



Count Every Vote New Mexico

2008 Election Report

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EXECUTIVE SUMMARY

The following report details the work done by New Mexico's Election Protection coalition during the 2008 election cycle, identifies election administration issues that impacted New Mexican voters, and sets forth actions and remedies for each of the issues highlighted.

A broad group of local and national nonpartisan organizations and attorneys came together to form New Mexico's Election Protection coalition. This year's operation was the largest, most sophisticated voter protection and education effort in New Mexico's history. In addition, Common Cause New Mexico formed Count Every Vote New Mexico, a program designed to sustain this work and focus public debate on ways to continue to improve election administration in New Mexico.

The following election reforms are discussed within: Same Day Registration; revising restrictions on third-party registration agents; a statute allowing early voting for voters who have requested absentee ballots but have not received them; setting a minimum deadline for absentee ballot applications; changing the deadline for mailing absentee ballots; adopting a county-level focus regarding post-election audits; replacing the two-percent audit with a risk-limiting approach employing an adjustable sample model; requiring that machines audited were actually used in the election; a "clean up" project to delete contradictory and outdated language from the Election Code; and an administrative rule codifying guidance issued by the Secretary of State regarding challengers.

I. INTRODUCTION

New Mexico's 2008 General Election was relatively trouble-free. Anticipated problems – widespread voting machine failures, challenges to voters on a large scale, mass confusion regarding registration issues – did not materialize. This was due in part to New Mexico's Election Protection coalition, a new broad-based election-monitoring program, which worked for months before the election to educate voters and to work with election officials so that Election Day would proceed as smoothly as possible.

Common Cause New Mexico, which played a major role in this coalition, has created a permanent state-based election-monitoring program called Count Every Vote New Mexico (www.counteveryvotem.org). This program is designed to follow through on the coalition's work, and to make sure that problems identified during the general election are addressed. We are releasing this analysis of the 2008 general election to further this critical goal.

New Mexico's election officials and poll workers should be commended on a great election. Their dedication to the people of New Mexico was reflected by their long hours, incredibly hard work, and commitment to democracy. Yet while Election Day 2008 passed with fewer problems than other recent national elections, it underscored some isolated but substantial flaws in New Mexico's election administration. Approximately 2,500 voters were deprived of their right to vote absentee because of one county's failure to send out their ballots in a timely fashion. Former felons who were entitled to vote were not entered onto the registrations rolls, or were denied the right to vote by poll workers despite being registered. Some Native Americans who were entitled to have alternative early voting sites on tribal lands were denied that right. The challenges posed by these and other issues revealed a number of critical areas that our election officials and legislature can address to ensure that all eligible New Mexican voters can have their votes counted.

New Mexico's history with elections has often been problematic. In 2002 problems with new Sequoia touch screen machines led to a loss of nearly 13,000 ballots that were

“recovered” by Sequoia representatives after taking the voting memory card to their corporate offices.ⁱ This episode led to a lawsuit to end the use of electronic voting machines that do not provide for a voter verifiable and auditable paper trail.ⁱⁱ In 2006, concern over this issue led policy makers to adopt a statewide optical scan paper ballot system.ⁱⁱⁱ

A series of infamous electoral mishaps occurred at the Pueblo of Laguna in 2004, including approximately 300 new voters whose registration forms were never processed, voter registration cards that were not received, rejected registration forms that were not properly processed, discrepancies between state and county voter lists, and a lack of envelopes from the county for provisional ballots.^{iv} And in 2008, during the June 3 primary, 182 ballots went missing in Cibola County, calling into question the legitimacy of a state senate race that was ultimately decided by five votes.^v Although Attorney General Gary King’s office found no evidence of criminal wrongdoing, the investigation identified a host of problems in the election practices used in Cibola County.^{vi}

It is in the context of these historic problems that the need for a nonpartisan election protection program in New Mexico became clear. New Mexico’s Election Protection coalition was formed to ensure that all voters have an equal opportunity to participate in the political process.

Examples of assistance voters received from the program include:

- Support for registration problems;
- Real time troubleshooting and guidance to overcome problems at each stage of the voting process – from registration through Election Day;
- Information on polling place locations;
- Checking registration status;
- Finding out about election-related deadlines;
- Reporting a problem at the polls; and
- Receiving legal assistance to protect their rights.

The coalition’s unprecedented ability to collect data through the 1-866-OUR-VOTE and 1-888-VE-Y-VOTA hotlines, pre-Election Day mobilization, and the Election

Day field program paints the most complete picture available of the New Mexican voting experience from the perspective of the voter. This data serves as the foundation for this report.

II. NEW MEXICO'S ELECTION PROTECTION PROGRAM

New Mexico's Election Protection coalition included Common Cause New Mexico, the New Mexico Federation of Labor AFL-CIO's nonpartisan Election Protection program (AFL-CIO), the New Mexico Women's Justice Project, the Lawyer's Committee For Civil Rights Under the Law (Lawyer's Committee), the National Association of Latino Elected and Appointed Officials (NALEO), the National Congress of American Indians, People For The American Way, and the Fair Elections Legal Network. This year's operation was the largest, most sophisticated voter protection and education effort in New Mexico's history. Common Cause New Mexico's Count Every Vote New Mexico program is designed to sustain this work and focus public debate on ways to continue to improve election administration in New Mexico.

A. ELECTION OFFICIAL OUTREACH

A critical component of New Mexico's successful Election Protection effort was the incorporation of extensive communications, including face-to-face meetings, with election officials. Wherever possible, New Mexico's Election Protection coalition developed cooperative relationships with state and local officials who were involved in the election process. Meetings with these officials in advance of Election Day allowed New Mexico's Election Protection coalition to understand the respective roles of each official in the process, and the preparedness of the state and local jurisdictions to conduct the election.

New Mexico's Election Protection coalition worked with the Secretary of State and Director of the Bureau of Elections to address statewide election administration issues and ensure that the Election Code was being enforced uniformly throughout the counties. Thanks to Secretary of State Mary Herrera's receptiveness to our coalition's

work we were able to work with her office on a number of important issues, including responding to potential disenfranchisement of voters who had requested absentee ballots and clarification regarding permissible Election Day challenges.

Members of New Mexico's Election Protection coalition attended the Secretary of State's 2008 Fall Election School for County Clerks from September 3 through 5. The state's 33 County Clerks, their deputies, and staff were present at the three-day Election School. On the morning of September 3 representatives from Common Cause New Mexico, AFL-CIO, the Lawyer's Committee and NALEO put on a presentation introducing New Mexico's Election Protection coalition and encouraging the Clerks to view the program as a collaborative, rather than adversarial, undertaking. During the remainder of the Election School training, coalition representatives spoke with election officials from Bernalillo, Chaves, De Baca, Doña Ana, Lea, Los Alamos, Luna, Mora, Otero, San Juan, Santa Fe and Torrance Counties about their concerns regarding the upcoming election.

In late September and October, New Mexico's Election Protection coalition continued to meet in-person with election officials to assess changing concerns and overall election preparedness regarding voter registration, early and absentee balloting, poll worker recruitment and training, voting equipment and ballots, Election Day communications, and accessibility issues.

B. PRE-ELECTION ACCOMPLISHMENTS

One of the major stories of New Mexico's 2008 General Election concerned problems with absentee ballots. Backlogs of absentee ballot applications in Doña Ana and Santa Fe Counties left many voters waiting weeks for their ballots. In the case of Doña Ana County, approximately 2,500 would-be absentee voters were deprived of the opportunity to vote at all.^{vii} Many counties around the state were swamped with requests for absentee ballots and did not have the resources to comply with a law requiring that absentee ballots be mailed out within 24 hours of the office's receiving requests for the ballots.^{viii}

New Mexico's Election Protection coalition was at the forefront of this issue. AFL-CIO's nonpartisan Election Protection program worked with the Secretary of State to issue an instruction to county clerks requiring them to allow voters who had requested but had not received their absentee ballots to vote in-person at early voting locations, including at County Clerks' offices around the state.^x When a dispute arose over enforcement of the Secretary's instruction in the Santa Fe County Clerk's office, New Mexico's Election Protection coalition once again took the lead as AFL-CIO filed suit to ensure uniform application of the instruction and let registered voters in Santa Fe who requested absentee ballots but had not yet received them vote in the early-voting process.^x

This year New Mexico had a backlog of voter registration reinstatements for individuals convicted of a felony who had completed their sentence and whose voter rights had been restored.^{xi} Coalition member the New Mexico Women's Justice Project worked with the Secretary of State to ensure that convicted felons who have completed all probation or parole were able to vote in the election. To remedy the problem of the backlog and make sure that people formerly convicted were given every opportunity to vote, Secretary Herrera agreed to issue a directive that took several important steps to permit anyone who had completed the terms of their sentence to vote on a provisional ballot.^{xii}

Another issue that New Mexico's Election Protection coalition addressed dealt with ballot marking and voter intent. Under a 2007 amendment to the Election Code, votes can be counted where voters did not follow strict voting instructions if election judges unanimously agree that the voter's intent is obvious.^{xiii} In an Advisory Letter issued in May, the state Attorney General's office concluded the requirement dealing with voter intent was problematic under the federal Help America Vote Act.^{xiv} The Secretary of State heeded the Attorney General's advice and issued an administrative rule in late September that left out the section of the statute allowing ballots to be counted where the voter's intent is clearly discernable but where the marks making it so did not fall into one of the listed categories.^{xv}

This potentially could have disenfranchised thousands of absentee voters who, for

example, put a rectangle instead of an allowable circle around a candidate's name, or who put a "dash" in the bubble, or who put a "plus sign" inside the bubble instead of what was considered to be a proper "cross."^{xxvi} New Mexico's Election Protection coalition determined that the New Mexico Supreme Court was in the best position to resolve this issue and requested that the New Mexico League of Women's Voters file suit.^{xxvii} The New Mexico Supreme Court ruled unanimously upholding the state law that said that a vote must be counted if election judges can agree upon the voter's intent.^{xxviii} The Court also ordered the Secretary of State to develop guidelines to assist election judges in deciding whether votes should be counted.^{xix} In accordance with the Court's Order the Secretary of State issued an instruction directing clerks to apply the statute as written^{xx} and issued another instruction providing illustrative examples of how to discern voter intent.^{xxi}

In early October New Mexico's Election Protection coalition met with Gerald Gonzalez, the Secretary of State's Director of Elections, and his deputy Larry Dominguez. During this meeting we requested all materials provided to precinct judges, and alerted Mr. Gonzalez and Mr. Dominguez to the fact that there was nothing in the materials addressing challenges. New Mexico's Election Protection coalition drafted information detailing permissible bases for challenges for the Secretary of State. This information was distributed to the County Clerks so that precinct judges would know what constituted an allowable challenge under the Election Code.^{xxii} Specifically, precinct judges were instructed that a voter could not be challenged because the voter's home was on a foreclosure list, because mail had been returned from the voter's registered address, or because the voter was a student registered at their school address.

Another problem related to alternative early voting sites on tribal lands. In 2007 the state legislature enacted a law stating that if a tribe is fifteen miles or more from the County Clerk's office, they are entitled to an early voting site if one is requested.^{xxiii} There was confusion about how to respond to these requests. Coalition members from the National Congress of American Indians, the Fair Elections Legal Network and Common Cause New Mexico worked with Native communities and urged the Secretary to issue an instruction that would ensure that valid requests were appropriately granted. The

Secretary issued an instruction, effective October 31, 2008, laying out the procedure for requests, location of alternative sites, staffing and hours of operation for sites, early voting procedures and voting support specific to Native voters.^{xxiv} This instruction will resolve many of the problems related to alternative early voting sites that New Mexico’s Election Protection coalition observed.^{xxv}

Another pre-election concern in New Mexico involved allegations of voter fraud and voter intimidation. In early October the Bernalillo County Clerk met with the FBI about an estimated 1,500 suspicious voter-registration cards turned in to her office by various registration groups, including ACORN.^{xxvi} A few days later, representatives of the state Republican Party held a news conference and announced that they had searched public records for 92 newly registered Albuquerque voters who cast ballots in the June primary election and found “highly suspect” voter registrations on file for 28 of those voters.^{xxvii} “We are presenting undeniable proof that there was voter fraud in the June election,” said State Rep. Justine Fox-Young, an Albuquerque Republican.^{xxviii}

The controversy quickly grew as questions arose as to how the state GOP obtained the confidential voter information – such as Social Security numbers and birthdates – upon which their claims were based.^{xxix} Even more troubling were reports of a private investigator sent by attorney Pat Rogers to the homes of voters suspected by the state GOP of voter fraud and reportedly intimidating voters.^{xxx} Election Protection coalition member Common Cause New Mexico asked the Department of Justice to investigate the charges of voter intimidation.^{xxxi} The Mexican American Legal Defense and Educational Fund (MALDEF) filed a federal lawsuit against Pat Rogers and the private investigator for intimidating voters in an attempt to interfere with their right to vote,^{xxxii} and the ACLU filed suit claiming that the state GOP illegally used private social security numbers to do background checks of legal voters and illegally disseminated confidential voter information to the press.^{xxxiii} Both suits are currently pending.

This was just another episode in the continuing effort of some partisan groups to lead the public to believe there is significant voting fraud in this country, despite evidence to the contrary,^{xxxiv} in order to pass restrictions and erect unnecessary barriers to voting. The claim that voter fraud threatens the integrity of American elections is itself a

fraud. It is being used to persuade the public that deceitful and criminal voters are manipulating the electoral system. No available evidence suggests that voters are intentionally corrupting the electoral process in numbers statistically sufficient to dilute and cancel out “the lawful votes of the vast majority of Americans.”^{xxxv} The lack of evidence is not due to a failure to codify voter fraud as a crime, nor is it due to the inability or unwillingness of local law enforcement agencies to investigate or prosecute potential cases of voter fraud.^{xxxvi} The exaggerated fear of voter fraud has a long history of scuttling efforts to make voting easier and more inclusive, especially for marginalized groups in American society.^{xxxvii}

During this tumult, New Mexico’s Election Protection coalition repeatedly reminded the public that “voter registration fraud” while problematic and illegal, does not lead to “voter fraud” at the polls. Voter registration fraud occurs when a canvasser fills out false information on a voter registration application in order to avoid doing the hard work of canvassing. Voter registration fraud does not result in any voter’s right to vote being taken away, and it is almost without fail an isolated act committed by someone with no intention of attempting to vote using a false registration. It does, however, waste the valuable time of local election officials who, in the weeks before an election, are under tremendous pressure to process a high volume of voter registration cards in a very short time with scarce resources and inadequate staffing. When inappropriate voter registration cards are found they need to be addressed. This is a legitimate concern, but it pales in comparison to the problems of purging legitimate voters from the rolls and suppressing the vote.

Finally, one of the most important elements of the coalition’s pre-election planning was a comprehensive media strategy to ensure wide dissemination of important voting information and the 1-866-OUR-VOTE and 1-888-VE-Y-VOTA Election Protection hotlines. This strategy had a particular focus on rural areas and Spanish-language and Native American-language media outlets. Common Cause New Mexico placed targeted paid media to promote our Election Protection hotlines, producing radio spots in English, Spanish and Native American languages. Common Cause New Mexico

also drafted and placed op-eds in papers throughout the state and worked with local reporters to keep provide frequent updates on developments. We garnered substantial earned media, fielded numerous broadcast and print interviews, and served as the voice of nonpartisan Election Protection on Election Day.

C. VOLUNTEER RECRUITMENT

New Mexico's Election Protection coalition recruited volunteers from New Mexico's legal community, working with the Hispanic Bar Association, the New Mexico Trial Lawyer's Association, the New Mexico Criminal Defense Lawyer's Association, the New Mexico Chapter of the National Lawyer's Guild, the Mexican American Law Student Association, the Black Law Student Association, the Native American Law Student Association and the New Mexico Trial Lawyer's Student Association. Coalition member the National Congress of American Indians recruited attorneys with expertise in Indian Law to serve Native American communities. In addition, coalition members such as the Lawyer's Committee and People for the American Way recruited volunteers via their websites, recruiting attorneys and non-attorneys from New York, Texas, California, Oregon and Washington State to come to New Mexico to be a part of our Election Protection program.

The coalition also worked with University of New Mexico Professor Mary Bowannie's Native American Voting Rights class to develop detailed assignments for her fourteen students to conduct additional student and Native American Election Protection outreach. Students distributed doorhangers alerting voters to the 1-866-OUR-VOTE hotline, acted as poll watchers and voter advocates on Election Day, and assisted County Leads in the Command Center.

D. ELECTION DAY ELECTION PROTECTION PROGRAM

The primary goal of New Mexico's Election Protection program on Election Day was preventing disenfranchisement of registered voters and ensuring that all eligible voters were able to cast a meaningful ballot. The coalition accomplished this goal by integrating the Election Protection hotlines and accompanying online database with a

sophisticated deployment of Election Day volunteers. In many cases, disputes were favorably resolved with advice given over the phone, but often our trained volunteers were needed on-site to advocate for the voter and resolve disputes at the polling place.

New Mexico's Election Protection program had an on-the-ground presence in eight counties on Election Day – Bernalillo, Chaves, Cibola, Doña Ana, McKinley, Rio Arriba, Sandoval and Santa Fe – focusing on counties with large populations and those with a history of election problems. The coalition identified precincts to monitor within each county based on historic election problems, high projected turnout, high levels of low-income voters, and high levels of Native American and/or Hispanic voters.

Our Election Day program had a four-part structure:

1) A command center in Albuquerque^{xxxviii} staffed with coalition leaders. This included a litigation team, attorneys from New Mexico Protection and Advocacy to address disability-related voting issues, and two support staff to provide Spanish- and Native American-language assistance as needed;

2) Attorneys and respected members of the community shadowing county clerks to give us a direct line to election administrators;

3) Mobile legal teams of attorneys, law students, and community members acting as poll watchers and voter advocates at the polls; and

4) An Election Protection call center in San Francisco fielding calls from the 1-866-OUR-VOTE and 1-888-VE-Y-VOTA Election Protection hotlines.

When a volunteer in the field encountered a situation where they were unsure how to proceed, or observed a specific behavior we had alerted them to in training (e.g., poll workers demanding photo ID, polling locations not opening on time), they would call their “county lead” at the command center and report that information. The county lead would then advise the volunteer on how to proceed, and if necessary contact the coalition volunteer shadowing the County Clerk.

On-the-ground volunteers were organized into teams of two to four individuals, with at least one attorney on each team whenever possible. All volunteers, attorneys and

non-attorneys, were required to complete a training session. Common Cause New Mexico and AFL-CIO conducted trainings. The Lawyer's Committee provided materials and instruction for the trainings, including putting on a two-day Election Protection training in Washington, DC and a train-the-trainer workshop in Albuquerque. The New Mexico Election Protection coalition put on a total of four in-person and three telephone trainings for volunteers. Volunteers monitored an average of four polling places per team, assisted voters and poll workers, and were dispatched to address problems called in through the hotlines. In addition to their important reporting duties, volunteers served a functional decision making/problem-solving role at polling places. They provided substantive voter education by referencing the extensive materials supplied by coalition organizers. They also collected information in the form of verbal reports and affidavits.

The highest volume of questions and problems reported, both on the hotlines and by volunteers in the field, dealt with polling places (e.g., locating the voter's correct polling location, reporting broken machines or uncooperative poll workers), voter registration (e.g., verifying registration, registered voters not on the rolls on Election Day), and absentee voting (e.g., procedural questions about absentee voting, reports of not receiving absentee ballots).^{xxxix}

III. PROBLEMS AND SOLUTIONS

A. LEGISLATIVE ISSUES

i. Registration

Registration was one of the biggest problems for voters on Election Day. Many voters expressed frustration with the registration process. Some specific registration problems New Mexico's Election Protection coalition encountered included incomplete registration forms submitted to County Clerks, missing key information such as a Social Security number or date of birth;^{xl} registration forms for the same voter submitted multiple times to County Clerks;^{xli} numerous reports of individuals previously convicted

of a felony not on the roll, despite having completed all probation and parole and re-registering;^{xlii} and multiple reports of voters being told they were not on the rolls despite having received confirmation of registration and showing their voter registration card to a poll worker.^{xliii}

In New Mexico, and across the nation, third-party registration agents were responsible for a tide of registration applications this election cycle. New Mexico limits third-party registration groups to fifty applications at a time,^{xliv} and imposes a year-round 48-hour deadline on the return of forms, the shortest in the country.^{xlv} Anyone who intentionally violates any provision of the law governing third-party registration agents is guilty of a petty misdemeanor^{xlvi} and subject to criminal penalties, including a \$500 fine or six months in jail for each violation of law.^{xlvii} These restrictions have been upheld in court.^{xlviii} This law is extremely burdensome to voter registration drives, which have become an increasingly important registration method over the past few election cycles, especially for low-income citizens, students, and particular racial or ethnic minority groups.^{xlix} These drives are a way for Americans to register members of their own communities, or for voters who would not otherwise register to be engaged in the process.

• Registration Solutions: Same Day Registration and Revising Restrictions on Third-Party Registration Agents

Many of the problems associated with the voter registration process could be avoided if voters had the option to register to vote on the day of the election, as is currently the case in nine states.¹ As an added bonus, those states with Same Day Registration (SDR) consistently show substantially higher participation rates than the rest of the country.^{li} Proponents of SDR in New Mexico estimate that implementing it here would improve voter turnout by 5.6 percent, which would have meant approximately 46,000 additional voters in this year's general election.^{lii}

Most voters who reported registration problems on Election Day ended up voting provisionally. A great benefit of EDR is that it greatly limits the need for provisional balloting. Under the Help America Vote Act, voters whose names do not appear on the

voter rolls on Election Day but who believe they are registered to vote cannot be turned away without being given the opportunity to cast a ballot – they must be issued a provisional ballot.^{lviii} Election authorities thereafter comb their registration records to determine if an error was made and such individuals were indeed duly registered, and whether the provisional ballots should be counted, under prevailing state law, and added to election tallies.^{lv} The process of investigating the validity of provisional votes can be laborious and time-consuming.

Much of this strain on election administrators is avoided with SDR. Individuals who find themselves left off the voter rolls simply reregister at the polls and cast a regular ballot. Questions about an individual's eligibility can be resolved at the time of registration. Even more importantly, SDR avoids the potential for the provisional ballot not to be counted. (According to the United States Election Assistance Commission, less than 50% of the provisional ballots cast in New Mexico's 2006 mid-term elections were counted.^{lv}) Concerns about voter registration fraud are also addressed by SDR because it is conducted in the presence of election officials.^{lvi} In addition, list maintenance and post-election audits adopted by some SDR states add an additional level of identity verification for persons registering at the polls.^{lvii}

Voting is a right, it is not a gift and it is not a privilege. Moreover, we cannot have a democracy without the voters – all voters – contributing to self-government. With this in mind, restrictions placed on third-party registration agents need to be revised. The 48-hour deadline for returning forms to the County Clerk should be extended to two weeks or the registration deadline, whichever is earlier. In addition, criminal penalties should be eliminated and shifted to a provision making it a fourth degree felony to intentionally destroy or withhold registration applications with the intent to prevent registration.

ii. Absentee Ballot Problems

Voters across New Mexico requested absentee ballots but did not receive them in a timely manner. Understaffed County Clerks' offices were flooded with requests for absentee ballots and did not comply during the election cycle with a law requiring that absentee ballots be mailed out within 24-hours of the office's receiving the request.^{lviii}

• Absentee Ballot Solutions: Allow Early Voting, Set a Minimum Deadline For Absentee Ballot Applications, Change the Deadline for Mailing Absentee Ballots

This situation revealed holes in our Election Code, and areas that need to be changed altogether. First, there is nothing in the Election Code that addresses a situation where someone has requested an absentee ballot but wants to vote early. The instruction issued by the Secretary, which allowed voters who had applied for an absentee ballot but who had not yet received it to vote at an early voting site, should be the basis for a statute to meet that need.^{lix} Codifying this now will eliminate the need for lawsuits like the one brought by AFL-CIO.^{lx}

Second, under the Code as it stands, an application for an absentee ballot shall be accepted at any time preceding the general election.^{lxi} At a minimum, it would be best if a deadline be set for the county clerks to receive applications for absentee ballots at close of business on the Monday of the week prior Election Day.^{lxii} (This will not conflict with the Uniformed and Overseas Citizens Absentee Voting Act, which requires States to accept and process absentee ballot applications from an absent uniformed services voter or overseas voter if the application is received by the appropriate State election official not less than 30 days before the election.^{lxiii})

Third, although Clerk's are supposed to mail out absentee ballots within 24 hours of receiving an application,^{lxiv} they have an absolute deadline of the Friday immediately prior to the election to mail them.^{lxv} At a minimum, this deadline should be moved up to the Tuesday of the week prior to the election. This will set the deadline for mailing all absentee ballots sufficiently in advance of the end of the early voting period so that if this year's backlog situation is repeated voters who have waited for their absentee ballots will still have an opportunity to vote early.

iii. Auditing Problems

New Mexico state law provides that: "The secretary of state shall direct the county clerks to compare the total votes tallied in the general election for the office of president or governor from two percent of the voting systems in the state with total votes tallied by hand from the voter verifiable and auditable paper trail from those voting

systems.^{lxvi} The method and manner employed for choosing votes to audit will have a tremendous impact on whether the audit itself is administratively burdensome, engenders public confidence in election results, detects errors, and provides feedback that will allow jurisdictions to improve elections in the future.

• Auditing Solutions: County-Level Focus, Risk-Limiting Approach with Adjustable Sample Model, Requiring That Machines Audited Were Used In the Election

Any approach to post-election audit reform must focus on election administration at the county-level, rather than the state-level. Each county is responsible for conducting logic and accuracy testing of its own voting machines,^{lxvii} and most election problems an audit seeks to uncover occur at the county, not state, level.^{lxviii} Thus, audit reform must focus on election administration at the county-level in order to obtain a truly complete, accurate auditing process.

Assuming a county-level focus, the most effective way to conduct post-election audits is to take a risk-limiting approach. The sampling model that works best for this approach is the adjustable sample model, where the size of the initial random sample depends on a number of factors, including the apparent margin of victory, the number of precincts, the number of ballots cast in each precinct, and a desired confidence level (e.g., 90%) that the winner of the election has been called correctly.^{lxix} Risk-limiting audits have advantages over fixed-percentage audits such as New Mexico's two-percent audit, which often count fewer or more ballots than necessary to confirm the outcome.^{lxx}

Multiple voting machines that were not used in the 2008 General Election, and had in fact been non-operational for a number of years, were reportedly included in the 2% audit of the 2008 General Election.^{lxxi} A provision should be added to the audit statute^{lxxii} requiring that machines included in post-election audits be among those actually used in the election being audited.

iv. Contradictory and Outdated Language Problem

Our Election Code is a living document, changing with each legislative session as our lawmakers strive to perfect our democracy. A side effect of this, however, is contradictory and outdated language that creates confusion, misinterpretation and

difficulties enforcing the Election Code.

• **Contradictory and Outdated Language Solution: “Clean Up” Project**

Two possible ways to clean up New Mexico’s Election Code come immediately to mind. First, the Secretary of State’s office could hire a contract lawyer to work solely on this project. Second, an employee at Legislative Council Services could be assigned to take on this task. Either way, the attorney assigned to accomplish this must have knowledge of the current Code and, ideally, a good working relationship with both the county clerks and the Secretary of State’s office. Once complete, the proposed draft of code changes should be thoroughly vetted by the Secretary of State’s office and transformed into a bill to be introduced during the 2010 legislative session.

B. REGULATORY ISSUE

i. Guidance Regarding Challengers Problem

The Secretary of State’s guidance regarding permissible bases for challenges was not issued as an official regulation.^{lxxiii} This critical guidance not only protects voters from illegal challenges, it also helps precinct judges and poll workers maintain a smoothly running polling place by clearly identifying bases and procedures for challenges. Slight edits, detailed below, to the issued guidance are necessary for a regulation to conform to state and federal law.

• **Guidance Regarding Challengers Solution: Codify Guidance as a Regulation and Selected Edits**

The guidance issued should be codified as a Secretary of State Regulation. Further, the following edits to the issued guidance should be made for the regulation to conform to state and federal law (new language underlined):

Under the section stating “During a general election, a challenger may only challenge the voter on these grounds:” the phrase “The voter is listed as someone who actually received an absentee ballot” should be revised to say “The voter is listed as someone from whom an absentee ballot was received.” This revision will make the section consistent with state law.^{lxxiv}

Under the section stating “The process for challenging is:” the phrase “If the challenge is not upheld by the Presiding Judge and two election judges, ‘not affirmed’ will be entered in the notation space of the signature roster; and” should be revised to say “If the challenge is not upheld by the Presiding Judge and two election judges, ‘not affirmed’ will be entered in the notation space of the signature roster; and the voter will be permitted to vote.”

Under the section stating “The process for challenging is:” the guidance issued states: “Even if the challenge is ‘affirmed,’ the voter can still vote a paper ballot, but an election judge shall clearly announce the voter’s name and place the ballot in an envelope marked ‘rejected.’” Section 302 of the Help America Vote Act (HAVA)^{lxxv} states that the voter should vote by provisional ballot, and that poll workers cannot make the final determination of a voter's eligibility.

HAVA requires that a voter whose qualification to vote is challenged by a local official at the precinct must be permitted to cast a provisional ballot with all the protections found in the law governing provisional ballots.^{lxxvi} N.M.S.A. 1978, Section 1-12-29.1, adopted in 2005 to conform to the HAVA provision, charges the Secretary with creating a uniform process and set of criteria for ensuring that “provisional, absentee and other paper ballots” are counted. A “rejected” ballot is a paper ballot within this section. In addition, the section on recounts^{lxxvii} requires the Secretary to ensure that “the qualification of provisional ballot envelopes, absentee and other paper ballots” are included in any contest or recount of election results. The easiest and perhaps the only way to meet these federal and state requirements is to treat a ballot rejected on the basis of a challenge at the polling site as a “provisional paper ballot.”

Unfortunately, under the New Mexico’s Election Code there is no process for recording the substance of the challenge, so there's no way for the County Clerk to make a determination of the voter's eligibility once the “rejected” ballots are brought back to the office.

The only record the County Clerk would have to go off in making the final determination of the voter's eligibility of is the word “CHALLENGED”^{lxxviii} and

“Affirmed” or “Not Affirmed”^{lxxxix} in the notation headings in the roster. This can be solved by adding a final bullet point under the section “The process for challenging is:” stating:

If the challenge is “affirmed,” the voter will be permitted to vote a provisional paper ballot. All rules governing the casting and counting of provisional ballots shall apply. In addition to making sure that the outer envelope is completed with all the information required on the outer envelope for provisional ballots, the election judge shall clearly announce the voter's name and mark on the outer envelope “rejected,” together with the substance of the challenge under N.M.S.A. § 1-12-20 (e.g. person is not registered; person is on a purge list placed with the signature rosters; person is listed as person from whom an absentee ballot was received; person is not a qualified elector; in the case of a primary, is not affiliated with a political party represented on the ballot; in the case of an absentee ballot, the official outer envelope has been opened prior to the counting of ballots) and the proof of or basis for the challenge presented by the interposing challenger.

Common Cause New Mexico submitted a proposed administrative rule to the Secretary of State’s office incorporating the edits described above on December 16, 2008 and is currently awaiting a response.

C. MISCELLANEOUS ISSUES

Leading up to November 4 there were concerns about voting tabulators bought in 2006 from Election Systems & Software (ES&S). New Mexico used federal money received under the Help America Vote Act to buy the equipment. Unlike some other states, New Mexico did not use the federal money to pay for multiyear maintenance agreements for its new voting system.^{lxxx} Expensive preventative maintenance contracts and disagreements over who should pay – the state or the counties – left most counties uncovered since the initial one-year warranty expired last fall.^{lxxxi} By September, preventative maintenance had not been performed on most of the tabulators in two years.^{lxxxii} We received reports on Election Day from multiple polling locations in Albuquerque and Santa Fe that the optical scanner machines were not working^{lxxxiii} – a problem that will only continue to grow until the maintenance situation is fixed.

The main roadblock to resolving this situation is confusion over who owns the machines – the state or the counties. The state legislature attempted to resolve the question in 2008 with House Bill 221.^{lxxxiv} The original House bill permitted the State Board of Finance and counties to renegotiate and terminate lease-purchase contracts on electronic voting machines. The bill was later amended in a House/Senate conference committee to require the State to pay all voting systems software and hardware maintenance costs regardless of ownership. Counties were to be responsible for storage of the machines, under Secretary of State guidelines. The bill was vetoed by the Governor, whose veto message stated that it placed a “financial duty, without any funding, on the State of New Mexico.”^{lxxxv} The message directed the Cabinet Secretary of the Department of Finance and Administration to prepare a resolution for adoption by the Board of Finance that would relieve counties from making lease purchase payments for those machines no longer in use, and committed the Governor to work with the Secretary of State and County Clerks to address their needs.^{lxxxvi}

It is imperative that the Governor, Secretary of State, and County Clerks continue to seek a resolution to this issue. Unexplained machine failures experienced in this election^{lxxxvii} reveal the ticking time bomb that this lack of maintenance has created. It would be unwise to rely on the saving grace of a paper trail as justification for inaction. The Governor’s commitment to work with the Secretary of State and County Clerks to address their needs must be borne out in the form of continued negotiations that seek to resolve questions of ownership and responsibility for cost so that New Mexicans are met with well-maintained, properly functioning machinery when they go to insert their paper ballots on Election Day.

IV. CONCLUSION

New Mexico’s Election Protection program was a success thanks to the hard work and dedication of Common Cause New Mexico, the New Mexico Federation of Labor AFL-CIO’s nonpartisan Election Protection program, the New Mexico Women’s Justice Project, the Lawyer’s Committee For Civil Rights Under the Law, the National

Association of Latino Elected and Appointed Officials, the National Congress of American Indians, People For The American Way, and the Fair Elections Legal Network. Open-door policies at the Secretary of State's office and County Clerks' offices around the state made it possible for our coalition to develop New Mexico's strongest nonpartisan Election Protection program to date. We are grateful to our election officials for their cooperation and generosity as we all worked together to protect democracy in New Mexico.

Our election officials rarely get the credit they deserve. They performed admirably and their hard work was reflected by a smooth, successful election. Common Cause's Count Every Vote New Mexico thanks all of our election officials and our Election Protection coalition partners, and we look forward to making logical reforms to improve election administration in New Mexico.

KEY ISSUES IN NEW MEXICO ELECTION LAW	
ABSENTEE BALLOTS	
Application	No-fault absentee – any voter may vote by absentee ballot. ^{lxxxviii} Applications must be made on the official postcard form authorized by the county clerk and secretary of state. ^{lxxxix} First-time voters who registered by mail need to provide ID. ^{xc} An application for an absentee ballot shall be accepted at any time preceding the general election. ^{xc}
Ballot Processing	Clerks must notify voters in writing of acceptance or rejection and explain why if rejecting. ^{xcii} Clerks must individually notify first-time voters who need to include ID when returning their ballot of the requirement. ^{xciii} Voters can apply for and vote absentee in-person at the clerk’s office from the 28 th day before the election to the Saturday immediately prior to the election. ^{xciv} Clerks shall mail the ballot or notice of rejection within 24 hours of receiving the voter’s application. ^{xcv} Ballots must be sent no later than the Friday before the election. ^{xcvi}
Absentee Voting	Voter is guaranteed the right to vote by absentee ballot on all questions, “as if [the voter] were able to cast his ballot in person at his regular polling place on election day.” Voters are provided with a number of alternative methods of casting an absentee ballot, including mail-in absentee ballots, paper ballots in person at the clerks’ offices, and early voting at both alternative locations and the clerks’ offices. ^{xcvii} Upon receipt of a sworn affidavit stating that the voter did not receive or use his absentee ballot, the county clerk shall issue a replacement absentee ballot. ^{xcviii}
Mis-marked Ballots	If a ballot is marked indistinctly or not marked according to the instructions for that ballot type, the counting team shall count the ballot as provided for in Subsection A and Paragraphs (1) through (4) of Subsection B of Section 1-9-4.2 N.M.S.A. § 1978. In no case, shall the counting team mark or remark the ballot. 1.10.23.12 N.M.A.C. contains illustrative examples of how to discern voter intent. ^{xcix}
NATIVE AMERICAN EARLY VOTE SITES	
Eligibility	If an Indian nation, tribe or pueblo with a boundary that is located more than fifteen miles from the office of a county clerk for a county in which the Indian nation, tribe or pueblo is located, the county clerk shall provide an alternate site. ^c County clerks are strongly encouraged to grant requests from an Indian nation, tribe or pueblo with a boundary that is located less than fifteen miles from the office of a county clerk. ^{ci}
Requests	Requests for alternate sites shall be made at least 14 days before the start of early voting by the chief executive officer or designee, or by the governing council or body, of an Indian nation, tribe or pueblo. The request need not be in writing, but if the request is not in writing, the county clerk shall keep a record of the request, including the date and the name of the person who made the request. ^{cii} The county clerk shall acknowledge, in writing, receipt of the request to the appropriate Indian nation, tribe or pueblo requesting officer, designee, governing council or body and shall also provide a copy of the acknowledgement to the secretary of state. ^{ciii} If, prior to the start of

	registration for voting, the county clerk has not received a request from an eligible Indian nation, tribe or pueblo for an early voting site, the county clerk is encouraged to contact the appropriate authority for the Indian nation, tribe or pueblo concerning arranging for an alternate site. ^{civ}
Hours of Operation for Site	Beginning on the third Saturday before election day, an alternate site shall be open for voting from noon to 8 p.m. on Tuesdays through Fridays and 10:00 a.m. to 6 p.m. through the Saturday immediately preceding the election. ^{cv} A county clerk may request and the secretary of state may grant a modification of these hours of operation from the secretary of state because of a hardship arising from inadequate facilities, difficulties with making appropriate personnel available or other exigent circumstances, provided the county clerk justifies in writing to the secretary of state the need for a modification. ^{cvi}
Language Assistance	The county clerk shall ensure that adequate interpreters are available at the alternate site who can speak the language or languages of the Indian nation, tribe or pueblo on whose land the alternate site is located, and who can provide information in that language to voters concerning the voting process, voting requirements, and the candidates and issues on the ballot so as to allow voters to make informed decisions concerning how they wish to vote. ^{cvii}
VOTER REGISTRATION	
Rejection	Registration form must include: name, gender, residence, municipality, post office, county of former registration, social security, date of birth, political party affiliation, zip code, telephone number, signature. ^{cviii}
Verification	Full SSN, driver's license, or state identification number and date of birth required. State has not defined the matching criteria, or the procedure when a match fails. ^{cix}
Notification	If the registration is rejected for any reason, the form will be stamped with "rejected" and returned to the voter registration applicant with an explanation of why the form was rejected and what can be done to correct the registration. ^{cx} If the registration is filled out properly, the voter will be sent a voter identification card. ^{cxii}
Database	Top-down registration database maintained by the Secretary of State; county registrars given access. ^{cxiii} County clerk is responsible for entering registration information into data processing system. ^{cxiii} Secretary of State has responsibility to ensure that counties enact uniform policies; state must provide counties with software and maintenance assistance for the statewide computerized voter registration system. ^{cxiv}
3rd Party Registration	Registration groups must register with the secretary of state, providing the names of the officers and the address of the organization; the names of any persons registering people to vote; a sworn statement from each person registering voters that he/she will obey all state laws and rules on a form describing penalties for false registration. Collected registration forms must be submitted to the state or county clerk within 48 hours of their having been completed. Violation of third-party laws is a petty misdemeanor and results in revocation of the "registration agent's" third-party status and/or fines. The Secretary of State must report violations of the law to the Attorney General or District Attorney. ^{cxv}

NVRA Implementation	State law calls for implementation of Motor-Voter ^{cxvi} and §7 provisions ^{cxvii} . Demos, ACORN, and Project Vote have filed a letter of complaint with the Secretary of State for failing to comply with §7 provisions, however. ^{cxviii}
VOTER IDENTIFICATION	Only first-time voters who registered by mail must present a physical form of identification. ^{cxix} Acceptable physical forms of identification are an original or copy of a current and valid photo ID, with or without an address and the address is not required to match the voter's registered address, ^{cxx} or an original or copy of a utility bill, bank statement, government document, including identification issued by an Indian nation, tribe or pueblo, that shows the voter's name and address and the address is not required to match the voter's registered address. ^{cxxi} All other voters may make a verbal or written statement of his or her name, year of birth and registered address. ^{cxii} If the voter cannot produce this proof of identity the voter may cast a provisional ballot, but that ballot will only be counted if the voter returns with the requisite identification or identifying information. ^{cxiii}
PROVISIONAL BALLOTS	
Distribution	A voter must cast a provisional ballot if his/her name does not appear on the registration list at the polling place on Election Day, or if he/she appears without proper identification at the polling place. ^{cxiv}
Verification	Provisional ballot is counted if the voter is later verified as having registered to vote. ^{cxv} County Clerks shall not disqualify any provisional ballot, absentee provisional ballot or in-lieu of absentee ballot because the voter has used an abbreviated name, address, middle name, middle initial or suffix, provided the county clerk can identify the voter with other information provided on the affidavit. ^{cxvi} County clerks shall not disqualify any provisional ballot because the voter did not sign both the affidavit and the polling place roster if the voter provided a valid signature and the county clerk can identify the voter with information provided on the outer envelope of the paper ballot or affidavit. ^{cxvii}
Wrong Precinct	If cast in the wrong precinct, a provisional ballot will be counted for the elections for which the voter is eligible to vote in the county. ^{cxviii}
Mis-marked Ballots	If a ballot is marked indistinctly or not marked according to the instructions for that ballot type, the counting team shall count the ballot as provided for in Subsection A and Paragraphs (1) through (4) of Subsection B of Section 1-9-4.2 N.M.S.A. § 1978. In no case, shall the counting team mark or re-mark the ballot. 1.10.23.12 N.M.A.C. contains illustrative examples of how to discern voter intent. ^{cxix}
SUPPRESSION/ CHALLENGES	
Deceptive Practices Law	It is a felony to coerce a voter to vote or not vote for a candidate or anything else on the ballot. ^{cxx} No law specifically addresses deceptive practices.
Challengers	At any time not less than forty-two days prior to any election, the secretary of state, an election official, the county chairman of any major political party or any 20 voters may submit a challenge petition briefly describing the supporting facts challenging a voter's registration. ^{cxxi} A hearing will then determine the voter's registration status. ^{cxxii} On election day, only a precinct

	official or an appointed party challenger may challenge a voter. ^{cxxxiii} The only acceptable bases for a challenge are that the voter is not registered, is on a purge list, is someone from whom an absentee ballot has been received, is not a qualified elector, is not affiliated with a party (in a primary), or the outer envelope of the absentee voter has been opened early. ^{cxxxiv}
POLLING PLACE/POLL	
Workers’ Training	State law requires that each poll worker attend a training put on by the county clerk. ^{cxxxv} The secretary of state produces a training video, ^{cxxxvi} and is required to produce a training manual for poll workers covering all aspects of election day procedure. ^{cxxxvii}
Recruitment	Depending on the type of voting machine used, state law requires 4 to 6 poll workers per precinct. ^{cxxxviii} High school students are not permitted to serve as poll workers.
VOTING MACHINES	
Distribution	Each precinct gets one “voting system” for every 600 registered voters; precincts with fewer than 600 registered voters are still allocated one “voting system.” ^{cxxxix}
STUDENT VOTING RIGHTS	The state Attorney General has specifically stated that students at school in the state can vote from their school addresses. ^{cxli} Student identification is acceptable identification.
VOTER EDUCATION	
Registration Information	<p><u>Secretary of State Website</u></p> <ul style="list-style-type: none"> ○ Information on eligibility, how and where to register, identification requirements, deadlines and verification.^{cxli} <p><u>Offline</u></p> <p>Registration information is provided in the form of newspaper and radio ads; as well as posters and flyers.^{cxlii}</p> <p>Secretary of State staff attends local fiestas and festivals to encourage and assist voter registration.^{cxliii}</p>
Polling Place Location/Hours	<p><u>Secretary of State Website</u></p> <ul style="list-style-type: none"> ○ Polling place locator. ○ Hours listed under Voters Bill of Rights. <p><u>Offline</u></p> <ul style="list-style-type: none"> ○ As required by law, polling place information is printed in newspapers.^{cxliv} <p><u>By Law</u></p> <ul style="list-style-type: none"> ○ Polling place location required to be published in newspaper.^{cxlv}
Sample Ballots	<p><u>By Law</u></p> <ul style="list-style-type: none"> ○ Sample ballots must be printed in both English and Spanish and be available in “reasonable quantities to all interested persons for distribution with the appropriate precincts.”^{cxlvi} Two sample ballots must be displayed on the outside of the polling place for public inspection and two must be displayed inside for public inspections.^{cxlvii}
Language Accessibility	<p><u>Voting Rights Act, Sec. 203</u></p> <ul style="list-style-type: none"> ○ New Mexico’s Hispanic population falls under the Section 203 language requirement. Ten counties in New Mexico fall under Section 203 for

	<p>their American Indian populations; twenty-one counties fall under Section 203 for their Hispanic populations.^{cxlviii}</p> <p><u>Secretary of State Website</u></p> <ul style="list-style-type: none"> ○ Available in Spanish: Voter Bill of Rights, which includes information on provisional voting, right to instructions, intimidation, and complaints.^{cxlix} The Secretary’s office is currently working on translating more information into Spanish.^{cl} <p><u>Offline</u></p> <ul style="list-style-type: none"> ○ All documents are printed in English and Spanish. The information is also provided in the respective Native American Languages-Navajo, Apache, Pueblo (Keres, Tewa, Tiwa, Towa, and Zuni).^{cli} ○ Translators are available to translate the ballots at polling sites for Native American voters.^{clii} ○ The Native American Election Officers from the counties offer educational workshops for their constituents that include information on registration deadlines, polling place hours and provisional ballots; some sample ballots are also available.^{cliii} <p><u>By Law</u></p> <ul style="list-style-type: none"> ○ All registration or voting notices, forms, instructions, assistance or other information relating to the electoral process shall be printed in both English and Spanish.^{cliv} ○ Where a minority language is historically unwritten, all information relating to the electoral process must be available orally in the respective minority language, through the media when practicable, in public meetings and on Election Day at the polls.^{clv}
<p>Voter Identification Requirement</p>	<p><u>Secretary of State Website</u></p> <ul style="list-style-type: none"> ○ Outlines identification requirements for voting ○ Provides a list of acceptable forms of identification.^{clvi} <p>No information about education efforts off-line</p>
<p>Absentee Voting</p>	<p><u>Secretary of State Website</u></p> <ul style="list-style-type: none"> ○ Explains how to receive an absentee ballot, where to return it and the deadline to request one.^{clvii} <p><u>By Law</u></p> <ul style="list-style-type: none"> ○ Reasonable efforts must be made to publicize and inform voters of the times and locations for absentee voting; provided, however, that notice is provided at least ten days before early voting begins.^{clviii}
<p>Voting Machines</p>	<p><u>Secretary of State Website</u></p> <ul style="list-style-type: none"> ○ Explains that all of New Mexico uses paper ballots that are optically scanned.^{clix} <p><u>By Law</u></p> <ul style="list-style-type: none"> ○ Before entering the voting machine, each elector will be instructed on how to operate the voting machine and have his attention called to the posted sample ballot.^{clx}

*A version of this chart appeared in *Voting In 2008: Ten Swing States*, co-sponsored by Common Cause and The Century Foundation, written by Tova Wang, Samuel Oliker-Friedland, Melissa Reiss and Kristen Oshyn, available online at

ⁱ Lonna Rae Atkeson, R. Michael Alvarez, Thad E. Hall, *The New Mexico 2006 Post Election Audit Report* (September 22, 2008), p.44, available online at http://www.pewcenteronthestates.org/uploadedFiles/NM_Audit_Report1.pdf, (citing personal interview with attorney John Boyd by Lonna Atkeson, May 21, 2007 and affidavit of Jim Noel, New Mexico Democratic Party Election Day attorney).

ⁱⁱ *Id.* (citing the Associated Press State & Local Wire, January 14, 2005, Friday, BC Cycle, accessed via Lexis-Nexis on May 31, 2007).

ⁱⁱⁱ *Id.*

^{iv} Testimony of Cathy Gorospe of the Laguna Development Corporation before Governor Bill Richardson's Election Reform Task Force (September 9, 2005), p. 5, available online at <http://www.nmlegis.gov/lcs/minutes/ertfmin09082005.pdf>.

^v Barry Massey, *AG: No crime in missing-ballots case*, *The Santa Fe New Mexican* (October 11, 2008), available online at <http://www.santafenewmexican.com/Local%20News/AG--No-crime-in-missing-ballots-case>.

^{vi} *Id.*

^{vii} Heath Haussamen, *Doña Ana County discusses absentee ballot snafu*, *The New Mexico Independent* (November 12, 2008), available online at <http://newmexicoindependent.com/9764/Doña-ana-county-discusses-absentee-ballot-snafu>.

^{viii} See N.M.S.A § 1-6-6(B) (Within twenty-four hours after receipt of a voter's application for an absentee ballot, the county clerk shall mail either the ballot, if it is within twenty-eight days of election day or a notice of rejection to the applicant).

^{ix} Below is the text of the instruction issued via email from the Secretary of State's Bureau of Elections Director Gerald Gonzales on October 29, 2008:

"It has been called to our attention that additional guidance is needed regarding voters who requested and were mailed an absentee ballot and having never received it, wish to vote at an early voting site.

We view the goal of the Election Code as being to enfranchise voters, and as such, conclude that a voter should be allowed to ask for a replacement absentee ballot during a flexible time period and at any authorized voting location. The additional guidance for this purpose is as follows:

Voters who have applied for an absentee ballot and to whom an absentee ballot has been mailed but who have not yet received it, shall be allowed to vote at any early voting site in the following manner:

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- The voter must execute, in the County Clerk’s office, or at the alternate voting site, an affidavit stating the voter has not received nor voted the voter’s mail-in absentee ballot.
 - The County Clerk or designee verifies with the absentee ballot registry at the time the affidavit is submitted that the voter was sent an absentee ballot and that it has not been received by the County Clerk’s office.
 - A poll official shall then invalidate the original mailed ballot on the I Power system by reflecting it as spoiled.
 - The voter will then be treated as an early voter. An absentee ballot application will be given to the voter to complete, followed by a “replacement absentee ballot” which for this purpose will be an early voting ballot like that issued to any other early voter. Once the voter has completed the ballot it will be fed through the tabulator like all other early voters’ ballots.
 - The entry previously made in I Power to spoil the original mail-in ballot will assure that a voter will not be able to vote more than once through this process. If the lost mail-in ballot is subsequently received by the County Clerk, the I Power system will reveal that the voter has already voted early in person. This mail-in ballot shall not be counted and shall be handled by the County Clerk in accordance with the federal election retention schedule—i.e. retained for 22 months.

All affidavits shall also be retained by the County Clerk in accordance with the federal election retention schedule.”

See also, BRIEF: Voter options for those who have not received absentee ballot, Las Cruces Sun News (October 31, 2008), accessed via Westlaw at 2008 WLNR 20763765; Heath Haussamen, Group urges early voting instead of absentee voting, The New Mexico Independent (November 1, 2008), available online at <http://newmexicoindependent.com/7920/group-urges-early-voting-instead-of-absentee-voting>.

^x Tom Sharpe, *Judge OKs Early Voting In Absentee Ballot Battle*, The Santa Fe New Mexican (November 1, 2008), *available online at* <http://www.santafenewmexican.com/PrintStory/Judge--rules-on-absentee-ballot-issue>.

^{xi} Associated Press, *Agreement Reached for Certain NM Felons To Vote*, Albuquerque Journal (October 25, 2008), *available at* <http://www.abqjournal.com/news/state/apfelons10-25-08.htm>, *see* N.M.S.A. § 31-13-1 for statute governing the restoration of voting rights for individuals convicted of a felony.

^{xii} Secretary Herrera agreed that the Secretary of State would:

- Issue a directive permitting anyone to vote on a provisional ballot who states that they should be permitted to vote because they completed the terms of their sentence under N.M.S.A. § 31-13-1 (2008), but who appears as an ineligible voter because of a felony conviction on the rolls.
- Waive any time constraints for qualifying the provisional ballot of these individuals, until such times as the Secretary of State can review them and cross-reference them with the information from the New Mexico Department of Corrections, New Mexico Administration of Courts, and the Federal Department of Corrections.
- Direct all County Clerks to issue a letter to anyone who has received a letter of rejection, clarifying that the individual may be permitted to vote on a provisional ballot.

- Enter all data of information for all persons with a prior felony conviction, now eligible to vote, into the computer system prior to this year's election.
- Provide record of information of all individuals who have been sent a rejection letter or who have not been able to vote based upon a prior felony conviction.

See Civil Rights Groups and Secretary of State Reach Agreement of Felon Voters, ACLU press release (October 24, 2008), *available at* http://www.aclu-nm.org/News_Events/news_10_24_08.html.

^{xiii} N.M.S.A. § 1-9-4.2(B)(4) (For paper ballots that are hand-tallied, a vote shall be counted if...the presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly discernable).

^{xiv} Advisory Letter from Assistant Attorney General Elizabeth A. Glenn to Secretary of State Mary Herrera and Rep. Jeff Steinborn (May 16, 2008), p.2, *available online at* <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=423>.

^{xv} N.M.A.C. § 1.10.12.15(C), *as reported in* New Mexico Register, Volume XIX, Number 19, October 15, 2008.

^{xvi} Personal correspondence with attorney John Boyd by Common Cause New Mexico Election Protection Coordinator, October 9, 2008.

^{xvii} Kate Nash, *Vote 2008: Lawsuit challenges N.M. ballot count rules*, The Santa Fe New Mexican (October 24, 2008), *available online at* <http://www.santafenewmexican.com/Local%20News/Vote-2008-Lawsuit-challenges-N-M--ballot-count-rules>.

^{xviii} New Mexico Supreme Court Writ of Mandamus and Plaintiff's Emergency Petition for Writ of Mandamus *available online at* <http://moritzlaw.osu.edu/electionlaw/litigation/lwv-newmexicov.herrera.php>; Dan Boyd, *Court: Count Ballots*, Albuquerque Journal (October 30, 2008), *available online at* <http://www.abqjournal.com/news/state/30114355356newsstate10-30-08.htm>.

^{xix} New Mexico Supreme Court Order Writ of Mandamus, p.2, lines 23-28, *available online at* <http://moritzlaw.osu.edu/electionlaw/litigation/lwv-newmexicov.herrera.php>.

^{xx} N.M.A.C. § 1.10.12.15(C) and N.M.A.C. § 1.10.22(K), effective November 3, 2008, New Mexico Register, Volume XIX, Number 22, December 1, 2008.

^{xxi} N.M.A.C. § 1.10.23.12, effective November 3, 2008, New Mexico Register, Volume XIX, Number 22, December 1, 2008.

^{xxii} Below is the text of the guidance issued via email from the Secretary of State's Bureau of Elections Director Gerald Gonzales on October 30, 2008 and November 4, 2008.

1. To repeat information previously provided concerning the appointment of challengers and watchers:

- Challengers:

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- Must be voters in a precinct in the county where they are appointed to be challengers.
 - Can be appointed by the county chair of each party represented on the ballot or else by the precinct chair of that party; if neither chair makes an appointment, the voters present belonging to that party may make the appointment.
 - One challenger and one alternate can be appointed for each precinct by a county or precinct party chair.
 - Challengers are to wear identification badges designating them as authorized challengers of their political party – but no other form of identification or campaign-related material.
 - The appointment must be in writing and presented to the precinct board but does not have to be made ahead of time.
 - Challengers may be appointed for absent voter precincts.
 - Watchers:
 - Must be voters in a precinct in the county where they are appointed to be watchers.
 - Two watchers can be appointed for a given precinct by the chair of a political party represented on the ballot or else by the precinct chair of that party; if neither chair makes an appointment, the voters present belonging to that party may make the appointment; the appointment must be in writing and presented to the precinct board but does not have to be made ahead of time.
 - One watcher per polling place can also be appointed by a candidate for office or an election-related organization provided the written request is made to the Secretary of State at least 10 days prior to the election; the Secretary of State is to notify the County Clerk of the qualified appointees five days prior to the election; the request must specify the polling places to be watched and name the corresponding watcher.
1. Additional information regarding challenger activities:
- Challengers may:
 - Inspect registration books, precinct voters lists, poll books, registration books or signature rosters for the purpose of making a challenge;
 - Examine the voting machines before polls open to ensure counter and ballot numbers are proper and the machines are ready for use; and
 - Prepare written memoranda of any “act or omission on the part of any member of the precinct board.”
 - During a general election, a challenger may only challenge the voter on these grounds:
 - The voter is not registered;
 - The voter’s name is on the purged list;
 - The voter is listed as someone who actually received an absentee ballot; or
 - The voter is not a qualified elector.
 - Voters cannot be challenged because:
 - The voter’s home is on a foreclosure list or mail has been returned from the voter’s registered address; or
 - The voter is a student registered at their school address.
 - The process for challenging is:
 - The election clerk is to place the word “challenge” by the voter’s name in the notation space of the signature roster;
 - If the challenge is unanimously upheld by the Presiding Judge and two election judges, “affirmed” will also be entered in the notation space of the signature roster;
 - If the challenge is not upheld by the Presiding Judge and two election judges, “not affirmed” will be entered in the notation space of the signature roster; and

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- Even if the challenge is “affirmed,” the voter can still vote a paper ballot, but an election judge shall clearly announce the voter’s name and place the ballot in an envelope marked “rejected.”
 - Challengers appointed for absent voter precincts:
 - Can raise challenges if an official outer mailing enveloped has been opened prior to being received by the absent voter precinct or if the voter is not a federal voter, federal qualified elector, overseas voter or not eligible to vote for some other reason; and
 - If the challenge to an absentee ballot has been upheld, the ballot will be placed unopened in an envelope reserved for challenged ballots.
2. Additional information regarding watcher activities:
- Watchers may:
 - Be present from the time a precinct board convenes a polling place until the ballots are counted and tallied after the polls close;
 - Observe that the election is being conducted according to the Election Code;
 - Inspect the precinct voter list to see what voters have voted;
 - Examine any voting machine in the same way as a challenger;
 - Make written notes or memoranda of any action or omission on the part of any member of the precinct board.

^{xxiii} N.M.S.A. § 1-6-5.6(E) (requiring county clerks to provide at least one alternate early voting location on Indian nation, tribal or pueblo land when requested by the Indian nation, tribe or pueblo if that Indian nation, tribe or pueblo if more than fifteen miles from an office of the county clerk).

^{xxiv} N.M.A.C. § 1.10.30, effective October 31, 2008, New Mexico Register, Volume XIX, Number 21, November 14, 2008.

^{xxv} For example, the instruction states that “If a county clerk receives a request from an Indian nation, tribe or pueblo with a boundary that is located more than fifteen miles from the office of a county clerk [...] the county clerk shall provide an alternate site as required by Section 1-5-5.6 N.M.S.A. 1978.” (N.M.A.C. § 1.10.30.9(A)(2)). Under the instruction now issued, if “a boundary” is more than fifteen miles from the clerk’s office, the clerk “shall” provide a site. This makes communities such as San Felipe Pueblo, who have boundary lines more than fifteen miles from the clerk’s office, eligible for alternative early voting sites despite the fact that some parts of the pueblo are less than fifteen miles from the clerk’s office. Another problem that this instruction will address has to do with how long alternative early vote sites are open. Rio Arriba County granted the Jicarilla Apache Nation’s request for an early vote site in Dulce, but only for one day. (*See* Matt van Buren, *Jicarilla Nation Questions New Polling Place, Open For Only a Day*, Rio Grande SUN, October 16, 2008; Matt van Buren, *First-Time Jicarilla Nation Polling Place Misses Voter Turnout Goal*, Rio Grande SUN, October 30, 2008). The Secretary’s instruction provides that beginning on the third Saturday before Election Day, an alternate site shall be open for voting from noon to 8 p.m. on Tuesdays through Fridays and 10:00 a.m. to 6 p.m. through the Saturday immediately preceding the election. (N.M.A.C. § 1.10.30.9(C)). This can only be modified because of a hardship arising from inadequate facilities, difficulties with making appropriate personnel available or other exigent circumstances, provided the county clerk justifies in writing to the secretary of state the need for a modification. (*Id.*)

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- ^{xxvi} Dan McKay, *FBI Investigating Suspicious Voter Cards*, Albuquerque Journal (October 10, 2008), available online at <http://www.abqjournal.com/news/metro/101126276349newsmetro10-10-08.htm>.
- ^{xxvii} Jeff Jones, *N.M. Republicans Take Aim At ACORN*, Albuquerque Journal (October 17, 2008), available online at <http://www.abqjournal.com/elex/171038288303elex10-17-08.htm>.
- ^{xxviii} Melanie Dabovich, *N.M. GOP finds 28 suspect voters*, The Santa Fe New Mexican (October 17, 2008), available online at <http://www.santafenewmexican.com/Local%20News/N-M--Republican-Party-finds-28-suspect-voters>.
- ^{xxix} Gwyneth Doland, *ACLU demands investigation of N.M. GOP; Bernalillo County Clerk (updated)*, The New Mexico Independent (October 22, 2008), available online at <http://newmexicoindependent.com/6221/aclu-demands-investigation-of-bernalillo-county-clerk-nm-gop>; Dan McKay, *ACLU: Where Did GOP Get Its Info?*, Albuquerque Journal (October 23, 2008), available online at <http://www.abqjournal.com/news/state/23119168528newsstate10-23-08.htm>.
- ^{xxx} Heather Clark, *Woman Says Mother Was Harassed Over Vote*, Albuquerque Journal (October 23, 2008), available online at <http://www.abqjournal.com/news/state/apharassed10-23-08.htm>.
- ^{xxxi} Gwyneth Doland, *N.M. Common Cause: DOJ should investigate charges of GOP voter intimidation*, The New Mexico Independent (October 24, 2008), available online at <http://newmexicoindependent.com/6639/govt-watchdog-group-urges-doj-investigation-of-gop-voter-intimidation>.
- ^{xxxii} Heather Clark, *GOP Lawyer Denies Charge*, Albuquerque Journal (October 30, 2008), available online at <http://www.abqjournal.com/news/metro/301132314717newsmetro10-30-08.htm>.
- ^{xxxiii} District Court pleadings available online at <http://moritzlaw.osu.edu/electionlaw/litigation/garciav.fox-young.php>; *ACLU Sues GOP Members to Protect Voter Privacy*, ACLU of New Mexico press release (October 27, 2008), available online at http://www.aclu-nm.org/News_Events/news_10_27_08.html.
- ^{xxxiv} See generally Lorraine C. Minnite, Ph.D., *The Politics of Voter Fraud* (March 5, 2007), available online at <http://projectvote.org/index.php?id=169>.
- ^{xxxv} *Id.* at p.5 (citing U.S. Senate Republican Policy Committee, “Putting An End to Voter Fraud,” (February 15, 2005); available online at http://rpc.senate.gov/_files/feb1504Voterfrauds.pdf).
- ^{xxxvi} *Id.*
- ^{xxxvii} *Id.*
- ^{xxxviii} Generously hosted by the Nordhaus Law Firm, LLP.

^{xxxix} Our Vote Live New Mexico data, *available online at* <http://www.ourvotelive.org/map.php?id=35>.

^{xl} Colleen Heild, *Bad Forms Prevent Voting: Missing Info, Misplaced Paperwork Thwart Some*, Albuquerque Journal (November 1, 2008), *accessed via Westlaw at* 2008 WLNR 20901578.

^{xli} Conversations between Common Cause New Mexico's Election Protection Coordinator and various county clerks at the Secretary of State's 2008 Fall Election School, September 3-5, 2008.

^{xlii} Our Vote Live database, "All Registration Problems in New Mexico," *available online at* http://www.ourvotelive.org/responses.php?op=list&filter_state=NM&filter_subset=epc_regprob&page=1.

^{xliii} *Id.*

^{xliv} N.M.C.A. §§ 1.10.25.8(C), 1.10.25.10(B).

^{xlv} N.M.S.A. § 1-4-49(B) (Organizations employing registration agents or using volunteer registration agents shall deliver or mail a certificate of registration to the secretary of state or county clerk within forty-eight hours of its completion by the person registering to vote or deliver it the next business day if the appropriate office is closed for that forty-eight-hour period); Brennan Center for Justice, *State Restrictions on Community-Based Voter Registration Drives* (updated August 4, 2008), p. 16, *available online at* http://www.brennancenter.org/content/resource/new_efforts_to_restrict_voter_registration_drives/.

^{xlvi} N.M.S.A. § 1-4-49(D) (A person who intentionally violates the provisions of this section is guilty of a petty misdemeanor and the person's third-party registration agent status shall be revoked).

^{xlvii} N.M.S.A. § 31-19-1(B) (Where the defendant has been convicted of a crime constituting a petty misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term not to exceed six months or to the payment of a fine of not more than five hundred dollars (\$500) or to both such imprisonment and fine in the discretion of the judge).

^{xlviii} Scott Sandlin, *Voter Registration Rules Upheld*, Albuquerque Journal (September 19, 2008), *available online at* <http://www.abqjournal.com/news/state/191056350158newsstate09-19-08.htm>.

^{xlix} *See generally* Minnite, *The Politics of Voter Fraud*, *supra*, at n. 34.

^l Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, Wisconsin and Wyoming.

^{li} Dēmos, *Voters Win with Election Day Registration* (Updated Winter 2008), p.4, *available online at*

<http://www.Demos.org/publication.cfm?currentpublicationID=2D9B9786-3FF4-6C82-5AC18BB4E53ADCFA>.

^{lii} Dan Boyd, *Voter Measure Gets Support*, Albuquerque Journal (November 20, 2008), available online at <http://www.abqjournal.com/news/state/201127382422newsstate11-20-08.htm>.

^{liii} Help America Vote Act of 2002, Pub. L. No. 107-252, § 302, 42 U.S.C. § 15482.

^{liv} *Id.*

^{lv} United States Election Assistance Commission, *Casting and Counting Provisional Ballots*, available online at http://www.eac.gov/program-areas/research-resources-and-reports/copy_of_docs/eds-2006/2006-eds-casting-and-counting-provisional-ballots.pdf.

^{lvi} Lorraine Minnite, Ph.D., Dēmos, *Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security 2* (2007), p.4, available online at <http://www.Demos.org/pubs/EDR%20VF.pdf>.

^{lvii} *Id.* at n.15.

^{lviii} See N.M.S.A. § 1-6-6(B) (Within twenty-four hours after receipt of a voter's application for an absentee ballot, the county clerk shall mail either the ballot, if it is within twenty-eight days of election day or a notice of rejection to the applicant).

^{lix} See text of instruction issued, *supra*, n. 9.

^{lx} See p. 7, *infra*.

^{lxi} N.M.S.A. § 1-6-4(D) (An application for an absentee ballot by a federal qualified elector or an overseas voter shall be accepted at any time preceding the general election).

^{lxii} N.M.S.A. § 1-6-5.7(A) (Commencing on the third Saturday prior to an election, an early voter may vote in person on a voting system at an alternate voting location established by the county clerk. . . . Early voting may be done at an alternate location from 12:00 p.m. to 8:00 p.m., Tuesday through Friday, and 10:00 a.m. to 6:00 p.m. Saturday through the Saturday immediately prior to the election).

^{lxiii} 42 U.S.C.A § 1973ff-1(a)(2) (Each State shall. . . accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election).

^{lxiv} N.M.S.A. § 1-6-6(B) (Within twenty-four hours after receipt of a voter's application for an absentee ballot, the county clerk shall mail either the ballot, if it is within twenty-eight days of election day or a notice of rejection to the applicant).

^{lxv} N.M.S.A. § 1-6-5(G) (Absentee ballots shall be sent to applicants not later than on the Friday immediately prior to the date of the election).

^{lxvi} N.M.S.A. § 1-14-13.1(A).

^{lxvii} N.M.S.A. 1-11-6.1(A) (The county clerk shall insure that all electronic voting machine programs are tested not later than ten days prior to the election. The tests shall be conducted by the county clerk in the presence of the county chairman of each major political party and any interested candidate or representative of the candidate).

^{lxviii} Conversation with University of New Mexico Political Science Professor Lonna Atkeson by Common Cause New Mexico Executive Director and Election Protection Coordinator, December 18, 2008.

^{lxix} Post-Election Audit Standards Working Group, *Report: Evaluation of Audit Sampling Models and Options for Strengthening California's Manual Recount* (July 27, 2007), available online at http://www.sos.ca.gov/elections/peas/final_peaswg_report.pdf.

^{lxx} ElectionAudits.org, *Principles and Best Practices for Post-Election Audits* (September 2008), available online at <http://electionaudits.org/principles>.

^{lxxi} Conversation with University of New Mexico Political Science Professor Lonna Atkeson and Santa Fe Chief Deputy Clerk for Elections Denise Lamb by Common Cause New Mexico Executive Director and Election Protection Coordinator, December 18, 2008.

^{lxxii} N.M.S.A. § 1-14-13.1 (Post-election duties; random voting system check; recount).

^{lxxiii} For the guidance issued *see* n.22, *supra*.

^{lxxiv} N.M.S.A. § 1-12-20(B) (the person presenting himself to vote is...listed among those persons in the precinct from whom an absentee ballot was received).

^{lxxv} Help America Vote Act of 2002, Pub. L. No. 107-252, § 302, 42 U.S.C. § 15482.

^{lxxvi} *Id.*

^{lxxvii} N.M.S.A. § 1-14-22 (The secretary of state shall issue rules governing and allowing procedures for reviewing the qualification of provisional ballot envelopes, absentee and other paper ballots in the case of a contest or recount of election results. All rejected provisional paper ballot envelopes shall be included in any contest or recount of election results, and a review of the qualification of provisional ballot envelopes shall occur in a recount).

^{lxxviii} N.M.S.A. § 1-12-21 (When a challenge is interposed, the election clerks shall enter the word "CHALLENGED" under the notation headings in the signature rosters).

^{lxxix} N.M.S.A. § 1-12-22(A)-(B) (A. if the challenge is unanimously affirmed by the presiding judge and the two election judges...[the] word "Affirmed" shall be written opposite such voter's name under the challenge notation in both signature rosters together with the number of the ballot so furnished. B. if the challenge is not unanimously affirmed by the presiding judge and the two election judges...the election clerks shall enter the words "Not Affirmed" under the challenge notation after the voter's name in the signature roster and the checklist of registered voters).

^{lxxx} Barry Massey, *State OKs Election Loan*, Albuquerque Journal (May 21, 2008), available online at <http://www.abqjournal.com/news/state/307668nm05-21-08.htm>.

^{lxxx} Trip Jennings, *Is New Mexico ready for Election Day?*, The New Mexico Independent, (August 21, 2008), *available online at* <http://newmexicoindependent.com/321/is-new-mexico-ready-for-election-day>.

^{lxxxii} Trip Jennings, *Officials scramble to put in place contract on voting machine repairs*, The New Mexico Independent (September 4, 2008), *available online at* <http://newmexicoindependent.com/156/officials-scramble-to-put-in-place-contract-on-voting-machine-repairs>.

^{lxxxiii} Our Vote Live Database, *available online at* http://www.ourvotelive.org/responses.php?op=list&filter_state=NM&filter_subset=epc_eqprob.

^{lxxxiv} *Available online at* http://nmlegis.gov/lcs/_session.aspx?Chamber=H&LegType=B&LegNo=221&year=08.

^{lxxxv} House Executive Message No. 56 (March 3, 2008), p.2, *available online at* www.sos.state.nm.us/Main/Elections/2008/HBill221.pdf.

^{lxxxvi} *Id.*

^{lxxxvii} Conversation with Santa Fe Chief Deputy Clerk for Elections Denise Lamb by Common Cause New Mexico Executive Director and Election Protection Coordinator, December 18, 2008.

^{lxxxviii} N.M.S.A. § 1-6-3 (Right to vote by absentee ballot).

^{lxxxix} N.M.S.A. § 1-6-3(A)-(B) (A. Any voter may vote by absentee ballot for all candidates and on all questions appearing on the ballot as if he were able to cast his ballot in person at his regular polling place on election day. B. Any federal qualified elector may register absentee and vote by an absentee ballot for any federal office).

^{xc} N.M.S.A. § 1-6-4(C) (Each application for an absentee ballot shall be subscribed by the applicant and shall require the applicant's printed name, registration address and year of birth to be supplied by the applicant, which shall constitute the required form of identification, except for new registrants who have registered by mail and at that time did not provide acceptable identification. The secretary of state shall issue rules to exempt voters from submitting identification only as required by federal law and shall review and, if necessary, update these rules no later than March 15 of even-numbered years).

^{xc} N.M.S.A. § 1-6-4(D) (An application for an absentee ballot by a federal qualified elector or an overseas voter shall be accepted at any time preceding the general election).

^{xcii} N.M.S.A. § 1-6-5(C) (The county clerk shall notify in writing each applicant of the fact of acceptance or rejection of the application and, if rejected, shall explain why the application was rejected).

^{xciii} N.M.S.A. § 1-6-5(D) (If the applicant has on file with the county a valid certificate of registration that indicates that the applicant is a voter who is a new registrant and who registered by mail without submitting the required voter identification, the county clerk shall notify the voter that the voter must submit with the absentee ballot the required

physical form of identification. The county clerk shall note on the absentee ballot register and signature roster that the applicant's absentee ballot must be returned with the required identification).

^{xciv} N.M.S.A. § 1-6-5(F) (...Absentee ballots may be marked in person at the county clerk's office during the regular hours and days of business beginning on the twenty-eighth day preceding the election and from 10:00 a.m. to 6:00 p.m. on the Saturday immediately prior to the date of the election...).

^{xcv} N.M.S.A. § 1-6-6(B) (Within twenty-four hours after receipt of a voter's application for an absentee ballot, the county clerk shall mail either the ballot, if it is within twenty-eight days of election day or a notice of rejection to the applicant).

^{xcvi} N.M.S.A. § 1-6-5(G) (Absentee ballots shall be sent to applicants not later than on the Friday immediately prior to the date of the election).

^{xcvii} *See* N.M.S.A. § 1-6-3(A) (Any voter may vote by absentee ballot for all candidates and on all questions appearing on the ballot as if he were able to cast his ballot in person at his regular polling place on election day); N.M.S.A. § 1-6-5(A)-(E) (mail in absentee ballots); N.M.S.A. § 1-6-5(F) (absentee ballots cast in person at the clerks' offices); N.M.S.A. § 1-6-5.7 (early ballots voted in person on a voting system at alternate voting location).

^{xcviii} N.M.S.A. § 1-6-16(B) (At any time prior to 5:00 p.m. on the Monday immediately preceding the date of the election, a person whose absentee ballot application has been accepted and who was mailed an absentee ballot but who has not received the absentee ballot may execute, in the office of the county clerk of the county where he is registered to vote, a sworn affidavit stating that he did not receive or vote his absentee ballot. Upon receipt of the sworn affidavit, the county clerk shall issue the voter a replacement absentee ballot).

^{xcix} N.M.A.C. § 1.10.12.15(C).

^c N.M.S.A. § 1-6-5.6(E), N.M.A.C. § 1.10.30.9(A)(2).

^{ci} N.M.A.C. § 1.10.30.9(A)(1).

^{cii} N.M.A.C. § 1.10.30.8(A).

^{ciii} N.M.A.C. § 1.10.30.8(B).

^{civ} N.M.A.C. § 1.10.30.10.

^{cv} N.M.A.C. § 1.10.30.9(C).

^{cvi} *Id.*

^{cvii} N.M.A.C. § 1.10.30.9 (B).

^{cviii} N.M.S.A. § 1-5-1(B) (The certificate of registration form shall require the following elements of information concerning the applicant for registration: name, gender, residence, municipality, post office, county of former registration, social security number,

date of birth, political party affiliation, zip code, telephone number at the applicant's option and statement of qualification for voting).

^{cix} Wendy Weiser, Justin Levitt, and Ana Munoz, *Making the List – New Mexico*, The Brennan Center for Justice (March 1, 2006), *available online at* http://www.brennancenter.org/content/resource/making_the_list_database_matching_and_verification_processes_for_voter_regi.

^{cx} N.M.S.A. § 1-4-11(B).

^{cxⁱ} N.M.S.A. § 1-4-12(A)(1).

^{cxⁱⁱ} N.M.S.A. § 1-5-3(B).

^{cxⁱⁱⁱ} N.M.S.A. § 1-5-5 (Entry of data into data processing system; county register; maintenance); *see also* N.M.S.A. § 1-5-30 (Secretary of state; establishment of statewide computerized voter registration system).

^{cx^{iv}} N.M.S.A. § 1-5-31 (Uniform procedures for counties).

^{cx^v} N.M.S.A. § 1-4-49 (Third-party registration agents; registration required; procedures; reports; penalty).

^{cx^{vi}} N.M.S.A. § 1-4-47 (Driver's license voter registration).

^{cx^{vii}} N.M.S.A. § 1-4-48 (Agency registration).

^{cx^{viii}} *Dēmos and Project Vote Notify New Mexico of Voting Rights Law Violations*, Dēmos and Project Vote (July 16, 2007), *available online at* http://Demos.org/pubs/scanned_NM_notice_letter_6.12.pdf.

^{cx^{ix}} 42 U.S.C. § 15483(b) (Computerized statewide voter registration list requirements and requirements for voters who register by mail).

^{cx^x} N.M.S.A. § 1-1-24(A)(1) (a physical form of identification...may be...an original or copy of a current and valid photo identification with or without an address, which address is not required to match the voter's certificate of registration).

^{cx^{xi}} N.M.S.A. § 1-1-24(A)(2) (a physical form of identification...may be...an original or copy of a utility bill, bank statement, government check, paycheck, student identification card or other government document, including identification issued by an Indian nation, tribe or pueblo, that shows the name and address of the person, the address of which is not required to match the voter's certificate of registration).

^{cx^{xii}} N.M.S.A. § 1-1-24(B) *as amended by Senate Bill 81*, *available online at* http://nmlegis.gov/lcs/_session.aspx?Chamber=S&LegType=B&LegNo=81&year=08 (a verbal or written statement by the voter of the voter's name, registration address and year of birth; provided, however, that the statement of the voter's name need not contain the voter's middle initial or suffix).

^{cx^{xiii}} N.M.S.A. § 1-12-7.1(D) (...If the voter does not provide the required voter identification, the voter shall be allowed to vote on a provisional ballot and shall provide the required voter identification to the county clerk's office before the county canvass

begins, or to the precinct board before the polls close, or the voter's provisional ballot shall not be qualified. If the required voter identification is provided, the voter's provisional ballot shall be qualified and the voter shall not vote on any other type of ballot).

^{cxxiv} N.M.S.A. § 1-12-8 (Conduct of election; provisional voting).

^{cxxv} N.M.S.A. § 1-12-25.4 (Provisional paper ballots; disposition).

^{cxxvi} N.M.A.C. § 1.10.22.9(C).

^{cxxvii} N.M.A.C. § 1.10.22.9(D).

^{cxxviii} N.M.S.A. § 1-12-25.4(F) (If the voter is a registered voter in the county, but has voted on a provisional paper ballot at a polling place other than the voter's designated polling place, the county canvassing board shall ensure that only those votes for the positions or measures for which the voter was eligible to vote are counted).

^{cxxix} N.M.A.C. § 1.10.22.9(K).

^{cxix} N.M.S.A. § 1-12-9.1 (Coercion of voters).

^{cxixi} N.M.S.A. § 1-4-22(A) (At any time not less than forty-two days prior to any election held pursuant to the Election Code, the secretary of state, the county chairman of any major political party or any twenty petitioners who are voters of the county may file and present to the district court a verified petition alleging either on personal knowledge or on information and belief that certain persons registered, named in the petition, are not qualified electors in the precincts named in the petition. The petition shall contain a brief statement of the facts upon which such allegation is made).

^{cxixii} N.M.S.A. § 1-4-22 (B) (Upon filing and presentation of such petition, the court shall by order fix a day for hearing thereon, which date shall be not less than five days nor more than ten days after such order. The court shall direct the county clerk to forthwith notify such persons named in the petition whose registration is sought to be canceled of the date and purpose of the hearing, and that each such person should be present at the hearing if he desires to oppose such cancellation).

^{cxixiii} N.M.S.A. § 1-12-20 (Conduct of election; interposing challenges).

^{cxixiv} N.M.S.A. § 1-12-20 (A)-(E).

^{cxixv} N.M.S.A. § 1-2-17 (Precinct board; schools of instruction).

^{cxixvi} *Available online at* <http://www.sos.state.nm.us/sos-PollWkr.html>.

^{cxixvii} N.M.S.A. § 1-2-4 (Secretary of state; training and instructions to precinct boards; training manual).

^{cxixviii} N.M.S.A. § 1-2-12 (Precinct board; number for each precinct; multipartisan).

^{cxixix} N.M.S.A. § 1-9-5(B)-(C).

^{cxl} 1971 Op. Att'y Gen. N.M. 181 (1971 N.M. AG LEXIS 875).

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- ^{cxli} New Mexico Secretary of State, *available online at* <http://www.sos.state.nm.us/>.
- ^{cxlii} Larry Dominguez, Office of the New Mexico Secretary of State, Personal Correspondence with authors of *Voting In 2008: Ten Swing States*, July 18, 2008.
- ^{cxliii} *Id.*
- ^{cxliv} *Id.*
- ^{cxlv} N.M.S.A. § 1-11-2(G).
- ^{cxlvi} N.M.S.A. § 1-10-10(C).
- ^{cxlvii} *Id.*
- ^{cxlviii} “Covered Areas for Voting Rights Bilingual Election Material-2000,” *Federal Register* 67, no. 144, July 26, 2002, *available online at* http://www.usdoj.gov/crt/voting/sec_203/203_notice.pdf.
- ^{cxlix} “Voter Bill of Rights-Spanish,” New Mexico Secretary of State, *available online at* <http://www.sos.state.nm.us/sos-bRspanish.html>.
- ^{cl} Larry Dominguez, Office of the New Mexico Secretary of State, Personal Correspondence with authors of *Voting In 2008: Ten Swing States*, August 13, 2008.
- ^{cli} Larry Dominguez, Office of the New Mexico Secretary of State, Personal Correspondence with authors of *Voting In 2008: Ten Swing States*, July 18, 2008.
- ^{clii} *Id.*
- ^{cliii} *Id.*
- ^{cliv} N.M.S.A. § 1-2-3(B).
- ^{clv} N.M.S.A. § 1-2-3(C), *see also* N.M.S.A. § 1-2-3.1.
- ^{clvi} “Elections,” New Mexico Secretary of State, *available online at* <http://www.sos.state.nm.us/sos-elections.html>.
- ^{clvii} *Id.*
- ^{clviii} N.M.S.A. § 1-6-5(I).
- ^{clix} “Elections,” New Mexico Secretary of State, *available online at* <http://www.sos.state.nm.us/sos-elections.html>.
- ^{clx} N.M.S.A. § 1-12-23 (Before each voter enters the voting machine, a member of the precinct board shall, so far as possible, instruct him on how to operate the voting machine, illustrate its operation on the model and call his attention to the posted sample ballot. If any voter, after entering the voting machine and before drawing its curtain, asks for further information regarding the machine's operation, the two election judges shall give him the necessary information and retire before the curtain is drawn).