



Joey D. Moya

IN THE NEW MEXICO SUPREME COURT

STATE OF NEW MEXICO *ex rel.*
JOHN P. SUGG, DIANNA LUCE,
FRANCESCA MARTINEZ-ESTEVEZ,
CLINT WELLBORN, DONALD GALLEGOS,
ANDREA REEB, PAULA PAKKALA, and
LEMUEL L. MARTINEZ

Petitioners,

v.

No. **S-1-SC-37723**

MAGGIE TOULOUSE OLIVER,
Secretary of State for the State of New Mexico

Respondent.

VERIFIED PETITION FOR ORIGINAL WRIT OF MANDAMUS
AND DECLARATORY JUDGMENT

John P. Sugg
Twelfth Judicial District Attorney
1000 New York Ave, Rm 101
Alamogordo, New Mexico 88310
(575) 437-3640
jsugg@da.state.nm.us

Counsel for Petitioners

June 10, 2019

TABLE OF CONTENTS

Statement of Compliance	ii
Table of Authorities	iii
Introduction	1
Jurisdiction	2
Parties	4
Grounds for the Petition	5
I. Under HB 407, the legal status of the incumbent district attorneys upon the expiration of their current four-year term of office on December 31, 2020 is uncertain, which implicates fundamental constitutional questions of great public importance.....	6
II. This Petition addresses the Respondent’s non-discretionary duties under the New Mexico Election Code	8
III. Section 103 of HB 407 is unconstitutional	9
a. The office of district attorney is required to appear on the ballot during the 2020 presidential election cycle under the New Mexico Constitution	11
b. Other jurisdictions that have considered whether a legislative body can extend constitutional terms of office by statute have found such attempts unconstitutional.....	13
c. HB 407 violates the incumbents’ right to seek re-election to office, and the voters’ rights to elect the chief law officer of their respective judicial district..	15
The Relief Sought.....	19

STATEMENT OF COMPLIANCE

The Verified Petition for Writ of Original Mandamus complies with the limitation of Rule 12-504(G)(3), NMRA. The body of the Petition uses a proportionally-spaced type style and is 4,206 words.

TABLE OF AUTHORITIES

New Mexico Cases

<i>Unite New Mexico v. Oliver</i> , 2019-NMSC-009.....	2
<i>Laumbach v. Bd. of Cty. Comm'rs</i> , 1955-NMSC-096, 60 N.M. 226, 290 P.2d 1067	2
<i>Heron v. Garcia</i> , 1944-NMSC-058, 48 N.M. 507, 153 P.2d 514	2
<i>State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n</i> , 2007- NMSC-023, 141 N.M. 657, 160 P.3d 566	2
<i>State ex rel. Shepard v. Mechem</i> , 1952-NMSC-105, 56 N.M. 762, 250 P.2d 897	2
<i>State ex rel. Clark v. Johnson</i> , 1995-NMSC-048, 20 N.M. 562, 904 P.2d 11	2, 3
<i>State ex rel. Sandel v. New Mexico Pub. Util. Comm'n</i> , 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.....	4
<i>State v. Neely</i> , 1991-NMSC-087, 112 N.M. 702, 819 P.2d 249.....	7
<i>City of Santa Fe v. Martinez</i> , 2010-NMSC033, 148 N.M. 708, 242 P.3d 275	7
<i>State v. Hollenbeck</i> , 1991-NMCA-060, 112 N.M. 275, 814 P.2d 143	7
<i>State v. Baca</i> , 1984-NMCA-096, 101 N.M. 716, 688 P.2d 34	7
<i>Weldon v. Sanders</i> , 1982-NMSC-136, 99 N.M. 160, 655 P.2d 1004.....	8
<i>State ex rel. King v. Raphaelson</i> , 2015-NMSC-028, 356 P.3d 1096.....	11, 18
<i>Jones v. Murdoch</i> , 2009-NMSC-002, 145 N.M. 473, 200 P.3d 523	11
<i>State ex rel. Taylor v. Johnson</i> , 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768	11
<i>State ex rel. Ward v. Romero</i> , 1912-NMSC-011, 17 N.M. 88, 125 P. 617	12
<i>Block v. Vigil-Giron</i> , 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72	13
<i>Denish v. Johnson</i> , 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914	15

<i>Territory ex rel. Klock v. Mann</i> , 1911-NMSC-076, 16 N.M. 744, 120 P. 313	16
<i>State ex rel. Read v. Crist</i> , 1919-NMSC-005, 25 N.M. 175, 179 P. 629.....	17
<i>Roberts v. Cleveland</i> , 1944-NMSC-031, 48 N.M. 226, 149 P.2d 120	18

New Mexico Statutes

NMSA 1978, § 36-1-18 (2001)	6
NMSA 1978, § 1-1-3 (1969)	8
NMSA 1978, § 1-8-12(A) (2019).....	8
NMSA 1978, § 1-8-13(B), (2019)	9
NMSA 1978, § 1-10-8 (2019)	9, 10
NMSA 1978, § 44-3-4 (1953)	17

New Mexico Session Laws

2019 N.M. Laws, ch. 212, §§ 279-281	10
---	----

New Mexico Rules

Rule 12-504(G)(3), NMRA	ii
-------------------------------	----

New Mexico Constitution

N.M. Const. art. VI, § 3	2
N.M. Const. art. XX, § 4.....	4, 18
N.M. Const. art. XX, § 6.....	8
N.M. Const. art. VI, § 24	9
N.M. Const. art XX, § 3.....	10
N.M. Const. art. XXII, §17	12
N.M. Const. art XXII, § 22.....	12

N.M. Const. art XI, § 1	13
N.M. Const. art. V, § 1 (amended 1970).....	14
N.M. Const. art. XX, § 2.....	15, 16
N.M. Const. art. II, § 2.....	17
N.M. Const. art. II, § 3.....	17

Other Jurisdictions – Cases

<i>McFadden v. Jordan</i> , 32 Cal. 2d 330, 196 P.2d 787 (Cal. 1948) (en banc), <i>cert. denied</i> , 336 U.S. 918 (1949).....	3
<i>Leininger v. Alger</i> , 316 Mich. 644, 26 N.W.2d 348 (Mich. 1947)	3
<i>Gemmer v. State</i> , 163 Ind. 150, 71 N.E. 478, 480 (1904).....	13, 14, 16, 17
<i>State ex rel. Smallwood v. Windom</i> , 131 Minn. 401, 155 N.W. 629 (1915).....	14
<i>Robinson v. Moser</i> , 203 Ind. 66, 179 N.E. 270, 274 (1931).....	14, 15

Other Jurisdictions – Constitution

Ind. Const., art. 15, § 3.....	16
--------------------------------	----

Other Authorities

Charles T. DuMars & Michael B. Browde, <i>Mandamus in New Mexico</i> , 4 N.M. L. Rev. 155, 170-72 (1974)	3
---	---

INTRODUCTION

The New Mexico Constitution establishes the office of district attorney and provides for a term of office of four years. Since 1912, district attorneys have been elected every four years, coinciding with the presidential election cycle. The Legislature has no power to alter the constitutional term of office for a district attorney. The term of office could only be changed by constitutional amendment. Nevertheless, the Legislature purported to change the district attorneys' constitutional term of office by statutorily changing their election cycle from presidential to gubernatorial, which will result in the present office holders either serving a six-year term of office or being ousted from office after four years without an election in violation of New Mexico's democratic form of government.

By purporting to alter the district attorneys' term of office, House Bill 407 (hereafter "HB 407") creates a substantial public crisis of constitutional magnitude that warrants this Court's exercise of original mandamus jurisdiction. This Court should declare HB 407 unconstitutional as it applies to the term of office of the district attorneys and direct the Secretary of State to include the office of district attorney on the 2020 primary and general election proclamations. Absent a constitutional amendment temporarily altering the term of office for district attorneys to two years or six years, the district attorneys' term of office must remain

on the presidential election cycle.

JURISDICTION

Petitioners invoke the original jurisdiction of this Court under Article VI, Section 3 of the New Mexico Constitution, which provides that the Supreme Court “...shall have original jurisdiction in...mandamus against all state officers...” *See also Unite New Mexico v. Oliver*, 2019-NMSC-009, ¶ 2. This is an action to declare Section 103 of HB 407 unconstitutional, and to direct the Respondent to place the office of district attorney on the 2020 primary and general election proclamation as required under the New Mexico Constitution.

Mandamus is the “proper remedy to compel the performance of an official act by a public officer.” *Laumbach v. Bd. of Cty. Comm'rs*, 1955-NMSC-096, ¶ 15, 60 N.M. 226, 290 P.2d 1067, quoting *Heron v. Garcia*, 1944-NMSC-058, ¶ 9, 48 N.M. 507, 153 P.2d 514; *see also State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566. Further, “the right of a relator to question, by a mandamus proceeding, the constitutionality of a statute, is very generally recognized...” *State ex rel. Shepard v. Mechem*, 1952-NMSC-105, ¶ 10, 56 N.M. 762, 250 P.2d 897.

New Mexico courts have exercised prohibitory mandamus since before statehood. *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M.

562, 904 P.2d 11. “[T]he authority to prohibit unlawful official conduct [is] implicit in the nature of mandamus... This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action. *Id.*, citing *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (Cal. 1948) (en banc) (issuing writ of mandamus to enjoin the secretary of state from submitting to the voters unconstitutional initiative proposal), *cert. denied*, 336 U.S. 918 (1949); *Leininger v. Alger*, 316 Mich. 644, 26 N.W.2d 348 (Mich. 1947) (same).

While the New Mexico Legislature has granted the district court “exclusive original jurisdiction in all cases of mandamus,” this Court has routinely exercised its constitutional authority to review petitions for writs of mandamus when the “proceeding implicates fundamental constitutional questions of great public importance.” *State ex rel. Clark*, 1995-NMSC-048, ¶16; *see also* Charles T. DuMars & Michael B. Browde, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 170-72 (1974) (“The conflict between Article VI, Section 3 of the Constitution and New Mexico statutory law has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction in mandamus.”).

This Court properly invokes its original jurisdiction of mandamus “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. Sandel v. New Mexico Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55.

PARTIES

Petitioners Sugg, Luce, Martinez-Estevez, Wellborn, Gallegos, Reeb, Pakkala,¹ and Martinez (collectively hereafter as “Petitioners”) are duly elected district attorneys from the Twelfth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh - Division 2, and Thirteenth Judicial Districts, respectively. As the chief law officers of their respective judicial districts, the Petitioners represent their constituents, the people of the State of New Mexico.

Petitioners’ current four-year terms of office began on January 1, 2017, and consequently, are constitutionally set to expire on December 31, 2020. Most of the Petitioners intended to seek re-election to their respective offices in 2020 to coincide with the expiration of their current terms of office. Under HB 407, the

¹ Paula Pakkala was appointed by the Honorable Governor Susana Martinez to fill the vacancy created by the retirement of Karl Gillson in the Eleventh Judicial District - Division 2. After being appointed, Pakkala stood election in the 2018 election in accordance with N.M. Const. art. XX, § 4. Accordingly, Pakkala is finishing the unexpired term of Karl Gillson, which is scheduled to end on

office of district attorney will not appear on the 2020 ballot, and the legal status of all of these district attorneys is uncertain for the time period between the expiration of their current terms of office and the next gubernatorial election to be held in 2022.

Respondent, the Honorable Maggie Toulouse Oliver, Secretary of State for the State of New Mexico, is named in her official capacity.

GROUNDINGS FOR THE PETITION

During the immediate past regular session of the Fifty-Fourth Legislature of the State of New Mexico, the Legislature duly passed HB 407. *See* Exhibit 1. The 425-page election bill, titled “Election Laws 50-year Tune-Up,” passed both chambers with bipartisan support.

In Section 286 of HB 407, the Legislature declared there to be an emergency, making “it necessary for the public peace, health and safety that this act take effect immediately.” Therefore, HB 407 became effective on April 3, 2019, when Governor Michelle Lujan Grisham signed the bill into law.

One of the changes HB 407 made to the State’s election laws was to rearrange the election cycles for various political offices. Among the political offices moved was the office of district attorney. Instead of district attorneys being

December 31, 2020.

elected during the presidential election cycle, as historically has been done in New Mexico, HB 407 requires the office of district attorney to appear on the primary and general election ballots during the gubernatorial election cycle.

I. Under HB 407, the legal status of the incumbent district attorneys upon the expiration of their current four-year term of office on December 31, 2020 is uncertain, which implicates fundamental constitutional questions of great public importance.

HB 407 has created a situation where there will be a two-year period, from January 1, 2021 until December 31, 2022, in which the incumbent district attorneys' constitutional terms of office have expired, but a successor has not been duly elected as required by the New Mexico Constitution. This poses a significant constitutional question involving great public importance.

The duties of the district attorneys are spelled out in NMSA 1978, Section 36-1-18 (2001), which provides:

- A. Each district attorney shall:
- (1) prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested;
 - (2) represent the county before the board of county commissioners of any county in his district in all matters before the board whenever requested to do so by the board, and he may appear before the board when sitting as a board of equalization without request;
 - (3) advise all county and state officers whenever requested; and
 - (4) represent any county in his district in all civil cases in which the county may be concerned in the supreme court or court of appeals, but not in suits brought in the name of the state.

Of these duties, the district attorneys' primary duty is to prosecute criminal cases within their respective judicial district. There can be no question that the people, through their government, have a legitimate interest in deterring crime and punishing criminal offenders. *See State v. Neely*, 1991-NMSC-087, ¶ 21, 112 N.M. 702, 819 P.2d 249 (“The state has an interest in punishing defendants found guilty of criminal acts...”); *City of Santa Fe v. Martinez*, 2010-NMSC033, ¶ 13, 148 N.M. 708, 242 P.3d 275 (recognizing the public's interest in deterring individual's driving while under the influence).

It is well established that “a court obtains no jurisdiction over an action brought without authority and that, if an individual who does not have authority to prosecute does prosecute, the court will lack jurisdiction.” *State v. Hollenbeck*, 1991-NMCA-060, ¶ 10, 112 N.M. 275, 814 P.2d 143; *see also State v. Baca*, 1984-NMCA-096, ¶ 7, 101 N.M. 716, 688 P.2d 34. Therefore, if this Court does not exercise its original jurisdiction to declare HB 407 unconstitutional and direct Respondent to place the office of district attorney on the 2020 primary and general election ballots, each defendant convicted during the time period after the expiration of the incumbents' current terms and the next gubernatorial election cycle, will have a legal basis to challenge the incumbent district attorneys' lawful authority to prosecute the case against him putting each criminal conviction

obtained during this time period in jeopardy.

II. This Petition addresses the Respondent’s non-discretionary duties under the New Mexico Election Code.

Respondent, Secretary Toulouse Oliver, is the chief election officer of the State. “Although the secretary of state is the chief election officer...she cannot negate mandatory provisions of the Election Code. To allow the secretary of state to do so would violate the doctrine of separation of powers.” *Weldon v. Sanders*, 1982-NMSC-136, ¶ 33, 99 N.M. 160, 655 P.2d 1004; *see also* NMSA 1978 § 1-1-3 (1969)(“As used in the Election Code [1-1-1 NMSA 1978], “shall” is mandatory.”). Accordingly, the Respondent has the non-discretionary duty to carry out her duties under the Election Code, which includes the recently enacted changes provided for in HB 407.

Under HB 407, Respondent has a non-discretionary duty to issue a public proclamation calling for a primary and general election to be held in 2020. *See* NMSA 1978, § 1-8-12(A) (2019)(“The secretary of state shall issue a public proclamation calling a general election to be held in each county and precinct of the state on the date prescribed by Article 20, Section 6 of the constitution of New Mexico.”). The proclamation is required to be filed no later than the last Monday in January of each election year. *Id.*

The proclamation must include a list of “offices to be elected at the general

election,” and provide the date on which declarations of candidacy and nominating petitions for various offices, including the office of district attorney, must be filed. *See* NMSA 1978, § 1-8-13(B), (2019).

Section 103 of HB 407 lists the ballot order in which the various public offices and ballot questions are required to appear on the primary and general election ballots. Section 103 moved the election cycle for the office of district attorney from the presidential election cycle to the gubernatorial election cycle. *See* NMSA Section 1-10-8 (2019)(“In the year in which the governor is elected, the ballot in a primary election and general election shall contain, when applicable, partisan offices to be voted on in the following order...(17) district attorney.”).

Accordingly, Respondent has a non-discretionary duty to omit the office of district attorney from the upcoming 2020 primary and general election ballots, and to move the district attorneys’ election cycle from the presidential election cycle to the gubernatorial election cycle. Respondent will violate the New Mexico Constitution if she exercises her non-discretionary duties under HB 407.

III. Section 103 of HB 407 is unconstitutional.

The New Mexico Constitution states that “[t]here shall be a district attorney for each judicial district, who...shall be the law officer of the state and of the counties within his district, [and] shall be elected for a term of four years, and shall

perform such duties...as may be prescribed by law.” N.M. Const. art. VI, § 24.

Petitioners are duly elected district attorneys from throughout the State. Their current four-year term of office began on January 1, 2017, and consequently, is set to expire on December 31, 2020 in accordance with the New Mexico Constitution. *See* N.M. Const. art XX, § 3 (“The term of office of every state, county or district officer, except those elected at the first election held under this constitution, and those elected to fill vacancies, shall commence on the first day of January next after his election.”).

The next presidential election cycle is scheduled to occur in 2020. Petitioners intended to seek re-election during the 2020 election cycle, which would have coincided with the expiration of the district attorneys’ current term of office. Under HB 407, the office of district attorney will not appear on the ballot until the next gubernatorial election cycle in 2022, two years after the expiration of the district attorneys’ current four-year term.

HB 407 contained several temporary provisions extending the terms of office for district court judges, metropolitan judges, the public regulation commission, public education commission, magistrate judges and county officers in order to align those offices with the election cycles for those offices listed in NMSA 1978 Section 1-10-8 (2019). *See* 2019 N.M. Laws, ch. 212, §§ 279-281. HB 407 is silent

as to the terms of office for the office of district attorney, an apparent oversight by the Legislature.

a. The office of district attorney is required to appear on the ballot during the 2020 presidential election cycle under the New Mexico Constitution.

Even if HB 407 had provided for an extension of the district attorneys' current terms of office, the Legislature lacks the constitutional authority to extend the term of office for the district attorneys beyond that which is provided for under the New Mexico Constitution. Consequently, the office of district attorney must appear on the ballot in 2020 to coincide with the expiration of the district attorneys' current terms of office as evidenced by the history of electing district attorneys in this State. This Court has noted the relevancy of past practice in interpreting constitutional and statutory issues. *See State ex rel. King v. Raphaelson*, 2015-NMSC-028, ¶ 22, 356 P.3d 1096 (analyzing the history of judicial selection and retention to determine when a state district court judge was required to stand for retention election), *see also Jones v. Murdoch*, 2009-NMSC-002, ¶ 28, 145 N.M. 473, 200 P.3d 523 (“[I]n light of past practice, it would be unreasonable to conclude that the Legislature decided to explicitly give the target the right to alert the grand jury to the existence of exculpatory evidence while nevertheless allowing the prosecutor to reject such offers without a check.”); *State ex rel. Taylor v. Johnson*,

1998-NMSC-015, ¶ 32, 125 N.M. 343, 961 P.2d 768 (holding that “the past practices of the New Mexico Legislature and Executive are instructive” in determining whether the executive branch had exceeded its constitutional powers in enacting and implementing certain welfare regulations).

On January 6, 1912, President William H. Taft signed a proclamation making New Mexico the forty-seventh state of the United States of America. After the New Mexico Constitution was approved, the governor of the State of New Mexico was required to “issue his proclamation for an election at which officers for a full state government, including...[all] officers as this constitution prescribes...[were] chosen by the people...” N.M. Const. art. XXII, § 17. “The term of office of all officers elected at the [initial] election...commence[d] on the date of their qualification and...expire[d] at the same time as if they had been elected on the Tuesday next after the first Monday of November in the year nineteen hundred and twelve.” N.M. Const. art XXII, § 22; *see also State ex rel. Ward v. Romero*, 1912-NMSC-011, ¶ 35, 17 N.M. 88, 125 P. 617 ([T]he district attorney under the constitution, is a State officer...”).

Since the district attorneys are constitutional state officers, the office of district attorney was required to appear on the first election ballot for the State of New Mexico in 1912, which occurred during a presidential election cycle. Given

the constitutional requirement that district attorneys serve four-year terms, the office of district attorney has subsequently appeared on the ballot the last twenty-five presidential election cycles² to coincide with the expiration of the incumbent district attorneys' terms of office. Given the plain language of the New Mexico Constitution, it is clear, absent a constitutional amendment, that the office of district attorney must appear on the ballot during the 2020 presidential election cycle to provide for the election of the district attorneys for a new four-year term. *See Block v. Vigil-Giron*, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72 (discussing Article XI, Section 1 of the New Mexico Constitution which provided for a one-time, two-year term of office to create staggered terms).

b. Other jurisdictions that have considered whether a legislative body can extend constitutional terms of office by statute have found such attempts unconstitutional.

While no New Mexico case has dealt directly with the issue addressed in this petition, Indiana's Supreme Court considered whether its legislative body could extend the terms of office for constitutional officers to align various political offices for election and uniformity purposes in *Gemmer v. State*, 163 Ind. 150, 71 N.E.

² Under the original New Mexico Constitution, the executive department, including the office of governor, was elected to serve two-year terms of office so the office of governor also appeared on the presidential election ballot. However, in 1970, the New Mexico Constitution was amended and the term of office for all executive departments was changed from two years to four years. As a result, the executive department offices no longer appear on the ballot during the presidential election

478, 480 (1904). In striking down the election law as unconstitutional, the Indiana Supreme Court noted that since the offices at issue were “constitutional and elective, the voters of the county are authorized to fill it at the first opportunity given under the Constitution. This right can not be taken away from them by the legislature, either directly, or indirectly, by an act postponing the choice of the officers named until a general election at which they might be elected has passed.” *Id.* at 482; *see also State ex rel. Smallwood v. Windom*, 131 Minn. 401, 155 N.W. 629 (1915) (The legislature cannot change the date of an election and thereby, or by other means, increase the term of a municipal judge beyond the term fixed by the Constitution).

The Indiana Supreme Court would later apply its *Gemmer* holding to another attempt by the Indiana General Assembly to unconstitutionally extend the terms of office, this time for prosecuting attorneys, for the purposes of aligning the terms of office for each of the state’s prosecuting attorneys in *Robinson v. Moser*, 203 Ind. 66, 179 N.E. 270, 274 (1931). In striking down the law, the Indiana Supreme Court noted that while there was “[n]o doubt...some advantage in having uniformity of beginning of terms of prosecuting attorneys and in having all prosecuting attorneys take office on the first of January next following their election...the highest of

cycle. *See* N.M. Const. art. V, § 1 (amended 1970).

motives and the achievement of a desirable result will not confer validity upon an act of the General Assembly which abrogates a specific right or privilege guaranteed to citizens by the Constitution.” *Id.* at 274. Like the Indiana General Assembly, the New Mexico Legislature simply has no legislative authority to alter the constitutional term of office absent an amendment to the Constitution.

c. HB 407 violates the incumbents’ right to seek re-election to office, and the voters’ rights to elect the chief law officer of their respective judicial district.

While the legal status of the district attorneys during this time period between the expiration of the incumbents’ current term and the next gubernatorial election is uncertain under New Mexico law, placing the office of district attorney on the gubernatorial election cycle will violate the constitutional rights of Petitioners both as voters and candidates.

One interpretation of the legal status of the incumbent district attorneys after the expiration of their current term is that the incumbent will remain in office under the New Mexico Constitution’s “holdover” provision in Article XX, Section 2, which states “[e]very officer, unless removed, shall hold his office until his successor has duly qualified.” *See also Denish v. Johnson*, 1996-NMSC-005, ¶ 48, 121 N.M. 280, 910 P.2d 914 (holding that the Governor had no power to place a person directly into office as he would an interim appointee to fill a midterm

vacancy when the office is still being held by an incumbent whose term has expired.); *Territory ex rel. Klock v. Mann*, 1911-NMSC-076, ¶ 1, 16 N.M. 744, 747, 120 P. 313, 315 (“Where provision is made by statute for an officer to hold over until his successor is duly elected and qualified, the holdover is regarded as in all respects a de jure officer and the expiration of his term does not produce a vacancy which may be filled by the authority having the power to fill vacancies.”).

Under this interpretation, the incumbent’s term is essentially legislatively extended by two years making the district attorneys’ current term six years instead of the constitutionally mandated four years, and voters will be deprived of their right to elect the chief law officer of their respective judicial district for a two-year period under HB 407.

In *Gemmer*, the Indiana Supreme Court rejected the argument that the Indiana holdover clause,³ which is similar to Article XX, Section 2 of the New Mexico Constitution, could be used by the Legislature to extend the terms of office for constitutional officers. They noted:

[The holdover clause is] “intended to prevent vacancies in the public offices to which it applies. It can not be understood to confer on the legislature the power to postpone unnecessarily the election of a successor to the office, and

³ “Whenever it is provided in this Constitution...shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified.” Ind. Const., art. 15, § 3.

thereby create a condition authorizing the incumbent to hold over after the expiration of his term. The mischiefs which would result from this construction of the Constitution, and the recognition of this authority in the legislature, are too evident to require discussion. By the adoption of measures of this character the legislative department could appropriate to itself an extensive and dangerous power and influence over a great number of offices and officers. Through this agency a political party might perpetuate its hold upon all public offices except those of governor and members of the General Assembly, and for considerable periods, or indefinitely, deprive the voters of the counties of the right to choose the officers who should administer the public affairs. *Gemmer v. State*, 163 Ind. 150, 71 N.E. 478, 483 (1904).

As this Court has recognized, the elective franchise is “the highest right of the citizen...The voter should not lightly be deprived of his right...” *State ex rel. Read v. Crist*, 1919-NMSC-005, ¶ 63, 25 N.M. 175, 179 P. 629. The elective franchise “is the means of participation by the people in representative government. No construction of constitutional or statutory provisions is to be indulged which will defeat or unduly restrict or obstruct the free exercise of the right.” *Id.* at ¶ 6; *see also* N.M. Const. art. II, § 2 (“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.”); N.M. Const. art. II, § 3 (“The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.”).

However, another interpretation is that upon expiration of the incumbent district attorneys’ current terms of office, the district attorneys will be subject to

quo warranto proceedings and removable by the Court. *See* NMSA 1978 § 44-3-4 (1953)(“An action may be brought by the attorney general or district attorney...against the parties offending...when any person shall usurp, intrude into or unlawfully hold or exercise any public office...within this state...When the attorney general or district attorney refuses to act...such action may be brought in the name of the state by a private person on his own complaint.”); *see also State ex rel. King v. Raphaelson*, 2015-NMSC-028, 356 P.3d 1096 (granting the Attorney General’s petition for writ of *quo warranto* to remove incumbent district court judge for failing to earn retention of her seat upon the expiration of the original term of office).

If a *quo warranto* action is granted, the Governor would have the right to appoint all 14 district attorneys in the State under N.M. Const. art. XX, § 4 (“If a vacancy occurs in the office of district attorney...the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election.”). This would not only deprive voters, including Petitioners, of their right to elect the district attorney in their judicial district, but it would also unconstitutionally deprive the incumbent district attorneys’ right to seek re-election to maintain his or her office. *See Roberts v. Cleveland*, 1944-NMSC-031, ¶ 9, 48 N.M. 226, 149 P.2d 120 (“Every voter has a right to be a candidate for a public

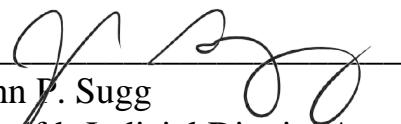
office if he possesses the qualifications required to fill the office.”).

For these reasons, absent a constitutional amendment, the Legislature does not have authority to modify the constitutional term of office for the district attorneys.

THE RELIEF SOUGHT

For the foregoing reasons, Petitioner respectfully requests the Court to advance this matter on its calendar and issue a Writ of Mandamus invalidating Section 103 of HB 407, and to direct Respondent to place the office of district attorney on the 2020 primary and general election proclamations.

Respectfully submitted,



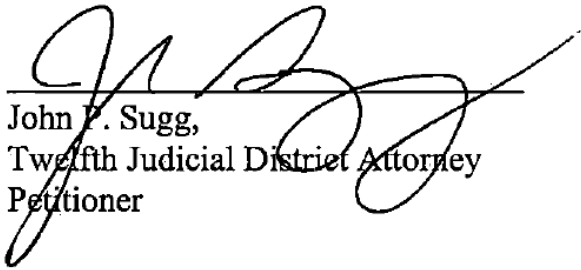
John F. Sugg
Twelfth Judicial District Attorney
1000 New York Ave., Rm 101
Alamogordo, NM 88310
jsugg@da.state.nm.us

Attorney for Petitioners

VERIFICATION

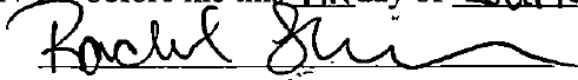
STATE OF NEW MEXICO)
) ss.
COUNTY OF LINCOLN)

John P. Sugg, being first duly sworn upon oath, deposes and states that he is the Petitioner in the above and entitled cause; that he has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of his knowledge, information, and belief.



John P. Sugg,
Twelfth Judicial District Attorney
Petitioner

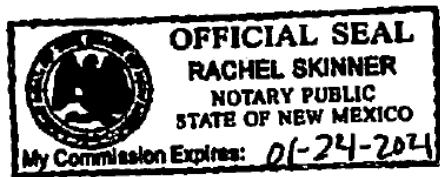
SUBSCRIBED AND SWORN TO before me this 7th day of June, 2019.



Notary Public

My Commission Expires:


January 24, 2021



VERIFICATION

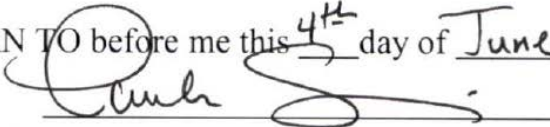
STATE OF NEW MEXICO)
) ss.
COUNTY OF LEA)

Dianna Luce, being first duly sworn upon oath, deposes and states that she is the Petitioner in the above and entitled cause; that she has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of her knowledge, information, and belief.



Dianna Luce,
Fifth Judicial District Attorney
Petitioner

SUBSCRIBED AND SWORN TO before me this 5th day of June, 2019.



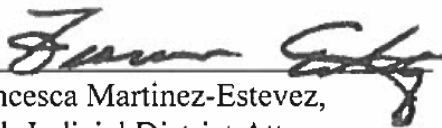
Notary Public

My Commission Expires:
5-15-2020

VERIFICATION

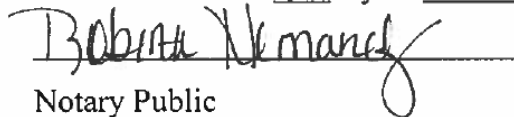
STATE OF NEW MEXICO)
) ss.
COUNTY OF GRANT)

Francesca Martinez-Estevez, being first duly sworn upon oath, deposes and states that she is the Petitioner in the above and entitled cause; that she has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of her knowledge, information, and belief.



Francesca Martinez-Estevez,
Sixth Judicial District Attorney
Petitioner

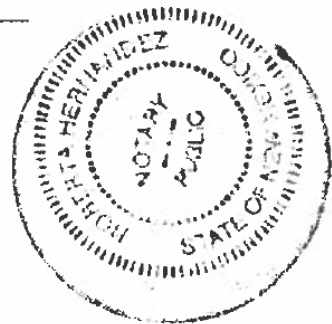
SUBSCRIBED AND SWORN TO before me this 7th day of June, 2019.



Notary Public

My Commission Expires:

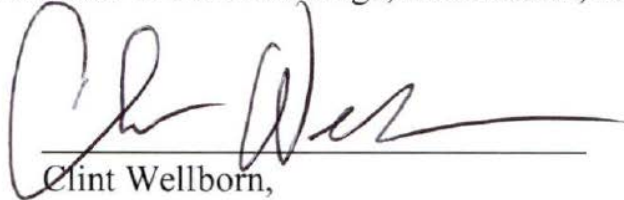
September 24, 2022



VERIFICATION

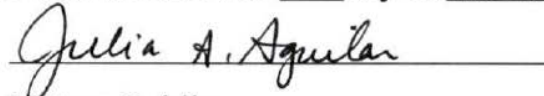
STATE OF NEW MEXICO)
) ss.
COUNTY OF SOCORRO)

Clint Wellborn, being first duly sworn upon oath, deposes and states that he is the Petitioner in the above and entitled cause; that he has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of his knowledge, information, and belief.



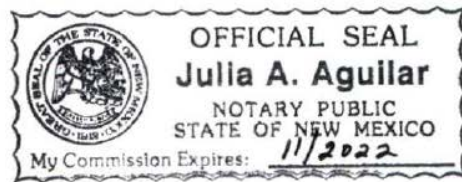
Clint Wellborn,
Seventh Judicial District Attorney
Petitioner

SUBSCRIBED AND SWORN TO before me this 5th day of June, 2019.


Notary Public

My Commission Expires:

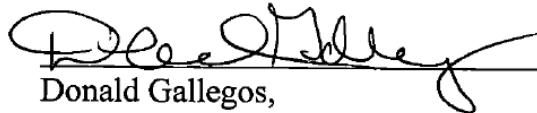
11 / 2022



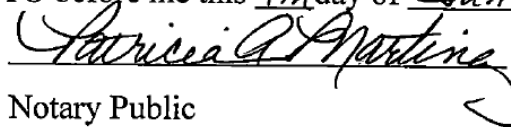
VERIFICATION

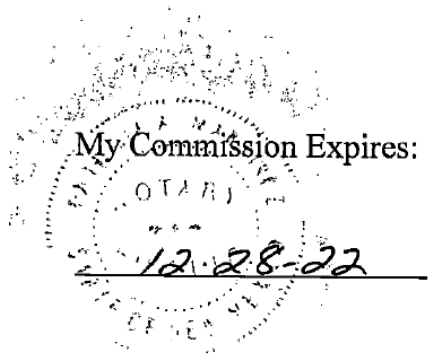
STATE OF NEW MEXICO)
) ss.
COUNTY OF TAOS)

Donald Gallegos, being first duly sworn upon oath, deposes and states that he is the Petitioner in the above and entitled cause; that he has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of his knowledge, information, and belief.


Donald Gallegos,
Eighth Judicial District Attorney
Petitioner

SUBSCRIBED AND SWORN TO before me this 7th day of June, 2019.



Notary Public



VERIFICATION

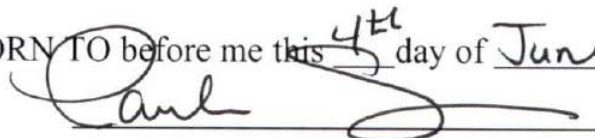
STATE OF NEW MEXICO)
) ss.
COUNTY OF CURRY)

Andrea Reeb, being first duly sworn upon oath, deposes and states that she is the Petitioner in the above and entitled cause; that she has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of her knowledge, information, and belief.



Andrea Reeb,
Ninth Judicial District Attorney
Petitioner

SUBSCRIBED AND SWORN TO before me this ^{4th} day of June, 2019.



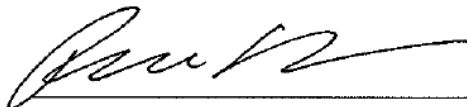
Notary Public

My Commission Expires:
5.15.2020

VERIFICATION

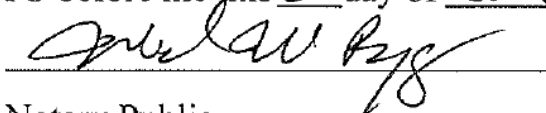
STATE OF NEW MEXICO)
) ss.
COUNTY OF McKINLEY)

Paula Pakkala, being first duly sworn upon oath, deposes and states that she is the Petitioner in the above and entitled cause; that she has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of her knowledge, information, and belief.



Paula Pakkala,
Eleventh Judicial District – Division 2 Attorney
Petitioner

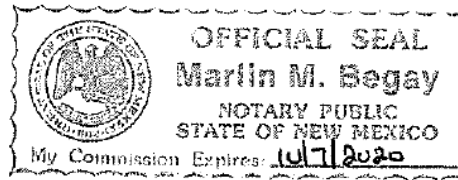
SUBSCRIBED AND SWORN TO before me this 5th day of June, 2019.



Notary Public

My Commission Expires:

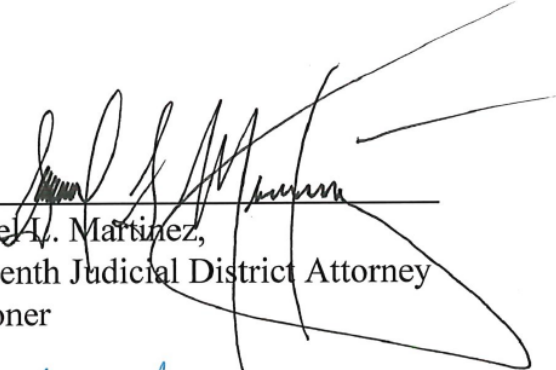
10/7/2020



VERIFICATION

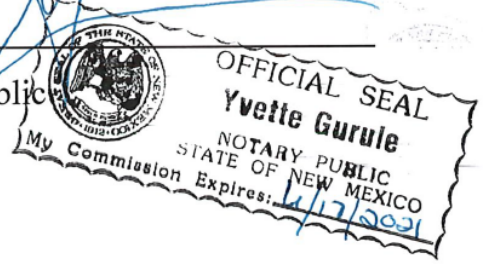
STATE OF NEW MEXICO)
) ss.
COUNTY OF CIBOLA)

Lemuel L. Martinez, being first duly sworn upon oath, deposes and states that he is the Petitioner in the above and entitled cause; that he has read the above and foregoing Petition and knows the contents thereof; and that the matters contained therein are true and correct to the best of his knowledge, information, and belief.



Lemuel L. Martinez,
Thirteenth Judicial District Attorney
Petitioner

SUBSCRIBED AND SWORN TO before me this 6th day of June, 2019.

Notary Public 

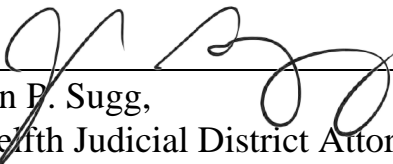
My Commission Expires:
6/17/2021

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2019, a copy of the foregoing Verified Petition for Original Writ of Mandamus and Declaratory Judgment, together with a separately filed compendium of Petitioner's Exhibit in Support of its Petition, has been served by hand delivery to the office of the Respondent and to the Attorney General as follows:

Office of the Secretary of State
New Mexico Capitol Annex North
325 Don Gaspar, Suite 300
Santa Fe, NM 87501

Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501



John P. Sugg,
Twelfth Judicial District Attorney
Counsel for Petitioners