

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

HEALTHY WORKFORCE ABQ, THE OLÉ EDUCATION
FUND, REBECCA GLENN, KRISTEN GAMBOA, and
DELIRIA JARAMILLO;

Plaintiffs,

v.

THE CITY OF ALBUQUERQUE; THE CITY COUNCIL
OF THE CITY OF ALBUQUERQUE, NEW MEXICO; KEN
SANCHEZ, ISAAC BENTON, KLARISSA PEÑA, BRAD
WINTER, DAN LEWIS, PAT DAVIS, DIANE GIBSON,
TRUDY JONES, AND DON HARRIS, in their capacities as
Albuquerque City Councilors; NATALIE HOWARD, in her
capacity as Albuquerque City Clerk,

Case No. D-202-CV-2016-
05539

Defendants,

and

ROXANNA MEYERS, CENTURY SIGN BUILDERS, INC.
DON KAUFMAN, KAUFMAN FIRE PROTECTION
SYSTEMS, INC., THE ASSOCIATION OF COMMERCE
AND INDUSTRY, NAIOP, AND THE NEW MEXICO
RESTAURANT ASSOCIATION,

Intervenors.

PLAINTIFFS' EMERGENCY MOTION FOR EXPEDITED HEARING AND TRIAL

Plaintiffs respectfully move this Court to set an expedited hearing and trial in this action **on or prior to August 9, 2017**, because the City Clerk must send out the first ballots to overseas military voters on Saturday, August 19, 2017. Absent an order enjoining the City Clerk, the ballot will be in 7-point type, the summary of the Healthy Workforce Ordinance will not appear on the ballot at all, and the ballot will contain a competing, misleading and illegal advisory question on paid sick leave. If the Court does not hear the merits of this action by August 9, 2017, there will not be sufficient time for the Court to render a decision or for either side to seek

emergency appellate review, which could deprive voters of their right to vote on a ballot they can read and understand.

STATEMENT OF FACTS

1. All the offices and questions that must appear on the 2017 municipal election ballot are known now, and it would be impossible to add any others. The deadline for the City Council to pass an election resolution providing a final list of ballot offices, issues, and questions to appear on the 2017 municipal election ballot was July 11, 2017. NMSA 1978 § 3-8-26. According to the election resolutions the City Council has passed, the ballot must contain a Mayoral race, City Council races in odd-numbered districts, 11 bond questions in English and Spanish, the Healthy Workforce Ordinance in English and Spanish, and an advisory question in English and Spanish. *See* July 10 draft ballot (attached as Exhibit 7 to Emergency Motion for Preliminary and Permanent Injunction and Declaratory Judgment (“PI Motion”)); July 10 election resolution (attached as Exhibit 6 to PI Motion); Transcript of July 26, 2017 Deposition of Natalie Howard (“Howard Tr.”) at 82-87 (attached as Exhibit 8 to PI Motion). The Clerk will not add anything to the ballot that has not been approved by City government. *See* Howard Tr. 49-52, 120.

2. Working with Albuquerque’s election services vendor, AES, the Clerk obtained the latest draft of the 2017 municipal election ballot on or about July 10, 2017. Howard Tr. 53-55, 61-62, 168-169. The July 10 draft ballot contains all of the offices and questions that will appear on the ballot except for the illegal advisory question, for which there is only room in the currently-blank space on the first page of the ballot. *Id.* 81-87, 168-171; July 10 draft ballot (attached as Exhibit 7 to PI Motion). Everything else appears on the July 10 draft ballot. *Id.* There are 11 bond questions, which appear in English and Spanish. *Id.* Because the actual order in which candidates will appear is set by drawing on August 10, 2017, the ballot contains placeholders for eight mayoral candidates and five city council candidates. Howard Tr. 83-84; NMSA 1978 § 3-8-27; §

2-4-7 ROA 1994. The Clerk will determine the candidates' names and the order in which they appear on August 10. *Id.* 136-138.

3. The Healthy Workforce Ordinance cannot fit on the ballot in a type size larger than 7-point. Printed in 7-point font, the full text of the Healthy Workforce Ordinance – with no summary – takes up the entire reverse side of the July 10 draft ballot. Howard Tr. 84; *see also* July 10 draft ballot (attached as Exhibit 7 to PI Motion). Although there is a small amount of blank space on the first page, it will likely contain the advisory question (unless it is enjoined). Howard Tr. 40-41, 86-87. Furthermore, AES produced the July 10 draft ballot in response to the Clerk's instruction to "make the font size as large as possible" and to use an 8-inch by 19-inch ballot, which is the largest option that AES offers *Id.* 77, 79, 80-84, 168-69.

4. The Clerk plans to finalize the ballot by Monday, August 14, 2017. *Id.* 133. The first ballots must be sent out electronically to overseas military voters on Saturday, August 19, 2017. *Id.* 127-128; 131-35. The ballot must be "completely ready" by August 17, 2017. *Id.* 128-132.

5. Plaintiffs did everything in their power to make this case trial-ready as soon as possible, including moving to compel the Clerk's deposition months ago. Once the Court ordered her to appear, Plaintiffs asked Defendants to make the Clerk available earlier than July 21, 2017. *See* Ex. 1 (Correspondence, E. Wagoner & C. Tebo, Jun. 16-26, 2017). Plaintiffs explained to Defendants that they hoped to avoid the need for emergency expedited motions like this one by completing discovery sooner. *Id.* Defendants rejected Plaintiffs' proposal, and the earliest date Defendants agreed to make the Clerk available was Friday, July 21, 2017. Plaintiffs' counsel filed today's motions as soon as possible thereafter.

ARGUMENT

It is crucial that the Court hear this case as soon as possible because, if the Court does not act, the ballot the Clerk sends out to overseas military voters on Saturday, August 19, 2017 will

be in violation of the Free and Open Elections Clause, for all of the reasons set forth in Plaintiffs' accompanying Memorandum of Law in Support of Emergency Motion for Preliminary and Permanent Injunction and Declaratory Judgment. The ballot will be illegal because it contains advocacy against the Healthy Workforce Ordinance that is coercive and misleading, lacks any summary of the Healthy Workforce Ordinance, and is printed as a full text ordinance in unlawfully small 7-point type. The result, unless enjoined, will be to deprive the plaintiffs and the voters of their right under the Election Code, Charter and New Mexico Constitution to reasonably consider, and vote for or against, the Healthy Workforce Ordinance.

Discovery in this case was complete as of July 21, 2017, when Plaintiffs took the City Clerk's deposition, and it is ready for a decision on the merits now.¹ Because the integrity of the municipal election is at stake in this case, the Court should consolidate an expedited preliminary injunction hearing with the trial on the merits, as Rule 1-066(A)(2) permits ("the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the [preliminary injunction] application."). The hearing and trial must take place on or before August 9, 2017 so that the Court has time to consider the evidence and render a decision; so that the non-prevailing party has time to appeal the decision before ballots go out; and so that the Court can make any necessary rulings on remand. All of this must happen before Saturday, August 19, 2017, after which date this case will be moot because the Clerk will send ballots out to voters. *Carter v. City of Las Cruces*, 1996-NMCA-047, ¶ 1, 13, 121 N.M. 580 (plaintiffs' claims for injunctive relief were rendered moot by holding of election.)

¹ Concurrently herewith, Plaintiffs have filed a request for trial pursuant to Rule 1-040 NMRA ("any party may submit a request for trial on the merits stating that the case is ready for trial and the amount of time needed for trial of the case").

An expedited hearing is proper because this is a declaratory judgment action. *See* Rule 1-057 (“The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.”) It particularly important here, because this is an elections case, in which the accuracy of the ballot is at stake. *See, e.g., Charley v. Johnson*, 2010-NMSC-024, ¶ 15, 148 N.M. 246 (“the prompt disposition of this type of case is not only of the utmost importance, but it is also a practical necessity if accurate ballots are to be prepared in time for the primary election.”). Finally, the Court has inherent authority to control its docket and to set a hearing as it sees fit. *See Gonzales v. Surgidev Corp.* 1995-NMSC-047, 120 N.M. 151 (“[C]ourts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”) (internal citation and quotation marks omitted).

Defendants or Intervenors will not be prejudiced by a trial date within the next two weeks. They have long known that Plaintiffs’ claims would have to be heard before the first ballots are sent out. Furthermore, neither Defendants nor Intervenors ever served discovery requests in this case, so there is no information they need from Plaintiffs to prepare for trial. Plaintiffs did everything in their power to make this case trial-ready as soon as possible, including moving to compel the Clerk’s deposition months ago, and, once the Court ordered her to appear, asking Defendants to make the Clerk available earlier than July 21, 2017. SOF ¶ 5. Even though Plaintiffs told Defendants that they wanted to complete discovery earlier to avoid the need for emergency motions, the earliest date Defendants agreed to make the Clerk available was Friday, July 21, 2017, and Plaintiffs’ counsel has filed today’s motions as soon as possible thereafter. *Id.*

Plaintiffs sought Defendants’ and Intervenors’ positions on this Motion at approximately 6:00 p.m. on Wednesday, July 27, 2017. Defendant City Counselors Isaac Benton, Diane Gibson,

Pat Davis, and Klarissa Peña do not oppose this Motion. Counsel for Intervenors declined to provide their position. Jessica Hernandez, Counsel for Defendants the City of Albuquerque, the Albuquerque City Council, and City Counselors Brad Winter, Dan Lewis, Trudy Jones, Ken Sanchez, and Don Harris was unable to obtain her clients' position by the time of filing this Motion at approximately 2:30 p.m. on Thursday, July 27, 2017. However, Ms. Hernandez asked Plaintiffs to inform the Court that the City is *not available* for hearing on the following dates:

- Monday, July 31
- Tuesday, August 2
- Tuesday, August 8
- Tuesday, August 10

For the foregoing reasons, to protect the integrity of the October 3, 2017 regular municipal election, this Court must exercise its authority to hear this Motion and the merits of Plaintiffs' claims at the earliest possible date, and **no later than August 9, 2017**.

Respectfully submitted,



By: Elizabeth Wagoner

Elizabeth Wagoner

elizabeth@nmpovertylaw.org

Tim Davis

tim@nmpovertylaw.org

Attorneys for Plaintiffs

NEW MEXICO CENTER ON LAW AND POVERTY

924 Park Avenue SW, Suite C

Albuquerque, NM 87102

Phone: (505) 255-2840

CERTIFICATE OF SERVICE

I hereby certify that on this this 27th day of July, 2017 the foregoing pleading was e-filed and served on counsel for all parties through the Court's electronic filing system, and I further certify that on that date I caused to be emailed a copy to Christopher Tebo, ctebo@cabq.gov, and Jessica Hernandez, jmhernandez@cabq.gov, counsel for Defendants the City of Albuquerque, the Albuquerque City Council, and City Counselors Brad Winter, Dan Lewis, Trudy Jones, Ken Sanchez, and Don Harris; on Tim Adler, tja@atlerfirm.com, counsel for Defendant City Counselors Isaac Benton, Diane Gibson, Pat Davis, and Klarissa Peña, and on Patrick Rogers, counsel for Intervenors, at patrogers@patrogerslaw.com.

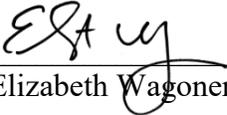

Elizabeth Wagoner

EXHIBIT 1

Elizabeth Wagoner

From: Tebo, Christopher J. <ctebo@cabq.gov>
Sent: Monday, 26 June 2017 10:24
To: Elizabeth Wagoner; Tim Davis
Cc: 'Pat Rogers' (patrogers@patrogerslaw.com); Yntema IV, Hessel E.; Berglund, Kathy; Hernandez, Jessica M.; Tim Adler
Subject: RE: have looked into RE: N. Howard Deposition

Dear Elizabeth,

I did thank you. Ms. Howard is not available for deposition during the week of July 3.

As for production, we cannot agree to the proposed schedule you reference below. That said, we do anticipate producing the materials in full accordance with the Court's order; i.e. no later than July 10 at 4 p.m.

Regards,
Chris

CHRISTOPHER J. TEBO

Assistant City Attorney – Real Estate and Land Use
Office of the City Attorney
One Civic Plaza – P.O. Box 2248 – Room 4072
Albuquerque, NM 87103
(505) 768-4652 – Direct | (505) 768-4525 – Facimile | (505) 768 – 4500 – Main

From: Elizabeth Wagoner [mailto:elizabeth@nmpovertylaw.org]
Sent: Monday, June 26, 2017 9:47 AM
To: Tebo, Christopher J.; Tim Adler
Cc: Tim Davis; 'Pat Rogers' (patrogers@patrogerslaw.com); Yntema IV, Hessel E.; Berglund, Kathy; Hernandez, Jessica M.
Subject: have looked into RE: N. Howard Deposition

Chris,

Thanks. I want to be sure you saw the email below concerning our proposal to move the schedule up to a production date of July 5 and a deposition date of July 7. Could you please ask Ms. Howard whether this is feasible and let me know the response?

Thanks,
Elizabeth

From: Tebo, Christopher J. [mailto:ctebo@cabq.gov]
Sent: Monday, 26 June 2017 09:19
To: Tim Adler <tja@atlerfirm.com>; Elizabeth Wagoner <elizabeth@nmpovertylaw.org>
Cc: Tim Davis <tim@nmpovertylaw.org>; 'Pat Rogers' (patrogers@patrogerslaw.com) <patrogers@patrogerslaw.com>;

Yntema IV, Hessel E. <hyntema@cabq.gov>; Berglund, Kathy <kberglund@cabq.gov>

Subject: RE: N. Howard Deposition

Counsel,

Notwithstanding Council's action last week, and given the availability of all counsel, as well as Ms. Howard, it appears we've narrowed down the afternoon of July 20 or the morning/afternoon of July 21 as the times open for Ms. Howard's deposition. We will ensure her schedule remains open for either of those times.

Per earlier emails, the setting should be in Judge Malott's jury room.

Regards,
Chris

CHRISTOPHER J. TEBO

Assistant City Attorney – Real Estate and Land Use
Office of the City Attorney
One Civic Plaza – P.O. Box 2248 – Room 4072
Albuquerque, NM 87103
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From: Tim Adler [<mailto:tja@atlerfirm.com>]

Sent: Monday, June 19, 2017 1:52 PM

To: Elizabeth Wagoner

Cc: Tebo, Christopher J.; Tim Davis; 'Pat Rogers' (patrogers@patrogerslaw.com); Yntema IV, Hessel E.; Berglund, Kathy

Subject: Re: N. Howard Deposition

Good afternoon -

I can be available on July 7, 20 or 21 for Ms. Howard's deposition.

Thanks -

Tim

Tim Adler

ATLER LAW FIRM, P.C.

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On Jun 16, 2017, at 4:54 PM, Elizabeth Wagoner <elizabeth@nmpovertylaw.org> wrote:

Counsel,

We believe it is in the interest of all parties to resolve this case as quickly as possible, so that the Court can make a determination on the legibility question without the need for expedited emergency motions close to the ballot finalization deadline of August 11.

Tim Atler said at the hearing that his clients thought that Ms. Howard and council staff would be preparing a mock 2017 ballot in late June or early July. If that is also your understanding, then we propose that defendants produce the mock ballot(s) on July 5, and that the deposition take place on July 7. We anticipate needing no more than 4 hours, and agree that the best place for this deposition is Judge Malott's jury room.

All, please let us know your thoughts on this timeline. We are also willing to move the schedule up – my only limitation is the week of July 10-17, when I will be out of state.

Sincerely,

Elizabeth Wagoner
Supervising Attorney, Workers' Rights
New Mexico Center on Law and Poverty
924 Park Avenue SW, Suite C, Albuquerque, NM 87102
Phone: (505) 255-2840 □ Fax: (505) 255-2778
elizabeth@nmpovertylaw.org

From: Tebo, Christopher J. [<mailto:ctebo@cabq.gov>]
Sent: Friday, June 16, 2017 3:05 PM
To: Elizabeth Wagoner; Tim Davis; 'Pat Rogers' (patrogers@patrogerslaw.com); tja@atlerfirm.com
Cc: Yntema IV, Hessel E.; Berglund, Kathy
Subject: N. Howard Deposition

Dear Counsel,

Subsequent to the Court's verbal June 14 order, Ms. Howard and her counsel are currently available throughout the day on either July 18, 19 or 21, or on the afternoon of July 20, to appear for her deposition in this case.

Given Ms. Howard's ongoing responsibilities in the few weeks remaining before July 24, we request that her deposition be taken at City Hall in one of the Legal Department's 4th floor conference rooms. If the parties are unable to agree on this location, then we suggest the Court's offer of the jury room as a venue for the setting be accepted.

We look forward to hearing back from you regarding your availability as well as receiving a notice of deposition once all parties have weighed in and the date identified.

Regards,
Chris

CHRISTOPHER J. TEBO

Assistant City Attorney – Real Estate and Land Use

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