



Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

Docket Number: S-1-SC-38228

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

Petitioners,

vs.

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

Respondent.

**BRIEF *AMICUS CURIAE* OF LEAGUE  
OF WOMEN VOTERS OF NEW  
MEXICO, COMMON CAUSE,  
AMERICAN CIVIL LIBERTIES UNION  
OF NEW MEXICO, DISABILITY  
RIGHTS NEW MEXICO, NATIVE  
AMERICAN VOTERS ALLIANCE  
EDUCATION PROJECT, AND SANTA  
DOMINGO PUEBLO IN SUPPORT OF  
STIPULATED PETITION**

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## TABLE OF CONTENTS

Cover Page .....	1
Table of Contents .....	3
Table of Authorities .....	5
Statement of Interests .....	8
Introduction .....	12
I. The Constitution of the United States and the Constitution of the State of New Mexico Each Protect the Fundamental Right to Vote.....	13
II. The Fundamental Right to Vote Will Be Violated if Ordinary Voting Protocols are Mandated in the Midst of an Extraordinary Public Health Emergency .....	16
A. For Purposes of the 2020 Primary Election, In-Person Voting Should Be Minimized to Protect the Health and Safety of the Public .....	20
B. Absentee Ballot Voting Alone is an Impermissibly Burdensome and Unconstitutional Substitute for In-Person Voting.....	22
i. The Election Code May Be Interpreted to Avoid the Injustice of Strict, “One Size Fits All” Absentee Ballot Protocols.....	23
ii. In the Alternative, the Election Code’s Strict Absentee Ballot Protocols Impermissibly Burden New Mexicans’ Fundamental Right to Vote and are Unconstitutional as Applied During a Declared Public Health Emergency .....	25

C. The Vote-by-Mail/Mobile Voting/Ballot-Drop Model Proposed in the Stipulated Petition is a Constitutionally Permissible Means of Protecting Both the Health and Safety of the Public and the Fundamental Right to Vote.....34

III. This Court Must Protect The Fundamental Right To Vote.....37

IV. Conclusion.....40

Type-Volume Limitation Compliance Statement .....43

Certificate of Service .....43

## TABLE OF AUTHORITIES

### **United States Supreme Court Cases**

<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 103 S. Ct. 1564 (1983).....	26
<i>Burdick v. Takushi</i> , 504 U.S. 428, 112 S. Ct. 2059 (1992). ....	26
<i>City of Los Angeles v. Patel</i> , 576 U.S. 409, 135 S. Ct. 2443 (2015).....	25
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181, 128 S. Ct. 1610, (2008).....	14, 30
<i>Doe v. Reed</i> , 561 U.S. 186, 130 S. Ct. 2811 (2010). ....	26
<i>Hadley v. Junior College Dist.</i> , 397 U.S. 50, 90 S. Ct. 791 (1970).....	14
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11, 25 S. Ct. 358 (1905). ....	21
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S. Ct. 554 (1963).....	22
<i>Marbury v. Madison</i> , 5 U.S. 137, 2 L. Ed. 60 (1803).....	38
<i>McDonald v. Board of Election Comm'rs</i> , 394 U.S. 802, 89 S. Ct. 1404 (1969).....	30
<i>Regents of the Univ. of Cal. v. Bakke</i> , 438 U.S. 265, 98 S. Ct. 2733 (1978).....	21
<i>Reynolds v. Sims</i> , 377 U.S. 533, 562, 84 S. Ct. 1362, 1381 (1964) .....	14, 34
<i>United States Term Limits v. Thornton</i> , 514 U.S. 779, 115 S. Ct. 1842 (1995).....	38
<i>United States v. Playboy Entm't Group</i> , 529 U.S. 803, 827, 120 S. Ct. 1878, 1893 (2000).....	36
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997).....	21
<i>Wesberry v. Sanders</i> , 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964) .....	13
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356, 370, 6 S. Ct. 1064 (1886). ....	13

### **Federal Appellate Cases**

<i>Buchwald v. University of N.M. School of Med.</i> , 159 F.3d 487 (10 <sup>th</sup> Cir. 1998) .....	21
<i>Common Cause Ind. v. Marion Cty. Election Bd.</i> , 311 F. Supp. 3d 949 (S.D. Ind. 2018).....	30
<i>League of Women Voters of Fla., Inc. v. Detzner</i> , 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018).....	29

*Navajo Nation Human Rights Comm'n v. San Juan Cnty.*, 281 F. Supp. 3d 1136 (D. Utah 2017).....31

*Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012).....35

**State Appellate Cases**

*Campos v. State*, 1994-NMSC-012, 117 N.M. 155.....14

*Does I Through Iii v. Roman Catholic Church*, 1996-NMCA-094, 122 N.M. 307 .....28

*Lewis v. Albuquerque Public Schools*, 2019-NMSC-022, 435 P.3d 445.....24

*Martinez v. Cornejo*, 2009-NMCA-0011, 146 N.M. 223.....23

*State v. Gomez*, 1997-NMSC-006, 122 N.M. 777.....14

*State v. Martinez*, 1998-NMSC-023, ¶8, 126 N.M. 39.....24

*State ex rel. League of Women Voters v. Advisory Comm. to N.M. Compilation Commission*, 2017-NMSC-025, 401 P.3d 734.....15

*State ex rel. Walker v. Bridges*, 1921-NMSC-041, 27 N.M. 169 .....15, 25

**State Constitutional Provisions**

N.M. Const. art. II, §8.....15

N.M. Const. art. IV, §12 .....39

N.M. Const. art. VII, § 1 .....15

N.M. Const. art. VII, § 3 .....15

**State Statutes**

The Election Code, NMSA 1978, §§ 1-1-1 to 1-26-6 (1969, as amended through 2019)..... 19, 20, 22, 23, 24, 25, 26, 27, 33, 38

NMSA 1978, Section 1-3-2 .....20

NMSA 1978, Section 1-6-5 .....24, 25, 26, 27, 37

**Out of Jurisdiction State Statutes**

Rev. Code Wash. (ARCW) § 29A.04.223.....30

**Secondary Authorities**

Cassandra DeWitt, Annabelle de St. Maurice & Michael Rios, VOTING AND INFECTION PREVENTION OF COVID-1, The UCLA Voting Rights Project (2020), <https://latino.ucla.edu/wp->

content/uploads/2020/04/UCLA-VBM-Health-Safety-Report-2.pdf (last visited April 7, 2020).....	21
EXECUTIVE ORDER No. 55, COMMONWEALTH OF VIRGINIA, OFFICE OF THE GOVERNOR (March 30, 2020), <a href="https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf">https://www.governor.virginia.gov/media/governorvirginiagov/executive- actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus- (COVID-19).pdf</a> (last visited April 8, 2020).....	18
Julia Goldberg: COVID-19 CASES PASS 300, Santa Fe Reporter (April 1, 2020), <a href="https://www.sfreporter.com/news/morningword/2020/04/01/nm-covid-19-cases-pass-300/">https://www.sfreporter.com/news/morningword/2020/04/01/nm- -covid-19-cases-pass-300/</a> (last visited April 7, 2020).....	17
Pablo Gutierrez: CORONAVIRUS WORD MAP: WHICH COUNTRIES HAVE THE MOST CASES AND DEATHS? The Guardian (2020), <a href="https://www.theguardian.com/world/2020/apr/08/coronavirus-world-map-which-countries-have-most-cases-deaths-covid-19">https://www.theguardian.com/world/2020/apr/08/coronavirus-world- map-which-countries-have-most-cases-deaths-covid-19</a> (last visited April 8, 2020).....	16
Institute for Health Metrics and Evaluation, COVID-19 PROJECTIONS ASSUMING FULL SOCIAL DISTANCING THROUGH MAY 2020, COVID-19 PROJECTIONS (2020), <a href="http://covid19.healthdata.org/united-states-of-america">http://covid19.healthdata.org/united-states-of- america</a> (last visited April 7, 2020).....	17
National Telecommunications and Information Administration, NARROWING THE DIGITAL DIVIDE IN THE NAVAJO NATION (2014), <a href="https://www.ntia.doc.gov/blog/2014/narrowing-digital-divide-navajo-nation">https://www.ntia.doc.gov/blog/2014/narrowing-digital-divide-navajo- nation</a> (last visited April 7, 2020).....	32
Native American Voting Rights Coalition, VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA AND SOUTH DAKOTA, SURVEY RESEARCH REPORT EXECUTIVE SUMMARY AND POLICY REFORM RECOMMENDATIONS (2018), <a href="https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf">https://www.narf.org/wordpress/wp- content/uploads/2018/01/2017NAVRCsurvey-summary.pdf</a> (last visited April 7, 2020).....	31
New Mexico Dept. of Health, 2019 NOVEL CORONAVIRUS DISEASE (COVID- 19), <a href="https://cv.nmhealth.org">https://cv.nmhealth.org</a> .....	17
New Mexico Secretary of State, ELECTION RESULTS, <a href="https://www.sos.state.nm.us/voting-and-elections/election-results/">https://www.sos.state.nm.us/voting-and-elections/election-results/</a> (last visited Apr 7, 2020).....	29

PUBLIC HEALTH EMERGENCY ORDER CLOSING ALL BUSINESSES AND NON-PROFIT ENTITIES EXCEPT FOR THOSE DEEMED ESSENTIAL AND PROVIDING ADDITIONAL RESTRICTIONS ON MASS GATHERINGS DUE TO COVID-19, (2020), <https://cv.nmhealth.org/wp-content/uploads/2020/03/SignedPHO03-24-2019.pdf> (last visited April 7, 2020)..... 18

Public Health Orders and Executive Orders, NMDOH - CORONAVIRUS UPDATES (2020), <https://cv.nmhealth.org/public-health-orders-and-executive-orders/> (last visited April 7, 2020) ..... 17

U.S. Department of Justice, THE AMERICANS WITH DISABILITIES ACT AND OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF VOTERS WITH DISABILITIES (2014),[https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm) (last visited April 7, 2020).....31

**STATEMENT OF INTERESTS**

*Amicus curiae* League of Women Voters of New Mexico (“LWVNM”) is a nonpartisan, community-based political organization formed in 1949. LWVNM has 534 members, provides support to four local Leagues, and is an affiliate of the League of Women Voters of the United States, which has worked for 100 years to educate and register voters and make government at all levels more accessible, accountable, and responsive to the public. LWVNM encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

Throughout the history of the organization, LWVNM members have worked to fulfill their mission by registering new voters, publishing nonpartisan voter guides, conducting candidate forums, helping educate citizens about New Mexico’s



voting processes, and advocating in favor of reforms which promote and facilitate the exercise of the fundamental right to vote. LWVNM supports election methods that make voting more accessible and thereby increase voter participation, including automatic voter registration and same-day voter registration; systems that ease ballot access through combinations of vote-by-mail, secure ballot drop-boxes, and accessible/mobile voting centers; and amending the State Constitution to allow run-off elections in non-partisan contests. LWVNM's chief concern in this unprecedented moment is the protection of the right of citizens to vote, where polling places may be inaccessible, woefully understaffed, or closed entirely, and where New Mexico voters may be unable to vote in person without risking their health and safety.

*Amicus Curiae* Common Cause is a nonpartisan, grassroots organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people. Founded by John Gardner in 1970 as a "citizens lobby," Common Cause has over 400,000 members nationwide and local organizations in 35 states. Common Cause is a leader in the fight for open, honest, and fair elections throughout the United States, and in New Mexico through its New Mexico chapter. Common Cause has long supported efforts to protect voting rights and encourage voter participation. The work done by Common Cause's New Mexico chapter to protect voting rights in recent years has included (1) furnishing

poll watchers and telephone hot-lines for voters on election days, (2) successful legislative advocacy for voter registration on-line and through the MVD, (3) successful advocacy in opposition to repeated efforts to impede the exercise of the voting franchise through photo-ID requirements and similar restrictive proposals, and, (4) the protection of the rights of rural voters, Native American voters, disabled voters, and other groups of voters disparately impacted by unduly restrictive electoral laws.<sup>1</sup>

*Amicus Curiae* American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1,600,000 members, 3,200,000 online activists, and 3,700,000 social media followers dedicated to the principles embodied in the Bill of Rights. The American Civil Liberties Union of New Mexico (ACLU-NM) is one of the ACLU's statewide affiliates with approximately 12,000 members. ACLU-NM has a strong, well-established interest in protecting the civil rights of the people of the State of New Mexico. Currently, ACLU-NM is working to develop its Indigenous Justice program, which includes collaborating with Native American attorneys, advocates, organizations, tribal representatives and tribal leaders on the issues impacting Native communities throughout New

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<sup>1</sup> No party's counsel authored this brief in whole or in part. No party, no party's counsel, nor any other person, other than Amici, their members, or their counsel, contributed money for the preparation or submission of this brief.

Mexico. ACLU-NM's interest in this matter centers around the voting rights of New Mexico's twenty-three Nations, Tribes and Pueblos, and ensuring that they have access to vote in a manner that is constitutionally sufficient to meet their unique needs.

*Amicus Curiae* Disability Rights New Mexico (DRNM) is an independent, private nonprofit organization designated by the New Mexico Governor as the protection and advocacy system under federal law for people with disabilities in New Mexico. The mission of DRNM is to protect, promote and expand the legal and civil rights of persons with disabilities. Voting rights for people with disabilities is an important aspect of DRNM's work, and is reflected in the organization's priorities and objectives. This work includes education and outreach to voters with disabilities and professionals in the disability field, as well as direct and systemic voter advocacy.

*Amicus Curiae* Native American Voting Alliance Education Project (NAVA) has a long history of engaging Native American people through integrated voter engagement (IVE) strategies. They have phone-banked, door knocked and registered thousands of Native Americans as part of an effort to educate and engage people on a variety of issues. They are one of the only Native American community organizations that has experience in issue campaign work in Navajo, Pueblo and

urban Indian communities in New Mexico. They understand the different protocols and strategies that work in each of these very distinct communities.

*Amicus Curiae* Santo Domingo Pueblo is a federally recognized Tribe located between Albuquerque and Santa Fe. Not a single household within its traditional village has access to the internet and broadband. The thousands of registered voters within Santo Domingo Pueblo would face an extreme burden to the Pueblo members right to vote if absentee voting and a reliance on requests for ballots through the internet were the only safe option for voting in the upcoming elections. In addition, Santo Domingo has many seniors, disabled and voters who require Keres language translators.

## **INTRODUCTION**

The health and safety of all New Mexicans is threatened by the outbreak of a severe pandemic. To prevent or slow the spread of contagion and to save lives, the Governor of New Mexico has implemented strict social distancing protocols and a “stay-at-home” order that requires most New Mexicans to avoid gatherings of five (5) or more people. While recognizing that the Governor’s attempts to prevent the spread of contagion are necessary and prudent under these extraordinary circumstances, the fundamental right to vote will be severely burdened if sufficient allowance is not made for alternative and flexible voting methods in the upcoming

2020 primary elections. Proceeding with standard in-person voting would force the people of New Mexico to choose between their health and safety and the exercise of their franchise, and absentee ballot voting alone would not offer equal protection to all the people of the State – particularly restricting the rights of rural voters, Native American voters, and voters with disabilities.

The pragmatic and flexible set of vote-by-mail, mobile-voting, and in-person ballot-drop protocols proposed in the Stipulated Petition of the County Clerks and the Secretary of State will allow for the continued implementation of crucially important social distancing and adherence to the Governor’s “stay-at-home” order while also sufficiently protecting the fundamental right to vote. In the absence of a special legislative session – which would present its own significant logistical (and potentially constitutional) difficulties in the midst of a pandemic – it falls to the Judiciary to protect the fundamental right to vote. It is for these reasons, more fully elaborated below, that Amici respectfully submit an amicus brief in support of the Stipulated Petition.

I. **THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF NEW MEXICO EACH PROTECT THE FUNDAMENTAL RIGHT TO VOTE**

Voting is a fundamental right preservative of all other rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064 (1886). “No right is more precious in a free country than that of having a voice in the election of those who make the laws

under which, as good citizens, we must live,” and “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964). The fundamental right to vote is rooted in the First and Fourteenth Amendments to the U.S. Constitution, “and is protected therein from dilution or debasement.” *Hadley v. Junior College Dist.*, 397 U.S. 50, 54, 90 S. Ct. 791, 794 (1970). The Judiciary is obliged to train a skeptical eye on any imposition upon or impediment to the fundamental right to vote. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 210, 128 S. Ct. 1610, 1627-1628 (2008); *see also Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381 (1964) (finding that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

Under New Mexico’s interstitial approach to the analysis of civil rights, the New Mexico Constitution offers even broader protection of the fundamental right to vote than the U.S. Constitution. *See State v. Gomez*, 1997-NMSC-006, ¶¶20, 21, 122 N.M. 777 (specifically adopting the interstitial approach, which provides “broader protection” of rights when our courts find federal analysis unpersuasive). “Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined.” *Id.* at ¶19. Our courts may find federal analysis unpersuasive because it is “flawed” in some way, because

of distinctive characteristics of our state laws or Constitution, or because of undeveloped federal analogs. *Id.* at ¶20. As demonstrated in cases like *Campos v. State*, 1994-NMSC-012, 117 N.M. 155, no extensive analysis is required for our courts to find federal analysis “flawed in some way,” even where the language of a state constitutional provision is functionally identical to the language of its federal constitutional counterpart. Our courts may simply determine that the federal constitution offers inadequate protection of a fundamental right, and extend further protection to that right under the New Mexico constitution. *Id.* at ¶10.

The fundamental right to vote is explicitly enshrined in the New Mexico Constitution. N.M. Const. Art. II, §8 (“All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); *see also* N.M. Const. Art. VII, §§1,3. These constitutional provisions “work in tandem to establish and guarantee the right to vote,” which is “among the most precious rights in a democracy.” *State ex rel. League of Women Voters v. Advisory Comm. to N.M. Compilation Commission*, 2017-NMSC-025, ¶1, 401 P.3d 734. “[T]he **supreme right** guaranteed by the Constitution of [New Mexico] is the right of a citizen to vote at public elections” – and if the regulations of elections may be reasonably construed to entitle a citizen to vote, those regulations should be so construed. *State ex rel. Walker v. Bridges*, 1921-NMSC-041, ¶8, 27 N.M. 169 (emphasis added). This more explicit, prominent, and unqualified

enshrinement of the right to vote under the New Mexico Constitution should be considered a “distinctive state characteristic” for purposes of any necessary interstitial analysis. If the federal constitutional analysis does not offer sufficient protection of the fundamental right to vote in this case, that federal analysis should be deemed “flawed” and broader protection should be extended under the New Mexico Constitution, as this Court did in *Campos*.

**II. THE FUNDAMENTAL RIGHT TO VOTE WILL BE VIOLATED IF ORDINARY VOTING PROTOCOLS ARE MANDATED IN THE MIDST OF AN EXTRAORDINARY PUBLIC HEALTH EMERGENCY**

As noted in the Stipulated Petition, the State of New Mexico faces a public health emergency unprecedented in modern times. As of the date the Stipulated Petition was filed, there were 718,685 confirmed cases of COVID-19 and 33,881 known deaths associated with COVID-19 worldwide. *Stipulated Petition*, ¶9. As of the date of this filing, there are 1,464,852 cases and 85,396 deaths worldwide, and there will be many more cases and deaths by the time oral argument is heard.<sup>2</sup> As of the date the Stipulated Petition was filed, there were 237 confirmed cases of COVID-19 in New Mexico and two deaths associated with COVID-19 in New Mexico. ¶11.

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<sup>2</sup> Pablo Gutierrez: CORONAVIRUS WORD MAP: WHICH COUNTRIES HAVE THE MOST CASES AND DEATHS? *The Guardian* (2020), <https://www.theguardian.com/world/2020/apr/08/coronavirus-world-map-which-countries-have-most-cases-deaths-covid-19> (last visited April 8, 2020).



As of the date of this filing, there are 794 confirmed cases of COVID-19 in New Mexico and 13 deaths,<sup>3</sup> and there will be more cases and deaths by the time oral argument is heard.

Current projections indicate that New Mexico is likely to suffer approximately 394 deaths from COVID-19 by August 4, 2020.<sup>4</sup> However, state health officials have also indicated that New Mexico could suffer a vastly higher number of infections and deaths – up to 1.25 million infections and 12,500 deaths – if “social distancing” measures are not strictly maintained.<sup>5</sup> In recognition of the severe threat that the COVID-19 pandemic poses to the health and safety of all New Mexicans, Governor Lujan Grisham has declared a public health emergency and issued a series of public health orders and Executive Orders designed to combat the spread of contagion

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<sup>3</sup> New Mexico Dept. of Health, 2019 NOVEL CORONAVIRUS DISEASE (COVID-19), <https://cv.nmhealth.org>

<sup>4</sup> *Institute for Health Metrics and Evaluation*, COVID-19 PROJECTIONS ASSUMING FULL SOCIAL DISTANCING THROUGH MAY 2020, COVID-19 PROJECTIONS (2020), <http://covid19.healthdata.org/united-states-of-america> (last visited April 8, 2020).

<sup>5</sup> See Julia Goldberg: COVID-19 CASES PASS 300, Santa Fe Reporter (2020), <https://www.sfreporter.com/news/morningword/2020/04/01/nm-covid-19-cases-pass-300/> (last visited April 7, 2020).

through diligent social distancing efforts.<sup>6</sup> In an order issued on March 23, 2020, the Governor prohibited mass gatherings of five or more individuals and advises all New Mexicans to “stay at home and undertake only those outings absolutely necessary for their health, safety, or welfare.” *See Public Health Emergency Order Closing All Businesses and Non-Profit Entities Except for Those Deemed Essential and Providing Additional Restrictions on Mass Gatherings Due to COVID-19*, dated March 23, 2020.<sup>7</sup> As stated in that public health order, “social distancing is the sole way New Mexicans can minimize the spread of COVID-19 and currently constitutes the most effective means of mitigating the potentially devastating impact of this pandemic in New Mexico.” *Id.* It is unclear how long these public health orders will remain in place in New Mexico, but other states with similar orders have already

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<sup>6</sup> *See generally*, Public Health Orders and Executive Orders, NMDOH - CORONAVIRUS UPDATES (2020), <https://cv.nmhealth.org/public-health-orders-and-executive-orders/> (last visited April 7, 2020).

<sup>7</sup> PUBLIC HEALTH EMERGENCY ORDER CLOSING ALL BUSINESSES AND NON-PROFIT ENTITIES EXCEPT FOR THOSE DEEMED ESSENTIAL AND PROVIDING ADDITIONAL RESTRICTIONS ON MASS GATHERINGS DUE TO COVID-19 (March 23, 2020), <https://cv.nmhealth.org/wp-content/uploads/2020/03/SignedPHO03-24-2019.pdf> (last visited April 7, 2020).

extended them until June 10, 2020. *See Executive Order No. 55, Commonwealth of Virginia, Office of the Governor*, dated March 30, 2020.<sup>8</sup>

Normal in-person elections – where tens or even hundreds of thousands of New Mexicans leave their homes to congregate in public polling places – do not lend themselves to self-isolation or social distancing in a time of contagion. To the contrary, in-person elections risk a severe exacerbation of the spread of contagion across the state. In recognition of the threat that this extraordinary pandemic poses to the safety of voters and poll workers in New Mexico’s upcoming 2020 primary election, and in deference to and compliance with the public health orders that the Governor has enacted to combat the pandemic, the petitioning County Clerks and the Secretary of State have developed and submitted to the Court a set of broadened, flexible voting protocols intended to protect the health and safety of New Mexicans while simultaneously preserving and protecting their fundamental right to vote. *See Stipulated Petition*, ¶¶46, 47. In its Response in Intervention, the Republican Party of New Mexico (“NMGOP”) opposes the Stipulated Petition, arguing that ordinary

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<sup>8</sup> EXECUTIVE ORDER NO. 55, COMMONWEALTH OF VIRGINIA, OFFICE OF THE GOVERNOR (March 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf) (last visited April 8, 2020)

voting protocols must be utilized despite these extraordinary circumstances unless or until the Legislature amends the Election Code (NMSA 1978 §§ 1-1-1 to 1-26-6).

**A. For Purposes of the 2020 Primary Election, In-Person Voting Should Be Minimized to Protect the Health and Safety of the Public**

In its Response in Intervention, NMGOP admits that strict adherence to the ordinary voting protocols detailed in the Election Code will require that in-person voting opportunities be provided in precincts across the state, as in a normal election under normal conditions. *Response in Intervention*, pg. 4 (“The Election Code currently requires that all primary and general elections in New Mexico offer both in-person voting... and absentee voting.”). Since NMGOP’s entire argument hinges on an inflexible reading of the Election Code, NMGOP would also presumably admit that hundreds of in-person precincts are mandated by NMSA 1978 § 1-3-2, and would need to be staffed with hundreds of living, breathing, frequently elderly human beings – as described in paragraph 21 of the Stipulated Petition. NMGOP does not acknowledge or address the argument that a strict adherence to ordinary voting protocols during an extraordinary public health emergency will force New Mexicans to choose between their health, safety, and obedience to Executive Orders on the one hand, and the exercise of their fundamental right to vote on the other. In the middle of a rapidly spreading and potentially deadly contagion, this Hobson’s choice is constitutionally unacceptable and unnecessary.

Amici respectfully reject any argument that Governor Lujan Grisham’s public health orders and executive orders themselves infringe upon Legislative prerogative or fundamental rights by ordering those who facilitate in-person voting to avoid public gatherings (without exception for polling places) or by ordering New Mexicans to stay at home without exception as to the exercise of their franchise. There is a compelling governmental interest in protecting the health and safety of the public.<sup>9</sup> See *Buchwald v. University of N.M. School of Med.*, 159 F.3d 487, 497 (10<sup>th</sup> Cir. 1998), citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310, 98 S. Ct. 2733, 2759 (1978); see generally *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) (discussing the broad police powers of the state with respect to preservation of public health and safety). If the fundamental right to vote might be infringed by the Governor’s orders, those orders are (for the time being) narrowly tailored to serve the compelling government interest in protecting the health and safety of the public in the midst of an unprecedented pandemic, and are therefore (for the time being) constitutionally legitimate. See, e.g., *Washington v. Glucksberg*,

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<sup>9</sup> For a thorough discussion of the health risks of in-person voting during the Covid-19 pandemic, see Cassandra DeWitt, Annabelle de St. Maurice & Michael Rios, VOTING AND INFECTION PREVENTION OF COVID-1, The UCLA Voting Rights Project (2020), <https://latino.ucla.edu/wp-content/uploads/2020/04/UCLA-VBM-Health-Safety-Report-2.pdf> (last visited April 7, 2020).

521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 2268, 117 S. Ct. 2302 (1997) (holding that infringements upon fundamental rights are prohibited except where “narrowly tailored to serve a compelling state interest.”). The Constitution is not a suicide pact. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160, 83 S. Ct. 554, 563, 9 L. Ed. 2d 644, 656 (1963). Neither is the New Mexico Election Code.

In light of the ongoing public health emergency, the Governor’s public health orders and executive orders are constitutionally legitimate. Under these extraordinary circumstances, the in-person voting protocols of the Election Code must give way so that reliance upon in-person voting in the upcoming primary election may be minimized. This is the first objective that the Petitioners and Respondent have sought to accomplish via their request for extraordinary writ relief, and Amici support the Petitioners and Respondent in that effort.

**B. Absentee Ballot Voting Alone is an Impermissibly Burdensome and Unconstitutional Substitute for In-Person Voting**

The Petitioners and Respondent seek to act in accordance with the orders of the Governor and minimize in-person voting in the 2020 primary election. These goals are both prudent and constitutionally permissible, in present circumstances. The remaining task is to protect New Mexicans’ fundamental right to vote despite a necessarily drastic reduction of polling places and in-person voting opportunities. Petitioners and Respondent propose a comprehensive set of vote-by-mail, mobile-voting, and in-person ballot-drop protocols. *See Stipulated Petition*, ¶¶46, 47. These

protocols will minimize the need for in-person voting by minimizing vote-by-mail barriers, while also protecting access to the polls by maximizing ballot distribution and available voting methods. At the other end of the spectrum, NMGOP proposes that every New Mexican who wishes to vote in the 2020 primary election should get to work on his or her absentee ballot application. *See Response in Intervention*, pg. 8 (“A state-promoted voluntary absentee-voting effort would be both legal and preferable, as a policy matter to [vote-by-mail]”).<sup>10</sup> Because a mandatory reliance on absentee ballot voting alone will create serious injustice and will impermissibly burden the fundamental right to vote, the “solution” proposed by NMGOP is constitutionally inadequate.

**i. The Election Code May Be Interpreted to Avoid the Injustice of Strict, “One Size Fits All” Absentee Ballot Protocols**

Contrary to NMGOP’s position, the Election Code does not require that absentee ballot voting be the only alternative to in-person voting during a serious pandemic and in spite of “stay at home” orders from the Governor. The Election

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<sup>10</sup> Oddly enough, given its alleged “separation of powers” concerns, NMGOP does not give any express indication that it has a problem with Executive orders which arguably conflict with the Election Code far more drastically than anything proposed by the Petitioners.

Code is a statutory framework like any other, and a court’s primary goal in interpreting any statute or set of statutes is to determine and give effect to the intent of the Legislature. *See, e.g., Martinez v. Cornejo*, 2009-NMCA-0011, ¶11, 146 N.M. 223; *see also State v. Martinez*, 1998-NMSC-023, ¶8, 126 N.M. 39. Nor are this Court’s powers of statutory construction as constrained as NMGOP implies. This Court has previously alluded to its plenary power of statutory interpretation, holding that “where the language of [a] legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity, or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others.” *Lewis v. Albuquerque Public Schools*, 2019-NMSC-022, ¶39, 435 P.3d 445(internal citation omitted).

While the Election Code does not explicitly endorse the use of vote-by-mail protocols outside of “special elections” defined by statute, neither does it prohibit using a wide array of voting methods (such as those proposed in the Stipulated Petition) where such an array of methods will serve to simultaneously protect the public health and the fundamental right to vote in the midst of a declared public health emergency. There is ambiguity in the Election Code, in these extraordinary circumstances. NMGOP insists that widespread use of vote-by-mail methods in statewide elections is prohibited, citing (among other statutes) NMSA 1978 § 1-6-5(F) (which states that “a mailed ballot shall not be delivered by the county clerk to



any person other than the applicant for the ballot.”) and NMSA 1978 § 1-24-3 (which in special elections requires that mailed ballots be provided to voters without requiring a voter to file an application to receive one). NMGOP provides no support for its implicit proposition that absentee ballot voting must serve as a “one size fits all” solution when in-person voting is inhibited or prohibited in a public health emergency. A narrow, literal, and unqualified interpretation of the Election Code would create serious injustice implicating constitutional rights. The Court is fully justified in interpreting the Election Code to include a “public health emergency” exception that would avoid serious injustice by significantly increasing the opportunities of New Mexicans to vote. “If the regulations of elections may be reasonably construed to entitle a citizen to vote, those regulations should be so construed.” *State ex rel. Walker v. Bridges*, 1921-NMSC-041, ¶8, 27 N.M. 169.

**ii. In the Alternative, the Election Code’s Strict Absentee Ballot Protocols Impermissibly Burden New Mexicans’ Fundamental Right to Vote and are Unconstitutional as Applied During a Declared Public Health Emergency**

If the Court interprets any provision of the Election Code to impose strict and inflexible absentee voting protocols without regard for a declared public health emergency that renders in-person voting a danger to the public health, then that provision impermissibly burdens the fundamental right to vote and is

unconstitutional under the present circumstances.<sup>11</sup> This burden on the right to vote would be a severe one, and the application of the burdensome provision should be subjected to strict scrutiny and a “least restrictive means” analysis. *See Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245, 253 (1992) (holding that when voting rights “are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’”). However, in assessing most constitutional challenges to specific provisions of state election law – where the burden to voting rights is anything less than “severe,” including burdens characterized as “moderate” – the United States Supreme Court utilizes the *Anderson-Burdick* balancing analysis. This analysis, first formulated in

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<sup>11</sup> Amici do not argue that *any* provision of the Election Code is facially unconstitutional. “A facial challenge is an attack on a statute itself as opposed to a particular application.” *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449, 192 L. Ed. 2d 435, 443 (2015). Amici argue that certain provisions of the Electoral Code (such as Section 1-6-5(F), Section 1-1-5.11, or Section 1-24-3) may become unconstitutional if rigidly applied during a declared public health emergency – an argument akin to an “as applied challenge,” were Amici in the shoes of a petitioner. *See, e.g., Doe v. Reed*, 561 U.S. 186, 194, 130 S. Ct. 2811, 2817 (2010) (noting that a constitutional challenge to a statute is “as applied” if it does not seek to strike the statute in all its applications, but as to particular applications under particular circumstances).

*Anderson v. Celebrezze*, 460 U.S. 780, 789-790, 103 S. Ct. 1564, 1570 (1983), is described as follows:

Constitutional challenges to specific provisions of a State's election laws cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions... Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first **consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments** that the plaintiff seeks to vindicate. It then must identify and **evaluate the precise interests put forward by the State** as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must **consider the extent to which those interests make it necessary to burden the plaintiff's rights**. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional... The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

*Id.* at 789-90, 103 S. Ct. at 1570 (emphasis added).

The present case is unusual in that the State is not attempting to justify the burdens imposed by a strict and literal reading of the Election Code during a public health emergency – much less by any reference to its “precise interests” in imposing that burden. While the elements of an *Anderson-Burdick* balancing equation are present before the Court – an asserted injury to the fundamental right to vote, and a compelling public interest in the protection of public health – there is no state-created conflict between the two, such that interest-balancing is truly necessary. The State itself has formulated a comprehensive plan to protect both compelling governmental interests simultaneously, rather than arguing “precise interests” to justify heightened

burdens on the franchise. Where one constitutional consideration might normally countervail another, here both constitutional considerations can be accommodated. Despite the restrictions arguably imposed by the Election Code, the Petitioners and Respondent have not asserted any interest in proceeding with either normal in-person elections or an all-absentee-ballot protocol. If COVID-19 is an unstoppable force, and the fundamental right to vote is an immovable object, the inflexible reading of the Election Code is caught between the two and must yield.

Because the State asserts no interest in burdening the right to vote by insistence upon an all-absentee-ballot election during a declared public health emergency, the Court may find that this conclusion ends the *Anderson-Burdick* interest-balancing inquiry and may grant the Stipulated Petition as a prudential matter. The fact that the State does not choose to advocate in favor of a narrow and unqualified reading of the Election Code does not mean that NMGOP should be granted standing advocate that position on the State's behalf. *Cf. Does I Through III v. Roman Catholic Church*, 1996-NMCA-094, ¶34, 122 N.M. 307. Even if the Court allows NMGOP or other partisan interest groups to argue the interests of the State for purposes of an *Anderson-Burdick* balancing analysis, the balance of constitutional interests favors the Petitioners and Respondent.

The COVID-19 pandemic and the Governor's public health orders have effectively made in-person voting unavailable to the majority of New Mexican

voters – any New Mexican not willing to risk his or her life to go to a polling place, but particularly older voters or voters with underlying medical conditions who are at highest risk of serious infection and death. Two alternatives present themselves for consideration: a status quo reliance on absentee ballot voting alone (favored by NMGOP), or a flexible, multi-method vote-by-mail/mobile voting/ballot-drop model (favored by the Petitioners and Respondent).

Reliance on absentee ballot voting alone will create an impermissible and unconstitutional burden on New Mexicans' fundamental right to vote. In the 2016 statewide primary election – the last presidential primary election – 206,891 New Mexicans cast their ballots in-person, as opposed to 14,052 by absentee ballot.<sup>12</sup> This nearly fifteen-fold disparity between in-person voting and absentee ballot voting must be acknowledged. Whether New Mexican voters are unaware of the availability of the absentee ballot option, are unable to navigate the heightened procedural hurdles of the absentee ballot option, lack trust in the absentee ballot option, lack access to reliable mailing infrastructure, or all of the above, absentee ballot voting is a secondary option for the majority of New Mexican voters. Absentee ballot voting

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<sup>12</sup> In the 2018 election 701,654 New Mexicans cast votes, and only 68,376 did so by absentee ballot. Voting statistics are from the Office of the New Mexico Secretary of State, accessible online at <https://www.sos.state.nm.us/voting-and-elections/election-results/> (last accessed April 7, 2020)

alone would disparately impact certain groups of New Mexico voters and would be a constitutionally inadequate means of protecting the fundamental right to vote in the 2020 primary election. “Disparate impact matters under *Anderson-Burdick*.” *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018). It matters, for purposes of the *Anderson-Burdick* balancing test, whether the effects of a facially neutral and non-discriminatory law are unevenly distributed across identifiable groups. *See Common Cause Ind. v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949, 968 (S.D. Ind. 2018) (citing a six-justice consensus in *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610 (2008)). Those identifiable groups include age and health. *Id.*

Absentee ballot statutes are designed to make voting more accessible to those who cannot easily get to the polls. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807, 89 S. Ct. 1404, 1408 (1969). However, absentee ballot voting is more difficult for groups who cannot easily utilize the mail service. Other states addressing this issue have found that “the elimination of polling places resulting from the transition to vote by mail creates barriers that restrict the ability of many voters with disabilities from achieving the independence and privacy in voting provided by the accessible voting devices required under the Help America Vote Act,” and that “[c]ounties must take appropriate steps to mitigate these impacts and to address the obligation to provide voters with disabilities an equal opportunity to

vote independently and privately.” Rev. Code Wash. (ARCW) § 29A.04.223. Department of Justice guidance indicates that “[w]hile absentee balloting can be *offered* to voters with disabilities, it cannot take the place of in-person voting for those who prefer to vote at the polls on Election Day.”<sup>13</sup> Advocates for rural voters – including the Navajo Nation Human Rights Commission – have repeatedly argued that the reduction or elimination of in-person polling places without the provision of adequate accessible alternatives impermissibly burdens rural residents’ right to vote. *See, e.g., Navajo Nation Human Rights Comm’n v. San Juan Cnty.*, 281 F. Supp. 3d 1136, 1152 (D. Utah 2017). Courts addressing such arguments have conceded that “were mail-in voting the *only* option or even the only *accessible* option to cast a ballot, then [a] County’s failure to provide other options could arguably be burdensome to rural voters” in a manner implicating the Equal Protection Clause. *Id.*

A “one size fits all” reliance on absentee ballot voting alone will disenfranchise many Native voters across the twenty-three Tribes, Nations, and Pueblos of New Mexico, including some tribal members who reside in urban areas.

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<sup>13</sup> U.S. Department of Justice, THE AMERICANS WITH DISABILITIES ACT AND OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF VOTERS WITH DISABILITIES (2014), [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm) (last visited April 7, 2020).

According to a 2018 survey research report from the Native American Voting Rights Coalition:<sup>14</sup>

- “Most people in Native communities vote in-person. There appears to be little familiarity with mail-in options and less trust in the process.”
- “Many Native American people do not have traditional street addresses, which can create significant problems in registering to vote and voting.”
- “Native Americans in any of these states seldom use online registration... In New Mexico, where the system is relatively new, only 3.3% of the Native American respondents registered online and in Nevada 5.1% registered online (as opposed to 21% of all registrants).”

Under NMGOP’s “one size fits all” absentee ballot plan, voters in areas with reliable access to internet service will be able to apply for absentee ballots online, receive those ballots in the mail and then mail the printed and completed ballot using a more reliable mail service. This group of New Mexicans will have to rely on a more reliable mail service twice. Under NMGOP’s “one size fits all” absentee ballot plan, New Mexicans in areas without access to internet services– including a

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<sup>14</sup> Native American Voting Rights Coalition, VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA AND SOUTH DAKOTA, SURVEY RESEARCH REPORT EXECUTIVE SUMMARY AND POLICY REFORM RECOMMENDATIONS (2018), <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf> (last visited April 7, 2020).



disproportionately high percentage of Native voters<sup>15</sup> – will be forced to rely on unreliable mail services three times: to 1) request an absentee ballot application by hit-or-miss mail service, 2) hope that a ballot arrives by hit-or-miss mail service in a timely manner, and 3) send the completed ballot by hit-or-miss mail service and hope that it arrives with the County Clerk in time to be counted. In circumstances where in-person voting opportunities must be minimized for the protection of the public health, a reliance on absentee ballots alone, without supplement, becomes additionally burdensome on identifiable groups of voters – a disparate impact that raises equal protection concerns and is relevant to *Anderson-Burdick* analysis.

While these structural disparities and barriers to voter access remain problematic even in the best of circumstances, they threaten a severe injury to Native voters’ rights if absentee ballots are deemed the only viable means of voting in the

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<sup>15</sup> “The National Broadband Map data show that only 54 percent of the population in Indian Country has access to basic wireline broadband speeds of 3 megabits per second downstream. That compares with 94 percent of the U.S. population as a whole. And only half of Indian Country population has access to 6-megabit wireless speeds, compared with 91 percent of the population as a whole.” See National Telecommunications and Information Administration, NARROWING THE DIGITAL DIVIDE IN THE NAVAJO NATION (2014), <https://www.ntia.doc.gov/blog/2014/narrowing-digital-divide-navajo-nation> (last visited April 7, 2020).

2020 primary election. If a strict and literal reading of the Election Code during a public health emergency leaves absentee ballots as the only viable means of voting, and Native Americans have no familiarity with, trust in, or adequate means of accessing absentee ballots, then the inevitable result will be that many Native Americans are prevented from voting – a constitutionally unacceptable outcome. “A citizen, a qualified voter, is no more nor less so because he [or she] lives in the city or on the farm... [t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.” *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 1384-1385 (1964).

An inflexible reliance on absentee ballot voting as the only means of voting in the upcoming 2020 primary election would work a constitutionally impermissible injury to many New Mexicans’ fundamental right to vote. A more varied and flexible voting model designed to meet the challenge of the public health crisis is required in these extraordinary circumstances, to distribute and carry the weight normally carried by in-person voting.

**C. The Vote-by-Mail/Mobile Voting/Ballot-Drop Model Proposed in the Stipulated Petition is a Constitutionally Permissible Means of Protecting Both the Health and Safety of the Public and the Fundamental Right to Vote**

The strict, “one size fits all” absentee ballot approach proposed by NMGOP will impermissibly burden the fundamental right to vote of many New Mexicans,

The flexible, multi-method vote-by-mail/mobile voting/ballot-drop model favored by the Petitioners and Respondent is a constitutionally permissible means of buttressing that same fundamental right in the midst of a public health emergency. “The public interest... favors permitting as many qualified voters to vote as possible,” *Obama for America v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012), and providing varied and flexible methods for voting is powerful means of maximizing turnout.

The plan of the Respondent and Petitioners will minimize the need for in-person voting by minimizing vote-by-mail barriers, and will protect voters’ access to the polls by maximizing ballot distribution and voting methods. Voters who wish to deliver their completed ballots in-person will be able to do so; voters who need to vote in-person due to disabilities, language barriers, or for any other reason will be able to do so; and alternate voting locations/mobile alternate voting locations will remain available to the voting public. In the meantime, to protect their own health and the public health by practicing social distancing and avoiding mass gatherings, many New Mexicans will be able to vote by mail – many of them for the first time – without having to navigate the heightened procedural hurdles of the absentee ballot application process on short notice. While the plan proposed in the Stipulated Petition will not eliminate the disparities in voting access caused by the digital divide and unreliable mail services in certain rural areas and on certain tribal lands

throughout the state, it will mitigate the disparity significantly by reducing the number of times a prospective voter must rely on unreliable mail services in order to vote, or allowing a prospective voter to utilize a Service Center, mobile voting center, or ballot-drop in the event that the mailing service is so unreliable as to be unworkable.

The Court must anticipate that State efforts to prevent the spread of contagion will create severe burdens on the right to vote in the 2020 primary election. If the right to vote is to be severely burdened in service to a compelling government interest, it must be done by the least restrictive means, even where the least restrictive means remains far from ideal. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 827, 120 S. Ct. 1878, 1893 (2000) (holding that a statute violated the First Amendment where it imposed a “severe burden” on speech and was not the “least restrictive means” of doing so). The plan proposed in the Stipulated Petition is not perfect, but it imposes fewer restrictions upon the fundamental right to vote than absentee ballot voting alone.

In ordinary circumstances, the multi-method vote-by-mail/mobile voting/ballot-drop model proposed by the Petitioners and Respondent would be unnecessary. Neither a compelling interest in the protection of the public health nor a compelling interest in the preservation of the fundamental right to vote would require any departure from the statutory provisions of the Election Code. In these

extraordinary circumstances, however, a broad interpretation of the statutory provisions of the Election Code is constitutionally necessary to protect the public health and the fundamental right to vote. The plan proposed in the Stipulated Petition is a constitutionally permissible means of protecting the fundamental right to vote and the public health simultaneously, and should be implemented.

### **III. THIS COURT MUST PROTECT THE FUNDAMENTAL RIGHT TO VOTE**

NMGOP complains that the Petitioners and Respondent have “openly entreated the Court to violate separation of powers by making new law (in conflict with existing statute) in an area that is the acknowledged constitutional ‘providence [sic] of the Legislature.’” *Response in Intervention*, pg. 1. The Petitioners and Respondent have not asked the Court to make new law, but to interpret existing statutory law to protect the public health in a global pandemic while also simultaneously protecting the fundamental right to vote. *See Stipulated Petition*, ¶45 (“Petitioners urge this Court to provide relief in this emergency by issuing a writ directing Respondent to conduct the 2020 primary election... using procedures that already exist in the Election Code, and are thus already Legislatively-adopted manners of conducting elections, adapted to this crisis.”). Nothing prevents this Court from a broad interpretation of New Mexico statutes to account for a declared public health emergency. This Court has already done so in other instances with

respect to COVID-19. *See* New Mexico Supreme Court Orders Nos. 20-8500-007 and 20-8500-008 (staying writs of restitution issued under the Uniform Owner-Resident Relations Act and the Mobile Home Park Act during the COVID-19 public health emergency).

While this Court may fairly interpret the Election Code in the manner urged by the Petitioners and Respondent without resort to fundamental rights analysis, this Court should also remember what NMGOP has apparently forgotten: that “it is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60, 73 (1803). “If an act [or inaction] of the legislature, repugnant to a written constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?” *Id.* To the contrary: “the constitution is superior to any ordinary act of the legislature” – including any provision of the Election Code – and “the constitution, and not such ordinary act, must govern the case to which they both apply.” *Id.* at 178.

This Court has full plenary authority to deem any particular provision of the Election Code unconstitutional as applied during a public health emergency, to the extent that the provision impermissibly burdens the fundamental right to vote. The power to *promulgate* an election code is the constitutional prerogative of the Legislature under Article VII, Section 1(B) of the New Mexico Constitution, but the Election Code itself, once promulgated, is statutory and carries no constitutional

gloss. See *United States Term Limits v. Thornton*, 514 U.S. 779, 833-834, 115 S. Ct. 1842, 1869 (1995) (noting that “the Framers understood the Elections Clause as a grant of authority *to issue procedural regulations*, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”) (emphasis added). The *Anderson-Burdick* cases specifically authorize judicial review of state election codes for constitutional legitimacy, and New Mexico’s interstitial approach to constitutional inquiries ensures that state constitutional protections of the fundamental right to vote are greater still than the federal protections. Deference to Legislative action or prerogative must always yield to the protection of fundamental rights.

Perhaps it would be preferable if the Legislature were convened in special session – if such a special session could be safely accomplished, and could be accomplished in so timely a manner as to avoid any imposition on fundamental rights in the imminent 2020 primary election. It does not appear that an in-person special session can be safely accomplished during the ongoing pandemic, or that an in-person special session is currently feasible under the Governor’s public health orders. As to the prospect of a “digital” or “remotely conducted” special session, it is difficult to envision how such a thing could be accomplished while honoring the requirement of Article IV, §12 of the New Mexico Constitution that “all sessions of each house shall be public.” A remotely-convened special session would not be

public to any New Mexican lacking internet access, and the ability of any member of the public to participate in such a special session (rather than passively observing it) would be severely hampered.

The Governor has not called the Legislature into special session. The Legislature has not called itself into special session. There is no indication at the time of filing that a special session will be called by either the Legislature or the Governor. The Court cannot force the Legislature to convene in special session. Whether convened in-person or remotely, if a special session did not result in a timely and constitutionally adequate solution to the threats to fundamental rights detailed in this brief, the task of protecting those rights would fall to this Court regardless. An order granting the Stipulated Petition for Extraordinary Writ Relief is preferable to the uncertainties of a special session, however convened. There is little time and little reason to wait for the Legislature to protect (or not protect) a fundamental right that this Court is fully justified in protecting – and may protect more quickly, more certainly, and more safely.

### **CONCLUSION**

The U.S. Constitution and the New Mexico Constitution empower this Court to act to protect the fundamental right to vote. The Court should exercise its power in this case, by resort to the interstitial approach and New Mexico's heightened constitutional protections, if necessary. It is only by acting – rather than abstaining



– that this Court can ensure orderly, fair, and honest elections rather than chaos and disenfranchisement. To halt the spread of a deadly contagion, the State of New Mexico has a compelling government interest in minimizing in-person voting in the upcoming 2020 primary election. However, reliance on absentee ballots alone is a constitutionally inadequate means of ensuring the fundamental right to vote in that election. Unless alternative voting methods are authorized, the fundamental right to vote will be severely and unnecessarily burdened. The Petitioners and Respondent have developed flexible substitute voting methods which taken together provide constitutionally adequate means of protecting the fundamental right to vote, and the extraordinary writ relief sought by the Petitioners and Respondent should be granted.

Respectfully submitted,

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## **TYPE-VOLUME LIMITATION COMPLIANCE STATEMENT**

Pursuant to Rule 12-318(G) NMRA, this Amicus Brief complies with the type-volume limitation in Rule 12-318(F)(3): the body of the Brief is prepared using a proportionally-spaced type style or typeface (Times New Roman, 14 point) and contains 9,152 words, using the word count feature in Microsoft Word 2016.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was directed to be served on all parties and other registered persons at the time of filing using the electronic filing system approved by the Supreme Court for use by attorneys to file and serve documents by electronic transmission, in compliance with Rule 12-307(C) NMRA.

/s/ Felicia L. Orth 4/8/20  
Felicia L. Orth