

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO,

Plaintiff,

vs.

Case No. _____

MAGGIE TOULOUSE OLIVER, Secretary of
State of New Mexico, PATRICK MARTINEZ,
County Clerk of Guadalupe County, and ANNA
MARTINEZ, County Clerk of Taos County,

Defendants.

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF REGARDING
ABSENTEE-BALLOT DROP BOXES**

Plaintiff Republican Party of New Mexico (“RPNM”) alleges the following as its three-count Complaint against Defendants Maggie Toulouse Oliver, Secretary of State of New Mexico (“the Secretary”), Patrick Martinez, County Clerk of Guadalupe County (“the Guadalupe Clerk”), and Anna Martinez, County Clerk of Taos County (“the Taos Clerk”).

THE NATURE OF THE ACTION

1. In 2019, the Election Code was amended to allow voters a fourth option for returning their completed absentee ballots — beyond mailing them in, walking them into the county clerk’s office, or walking them into a polling place. That option is the “secured container,” which is described in NMSA 1978, § 1-6-9(E). That subsection of the Election Code attaches a number of security requirements to the use of secured containers, and it additionally requires that “the location of the containers and the days and times the containers will be available to receive ballots [be] posted by the county clerk *at least ninety days before* a statewide election.” *Id.* § -

9(E)(1) (emphasis added). For reasons that remain unclear, very few county clerks thought about setting up such containers in time to meet the deadline, *see, e.g.*, Petition for Order to Post Notice of Secured Container, *In re: Bernalillo Cnty. Petition for Secured Container*, No. D-202-CV-2020-05052 (N.M. 2d Jud. Dist. Ct. Sept. 4, 2020) (asking the Court to allow untimely designation of a secured container, which was ultimately denied), and the Secretary’s solution was to create another ballot-return option — one with no basis whatsoever in statute — called the “drop box.” The Secretary released her main guidance on the use of drop boxes in early September, *see* General Election 2020 Drop Box Standards & Guidance (dated Sept. 9, 2020) (Exhibit 1 to this Complaint) (“Standards & Guidance”), and followed up with an additional, multi-topic advisory touching on drop boxes in mid-October, *see* Secretary of State and Attorney General’s 2020 New Mexico General Election Voter Information Advisory at 6 (dated Oct. 14, 2020) (Exhibit 2 to this Complaint), which unfortunately some clerks appear to be interpreting as softening the earlier Standards & Guidance (the subsequent advisory, *e.g.*, changes references to “must remain under the direct supervision of at least two county staff or election workers at all times” to “should have at least two workers supervising them”).

2. The RPNM wants to promote widespread voter turnout under safe, secure conditions, and as such it did not categorically object to this legally questionable creation of the Secretary’s, given the unique circumstances of this election and the COVID-19 pandemic.¹ However, in addition to being treated as in-person drop-offs under § 1-12-8.2(A), these drop boxes

¹ The basic answer to the practical question “why has the RPNM opposed untimely petitions for secured containers but not opposed drop boxes” is that drop-box locations, unlike secured-container locations, are necessarily tied to preexisting polling places, and thus not subject to the same degree of location-selection gamesmanship. For example, in the previously cited Bernalillo County case, the county clerk was asking to put a single secured container in an 80%-Democrat precinct surrounded by 65%-, 73%-, 73%, 67%-, 77%-, 75%-, 78%-, and 77%-Democrat precincts, despite the fact that Bernalillo County at large is only 62% Democrat (these numbers refer to the 2018 gubernatorial vote). *See* RPNM Response to Petition, No. D-202-CV-2020-05052 (filed Sept. 15, 2020). There is a greater degree of protection in place to prevent the ruling party of a county from just setting up *polling places* in locations designed to benefit themselves.

should be held to the same security requirements as secured containers, including the requirement that they “shall be monitored by video surveillance cameras and the video recorded by that system shall be retained by the county clerk as a record related to voting.” NMSA 1978, § 1-6-9(E)(3). Applying the secured-container rules — other than the 90-day posting rule — to drop boxes statewide is the subject of Count 1 of this three-count Complaint.

3. Counts 2 and 3 of this Complaint are even more imminently serious. The Secretary’s Standards & Guidance, while not fully tracking the rules for secured containers, do provide a somewhat meaningful framework for ballot security, requiring, among other things, that “[t]he drop box must remain under the direct supervision of at least two county staff or election workers at all times (aka ‘ballot collection team’),” that the “ballot collection team must be bipartisan,” and that the drop boxes be emptied at the end of each voting day — whenever the polling place they are associated with closes — and moved to an inaccessible location during the off hours. Standards & Guidance at 2-3. The Plaintiffs have obtained evidence that the Guadalupe Clerk’s office has been leaving drop boxes unattended and accessible at all hours; this practice, especially if coupled with a failure to monitor the boxes via videorecording, leaves open myriad potential for election misconduct — from the theft, damaging, or destruction of ballots left in the box (or placed there after hours), to the dropping off of large numbers of harvested (or otherwise improperly collected)² ballots during the unmonitored off hours. Count 2 asks the Court to issue an injunction against the Guadalupe Clerk to put an immediate end to this practice. The Taos Clerk, on the other hand, has continuously declined to order poll workers at the county-courthouse polling place to man and observe the drop boxes outside the courthouse, despite several rounds of

² In New Mexico, only the “voter, [a] caregiver to that voter or [a] member of that voter’s immediate family may deliver that voter’s absentee ballot to the county clerk in person or by mail; provided that the voter has subscribed the official mailing envelope of the absentee ballot.” NMSA 1978, § 1-6-10.1(A); *see id.* § -10.1(B) (defining “‘immediate family’ [to] mean[] the spouse, children, parents or siblings of a voter”).

complaints and assurances from the Secretary that the issue has been fixed. Count 3 asks the Court to order the Taos Clerk to either discontinue the use of drop boxes or to ensure their continuous observation.

THE PARTIES

4. Plaintiff RPNM is a qualified major political party in New Mexico under NMSA 1978, § 1-7-7(A). It counts among its membership large numbers of registered voters in Guadalupe and Taos Counties, and has candidates who will appear on the ballots of all Guadalupe County and Taos County voters.

5. Defendant Patrick Martinez is the County Clerk of Guadalupe County, and in that capacity is the chief election official for the county and has numerous duties relating to the issuance, receipt, and processing of absentee ballots. *See, e.g.*, NMSA 1978, §§ 1-2-6 & -12.

6. The Secretary “is the chief election officer of the state,” NMSA 1978, § 1-2-1(A), oversees the state Bureau of Elections, *see id.* § 8-4-5, and is tasked by statute with “obtain[ing] and maintain[ing statewide] uniformity in the application, operation and interpretation of the Election Code,” *id.* § 1-2-1(B)(1).

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction under § 13 of Article VI of the New Mexico Constitution, the Declaratory Judgment Act, NMSA 1978, § 44-6-1 to -15.

8. This Court has personal jurisdiction over the Defendants under the New Mexico long-arm statute, NMSA § 38-1-16, and under § 1-14-9 of the Election Code.

9. Venue in Santa Fe County is proper under NMSA 1978, § 38-3-1(G), because Santa Fe County is both “the county in which [the Secretary’s] offices are located” and “the capital.”

COUNT 1
CLAIM FOR AN INJUNCTION AND DECLARATION AGAINST THE SECRETARY
REQUIRING THAT THE SECURED-CONTAINER SECURITY STANDARDS OF
§ 1-6-9(E)(3) TO (5) BE APPLIED TO DROP BOXES

10. Pursuant to Rule 1-010(C) NMRA, the Plaintiff incorporates by reference all of the foregoing allegations in this Complaint.

11. The following section of the Election Code — which is reproduced here in full — is the only section laying out voters' options for returned a completed absentee ballot for counting:

- A. When voting a mailed ballot, the voter shall secretly mark the mailed ballot in the manner provided in the Election Code for marking paper ballots, place it in the official inner envelope and securely seal the envelope. The voter shall then place the official inner envelope inside the official mailing envelope and securely seal the envelope. The voter shall then complete the form on the reverse of the official mailing envelope, which shall include a statement by the voter under penalty of perjury that the facts stated in the form are true and the voter's name, registration address and year of birth. The voter or another person authorized by law shall then return the official mailing envelope containing the voted ballot to the county clerk of the voter's county of residence. If returned by a person other than the voter, the official mailing envelope shall contain the signature, printed name and relationship to the voter of the person returning the ballot.
- B. The official mailing envelope may be returned by mail using the United States postal service. The secretary of state shall implement a free-access tracking system for each voter to be able to see the status of the voter's mailed ballot while en route to the voter as well as when returned to the county clerk.
- C. The official mailing envelope may be returned using a commercial delivery service; provided that unless the secretary of state has approved the use of a specific commercial delivery service, the voter shall be responsible for the costs of delivery by means of such service.
- D. The official mailing envelope may be returned in person to the office of the county clerk or to an alternate voting location, mobile alternate voting location or election day voting location.
- E. The official mailing envelope may be returned by depositing the official mailing envelope in a secured container made available by the county clerk to receive voted mailed ballots for that election; provided that:

- (1) the location of the containers and the days and times the containers will be available to receive ballots are posted by the county clerk at least ninety days before a statewide election or forty-two days before a special election;
- (2) the location of a secured container is considered a polling place for purposes of electioneering too close to the polling place in violation of Section 1-20-16 NMSA 1978;
- (3) all secured containers shall be monitored by video surveillance cameras and the video recorded by that system shall be retained by the county clerk as a record related to voting pursuant to the provisions of Section 1-12-69 NMSA 1978;
- (4) signage at the location of a secured container shall inform voters and those dropping off ballots at the location:
 - (a) that it is a violation of law for any person who is not an immediate family member to collect and deliver a ballot for another person;
 - (b) that electioneering is prohibited within one hundred feet of the secured container; and
 - (c) of the dates and approximate time the ballots will be collected; and
- (5) at least once a day, the county clerk or a full-time deputy county clerk shall collect the ballots from the secured containers, register the date and time stamp on each official mailing envelope and identify the location of the secured container in the ballot register.

NMSA 1978, § 1-6-9.

12. The Secretary has justified drop boxes under subsection (D) of the above statute, the generic provision allowing for the “in person” return of ballots to the county clerk’s office, an alternate or mobile alternate voting location (*i.e.*, an early-voting site), or an election day location. *See Standards & Guidance at 2.* Given existence of subsection (E) on secured containers, and given the historical practice of enforcing the requirements in the last sentence of subsection (A)

and in § 1-6-10.1 by having a poll worker orally verify whether the person dropping off the ballot is the voter — and, if not, further verifying that the person is an immediate family member and that they have signed the outside of the ballot — this conclusion is highly dubious. It is also in direct contravention of the statutory procedure for turning in an absentee ballot to a polling place:

A voter who requested and received an absentee ballot shall be allowed to deliver the official mailing envelope containing the voter’s absentee ballot on election day to any polling location in the county in which the voter is registered *if the voter presents the official mailing envelope to the presiding judge* before the polls close on election day.

NMSA 1978, § 1-12-8.2(A) (emphasis added).

13. The RPNM, however, has generally been game to consider drop boxes a permissible cross-breed of traditional in-person delivery of absentee ballots and the “secured container” construct of subsection (E), reasoning that the requirement that the “locations of the containers . . . [be] posted . . . at least ninety days before [the] election” is specifically linked to addressing concerns over — *i.e.*, allowing time for citizen complaints and litigation, in addition to public awareness of — the *locations* of the containers, rather than their security. NMSA 1978, § 1-6-9(E)(1); *see* note 1, *supra*.

14. There is no reason, however, for drop boxes to not be subject to the security requirement of subsection (E)(3) to (E)(5) — including the requirement that they be continuously monitored by video surveillance — in addition to those attendant to in-person voting, including that a poll worker orally verifies the ballot deliverer’s relationship to the voter and that he or she has signed the exterior of the envelope. This Court should issue a declaration and an injunction requiring the Secretary to take this position and to issue instructions to all county clerks to adhere to the same.

COUNT 2
CLAIM FOR AN INJUNCTION AGAINST THE GUADALUPE CLERK
FOR KEEPING DROP BOXES OPEN AND ACCESSIBLE DURING OFF HOURS

15. Pursuant to Rule 1-010(C) NMRA, the Plaintiff incorporates by reference all of the foregoing allegations in this Complaint.

16. Guadalupe County voters have informed the RPNM that drop boxes in Guadalupe County have been left open (as in open to individuals placing items into the box) and unattended, not only during hours that the polls are open, but when the polls are closed, as well. The RPNM has been provided with video footage of a drop box left unattended on Saturday, October 23, 2020, when the corresponding polling location was not open for business.

17. This is in direct contravention of both the Election Code and the Standards & Guidance, and the Court should issue an injunction ordering the Guadalupe Clerk to, if he wishes to continue using drop boxes, ensure that all drop boxes are continuously monitored and that they are only open and accessible to the public during hours that the polls are open.

COUNT 3
CLAIM FOR AN INJUNCTION AGAINST THE TAOS CLERK
FOR FAILING TO KEEP DROP BOXES UNDER DIRECT SUPERVISION

18. Pursuant to Rule 1-010(C) NMRA, the Plaintiff incorporates by reference all of the foregoing allegations in this Complaint.

19. Taos County voters have informed the RPNM that the Taos Clerk has left the drop box outside the county courthouse open and unattended during polling hours, and have provided the RPNM with video footage of individuals dropping ballots into the drop box, with no poll workers within sight. This course of conduct has persisted despite several back-and-forth exchanges with the Secretary — with the Secretary attempting to correct the issue and getting

verbal assurances from the Taos Clerk's office that the issue has been rectified — illustrating the need for the Court to issue an injunction.

PRAYER FOR RELIEF

The Plaintiffs hereby pray that this Court grant the following forms of relief to resolve the actual controversies raised in the Complaint and to afford relief from uncertainty and insecurity with respect to the rights, status, and other legal relations of the parties:

A. a TRO or preliminary injunction, followed by a permanent injunction and declaratory judgment, to Defendant Maggie Toulouse Oliver, Secretary of State of New Mexico, determining that, if drop boxes are to be used, they must comply with both with the secure-container security provisions of NMSA 1978, § 1-6-9(E)(3) to (5) and with the in-person security provisions outlined in her Standards & Guidance;

B. a TRO or preliminary injunction, followed by a permanent injunction, ordering Defendant Patrick Martinez, County Clerk of Guadalupe County, to either immediately discontinue the use of drop boxes or ensure that they are made inaccessible to the public during non-polling hours and kept continuously, directly monitored by at least two bipartisan election officials during polling hours, in keeping with the Secretary's Standards & Guidance;

C. a TRO or preliminary injunction, followed by a permanent injunction, ordering Defendant Anna Martinez, County Clerk of Taos County, to either immediately discontinue the use of drop boxes or ensure that they are kept continuously, directly monitored by at least two bipartisan election officials during polling hours, in keeping with the Secretary's Standards & Guidance; and

D. any other relief allowed by law and that the Court deems just and appropriate.

Respectfully submitted,

HARRISON & HART, LLC

By: 

Carter B. Harrison IV
N.M. Bar No. 148090
924 Park Avenue SW, Suite E
Albuquerque, NM 87102
Tel: (505) 295-3261
Fax: (505) 341-9340
Email: carter@harrisonhartlaw.com

Attorneys for the Plaintiff

Exhibit List

- Ex. 1: SOS Standards & Guidance on Drop Boxes (11 pages)
- Ex. 2: Drop-Box Excerpt from SOS Advisory on Various Subjects (2 pages)