IN THE SUPREME COURT OF NEW MEXICO

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

Petitioners,

v.

No. S-1-SC-38228

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

Respondent,

THE REPUBLICAN PARTY OF NEW MEXICO *et al.,*

Intervenors.

Brief of Amici Curiae Voters

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Certificate of Compliance with Rule 12-318(F) NMRA

I certify that, according to Rule 12-318(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains less than 11,000 words of substantive text, excluding all text excluded by that rule, and was prepare in size 14 Times New Roman font, which a proportionally-spaced type face, using WordPerfect as part of WordPerfect Office X9.

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U.S. Const. Article IV, § 4 53

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Other Authorities

B. Marsh, *Illinois Is Trying. It Really Is. But the Most Corrupt State Is Actually...*, N.Y. Times, Dec. 13, 2008. 47

David L. Caffey, *Chasing the Santa Fe Ring: Power and Privilege in Territorial New Mexico,* 184–85 (Univ. N.M. Press, 2014) 46

Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 864-69 (1994) 55

New Mexico Office of the Secretary of State Absentee and Early Voting, https://www.sos.state.nm.us/voting-and-elections/voter-information/absentee-and-early-voting/ 27

John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* 118 n.* (1980) 56

Lang, Heather, *Over 10 Million Americans applied for unemployment benefits in March as Economy Collapsed*, The Washington Post, April 2, 2020, ... 16, 18

Laurence H. Tribe, *American Constitutional Law* 398 (2d ed. 1988) 56

Richard L. Hasen, *Reining in the* Purcell *Principle*,
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S. Simon, *New Mexico's Political Wild West*, Wall St. J., Jan. 17, 2009 47

Introduction

Ronnie Cisneros, Darryl Dunlap, Stacie Ewing, Lynn Lewis, Jessica Sanders, Joe Delk, Dan Banks, Carolyn Banks, David Cheek, Timothy Burke, and Joye Burke (collectively, hereinafter "the Voters") appear as amici curiae in this extraordinary action to protect their fundamental right to vote as eligible and registered voters in New Mexico.

The stipulated Petitioners and Respondent (collectively, hereinafter "the Parties") seek a remedy that conflicts with both New Mexico's Constitution and election laws, but nonetheless beseech this Court to step outside of its properly delegated authority to "fashion a constitutional solution to proceed with the 2020 Primary election in a manner" that is neither equitable nor constitutional. What the Parties request this Court to do here is little else than pure anarchy that robs both the legislature and the eligible, registered voters of New Mexico of the authority and protections afforded each under the New Mexico and the United States Constitution.

Background on Registered Voters[1]

1. Ronnie Cisneros is a resident of and a qualified elector and registered voter in Dona Ana County, State of New Mexico. Mr. Cisneros votes in person and

[1] Counsel corrects facts pertaining to Voters misstated in previous pleading.

absentee. He is a grandfather.

2. Darryl Dunlap is a resident of and a qualified elector and registered voter in San Juan County, State of New Mexico. Mr. Dunlap served in the military, is medically retired, and votes in-person. He counts on being able to deliver his ballot to the vote tabulator to ensure his vote is counted. Mr. Dunlap is the President of the Farmington Visitors Bureau.
3. Stacie Ewing is a resident of and a qualified elector and registered voter in Colfax County, State of New Mexico. She runs three businesses in northern New Mexico. Ms. Ewing always votes in-person and does not want the government to dictate the manner by which she can vote.
4. Lynn Lewis is a resident of and a qualified elector and registered voter of Sandoval County, State of New Mexico. She votes in-person and is retired from the furniture industry.
5. Jessica Sanders is a resident of and a qualified elector and registered voter in Sandoval County, State of New Mexico. Ms. Sanders votes-in person. She was a teacher of the year.
6. Joe Delk is a resident of and a qualified elector and registered voter in Dona Ana County, State of New Mexico. Mr. Delk votes early in-person.
7. Dan Banks is a resident of and a qualified elector and registered voter in Eddy

County, State of New Mexico. Mr. Banks votes in-person. He is a retired attorney.

8. Carolyn Banks is a resident of and a qualified elector and registered voter in Eddy County, State of New Mexico.

9. David Cheek is a resident of and a qualified elector and registered voter in Dona Ana County, State of New Mexico.

10. Timothy L. Burke has been a resident of Bernalillo County, State of New Mexico since November 14, 1997. Mr. Burke is a registered voter in Bernalillo County; however, he has not updated his new address on his voter registration. Under the relief requested, Mr. Burke's ballot will be sent to his prior address, and will not be forwarded, and thereby denying his fundamental right to vote.

11. Joye Burke has been a resident of Bernalillo County, State of New Mexico since November 14, 1997. Mrs. Burke is a registered voter in Bernalillo County; however, she has not updated her new address on her voter registration. She is a Weekend On Call Supervisor for ARCA. Under the relief requested, Mrs. Burke's ballot will be sent to her prior address, and will not be forwarded, and thereby denying her fundamental right to vote.

Argument

The amici Voters in New Mexico have a fundamental right to vote established by both this State's and the Federal Constitution, but that right is imperiled by the Parties' requested relief in their Extraordinary Writ before this Court. The Parties here attempt to entice this Court to utilize the national emergency created by the Covid-19 virus as a guise to usurp the constitutionally delegated authority of the legislature and overrule and replace current election laws with robust protections against voter fraud with a *court*-created scheme of mail-in balloting. Amici argue that this Court should decline Parties' invitation and instead protect the integrity of the state's primary elections from voter fraud and preserve the rights of every eligible and registered voter in this State.

I.

The Petition Fails to Justify The Necessity for this Extraordinary Relief.

The Parties' petition claims as necessity for their extraordinary writ the Covid-19 global pandemic. But even in these sober times, this Petition fails to provide any legal basis to justify the extraordinary relief sought. The Parties recite the general data and figures that (Pet. at 11-13), they concede, "will be out of date when the Court reads them," (Pet. ¶ 7 at 11.) The Parties attempt to support their request by stating that "[m]any experienced election workers are unwilling to

work," (Pet. ¶ 22, at 15), and most of those "workers come from an identified high risk population," (Pet. ¶ 24, at 17), i.e., aged over 60.[2] None of these assertions though provide any usable information regarding the scope of the global or local threat in New Mexico on June 2, 2020—the date of the New Mexico Primary Election–or provide any necessary support for their requested relief.

Furthermore, there is no evidence that The Parties consulted with any healthcare professional to determine how to mitigate their concerns with holding an election as required by law. Moreover, The Parties acknowledge that "[t]he 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," (Pet. at 12), but The Parties failed to consult with the Governor's office or any other state agencies or officials for assistance to mitigate any health risks associated with voting in person before petitioning this Court.

The Petition builds no argument as to why this Court should provide a remedy instead of petitioning the legislature—only that "this Court is the last resort" to

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[2] There is no connection between people over age 60 and ability to hold a lawful election. Although some may no longer want to be poll workers, there are 10 million people out of work who are looking for jobs. *See* https://www.washingtonpost.com/business/2020/04/02/jobless-march-coronavirus/. Hiring younger poll workers is just one example out of many of measures that could be taken to mitigate any health risk in voting in person.

provide a lawful election and protect public health. (Pet. at 23) The Governor has the power to convene a special session (N.M. Const. Art. IV, § 6), but there is no evidence that the Parties have requested a proclamation from the Governor.[3] The Parties present a letter from the Cabinet Secretary of New Mexico Department of Health who generally expresses concerns for legislature convening for a special session. (Pet. at 22.) This letter does not state that the legislature cannot meet nor does the letter prohibit it. The letter provides no options for mitigation.

Finally, the Petition only alleges facts concerning the current state of the Covid-19 global pandemic. The Parties recite the general data and figures that (Pet. at 11-13), they concede, "will be out of date when the Court reads them," (Pet. ¶ 7, at 11). The Parties attempt to support their request by stating that "[m]any experienced election workers are unwilling to work," (Pet. ¶ 22, at 15), and most of those "workers come from an identified high risk population," (Pet. ¶ 24, at 17), i.e., aged over 60.[4] None of these assertions provide any usable

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[3] "Special sessions of the legislature may be called by the governor, but no business shall be transacted except such as relates to the objects specified in this proclamation." N.M. Const. Art. IV, § 6.

[4] There is no connection between people over age 60 and ability to hold a lawful election. Although some may no longer want to be poll workers, there are 10 million people out of work who are looking for jobs. *See* https://www.washingtonpost.com/business/2020/04/02/jobless-march-coronavirus/. Hiring younger poll workers is just one example out of many of measures that

(continued...)

information regarding the scope of the global or local threat in New Mexico on June 2, 2020—the date of the New Mexico Primary Election–or even discuss whether efforts could be made then to mitigate any health risks.

In sum, the Parties have not demonstrated why this Court should grant this emergency, extraordinary writ with any facts to justify any form relief, but certainly not relief as unconstitutional as has been requested here.

II.
Equity Is Not Available Remedy in this case.

The Parties claim that this Court has jurisdiction over this matter because "[t]he supreme court shall have . . . power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary and proper for the complete exercise of its jurisdiction and to hear and determine the same." (Pet. ¶ 4, at 10.) They have requested this Court issue an extraordinary writ in equity to alter the duly enacted election law of New Mexico. But the Court neither has original jurisdiction over this Petition nor can this Court provide any of the requested remedial relief, in equity or otherwise.

A. None of the judicial powers or remedies provided for in the New Mexico Constitution to the New Mexico Supreme Court are available here to grant the requested Relief.

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[4] (...continued)
could be taken to mitigate any health risk in voting in person.

The complete text from Article 6 Section 3 of the New Mexico Constitution makes explicit that the New Mexico Supreme Court's exercise of original jurisdiction is limited:

> The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also 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. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

N.M. Const. Art. VI, § 3. This text confines the Court's authority to hear and determine directly requests for three types of extraordinary writs: quo warranto,[5] mandamus, and superintending authority.[6] But the Petition nowhere identifies the writ sought as one of these specific writs.

The language above quoted has been determined by this Court to be language

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[5] This Court has held that "[o]ne of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims, and the court will go no further under its common law powers than to oust the wrongful possessor of the office." *State ex rel. King v. Sloan*, 2011-NMSC-020, ¶ 1, 149 N.M. 620, 253 P.3d 33. It is similar to, and can be exercised as an alternative to, legislative impeachment. *Id.*

[6] This Court is authorized to assert superintending control over the district and all inferior courts. *See State of New Mexico, ex rel., Brandenburg v. Blackmer*, 2005-NMSC-008, TT 8 & 10, 137 N.M. 258.

of limitation, as "[i]t is well settled that an express grant of original jurisdiction in given cases is an implied denial of it in all others." *Thurman v. Grimes*, 1931-NMSC-035, ¶ 11, 35 N.M. 498, 1 P.2d 972. In fact, this very principle has endured almost as long as this Court, which announced it in the second case reported of the territorial Supreme Court. *Id.* The Constitution so confined the courts for good reason:

> It became necessary, therefore, when it was deemed wise to confer upon this court certain original jurisdiction, to specifically point out its scope and specifically define its limits. In no other way could the result desired be accomplished. It seems clear that this grant is not, in legal contemplation, a specific grant of original jurisdiction, in the sense that it will exclude jurisdiction of other courts, but is, rather, a grant of original jurisdiction, which is merely specifically defined and limited.

State ex rel. Owen v. Van Stone, 1912-NMSC-003, ¶ 5, 17 N.M. 41, 121 P. 611. That wisdom confines the Court's exercise of jurisdiction in this matter.

The only extraordinary writ that could possibly be invoked by the relief requested by petition is a mandamus action, which would fail on the pleadings. As an extraordinary writ, "'[m]andamus is a drastic remedy to be invoked only in extraordinary circumstances.'" *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n,* 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566 (internal citation omitted). Specifically, the writ "'lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other

plain, speedy and adequate remedy in the ordinary course of law.'" *Id.,* (quoting *Brantley Farms v. Carlsbad Irrigation Dist.,*, 1998 NMCA 23, P 16, 124 N.M. 698, 954 P.2d 763). Mandamus is correctly issued to compel a public officer to perform an official act, *id.*, or to prohibit unconstitutional or unlawful official action. *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562, 904 P.2d 11.

> The standard for determining whether mandamus will lie is well settled:
>
> [I]t is . . . well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting.

Id.¶ 10. Of course, in New Mexico, a mandamus proceeding is strictly regulated by statute. *See* N.M.S.A. Sections 44-2-1 to -14 (1884, as amended through 1953). Accordingly, this Court applies a multi factor test to any exercise of its original mandamus jurisdiction:

> when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State ex rel. Sugg v. Oliver, 2020-NMSC-002, ¶ 7, 456 P.3d 1065; (quoting *State*

ex rel. King v. Lyons, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878). When sought against legislative authority, this Court has "recognized mandamus as a proper proceeding in which to question the constitutionality of legislative enactments." *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). But the Parties nowhere challenge the legality of any of the provisions of the Election Code that they seek this Court's writ to ignore.

The New Mexico Constitution, and this Court's precedent, require the denial of the Parties' extraordinary writ. First, the Petition does not present a purely legal issue for this Court to consider which can be answered on the basis of undisputed facts. The Parties make several conclusory statements asserted as facts that have now been roundly disputed by the intervening Respondents. With facts in dispute, the petition cannot be decided only by reference to the law. Second, this Petition does not present a "purely legal issue concerning the non-discretionary duty of a government official." Aside from the fact that mandamus actions are not authorized against it, the Petition does not cite any non-discretionary duty under law compelling the Legislature to change the election laws to accommodate even exigent health concerns, nor has the Legislature violated their plenary authority to set the time, place, and manner of voting, as conceded by the Parties. (Pet. ¶ 33, at 20-21.) Third, the only fundamental constitutional question of great public

importance implicated here is created solely by the relief sought by the Parties. And finally, as demonstrated *Infra* II.C., this petition presents an issue that is already contemplated in this State's election law and can be completely and adequately remedied without any intervention or remedy provided by this Court.

Here, members of the executive branch and local officials seek to legislate the time, place, and manner of the New Mexico primary election through an extraordinary writ, conscripting this Court into an unconstitutional usurpation that will thereby divest a coordinate branch of government of its proper authority. This Court must deny the Parties' lawless writ.

B. Equity is a limited remedy not applicable here.

The Parties assert that this Court can assert jurisdiction over their petition because "there is no adequate remedy available at law," and the petition presents a cause of "an unusual and compelling circumstance." (Pet. ¶ 44, at 25.) But the cases cited in the petition do not address the Supreme Court's exercise of jurisdiction in equity.

The Parties first cite to *Romero v. Munos*, (Pet. ¶ 41, at 24.), in which this Court determined that the district court had erred in failing to provide a remedy in equity in a case heard pursuant to its appellate jurisdiction. 1859-NMSC-008, ¶ 4, 1 N.M. 314. Similarly, the Parties cite *Hilburn v. Brodhead,* (Pet. ¶ 42, at 24.)

which again addressed the Court's discussion of the district court's equitable powers on appeal. 1968-NMSC-142, ¶ 1, 79 N.M. 460, 444 P.2d 971. *Navajo Academy, Inc., v. Navajo United Methodist Mission School, (*Pet. ¶ 43, at 24-25.) also discusses the district court's equitable authority on appeal. 1990-NMSC-005, ¶ 1, 109 N.M. 324, 785 P.2d 235. The Parties cite no authority that gives this Court the broad equity powers that they claim.

This Court has also consistently held that a threshold requirement of the district court's exercise of jurisdiction in equity is that there exist no adequate remedy at law for the asserted harm. *In re Dydek*, 2012-NMCA-088, ¶ 53, 288 P.3d 872. But while the "lack of an adequate remedy at law is essential to the jurisdiction of equity in injunction, [] it does not in itself give rise to it. The party seeking the relief must have a right in respect to which he is threatened with irreparable injury." *Asplund v. Hannett*, 1926-NMSC-040, ¶ 47, 31 N.M. 641, 249 P. 1074.

Moreover, "the existence of the right is as essential as the lack of other remedy. There are many rights for which the citizen must look to the other branches of his government, and which it is not within the power of the courts to secure to him. To vindicate such rights his remedies are political." *Id.* The Parties have failed to identify any right that entitles them to the relief they seek. To wit,

that relief is directly contrary to the duties required by law to be carried out by the Parties, and rather seeks to secure the Court's permission to dictate by writ their own construction of those duties without reference to the law or Constitution. Such relief, even in the face of a health crisis, cannot issue from the Court that is equally prohibited from intruding on the Legislature's constitutionally prescribed and plenary authority.

But critically, absent an extraordinary writ, this Court is without jurisdiction to consider the Petition at all. The New Mexico Constitution provides that the Supreme Court's original jurisdiction extends to writs of mandamus, quo warranto, supervening control, and "all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." The very same document plainly provides that "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution . . . ." N.M. Const. Art. VI, § 13. As such, the proper court to hear this petition, if any, is the district court.

As stated above, this Petition and the remedy so requested does not justify this Court's original jurisdiction, and without it, the Parties cannot beg a remedy in equity from this Court simply because they claim no other remedy can afford them the exact terms of the remedy they seek. The Petition, then, must be denied.

C. Legal relief is available.

1. Absentee balloting is an available legal remedy.

Absentee balloting is a solution for the primary election and is available right now. Any registered voter "can vote absentee in all candidate contests and on all ballot questions and any as if the voter had appeared on the day of the election to vote in person at a polling location." N.M.S.A. § 1-6-3. Absentee balloting would cure the issue of individuals having to work the polls or vote in person, thereby continuing the practice of social distancing to prevent the spread of Covid-19—the alleged primary concern for the Parties.

Moreover, according to the Secretary of State's website, a voter can request a ballot until 5 days before the election. *See* https://www.sos.state.nm.us/ voting-and-elections/voter-information/absentee-and-early-voting/. And absentee voting provides substantial protections against fraud by requiring voters to request a ballot and verify voter's information. *See infra* III(B)(1)(a). Given that the election is not set to occur until June 2, there is ample time to notify and facilitate an absentee ballot only election.

2. The Government Public Health Emergency Response Act is an available legal remedy.

The New Mexico Constitution also vests plenary power in the Legislature to

deal with a disaster emergency:

> In addition to the powers herein enumerated, the legislature shall have all powers necessary to the legislature of a free state, including the power to enact reasonable and appropriate laws to guarantee the continuity and effective operation of state and local government by providing emergency procedure for use only during periods of disaster emergency. A disaster emergency is defined as a period when damage or injury to persons or property in this state, caused by enemy attack, is of such magnitude that a state of martial law is declared to exist in the state, and a disaster emergency is declared by the chief executive officer of the United States and the chief executive officer of this state, and the legislature has not declared by joint resolution that the disaster emergency is ended. Upon the declaration of a disaster emergency the chief executive of the state shall within seven days call a special session of the legislature which shall remain in continuous session during the disaster emergency, and may recess from time to time for [not] more than three days.

N.M. Const. Art. IV, § 2. This provision, anticipating the danger and inherent risk posed by a disaster emergency, nonetheless vested the Legislature, not this Court, with authority to guarantee the continuity and effective operation of government.

The Legislature has acted under its constitutional authority by adopting the Public Health Emergency Response Act, which authorizes state officials to deal with a disaster emergency, including the adoption of regulations. 2003 N.M. ALS 218, 2003 N.M. Laws 218, 2003 N.M. Ch. 218, 2003 N.M. HB 231. Thus, to the extent consistent with this Act and the Constitution, state officials are legally empowered to respond to disaster emergencies which could include steps to mitigate health concerns relating to in person voting.

3. The New Mexico Legislature is a constitutional, legal remedy.

Just as section 6 of the New Mexico Constitution empowers the governor of the State to call the Legislature into special session by proclamation, it also authorized the Legislature to convene an extraordinary session:

> . . . [I]n the event said governor shall, within said time, Sundays excluded, fail or refuse to convene said legislature as aforesaid, then and in that event said legislature may convene itself in extraordinary session, as if convened in regular session, for all purposes, provided that such extraordinary self-convened session shall be limited to a period of thirty days, unless at the expiration of said period, there shall be pending an impeachment trial of some officer of the state government, in which event the legislature shall be authorized to remain in session until such trial shall have been completed. (As amended November 2, 1948.)

N.M. Const. Art. IV, § 6. This is the constitutionally provided mechanism that provides an adequate and complete remedy here. Thus, this Court must deny the Parties' writ.

III.
Requested Relief Violates the Voters' Fundamental Rights to Vote.

Those attacking New Mexico's duly enacted election laws seek to have them overruled and replaced by a *court*-created scheme of mail-in balloting. They argue that this Court has equitable power to overrule and replace what the legislative and executive branches have done in enacting the State's election laws. But that requested relief itself, if granted, would violate the Voters' fundamental rights, including the fundamental right to vote—including the rights not to have one's

vote diluted—and the right to a republican form of government. In other words, just as legislative action is subject to challenge to protect fundamental rights, any action by this Court to create a new election scheme that overrides and replaces duly enacted election laws is subject to challenge to protect fundamental rights. And the requested relief violates Voters' fundamental rights.

A. Voters have a fundamental right to vote under both the New Mexico and United States Constitution.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections" and to have that vote counted. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Id.* at 555 (internal citations omitted). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*

This Court recognizes the right to vote, noting for example that

> The "one person, one vote" doctrine is grounded in the Equal Protection Clause of U.S. Const. amend. XIV, § 1. This doctrine prohibits the dilution of individual voting power by means of state districting plans that allocate legislative seats to districts of unequal populations, thereby diminishing the relative voting strength of each voter in overpopulated districts.

Maestas v. Hall, 2012-NMSC-006 ¶ 1, 274 P.3d 66. Regarding the New Mexico Constitution, this Court says: "Probably no Constitution was ever drafted that refers to the people so much power to be exercised by direct vote." *Varney v. City of Albuquerque*, 1936-NMSC-010, ¶ 20, 40 N.M. 90, 55 P.2d 40. And "[t]he 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.

B. The requested relief of mail-in balloting violates the voters' right to vote.

The level of scrutiny to be applied to a grant by this Court of the requested relief (of overruling and replacing state election laws with a court-ordered mail-in balloting scheme) would be strict scrutiny if the *Anderson-Burdick* test applies. That test requires "weighing 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,'" considering "'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)). Under this test, strict scrutiny applies to "severe restrictions" (at issue here) as follows, *id.* at 434:

> the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788; see also *id.*, at 788-789, n. 9.

Because the burdens (described below) that the requested relief would impose on the Voter's right to vote are severe,[7] strict scrutiny applies.

But the *Anderson-Burdick* test should not apply to the *requested relief*, even though it would govern actual challenges to New Mexico's legislatively enacted election laws. This is so because the test by its terms applies to "[i] a challenge to [ii] a state election law," *id.*, and the present case involves no "challenge to" any "state election law." Moreover, the requested relief here also would not be legislated "state election law," but rather it would be a court order *overriding* and *replacing* legislated state election law. So the *Anderson-Burdick* test doesn't apply to evaluating the constitutional infirmities of the requested relief (though were it held to apply, it would require strict scrutiny of the requested relief).

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[7] Disenfranchisement is a severe burden. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

Rather, the applicable scrutiny where voter disenfranchisement is involved, such as by vote dilution, is found in the *Reynolds-Bush* case line. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).[8] In considering whether, under the federal Equal Protection Clause, "any constitutionally cognizable principles . . . would justify departures from the basic standard of equality among voters," *Reynolds*, 377 U.S. at 561, *Reynolds* held that the right to vote is "fundamental": "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." 377 U.S. at 561-62. So franchise impairments get careful, meticulous scrutiny: "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. After reviewing arguments that these were "complex" issues, the Court held that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen," *id.* at 567, and "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with

[8] Though *Bush* was decided long after *Anderson* and *Burdick*, no opinion in *Bush* cited *Burdick* and only one concurrence cited *Anderson*, once, but for another proposition. 551 U.S. at 112 (Rehnquist, joined by Scalia and Thomas, JJ., concurring). So those older cases have no bearing on the required analysis here.

votes of citizens living in other parts of the State," *id.* at 568.

Building on *Reynolds*, *Bush* didn't discuss the scrutiny level, but held that the Florida Supreme Court could not by its orders and interpretations of state law dilute voters' fundamental right to vote, 551 U.S. at 107-11, which was either a per-se ban of vote dilution or at least an exercise of the strict scrutiny now required in equal-protection challenges involving fundamental rights with an analysis and outcome so readily apparent that it required no detailing.

Bush is particularly analogous because it addressed the actions of the Florida Supreme Court (not the legislature) and found them in violation of the vote-dilution barred by *Reynolds*. The issue here, similarly subject to U.S. Supreme Court review, would be action by this Court that would do the same. *Bush* noted that "[t]he petition present[ed] the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution[9] and failing to comply with 3 U.S.C. § 5, and whether the use of standardless

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[9] In elections selecting Electors for choosing the President and Vice President, this provision mandates that "the *Legislature*," not a *court*, establish procedures: "Each State shall appoint, in such Manner as the Legislature thereof may direct ....." So the requested relief here may not be used in choosing Electors because even though the requested relief would "adapt" "Legislatively adopted manners" in existing election-law provisions, (Pet. ¶ 45, at 25), those provisions are not used in the Manner directed by the Legislature.

manual recounts violates the Equal Protection and Due Process Clauses." 551 U.S. at 103. The Court found that "it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition," *id.* at 105, because "recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right," *id. Bush* also noted that where *both* sides claim they are vindicating the right to vote, constitutional guarantees such as equal protection still control. *Id.* at 105.[10] And *Bush* highlighted the fact that the Florida Supreme Court lacked the necessary "safeguards" to assure confidence in the outcome,[11] which is relevant to the arguments Voters develop below.

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[10] As *Bush* put it, regarding both sides claiming they advance the right, *id.*:

> There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

[11] As *Bush* put it, adequate "safeguards" are mandatory, *id.* at 109:

> [W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

So the requested relief here is either barred per se[12] if votes are diluted or it would be subject to strict scrutiny and must at a minimum be justified as narrowly tailored to a compelling governmental interest.[13] Under *Reynolds* and *Bush* it is readily seen that vote dilution cannot be justified.

1. The requested relief of mail-in balloting violates the Voters' right to vote by diluting their votes with illegal votes.

The requested relief would violate the Voters' right to vote by diluting their votes with illegal votes. While vote dilution in *Reynolds* and *Bush* was reviewed under an equal-protection analysis, *Reynolds* held that "[t]he right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." 377 U.S. at 555 (internal citations omitted), and those violations don't involve equal protection. "[T]he right of suffrage can be denied by

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[12] If government may not dilute voters' right to vote, doing so cannot be justified under any interest-tailoring analysis.

[13] This scrutiny applies only if the Court has the authority to override and replace the legislature's plenary authority in this area, which the Voters do not further address that here but incorporate the arguments of Intervening Respondents. (Response in Intervention, at 7-8.)

Voters further note that the asserting of interests in interest-tailoring analyses is by the legislative branch in enacting statutes and by the executive branch in defending those statutes, or in defense of legislation by the legislature, *see, e.g.*, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019) (situations where legislatures may defend legislation), so *courts* don't assert interests on behalf of the state. Even assuming such ability *arguendo*, the analysis here shows that the requested relief is unconstitutional.

a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *id.*, which is not limited to the equal-protection context. Likewise, "the Fifteenth and Nineteenth Amendments prohibit a State from overweighting or diluting votes on the basis of race or sex," *id.* at 557, which is not limited to the equal-protection context. So challenges based on vote dilution are not limited to the equal-protection context.

Consequently, since the requested relief dispenses with many of the current statutory protections against illegal voting found in absentee ballot voting and in person voting law, granting the requested relief would be a cognizable debasement or dilution of the votes of eligible, registered voters. That dilution requires strict scrutiny, because "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *id.* at 562, which the requested relief fails.

a. Mail-in balloting strips away substantial protections against voter fraud contained in procedures for in person voting and absentee ballots.

Both in-person and absentee ballot voting laws contain substantial safeguards that protect against voter fraud, as can be confirmed by the intent of the New Mexico Legislature, a comprehensive reading of all the statutes addressing voting, and this Court's treatment of voting.

"When construing statutes, [this Court's] guiding principle is to determine and

give effect to legislative intent. *New Mexico Indus. Energy Consumers v. PRC*, 2007-NMSC-053, 20, 142 N.M. 533, 168 P.3d 105. "A statute must be interpreted as the Legislature understood it at the time it was enacted." *Montoya v. City of Albuquerque*, 82 N.M. 90, 94, 476 P.2d 60, 64 (1970). But in ignorance of that intent, the Parties' requested relief to conduct the primary election by mail-in balloting strips away all protections afforded under statute by the New Mexico Legislature to prevent such fraud.

The obvious intent of the Legislature was to protect the secrecy of the ballot and the purity of the election by crafting detailed provisions set forth in the statues regarding in person voting, early voting, and the Absent Voter Act, N.M.S.A. §§ 1-6-1 through 1-6-25. In so doing, the Legislature provided the framework for fair elections to peacefully transfer power and prevent fraud. An examination of those protections for in person voting, early voting, and absentee voting follows.

To ensure the secrecy and purity of the elections requires that only qualified electors exercise the voting franchise, as set forth in the New Mexico Constitution and statutes. This principle, commonly known as "one man, one vote" is provided as a right ensconced in the New Mexico Constitution and codified in the election code as a qualified elector. N.M.S.A. § 1-1-4.

Further, N.M.S.A. § 1-12-7 sets forth additional details defining a qualified elector as a voter of the county where that person offers to vote and who has a valid certificate of registration on file with the County Clerk. N.M.S.A. § 1-12-7.1 sets forth detailed provisions regarding lists of voters and rosters that allow the Election Board to confirm if a person is a qualified elector. These lists and rosters also ensure that each voter only gets one vote through a detailed process, which begins with a review of the voter lists. Upon confirming a voter is on the list, the voter is then required to provide the election board with the required voter ID. Upon successfully doing so, the election board has the voter sign the signature roster. Then, pursuant to N.M.S.A. § 1-12-7.4, the voter receives a ballot from the election board. Next, pursuant to N.M.S.A. § 1-12-25.2 and N.M.S.A. § 1- 12-57, the voter marks the ballot in secret, and then the voter feeds the ballot into the tabulator to record the vote. The voter can see the counter advance as the vote is recorded. The marked ballot acts a written record of the vote should an election contest result.

> When a voter appears in person at the polls to vote the voter shall
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> > announce the voter's name and address in an audible tone of voice. When a judge or election clerk finds the voter's name in the signature roster, the judge or election clerk shall in like manner repeat the name of the voter. The judge or election clerk shall then ask the voter to provide the required voter identification. The voter shall then sign the voter's name or make the voter's mark on the signature line in the copy of the signature roster to be returned to the county clerk.

N.M.S.A. § 1-12-10. The law additionally contains a penalty provision that criminalizes the casting of a fraudulent ballot as a fourth degree felony. N.M.S.A. §1-20-8.1.

To obtain an absentee ballot, a voter must complete the proscribed absentee ballot request application either through the mail or online. N.M.S.A. § 1-6-4(A). The voter applying for an absentee ballot either by mail or online must provide their name, address, and year of birth. *Id*. Online applicants will be required to provide their full New Mexico current or expired driver's license number or full state issued ID number. *Id*. at (C). In both applications in requesting a mail ballot, the voter must swear or affirm that

> [ ] I am the person whose name and identifying information is provided on this form and I desire to request a mailed ballot to vote in the state of New Mexico; and
>
> [ ] All of the information that I have provided on this form is true and correct as of the date I am submitting this form.

Id. at (D). If an applicant falsifies an absentee ballot request or if the signature on the affirmation is other than the person's own, the person has committed a 4th degree felony. *Id*. at (G). Also, like new registrants that appear to vote in person that have not provided the required ID, absentee voters must comply with the required ID requirements when returning their absentee ballot. The affirmation on

the official mailing envelope for the absentee ballot states, “I have not and will not vote any other ballot in this election.” N.M.S.A. § 1-6-8. The voter must sign the ballot and state their name, registration address, and year of birth. If the ballot is returned by a person other than the voter, the person delivering the ballot must also sign the official mailing envelope, the printed name of that person, and the relationship to the absentee voter.

The County Clerk must keep an absentee log that keeps detailed information regarding the chain of custody of an absentee ballot. This chain of custody begins with the application. The County Clerk marks each completed application for an absentee ballot with the date and time of receipt of same in the clerk’s office. The County Clerk then must determine if the applicant is a qualified elector pursuant to N.M.S.A. 1978, § 1-6-5, or a uniform service voter, or an overseas voter pursuant to N.M.S.A. 1978, § 1-6B-1 through 1-6B-17.

Any absentee ballots returned to the County Clerk's office must be placed in a secure container, from which the County Clerk must collect the ballots at least once a day. The secure container must be monitored 24 hours per day by video, and the recording of same must be retained as a part of the election record pursuant to N.M.S.A. § 1-12-69. Pursuant to N.M.S.A. § 1-6-11, the County Clerk delivers the absentee ballots to a Special Deputy County Clerk, who must sign a

receipt for same that details the number of ballots received. The Special Deputy County Clerk then delivers the absentee ballots to the absentee voter precinct board, who must also sign a receipt for same that details the number of ballots received.

N.M.S.A. § 1-6-19 provides that the County Clerk convenes the absentee election board to qualify the mailed absentee ballots. Before any of the official mailing envelopes can be opened, the Presiding Judge and the Election Judge shall determine that the required information has been completed. If the vote's signature or the voter's identifying information is missing, the Presiding Judge shall write "rejected" on the front of the official mailing envelope. The election board enters the voter's name on the signature roster and reflects "rejected- missing signature" or "rejected-missing required voter ID." The unopened, rejected ballot is then placed in the rejected absentee ballot container. The rejected absentee ballots are handled in the same manner as provisional ballots.

Like in person voting, absentee voting allows for lawfully appointed Challengers. Challengers may view the official mailing envelope and may challenge any mailed ballot to determine if the official mailing envelope has been opened by someone other than the voter prior to being received by the absentee voter board, the official mailing envelope does not contain a signature, the official mailing

envelope does not have the required voter ID, or the voter is not a voter as provided by the Election Code. If a challenge is unanimously affirmed, the official mailing envelope of the absentee ballot shall not be opened, and the ballot is placed in a container for challenged absentee ballots. Also, like in person voting, if the challenge is satisfied by the voter before the conclusion of the canvass or as part of an appeal, the official mailing envelope may be opened, and the ballot counted. There is a dedicated tabulator machine(s) to count absentee ballots.

The above considered provisions of the election code demonstrate a statutory scheme that seeks to ensure multiple levels of verification and security employed during every election to guarantee the integrity of the voting process. Nowhere is this more evident than in the penalty provisions punishing those who cast fraudulent votes with felony prosecution. All of these protections and penalties currently codified by the New Mexico Legislature–in the black letter law–would be dispensed with under the Parties' writ requesting a judicially ordered, court-mandated, and unlawful voting scheme. Nowhere in the Election Code is there a procedure to conduct an all mail-in ballot election on statewide issues in every precinct in every county in the State. Thus, an all-mail in ballot election cannot serve as a substitute for absentee balloting under law.

The relief requested would require the State of New Mexico to forego almost

all in person voting and instead conduct the 2020 Primary Election by mailed ballot. (Pet. ¶ 46(c)(1), at 26.) The county clerk would send each voter in the county a ballot, without the individual first having to submit an application for an absentee or mailed ballot. That ballot, then, is to be completed by the voter and returned by mail. An election conducted by mail ballot only, as proposed here, would all but ensure an election replete with both ballot fraud and vote harvesting.

It is all but certain that, without these measures, many ballots will be unlawfully procured and counted in the June 2, 2020 Primary. Those individuals who illegally vote will unlawfully negate and ultimately dilute the choices made by the lawfully registered voters of this State—voters the Legislature has carefully and methodically taken great care to protect.

b. The risk of fraud in mail-in ballots is substantial since the New Mexico Secretary of State has repeatedly acknowledged that New Mexico plagued with political corruption currently and throughout its history.

There is a significant history of corruption in New Mexico which increases the risk of mail fraud in mail-in balloting. The Secretary of State, Respondent to the Stipulated Petition, concedes that "[p]olitical corruption has plagued New Mexico since before statehood." Defs. SJ Br. at 7, *Republican Party of New Mexico v.*

Balderas, Case No. 1:11-cv-00900 (D.N.M. Dec. 12, 2018) (Doc. 122).[14] The Secretary of State said that "[t]he tarnished reputation of the Santa Fe Ring is reported to have delayed New Mexico's admission to the Union for decades." *Id*. (citing David L. Caffey, Chasing the Santa Fe Ring: Power and Privilege in Territorial New Mexico 184–85 (Univ. N.M. Press, 2014) ("describing Senator Albert Beveridge's belief that New Mexico was a 'sinkhole of corruption controlled by mining interests, banks, and other self-seeking entities' and Beveridge's opposition to New Mexico's statehood").

The Secretary of State acknowledged more recently that "New Mexico faced a crisis of corruption in its government." Defs.' Prelim. Inj. Resp. at 22, *King*, 850 F. Supp. 2d 1206 (Doc. 15). And that this "corruption crisis [ ] garnered national attention." Defs. SJ. Br. at 33, *Balderas*, Case No. 1:11-cv-00900 (Doc. 122). In so doing, the Secretary of State highlighted multiple news articles, including the New York Times and the Wall Street Journal, which discussed New Mexico's significant corruption issues. "The New York Times spotlighted a survey of journalists that named New Mexico the third-most-corrupt state." *Id*. at 12 (citing B. Marsh, "Illinois Is Trying. It Really Is. But the Most Corrupt State Is

[14] *See also* Defs.' Prelim. Inj. Resp. at 2, *Republican Party of New Mexico v. King*, 850 F. Supp. 2d 1206 (D.N.M. 2012) (Doc. 15) (New Mexico has "been plagued by scandals").

Actually...," N.Y. Times, Dec. 13, 2008.) "The newspaper also described New Mexico as being 'rocked by corruption scandals' and having corruption problems 'over and over again.'" *Id*. "[T]he Wall Street Journal labeled New Mexico the 'political wild west[.]'" *Id*. (citing S. Simon, "New Mexico's Political Wild West," Wall St. J., Jan. 17, 2009).

But according to the Respondent in this action, this "long legacy of corruption" (*id*. at 7) continues. More recently, there were a "wake of corruption scandals involving New Mexico's highest-ranking government officials[.]" *Id*. at 7; *see also id*. at 8-10, 12-13 (detailing general corruption scandals involving the State Investment Officer, the Deputy State Treasurer, a State Representative, multiple State Treasurers, a State Senator, and a Governor). And Respondent highlighted deposition testimony from Senator Dede Feldman describing "an atmospheric corruption where the headlines every day were about the wrongdoing of elected officials." *Id*. at 15. Respondent in her official capacity as the Secretary of State cannot hide from the "long legacy of corruption" (*id*. at 7) in New Mexico, which significantly increases the risk of mail fraud in mail in balloting.

c. The addition of illegal votes resulting from mail-in balloting will dilute the votes of eligible, registered voters thereby violating their right to vote.

Because the requested relief (i) strips away substantial legislative protections against voter fraud and (ii) substitutes a mail-in balloting scheme with a substantial risk of fraud, a substantial likelihood of additional illegal votes exists. That risk is cognizable because "safeguards" are required, *Bush*, 531 U.S. at 109, and "confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," and "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Similarly, the Seventh Circuit recently stayed an injunction by the U.S. District Court for the Western District of Wisconsin because it had given inadequate attention to the interest in preventing voter fraud by eliminating the witness requirement for absentee ballot signatures: "This court is concerned with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest in combating voter fraud." *Democratic National Committee v. Bostelmann*, slip op. 3, Nos. 20-1538, 20-1539, 20-1545 & 20-1546 (7th Cir. Apr. 3, 2020) (citing *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)).[15]

[15] The district-court order in *Bostelmann*, Nos. 3:20-cv-00249-wmc, 3:20-cv-00278-wmc, 3:20-cv-00284-wmc (W.D. Wisc. Apr. 2, 2020), makes it the only case so far granting election-related relief based on COVID-19 concerns. *See Wil-*
(continued...)

Vote dilution, identified in *Reynolds* and *Bush*, *supra* Part III(A), is readily apparent where illegal votes are allowed because of inadequate safeguards. Only the votes of eligible, registered voters are supposed to be cast and counted. So every legitimate voter is one of the total number of legitimate voters. For example, if the legitimate voter's vote is one of ten legitimate votes cast, her vote is worth one tenth of the total. But if, in addition, ten illegal votes are cast, her vote is now worth one twentieth of the total. So her vote was debased by half as a result of vote dilution. That violates her constitutional right to vote.

In sum, because the weakened safeguards in the requested relief permit dilution and debasement by illegal voting, the right to vote of eligible, registered voters is violated.

2. Mail-in balloting violates the right to vote of eligible, registered voters who do not receive mailed ballots and are required to take additional step to obtain a ballot.

The requested relief unconstitutionally discriminates against and burdens the right to vote of eligible, registered voters who don't receive mailed ballots and must take additional steps to obtain one. As set out in the Stipulated Petition, a

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[15] (...continued)
liams v. DeSantis, No. 1:20-cv-00067 (N.D. Fla. Mar. 16, 2020); *Mays v. Thurston*, No. 4:20-cv-341 (E.D. Ark. voluntarily dismissed Mar. 31, 2020); *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-01638 (S.D. Ohio Apr. 3, 2020).

ballot would be mailed to each person on the voter rolls "whose election-related mail has not been returned and who is not on the inactive voter list." Pet. ¶ 46(c)(1), at 26). But the latter two groups won't get a mailed ballot automatically. Instead, they will get a notice that they must take additional steps to get a ballot:

> 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.

Pet. ¶ 46(c)(2), at 27).

This creates two classes of eligible, registered voters that are similarly situated as to their fundamental right to vote and their eligibility to vote, so the disparate treatment must be justified under strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Class 1 consists of eligible, registered voters who are active voters and who will receive automatically a ballot by mail; they get the favored treatment. Class 2 consists of eligible, registered voters who are inactive or for whom mail was returned because they have moved; they get the disfavored treatment by not automatically receiving a mail ballot and must take additional and burdensome steps to obtain a ballot.

Now, it might be argued that active voters are not similarly situated with the

latter two groups because they are active and had no returned mail. But that would superficially conflate the categories by which the disparate treatment occurs with a showing that they are not similarly situated when they are all eligible, register voters and all have a right to vote. There is nothing about being inactive or having moved that diminishes that eligibility or right. And under the legislature's plan, such voters could simply go to the polls and vote, providing one's new address as required for those who have moved. But the requested relief strips that option, by prohibiting in person voting, and then burdens class 2 with the need to apply, update, or request. So they are similarly situated and there is disparate treatment.

No justification is provided as to why this disparate treatment is narrowly tailored to any compelling interest. Nor is there any interest that could meet the government's interest-tailoring burden because the categories apparently relate to convenience for election administrators, not to providing all eligible, registered voters with the same opportunity and equality they would have if in person balloting were available to them.

In sum, similarly situated groups of eligible, registered voters are disparately treated without justification in violation of the Equal Protection Clause of the Fourteenth Amendment. So the requested relief violates the right to equal protection of those in Class 2.

3. The Court ordering mail-in balloting contrary to the plenary power of the legislature to establish election and voting procedures violates the Voter's right to vote by invalidating the Voter's votes for their representatives, rather than judges, to make these laws.

The Voters' right to vote is also violated by the requested relief of mail-in balloting because, while voters voted for representatives with plenary power to govern the manner of voting to represent them, they didn't vote for judges to represent them, yet the manner of voting proposed here is to be decided by judges instead of representatives. This invalidates Voters' votes for their representatives in this context. While judges face balloting, they are not elected or retained to be representatives of the People in general. The Petition doesn't even ask this Court to act in a representative capacity, invoking instead equitable powers. That eliminates representation, representatives, and the right to vote for representatives to decide the manner of elections.

Since the requested relief would overrule and replace the representatives' chosen manner of election, the Voters' votes for representatives who would decide the manner of elections is invalidated. That violates the Voters' right to vote.

4. The Court ordering mail-in balloting contrary to the plenary power of the legislature to establish election and voting procedures, thereby invalidating the Voter's votes for their representatives, rather than judges, to make these laws violates the Voter's right to a republican form of government under the United States Constitution and to popular sovereignty and self-government under the New Mexico Constitution.

The loss of representative government and invalidation of votes for legislators identified in the preceding discussion violates the Voters' right to a republican form of government under the U.S. Constitution and to popular sovereignty and self-government under the New Mexico Constitution.

Article IV, § 4, of the U.S. Constitution provides that "the United States shall guarantee to every state in this union a republican form of government."

Article II, §§ 2 and 3, of the New Mexico Constitution guarantee popular sovereignty and self-government as follows:

> Sec. 2. [Popular sovereignty.]
> All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.
>
> Sec. 3. [Right of self-government.]
> The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.

A republican form of government is lost if judges supplant the people's elected representative in exercising powers entrusted entirely to the legislative branch, in this

case establishing the manner of elections. And since both the federal and state constitutions are founded on and derived from the will of the people,[16] who hold the ultimate power, the people have a right to the republican government they chose in their own exercise of that political will and which the United States guarantees. So the requested relief would violate the very foundational rights of the Voters to a republican form of government, popular sovereignty, and right of self-government.

Now, those seeking the requested relief may argue that claims by individuals under the Guarantee Clause are nonjusticiable, because they are political questions. That view is rooted in dicta in *Luther v. Borden*, 48 U.S. 1 (1849). *See New York v. United States*, 505 U.S. 144, 184 (1992) ("view . . . has its origin in *Luther*"). But the Supreme Court has severely cut back on political-question doctrine, starting with *Baker v. Carr*, 369 U.S. 186 (1962), and continuing with *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012), which restricted political questions to where there is either "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department" or "a lack of judicially discoverable and manageable standards for resolving it," *id.* at 195 (citation omitted). In *New York*, the Court said, "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. at 185 (citing *Reynolds*, 377 U.S. at 582).

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[16] *See* Preamble, U.S. Const. ("We the people . . . .").

In *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), the Tenth Circuit decided that political-question doctrine didn't prevent considering a Guarantee Clause claim against a voter-initiative constitutional amendment, though that was vacated and remanded by *Kerr*, 135 S. St. 2927 (2015), and ultimately resolved on lack of ordinary Article III standing, 824 F.3d 1207, 1217 (10th Cir. 2016). Other courts have considered Guarantee Clause claims on the merits. *See, e.g.*, *Largess v. Supreme Judicial Court*; *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1137-39 (Cal. 2006); *Vansickle v. Shanahan*, 511 P.2d 223, 234 (Kan. 1973).

Scholars advocate and foresee Guarantee Clause challenges being allowed by the Supreme Court. *See, e.g.*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 864-69 (1994); *see also id.* at 851 ("[T]he time is clearly approaching in which the Court may . . . reject the view that cases under the Guarantee Clause should always be dismissed on political question grounds."); Laurence H. Tribe, *American Constitutional Law* 398 (2d ed. 1988): John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* 118 n.* (1980).

The requested relief presents a case where a Guarantee Clause challenge should not be deemed a political question. In *Clinton*, the U.S. Supreme Court limited political questions to where there is either a clear "constitutional commitment" to

some political branch or "a lack of judicially discoverable and manageable standards." 566 U.S. at 195. Only the "standards" issue might apply. While such "standards" might be difficult in some situations, they are not here. The requested relief would substitute this Court for the legislature in doing the exclusively legislative function of establishing the "manner" of this election. The U.S. Supreme Court would simply need to hold that in a republican form of government, courts may not usurp legislative roles and the rule of law and so declare the action unconstitutional under the Guarantee Clause and enjoin it. There are no complicated issues to prevent such straightforward action, so this challenge may proceed.

5. The requested relief violates Voters' right to vote under the *Purcell* Principle.

The requested relief also violates what has come to be called the *Purcell* Principle. *See, e.g.*, Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 Fl. St. U. L. Rev. 427 (2016). That Principle is named for *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). The Principle is anchored in the right to vote and its potential for debasement. *Id.* at 4 (citing *Reynolds*, 377 U.S. at 555). Among its critiques of the Ninth Circuit for staying a voter-identification near an election, the Court held in *Purcell* that such near-election court orders *themselves* risk debasement and dilution of the right to vote because "[c]ourt orders affecting elections, especially conflicting

orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. at 4-5. The "possibility that qualified voters might be turned away from the polls," *id.* 4, violates their right to vote. So the general rule is that no court order altering election procedures near an election is permissible because it violates the right to vote. And because the Principle is anchored in the right to vote, it applies to state courts as well as federal courts because state-court orders pose the same risk.

On April 6, 2020, the U.S. Supreme Court issued an opinion in *Republican National Committee v. Democratic National Committee*, No. 19A1016 (U.S. Apr. 6, 2020) (per curiam)., *slip op. available at* https://www.supremecourt.gov /opinions/19pdf/19a1016_o759.pdf, again applying that Principle, which it summarized thus:

> This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. See *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U. S. 929 (2014); *Veasey v. Perry*, 574 U. S. __ (2014).

Slip op. 2. This *RNC* case stayed a lower-court order allowing voters to mail absentee ballots after election day. *RNC* recited various problems that the lower-court order posed and said they "underscore[] the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion." *Id.* at 3. A crucial point was that

the lower-court order "fundamentally alters the nature of the election." *Id.* at 2.

The requested relief here would also fundamentally alter the nature of New Mexico's election, changing it from an in-person election with absentee balloting to exclusively a mail-in-ballot election. That alone invites a U.S. Supreme Court stay. And the same risk of voters losing their franchise because of the confusion caused by this Court's order exists. For example, voters are accustomed to going to the polls on election day or getting an absentee ballot. They may be unaware that the usual options are no longer available. They might show up at their usual polling place on election day to discover there is no poll there, and the usual whatever-else-happens, in-person, voting opportunity is gone. A mailed ballot doesn't alter the disenfranchisement risk because it might be ignored, lost in a pile of letters set aside for a period before opening to allow any resident viruses to die, not noticed because the resident voters are sheltering in place at a different location, or some other such possibility. Inactive and moved voters don't even get a mailed ballot, but rather a notice (so instead of their usual procedures they must clear additional hurdles to get one if they actually get notice of the need to do so). This fundamental alteration of the nature of the election raises the same possibility of voters losing their franchise as in *Purcell* and *RNC*. Here, as in *RNC*, the Supreme Court would likely follow its usual *Purcell*-Principle practice: "[W]hen a lower court intervenes and alters the election rules so

close to the election date, our precedents indicate that this Court, as appropriate, should correct that error." Slip op. 3.

Conclusion

This Court should deny the Petition.

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Respectfully Submitted,

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Certificate of Service

I hereby certify that on Wednesday, April 8, 2020 the foregoing Motion to Intervene was filed with the State of New Mexico's Tyler/Odyssey E-File & Serve System, causing service upon all parties through counsel of record.

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