


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*,
M. KEITH RIDDLE, *et al.*,
in their official capacities as County Clerks,

Petitioners,

v.

Docket Number: **S-1-SC-38228**

MAGGIE TOULOUSE OLIVER,
in her official capacity as Secretary of State,

Respondent.

**STIPULATED VERIFIED EMERGENCY PETITION
SEEKING EXTRAORDINARY WRIT RELIEF FOR THE 2020
PRIMARY ELECTION AND PRESIDENTIAL PRIMARY ELECTION**

Submitted by:

*Counsel for Petitioners
the County Clerks*

DANIEL A. IVEY-SOTO
INACCORD,
A PROFESSIONAL CORPORATION
1420 Carlisle Blvd. NE, Suite 208
Albuquerque, New Mexico 87110-5662
(505) 881 – 4475
Daniel@InAccord.pro

*Counsel for Respondent
the Secretary of State*

TONYA NOONAN HERRING
GENERAL COUNSEL
OFFICE OF THE SECRETARY OF STATE
325 Don Gaspar Avenue, Suite 300
Santa Fe, New Mexico 87501-4401
(505) 827 – 8306
Tonya.Herring2@state.nm.us

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE STATE OF NEW MEXICO, *ex rel.*,

M. KEITH RIDDLE,

in his official capacity as Clerk of Catron County, and
Chair of the New Mexico County Clerks Affiliate;

SHELLY K. TRUJILLO,

in her official capacity as Clerk of Sierra County, and
Chair-Elect of the New Mexico County Clerks Affiliate;

LINDA STOVER,

in her official capacity as Clerk of Bernalillo County, and
Vice President of the New Mexico Association of Counties;

MICHELLE E. DOMINGUEZ,

in her official capacity as Clerk of Cibola County;

RAYETTA M. TRUJILLO,

in her official capacity as Clerk of Colfax County;

ROSALIE A. GONZALES-JOINER,

in her official capacity as Clerk of De Baca County;

AMANDA LOPEZ ASKIN,

in her official capacity as Clerk of Doña Ana County;

ROBIN VAN NATTA,

in her official capacity as Clerk of Eddy County;

MARISA CASTRILLO,

in his official capacity as Clerk of Grant County;

PATRICK Z. MARTINEZ,

in his official capacity as Clerk of Guadalupe County;

C.J. GARRISON,

in her official capacity as Clerk of Harding County;

MELISSA K. DE LA GARZA,

in her official capacity as Clerk of Hidalgo County;

NAOMI D. MAESTAS,

in her official capacity as Clerk of Los Alamos County;

ANDREA RODRIGUEZ,
in her official capacity as Clerk of Luna County;

HARRIETT K. BECENTI,
in her official capacity as Clerk of McKinley County;

CARLOS ARELLANO,
in his official capacity as Clerk of Mora County;

ROBYN HOLMES,
in her official capacity as Clerk of Otero County;

ELLEN L. WHITE,
in her official capacity as Clerk of Quay County;

LINDA J. PADILLA,
in her official capacity as Clerk of Rio Arriba County;

GERALDINE E. GUTIERREZ,
in her official capacity as Clerk of San Miguel County;

EILEEN GARBAGNI,
in her official capacity as Clerk of Sandoval County;

GERALDINE SALAZAR,
in her official capacity as Clerk of Santa Fe County;

BETTY SAAVEDRA,
in her official capacity as Clerk of Socorro County;

ANNA MARTINEZ,
in her official capacity as Clerk of Taos County;

LINDA JARAMILLO,
in her official capacity as Clerk of Torrance County;

MARY LOU HARKINS,
in her official capacity as Clerk of Union County; AND

PEGGY CARABAJAL,
in her official capacity as Clerk of Valencia County,

Petitioners,

v.

MAGGIE TOULOUSE OLIVER,
in her official capacity as Secretary of State,

Respondent.

**STIPULATED VERIFIED EMERGENCY PETITION
SEEKING EXTRAORDINARY WRIT RELIEF FOR THE 2020
PRIMARY ELECTION AND PRESIDENTIAL PRIMARY ELECTION**

Submitted by:

*Counsel for Petitioners
the County Clerks*

DANIEL A. IVEY-SOTO
INACCORD,
A PROFESSIONAL CORPORATION
1420 Carlisle Blvd. NE, Suite 208
Albuquerque, New Mexico 87110-5662
(505) 881 – 4475
Daniel@InAccord.pro

*Counsel for Respondent
the Secretary of State*

TONYA NOONAN HERRING
GENERAL COUNSEL
OFFICE OF THE SECRETARY OF STATE
325 Don Gaspar Avenue, Suite 300
Santa Fe, New Mexico 87501-4401
(505) 827 – 8306
Tonya.Herring2@state.nm.us

Table of Contents

Cover Page	1
Complete Caption	2
Table of Contents & Type-Volume Compliance Statement	5
Table of Authorities	6
A. Jurisdiction	9
B. The State of New Mexico Faces a Public Health Emergency Unprecedented in Modern Times	11
C. In the Midst of this Pandemic, County Clerks are Preparing for the 2020 Primary Election	13
D. It is Impossible to Lawfully Administer the 2020 Primary Election in the Midst of the COVID-19 Pandemic	19
E This Court is the Last Resort to Both Conduct a Lawful Election and Preserve the Public Health	23
F. Conclusion and Prayer for Relief	30
Verification	31
Certificate of Service	32

Type-Volume Compliance Statement

Per Rule 12-318 NMRA, the body of this brief is prepared using a proportionally-spaced typeface and, according to the word count feature in Microsoft Word 2019, contains 4,328 words.

Table of Authorities

New Mexico Constitutional Provisions

N.M. Const. art. III, § 1	20
N.M. Const. art. IV, § 1	23
N.M. Const. art. VI, § 3	10
N.M. Const. art. VII, § 1	14, 19, 20
N.M. Const., art XX, § 1	19

New Mexico Appellate Cases

<i>ACLU of N.M. v. City of Albuquerque</i> , 2008-NMSC-045, 144 N.M. 471	9, 10
<i>Chase v. Lujan</i> , 1944-NMSC-027, 48 N.M. 261	20, 21
<i>City of Raton v. Sproule</i> , 1967-NMSC-141, 78 N.M. 138	21
<i>Cobb v. N.M. State Canvassing Board</i> , 2006-NMSC-034, 140 N.M. 77	21
<i>Hilburn v. Brodhead</i> , 1968-NMSC-142, 79 N.M. 460	24
<i>Lopez v. Kase</i> , 1999-NMSC-011, 126 N.M. 733	25
<i>Navajo Academy, Inc. v. Navajo United Methodist Mission School, Inc.</i> , 1990-NMSC-005, 109 N.M. 324	24, 25
<i>People’s Constitutional Party v. Evans</i> , 1971-NMSC-116, 83 N.M. 303	21
<i>Romero v. Munos</i> , 1859-NMSC-008, 1 N.M. 314	24
<i>State of New Mexico, ex rel., Brandenburg v. Blackmer</i> , 2005-NMSC-008, 137 N.M. 258	10
<i>State ex rel. Clark v. Johnson</i> , 1995-NMSC-048, 120 N.M. 562	11
<i>State ex rel. League of Women Voters v. Advisory Comm. to the N.M.</i> <i>Compilation Comm’n</i> , 2017-NMSC-025, 401 P.3d 734	10
<i>State of NM ex rel. League of Women Voters v. Herrera</i> , 2009-NMSC-003, 145 N.M. 563	29
<i>State ex rel. Witt v. State Canvassing Bd.</i> , 1968-NMSC-017, 78 N.M. 682	19
<i>Unite New Mexico v. Oliver</i> , 2019-NMSC-009, 438 P.3d 343	20

Federal Laws

Help America Vote Act of 2002 (HAVA), 52 U.S.C. 21081 to 21102 (2014)	28
Voting Accessibility for the Elderly and Handicapped Act of 1998, 52 U.S.C. §§ 20101 to 20107 (2014)	27, 28
Voting Rights Act of 1965 (VRA), 52 U.S.C. §§ 10301 to 10314 (2014)	28

New Mexico Statutes

Election Code, NMSA 1978, §§ 1-1-1 to 1-26-6 (1969, as amended through 2019)	9
Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2013)	23
NMSA 1978, § 1-2-1 (2017)	10
NMSA 1978, § 1-2-2 (2011)	10
NMSA 1978, § 1-2-5 (1975)	18
NMSA 1978, § 1-2-6 (2019)	14
NMSA 1978, § 1-2-19 (1989)	15, 28
NMSA 1978, § 1-2-20 (2019)	15
NMSA 1978, § 1-3-2 (2019)	17, 26
NMSA 1978, § 1-3-4 (2019)	28
NMSA 1978, § 1-3-18 (2019)	17
NMSA 1978, § 1-4-5.7 (2019)	28
NMSA 1978, § 1-6-5.6 (2019)	27
NMSA 1978, § 1-6-5.7 (2019)	15, 17, 18, 27
NMSA 1978, § 1-6-5.8 (2019)	27
NMSA 1978, § 1-6-9 (2019)	26, 29
NMSA 1978, § 1-6-16 (2019)	27
NMSA 1978, § 1-6B-7 (2019)	18
NMSA 1978, § 1-8-2 (2019)	29
NMSA 1978, § 1-8-11 (2011)	13
NMSA 1978, § 1-8-18 (2019)	14, 18
NMSA 1978, § 1-8-51 (2019)	29
NMSA 1978, § 1-8-52 (2014)	29
NMSA 1978, § 1-9-13 (2010)	15
NMSA 1978, § 1-15A-2 (2011)	13
NMSA 1978, § 1-24-3 (2019)	26, 27
NMSA 1978, § 10-15-1 (2013)	23
NMSA 1978, § 10-15-2 (2009)	23

Other State Statutes

Ill. Code Ann. § 5/20-25	20
Ky. Rev. Stat. § 39A.100(1)(L)	20
La. Rev. Stat. § 18:401.1.A&B	20

New Mexico Court Rules

Rule 1-096 NMRA	14
Rule 12-307 NMRA	32
Rule 12-504 NMRA	9
Rule 23-112 NMRA	8

Other Sources

<i>Centers for Disease Control</i> , www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html	12
<i>Institute for Health Metrics and Evaluation</i> , covid19.healthdata.org/projections	12
<i>Johns Hopkins</i> , www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6	11, 12
Kunkel, Kathyleen M., Secretary of Health, <i>Letter dated March 29, 2020</i>	22
<i>New Mexico Department of Health</i> , cv.nmhealth.org	12, 13
<i>Nursing Center</i> , www.nursingcenter.com/ncblog/march-2020/covid-19-highest-risk	13
Pomeroy, John Norton, <i>A Treatise on Equity Jurisprudence</i> , Volume 1 (Symons ed., 5th ed. 1941)	24, 25
<i>The Bluebook: A Uniform System of Citation</i> (20th ed. 2015)	8
<i>World Health Organization</i> , www.who.int/emergencies/diseases/novel-coronavirus-2019	11

NOTE: Pursuant to Rule 23-112(F) NMRA and Rule 18 of *The Bluebook: A Uniform System of Citation*, all Internet citations in this brief were last checked on March 30, 2020.

COME NOW, Petitioners, twenty-seven of the State’s thirty-three County Clerks (collectively “County Clerks”) in their official capacities as local elected officials and the administrators of elections in their respective Counties, and Respondent, the Secretary of State in her official capacity as a statewide elected official and as the chief election officer of this state, to petition this Honorable Court pursuant to Rule 12-504(B)(3) NMRA in an emergency for extraordinary writ relief invoking this Court’s original jurisdiction as a court of equity, and in support thereof, the Parties in unison hereby **STATE**:

A. JURISDICTION

- 1) Petitioners County Clerks, appearing in their official capacity, are elected officials in their respective Counties. The County Clerk is the official responsible for administering elections and the election process in each County of the State. See Election Code, NMSA 1978, §§ 1-1-1 to 1-26-6 (1969, as amended through 2019).
- 2) Petitioners have standing to bring this case on their behalf, on behalf of the Elections Boards and other temporary election workers appointed by the Clerk, and on behalf of the voters in each of their Counties. This case presents a matter of great public importance. See *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 33, 144 N.M. 471 (“It is clear that this Court can ‘confer’

standing and reach the merits of a case regardless of whether a plaintiff meets the traditional standing requirements, based on a conclusion that the questions raised involve matters of great public importance.”). In analyzing the cases where the great public importance doctrine is applicable, this Court has found that: “The right of qualified electors to vote is fundamental to the integrity of state government.” *State ex rel. League of Women Voters v. Advisory Comm. to the N.M. Compilation Comm'n*, 2017-NMSC-025, ¶ 10, 401 P.3d 734.

- 3) Respondent Secretary of State is the chief election officer of the state, NMSA 1978, § 1-2-1(A) (2017), whose responsibilities include supervising all elections by administering the Election Code in its statewide application, NMSA 1978, § 1-2-2(A) (2011), and maintaining uniformity in the application, operation and interpretation of the Election Code. § 1-2-1(B).
- 4) Our Constitution provides that: “The supreme court shall have . . . power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same.” N.M. Const. art. VI, § 3.
- 5) The issues raised in this proceeding are of statewide interest and importance, and thus an appropriate exercise of this Court’s original jurisdiction. *State of New Mexico, ex rel., Brandenburg v. Blackmer*, 2005-NMSC-008, ¶¶ 8 & 10, 137 N.M. 258.

- 6) In addition, this Court should exercise original jurisdiction because: 1) the issue presents a fundamental question of great public concern; 2) the relevant facts are undisputed and no further factual questions exist to be decided; 3) the purely legal issue eventually will have come before this Court; and 4) the Petitioners and the Respondent desire an early resolution of the dispute. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 17, 120 N.M. 562.

B. THE STATE OF NEW MEXICO FACES A PUBLIC HEALTH EMERGENCY UNPRECEDENTED IN MODERN TIMES

- 7) This *Petition* is being written and submitted to this Court in the midst of a pandemic whose scope and impact continue to escalate; with no known timeframe before it can be determined that we are no longer experiencing a public health emergency, to wit: the numbers below will be out of date when the Court reads them.
- 8) COVID-19, a disease caused by infection from exposure to the SARS-CoV-2 virus, was first acknowledged to exist in humans in December 2019. *World Health Organization*, www.who.int/emergencies/diseases/novel-coronavirus-2019.
- 9) In 3 months and 5 days, the disease has spread to 177 countries, reporting 718,685 confirmed cases with 33,881 known associated deaths. *Johns Hopkins*,

www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6.

- 10) The first case was reported in the United States on January 21, 2020, and has since spread to 122,653 confirmed cases in all 50 states and five territories with 2,112 known associated deaths. *Centers for Disease Control*, www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.
- 11) The first case was reported in New Mexico on March 10, 2020 and has since spread 237 confirmed cases, resulting in 2 deaths. *New Mexico Department of Health*, cv.nmhealth.org.
- 12) Current academic projections are that New Mexico will suffer between 245 and 803 deaths from COVID-19 and that the current wave of SARS-CoV-2 infections in New Mexico may last through late July or August. *Institute for Health Metrics and Evaluation*, covid19.healthdata.org/projections.
- 13) The Governor of New Mexico has issued 7 Executive Orders in response to the outbreak and the Secretary of Health has issued 6 Public Health Orders. *New Mexico Department of Health*, cv.nmhealth.org/public-health-orders-and-executive-orders. Those orders have, among other precautions, limited gatherings of unrelated people and even then asked that non-related individuals stay at least 6 feet away from others, cancelled all public events, closed all restaurant and bar dining areas, and closed school for the rest of the school year.

- 14) In addition, this Court has issued at least three *Orders* in response the public health emergency.
- 15) While much of population may be exposed to the virus, high risk populations are particularly vulnerable to contract the disease. These include adults 60 years of age and older and people with underlying health conditions. *Nursing Center*, www.nursingcenter.com/ncblog/march-2020/covid-19-highest-risk.

**C. IN THE MIDST OF THIS PANDEMIC, COUNTY CLERKS
ARE PREPARING FOR THE 2020 PRIMARY ELECTION**

- 16) The 2020 Primary Election is set to be held on June 2, 2020. NMSA 1978, §1-8-11 (2011).
- 17) In presidential election years, a Presidential Primary Election is held concurrent with and on the same ballot as the Primary Election. NMSA 1978, § 1-15A-2 (2011).
- 18) The Presidential Primary Election is “conducted and canvassed along with and in the manner provided by law for the conduct and canvassing of the primary election.” NMSA 1978, § 1-15A-4 (2011). Although both elections are compiled distinctly, because they are held concurrent and in the same manner provided by law, Petitioners ask that the Court consider references in the rest of this *Petition* to the Primary Election to also be a reference to the Presidential Primary Election.

- 19) While this Court is well aware of the tight timeframes for the Primary Election in terms of candidate qualification challenges, NMSA 1978, § 1-8-18(B) (2019) and Rule 1-096 NMRA, there are a number of other deadlines in advance of voting with which County Clerks must abide.
- 20) Significant among these deadlines is that no later than the forty-second day before the election, which this year falls on Tuesday the 21st of April, the County Clerk must have appointed and confirmed the willingness to serve of every Election Board for the Primary Election including those for early voting, mobile voting, absentee, and election day. There are approximately 774 Election Boards appointed throughout the state, each with one presiding judge, two election judges, and the requisite number of election clerks for each polling location to operate. NMSA 1978, § 1-2-6 (2019); N.M. Const. art. VII, § 1(B).
- 21) In addition to Election Board members and depending on what part of the state and what resources a Clerk's Office may or may not have year-round, County Clerks may need to hire additional election workers to work the Primary Election, particularly since there are federal candidates on the ballot which makes several federal requirements applicable. These include:
- a) Messengers, who provide supplies back and forth between the County Clerk's Office and the polling locations and assist with expediting returns on the closing of the polls. NMSA 1978, § 1-2-20 (2019).

- b) Voting Machine Technicians, especially for the smaller Counties who don't have technicians on staff year-round. NMSA 1978, § 1-9-13 (2010).
 - c) Language Interpreters, primarily for areas with Indian nations, tribes, and pueblos. NMSA 1978, § 1-2-19 (1989).
 - d) Same Day Registration Officers, for those County Clerks conducting same day registration at early voting locations, these registration officers are required to be present at those early voting sites to work alongside the Election Board. NMSA 1978, § 1-6-5.7(C) (2019).
 - e) Extra staff in general, because the Election takes constant attention, especially since the County Clerk is also expected to continue to attend to the other regular duties of the Clerk's Office.
- 22) Because there is so much uncertainty about how long the COVID-19 pandemic will continue to spread, many experienced election workers are unwilling to work the 2020 Primary Election. The duties of voting machine technicians and the language interpreters is specialized and cannot be immediately replaced. The experience of the constitutionally-required presiding judges and election judges cannot effectively be replaced on a system-wide basis.
- 23) In preparing this *Petition*, each of the 33 County Clerks provided information regarding the number of Election Board members and other temporary election workers they planned to hire for the Primary, with results on the next page:

County Name	Election Workers	Number Aged 60+	Percent Aged 60+
Statewide	3733	2444	65.47%
Bernalillo	670	452	67.46%
Catron	45	40	88.89%
Chaves	66	42	63.64%
Cibola	77	40	51.95%
Colfax	60	45	75.00%
Curry	48	40	83.33%
De Baca	8	6	75.00%
Doña Ana	286	165	57.69%
Eddy	70	46	65.71%
Grant	80	64	80.00%
Guadalupe	30	20	66.67%
Harding	17	11	64.71%
Hidalgo	30	6	20.00%
Lea	100	90	90.00%
Lincoln	65	35	53.85%
Los Alamos	75	65	86.67%
Luna	25	22	88.00%
McKinley	165	67	40.61%
Mora	46	34	73.91%
Otero	111	67	60.36%
Quay	34	31	91.18%
Rio Arriba	165	85	51.52%
Roosevelt	40	34	85.00%
Sandoval	421	251	59.62%
San Juan	243	149	61.32%
San Miguel	115	95	82.61%
Santa Fe	280	180	64.29%
Sierra	38	26	68.42%
Socorro	48	35	72.92%
Taos	100	64	64.00%
Torrance	20	12	60.00%
Union	30	25	83.33%
Valencia	125	100	80.00%

- 24) For those election workers who do agree to receive their appointments, County Clerks are faced with a dilemma, as their most reliable and experienced workers come from an identified high risk population.
- 25) In addition, for the 2020 Primary Election there will be 568 election-day polling locations. The location of election-day polling places is the responsibility of each Board of County Commissioners, and were set for the entire election-cycle by resolutions adopted in June or July of 2019. NMSA 1978, § 1-3-2 (2019).
- 26) The location of the 168 early voting locations throughout 30 Counties were set by each County Clerk by posting 90 days before the primary (in many of the smaller Counties whose voter registration numbers do not trigger the alternate location requirement, the early voting location operates in lieu of voting at the County Clerk's office). § 1-6-5.7(A) & (A)(3).
- 27) Many of these 736 facilities are currently closed with no definitive plans on when they will reopen. County Clerks are required to do a physical inspection of each location at least 30 days before a statewide election, NMSA 1978, § 1-3-18 (2019), yet in many cases County Clerks do not have access to perform the inspection, and they have no guarantee these locations will be reopened and available when they are needed for voters to exercise the franchise during early voting or election day.

- 28) Ballots are to be delivered to military and overseas voters no later than April 18, 2020. NMSA 1978, § 1-6B-7(A) (2019). Voting in the County Clerk's office or an alternate location in lieu of the County Clerk's office begins on May 5th, 2020 (just 36 days from the day this *Petition* is filed with the Court), while widespread early voting locations and mobile voting locations begin on May 16, 2020. NMSA 1978, § 1-6-5.7 (2019). Election day voting for the 2020 Primary Election is June 2, 2020. NMSA 1978, § 1-8-11 (2011).
- 29) Finally, Petitioner brings to this Court's attention that before each statewide election, County Clerks are required by statute to attend an election seminar hosted by the Secretary of State to update the County Clerks on new procedures and requirements – or more likely in the case of this year's Primary, how to run an election in the midst of the public health crisis. NMSA 1978, § 1-2-5 (1975). This year the election seminar is scheduled over 3 days from the afternoon of Monday the 6th of April through the morning of Wednesday the 8th of April. Due to the current Public Health Orders, the seminar is being conducted via videoconference.

**D. IT IS IMPOSSIBLE TO LAWFULLY ADMINISTER THE
2020 PRIMARY ELECTION IN THE MIDST OF THE
COVID-19 PANDEMIC**

- 30) County Clerks have a choice: (a) follow the provisions of the Election Code for the conduct of a statewide election and risk the lives of their staff and those community members supporting the election process, not to mention the voters exercising their franchise; or (b) violate their oath of office in order to protect the health and safety of their community, their voters, their staffs, and themselves. No public official should be placed in this position.
- 31) County Clerks are prohibited from each going it alone and making County by County rules to protect election workers and voters. There is no authority in the Election Code for doing so, and if County Clerks were to begin enacting differing standards on access to voting, such would likely violate the equal protection clause. *See generally State ex rel. Witt v. State Canvassing Bd.*, 1968-NMSC-017, ¶ 18, 78 N.M. 682 (voting method resulting in the weight of votes to differ by county violates the equal protection clause).
- 32) The Secretary of State is bound by her oath of office to follow the constitution and laws of the state of New Mexico, N.M. Const. art XX, § 1, which in this situation makes her duty-bound to follow the Election Code.
- 33) The time, place, and manner of voting is the providence of the Legislature. N.M. Const. art VII, § 1(B).

- 34) There are a few states where the Legislature has adopted statutes to delegate to the Governor unilaterally or in conjunction with the Secretary of State or State Board of Elections the authority to change certain election rules in the face of a natural disaster or a declared emergency. See Louisiana Revised Statutes § 18:401.1.A&B, Kentucky Revised Statutes 39A.100(1)(L), and Illinois Code Annotated § 5/20-25.
- 35) Barring an act by the Legislature, a decision by the Governor or the Secretary of State to change the manner in which elections are held – even in the face of a deadly pandemic – would run afoul of Article VII, Section 1(B) of the New Mexico Constitution and thus violate separation of powers. N.M. Const. art. III, § 1. (“The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.”); see also *Unite New Mexico v. Oliver*, 2019-NMSC-009, ¶ 6, 438 P.3d 343 (“N.M. Const. art. VII, § 1(B) . . . vests our Legislature with plenary authority over elections, an authority limited only by the Constitution itself.”); *Chase v. Lujan*, 1944-NMSC-027, ¶ 24, 48 N.M. 261 (“[E]xcept as prohibited, the [L]egislature has plenary power to regulate the manner of voting

. . . .”); *People’s Constitutional Party v. Evans*, 1971-NMSC-116, ¶ 10, 83 N.M. 303 (“Elections of necessity must be organized and controlled to protect the right of suffrage, secrecy of the ballot, and against confusion, deception, dishonesty and other possible abuses of the elective franchise. The Legislature is charged with the duty of enacting laws to accomplish the purity of elections and protect against abuses.”); *City of Raton v. Sproule*, 1967-NMSC-141, ¶ 76, 78 N.M. 138 (“We are of the opinion that our constitution expressly contemplates and directs that the legislature shall provide the proper machinery for conducting elections for different purposes”).

- 36) The solution, of course, is for the Governor to call the Legislature into Special Session in order to approve either a change in the manner of voting for the 2020 Primary Election or a statute delegating to the Executive the ability to make limited changes to the election process in the face of a disaster or emergency, so long as that authority is sufficiently limited so as to avoid violating the nondelegation doctrine. *Cobb v. N.M. State Canvassing Board*, 2006-NMSC-034, ¶ 40-41, 140 N.M. 77.
- 37) Unfortunately, a Special Session is not feasible in the midst of a viral pandemic. In weighing the options for addressing this problem, the County Clerks Affiliate reached out to the Executive requesting a Special Session. That request was denied, with a letter that followed explaining the rationale:

MICHELLE LUJAN GRISHAM
GOVERNOR



KATHYLEEN M. KUNKEL
CABINET SECRETARY

VIA EMAIL: keith.riddle@catroncountynm.gov

March 29, 2020

Mr. Keith Riddle
Chair
County Clerks Affiliate
100 Main Street
Reserve, New Mexico 87830
keith.riddle@catroncountynm.gov

Re: Concerns regarding convening a special session during a declared public health emergency caused by novel coronavirus 2019 (COVID-19)

Dear Mr. Riddle:

As Cabinet Secretary of the New Mexico Department of Health, I write to express concern with the New Mexico Legislature convening a special session to enact vote-by-mail election laws during this serious and immediate public health emergency caused by COVID-19¹. The in-person convening of our 112 state legislators has the high likelihood of spreading this dangerous virus among individual legislators and may have the effect of further spreading this disease to every corner of the state upon the return of each legislator to their respective districts.

The social distancing and stay-at-home policies adopted by Governor Michelle Lujan Grisham are some of the most powerful tools the state can utilize in the fight against COVID-19. To this pursuit, I stand in full support of conducting vote-by-mail elections during this public health emergency to promote social distancing and prevent the unnecessary in-person gathering of thousands of New Mexicans at polling locations across the state. Convening a special session at this time will accelerate the community transmission of COVID-19 and place legislators, some of whom are at-risk for serious medical complications, in significant harm.

Sincerely,

A handwritten signature in blue ink that reads "Kathyleen M. Kunkel".

Kathyleen M. Kunkel
Cabinet Secretary
New Mexico Department of Health

¹ See <https://www.abqjournal.com/1434887/new-mexico-considers-holding-mail-elections.html>

OFFICE OF THE SECRETARY

1190 St. Francis Dr., Suite N4100 • P.O. Box 26110 • Santa Fe, New Mexico • 87502
(505) 827-2613 • FAX: (505) 827-2530 • www.nmhealth.org



- 38) It bears noting that 36 of the 70 members of the State House of Representatives (52%) and 25 of the 42 members of the State Senate (60%) are age 60 and older, such that the Legislature could not even achieve quorum in either chamber if a Special Session were attempted while allowing Members in a high risk category stay home.
- 39) Further, while the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2013), permits non-legislative bodies to meet telephonically, NMSA 1978, § 10-15-1(C) (2013), no such authority exists for legislative meetings, NMSA 1978, § 10-15-2 (2009). *See also* N.M. Const. art. IV, § 1 (“[T]he legislature of the state of New Mexico . . . shall hold its sessions at the seat of government.”).

**E. THIS COURT IS THE LAST RESORT TO BOTH
CONDUCT A LAWFUL ELECTION AND PRESERVE
THE PUBLIC HEALTH**

- 40) Given the public health crisis, the inability of the Legislature to meet in-person at this time, and the consequences of maintaining the status quo, the Parties have come to this Court to fashion a constitutional solution to proceed with the 2020 Primary Election in a manner that protects election workers and the public while honoring democracy.

- 41) At the very inception of New Mexico's territorial jurisprudence, there was a recognition that situations arise in which the law is incomplete and inadequate.

In such circumstances:

[e]quity obtains jurisdiction where the remedy at law is not plain, adequate, and complete. It is not enough to exclude its jurisdiction that there is a remedy at law. The remedy should be equal to give complete redress. If it fails in some essential quality, the equity may be invoked.

Romero v. Munos, 1859-NMSC-008, ¶ 2, 1 N.M. 314.

- 42) Slightly more than a century after the above concept was first articulated, this Court continued along that same line, recognizing:

that a court of equity has power to meet the problem presented, and to fashion a proper remedy to accomplish a just and proper result, and that the trial court in doing so in the instant case did not err.

Hilburn v. Brodhead, 1968-NMSC-142, ¶ 11, 79 N.M. 460.

- 43) And in *Navajo Academy, Inc. v. Navajo United Methodist Mission School, Inc.*, this Court further explained that:

[e]quitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.

1990-NMSC-005, ¶17, 109 N.M. 324 (*quoting* 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 109, at 141 (Symons ed., 5th ed. 1941)) (omission in original).

- 44) Petitioners assert to this Court that this *Petition* has established not only that there is no adequate remedy available at law, but that this is also very much an unusual and compelling circumstance, exceeding both thresholds for seeking equitable relief. *Lopez v. Kase*, 1999-NMSC-011, ¶ 6, 126 N.M. 733 (“[T]his Court generally will not grant equitable relief by way of an extraordinary writ when there is an adequate remedy available to the petitioner at law, absent unusual and compelling circumstances.”).
- 45) The Parties, while coming before this Court beseeching succor, recognize the need to do so in a manner that recognizes the temporal nature of this exigency, yet also protects the Judiciary itself from encroaching upon the providence of the Legislature as it pertains to the area of elections. To cut the Gordian Knot, Petitioners urge this Court to provide relief in this emergency by issuing a writ directing Respondent to conduct the 2020 Primary Election (and the concurrent Presidential Primary Election) using procedures that already exist in the Election Code, and thus already are Legislatively-adopted manners of conducting elections, adapted to this crisis.

46) As such, an equitable remedy would adapt procedures which are already legislatively-authorized for use in elections, adapted to the clear and present danger confronting the state for the 2020 Primary Election, as follows:

- a) There should be no in-person voting in the 2020 Primary Election, except as provided below. Instead, the 2020 Primary Election should be conducted primarily by mailed ballot.
- b) The 568 election-day polling places established pursuant to NMSA 1978, Section 1-3-2 (2019) should be ordered not to operate in the 2020 Primary Election.
- c) Delivery of ballots to voters 2020 Primary Election should follow the procedures for special elections contained in NMSA 1978, Section 1-24-3 (2019) (which also incorporates the applicable procedures in the Election Code for the conduct and canvass of an election). Doing so would ensure, among other procedures, that:
 - (1) without having to submit an application for a mailed ballot, the County Clerk should send each voter in the County whose election-related mail has not been returned and who is not on the inactive voter list a ballot by mail. Per Section NMSA 1978, Section 1-6-9(A) (2019), once received, the ballot is to be completed by the voter and then returned in the provided postage pre-paid official mailing

envelope after the voter signs under the privacy flap and provides the voter's name, registration address, and year of birth.

- (2) voters whose election-related mail has been returned or who are on the inactive voter list would be sent a notice by forwardable mail that no ballot will be mailed unless the voter submits an application for a mailed ballot, updates the voter's certificate of registration, or requests a replacement ballot; and
 - (3) all voters could be issued replacement or provisional ballots as needed, pursuant to parameters in Subsection E of Section 1-24-3.
- d) Recognizing that some voters will still require in-person assistance, the alternate locations and mobile alternate locations pursuant to NMSA 1978, Section 1-6-5.6 (2019), Section 1-6-5.7, and NMSA 1978, Section 1-6-5.8 (2019) should still operate, though not as early voting locations, but instead in the 2020 Primary Election as Service Centers in order to facilitate voters:
- (1) who need to receive replacement ballots, as well as provisional ballots as contemplated by Section 1-24-3(E) and NMSA 1978, Section 1-6-16 (2019);
 - (2) with disabilities to participate in the voting process as required by the federal Voting Accessibility for the Elderly and Handicapped Act

of 1998, 52 U.S.C. §§ 20101 to 20107 (2014), and the Help America Vote Act of 2002 (HAVA), 52 U.S.C. 21081 to 21102 (2014);

- (3) to update an existing registration and to facilitate qualified electors to register to vote immediately prior to voting, also known as same-day registration, as required for both a special election and a statewide election during the early voting period, NMSA 1978, Section 1-4-5.7(D) & (F) (2019), provided that pursuant to Subsection E of that Section, a voter would not be allowed to change political party affiliation when updating an existing voter registration immediately prior to voting in the Primary Election;
 - (4) where applicable, to receive oral language interpretation assistance as required by Section 1-2-19 and the federal Voting Rights Act of 1965 (VRA), 52 U.S.C. §§ 10301 to 10314 (2014); and
 - (5) in order to continue to comply with the above federal requirements, on Election Day early alternate location, whose operation on election day is authorized in NMSA 1978, Section 1-3-4(B)(6) (2019), should remain open on Election Day.
- e) Each County Clerk's Office in the 2020 Primary Election should also be a Service Center beginning 22 days before the election as contemplated by Section 1-24-3(D), as well as on Election Day, unless the County Clerk

has established an alternate location in lieu of voting in the County Clerk's office; provided that if a County Clerk's office is too small to meet Department of Health guidelines, the County shall provide the County Clerk a space which can meet such guidelines when operating as a Service Center.

- f) Each of the Service Centers in the 2020 Primary Election should also serve as a drop-off location to receive completed ballots from voters, though in a manner that minimizes or excludes personal contact with election workers. § 1-6-9(D).
- 47) The above modifications for the 2020 Primary Election will create the framework for an election that is capable of being administered in this crisis and which will protect the public. This Court has recognized the Secretary of State's role in providing guidance to establish uniform procedures throughout the state. *State of NM ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 9, 145 N.M. 563. The parameters listed above will permit Respondent to work with Petitioners to ensure consistency as County Clerks pivot to serve their communities.

F. CONCLUSION & PRAYER FOR RELIEF

- 48) This public health crisis has stressed the capacity of many families, businesses, and institutions. In the midst of the uncertainty, it is important that certain

scheduled events affecting each community in this state proceed, though in a manner adapted to the realities of what we know, and in preparation for what is to come that we do not yet know.

- 49) It is important for the 2020 Primary Election and Presidential Primary Election to occur, for people to be able to exercise their voice through their vote, and to know that, come what may, our republic is strong and our democracy is unwavering.
- 50) However, this election cannot happen without this Court's emergency intervention.

Respectfully Submitted by:

*Counsel for Petitioners
the County Clerks*

Daniel A. Ivey-Soto
DANIEL A. IVEY-SOTO
INACCORD,
A PROFESSIONAL CORPORATION
1420 Carlisle Blvd. NE, Suite 208
Albuquerque, New Mexico 87110-5662
(505) 881 – 4475
Daniel@InAccord.pro

*Counsel for Respondent
the Secretary of State*

Tonya Noonan Herring
TONYA NOONAN HERRING
GENERAL COUNSEL
OFFICE OF THE SECRETARY OF STATE
325 Don Gaspar Avenue, Suite 300
Santa Fe, New Mexico 87501-4401
(505) 827 – 8306
Tonya.Herring2@state.nm.us

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF CATRON)

I, M. Keith Riddle, after being first duly sworn upon my oath, state that I am the Chair of the New Mexico County Clerks Affiliate, and on behalf of the Petitioning County Clerks in the above entitled cause of action, I have read and understand the foregoing *Stipulated Verified Petition Seeking Extraordinary Writ Relief for the 2020 Primary Election and Presidential Primary Election*, and the same is true and correct to the best of my knowledge, information, and belief.



M. Keith Riddle
Catron County Clerk
NM County Clerks Affiliate Chair

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 12-307.2(B) NMRA a true and correct copy of the foregoing was filed with the Court by electronic transmission through the electronic filing system (EFS) approved by the Supreme Court for use by attorneys to file and serve documents by electronic transmission in Supreme Court or Court of Appeals proceedings. Pursuant to Rule 12-307.2(D) NMRA, undersigned Counsel elects to serve a conformed copy of the foregoing document by electronic transmission through the EFS.

Daniel A. Ivey-Soto

Daniel A. Ivey-Soto

INACCORD, P.C.

Counsel for Petitioners

County Clerks