IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

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.

DEFENDANTS' RESPONSE TO THE STATE'S BRIEF IN CHIEF

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STATEMENT OF COMPLIANCE

In accordance with Rule 12-213(F)(3) NMRA, I certify that this answer brief, set forth in fourteen-point Times New Roman typeface, does not exceed eleven thousand (11,000) words. This document was drafted, and the words counted, with "WordPerfect X4."

STATEMENT OF THE PROCEEDINGS

In accordance with Rule 12-213(B) NMRA, this answer brief does not include a summary of the proceedings.

LEGAL DISCUSSION

I. The Voter Action Act Sets Forth An Exclusive Enforcement Procedure Under Which The Attorney General Lacks The Authority To Initiate Criminal Prosecutions Such As This One Without A Referral From The Secretary Of State.

The district court correctly concluded that the New Mexico attorney general exceeded the scope of his prosecutorial authority under the Voter Action Act, NMSA 1978, §§ 1-19A-1 to 1-19A-17 (2003), by pursuing criminal charges against the Blocks without the requisite referral from the secretary of state. The attorney general's insistence that the Voter Action Act does not limit his power to unilaterally enforce the criminal provisions of that Act is without merit. The powers of both the secretary of state and the attorney general are defined by the Legislature, which granted primary investigative and enforcement authority of the Voter Action Act to the secretary of state. The attorney general may only bring a criminal action under the Voter Action Act after the secretary of state transmits a finding of a violation of that Act to the attorney general for prosecution.

A. Standard of Review.

Because the State's appeal on the issue of the attorney general's authority to prosecute the Blocks for violations of the Voter Action Act implicates the proper construction of that Act, the Court's standard of review is *de novo*. *See State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 ("We review questions of statutory interpretation *de novo*.").

B. The Voter Action Act.

1. Statutory Purpose and Provisions.

The Voter Action Act [NMSA 1978, §§ 1-19A-1 to 1-19A-17 (2003)] was enacted in 2003 to establish a public funding system for candidates running for the New Mexico Public Regulation Commission.[1] The purpose of this law is to limit the influence, or the appearance thereof, of campaign contributions from PRC-regulated industries.

In order to qualify for public funding under the Voter Action Act, a candidate must gather a certain number of "qualifying contributions" from registered voters. § 1-19A-4(A). Once the secretary of state verifies that the candidate has met this requirement, the secretary of state certifies the candidate for

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[1] During the 2007 Legislative Special Session, the Voter Action Act was amended to extend its provisions to the elections of judges.

purposes of the Act. The secretary of state's certification makes the candidate eligible for public financing of his or her campaign. § 1-19A-6.

A certified candidate who receives public funding must comply with the requirements of the Voter Action Act. The candidate must agree to spend no more than the candidate receives from the public fund and to seek contributions from no other source. § 1-19A-7(C). The candidate must also return to the public election fund any money that is unspent or unencumbered at the time that person ceases to be a candidate. § 1-19A-7. In order to ensure proper accounting, the candidate must report campaign-related expenditures to the secretary of state, in accordance with the campaign reporting requirements specified in the Election Code [NMSA 1978, Chapter 1], and published guidelines.[2] § 1-19A-9.

The secretary of state may require a candidate who violates the Voter Action Act to return to the public election fund all amounts that were distributed to the candidate. § 1-19A-17(A). In addition, if the secretary of state determines the candidate has violated the Act, the secretary has the discretion to either "impose a fine or transmit the finding to the attorney general for prosecution." § 1-19A-

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[2] Section 15 of the Voter Action Act provides that the secretary of state shall adopt rules to ensure effective administration of the Act. These rules give guidance to certified candidates regarding, *inter alia*, the collection of revenue and the return of fund disbursements and other money to the Public Election Fund. § 1-19A-15.

17(A). In determining whether the candidate violated the expenditure provisions of the Act, the secretary must consider as a mitigating factor any circumstances out of the candidate's control. § 1-19A-17(A).

If the secretary determines that the public interest is best served by transmitting her finding of a violation to the attorney general for prosecution, rather than issuing a punitive fine, the attorney general then gains jurisdiction over the matter. At trial, the attorney general must prove beyond a reasonable doubt that the violation was willful and knowing. § 1-19A-17(B); *see Order Dismissing Voter Action Act Charges* (hereinafter *Order*), [RP-138 : 984] ("Paragraph B defines the crime that may result from a violation of the Voter Action Act and must modify the prosecution option contained in Paragraph A.").

In this case, it is not disputed that the secretary of state, exercising the discretion the Legislature granted her, chose not to transmit her finding to the attorney general and instead determined that the public interest was best served by imposing three fines equaling $11,000, and the return of $10,000 previously disbursed to the campaign from the public election fund. [RP-138 : 623-24, 638, 649-50, 700-01, 986] Thus, once the determination was made to pursue remuneration to the fund, plus punitive fines, the penalties available under the Voter Action Act were exhausted and the attorney general was without authority

to initiate criminal proceedings against the Blocks. As the trial court stated:

> Had the Legislature intended to provide that the secretary of state could impose both a fine for a violation of the Voter Action Act *and* transmit such a violation to the attorney general for prosecution, it could have said so. *Compare Kirby*, 2003-NMCA-074, at ¶¶ 25-26, 133 N.M. at 788, 70 P.3d at 778 (analyzing provisions of the Securities Act). The State's argument that use of the word "and" would have tied the secretary of state's hands in unconvincing. If the Legislature intended to give *both* the secretary of state the discretion to impose a civil find *and* the attorney general the latitude to criminally prosecute without any transmittal by the secretary of state, it surely knew how to draft such legislation. *Compare id.*

Order [RP-138 : 984] This Court should not upset the district court's well-reasoned order.

2. The Plain Language Of The Voter Action Act Indicates That The Legislature Intended To Allow The Secretary Of State, Upon Making A Finding Of A Violation Of That Act, To Either Impose A Fine Or Transmit Such Finding To The Attorney General For Criminal Prosecution, But Not Both.

The plain language of the Voter Action Act readily resolves one of the central disputes now on appeal: the secretary of state may, upon a finding of a violation under the Voter Action Act, either impose a fine *or* transmit such finding to the attorney general for criminal prosecution, but not both. Section 1-19A-17(A) provides: "If the secretary [of state] makes a determination that a violation of this act has occurred, the secretary shall impose a fine or transmit the finding to the

attorney general for prosecution." As the district court correctly held, "[t]he word 'or,' the context in which it [is] used, and the phrase 'for prosecution' indicate that the Legislature intended to allow the secretary of state to *either* impose a fine if she or he finds a violation of the Voter Action Act *or* transmit a finding of a violation to the attorney general for prosecution, but not both." [RP-138 : 983] (emphasis in original).

As the New Mexico Supreme Court has noted, "[t]he first and most obvious guide to statutory interpretation is the wording of the statutes themselves." *DeWitt v. Rent-a-Center, Inc.*, 2009-NMSC-032, ¶ 29, 146 N.M. 453, 212 P.3d 341 (citing *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (providing that where a statute has plain meaning, it is "to be given effect as written without room for construction")). When courts interpret statutory language, the primary goal is to give effect to the intent of the Legislature. *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. The primary indicator of legislative intent is the plain language of the statute. *State v. Young*, 2004-NMSC-015, ¶ 5, 135 N.M. 458, 90 P.3d 477. Thus, absent an express legislative intent to the contrary, courts "look first to the words chosen by the Legislature and the plain meaning of the Legislature's language." *State v. Martinez*, 1998-NMSC-023, ¶ 8, 126 N.M. 39, 966 P.2d 747; *see also State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853

(1994) ("The words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary."). "Only when there exists a substantial doubt as to the meaning of the statutory language, or when the literal language of a statute leads to an absurd result, should a court depart from the plain meaning rule." *State v. Muniz*, 119 N.M. 634, 636, 894 P.2d 411, 413 (Ct. App.1995) (citing *State v. Gutierrez*, 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct. App.1993)).

In this case, had the Legislature intended for the secretary of state to be able to impose and fine *and* transmit her findings to the attorney general for prosecution, it would have drafted the statute in such a manner. For example, the penalties section of the Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to 1-19-36, provides: "Any person who knowingly and willfully violates any provision of [this act] is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment *or both*." § 1-19-36 (emphasis added). Here, as the district court noted, "[h]ad the Legislature intended to provide that the secretary of state could both impose a fine for a violation of the Voter Action Act *and* transmit such a violation to the attorney general for prosecution, it could have said so." [RP-138 : 984]

The statutory language authorizing the secretary of state to choose between

imposing a fine or transmitting her finding of violation to the attorney general for prosecution does not create "substantial doubt as to the meaning of the statutory language" or lead to the type of "absurd result" that would cause this Court to "depart from the plain meaning rule." *Muniz*, 155 N.M. at 552, 854 P.2d at 879. "The Legislature's language instilling in the secretary of state the authority to choose between imposing a civil penalty or transmitting a finding of a violation to the attorney general for prosecution does not lead to an absurd or unreasonable result and appears to be grounded in sound public policy determinations." *Order* [RP-139 : 985] Furthermore this Court has opined that "[i]t is not within our province to second-guess these policy decisions." *State v. Whittington*, 2008-NMCA-063, ¶ 16, 144 N.M. 85, 183 P.3d 970 (citing *State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933 ("Our role is to construe statutes as written and we should not second guess the [L]egislature's policy decisions.")).

C. The Legislature Intended To Grant The Secretary Of State Primary Authority To Determine How Best To Enforce The Act Upon Discovering A Violation Of The Act.

The Legislature entrusted the secretary of state with the duty to enforce the Voter Action Act and described a specific enforcement procedure: upon the finding of a violation, the secretary must choose either to levy a punitive fine of up

to $10,000 per violation, or transmit her finding to the attorney general for prosecution. The secretary may also order the return of funds to the Public Election Fund, which is established not only to finance the election campaigns of certified candidates, but also to pay "the enforcement costs of the Voter Action Act." § 1-19A-10(A)(1) - (2). This specific enforcement mechanism is the *exclusive* enforcement mechanism under the Voter Action Act. If the secretary of state determines – based on her unique expertise in election related regulation, her considerable experience investigating other suspected violations, and her knowledge of the violation at issue – that issuing punitive fines is the appropriate response to a particular violation, then the attorney general simply does not enjoy the authority to unilaterally initiate criminal proceedings under the Act, because the Legislature has not granted the attorney general that power.

1. The Attorney General's Power To Initiate Criminal Prosecution Is Defined And Limited By Statute.

The attorney general is not a constitutional officer and possesses only those powers conferred to him by statute. Our Supreme Court has long held that "no common-law powers were confirmed in the office of the attorney general by our Constitution," and that the attorney general's "powers and duties [have been] defined and limited by statute from its inception." *State v. Davidson*, 33 N.M.

664, 666, 275 P. 373, 375 (1929); *see also State ex. rel. Attorney General v. Reese*, 78 N.M. 241, 246–48, 430 P.2d 399, 404–06 (1967) (reaffirming holding of *Davidson*).

Section 8-5-2 sets forth the attorney general's powers and duties. This section provides reads, in pertinent part:

> *Except as otherwise provided by law*, the attorney general shall:
>
> A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;
>
> 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 (1933) (amended 1975) (emphasis added).

Here, the question is not whether the Legislature may limit the attorney general's prosecutorial authority – it is undisputed that the phrase "[e]xcept as otherwise provided by law" allows the Legislature to limit the attorney general's prosecutorial authority. In fact, the Legislature has chosen to significantly restrict the attorney general's power to initiate criminal prosecutions. In the vast majority of criminal cases, the attorney general obtains the authority to prosecute only if the

district attorney declines to prosecute. *See* NMSA 1978, § 8-5-3 ("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."); *State v. Koehler*, 96 N.M. 293, 295, 629 P.2d 1222, 1225 (1981) (holding that attorney general acted within authority because evidence showed that district attorney had "delegated the prosecution" to the attorney general).

Indeed, our Supreme Court has held that the attorney general may not supplant a district attorney who is adequately representing the state. In *Attorney General v. Reese*, 78 N.M. 241, the attorney general moved to intervene in an action the district attorney brought in the name of the State, thereby attempting to oust the district attorney. *Id.* at 245. The Court held that the district attorney, not the attorney general, had the authority to pursue the matter, holding that "[there is] nothing in § 4-3-2(b) [now § 8-5-2(B) (Duties of attorney general)] . . . suggesting a right in the attorney general to displace the district attorney in a case where the rights of the state are being actively advocated. . . . We see nothing therein which remotely suggests a right to supplant or take over from a district attorney who is

performing his legal duties." *Id.* at 245-46.

Just as the attorney general is secondary to district attorneys in the enforcement of most criminal statutes, the attorney general is secondary to the secretary of state in the enforcement of the Voter Action Act. When the legislature sets forth a statutory scheme for enforcing a law, as it has in the Voter Action Act, nothing in § 8-5-2 permits the attorney general to ignore such carefully crafted procedures and oust the appropriate administrator of the law. *See Stinbrink v. Farmers Ins. Co. of Arizona*, 111 N.M. 179, 182, 803 P.2d 664, 667 (1990) (providing that a statute dealing with a specific subject will be given effect over a more general statute). In this case, the secretary of state fulfilled her statutory duties by finding a violation and choosing to require the Block campaign to pay punitive fines and refund the public funding it received, instead of referring the matter to the attorney general for prosecution. Without the statutorily required referral from the secretary of state, the attorney general had no authority to act. The Legislature did not confer on the attorney general the power to second guess the decision of the secretary of state – the executive officer with the necessary expertise in administering and enforcing our election laws. As the district court noted, "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." *Order* [RP-138 : 985].

2. In Matters Concerning The Election Code, The Legislature Has Vested The Secretary Of State With Primary Enforcement Authority, And Has Statutorily Limited The Prosecutorial Powers Of The Attorney General.

The secretary of state is the State's chief elections officer. NMSA 1978, §§ 1-2-1 & 1-2-2 (1953). As such, the secretary is charged with the application, operation, and interpretation of the Election Code, Chapter 1 NMSA 1978, including the Voter Action Act. *Id.* The secretary of state is entrusted with a great deal of administrative discretion, and "shall . . . through the attorney general . . . bring such actions *as deemed necessary and proper* for the enforcement of the provisions of the Election Code. *Id.* § 1-2-1(A)(3) (emphasis added). Additionally, the Legislature recognizes that the secretary of state's day-to-day duties give her the unique expertise required to enforce election-related statutes: she works with the candidates, helping shepherd them through complex campaign regulations; her staff communicates with them when they have questions or concerns; she drafts regulations and guidelines, and has the obligation to "obtain and maintain uniformity in the application, operation and interpretation of the

Elections Code." § 1-2-1(A)(1). In other words, the secretary of state is in the unique position to know whether a candidate should be punished by a fine or by criminal prosecution, which could lead to that person becoming disqualified to hold public office due to a felony conviction. NMSA 1978, § 10-1-2 ("No person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in this state.").

The attorney general, on the other hand, plays a subordinate role to the secretary of state in the enforcement of the Election Code. NMSA 1978, § 1-2-1.1 (1978). In this role, the attorney general, "upon request of the secretary of state shall provide . . . representation as counsel in any action to enforce the provisions of the Election Code." *Id.* This delegation of authority makes sense given the respective public officials' expertise, and ensures efficiency in government by minimizing duplicative enforcement processes. *See Montoya v. Dep't of Fin. & Admin.*, 98 N.M. 408, 413, 649 P.2d 476, 481 (Ct. App. 1982) (recognizing the Legislature's interest in "the furtherance of economy and efficiency in state government.").

The Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to 1-19-36 (1979), which governs the expenditure of funds by political or campaign committees,

illustrates the roles the Legislature intended for the secretary of state and the attorney general to play in enforcing our election laws. The Act prohibits three particular kinds of campaign donations. First, it is unlawful for a legislator, candidate for the state Legislature, or the Governor to solicit a campaign donation during a regular or special legislative session. § 1-19-34.1. Second, it is unlawful for a regulatory officer to solicit donations from an entity directly regulated by that office. § 1-19-34.2. And third, the Campaign Reporting Act prohibits a candidate committee from accepting a donation from a person or entity when it is known that the donation is actually from another person or entity. § 1-19-34.3.

Section 1-19-34.4 describes the enforcement mechanism for this Act. First, the law makes clear that primary investigatory and enforcement power rests with the secretary of state. "The secretary of state may initiate investigations to determine whether any provision of the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978] has been violated. Additionally, any person who believes that a provision of that act has been violated may file a written complaint with the secretary of state . . . ." § 1-19-34.4(B). There is no provision that allows the attorney general to initiate investigation under this Act, nor is there a provision guiding concerned citizens to file written complaints with the attorney general.

If, upon investigation, the secretary of state determines a violation of the

Campaign Reporting Act has occurred, "the secretary of state shall by written notice set forth the violation and the fine imposed and inform the reporting individual that he has ten working days from the date of the letter to correct the matter and to provide a written explanation, under penalty of perjury, stating any reason why the violation occurred." § 1-19-34.4(C). If, after hearing from the person against whom the penalty has been imposed, the secretary of state determines that a fine shall be levied, that person may "protest the secretary of state's determination . . . by submitting . . . a written request for binding arbitration . . . ." § 1-19-34.4(D). The arbitrator's duties and powers are set forth in Subparts (E) and (F), including that "[t]he arbitrator may impose any penalty the secretary of state is authorized to impose." § 1-19-34.4(F).

Finally, the secretary of state may, in her discretion, "refer a matter to the attorney general or a district attorney for a civil injunctive or other appropriate order or for criminal prosecution." § 1-19-34.4(G); *see* § 1-19-36 (providing criminal penalties for willful violations of the Campaign Reporting Act and providing that the attorney general may enforce the Act in the county where the candidate resides, where a political committee has its principal place of business, or where the violation occurred). Nowhere in the Campaign Reporting Act does the Legislature suggest that the attorney general has any original enforcement,

investigative, or prosecutorial powers under the Act. Indeed, the plain language of the statute provides a clear enforcement regime under which the secretary of state, not the attorney general, investigates suspected violations. *See* § 1-19-34.4(B) (directing the public to notify the secretary of state, not the attorney general, of any suspected violations under this Act); §§ 1-19-34.6(A) & (B) (providing a civil enforcement mechanism under which "[i]f the secretary of state reasonably believes that a person committed, or is about to commit, a violation of the Campaign Reporting Act, the secretary of state shall refer the matter to the attorney general . . . for enforcement." Whereupon, "[t]he attorney general . . . may institute a civil action in district court . . . ."). Only if the secretary of state determines that the matter should be referred to the attorney general does the statute grant the attorney general with the authority to enforce the provisions of the Act.

The same is true for the Voter Action Act. As the district court correctly held, "the Legislature chose to place the authority to decide between imposition of a civil penalty and transmitting the matter for criminal prosecution in the domain of the secretary of state." *Order* [RP-138 : 985] This decision, which "appears to be grounded in sound public policy determinations" [RP-138 : 985], is in complete accord with the enforcement hierarchy mandated by the Election Code as a whole,

which grants primary investigative and enforcement authority to the secretary of state, thereby limiting the attorney general's normal power to prosecute.

3. Statutes Concerning Complex Regulatory Schemes Typically Include Provisions Specifically Defining The Authority of the Prosecuting Agency.

As the district court noted, "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]. A brief survey of the New Mexico Code establishes that this statement is well-reasoned: the Legislature knows full well how and when to draft legislation that grants the attorney general or the district attorneys independent investigative and enforcement authority under complex regulatory acts.

The district court cited a provision of the New Mexico Uniform Securities Act as one example of the type of statutory language the Legislature chooses when it intends to give the attorney general plenary power to prosecute, regardless of whether the agency with expertise in the area makes a referral. *Order* [RP-138 : 985] NMSA 1978, § 58-13C-508(J) states, in pertinent part, "[T]he attorney general or the proper district attorney, with or without a referral from the director,

may institute criminal proceedings pursuant to the New Mexico Uniform Securities Act."[3] Unlike the Voter Action Act, the Uniform Securities Act allows the attorney general to prosecute even without a referral. Our statutes include other similar examples. The New Mexico Model State Commodities Code, NMSA 1978, §§ 58-13A-1 to 58-13A-22 (1985), provides an investigatory and enforcement regime whereby the chief of the securities bureau of the financial institutions division of the regulation and licensing department (the "director") may initiate an investigation under the act and transmit any evidence he compiles to the attorney general for criminal prosecution. § 58-13A-14. However, the statute provides that this is not the exclusive means by which the attorney general may gain jurisdiction over commodities violations. "The director may refer such evidence as is available concerning violations of the Model State Commodity Code or any rule or order of the department of [to] the attorney general or the proper district attorney, who may, *with or without such a reference from the director, institute the appropriate criminal proceedings under that code.*" *Id.* (emphasis added; bracketed language in original).

Additionally, New Mexico's Fruit and Vegetable Standards Act, NMSA

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[3] The district court cited § 58-13B-39(B), which once included the language now found in § 58-13C-508(J).

1978 §§ 76-15-1 to 76-15-22, vests in the director the responsibility of "the administration and enforcement of this act." § 76-15-7(A). However, "[e]ach district attorney of this state may, *upon his own initiative*, and upon any complaint of any person, shall, if after investigation he believes a violation to have occurred, bring a criminal action in the proper court in his district, in the name of the state of New Mexico, in any court of competent jurisdiction in the state of New Mexico against any person violating any provision of this act or of any marketing order duly issued by the director hereunder." § 76-15-7(F). The attorney general may not initiate proceedings under this act, and may only participate in such actions as representative for the State of New Mexico if the director specifically makes such a request. § 76-15-7(G).

Finally, the Lobbyist Regulation Act, NMSA 1978, §§ 2-11-1 to 2-11-9 (1953), mandates that all lobbyists operating in New Mexico register with the secretary of state and comply with the expenditure and donation provisions of the Act. As with other political or campaign related laws in New Mexico, the secretary of state is charged with administration of the Lobbyist Regulation Act. § 2-11-8.2. However, unlike other laws concerned with the regulation of elections under the Election Code, such as the Campaign Reporting Act and the Voter Action Act, the Lobbyist Regulation Act specifically provides that the general

criminal enforcement powers of the attorney general shall not be limited by this act. § 2-11-5 ("The powers and duties of the attorney general pursuant to the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA 1978] shall not be construed to limit or restrict the exercise of his power or the performance of his duties.") (referencing NMSA 1978, § 8-5-2, duties of the attorney general). If the Legislature intended that it be presumed that the attorney general enjoyed plenary criminal enforcement powers, then the Legislature would not have provided the type of specific jurisdictional grants listed above. *See Cromer v. J. W. Jones Constr. Co.*, 79 N.M. 179, 184, 441 P.2d 219, 224 (Ct. App. 1968) ("It is fundamental that a statute should be so construed that no word, clause, sentence provision or part thereof shall be rendered surplusage or superfluous."), *overruled on other grounds by Schiller v. Sw. Air Rangers, Inc.*, 87 N.M. 476, 476, 535 P.2d 1327, 1327 (1975), *quoted in State v. Jackson*, 2010 -NMSC- 032, ¶ 28, ___ P.3d ___.

All of these provisions stand in stark contrast to the provisions of the Election Code in general, and the Voter Action Act in particular, which purposefully contain no similar language that would grant the attorney general the broad authority to prosecute, even without a referral from the secretary of state.

4. *The State's Reliance On Federal Cases Interpreting A Federal Statute Is Misplaced.*

The State relies on several federal cases construing the Federal Elections Campaign Act (FECA) in support of its conclusion that the Voter Action Act does not "otherwise provide[]" for a limitation on the attorney general's authority to pursue criminal prosecutions under the Act. These cases are inapposite because (1) the Attorney General of the United States enjoys broader prosecutorial authority than our state attorney general, and (2) there are significant differences between the Voter Action Act and the FECA. *See Starko, Inc. v. Cimarron Health Plan, Inc.*, 2005-NMCA-040, ¶ 17, 137 N.M. 310, 314, 110 P.3d 526, 530 (reliance of federal case law is misplaced when there is no federal counterpart to the New Mexico provision at issue).

A. Our State Attorney General, Unlike His Federal Counterpart, Is Not Presumed To Enjoy Plenary Authority To Initiate Criminal Prosecutions.

It is well-established that the United States Congress "has vested in the Attorney General the power to conduct the criminal litigation of the United States Government." *United States v. Nixon*, 418 U.S. 683, 694, 94 S. Ct. 3090 (1974) (citing 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is interested . . . is reserved to officers of

the Department of Justice, under the direction of the Attorney General."). Accordingly, federal courts have held that "criminal prosecution is 'an executive function within the exclusive prerogative of the Attorney General.' " *United States v. Palumbo Bros., Inc*, 145 F.3d 850, 865 (7th Cir. 1998) (quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1366 (9th Cir. 1987)).

Although Congress may specifically limit the authority of the Attorney General with regard to civil or criminal litigation, *see Case v. Bowles*, 327 U.S. 92, 96-7, 66 S. Ct. 438 (1946), "there must be an express declaration of such intent and it may not be inferred." *United States v. Tonry*, 433 F. Supp. 620, 622 (E.D. La. 1977) (citing *United States v. California*, 332 U.S. 19, 67 S. Ct. 1658 (1947)); *see United States v. Morgan*, 222 U.S. 274, 282, 32 S. Ct. 81 (1911) (the delegation of prosecutorial powers to another executive agency "require[s] a clear and unambiguous expression of the legislative will."); *Fieger v. United States Attorney General*, 542 F.3d 1111, 1117 (6th Cir. 2008). Therefore, "[t]he fact that a particular statute provides authority for an agency or department to conduct administrative proceedings does not, in the absence of a specific prohibition to the contrary, prevent the Attorney General (and the Grand Jury) from proceeding under their general powers." *Tonry*, 433 F. Supp. at 622 (citing *Morgan*, 222 U.S. at 282).

Using the federal requirement that the U.S. Attorney General's generic prosecutorial powers may not be derogated unless done so by a clear and unambiguous statement of such an intent, the State maintains that New Mexico courts should adopt the same presumption of prosecutorial authority. *Brief in Chief* at 17-20. However, no such presumption has ever been found by New Mexico courts. Indeed, the decisions of our Supreme Court suggest that the attorney general only has the authority to do what the Legislature has explicitly allowed it to do by statute. *See Davidson*, 33 N.M. at 666, 275 P. at 375 (holding that "no common-law powers were confirmed in the office of the attorney general by our Constitution," and that the attorney general's "powers and duties [have been] defined and limited by statute from its inception"); *State ex. rel. Attorney General v. Reese*, 78 N.M. at 246–48, 430 P.2d at 404–06 (1967) (reaffirming holding of *Davidson*).

Moreover, as evidenced by the regulatory statutes described above, including the Election Code, the attorney general independent prosecutorial authority in matters involving complex regulatory schemes when the Legislature has specifically granted or reserved that power by statute. *Compare* the Lobbyist Regulation Act, NMSA 1978, § 2-11-5 ("The powers and duties of the attorney general pursuant to [this act] shall not be construed to limit or restrict the exercise

of his power or the performance of his duties.") *and* the Fruit and Vegetable Standards Act, NMSA 1978 § 76-15-7(A) ("Each district attorney of this state may, *upon his own initiative*, and upon any complaint of any person, shall, if after investigation he believes a violation to have occurred, bring a criminal action in the proper court in his district, in the name of the state of New Mexico, in any court of competent jurisdiction in the state of New Mexico against any person violating any provision of this act or of any marketing order duly issued by the director hereunder.") (emphasis added); *and* the Commodities Code, NMSA 1978, §§ 58-13A-14 (The director may refer such evidence as is available concerning violations of the Model State Commodity Code or any rule or order of the department of [to] the attorney general or the proper district attorney, who may, *with or without such a reference from the director, institute the appropriate criminal proceedings under that code.*") (emphasis added) *with* the Voter Action Act, NMSA 1978, § 1-19A-17 ("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."). Accepting the State's argument – that the attorney general has independent power to prosecute even if the statute does not explicitly confer such power – would render the explicit grants of prosecutorial power in the statutes cited above superfluous. *See State v. Javier M.*,

2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 (holding that statutes should not be construed to permit language to become superfluous).

Therefore, if the question is whether the Voter Action Act "otherwise provide[s]" for a limitation on the attorney general's usual broad authority, the answer is "yes." The specific grant of independent power that is omitted from the Voter Action Act speaks volumes when compared to other regulatory provisions that include such language, especially in light of the Elections Code's hierarchy, under which the attorney general is subordinate to the secretary of state.

B. Significant Differences Between The Federal Elections Campaign Act Render The Federal Case Law Inapposite.

As noted in the State's Brief, "[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.' " *Brief in Chief* at 18 (listing cases). However, federal case law on this matter is inapposite because the Voter Action Act is unlike the FECA in a number of meaningful ways, including its plain language and legislative history.

In 1971, the United States Congress enacted the Federal Election Campaign Act (FECA) to "limit spending in federal election campaigns and to eliminate the

actual or perceived pernicious influence over candidates for elective office that wealthy individuals or corporations could achieve by financing the 'political warchests' of those candidates." *Orloski v. Fed. Election Com'n*, 795 F.2d 156, 163 (D.C. Cir. 1986). Within FECA, Congress established the Federal Elections Commission to oversee the civil enforcement of the Act's provisions. 2 U.S.C. § 437c ("The [Federal Elections] Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions."). In exercising its civil enforcement power, the FEC may issue subpoenas, administer oaths, render advisory opinions regarding compliance with the Act, and litigate civil actions through its general counsel. 2 U.S.C. § 437d(a).

When the FEC decides, through an affirmative vote of at least four of its members, that an individual has violated or is about to violate the Act, it must notify that person of the factual basis for the alleged violation and conduct an investigation. 2 U.S.C. § 437g(a)(2). If the FEC finds probable cause for the suspected violations, it must "attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." *Id.* at § 437g(a)(4)(A)(i). If a conciliation agreement is entered into, such agreement acts as a "complete bar to any further action by the Commission,

including the bringing of a civil proceeding." *Id.*

During the course of an investigation, the FEC may also find probable cause to believe that the campaign finance violation was "knowing and willful." In this event, FECA allows the FEC to refer the case to the Attorney General for criminal prosecution. Such a referral requires the votes of four FEC Commissioners. § 437g(a)(5)(C).[4]

It is this last provision that, as the State has noted, has been unsuccessfully challenged in federal court to limit the power of the Attorney General to independently investigate and prosecute criminal violations of FECA. *E.g., Bialek v. Mukasey*, 529 F.3d 1267, 1270 (10th Cir. 2008). In *Bialek*, the court rejected the plaintiff's assertion 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." *Id.* at 1270. This rejection, and other similar rejections in federal court, are based on two rationales unique to

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[4] The referral provision, § 437g(a)(5)(C), provides in full:

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

federal law and FECA.

First, in federal law, the Attorney General of the United States is presumed to have plenary authority to independently initiate criminal proceedings. *Id.* ("At the outset, we emphasize that we cannot presume that Congress has divested the Attorney General of his prosecutorial authority absent 'a clear and unambiguous expression of legislative will.' ") (quoting *Morgan*, 222 U.S. at 281). The *Bialek* court noted that

> [n]owhere in FECA do we find a single phrase limiting the Attorney General's powers. If Congress wished all campaign finance litigation, both civil and criminal, to originate with the FEC, only a few lines of statutory text would have been required. Instead, Congress explicitly granted the FEC only "exclusive jurisdiction with respect to *civil* enforcement of FECA's provisions. § 437c(b)(1) (emphasis added). The obvious implication, uncontroverted by any words in the statute, is that the FEC and Attorney General retain concurrent jurisdiction to investigate criminal matters.

Id. at 1271. However, as noted above, the New Mexico attorney general, unlike his federal couterpart, is not presumed to have such wide-ranging authority, especially in matters concerning elections or other heavily regulated industries. Therefore, the Legislature's omission from the Voter Action Act of any provision detailing the attorney general's independent authority under that act indicates that the Legislature intended that the attorney general would only acquire prosecutorial authority if the secretary of state determined that a violation of the Voter Action

Act occurred and transmitted such finding to the attorney general for prosecution.

Second, the legislative history of FECA makes clear that Congress considered, and then rejected, vesting primary criminal enforcement of that act's provisions in the FEC. During the congressional debates prior to FECA's amendment in 1974, "Congress explicitly considered language that would have mandated approval from the FEC prior to the AG undertaking any prosecutorial acts." *Fieger v. United States Attorney General*, 542 F.3d 1111, 1118 (6th Cir. 2008). The proposed Senate bill stated, in pertinent part:

> Notwithstanding any other provision of law, the Commission shall be the primary *civil and criminal* enforcement agency for violations of provisions of this Act . . . Any violation of any such provision shall be prosecuted by the Attorney General or Department of Justice personnel *only after* consultation with, and with the consent of, the Commission.

S. 3044, 93 Cong., § 207(a), sec. 309(d), at 49 (2d Sess. 1974) (quoted in, and emphasis added by, *Fieger*, 542 F.3d at 1118).

This language was subsequently excised in conference, and the Conference Report specifically indicates that "[t]he primary jurisdiction of the [FEC] to enforce the provisions of the Act is not intended to interfere with the activities of the Attorney General or the Department of Justice in performing their duties . . ." H.R. Rep. No. 93-1438, at 22 (2d Sess. 1974). "These changes reflect that Congress expressly decided against granting exclusive criminal jurisdiction to the

FEC." *Fieger*, 542 F.3d at 1118.

The Voter Action Act contains no such similar history, and there is no indication that our Legislature intended to vest independent prosecutorial power in the attorney general absent the transmittal of a finding of a violation of that act by the secretary of state. In fact, as explained above, concluding that our attorney general has the independent power to prosecute candidates and officeholders runs contrary to the plain language of the statute and the overall statutory scheme envisioned by our Legislature, under which the attorney general must take a secondary role to the secretary of state. Indeed, the district court found the Legislature's decision to vest primary authority in the secretary of state "to be grounded in sound public policy determinations." *Order* [RP-138 : 985]

> [G]iving the secretary of state the authority to choose which alternative by which to address a violation places the initial determination in the hands of the official who is charged with overseeing elections and making rules to implement the Voter Action Act and who has the expertise in those areas, and would also preclude opportunities for an attorney general to reach out and pursue a criminal prosecution of a candidate for political motives.

Id. The district court correctly recognized that there is a significant risk that political considerations – such as the desire of an elected prosecutor to attack a political rival or enemy or simply to be perceived as tough on corruption – could impact the decision to prosecute an elected official or candidate for elected office

under the Voter Action Act, and that making the secretary of state the gatekeeper for prosecutions under the Act significantly reduces that risk. "In other words, the system the Legislature established creates a sort of checks and balances between two politically-elected officials on the effect either can have on another candidate's election efforts." *Order* [RP-138 : 985]

In light of the Legislature's intent that the secretary of state be vested with exclusive primary jurisdiction over the Voter Action Act, this Court should uphold the district court's order dismissing the Voter Action Act charges against Jerome Block, Sr. and Jerome Block, Jr. as enforcement of those provisions, in the absence of the statutorily required referral from the secretary of state, was beyond the attorney general's grant of prosecutorial authority.

II. The State, Under New Mexico's Double Jeopardy Provisions, Is Barred From Prosecuting Counts I & II Against Jerome Block, Jr.

As a separate and alternative basis for dismissing the Voter Action Act charges against Jerome Block, Jr., the district court correctly found that the punitive fines levied against the younger Block by the secretary of state constituted punishment under New Mexico's Double Jeopardy provisions, New Mexico Constitution Article II, § 15, and NMSA 1978, § 30-1-10. *Order* [RP-138 : 986]

In its Order, the district court dismissed Counts I, II, III, and IV of the Indictment against Jerome Block, Jr. [RP-138 : 1-9] on Double Jeopardy grounds. In its Brief, the State contends that the district court erred in dismissing Counts III and IV because the conduct alleged in these counts is not the same conduct alleged for which Mr. Block was fined (i.e., the alleged Conduct charged in Counts I and II). It should be noted, however, that the district court was placed in an awkward position created by the State's vague Indictment. On February 8, 2010, unable to decipher what alleged conduct related to which specific Count, the court ordered the State to produce a Statement of Facts, which it did on February 26, 2010, eleven days *after* the charges were dismissed. [RP-138 : 967-78]

Now, with the benefit of a more detailed Statement of Facts, Jerome Block, Jr. does not dispute that the conduct alleged in Counts III and IV of the Indictment is not the same alleged conduct that resulted in the secretary of state imposing two $5,000 fines against Mr. Block. Accordingly, Mr. Block, Jr. respectfully requests that this Court uphold the portion of the district court's Order dismissing Counts I and II, as subsequent criminal punishment for these alleged actions is prohibited by New Mexico Double Jeopardy law.[5]

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[5] The dismissal of Counts III and IV is still appropriate under the statutory construction argument set forth above.

A. Standard Of Review.

A defendant's allegation of double jeopardy violations is a question of legislative intent that is reviewed *de novo*. *State v. Franco*, 2005-NMSC-013, ¶ 5, 137 N.M. 447, 112 P.3d 1104.

B. New Mexico's Double Jeopardy Clause Protects An Accused Like Jerome Block, Jr. From Multiple Punishments In Separate Proceedings For The Same Offense.

The constitutional and statutory underpinnings of New Mexico's Double Jeopardy jurisprudence are provided in Article II, Section 15 of the New Mexico Constitution and Section 30-1-10 of the New Mexico Statutes. The New Mexico Constitution's Double Jeopardy Clause reads:

> No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.

N.M. Const. art. II, § 15.

Similarly, New Mexico's Double Jeopardy statute reads:

> No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a

> new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.

NMSA 1978, § 30-1-10.

Interpreting these provisions, the New Mexico Supreme Court has held that "New Mexico's constitutional protection against double jeopardy, on its face, is of a different nature, more encompassing and inviolate," when compared to recent United States Supreme Court Fifth Amendment jurisprudence. *State v. Nuñez*, 2000-NMSC-013, ¶ 27, 129 N.M. 63, 2 P.3d 264 (finding double jeopardy violations in post-conviction forfeiture proceedings under the Controlled Substances Act); *see also State v. Kirby*, 2003-NMCA-074, ¶ 16, ("the New Mexico Constitution afford[s] New Mexico defendants greater rights than the federal Constitution.").

The basic framework for a state double jeopardy analysis is provided by *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 626, 904 P.2d 1044, 1051 (1995). First, the court must determine "whether the State subjected the defendant to separate proceedings." *Id.* Second, the court must examine "whether the conduct precipitating the separate proceedings consisted of one offense or two offenses." *Id.* Third, the court must consider "whether the penalties in each of the proceedings may be considered 'punishment' for the purposes of the Double

Jeopardy Clause." *Id.*

1. The Secretary Of State Proceeding And The Subsequent Criminal Prosecution Constitute "Separate Proceedings."

The State, in its Brief in Chief at 33, concedes that the Jerome Block, Jr. has been the subject of separate proceedings. The first proceedings began on October 4, 2008, when the secretary of state notified Mr. Block, Jr. that her office had begun a preliminary inquiry into media reports that he had misappropriated public election funds. [RP-138 : 648] On October 29, 2008, Mr. Block, Jr. refuted the allegations via letter to the secretary of state. [RP-138 : 623] On November 1, 2008, the secretary of state issued a Notice of Final Action, obligating Mr. Block to pay $11,000 in fines, and return $10,000 of the public funds distributed to his campaign. [RP-138: 649-50]

On April 8, 2009, an indictment was filed against Jerome Block, Jr., charging *inter alia*, one count of willfully or knowingly violating the Voter Action Act (Count I), and conspiring to violate the Voter Action Act (Count II). [RP-138 : 1-9] A criminal prosecution based on this indictment was thereby initiated. The secretary of state's proceeding and the instant criminal matter constitute separate proceedings. *Nuñez*, 2000-NMSC-013, ¶ 55.

2. The Alleged Conduct Precipitating The Separate Proceedings Involve The "Same Offenses."

The second factor in the *Schwartz* test – whether the conduct at issue consists of one or more than one offense – is likewise not in dispute. *State's Brief in Chief* at 33. In *Nuñez*, the Court established a presumption that when two proceedings are directed at the same defendant and rely on the same general evidence, then both proceedings involve the same offense. 2000-NMSC-013, ¶ 59. This presumption applies here. The two proceedings at issue both involve Jerome Block, Jr.; both allege violations of the Voter Action Act; and, if the criminal prosecution were to continue, the state would allege the same alleged conduct and rely on the same evidence. *See Kirby*, 2003-NMCA-074, ¶ 21 (finding that the securities violations at issue during the administrative proceedings formed the basis for the subsequent criminal charges).

3. The Secretary Of State's Final Notice Was Intended To, And Did, Inflict "Punishment" On Jerome Block, Jr. The Fines Levied, Therefore, Preclude Subsequent Prosecution.

In *City of Albuquerque v. One (1) White Chevy*, 2002-NMSC-014, 132 N.M. 187 46 P.3d 94, the New Mexico Supreme Court clarified the *Schwartz* test to determine whether a sanction is remedial or punitive:

> To determine whether a sanction is remedial or punitive, a reviewing court begins by evaluating the government's purpose in enacting the

> legislation, rather than evaluating the effect of the sanction on the defendant. Then the court must determine whether the sanction established by the legislation was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect.

White Chevy, 2002-NMSC-014, ¶ 11 (internal quotation marks and quoted authority omitted).

i. The Legislature Intended Only One Punishment Under The Voter Action Act: Either The Issuance Of A Fine, Or A Criminal Prosecution, But Not Both.

In determining whether a sanction is sufficiently punitive to trigger the protections of the Double Jeopardy Clause, courts begin by evaluating the Legislature's purpose in enacting the law. *Kirby*, 2003-NMCA-074, ¶ 13; *White Chevy*, 2002-NMSC-014, ¶ 5 ("In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the Legislature.") (quoting *N.M. Dep't of Health v. Compton*, 2001-NMSC-032, ¶ 18, 131 N.M. 204, 34 P.3d 593)). As set forth above, the Voter Action Act establishes a public financing system for certified candidates running for Public Regulation Commissioner. By enacting this law, the Legislature sought to prevent such candidates from receiving campaign contributions from the very industries they would be charged with regulating once in office.

In order to ensure compliance, the Act sets forth detailed expenditure and

reporting requirements, including provisions for the return of unspent and unencumbered funds at the end of the primary and general election cycles. NMSA 1978, §§ 1-19A-7 to 1-19A-10. The penalties section of the Voter Action Act punishes any violation of the Act. § 1-19A-17(A). Subsection (B) makes willful and knowing violations of the Act a fourth degree felony. § 1-19A-17(B). The Legislature chose to grant the secretary of state the discretion to decide whether to issue fines or transmit a finding of a violation to the attorney general for potential prosecution. *See Order* [RP-138 : 985]

In drafting the penalties section, the Legislature evinced a clear desire to prevent the issuance of a fine in conjunction with a criminal prosecution. This is why the Legislature delineated procedures for one or the other, but not both. As the district court noted, although "the Legislature has neither explicitly nor implicitly authorized multiple punishments for violations of the Voter Action Act" the Legislature's intent is nevertheless clear because "[t]he Legislature has only authorized imposition of civil penalties *or* criminal prosecution, but not both." [RP-138 : 986-87] ("The Legislature apparently intended that violator of the Voter Action Act either be fined by the secretary of state or criminally prosecuted by the attorney general, but not both, and thereby signaled a view that the fine was an alternative punishment to prosecution.").

In addition, the statutory language at issue in this appeal "is distinguished in significant respects from that at issue in *Kirby*." *Order* [RP-138 : 987] In *Kirby*, this Court found no double jeopardy violations after a defendant charged under the New Mexico Uniform Securities Act was fined $75,000 by administrative order under NMSA 1978, § 58-13B-37(B), and then indicted for the same conduct under NMSA 1978, § 58-13B-39.[6] *Kirby*, 2003-NMCA-074, ¶¶ 23–26, 39. This Court held that "as opposed to Section 58-13B-39 that provides for the 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." *Id.* at ¶ 26.

In contrast to the two clearly distinguishable penalty provisions of the Securities Act at issue in *Kirby* – one clearly setting forth civil remedial penalties, the other providing for punitive criminal penalties – the Voter Action Act contains only one provision, which reads:

> In addition to other penalties that may be available, 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

[6] The $75,000 fine reflects the director's findings that the defendant engaged in fifteen separate violations of the Securities Act, which allows a maximum civil penalty of $5,000 for each violation. *Kirby*, 2003-NMCA-073, ¶ 5. The administrative order also required the defendant to pay $1,000 for costs of investigation. *Id.*

> 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. . . .

NMSA 1978, § 1-19A-17(A). As the district court recognized, "Paragraph B defines the crime that may result from a violation of the Voter Action Act and must modify the prosecution option contained in Paragraph A. If the prosecution option referenced in Paragraph A were not modified by Paragraph B, there would be no penalty for the criminal prosecution by the attorney general referenced in Paragraph A." *Order* [RP-138 : 984]

In setting forth the penalties section in this way, the Legislature intended that the levying of punitive fines and the pursuance of criminal prosecutions should be treated as separate but equally important punishments. *See Order* [RP-138 : 987] ("The Legislature apparently intended that violators of the Voter Action Act either be fined by the secretary of state or criminally prosecuted by the attorney general, but not both, and thereby signaled a view that the fine was an alternative punishment to prosecution."). These two mutually exclusive penalties, found not just in the same statutory provision but literally in the same sentence, stand on the same statutory footing, and are intended, like all criminal sanctions, to be punitive, not remedial, in nature and effect.

ii. The Punitive Effects Of The Fines Available Under The Voter Action Act Outweigh Their Remedial Effect.

The next step courts may take in the Double Jeopardy analysis is to consider whether the sanction established by the legislation, and intended to be purely remedial, was nevertheless sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect. *State v. Diggs*, 2009-NMCA-099, 147 N.M. 122, 217 P.3d 608 (applying *White Chevy*, 2002-NMSC-014, ¶ 11). In making this determination, courts "should be guided by whether the sanction affects a fundamental right." *Nuñez*, 2000-NMSC-013, ¶ 64. "Thus, in a close case, if the right at stake were statutory, such as the loss of an administrative license, the most likely conclusion would be that the sanction is remedial." *Id.* Conversely, if "the purpose of the sanction is to deprive the defendant of the fundamental constitutional right of acquiring, possessing and protecting property" then "[t]his creates a strong presumption that the sanction is punitive." *Id.* As the district court held, the fines at issue in this case implicate important rights and should be considered punitive under New Mexico law. *Order* [RP-138 : 988] ("In the context of a campaign finance provision, a maximum $10,000 fine carries . . . significant implications for a candidate who is running for elected office, who may not have substantial personal wealth, and who has a constitutional right to run for

elected office.").

Additionally, Section 17 of the Voter Action Act provides that the secretary of state may require a candidate found in violation of the Act to return "all amounts distributed to the candidate from the Fund." § 1-19A-17(A). This provision is clearly remedial, in that the public election fund was created not only to "financ[e] the election campaigns of certified candidates for covered offices," § 1-19A-10(A)(1), but also to "pay[] administrative and enforcement costs of the Voter Action Act," § 1-19A-10(A)(2). By contrast, the fines available under the Act are in no way related to similar remedial goals. As the district court found,

> Unlike suspending a drivers license or forfeiting a vehicle to protect society from the dangers presented by drunken drivers, which were at issue in *One White Chevy* and precedent that case relied upon, no legitimate non-punitive purpose has been articulated for a maximum $10,000 penalty, nor is there any correlation between the harm presented by violations of the Voter Action Act and imposition of a maximum $10,000 fine.

[RP-138 : 987] In other words, insofar as the public may be harmed by violations of the Voter Action Act, the return of public funds fully compensates the public fisc, and any additional fines levied must be construed as purely punitive in purpose and effect. *Order* [RP-138 : 988] ("Any remedial goal is accomplished by reimbursement provisions of the Voter Action Act.").

4. The Test For Determining Whether A Civil/Criminal Statutory Scheme Implicates Double Jeopardy Concerns Is Only Applicable When The Legislature Intended To Make Both Civil Remedies and Criminal Penalties Available To The State.

In New Mexico, civil/criminal double jeopardy analysis centers on four seminal cases: *Schwartz*, 120 N.M. 619, *Nuñez*, 2000-NMSC-013, *White Chevy*, 2002-NMSC-014, and *Kirby*, 2003-NMCA-074. Unlike the instant matter, all of these cases involved statutes intended by the Legislature to create a dual-track enforcement system, under which the penalties available to the state or municipality were intended to include both civil remedial sanctions, in addition to stand-alone criminal punishments. *Schwartz*, 120 N.M. at 622 (driver's licence revocation plus subsequent DWI prosecution); *Nuñez*, 2000-NMSC-013, ¶¶ 1, 16 (property forfeiture plus drug possession prosecution under the Controlled Substances Act); *White Chevy*, 2002-NMSC-014, ¶ 1 (vehicle forfeiture plus subsequent DWI prosecution); *Kirby*, 2003-NMCA-072, ¶ 1 (civil penalty plus subsequent fraud prosecution under the Securities Act). In these types of cases, reviewing courts analyze whether, despite Legislative efforts to create wholly remedial sanctions, the civil sanctions at issue nevertheless constitute punishment for the purposes of the Double Jeopardy Clause.

In *Kirby*, this Court analyzed whether the Legislature intended for both civil

and criminal sanctions to be available under the Securities Act, and whether the punitive effects of the civil fines provided for in that Act outweighed their remedial effects. *Kirby*, 2003-NMCA-074, ¶ 27. In concluding that, on balance, the civil fines' punitive effects did not outweigh their remedial effects, this Court was guided by seven non-exclusive factors, first articulated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554 (1963). *Id.* ¶ 28 (setting forth the *Medoza-Martinez* factors).

These factors, however, are only relevant where "the inquiry [is] 'whether the statutory scheme was 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 (ellipsis and bracketed letter in original) (quoting *Hudson v. United States*, 522 U.S. 93, 95-6, 118 S. Ct. 488 (1997)). Here, the Legislature clearly *did not* intend the fines available under the Voter Action Act to be a civil remedy. Indeed, as outlined above, the Legislature intended the exact opposite: that the remedial aspects of the law would be taken care of by the reimbursement provisions, while the punitive aspects would be taken care of by either a fine of up to $10,000 or a criminal prosecution, but not both.

In its Order, the district court recognized that because "[t]he Legislature has only authorized imposition of civil penalties *or* criminal prosecution, but not

both," it was not "necessary to reach the issue of whether the civil penalties constitute punishment" as once legislative intent to provide only one sanction is determined, the issue is resolved in favor of the defendant, and the remainder of the Double Jeopardy analysis is unnecessary. [RP-138 : 987].

Although neither this Court nor the district court need go further once the legislative intent is found, the district court nevertheless analyzed "various factors" and found that "the civil penalties are more punitive than remedial." [RP-138 : 987-88]. Jerome Block, Jr. submits that the court was correct in its analysis, and believes that, on balance, the punitive effects of the fines levied against him are significantly more punitive than remedial.

First, the fines available under the Voter Action Act constitute an affirmative disability and restraint on a candidate's ability to run for public office. *See Kirby*, 2003-NMCA-074, ¶ 7 (listing the first *Mendoza-Martinez* factor as "whether the sanction involves an affirmative disability or restraint."). As noted by the district court, "[i]n the context of a campaign finance provision, a maximum $10,000 fine carries a significant implication[] for a candidate wo is running for public office, who may not have substantial personal wealth, and who has a constitutional right to run for public office." *Order* [RP-138 : 988]

Second, because the secretary of state "may consider as a mitigating factor

any circumstances out of the candidate's control," NMSA 1978, § 1-19A-17(A), in determining whether a violation of the Voter Action Act has occurred, the "finding of *scienter*" comes into play in the secretary of state's decision on whether to issue a fine or transmit her findings to the attorney general for prosecution. *Kirby*, 2003-NMCA-074, ¶ 7 (third factor is "whether it comes into play only on a finding of *scienter*.").

Next, it is clear that substantial fines "promote the traditional aims of punishment-retribution and deterrence." *Kirby*, 2003-NMCA-074, ¶ 7. As the district court held "[t]he $10,000 penalty is aimed more at punishment-retribution toward the violator and deterrence of other candidates than at remedial purposes[.]" *Order* [RP-138 : 988]

Finally, "[u]nlike the civil penalty imposed pursuant to the Securities Act in *Kirby*, imposition of the $10,000 fine appears disproportionate in relation to any asserted remedial purpose." *Order* [RP-138 : 988] Again, as noted, "[a]ny remedial goal is accomplished by reimbursement provisions of the Voter Action Act." *Id.*

In light of the strong state protections against being placed in jeopardy twice, the fact that the Legislature did not intend for there to be two punishments available, and that the *Kirby/Mendoza-Martinez* factors weigh heavily in favor of

the defendant, the district court was correct to dismiss Counts I and II against Jerome Block, Jr. on Double Jeopardy grounds.

CONCLUSION

For the reasons set forth above, the Blocks request that this Court uphold the district court's Order dismissing the Voter Action Act charges against them.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 8th day of September, 2010, I caused true copies of this *Answer Brief* to be served by first-class mail, postage prepaid, on:

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