IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

ORIGINAL

v.

No. 30,285

JEROME D. BLOCK, a.k.a. JEROME D. BLOCK II and
JEROME D. BLOCK JR., and
JEROME D. BLOCK, a.k.a. JEROME D. BLOCK SR.,

Defendants-Appellees.

BRIEF IN CHIEF

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
MICHAEL E. VIGIL, District Judge

Oral Argument Is Requested

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Note regarding record on appeal: The record on appeal is comprised of (1) a sequentially numbered, four-volume record proper in No. D-101-CR-2009-00137, (2) a sequentially numbered, four-volume record in No. D-101-CR-2009-00138, and (3) an audio transcript of proceedings below recorded on compact disc. Citations to the record on appeal are in the following forms:

Citation form	Proceeding below
[RP(137) {page}]	Record proper in No. D-101-CR-2009-00137
[RP(138) {page}]	Record proper in No. D-101-CR-2009-00138
[CD, 2/8/10, {time}]	Audio transcript of hearing on motions to dismiss

Statement of compliance: I certify in accordance with Rule 12-213(F)(3) NMRA that this brief is proportionally spaced and that the body of the brief contains 10,681 words. This brief was prepared using Microsoft Word 2000, version 9.0.

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

This case is believed to be the first criminal prosecution under the New Mexico Voter Action Act. The district court dismissed all charges under that Act on the grounds that (1) the Attorney General has no authority to prosecute criminal violations of the Act without a prior referral from the Secretary of State, and (2) prosecution of the same conduct for which the Secretary has previously assessed a civil penalty constitutes double jeopardy. At issue is whether those legal determinations are correct.

II. SUMMARY OF FACTS

The material facts are undisputed. In the 2008 primary and general election cycles, Defendant Jerome D. Block Jr. campaigned as a certified candidate for the office of Commissioner of the Public Regulation Commission. [RP(138) 622-23, 637] In doing so, he accepted public money from the Public Election Fund, a fund established and regulated under the Voter Action Act, NMSA 1978, §§ 1-19A-1 - 1-19A-17 (2003, as amended in 2007). [RP(138) 623, 637]

On October 4, 2008, one month before the general election and following news reports alleging possible misappropriation of public money, the Secretary of State notified Defendant Block Jr. of an inquiry into whether he had violated the Act. [RP(138) 623, 638, 648] On November 1, 2008, after providing notice and an

opportunity to be heard, the Secretary issued a notice of final administrative action in which she assessed three fines totaling $11,000 and ordered Defendant Block Jr. to return $10,000 previously disbursed to him from the Fund. [RP(138) 623-24, 638, 649-50, 700-01]

Of the three fines, one in the amount of $5,000 was based on the Secretary's finding of a violation of, *inter alia*, Section 1-19A-9(D) of the Act by failure to accurately and truthfully report a campaign expenditure. [RP(138) 623, 648-49, 685-86, 700] The Secretary found that Defendant Block Jr. failed to accurately report a $2,500 payment to the band Wyld Country for rally entertainment that the band never provided. [RP(138) 649, 700]

A second fine of $5,000 was based on the Secretary's finding of a violation of Section 1-19A-7(D) of the Act by improper use in the general election cycle of public funds earmarked for the primary. [RP(138) 623-24, 638, 648-49, 685-86, 700-01] The Secretary found that Defendant Block Jr. failed to return to the Public Election Fund the $2,500 paid to Wyld Country, although he was required to return that money within thirty days after the primary election. [RP(138) 649, 700-01]

The remaining fine of $1,000 was based on the Secretary's finding that Defendant Block Jr. violated the Act by spending public money for non-campaign-related purposes, *viz.*, by contributing $700 to help retire Senator Hillary Clinton's presidential campaign debt. [RP(138) 649, 701]

The Secretary's notice of final action indicates on its face that a copy was transmitted to the Attorney General. [RP(138) 650] However, the State does not dispute that the Secretary made no decision to refer the matter to the Attorney General for prosecution. [RP(138) 638-39, 652-53; CD, 2/8/10, 10:24:50 - 10:25:06] The Secretary has explained that she is not a prosecutor, she has no legal training, and any decision whether a criminal prosecution should be initiated under the Act was beyond her purview. [RP(138) 652, 655; CD, 2/8/10, 10:36:13 - 10:37:00, 10:42:04 - 10:42:10]

III. COURSE OF PROCEEDINGS

On April 8, 2009, a grand jury charged Defendant Block Jr. with, *inter alia*, two counts of willfully or knowingly violating the Voter Action Act and other provisions of the Election Code (Counts I and III) and two counts of conspiring to violate the Voter Action Act and other provisions of the Election Code (Counts II and IV). [RP(138) 1-6] On the same date, a grand jury charged Defendant Block Sr. with, *inter alia*, one count of willfully or knowingly violating the Voter Action Act and other provisions of the Election Code (Count I) and one count of conspiring to violate the Voter Action Act and other provisions of the Election Code (Count II). [RP(137) 1-5] The charges against Defendants were joined pursuant to Rule 5-203(B) NMRA. [RP(137) 7; RP(138) 8]

Defendants jointly moved to dismiss all charges under the Voter Action Act on the ground that the Attorney General lacks statutory authority to prosecute. [RP(138) 637-55, 913-21] Defendants acknowledged that "the Attorney General is typically vested with broad authority to prosecute criminal cases," but they argued that the Act supersedes that authority and requires the Attorney General to receive a referral from the Secretary of State before initiating a criminal prosecution under the Act. [RP(138) 640-45, 913-20]

Defendant Block Jr. also separately moved to dismiss Counts I, II, and VII against him. [RP(138) 622-36, 928-35] He argued that the two $5,000 fines levied by the Secretary were criminal punishments for purposes of the New Mexico Double Jeopardy Clause and precluded a successive criminal prosecution based on the same conduct. [*Id.*] He did not request dismissal of Counts III and IV, as he did not claim that they were based on the conduct for which he was fined. [*Id.*]

IV. DISPOSITION BELOW

The district court issued an order dismissing all charges under the Voter Action Act. [RP(137) 819-26; RP(138) 937-44] The court ruled that the Act limits the Attorney General's prosecutorial authority by requiring the Secretary of State, upon finding a violation of the Act, either to impose a fine or to transmit the finding to the Attorney General for prosecution but not both. [RP(138) 938-41, 944] The court also ruled that all charges under the Voter Action Act against

Defendant Block Jr.—Counts III and IV as well as Counts I and II—violate the Double Jeopardy Clause. [RP(138) 941-44] The State filed timely notices of appeal. [RP(137) 861-71; RP(138) 979-89]

ARGUMENT

I. THE ATTORNEY GENERAL HAS AUTHORITY TO PROSECUTE THE CHARGES UNDER THE VOTER ACTION ACT

A. Standard of Review and Preservation of Claim of Error

Statutory interpretation presents a legal question to be reviewed de novo. *State v. Lewis*, 2008-NMCA-070, ¶ 6, 144 N.M. 156, 184 P.3d 1050.

Insofar as it was required to do so, the State preserved its claim that the Attorney General has authority to prosecute the charges under the Voter Action Act by written and oral arguments in opposition to Defendants' motion to dismiss asserting a lack of such authority. [RP(138) 713-20; CD, 2/8/10, 10:58:02 - 11:19:40, 11:41:00 - 11:42:32]; *see* Rule 12-216(A) NMRA; *cf.* Rule 12-216(B) NMRA (providing that Court may consider jurisdictional questions whether or not they were preserved).

B. Governing Principles of Statutory Interpretation

"The primary aim of statutory construction is to 'give effect to the intent of the Legislature.'" *Lewis*, 2008-NMCA-070, ¶ 6 (quoting *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022). A court should begin "'by looking at the language of the statute itself.'" *Id.* (quoting *Smith*, 2004-NMSC-032, ¶ 9).

The statutory language should be read "in its entirety," construing "each part in connection with every other part to produce a harmonious whole." *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (citations and internal quotation marks omitted). Moreover, a court should not "read into a statute language which is not there, especially when it makes sense as it is written." *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579.

"When 'the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written.'" *Lewis*, 2008-NMCA-070, ¶ 6 (quoting *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994)). In other words, if the statute's language is unambiguous, the Court should "give effect to that language and refrain from further statutory interpretation." *State v. Smile*, 2009-NMCA-064, ¶ 8, 146 N.M. 525, 212 P.3d 413 (citation and internal quotation marks omitted), *cert. quashed*, 2010-NMCERT-006.

"In the event there is any doubt as to the meaning of the words of a statute," the Court should "also consider the statute's history and background." *Lewis*, 2008-NMCA-070, ¶ 7. The statute should be construed "in the context of its history and legislative objectives, reading statutes in pari materia to ascertain legislative intent." *Id.* Whenever possible, different legislative enactments should be read "as harmonious instead of as contradicting one another." *State v. Rivera*,

2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (citation and internal quotation marks omitted). In construing an ambiguous statute, the Court may also consider "the policy implications of the various constructions of the statute." *Id.* ¶ 14. The Court should reject "a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." *Smith*, 2004-NMSC-032, ¶ 10.

Finally, "[s]tatutes defining criminal conduct should be strictly construed, and doubts about construction of criminal statutes are resolved in favor of lenity." *State v. Johnson*, 2009-NMSC-049, ¶ 18, 147 N.M. 177, 218 P.3d 863 (citation and internal quotation marks omitted). However, "[a] penal statute is not ambiguous merely because it [is] *possible* to articulate a construction more narrow" than that urged by the State. *Id.* (citation and internal quotation marks omitted). "Rather, lenity is reserved for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." *Id.* (citation and internal quotation marks omitted).

C. The Voter Action Act Does Not Limit the Attorney General's Authority

The New Mexico Constitution creates the office of the Attorney General as one of seven principal offices of the executive department, and the only such officer who must be licensed as an attorney of the New Mexico Supreme Court.

N.M. Const. art. V, §§ 1, 3. "[T]he attorney general is the State's highest ranking law enforcement officer, elected by the people of New Mexico." *State v. Armijo*, 118 N.M. 802, 816, 887 P.2d 1269, 1283 (Ct. App. 1994). As such, this Court has cautioned, "[f]or a court to forbid the attorney general from engaging in a prosecution within the jurisdiction of the office is a serious encroachment on the executive branch." *Id.* While it unquestionably is within the judiciary's province to determine whether indeed the Attorney General has jurisdiction, that determination "should be undertaken with the greatest circumspection" in view of the separation-of-powers principles it implicates. *Id.*; *see* N.M. Const. art. III, § 1.

The Constitution does not enumerate powers and duties of the Attorney General, nor does it confer common law powers on him. *State v. Davidson*, 33 N.M. 664, 667-69, 275 P. 373, 374-75 (1929). Rather, the Attorney General's powers and duties are defined by statute. *State ex rel. Bingaman v. Valley Sav. & Loan*, 97 N.M. 8, 10, 636 P.2d 279, 281 (1981).

The basic grant of authority to the Attorney General is set out in NMSA 1978, Section 8-5-2, which charges him with the following duty, among others:

> *Except as otherwise provided by law, the attorney general shall*:
>
> . . .
>
> B. *prosecute* and defend in any other court or tribunal *all actions and proceedings, civil or criminal*, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor[.]

NMSA 1978, § 8-5-2 (1975) (emphasis added); *see Armijo*, 118 N.M. at 805-06, 887 P.2d at 1272-73.

Our Supreme Court has broadly construed the Attorney General's prosecutorial authority as provided by Section 8-5-2, and has rejected the contention "that the Legislature intended Section 8-5-2 to be a restrictive statute." *Valley Sav. & Loan*, 97 N.M. at 10, 636 P.2d at 281 (holding that § 8-5-2 grants Attorney General discretion to determine when public interest requires initiation of civil action on State's behalf). In the criminal context, in particular, the Supreme Court has recognized that "Section 8-5-2(B) grants the attorney general concurrent power with the district attorneys to prosecute criminal offenses." *State v. Naranjo*, 94 N.M. 407, 410, 611 P.2d 1101, 1104 (1980) (per curiam); *accord State v. Koehler*, 96 N.M. 293, 295, 629 P.2d 1222, 1224 (1981) ("Section 8-5-2 provides authority for the AG to prosecute criminal cases in any court when the State's interest requires such action . . . 'except as otherwise provided by law.'").

The Attorney General's authority is not unlimited. The Legislature explicitly made exception for what may be "otherwise provided by law." § 8-5-2. The grant of authority in Section 8-5-2 is "tempered" by the coordinate provisions of Section 8-5-3, *see Naranjo*, 94 N.M. at 410, 611 P.2d at 1104, which state:

> That *upon the failure or refusal of any district attorney to act* in any criminal or civil case or matter in which the county, state or any department thereof is a party or has an interest, *the attorney general be, and he is hereby, authorized to act* on behalf of said county, state

> or any department thereof, if after a thorough investigation, such action is ascertained to be advisable by the attorney general.

NMSA 1978, § 8-5-3 (1933) (emphasis added). Read together, Sections 8-5-2 and 8-5-3 grant the Attorney General "concurrent right with the district attorney to bring an action," but they condition the exercise of that authority "upon the failure or refusal" of a district attorney to act, with the result that the Attorney General may not "supplant" or "displace the district attorney in a case where the rights of the state are being actively advocated." *State ex rel. Att'y Gen. v. Reese*, 78 N.M. 241, 245-46, 430 P.2d 399, 403-04 (1967).

Thus, the pattern in the basic statutes is straightforward: As a general rule, the Attorney General has broad authority to prosecute criminal cases in the courts of this State, but that authority may be limited or conditioned where the Legislature has "otherwise provided by law." *See* §§ 8-5-2, 8-5-3.

Here, Defendants' challenge to the Attorney General's authority depends on the premise that the Legislature has "otherwise provided"—*i.e.*, limited the Attorney General's authority—in the Voter Action Act. Defendants acknowledged that "the Attorney General is typically vested with broad authority to prosecute criminal cases," but stated that "this authority may be displaced by superceding statute." [RP(138) 640] They argued that the Voter Action Act "is just such a statute," and that "the initiation of any criminal prosecutions under Section 1-19A-17 *must* come by referral from the Secretary of State." [RP(138) 640]

The question for review thus reduces to whether the Legislature has "otherwise provided" in Section 1-19A-17 for a limitation on the Attorney General's authority, or, if the statute is ambiguous, whether such a limitation should be inferred from its history and background, from statutes in pari materia, or from policy implications. *See Smith*, 2004-NMSC-032, ¶ 10; *Lewis*, 2008-NMCA-070, ¶¶ 6-7. These several bases for interpretation of the statute are examined in turn.

1. The statutory language

The Court's inquiry properly begins with the language of the statute itself. *Lewis*, 2008-NMCA-070, ¶ 6. Section 1-19A-17, entitled "Penalties," provides:

> A. In addition to other penalties that may be applicable, a person who violates a provision of the Voter Action Act is subject to a civil penalty of up to ten thousand dollars ($10,000) per violation. In addition to a fine, a certified candidate found in violation of that act may be required to return to the fund all amounts distributed to the candidate from the fund. If the secretary makes a determination that a violation of that act has occurred, the secretary shall impose a fine or transmit the finding to the attorney general for prosecution. In determining whether a certified candidate is in violation of the expenditure limits of that act, the secretary may consider as a mitigating factor any circumstances out of the candidate's control.
>
> B. A person who willfully or knowingly violates the provisions of the Voter Action Act or rules of the secretary or knowingly makes a false statement in a report required by that act is guilty of a fourth degree felony and, if he is a certified candidate, shall return to the fund all money distributed to that candidate.

NMSA 1978, § 1-19A-17 (2003).

What is immediately clear from the language of Section 1-19A-17 is that it does not explicitly say anything about what the Attorney General shall or may do. Instead, it prescribes penalties for violations of the Act, providing in Subsection (A) for a civil penalty to be administered by the Secretary and in Subsection (B) for a criminal penalty for a willful or knowing violation. §§ 1-19A-17(A), (B).

Subsection (A) sets out an explicitly non-exhaustive list of penalties that may be imposed on a person "who violates" the Act. § 1-19A-17(A). "*In addition to other penalties* that may be applicable," a violator "is subject to a civil penalty" of up to $10,000 per violation, and a certified candidate found in violation of the Act "may" be required to return money distributed him or her from the Public Election Fund. *Id.* (emphasis added). Subsection (A) specifies what the Secretary "shall" and "may" do in administering the civil penalties. *Id.*

In contrast, Subsection (B) provides that a person who "willfully or knowingly violates" the Act or its implementing rules, or who "knowingly" makes a false statement in a required report, "is guilty of a fourth degree felony." § 1-19A-17(B). Also, whereas a certified candidate who violates the Act "may" be required to return public money, § 1-19A-17(A), one who "willfully or knowingly" violates the Act "shall return" all such money, § 1-19A-17(B).

Section 1-19A-17 mentions the Attorney General only once, and then only as the recipient of referrals from the Secretary: "If the secretary makes a

determination that a violation of that act has occurred, the secretary shall impose a fine or transmit the finding to the attorney general for prosecution." § 1-19A-17(A). This sentence states what the Secretary "shall" do, but says nothing about what the Attorney General shall or may do except to imply that he is the proper officer to prosecute violations of the Act. *Id.*

The district court ruled that the word "or" divests the Attorney General of his usual broad authority to prosecute criminal violations because, in the court's view, the Secretary's options were either to impose a fine "or" to transmit a finding for prosecution but not both. [RP(138) 938-41] That ruling is error for two reasons.

First, the district court misinterpreted the Act's provisions regarding the Secretary of State's duties. Simply stated, the directive that the Secretary "shall" impose a fine "or" refer the matter for prosecution does not prohibit the Secretary from doing both. The word "shall" speaks of what the Secretary is *required* to do, not of what she is *authorized* to do. *E.g.*, *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 ("'[S]hall' indicates that the provision is mandatory[.]"). Moreover, "[a]lthough in common usage the conjunction 'or' denotes alternatives, the alternatives are not necessarily mutually exclusive." *Swink v. Fingado*, 115 N.M. 275, 279 n.10, 850 P.2d 978, 982 n.10 (1993). "The disjunctive 'or' does not exclude the conjunctive

'and' unless the context so requires." *State ex rel. Haynes v. Bonem*, 114 N.M. 627, 632, 845 P.2d 150, 155 (1992).

Here, the "context" requires the conclusion that civil and criminal penalties are cumulative, not mutually exclusive: The statute says explicitly that the a civil penalty is "*[i]n addition to* other penalties that may be applicable." § 1-19A-17(A) (emphasis added); *cf. Davis v. Farmers Ins. Co.*, 2006-NMCA-099, ¶¶ 22-23, 140 N.M. 249, 142 P.3d 17 (construing insurance policy to provide for mutually exclusive alternatives where it did not contain words like "in addition to").

The district court explicitly decided to disregard the nine words, "In addition to other penalties that may be applicable." [RP(138) 939] It believed that those nine words would "rewrite" and "require nullification" of its preferred interpretation of the statute as requiring a choice between a civil penalty and a referral for prosecution. [*Id.*] Our Supreme Court has cautioned, however, that the language of a statute should be read in its entirety and each part of the statute should be construed in connection with every other part to produce a harmonious whole. *Smallwood*, 2007-NMSC-005, ¶ 11. The district court should have heeded that caution not by ignoring the first nine words, but by rethinking its interpretation of the rest of the statute. When the court found that the statute's opening words contradicted its interpretation of other words, it should have adopted an

interpretation giving effect to every part of the statute instead of treating the first nine words as if they did not exist.

Had the Legislature meant to limit the Secretary's authority to only one of the two alternatives, it could simply have said that "the secretary *may* impose a fine or transmit the finding to the attorney general for prosecution *but not both*." The Legislature did not include such words of limitation on the Secretary's authority, however, and the district court erred in reading into the statute language that was not there, especially when the Act makes sense as it is written. *Hubble*, 2009-NMSC-014, ¶ 10.

Second, whatever the meaning of "shall" and "or" in Section 1-19A-17(A), the district court erred when it inferred a limitation on the *Attorney General's authority* from what is at most a limitation on the *Secretary's authority*. Ultimately, the question for this Court's review is not the extent of the Secretary's authority to act upon finding a violation of the Act, but the Attorney General's authority to prosecute criminal violations. While Section 1-19A-17(A) provides one means by which the Attorney General is to be apprised of a violation of the Act, nothing in the Act says that it is the *only* means by which the Attorney General may undertake a prosecution.

The district court assumed that if the Secretary elects not to transmit a finding of a violation to the Attorney General, then the Attorney General has no

authority to commence a prosecution. Again, however, that assumption reads into the statute language that is not there. The Legislature could have provided, for example, that "the secretary shall impose a fine or transmit the finding to the attorney general for prosecution, *and the attorney general may not commence a prosecution unless the secretary has first transmitted such a finding*." But the Legislature did not include such language, and the court erred in reading such a limitation into the Act. *Hubble*, 2009-NMSC-014, ¶ 10.

In this respect, Section 1-19A-17 is unlike Section 8-5-3, which explicitly states that the Attorney General is "authorized to act" but conditions that authority "upon the failure or refusal" of a district attorney to act in a matter. § 8-5-3. Whereas Section 8-5-3 tempers the general grant of authority in Section 8-5-2, Section 1-19A-17 contains no similar language conditioning the Attorney General's authority to act upon a referral from the Secretary. §§ 1-19A-17(A), (B).

The district court reasoned that, "had the Legislature intended to allow the attorney general to exercise his or her usual broad authority to initiate criminal charges without the secretary of state having transmitted findings of a violation, it would have said so, particularly given the intricacies of the statutory scheme it established." [RP(138) 985] That reasoning, however, stands Section 8-5-2 on its head. The Legislature has already directed the Attorney General to "prosecute . . . *all* actions and proceedings, civil or criminal," to which the State is a party,

"[e]xcept as otherwise provided by law." § 8-5-2 (emphasis added). No canon of statutory construction requires the Legislature to be redundant. The relevant question is not whether the Voter Action Act repeats or confirms that the Attorney General has authority to prosecute, but whether the Act "otherwise provide[s]" for a limitation on the Attorney General's usual broad authority. *Id.* By its plain language, the Act does not.

The language of the Voter Action Act is further illuminated by comparing it to two other statutes governing campaign financing and reporting: (1) a federal statute which *does not* include language limiting prosecutorial authority of the sort that the district court read into the Voter Action Act, and (2) an Ohio statute which *does* include such limiting language.

(a) The Federal Election Campaign Act

Similar to the Voter Action Act, the Federal Election Campaign Act authorizes the Federal Election Commission to seek a civil penalty if it believes that a "violation" of the FECA has occurred. 2 U.S.C. § 437g(a)(5)(A). If the FEC believes that a "knowing and willful violation" of the FECA has been committed, it may seek a larger civil penalty. § 437g(a)(5)(B). If four members of the FEC determine that there is probable cause to believe that a "knowing and willful violation" of the FECA has occurred, the FEC may make a referral to the Attorney General of the United States. § 437g(a)(5)(C).

A number of persons suspected of campaign finance violations have challenged the Attorney General's authority to prosecute under the FECA on the theory that "the Attorney General may not investigate or prosecute FECA violations without first receiving a referral from the FEC." *Marcus v. Holder*, 574 F.3d 1182, 1184 (9th Cir. 2009); *see, e.g., Fieger v. United States Att'y Gen.*, 542 F.3d 1111, 1113-14 (6th Cir. 2008); *Bialek v. Mukasey*, 529 F.3d 1267, 1268-69 (10th Cir. 2008). The reasoning underlying such challenges is remarkably similar to Defendants' reasoning in the present case. *Compare Bialek*, 529 F.3d at 1270 (reasoning that "[b]ecause FECA establishes a mechanism through which the FEC may refer matters for criminal investigation, . . . this must be the *only* way that such investigations can commence"), *with* [RP(138) 640] (reasoning that the Voter Action Act "provides the exclusive procedural mechanism by which the Attorney General may initiate a criminal prosecution for violations of the Act . . . [and] the initiation of any criminal prosecutions under Section 1-19A-17 *must* come by referral from the Secretary of State").

But the courts have uniformly rejected that reasoning. They have recognized that the FECA delineates civil enforcement actions that the FEC shall or may take. *E.g., Bialek*, 529 F.3d at 1270. The courts have concluded, however, that the FECA "speaks only to the power of the FEC. . . . Nowhere in FECA do we find a single phrase limiting the Attorney General's powers." *Id.* at 1271.

> By its plain terms, [§ 437g(a)(5)(C)] concerns only the scope of the FEC's authority. . . . [T]he Act contains no explicit language suggesting that this referral process is the *sole* avenue through which the Attorney General may initiate criminal prosecutions. Absent a clear and unambiguous expression to situate referrals as the exclusive origin of criminal investigation by the Attorney General, this Court should not and will not read such a meaning into the statute.

Fieger, 542 F.3d at 1117; *accord Marcus*, 574 F.3d at 1186 ("[A]n FEC referral is not a prerequisite to criminal enforcement of the federal election laws by the Attorney General."); *United States v. Int'l Union of Operating Eng'rs*, 638 F.2d 1161, 1162-63 (9th Cir. 1979) (holding that FECA's provisions "detail duties of the FEC and rights of persons complained against, not limitations upon the statutory power of the Attorney General to initiate prosecution"); *Beam v. Gonzales*, 548 F. Supp. 2d 596, 609-10 (N.D. Ill. 2008) (holding that statutory language vesting FEC with exclusive jurisdiction over civil enforcement of FECA does not divest Attorney General of authority to investigate criminal violations); *United States v. Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977) ("At no place in the statute is specific provision made prohibiting the Attorney General from going forward with criminal investigation without a referral by the Commission. In the absence of such a specific provision the general authority of the Attorney General to proceed cannot be limited."); *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977) ("A finding of probable cause by the Commission and its subsequent referral

to the Attorney General is not a condition precedent to the jurisdiction of the Attorney General to investigate and prosecute alleged criminal violations . . . .").

The result under the Voter Action Act is the same. The Act provides for what the Secretary of State shall do and what she may do. Nowhere in the Act, however, is there a single phrase saying what the Attorney General shall or shall not do, or what he may or may not do. *See, e.g., Bialek*, 529 F.3d at 1271. And although Section 1-19A-17(A) provides for one procedural mechanism through which the Secretary can refer a matter for criminal prosecution, not a single phrase in the Act suggests that "this referral process is the *sole* avenue through which the Attorney General may initiate criminal prosecutions." *Fieger*, 542 F.3d at 1117; *see, e.g., Marcus*, 574 F.3d at 1184-85.

(b) The Ohio Elections Code

At least one legislature has decided to condition a prosecutor's authority to act upon a referral from an administrative body. Its example shows how a legislative intent to achieve such a result can readily be expressed. The Ohio legislature enacted a scheme of public financing for election campaigns and concurrently imposed various restrictions on campaign practices, with attendant criminal penalties for violations. Ohio Rev. Code Ann. §§ 3517.16 - 3517.18, 3517.20 - 3517.22, 3517.992(U)-(V). It explicitly decided, however, to condition

any criminal prosecution of certain violations on the prior filing of a complaint with the Ohio elections commission:

> *Before a prosecution may commence* under this section, a complaint shall be filed with the Ohio elections commission under section 3517.153 of the Revised Code. After the complaint is filed, the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code.

§§ 3517.20(D), 3517.21(C), 3517.22(C) (emphasis added). Upon hearing a complaint and determining that a violation has occurred, the elections commission is unequivocally directed to take "only one" of four possible actions:

> At the hearing, the commission shall determine whether or not the failure to act or the violation alleged in the complaint has occurred and *shall do only one of the following* . . . :
>
> (a) Enter a finding that good cause has been shown not to impose a fine or not to refer the matter to the appropriate prosecutor;
>
> (b) Impose a fine . . . ;
>
> (c) Refer the matter to the appropriate prosecutor;
>
> (d) Direct the secretary of state or appropriate board of elections with the authority to certify a candidate to the ballot to remove a candidate's name from the ballot . . . .

§ 3517.155(A)(1) (emphasis added).

Ohio courts recognize that these statutory provisions withhold authority from a prosecutor to commence a criminal prosecution until after the elections commission determines that a violation has occurred and makes a referral for prosecution:

> The function of the Ohio Elections Commission appears to be somewhat similar to that of a grand jury in felony cases. A prosecution cannot be commenced by merely filing a complaint with

> the court; rather, there must first be a preliminary determination by the Ohio Elections Commission as to whether a violation has occurred.

Ohio ex rel. Common Cause/Ohio v. Ohio Elections Comm'n, 806 N.E.2d 1054, 1058 (Ohio App. 2004) (citation and internal quotation marks omitted); *accord Pestrak v. Ohio Elections Comm'n*, 670 F. Supp. 1368, 1376 (S.D. Ohio 1987) ("The election commission, in effect, operates as a court when imposing civil penalties . . . and as a public grand jury with respect to findings of fact for criminal prosecutions."), *aff'd in part, rev'd in part on other grounds*, 926 F.2d 573 (6th Cir. 1991).

The Voter Action Act differs in two critical respects from the Ohio statutory scheme—*viz.*, (1) in the authority of the civil enforcement body, and (2) in the authority of the prosecutor. The Ohio elections commission is under an explicit mandate to "do only one" of four specified actions, meaning that imposing a fine and referring the matter for prosecution are mutually exclusive alternatives. Ohio Rev. Code Ann. § 3517.155(A)(1). In contrast, the Voter Action Act explicitly provides that the imposition of a fine is "[i]n addition to other penalties that may be applicable." NMSA 1978, § 1-19A-17(A). Moreover, by explicit statutory prohibition, no prosecution may be commenced under the Ohio statutes until the elections commission has made a referral for prosecution. Ohio Rev. Code Ann. §§ 3517.20(D), 3517.21(C), 3517.22(C). In contrast, the Voter Action Act, like the FECA, speaks only to the powers of the Secretary of State and contains not "a

single phrase limiting the Attorney General's powers." *Bialek*, 529 F.3d at 1271; *see* NMSA 1978, § 1-19A-17; 2 U.S.C. §§ 437g(a)(5)(A)-(C).

In sum, the district court erred by reading the words, "In addition to other penalties that may be applicable," *out of* the statute. [RP(138) 939] It compounded the error by reading words limiting the Attorney General's authority *into* the statute when no such words are there and the statute makes sense as it is written. [RP(138) 938-41, 944] Because the court failed to "apply the statute as written," this Court should reverse the order of dismissal without "further statutory interpretation." *Smile*, 2009-NMCA-064, ¶ 8; *Lewis*, 2008-NMCA-070, ¶ 6.

2. Legislative history, background, and policy implications

If the language of Section 1-19A-17 leaves any room for doubt, the Court may consider the history and background of the Act, statutes in pari materia, and policy implications for further indications of the Legislature's intent. *Rivera*, 2004-NMSC-001, ¶¶ 13-14; *Lewis*, 2008-NMCA-070, ¶ 7.

The Voter Action Act was enacted in 2003 and, *inter alia*, created the Public Election Fund, provided for a civil penalty of up to $10,000 for a violation of the Act, and made a willful or knowing violation punishable as a fourth-degree felony. 2003 N.M. Laws, ch. 14, §§ 10, 17 (codified as amended at NMSA 1978, §§ 1-19A-10, 1-19A-17). At the time of its enactment, the pre-existing Campaign Reporting Act already regulated some aspects of campaign spending and reporting.

NMSA 1978, §§ 1-19-25 - 1-19-36 (1979, as amended through 2002, before amendments in 2003 and thereafter). Under the Campaign Reporting Act, however, violations may result in a civil penalty of only $250 per violation, not to exceed $5,000 in total, while a knowing and willful violation is criminally punishable only as a misdemeanor. NMSA 1978, §§ 1-19-34.6(B), 1-19-36(A). Moreover, the Secretary of State is not authorized to impose civil penalties under the Campaign Reporting Act; rather, where the Secretary reasonably believes that a violation has been or is about to be committed, the Secretary "shall refer the matter to the attorney general or a district attorney for enforcement." § 1-19-34.6(A).

The Legislature presumptively was "well informed regarding existing statutory and common law" and "intend[ed] to change existing law when it enact[ed] a new statute." *Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 213, 922 P.2d 1205, 1209 (1996). Two particular changes in the Voter Action Act evince a legislative intent to strengthen and expedite enforcement of New Mexico's election laws. The new civil and criminal penalties armed enforcement authorities with stronger remedies, having both remedial and deterrent aspects. § 1-19A-17. The new authority of the Secretary of State to assess civil penalties provided a swifter means of enforcement than the criminal process could accommodate. § 1-19A-17(A). In the present case, for example, the Secretary

conducted an investigation from start to finish and assessed civil penalties all within one month before the November 2008 general election. [RP(138) 648-50]

It is not difficult to discern why the Legislature would seek to bolster and expedite enforcement in the Voter Action Act. The Act for the first time put public money directly into the hands of election candidates. §§ 1-19A-10 - 1-19A-14. Without stronger and faster enforcement mechanisms, the public fisc was vulnerable to new risks of misappropriation.

It stands to reason, moreover, that the Legislature intended the enforcement remedies in Section 1-19A-17 to be complementary rather than mutually exclusive, and the Secretary's civil enforcement authority likewise to complement rather than exclude the Attorney General's criminal enforcement authority. The Secretary, as New Mexico's chief elections officer, is well positioned to make speedy administrative determinations regarding regulatory compliance within the compressed timeframes leading up to elections, without regard to whether grounds exist for criminal prosecution. In contrast, the Attorney General, as New Mexico's chief law enforcement officer, is best positioned to make legal determinations regarding whether a crime has been committed and whether a criminal prosecution should be undertaken. Indeed, as our Supreme Court has recently reaffirmed, "the determination of whom and when to prosecute, while not entirely exempt from judicial review, lies nonetheless at the heart of the prosecutor's powers." *State v.*

Belanger, 2009-NMSC-025, ¶ 50, 146 N.M. 357, 210 P.3d 783. By contrast, the Secretary is not a prosecutor at all; she is not required to have any legal training and in fact she has none; and—as the Secretary correctly recognized in this case—any decision to initiate a criminal prosecution is outside her purview. [RP(138) 652, 655; CD, 2/8/10, 10:36:13 - 10:37:00, 10:42:04 - 10:42:10]

Defendants nonetheless argued, and the district court ruled, that the Voter Action Act vests the Secretary with the authority to decide whether a criminal prosecution can be brought, and leaves the Attorney General with no authority to prosecute unless and until the Secretary has made a referral. [RP(138) 640-45, 938-41, 944] If that were correct, however, the Legislature's program to strengthen and expedite enforcement would not be furthered; it would be gutted.

Under the district court's interpretation, an attempt by the Secretary to enforce the Act with a civil penalty would preclude the Attorney General from pursuing any form of criminal enforcement. A referral to the Attorney General for prosecution would preclude the Secretary from pursuing any form of civil enforcement. No enforcement at all, civil or criminal, could be undertaken until the Secretary had conducted an investigation and determined that a violation had occurred. The Secretary's simple failure to act, due to lack of knowledge of a violation, lack of resources, or otherwise, would be virtually unreviewable and would completely preclude enforcement. A decision by the Secretary to assess a

fine of one dollar would leave the Attorney General entirely without recourse (including by writ of mandamus [RP(138) 939]) and would effectively arrogate to the Secretary the power to grant complete immunity from prosecution (i.e., "transactional immunity). *Cf. Belanger*, 2009-NMSC-025, ¶ 50 (recognizing that "separation-of-powers concerns resonate deeply" where transactional immunity is involved, because it "amounts to a decision not to prosecute at all" and "[t]he decision to grant this broad and sweeping immunity is one which courts are not well-suited to make"); *accord Marcus*, 574 F.3d at 1186 ("[A]n FEC referral is not a prerequisite to criminal enforcement of the federal election laws by the Attorney General. The absence of a referral is not tantamount to a grant of immunity.").

According to the district court, "[o]ne could reason" that the Legislature placed the decision of whether to bring criminal prosecutions in the Secretary's hands in order to "preclude opportunities for an attorney general to reach out and pursue a criminal prosecution of a candidate for political motives." [RP(138) 940] Conversely, "one could reason" that the Legislature placed the decision in the Attorney General's hands in order to preclude opportunities for a secretary of state to reach out and preclude a criminal prosecution of a candidate for political motives. To correctly interpret the Act, however, the district court needed to do more than posit an argument. It needed to ground the argument in the language, history, background, or policy implications of the Act.

Nothing in the Act or its history supports the view that the Legislature subordinated the Attorney General's "usual broad authority to initiate criminal charges" [RP(138) 940] to a peculiar concern about political motives of the office of the attorney general. To the contrary, if anything, the Legislature gave the Attorney General *broader* than usual authority, as it designated the Attorney General as the only officer to receive referrals from the Secretary, whereas the Attorney General typically shares authority to prosecute concurrently with district attorneys. *Compare* § 1-19A-17(A), *with* § 1-19-36(B) (authorizing Attorney General or a district attorney to prosecute violations of Campaign Reporting Act); *Naranjo*, 94 N.M. at 410, 611 P.2d at 1104 (recognizing that Section 8-5-2(B) grants attorney general and district attorneys concurrent prosecutorial authority).

The district court's reasoning also leads to conflict between what it understood to be the Secretary's authority under Section 1-19A-17 and the Secretary's pre-existing, general duty to "report possible violations of the Election Code of which [s]he has knowledge to the district attorney or the attorney general for prosecution." NMSA 1978, § 1-2-2(E) (1995, before amendment in 2005). The Voter Action Act is part of the Election Code. NMSA 1978, § 1-1-1 (1975). Thus, by its terms, Section 1-2-2(E) directs the Secretary to report possible violations of the Voter Action Act to the District Attorney or the Attorney General for prosecution. If possible, Sections 1-19A-17 and 1-2-2(E) should be read as

harmonious rather than as contradicting one another. *Rivera*, 2004-NMSC-001, ¶ 13.

Read together and in harmony, Sections 1-19A-17 and 1-2-2(E) require the Secretary, at a minimum, to report possible violations of the Voter Action Act to the Attorney General for prosecution, although the Secretary may impose a fine "[i]n addition to other penalties that may be applicable." *See* §§ 1-19A-17(A), 1-2-2(E). Under the district court's view, by contrast, the Secretary *need not* ever report a possible violation of the Voter Action Act to the Attorney General, and *is precluded* from reporting a violation to the Attorney General if she elects to impose a fine instead. [RP(138) 938-41] The result would be a repeal by implication of Section 1-2-2(E) in cases arising under the Act. *But see Smith*, 2004-NMSC-032, ¶ 22 ("Repeals by implication are not favored."); *Rivera*, 2004-NMSC-001, ¶ 13 (favoring construction of different legislative enactments as harmonious rather than contradictory).

3. The rule of lenity is inapplicable

Defendants also argued that any ambiguity about whether the Attorney General has authority to prosecute violations of the Voter Action Act should be resolved in Defendants' favor by application of the rule of lenity. [RP(138) 919-20] For two reasons, however, the rule of lenity does not apply.

First, this case presents no claim of ambiguity in a definition of criminal conduct. *Cf. Johnson*, 2009-NMSC-049, ¶ 18 ("[S]tatutes *defining criminal conduct* should be strictly construed . . . .") (emphasis added, citation and internal quotation marks omitted). The rule of lenity is grounded in principles of fair warning to the accused. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971) ("'[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'") (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)). Defendants assert no ambiguity—no lack of fair warning—in the Act's definition of criminal conduct, but only ambiguity in the procedural question of the Attorney General's authority to prosecute. [RP(138) 919-20] Applying the rule of lenity in this situation would serve no purpose "other than lenity for the sake of lenity." *State v. Edmondson*, 112 N.M. 654, 659, 818 P.2d 855, 860 (Ct. App. 1991).

Second, lenity does not apply whenever an imaginative lawyer can come up with an argument for construing a statute unfavorably to the State. *Johnson*, 2009-NMSC-049, ¶ 18. Because no doubt remains about the Legislature's intent "*after* resort to the language and structure, legislative history, and motivating policies of the statute," the rule of lenity is inapplicable. *Id.*

In sum, every indication of the Legislature's intent points to the conclusion that the Attorney General may exercise his general authority to prosecute crime, as

provided in Section 8-5-2, in a case arising under the Voter Action Act. The Act contains not a single phrase limiting the Attorney General's authority to prosecute, and nothing in its history and background, in statutes in pari materia, or in policy implications suggests a hidden intent to limit that authority. The district court's order dismissing all charges under the Voter Action Act on the ground that the Attorney General lacks authority to prosecute should therefore be reversed.

II. SUCCESSIVE CIVIL AND CRIMINAL PENALTIES UNDER THE ACT DO NOT CONSTITUTE DOUBLE JEOPARDY

A. Standard of Review and Preservation of Claim of Error

Double jeopardy issues are reviewed de novo, particularly when the material facts are undisputed and only the legal purposes and effects of a sanction are at issue. *State v. Kirby*, 2003-NMCA-074, ¶ 12, 133 N.M. 782, 70 P.3d 772.

Insofar as it was required to do so, the State preserved its claim that the New Mexico Double Jeopardy Clause does not bar prosecution of charges against Defendant Block Jr. by its written and oral arguments in opposition to his motion to dismiss on double jeopardy grounds. [RP(138) 685-712; CD, 2/8/10, 11:19:42 - 11:26:15]; *see* Rule 12-216(A); *cf. State v. Dombos*, 2008-NMCA-035, ¶ 21, 143 N.M. 668, 180 P.3d 675 ("We will address double jeopardy challenges on appeal irrespective of whether the issue was preserved.").

B. The Governing Double Jeopardy Analysis

The New Mexico Double Jeopardy Clause provides, "No person shall . . . be twice put in jeopardy for the same offense . . . ." N.M. Const. art. II, § 15; *see also* NMSA 1978, § 30-1-10 (1963). Our Supreme Court has recognized that "'[a] legislature "may impose *both a criminal and a civil sanction* in respect to the same act or omission without violating the Double Jeopardy Clause."'" *City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 7, 132 N.M. 187, 46 P.3d 94 (emphasis added, citations and internal quotation marks omitted). The Double Jeopardy Clause "protects only against the imposition of multiple *criminal punishments* for the same offense and then only when such occurs in successive proceedings." *Id.* (emphasis added, citation and internal quotation marks omitted).

The applicable double jeopardy analysis looks to three factors:

> (1) whether the [s]tate subjected the defendant to separate proceedings; (2) whether the conduct precipitating the separate proceedings consisted of one offense or two offenses; and (3) whether the penalties in each of the proceedings may be considered "punishment" for the purposes of the Double Jeopardy Clause.

White Chevy, 2002-NMSC-014, ¶ 8 (citation and internal quotation marks omitted). In applying the third factor, a court determines whether a sanction constitutes "punishment" by considering (1) the Legislature's "purpose in enacting the legislation, rather than evaluating the effect of the sanction on the defendant,"

and (2) "whether the sanction established by the legislation was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect." *Id.* ¶ 11 (citation and internal quotation marks omitted); *see State v. Diggs*, 2009-NMCA-099, ¶ 7, 147 N.M. 122, 217 P.3d 608.

C. The Double Jeopardy Clause Does Not Bar Prosecution

1. Separate proceedings

The first factor is whether Defendant Block Jr. has been the subject of separate proceedings. *White Chevy*, 2002-NMSC-014, ¶ 8. There is no dispute that he has been. [RP(138) 627-28, 687] The Secretary of State conducted an administrative investigation culminating in a notice of final action assessing civil penalties. [RP(138) 649-50] The present matter is a criminal proceeding commenced by a grand jury indictment. [RP(138) 1-6]

2. Unitary or separate conduct

The second factor is whether the conduct precipitating the separate proceedings was unitary (consisting of one offense) or separate (consisting of more than one offense). *White Chevy*, 2002-NMSC-014, ¶ 8. Defendant Block Jr. argued, and the State did not dispute, that the conduct alleged in Counts I, II, and VII of the indictment was the same conduct that precipitated the Secretary's investigation and assessment of fines. [RP(138) 1-3, 628-29, 687] In contrast, Defendant Block Jr. did not argue that the conduct alleged in Counts III and IV

was at issue in the Secretary's fining proceeding. [RP(138) 628-29, 687] Rather, Counts III and IV on their face allege different acts occurring on different dates than those alleged in Counts I and II. [RP(138) 1-2]

The district court erred in part in applying this factor. More precisely, it skipped over the factor without considering whether all of the conduct at issue was unitary. It did not find that the conduct alleged in Counts III and IV was also the conduct for which Defendant Block Jr. was fined. [RP(138) 941-44] Instead, it apparently assumed that all charges under the Voter Action Act must have arisen out of the same acts. [RP(138) 941] ("At issue in this matter is whether the penalty imposed by the Secretary of State precludes criminal prosecution *for the same acts*.") (emphasis added). That assumption was unfounded. The dismissal of Counts III and IV should be reversed on the ground that the court erred in assuming that those charges arose out of the same conduct for which the Secretary had imposed fines.

3. Civil remedy or criminal punishment

The third factor is whether the civil penalty assessed by the Secretary was "punishment" for double jeopardy purposes, taking into account (1) the Legislature's purpose in authorizing the sanction and (2) whether on balance the sanction is so punitive in effect as to outweigh its remedial effect. *White Chevy*, 2002-NMSC-014, ¶¶ 8, 11.

(a) The Legislature's purpose

The Voter Action Act in general and Section 1-19A-17(A) in particular evince a remedial and non-punitive purpose, namely, to promote open and honest election campaigning in New Mexico while protecting against misappropriation of the public fisc. The Act seeks to achieve open and honest election campaigns by establishing a system of public financing subject to extensive regulatory oversight. NMSA 1978, §§ 1-19A-2 - 1-19A-17. The regulatory and administrative provisions cover, *inter alia*, candidates' requisite qualifications for public funding, distribution of funds, and candidate reporting of expenditures and seed money contributions. §§ 1-19A-2 - 1-19A-17(A). The Secretary of State is charged with responsibility for administering the Act by, *inter alia*, certifying eligible candidates, distributing money from the Public Election Fund, implementing the Act by rules, and enforcing the Act by assessment of civil penalties and other remedies. §§ 1-19A-6, 1-19A-11 - 1-19A-15, 1-19A-17(A).

Of the Voter Action Act's seventeen sections, only the second subsection of the seventeenth section provides for a criminal penalty. § 1-19A-17(B); *see Kirby*, 2003-NMCA-074, ¶ 25 (noting that only one section in Securities Act addresses criminal conduct). The plain language of Section 1-19A-17 evinces important differences between the purpose of the civil penalty authorized in Subsection (A) and the criminal penalty authorized in Subsection (B). The civil penalty may be

imposed on any person "who violates" the Act, whether culpably or not. § 1-19A-17(A). The criminal penalty applies only to a person who acts with criminal intent, either by "willfully or knowingly" violating the Act or its implementing rules, or by "knowingly" making a false statement in a requisite report. § 1-19A-17(B). A certified candidate subject to a civil penalty "may be" required to return money distributed from the Fund, whereas a certified candidate subject to a criminal penalty "shall return" all such money. *Compare* § 1-19A-17(A), *with* § 1-19A-17(B).

The civil penalty is to be assessed by the Secretary of State as among her administrative responsibilities under the Act. § 1-19A-17(A). The Secretary has no authority to pursue a criminal penalty but must transmit a finding of a violation to the Attorney General for prosecution. §§ 1-19A-17(A), (B); *accord* § 1-2-2(E). The Secretary may pursue a civil penalty through the expedited and informal procedure of an administrative investigation, as she did in the present case. [RP(138) 648-50, 700-01] The Attorney General can pursue a criminal penalty only through the protracted process of a criminal prosecution in which the accused is afforded the full panoply of constitutional and statutory protections.

Unlike the criminal penalty in Subsection (B), Subsection (A)'s provision for a civil penalty evinces a legislative purpose to equip the Secretary with "one of several tools of regulatory and administrative enforcement." *Kirby*, 2003-NMCA-

074, ¶ 26. The Secretary's responsibility for administering the Act by, among other things, investigating noncompliance and assessing fines reflects a regulatory purpose that is distinct from punishment of willful or knowing violations. *See id.* ¶¶ 23-26 (determining that, as opposed to section of Securities Act providing for criminal penalties, "the legislative purpose in enacting the civil penalty was that the penalty constitute an integral part of an overall remedial regulatory and administrative scheme to protect the public"); *see also White Chevy*, 2002-NMSC-014, ¶¶ 13-19 (holding that motor vehicle forfeiture serves remedial, non-punitive purpose of protecting public safety); *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 631-35, 904 P.2d 1044, 1056-60 (1995) (holding that driver's license revocation serves legitimate, non-punitive regulatory goals even though it incontrovertibly has deterrent effect on drunk drivers).

The civil penalty in the Act is unlike the forfeiture sanctions authorized in the Controlled Substances Act. *Cf. State v. Nunez*, 2000-NMSC-013, ¶ 52, 129 N.M. 63, 2 P.3d 264. The Controlled Substances Act is part of the Criminal Code, and its provisions authorizing forfeitures "do not concern a regulated lawful activity, but rather an illegal criminal activity," namely, "[t]rafficking in controlled substances." *Id.* In the wake of *Nunez*, New Mexico courts have consistently distinguished "statutes aimed at illegal criminal activity" from "primarily

regulatory and administrative remedial legislation." *Kirby*, 2003-NMCA-074, ¶ 40; *see White Chevy*, 2002-NMSC-014, ¶ 9.

The Voter Action Act, which forms part of the Election Code as opposed to the Criminal Code, is concerned with the regulated lawful activity of campaigning for election with public financing. A public subsidy for an election campaign is a "government-granted privilege." *See Nunez*, 2000-NMSC-013, ¶ 52. As such, it is legitimately subject to regulation by a variety of restrictions and enforcement tools, one of which is a civil penalty. *Kirby*, 2003-NMCA-074, ¶ 26. Even if the "civil penalty may cause a degree of punishment for the defendant, such a subjective effect cannot override the legislation's primarily remedial purpose." *White Chevy*, 2002-NMSC-014, ¶ 11.

(b) The balance of remedial and punitive effects

Although the Voter Action Act in general, and the civil penalty in particular, have a primarily remedial regulatory and administrative purpose, it might still be argued that the Act's statutory scheme is "'so punitive either in purpose or effect . . . as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Kirby*, 2003-NMCA-074, ¶ 28 (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997)). Thus, the Court should further inquire whether the civil penalty "'was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect.'" *Id.* ¶ 27 (quoting *White Chevy*, 2002-NMSC-014,

¶ 11). To conduct that inquiry, the Court need only apply its decision in *Kirby*, which is on point.

The defendant in *Kirby* was the subject of an administrative order imposing the following penalties pursuant to the Securities Act, NMSA 1978, §§ 58-13B-37, 58-13B-44: (1) a civil penalty totaling $75,000 (possibly consisting of individual penalties for fifteen violations in the maximum amount of $5,000 per violation); (2) an assessment of $1,000 for costs of investigation; (3) a requirement to cease and desist from selling securities in New Mexico without first complying with the Securities Act; (4) a permanent bar against associating with any licensed broker-dealer or investment advisor in the State; and (5) a requirement to offer all purchasers of securities the opportunity to rescind their purchases and receive their money back. *Kirby*, 2003-NMCA-074, ¶¶ 5-6. The defendant was later indicted for criminal violations of the Securities Act and argued that the separate criminal prosecution constituted double jeopardy. *Id.* ¶¶ 7, 10.

This Court rejected the defendant's argument. *Kirby*, 2003-NMCA-074, ¶ 48. After determining that the legislative purpose of the civil penalty was to constitute part of an overall remedial regulatory and administrative scheme to protect the public, the Court went on to inquire whether the punitive effects of the penalty outweighed its remedial effect. *Id.* ¶¶ 26-27. In weighing the effects of the penalty, the Court considered seven factors:

> "(1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned."

Id. ¶ 28 (quoting *Hudson*, 522 U.S. at 99-100) (additional citation and internal quotation marks omitted); *see also White Chevy*, 2002-NMSC-014, ¶ 11 (citing *Hudson*, 522 U.S. at 99-100, as describing "the test for determining whether a statutory scheme created a civil remedy or criminal penalty").

The same analysis applies to the civil penalties that the Secretary imposed under the Voter Action Act in this case:

First, a civil penalty under the Act "does not impose an 'affirmative disability or restraint.'" *Kirby*, 2003-NMCA-074, ¶ 30 (quoting *Hudson*, 522 U.S. at 104). Even when coupled with another sanction such as an industry-wide ban on employment—a sanction not imposed on Defendant Block Jr.—a civil fine does not approach "'the infamous punishment of imprisonment'" or carry "the stigma of a criminal conviction." *Id.* (quoting *Hudson*, 522 U.S. at 104).

Second, civil fines and assessments such as the civil penalty under the Act have not historically been regarded as punishment, but "'are traditionally a form of civil remedy.'" *Kirby*, 2003-NMCA-074, ¶ 31 (quoting *United States v. Ward*, 448

U.S. 242, 256 (1980) (Blackmun, J., concurring)); *see id.* ("'[M]onetary penalties have historically been regarded as civil, not criminal, penalties.'") (quoting *Kimmelman v. Henkels & McCoy, Inc.*, 527 A.2d 1368, 1373 (N.J. 1987)).

Third, the civil penalty under the Act "does not come into play 'only on a finding of scienter.'" *Kirby*, 2003-NMCA-074, ¶ 32 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). Whereas a civil penalty under Subsection (A) applies to any person "who violates" the Act, § 1-19A-17(A), a criminal penalty under Subsection (B) comes into play only upon a finding that a person has "willfully or knowingly" violated the Act, § 1-19A-17(B). The element of culpable intent for the criminal but not the civil penalty indicates that only the criminal penalty imposes a punishment. *See Kirby*, 2003-NMCA-074, ¶ 32.

Fourth, the civil penalty under the Act no doubt will "deter others from engaging in similar [campaign finance and reporting] violations in the future." *Kirby*, 2003-NMCA-074, ¶¶ 33-34. "'[T]he mere presence of this purpose is insufficient to render a sanction criminal," however, "as deterrence may serve civil as well as criminal goals.'" *Id.* ¶ 34 (quoting *Hudson*, 522 U.S. at 105) (additional citation and internal quotation marks omitted).

Fifth, it is undisputed that the conduct for which the civil penalties were assessed in this case also forms the basis of some of the criminal charges under the Act (*viz.*, Counts I and II, as opposed to Counts III and IV). [RP(138) 1-2, 649-50,

700-01] But "'[t]his fact is insufficient to render the money penalties . . . criminally punitive . . . particularly in the double jeopardy context.'" *Kirby*, 2003-NMCA-074, ¶ 35 (quoting *Hudson*, 522 U.S. at 105).

Sixth, "there exists an alternative, remedial purpose to which the civil penalty may rationally be connected." *Kirby*, 2003-NMCA-074, ¶ 36. As discussed above, the civil penalty serves the important non-punitive purpose of promoting openness and honesty and keeping corruption out of New Mexico's publicly financed election campaigns. In exchange for the government-granted privilege of public funding, the Act imposes various conditions, and the civil penalty is integral to enforcing regulatory compliance with those conditions. *See id.* ¶ 26. Moreover, the Legislature contemplated that civil penalty proceeds would be earmarked for return to the Public Election Fund for the purpose of, *inter alia*, recouping administrative and enforcement costs: It directed the Secretary of State to establish procedures for "return of fund disbursements *and other money*" to the Fund, a purpose of which is "paying administrative and enforcement costs of the Voter Action Act." NMSA 1978, §§ 1-19A-10(A)(2), 1-19A-15(B)(5) (emphasis added). "The civil penalty, together with the use of penalty funds for [administration and enforcement], serve [the] purpose" of protecting the integrity of the electoral process to a degree that the reimbursement provisions alone could not. *See Kirby*, 2003-NMCA-074, ¶ 36.

Seventh, "imposition of the civil penalty does not appear excessive in relation to the [Voter Action] Act's remedial purpose." *Kirby*, 2003-NMCA-074, ¶ 37. In *Kirby*, it should be remembered, the defendant was not only fined $75,000, but was also ordered (1) to pay $1,000 for costs of investigation and (2) to offer all purchasers of securities the opportunity to rescind their purchases and receive their money back. *Id.* ¶¶ 5-6. Thus, the $75,000 penalty that this Court determined not to be excessive went above and beyond the obligation to make full refunds and pay the costs of investigation. *Id.* ¶ 37.

In this case, the district court ruled that, in contrast to the $75,000 civil penalty in *Kirby*, the maximum $10,000 civil penalty in the Voter Action Act "appears disproportionate in relation to any asserted remedial purpose," because "[a]ny remedial goal is accomplished by reimbursement provisions" of the Act. [RP(138) 943] By that reasoning, however, the requirement in *Kirby* to make full refunds to all securities purchasers should likewise have accomplished any remedial goal of the Securities Act. The flaw in the district court's reasoning was its assumption that all harm to the public from violations of the Act is remedied by reimbursement of the money that a candidate misappropriates. Beyond the direct losses of misappropriated funds, the public sustains not only the costs of investigating violations and enforcing compliance with the Act, but also the less quantifiable but no less real losses in the form of diminished confidence in the

integrity of the State's elections. Unlike the defendant in *Kirby*, Defendant Block Jr. paid no separate assessment for costs of investigation. *Cf. Kirby*, 2003-NMCA-074, ¶ 5. For three separate violations of the Act he was ordered to pay two fines of $5,000 and one fine of $1,000, fine, and to return $10,000 of the far larger amounts distributed to him from the Public Election Fund. [RP(138) 649-50, 700-01] For the damage done to public confidence in New Mexico's electoral process, those amounts cannot be regarded as excessive. *See Kirby*, 2003-NMCA-074, ¶ 37.

The above seven factors may be summarized in terms virtually identical to what this Court said in *Kirby*:

> (1) the civil penalty did not impose an affirmative disability or restraint; (2) it has not been historically viewed as punitive; (3) it does not come into play only on a finding of scienter; (4) the civil penalty speaks more to regulating persons [campaigning for election with public funds]; (5) simply because the conduct to which the civil penalty applies is already a crime is insufficient, by itself, to render the sanction criminally punitive; (6) there is a specific statutory remedial purpose, in addition to the Act's general remedial purpose, to which the civil penalty is connected; and, finally, (7) the civil penalty was not excessive in relation to its remedial purpose.

Kirby, 2003-NMCA-074, ¶ 38.

"Further, it should not go unnoticed that the Legislature chose to label the penalty a *civil* penalty." *Kirby*, 2003-NMCA-074, ¶ 38; *see* § 1-19A-17(A). The label chosen by the Legislature is not *dispositive* of the double jeopardy analysis. *Kirby*, 2003-NMCA-074, ¶ 29; *see Nunez*, 2000-NMSC-013, ¶ 48. But neither is it *irrelevant*. The Legislature's decision to refer to the penalty in Section 1-19A-

17(A) as a "civil" penalty signifies its understanding of the purpose and effect of the sanction it authorized. *See Kirby*, 2003-NMCA-074, ¶ 38. The Legislature's purpose in the Voter Action Act and the predominant effect of the civil penalty in the Act make clear that the Secretary did not impose a criminal "punishment" on Defendant Block Jr. *Id.* ¶ 48. The claim of double jeopardy therefore fails.

CONCLUSION

The district court's dismissal of all charges under the Voter Action Act should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

The order on appeal puts into question this State's ability to enforce standards of honesty and integrity in publicly financed elections. It is respectfully submitted that oral argument would materially assist the Court in resolving the questions presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 23, 2010, I caused true copies of this *Brief in Chief* to be served by first-class mail, postage prepaid, on:

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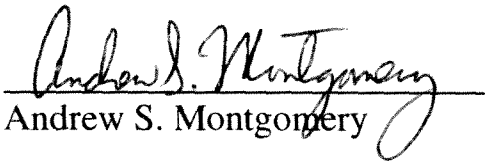

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