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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
WILLIAM E. SHARER, MARK MOORES
JAMES R.J. STRICKLER, and
DAVID M. GALLEGOS,

No. S-1-SC-37435

Petitioners,

vs.

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

Respondent.

SECRETARY OF STATE'S VERIFIED RESPONSE

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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SECRETARY OF STATE Maggie Toulouse Oliver, through the Office of the Attorney General, hereby files this response to the Verified Petition for Writ of Mandamus and Request for Stay (the "**Petition**"). As set forth in more detail below, this Petition fails on both jurisdictional and substantive grounds. With respect to the former, this case, and the Petition filed herein, are simply not a worthwhile exercise of the Court's extraordinary writ authority. With respect to the latter, the regulations are squarely in keeping with the statutory authority conferred on the Secretary and thus altogether lawful.

This matter involves the promulgation of regulations in 2017 by the Secretary which implement a variety of campaign finance provisions contained in the Election Code, Chapter 1, NMSA 1978, including the reporting of certain election-related expenditures. The challenged regulations were on the books for more than fifteen months before this appeal was filed. Petitioner Moores (but not the other Petitioners) participated in the rulemaking, but declined to take an appeal when the regulations were adopted. Since then, the Secretary has enforced the new regulations without consequence, including during the busy 2018 primary and general election seasons.

Now, Petitioners arrive at the courthouse steps demanding an "expeditious" resolution through mandamus. In addition, Petitioners urge the court to set aside traditional standing requirements, and instead permit this appeal to proceed under

the Court's great public importance exception. However, Petitioners' long delay in seeking relief, coupled with the rather uneventful enforcement of the Regulations, suggests a dispute of insufficient import to implicate the Court's extraordinary writ authority. What's more, Petitioners, despite seemingly having access to adequate alternative remedies, have failed to explain why those avenues are insufficient to address the grievances set forth in this case. Rather, Petitioners seem to believe that by merely invoking separation of powers concerns, jurisdiction in mandamus is presumed, but this case doesn't implicate the sort of "clear threats" to our system of government that warrants adjudication in expedited mandamus proceedings.

On the merits, Petitioners also fail to adequately make their case. Instead of meeting their burden to establish that the challenged regulations are impermissibly inconsistent with corresponding Election Code provisions, Petitioners dwell on a wide range of arguments about the separation of powers doctrine. While the Secretary readily acknowledges the foundational importance of separation of powers, this case is ultimately about whether the regulations are authorized by statute. On that front, the Secretary provides a singular analysis, which reveals an earnest rulemaking intended to address the real-world realities of New Mexico's modern political system. These rules are consistent with the Election Code, and thus altogether lawful.

The Secretary urges the Court to quash or otherwise reject the Petition.

FACTUAL BACKGROUND

On September 8, 2017, following an extensive public rulemaking process, the Secretary adopted new regulations codified at 1.10.13.1 NMAC (the "**Regulations**") implementing provisions of the Campaign Reporting Act, NMSA 1978, Sections 1-19-25 to -36 (the "**CRA**"). See Pet., Exh H. As required under the CRA, the rulemaking was conducted pursuant to the Administrative Procedures Act. § 1-19-26.2. The Secretary conducted public hearings in Albuquerque, Las Cruces, and two in Santa Fe, and solicited and accepted written comments from members of the public.[1] Among those providing written comment was Petitioner Mark Moores.[2] No judicial appeal was filed challenging the Regulations upon adoption and implementation.

The rulemaking came on the heels of a series of legal and legislative developments affecting the enforcement and viability of the CRA. For example, in the wake of the U.S. Supreme Court's decision in Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), the federal district court in New Mexico enjoined imposition of the CRA's limits on "contributions used for independent

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[1] See New Mexico Secretary of State, 2017 Campaign Finance Rulemaking, http://www.sos.state.nm.us/Elections_Data/2017-campaign-finance-rulemaking.aspx. (last visited Feb. 8, 2019).

[2] Letter from Senator Mark Moores to Secretary Toulouse Oliver (July 18, 2017), http://www.sos.state.nm.us/uploads/files/Mark%20Moores%20CF%20Public%20Comment%20071917_Redacted.pdf.

expenditures."[3] See Republican Party of New Mexico v. King, 850 F. Supp. 2d 1206, 1215 (D.N.M. 2012), aff'd, 741 F.3d 1089 (10th Cir. 2013). In addition, in 2010, the Tenth Circuit invalidated certain provisions in the CRA regarding the definition and registration of political committees. See New Mexico Youth Organized v. Herrera, 611 F.3d 669, 673 (10th Cir. 2010).

In the 2017 legislative session, in an effort to clarify the state of the CRA following the Republican Party of New Mexico injunction, the Herrera decision and other developments in federal First Amendment jurisprudence, the State legislature passed Senate Bill 96 ("**SB 96**"), which is a central focus of Petitioners' extensive averments regarding the Secretary's motives in promulgating the Regulations. See Pet. at 9-10, 23 (characterizing the Secretary as "disingenuous").[4] Despite strong bipartisan support in both chambers of the legislature, including a 36-6 vote in the senate, Governor Martinez vetoed the legislation. See Pet., Exhs. B & E. A similar measure is progressing through the 2019 legislative session, and is the basis for a pending motion to stay filed by the

[3] Generally, "independent expenditures" are political (i.e. campaign or election-related) expenditures made without coordination with a candidate. See 1.10.13.7 (H) and (Q) NMAC.

[4] If Petitioners wish to introduce evidence about the Secretary's motives, then this dispute is not subject to adjudication before this Court in mandamus as a "purely legal" matter. State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768.

Secretary in these proceedings. See Mot. to Stay the Proceedings (Feb. 1, 2019) (citing S.B. 3, 54th Leg., 1st Sess. (N.M. 2019)).

The Secretary has dutifully enforced the Regulations since adoption in 2017. For instance, in the 2018 election year, which included statewide primary and general elections, 261 entities filed required reports with the Secretary disclosing election-related spending in the form of "independent expenditures." See Rule 1.10.13.11 NMAC ("Reporting of Independent Expenditures").[5] No person or entity subject to enforcement under the Regulations has mounted a judicial challenge to enforcement of the Regulations. Indeed, until this lawsuit, filed more than fifteen months after the Regulations were adopted, no judicial or administrative challenge has been initiated pertaining to the Regulations.

ARGUMENT

I. THE COURT'S EXTRAORDINARY WRIT JURISDICTION DOES NOT LIE IN THE INSTANT MATTER.

In their averments and argument regarding jurisdiction and standing, Petitioners contend that the Court should hear this matter because it involves "matters of great public importance" where "no adequate remedy at law" exists and because it demands an "expeditious resolution that cannot be obtained on

[5] Because this is a mandamus proceeding, no affidavit has been submitted to support citation to the "261 entities" figure. However, the Secretary has verified this response.

appeal." See Pet. at 4, 6, 8. However, as set forth below, Petitioners fail to adequately explain why a different judicial avenue isn't viable. Moreover, Petitioners' long delay in seeking judicial review, coupled with the Secretary's successful and uneventful enforcement of the Regulations undermine their claims of urgency.

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." State ex rel. Coll v. Johnson, 1999-NMSC-036, 128 N.M. 154, 990 P.2d 1277. While relief is only generally available under mandamus "on the information of the party beneficially interested….who has a clear legal right to the performance sought," see id. (internal citations and quotation marks omitted), this Court has carved out a limited exception to these "traditional standing requirements" where the matters involved implicate matters of "great public importance." ACLU of New Mexico v. City of Albuquerque, 2008-NMSC-045, ¶ 9, 144 N.M. 471, 188 P.3d 1222 ("this Court has exercised its discretion to confer standing and reach the merits in cases where the traditional standing requirements were not met due to the public importance of the issues involved").

Not surprisingly, this "great public importance" exception, which lies within the Court's already limited "extraordinary writ" jurisdiction, has been exercised only "occasionally" by this Court. See State ex rel. Coll, 1999-NMSC-036, ¶ 21; see also Baca v. New Mexico Dep't of Pub. Safety, 2002-NMSC-017, ¶ 3, 132

N.M. 282, 284, 47 P.3d 441 (quoting Jolley v. State Loan & Inv. Bd., 38 P.3d 1073, 1078 (Wyo. 2002), for the proposition that "[t]he doctrine of great public interest or importance should be applied cautiously"). The great public importance exception is "reserved for those cases involving clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution." Forest Guardians v. Powell, 2001-NMCA-028, ¶ 35, 130 N.M. 368, 24 P.3d 803 (internal quotation marks omitted) (emphasis added). While it is undisputed that this Court has invoked the great public importance exception in cases implicating separation of powers concerns, this Court retains jurisdiction to reject any such claim that does not meet the high bar set by this Court. See State ex rel. Sego v. Kirkpatrick, 1974-NMSC-059, ¶ 7, 86 N.M. 359, 524 P.2d 975 ("this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance") (emphasis added).

Thus, this Court has developed factors to consider in determining whether exercise of its extraordinary writ jurisdiction is warranted. To wit, the Court will only consider mandamus in actions where 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. See State ex rel. King v. Lyons, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 337, 248 P.3d 878, 885. Stated succinctly, "circumstances which justify bringing an original mandamus proceeding in this Court include the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." State ex rel. Clark v. Johnson, 1995-NMSC-048, ¶ 16, 120 N.M. 562, 569, 904 P.2d 11, 18 (internal quotation marks omitted). A Petitioner is obligated to set forth their entitlement to relief with sufficient specificity akin to the pleading "of a complaint in an ordinary civil action…" Brantley Farms v. Carlsbad Irr. Dist., 1998-NMCA-023, 124 N.M. 698, 703, 954 P.2d 763, 768; Rule 12-504(B) NMRA.

a. Petitioners Fail to Set Forth the Circumstances Making it Necessary or Proper to Seek the Writ in the Supreme Court.

Petitioners contend that because they seek to "prohibit the Secretary's unconstitutional arrogation of executive and legislative power, there is no adequate remedy at law." See Pet. at 6. In similarly conclusory fashion, Petitioners rely on this Court's statement in State ex rel. King v. Lyons for their position that "declaratory judgment, although theoretically an option, does not constitute an adequate remedy at law that would preclude mandamus relief." See Id. (citing 2011-NMSC-004, ¶ 26, 149 N.M. 330, 248 P.3d 878. Petitioners' mere recitation of these standards fails in their duty to explain to the Court why it should invoke its extraordinary jurisdiction. Moreover, despite Petitioners' claim that an

"expeditious resolution" is "require[ed]," see Pet. at 8, there is no indication that resolution in the district court – whether via mandamus, declaratory action or some other avenue – is precluded under the circumstances of this dispute.

This Court has made clear that a party invoking extraordinary writ jurisdiction must "set forth the circumstances making it necessary or proper to seek the writ in the Supreme Court if the petition might lawfully have been made to some other court in the first instance." In re Adjustments to Franchise Fees Required by Elec. Util. Indus. Restructuring Act of 1999, 2000-NMSC-035, ¶ 6, 129 N.M. 787, 14 P.3d 525 (citing Rule 12-504 NMRA). Under the Administrative Procedures Act, NMSA 1978, §§ 12-8-1 to -25 (the "**APA**"), which governed promulgation of the Regulations, see § 1-19-26.2, a direct right of appeal – via declaratory action – is available "if the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the interests, rights or privileges of the plaintiff." § 12-8-8.

Petitioner's contention that declaratory judgment relief is "preclude[d]" as an inadequate remedy in the instant matter is plainly contradicted by this Court's jurisprudence. For instance, in an analogous challenge to state agency rulemaking, that went "to the heart of constitutional separation of powers," this Court made clear that the challenge "appear[ed] to fit comfortably within either mandamus or declaratory judgment, and thus, declaratory relief against [the state agency] would

appear to be appropriate." See State ex rel. Hanosh v. State ex rel. King, 2009-NMSC-047, ¶ 11, 147 N.M. 87, 217 P.3d 100; see also State ex rel. Collier v. New Mexico Livestock Bd., 2014-NMCA-010, ¶ 17, 316 P.3d 195, 199 ("A plaintiff may seek relief under the Declaratory Judgment Act in cases in which mandamus relief would otherwise lie.").

In keeping with Hanosh, this Court's jurisprudence suggests that the specific circumstances of a given dispute are determinative of whether an adequate alternate remedy is available. For instance, in King, which Petitioners rely on for their sentence addressing declaratory judgment, the Court found declaratory judgment inadequate because that case, which implicated four active large-scale transfers of State trust lands and implicated New Mexico's 1910 Enabling Act (among other weighty constitutional and statutory authorities), "demand[ed] expeditious resolution that can only come through our exercise of mandamus." 2011-NMSC-004, ¶¶ 1, 23, 26.

The circumstances in State ex rel. Taylor v. Johnson, which Petitioners cite extensively, see Pet. at 12-15 ("[t]he facts in Taylor and the facts giving rise to this petition are materially indistinguishable"), illustrate the sort of urgency on the part of a litigant that might justify seeking an "expeditious resolution" in the context of a rulemaking dispute. 1998-NMSC-015, ¶¶ 12-13, 125 N.M. 343, 961 P.2d 768. In that dispute, where it was contended that rulemaking undertaken by Governor

Johnson's administration violated separation of powers, the mandamus action was filed just 20 days after the challenged regulations were adopted. Id., ¶¶ 1-3, 12-13.

City of Albuquerque v. Ryon, which King relied on for its statement on declaratory judgment, illustrates the type of exceptional circumstances where declaratory judgment is not a viable alternative to mandamus. 1987-NMSC-121, 106 N.M. 600, 747 P.2d 246. In that case, the petitioner sought mandamus relief against the city to enforce an administrative order reinstating her employment. Id., ¶ 1. The city – after failing to timely file a judicial appeal of the administrative order – initiated a declaratory judgment as an end-around of its failure to meet the appellate deadline. Id., ¶¶ 6-7. As this Court found, mandamus was proper to seek compliance with the administrative order, and the city could not force the petitioner to re-litigate the final, unappealable administrative order through declaratory judgment. Id., ¶¶ 6-9.

In this dispute, Petitioners have simply failed to make a showing that no adequate alternate remedy is available, and this Court need not look beyond this failure of pleading in quashing this action. Petitioners have failed to undertake the sort of analysis presented in Ryon which might satisfy their obligation to establish that alternative remedies are inappropriate and it is therefore necessary to invoke this Court's limited extraordinary writ jurisdiction. In addition, there is simply no indication substantively that the matters here rise to the level of urgency or

weightiness set forth in cases like King. That these Regulations have been enforced through an entire election cycle, and that no fewer than 261 entities have complied with just one provision in the Regulations, belie the purported peril and urgency conveyed through the Petition.

In truth, Petitioners have slept on their rights, which attached under the APA the instant the Regulations were adopted on September 8, 2017. See § 12-8-8 ("threatened application" of rule vests right to seek declaratory judgment). Particularly stark is the contrast to the timeline in Taylor. There, petitioners sought mandamus relief just twenty days after the challenged regulations were adopted. Here, Petitioners have waited more than fifteen months before filing their demand for "expeditious" review before this Court. Under these circumstances, Petitioners have simply not established that the Regulations constitute a "clear threat" to New Mexico's system of government, and thus application of the Court's narrow extraordinary writ jurisdiction – further limited in scope by the great importance exception – is simply not warranted.

II. THE REGULATIONS ARE CONSISTENT WITH THE CRA, AND THUS LAWFAUL.

a. As the State's Chief Election Officer, the Secretary is Entitled to a Measure of Deference in the Promulgation of Regulations.

As New Mexico's "chief election officer," it is the duty of the Secretary to "obtain and maintain uniformity in the application, operation and interpretation of

the Election Code." § 1-2-1. Under the CRA, which is codified within the Election Code, the Secretary has been expressly delegated the authority to "adopt and promulgate rules and regulations to implement the provisions of the [CRA]." § 1-19-26.2. Given the Legislature's choice to confer this status and authority on the Secretary, her interpretations construing the Election Code through rulemaking are entitled to deference. See Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 1995-NMSC-062, ¶ 11, 120 N.M. 579 ("When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation"). A "heightened degree of deference" is afforded "to legal questions that "implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." See Id., see also Stokes v. Morgan, 101 N.M. 195, 202, 680 P.2d 335 (1984) ("The special knowledge and experience of state agencies should be accorded deference.").

b. Petitioners Mount only a Limited Challenge to the Regulations, Bereft of Sufficient Detail to Substantiate their Grievances.

In the Petition, it is argued that the Regulations unconstitutionally encroach upon the Legislature's exclusive policymaking authority. See Pet. at 13-14. Of the thirty-one provisions contained in the Regulations, Petitioners have specifically

challenged three.[6] "Most consequential" in the view of Petitioners, is the provision at 1.10.13.11 NMAC requiring the "reporting of independent expenditures," which Petitioners contend is absent from the CRA. See Pet. at 15. Petitioners' second challenge is to the definition of terms they allege do "not appear[] in the CRA," specifically the definitions of "independent expenditure," "coordinated expenditure," "advertisement," and "ballot measure" codified at 1.10.13.7 NMAC. See Id. Finally, Petitioners take issue with what is characterized in the Petition as a "redefin[ition]" of the term "political committee" in the Regulations at 1.10.13.10 NMAC.

Aside from these conclusory contentions, Petitioners provide virtually no additional analysis to support their view that these provisions "arrogate" the legislature's policymaking authority. See Pet. at 11, 15. Despite endorsing the analytical approach in Taylor, where the Court conducted a "side-by-side comparison" of applicable statutory standards to the challenged regulations, the Petition provides no such analysis. See Pet. at 14 (citing State ex rel. Taylor, 1998-

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[6] Despite challenging only a few of the provisions, Petitioners nevertheless urge the Court to jettison the Regulations in their entirety. See Pet. at 26. However, under New Mexico law, if part of an enactment is deemed unconstitutional, but the "remainder of it valid" which "may be properly separated" from the invalid portion "without impairing the force and effect of the portion which remains" than the reviewing court may leave the valid portions intact. Barber's Super Markets, Inc. v. City of Grants, 1969-NMSC-115, ¶ 13, 80 N.M. 533, 458 P.2d 785.

NMSC-015, ¶ 26). In conducting its comparison, the Taylor Court provided an in-depth substantive comparison of the statutes and corresponding regulatory provisions at issue. See Id., ¶¶ 27-31. For example, in examining a regulation concerning work requirements for public assistance beneficiaries, the Court identified an actual contradiction between the regulation – which imposed a mandatory work requirement – and the applicable statute – which did not. See Id., ¶ 28.

In the instant matter, Petitioners have provided no such concrete analysis, simply concluding in two brief paragraphs of their twenty-five page brief that because the independent expenditure reporting provisions and definitional provisions are absent from the Regulations, those provisions are per se invalid. Petitioners likewise presume that because the Regulations alter the definition of political committee, that those provisions are per se invalid. Not only does this not conform to the dictates of Taylor, it adds yet another shortcoming to Petitioners' failures to adequately state and plead their claims. See Rule 12-504 NMRA.

Indeed, as this Court has made clear, because administrative actors are entitled to deference in the exercise of their rulemaking authority, a presumption of validity attaches to any rules promulgated. State ex rel. Stapleton v. Skandera, 2015-NMCA-044, ¶ 9, 346 P.3d 1191, 1195 ("we presume that rules and regulations enacted by an agency are valid") (internal quotation marks and

grammar omitted). Thus, "Petitioners bear the burden of establishing the invalidity of the [challenged regulations."]. See Id. In this instance, Petitioners have failed to dispatch that burden, and the Petition should be rejected. Nevertheless, as set forth below, to the extent the Court elects to consider Petitioners' objections, the Petition still fails.

c. Administrative Actors are Entitled to Discretion in Enacting Regulations within the Scope of Agency Expertise and Know-how.

The applicable test to ascertain the validity of a regulation is not whether the regulation simply mimics the statute, but rather whether the challenged regulation impermissibly deviates from that statute. As such, inherent in agency rulemaking authority is a certain degree of discretion. See Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 1984-NMSC-042, ¶ 7, 101 N.M. 291, 681 P.2d 717 ("The Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law."). While agencies may only exercise their rulemaking prerogative "in a reasonable manner consistent with legislative intent," agencies must retain sufficient flexibility in rulemaking to "develop the necessary policy to respond to unaddressed or unforeseen issues." See City of Albuquerque v. New Mexico Pub. Regulation Comm'n, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297. Inherent in this grant of discretion is the understanding that administrative agencies and regulators on the ground are best-positioned to address the "everyday realities" characteristic of the administration of government. See Id.

So long as the exercise of discretion in rulemaking stays within the scope of "a governmental scheme, policy, or purpose," it does not run afoul of separation of powers concerns. See Cobb v. State Canvassing Bd., 2006-NMSC-034, ¶ 41, 140 N.M. 77, 140 P.3d 498.

Despite Petitioners' failure to adequately plead their objections to the Regulations (a defense the Secretary asserts and does not waive), for the sake of argument, the Secretary will clarify the statutory bases for the three provisions challenged in the Petition.

d. The Provisions in the Regulations Governing "Independent Expenditures" are Consistent with Analogous Provisions in the Campaign Reporting Act.

The independent expenditure reporting provision at 1.10.13.11, which Petitioners characterize as "most consequential" without explaining why, flows from and is authorized by existing provisions of the CRA. Two provisions in particular, the definition of "expenditure" in Section 1-19-26(J), and the reporting requirement in Section 1-19-27 set forth the basis for Section 1.10.13.11 in the Regulations.

The broad definition of expenditure in the statute, i.e. "a payment, transfer or distribution or obligation or promise to pay, transfer or distribute any money or

other thing of value for a political purpose…"[7] encompasses the much narrower subcategory of "independent expenditures" set forth in the Regulations. Compare NMSA 1978, § 1-19-26 with 1.10.13.7(Q) NMAC. Indeed, the independent expenditures definition, by its own express terms, delimits that it is a subcategory of the statutory delineation of expenditures, reading "[i]ndependent expenditure means an expenditure," and then further specifying what is included within that subcategory. See 1.10.13.7(Q) NMAC (internal quotation marks omitted). The three items included in the regulation's subcategory of independent expenditures, all of which involve paying for advertisements pertaining to a "clearly identified candidate" or "ballot measure," fall comfortably within the "political purpose" standard and thus the CRA definition of "expenditure."

The reporting requirement for independent expenditures in Section 1.10.13.11 of the Regulations similarly falls within the broad reporting requirements set forth in the CRA. Under the CRA, all "reporting individuals" "shall" file with the Secretary biannual[8] "report[s] of expenditures and contributions on a prescribed form." See NMSA 1978, §§ 1-19-27 and -29. The Regulations merely clarify that independent expenditures – a subcategory of

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[7] "Political purpose" is defined in the CRA as "influencing or attempting to influence an election or pre-primary convention, including a constitutional amendment or other question submitted to the voters." § 1-19-26(M).
[8] More frequent reporting is required in an election year. § 1-19-29(B).

"expenditures" as defined in the CRA, are subject to reporting as required under the existing statutory requirement. See 1.10.13.11.

Thus, the independent expenditure requirements are promulgated consistent with the broad transparency requirements set forth in the CRA.

e. The Definition of Terms Objected to by Petitioners Are Consistent with (and in Furtherance of) the Legislature's Disclosure and Reporting Requirements.

As mentioned supra, Petitioners also object to the inclusion of definitions in the Regulations for the terms "coordinated expenditure, "advertisement," and "ballot measure." See Pet. at 15. But aside from suggesting that the definitions must be invalid because the terms don't "appear[] in the CRA," Petitioners provide no basis to substantiate their objection. As with any other regulation, however, the test to determine its validity is not whether the content of the regulation appears in the corresponding statute, but whether the regulation is reasonably consistent with the authorizing statute. See City of Albuquerque, 2003-NMSC-028, ¶ 16.

In this instance the three terms at issue were defined to enable the Secretary to carry out the transparency requirements inherent in the CRA's disclosure and reporting requirement in Section 1-19-27. "Coordinated expenditures," like independent expenditures, are a subcategory of "expenditures" as defined in Section 1-19-26(J). By defining the term, the Regulations contrast such expenditures to "independent expenditures" and provide additional clarity with

respect to what types of activity constitute coordinated expenses, and how those should be reported. See 1.10.13.28 NMAC. It also warrants mentioning that the CRA does make reference to "coordinated" activity, prohibiting contributions "coordinated through another person" that would serve to contravene contribution limits. 1-19-34.7(C).

"Advertisement," despite Petitioners representation to the contrary, is present in the CRA, included as a term in the definition of "advertising campaign." See 1-19-26(A). ("'advertising campaign' means an advertisement or series of advertisements…") (emphasis added). The definition in the Regulation is consistent with the statutory definition, and merely adds additional clarity with respect to the scope (by delineating what is not an advertisement) and modernizes the enumeration of means by which advertising can occur, i.e. interpreting the term "electronic means" in the statute to include "internet videos," "paid online advertising," etc. Compare 1-19-26(A) with 1.10.13.7(A) NMAC.

Similarly, the final term at issue, "ballot measure" merely clarifies existing language in the CRA. Under the CRA, as discussed supra, "expenditures" made for a "political purpose" are subject to regulation. See §§ 1-19-26(J) and (M). "Political purpose," as defined in the CRA includes influencing (or attempting to influence) elections involving "a constitutional amendment or other question submitted to voters." See § 1-19-26(M) (emphasis added). The definition of

"ballot measure" in the Regulations, i.e. "a constitutional amendment, bond, tax or other question submitted to the voters," just adds additional clarity to the types of "other questions" within the scope of the statutory definition. Compare 1.10.13.7(D) with 1-19-26(M).

Thus, despite Petitioners' claims that none of these terms appear in the CRA, in truth, either the terms themselves or related subject matter are included in the statute. The definitions promulgated by the Secretary directly correspond with CRA provisions and are reasonably consistent therewith.

f. The Regulations Treatment of "Political Committees" is Consistent with Applicable CRA Provisions and Governing Case Law.

Petitioners, final challenge is to the "political committee registrations" provision in the Regulations, Section 1.10.13.10 NMAC. Petitioners contend that the regulation constitutes a "redefinition" of the definition of "political committees" in Section 1-19-26. Petitioners fail to flesh out their objections in any further detail.

Under the CRA, political committees receiving contributions or making expenditures in excess of $500 in any calendar year (among other criteria), are required to register with the Secretary of State and file reporting disclosures. See NMSA 1978, §§ 1-19-26 (L), 1-19-26.1, and 1-19-27. However, in the Tenth Circuit's Herrera decision, the court expressly invalidated the $500 threshold under

the First Amendment. 611 F.3d at 679. As such, substantial portions of the CRA's political committee provisions were determined to be unconstitutional, in litigation where the New Mexico Secretary of State was a party defendant and subject to the court's directives.

Under this Court's jurisprudence, agencies engaging in rulemaking exercise that function by acting consistently with both corresponding statutory language and applicable "case law." See State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999-NMSC-019, ¶ 12, 127 N.M. 272, 980 P.2d 55 (emphasis added). Thus, in promulgating the political committee portions of the Regulations, the Secretary complied with the Herrera court's 2010 directive and the universe of case law applicable to the issue. As a result, the political committee registration requirements contain some monetary triggers higher than those set forth in the CRA. Compare § 1-19-26.1 ($500 trigger for registration) with 1.10.13.10 NMAC ($500 to $5000 trigger, depending on the nature of the entity's contributions and expenditures). Because restrictions on independent expenditure activity are subject to particularly exacting constitutional scrutiny, see Citizens United, 558 U.S. at 340, a $5000 registration threshold is applicable in that context. See 1.10.13.10 NMAC. As such, the Regulations are consistent with the current state of the statutory and case law framework applicable to political committees in New Mexico.

g. **The Secretary's Promulgation of the Regulations Reflects the Everyday Realities Involved with the Regulation of Campaign Finance.**

The Regulations reflect the experiences of the Secretary of State's office in regulating elections and implementing and enforcing the Election Code. Particularly, in the wake of Citizens United and its real-world manifestation in New Mexico through the King injunction, federal jurisprudence has effectively eliminated limitations on contributions to be used as independent expenditures. Because this has resulted in the reality of significantly increased independent expenditures in our politics,[9] in order to implement the Legislature's broad-based transparency dictates under Section 1-19-27 of the CRA, the Secretary was arguably duty-bound – but at the very least authorized – to implement the Regulations.

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[9] By one measure, independent expenditures have increased from $395,159,022 in 2010 (the year Citizens United was issued) to $1,637,121,554 in 2016. Center for Responsive Politics, Total Outside Spending by Election Cycle, All Groups, https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2018&view=A&chart=A#viewpt (last visited Feb. 8, 2019). The effects have been felt here in New Mexico. As the Albuquerque Journal reported in October of last year, in the midst of the general election season, "it's clear that independent expenditure groups funded by out-of-state interests are – once again – pumping huge sums of money into state political races." Dan Boyd, Out-of-state PACs pour $$$ into New Mexico, ALBUQUERQUE JOURNAL, Oct. 8, 2018, https://www.abqjournal.com/1230920/outofstate-pacs-pour-into-new-mexico.html (last visited Feb. 7, 2019) (attached hereto as "**Exhibit A**").

Publishing Regulations to address "everyday realities" to deal with "unaddressed issues" is at the heart of the discretion afforded administrative actors in exercising their rulemaking prerogative. See City of Albuquerque v. New Mexico Pub. Regulation Comm'n, 2003-NMSC-028, ¶ 16. Thus, the Regulations, which have not been effectively challenged by Petitioners, should remain in force.

III. THE SECERTARY'S ACTIONS DO NOT CONSTITUTE A BREACH OF THE LEGISLATURE'S OR GOVERNOR'S AUTHORITY.

a. The Secretary did not Subvert Governor Martinez's Veto of Senate Bill 96.

Petitioners devote a considerable portion of their brief to comparing the Regulations to the provisions of the Legislature's failed CRA bill in 2017, SB 96. Petitioners suggest that the Secretary has employed the Regulations as a means of implementing SB 96, despite Governor Martinez's veto of the popular legislation. See Pet. at 17. To that end, Petitioners conduct a fairly thorough comparison of the provisions in SB 96 to analogous provisions in the Regulations. See Pet. at 21.

While the Secretary does not dispute that there are parallels between the Regulations and SB 96, it does not constitute evidence that the Secretary has invaded the province of the Legislature. First, much of the content in SB 96 is not contained in the Regulations, as the Secretary only promulgated Regulations for which she had statutory authority. Second, the legislature may enact statutory amendments that also fall within the scope of agency rulemaking authority. Just

because rulemaking authority has been conferred, doesn't preclude the legislature from acting on matters within that authority. Third, under New Mexico law, not every legislative enactment constitutes a change to the law. In some instances, the legislature may amend a statute to "clarify existing law." See Aguilera v. Bd. of Educ. of Hatch Valley Sch., 2006-NMSC-015, ¶ 19, 139 N.M. 330, 132 P.3d 587.

Perhaps most remarkable is the amount of analysis devoted in the Petition to comparing the Regulations to SB 96. Petitioners devote considerably more detail and analysis to making that comparison than they did in comparing the Regulations to the CRA. However, as Petitioners acknowledged, the relevant inquiry in deciding this dispute is the "side by side" comparison of statute versus regulations conducted by this Court in Taylor. See Pet. at 14 (citing State ex rel. Taylor, 1998-NMSC-015, ¶ 26). As the Secretary's detailed analysis above shows, that analysis reveals a set of Regulations consistent with the Legislature's directives under the CRA.

b. The Regulations do not implicate the Nondelegation Doctrine.

Petitioners' final argument is another formulation of its separation of powers claims. See Pet. at 23-25. In this instance, Petitioners urge the Court to apply the non-delegation doctrine, arguing that a "statutory void" exists "regarding independent expenditure reporting." See Pet. at 25. However, as this brief makes clear, the Secretary's promulgation of the Regulations arises directly from statutory

authority conferred in the CRA. The Secretary has not engaged in legislating, she merely acted within her discretion under the CRA and as New Mexico's chief election officer.

CONCLUSION AND REQUEST FOR RELIEF

Given the manifest shortcomings in the brief, particularly with respect to the adequacy of setting forth a basis for relief, and in explaining why this Court's extraordinary writ jurisdiction is warranted, the Court should simply quash this Petition. In the event the Court elects to reach the merits, Petitioners have simply not carried their burden to establish that the Secretary's rulemaking discretion should be disturbed. To the contrary, a careful examination of the Secretary's actions reveals a rulemaking faithful to the Election Code, which also appropriately takes into account the realities on the ground. The Secretary urges that the Petition be denied. To the extent the Court determines that any particular provision of the Regulations is invalid, the Secretary asks that only those portions be severed and that the remainder of the Regulations remain intact.

Respectfully submitted by:

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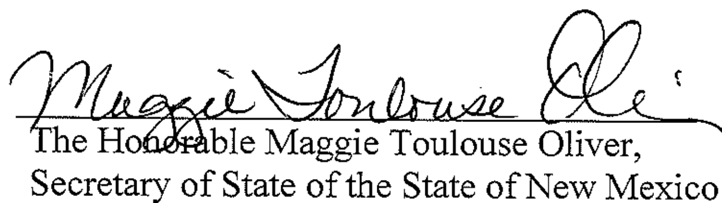
STATEMENT OF COMPLIANCE WITH RULE 12-504(G)(3)

The body of the response exceeds the 20-page limit set forth in this Rule 12-504(G) (3) for a response to a petition for an extraordinary writ. I certify that this response uses a proportionally spaced typeface (Times New Roman) and that the body of the response contains 5,791 words, which is less than the 6,000 word maximum permitted by Rule 12-504(G)(3). This response was prepared using Microsoft Word, and the word count was obtained from that program.

VERIFICATION

I, Maggie Toulouse Oliver, the Secretary of State of the State of New Mexico, do hereby swear and affirm that the Response filed on behalf of the Secretary of State in these proceedings is true and correct to the best of my knowledge, information and belief and acknowledge the same this 8h day of February, 2019.



The Honorable Maggie Toulouse Oliver,
Secretary of State of the State of New Mexico

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2019, I filed and initiated service of the foregoing electronically through the Odyssey Electronic Filing System, which caused all parties of record on that platform to be served by electronic means.

/s/ Sean Cunniff
Sean Cunniff

EXHIBIT A

Out-of-state PACs pour $$$ into New Mexico

By Dan Boyd / Journal Capitol Bureau Chief

Published: Monday, October 8th, 2018 at 11:35pm
Updated: Monday, October 8th, 2018 at 11:15pm

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SANTA FE – One Texas-based political committee funded by oil and gas companies spent roughly $600,000, during a recent four-week period, most of it on television and internet ads attacking the Democratic candidate in the state land commissioner race.

A separate Washington, D.C.-based political committee bankrolled by a national labor union and prominent liberal donors spent more than $525,000 during that same period on mailers, radio ads and more in an attempt to get Democrats elected to the New Mexico House of Representatives.

With four weeks left until Election Day, it's clear that independent expenditure groups funded by out-of-state interests are – once again – pumping huge sums of money into state political races.

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And although the spending is legal under recent court rulings, it can be hard to track for the average voter, because many of the independent expenditure groups – or Super PACs – can appear on the scene suddenly and then fade away just as quickly.

"I think what it does is make the public feel like their voices are being drowned out," said Heather Ferguson, the executive director of Common Cause New Mexico, a group that has pushed for more disclosure requirements in campaign spending.

New Mexico enacted campaign donation limits after the 2010 election cycle, but those caps don't apply to Super PACs, which can accept contributions of any size but are barred from coordinating directly with candidates.

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As in recent election cycles, several groups appear to be taking advantage of that opportunity. Among those filing spending reports Monday with the Secretary of State's Office:

• New Mexico Strong, a group based in Austin, Texas, that was created in December 2017, reported getting a $2 million contribution from Chevron Corp. in early September.

It reported spending less than a third of that, or slightly more than $600,000, primarily on TV and online ads targeting Stephanie Garcia Richard, a Democrat from the Los Alamos area who's running for land commissioner against Republican Pat Lyons, a Cuervo rancher who is a former land commissioner.

"It's an out-of-state company trying to buy a state election," Garcia Richard said Monday.

The group also got big contributions from two oil companies – Chevron and Artesia-based Mack Energy Corp. – during the primary election and used the money on campaign ads and mailers supporting a moderate Democratic candidate for land commissioner and two incumbent lawmakers. All three of the candidates lost in the June primary.

• Patriot Majority New Mexico, a Washington, D.C.-based political committee, reported getting $425,000 in the four weeks that ended Oct. 1, with $300,000 coming from the American Federation of State, County and Municipal Employees labor union.

It spent more than $525,000 on radio ads, mailers and political research but did not specify which races it was targeting. Patriot Majority has focused its efforts in recent years on contested state legislative races, and all 70 New Mexico House seats are up for election in November.

• Better Future for New Mexico, a super PAC that arrived on the scene earlier this year, reported taking in more than $808,000, most of it from State Victory Action, an advocacy group that's also reportedly given to pro-Democratic groups in Maine, Nevada and Minnesota.

The group gave a total of $170,000 to two state political committees – Stronger New Mexico and Equality New Mexico – and still has more than $1.1 million in its bank account.

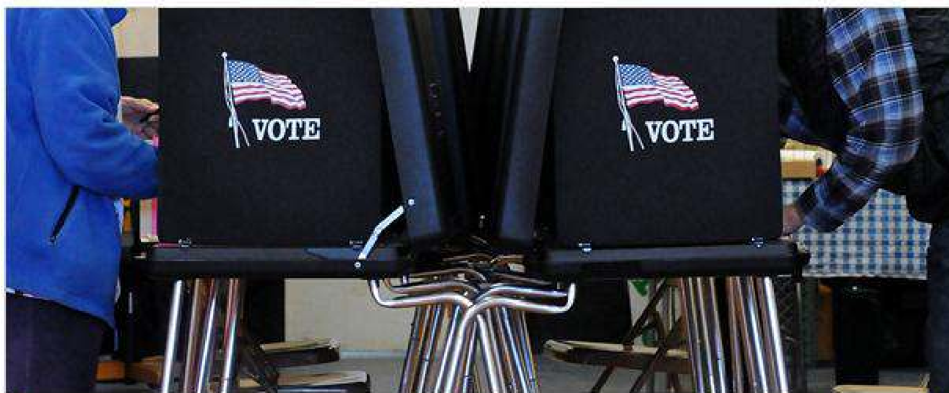
There are also other independent expenditure groups active in New Mexico, though it's unclear how many.

Ferguson said Monday that she's not surprised by the amounts of money being spent by super PACs and other outside groups, saying it's important for voters to study the motivations behind the big dollars.

"The amount of money that's being spent allows those that represent specific interests to try to support the candidate that reflects their interest," Ferguson said.

New Mexico's general election is set for Nov. 6. Candidates and political committees will have to file one more political spending report before Election Day, and a final report a month later.

ELECTION 2018



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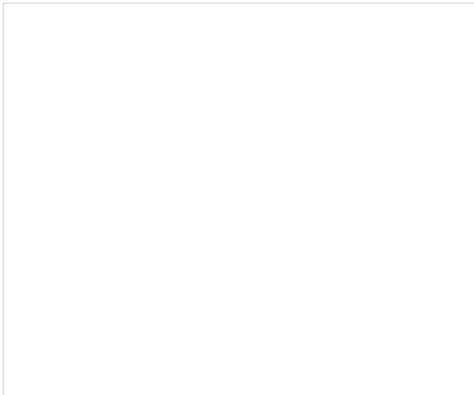

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