CITY OF ALBUQUERQUE

BOARD OF ETHICS AND CAMPAIGN PRACTICES

NERI HOLGUIN,

Complainant,

v. Case No. BOE 01-2021

MANUEL GONZALES, III,

Respondent.

RESPONDENT'S BRIEF OF LEGAL AUTHORITIES

The *Holguin I* case involves an extremely isolated incident — extending to exactly *one* $5 qualifying contribution ("QC") — with no evidence whatsoever of a broader pattern that might tend to either seriously impugn the campaign's (or even the Sheriff's personal) overall QC-collection efforts, or even to suggest that the isolated-incident narrative offered by Mr. Zantow is true. That's not to say that Mr. Zantow is lying; just that all indications are that the environment was fast-moving and the Sheriff-to-Zantow communications ambiguous, and received differently than they were intended. The proper resolution of this Complaint is invalidation of Mr. Zantow's QC and reduction of the Sheriff's total by one — if Mr. Zantow says that he didn't give the $5 that was attributed by the campaign to the QC receipt that he undisputedly signed, then he probably didn't, and the QC should be invalidated, in the same way that a large number of both the Sheriff's and Tim Keller's campaigns' QCs have been invalidated for being made by non-City residents, non-registered voters, or two-time donors — but nothing further.

Importantly, this incident has no relationship whatsoever with the broader-in-scope allegations of the *Holguin II* case, as the Complainant seems to recognize by not submitting any of that case's evidence in support of this Complaint. The *Holguin I* and *Holguin II* allegations

differ in basic nature of the alleged violation (allowing third-party funding in connection with a QC receipt filled out by the voter, versus forging QC receipts for either non-donors or donors who didn't fill out a QC slip), the means of committing it (an out-loud and in-person statement at a meeting of white-collar professionals, versus a secret transposition of signatures from nominating petitions to QC receipts), the motive for committing it (Mr. Zantow himself will say that *he was about to give $5* before he heard what he thinks he heard from the Sheriff, so it's not clear what the motive would be here, under the Complainant's theory), and the personnel involved (the Sheriff personally, accompanied solely by his two Undersheriffs, versus two women working for the campaign who did not attend the Salvation Army meeting).

I. <u>There is woefully insufficient evidence of fraud under the relevant legal standard</u>.

The substantive section that the Sheriff is alleged to have violated — and that the Respondent concedes the QC itself is covered by — sets forth the appropriate remedy:

> All $5 Qualifying Contributions must be paid by the contributor; ***if the funds are provided by any person other than the contributor who is listed on the receipt***, the Qualifying Contribution will be deemed fraudulent. ***The City Clerk shall not certify Qualifying Contributions toward the required number of Qualified Contributions necessary to qualify*** an Applicant Candidate as a Participating Candidate that do not meet the requirements of this paragraph.

2021 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code, Part C(6), at 8 ("Clerk's OEEC Regulations") (emphases added). The Complainant obviously doesn't want that to be the answer, though, because the Sheriff currently has 403 more City Clerk-validated QCs than needed.

What the Complainant wants is for the Board to win the election for her by stripping the Sheriff of public financing. But even under the Clerk's OEEC Regulations — which the Respondent contends violate, in this respect, the City Charter (both the Ethics Code of Article XII and the OEEC itself, which is Article XVI) and the Board of Ethics' Rules — yanking public

financing away from the voters who electorally supported the Sheriff with their QCs is allowed only when "the candidate or an agent of the candidate . . . [s]ubmitted any fraudulent Qualifying Contributions or Qualifying Contributions that were not made by the named contributor, and the Participating Candidate knew or should have known of the fraudulence." Clerk's OEEC Regulation C(17), at 11.

It is well-established, of course, that fraud, somewhat unusually among accusations made outside of the criminal context, must be proven by clear and convincing evidence, rather than a mere preponderance of the evidence.[1] "Fraud requires a false representation with intent to deceive, and this must be established by clear and convincing evidence." *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 30 (citation omitted). "The clear and convincing evidence standard means that the evidence should be 'clear' in the sense that it is certain, plain to the understanding, unambiguous, and 'convincing' in the sense that it is so reasonable and persuasive as to cause the jury to believe it." *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1509 n.27 (D. Kan. 1990).[2] The so-called fraud here occurred in a split-second, ambiguous, and easily misunderstandable statement that went uncorroborated by the other individuals, including mostly people unaffiliated with the campaign, present — the Complainant sent out private investigators after every advisory board member that would talk to them, and the Board of Ethics won't be hearing from any of them besides Mr. Zantow.

[1] *See Mason v. Salomon*, 1957-NMSC-043, ¶ 11 ("The rule is that transactions are presumed to be fair and honest until the contrary is proved by clear and convincing evidence . . . . [T]he burden is upon the party alleging fraud to establish its existence by clear and convincing evidence." (citations omitted)); *Steadman v. Turner*, 1973-NMCA-033, ¶ 5 ("Each element of fraud must be established by clear and convincing evidence.").

[2] *See also Black's Law Dictionary* (11th ed. 2019) (defining "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. • This is a greater burden than preponderance of the evidence . . . ."); II Stephen Michael Sheppard, *Bouvier Law Dictionary* 2221 (desk ed. 2012) (defining "clear and convincing evidence" as "requir[ing] more evidence than a proof by a preponderance of the evidence but not quite so much as proof beyond a reasonable doubt").

The standard that the candidate "should have known" cannot be read to undo these high burdens — the intent of that standard's inclusion is not to change the well-known definition of the word "fraud," but rather to prevent candidates from deliberately ignoring fraud committed *by others* in the campaign. There are no imputed or implied-in-law duties here, either, even under the Clerk's OEEC Regulations: although someone is required to sign the "Representative Collecting Contribution" line on the QC receipts, there are no rules requiring that that person have personally verified that the requirements of a legally valid QC are met, let alone equating a signature on that line to an attestation to the validity (or even non-fraudulence) of the QC.

II. Even if there were fraud by the candidate — which there isn't — it would not justify wholesale denial of public financing under this Board's own precedent, state law, or basic principles of voter enfranchisement and electoral fairness.

Interpreting the "any fraudulent [QCs]" provision of Part C(17) of the Clerk's OEEC Regulations to allow the complete undoing of the voters' democratic decision to award a candidate public financing — at a crucial point midway through the campaign, after the campaign has been foregoing private fundraising for the whole time — over *one* "fraudulent" QC presents obvious problems regardless of the severity of the fraud and the personal involvement of the candidate. The Sheriff submitted 4,182 City Clerk-validated (*i.e.*, facially valid, from registered voters in the City) QCs, which is 403 more than the required number. The Complaint is thus attacking 0.0239% of the Gonzales campaign's signatures.

In this Board's prior decision in *Padilla v. Benavidez*, BOE 02-2017, the Board found "that nineteen (19) violations of Article XVI of the City Charter (OPEN AND ETHICAL ELECTIONS CODE) occurred for which Respondent Javier Benavidez is ultimately responsible," but nonetheless simply issued at $100-per-violation fine against him. *Benavidez* Decision ¶¶ 1-2, at 2-3 (filed Sept. 19, 2017). This decision was animated, rightly, by the same principles that should

govern here, which are also the principles that guide our state courts to aggressively shoot down nominating-petition challenges at the legislative, statewide judicial and executive, and gubernatorial level: the *voters* chose to give the Sheriff public financing, and the Sheriff's ability to compete with public financial support is an electoral outcome, not unlike winning a primary or obtaining ballot access. *See, e.g., Charley v. Johnson*, 2010-NMSC-024, ¶¶ 10-11 ("[I]t was not just [the nominee's] interests that were at stake, but also the right of the citizens to nominate and vote for the candidate of their choice . . . . [E]very precaution must be taken to protect the right of New Mexico citizens to vote for the candidate of their choice." (citations omitted)); *Gunaji v. Macias*, 2001-NMSC-028, ¶ 29 ("[A]n election is only 'free and equal' if the ballot allows the voter to choose between the lawful candidates for that office . . . ."); *id.* ¶ 26 ("The omission of a candidate's name from the ballot has deprived some voters of that choice, thereby, strictly speaking, compromising the validity of the election." (citation omitted)). Denying a candidate in the Sheriff's position public financing does not necessarily disqualify him from winning the election — neither does denying ballot access, since you can run as a write-in — but as a practical matter, it does.

III. Clerk's OEEC Regulation C(17) is *ultra vires* and violates the City Charter and this Board's own rules.

This Board in fact lacks jurisdiction to impose the sanction of depriving the Sheriff of public financing. Space in this brief is limited, and it seems exceptionally unlikely that the Board is actually going to grant such relief, so few words will be devoted to this argument. But the City Charter is clear about what entitles a candidate to, and disqualifies him from, public financing; what this Board's powers are; and what the City Clerk's rulemaking authority extends to. And it's not denial of public financing for subjectively assessed misconduct.

IV. Procedural violations by the Complainant and the City Clerk warrant (and actually mandate) dismissal.

The Complainant filed her witness list, exhibits, and statement of issues — known collectively as § 4(E)(2) notices/disclosures — on July 2, exactly 9 business days before this hearing set for July 16. This is a problem because these disclosures must be filed "at least 10 days prior to the scheduled hearing,"[3] and the "[f]ailure of a Complainant to comply *fully* with this paragraph *shall* result in a dismissal of the complaint."[4] Board of Ethics' Rules § 4(E)(2), at 7 (emphases added).[5] Although this may seem ticky-tacky, bear in mind this is a case where the Complainant is attacking *one* QC whose putative legal defects are not only not egregious, it's outright questionable whether they really exist.

A bigger problem is that the witness list filed that day is clearly defective, listing, as Witness #5, "Other Members of the Salvation Army Advisory Board." That's not what a "witness list" is. Given that the allegations occurred *at* a Salvation Army Advisory Board meeting, it isn't even a good non-name description of who they intend to call. In fairness to the Complainant, however, when the Respondent called out the Complainant over this issue and asked that she disclose her witnesses, she responded a few days later, on July 9, to let the Respondent know that the Complainant "expect[ed] to call Heidi Brooks, Neri Holguin, Dean Zantow and Kari

[3] As the City Clerk told both sides' attorneys early on this case, the Uniform Statute and Rule Construction Act ("USRCA") supplies, among other things, time-computation rules, and under the USRCA, "if the period is less than eleven days, a Saturday, Sunday or legal holiday is excluded from the computation." NMSA 1978, § 12-2A-7(E). July 5 was a federal holiday.

[4] "As used in the Election Code, 'shall' is mandatory and 'may' is permissive." NMSA 1978, § 1-1-3. "'Shall' and 'must' express a duty, obligation, requirement or condition precedent." NMSA 1978, § 12-2A-4(A) (USRCA).

[5] The Respondent also filed his § 4(E)(2) notices on July 2 — after the Complainant's, as is his right — but the rules are, rightly, not symmetrical in this regard, and do not provide for mandatory default against respondents like they do against complainants. *See* Board of Ethics' Rules § 4(E)(2), at 7 ("Failure of a Respondent to comply fully with this paragraph *may* result . . . in admission of all alleged charges . . . ." (emphasis added)).

Brandenburg." Email from Lauren Keefe to Carter Harrison (dated July 9, 2021). This does indeed greatly reduce the prejudice to the Respondent.

What is honestly less acceptable are the violations by the City Clerk himself of not only the Board of Ethics' Rules — which provide that prior decisions and advisory opinions have precedential value and that "[p]rior decisions *are available* at the City Clerk's Office"[6] — but of the Inspection of Public Records Act, since it's now well past even the 15-day deadline that applies under state law. These decisions need to be made available — ideally free (which the City Clerk won't do), but available regardless.

CONCLUSION

This Board should dismiss the Complaint and enter a decision finding that the communications between the Sheriff and Mr. Zantow were non-fraudulent.

Respectfully submitted,

HARRISON & HART, LLC

By: _____

Carter B. Harrison IV
924 Park Avenue SW, Suite E
Albuquerque, NM 87102
Tel: (505) 369-6599
Fax: (505) 341-9340
Email: carter@harrisonhartlaw.com

Attorneys for the Respondent

This Brief Has No Exhibits

[6] Board of Ethics' Rules § 3(D)(3), at 3; *id.* § 4(E)(4)(e), at 8 ("Prior decisions by the Board on the same issue will generally be followed and the parties are urged to refer to prior rulings on identical or similar issues. Prior decisions are available at the City Clerk's Office. The City Clerk shall index all Board case decisions by subject and date." (emphasis added)).

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 2021, I submitted the foregoing Brief via email to the Albuquerque City Clerk (ewatson@cabq.com), the Board of Ethics and Campaign Practices (aschultz@rodey.com), and to the following counsel of record:

Lauren Keefe
Keefe Law Firm
P.O. Box 40693
Albuquerque, NM 87196
(505) 307-3447
keefelawoffice@gmail.com

Attorneys for the Plaintiff

HARRISON & HART, LLC

By: */s/ Carter B. Harrison IV*
Carter B. Harrison IV