



Joey D. Moya

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

**TOBBY ANDERSON; BRYN ARNOLD;  
ANITA CARRILLO; AMANDA ELLER;  
SEAN GODKIN; PAMELA  
HOFFSCHNEIDER; HEIDI  
MACHACEK; EDUARDO TRISTE; NEW  
MEXICO CRIMINAL DEFENSE  
LAWYERS ASSOCIATION; and  
AMERICAN CIVIL LIBERTIES UNION  
OF NEW MEXICO,**

Plaintiffs-Appellants,

v.

**NO. S-1-SC-38570**

**STATE OF NEW MEXICO; MICHELLE  
LUJAN GRISHAM, Governor, STATE  
OF NEW MEXICO; ALISHA TAFOYA  
LUCERO, Secretary, New Mexico  
Corrections Department; and  
MELANIE MARTINEZ, Director, New  
Mexico Probation and Parole,**

Defendants-Appellees.

Original Appeal from the Honorable Judge Matthew Wilson,  
First Judicial District Court, Santa Fe County

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**GOVERNOR MICHELLE LUJAN GRISHAM'S  
ANSWER BRIEF**

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## INTRODUCTION

The Governor fully joins the answer brief submitted by Defendants Secretary Alisha Tafoya Lucero and Melanie Martinez (collectively, the “State Defendants”) addressing the merits of the district court’s dismissal for lack of subject matter jurisdiction. However, Plaintiffs’ action as it pertains to the Governor raises a separate but significant issue that warrants this Court’s attention: Whether Plaintiffs can maintain an action against the Governor solely based on her refusal to exercise her clemency powers under Article V, Section 6 of the New Mexico Constitution to release more inmates than she already has? The answer is clearly “no.”

Plaintiffs’ only allegations in this case regarding the Governor pertain to her Executive Order 2020-21, which directs the commutation of certain prisoners’ sentences in response to the COVID-19 pandemic. Plaintiffs’ request that the court command the Governor to further reduce the number of inmates in correctional facilities. However, this request clearly violates separation of powers, as she has no authority to release inmates other than through her discretionary clemency powers. Without any other basis for a claim against the Governor, Plaintiffs have no right to any relief against her. Accordingly, her presence in this suit is improper.

Although the district court did not rule on this issue because it dismissed the entire action for lack of subject matter jurisdiction, should this Court reverse the district court’s ruling, it should nonetheless affirm its dismissal as it pertains to the

Governor under the right for any reason doctrine. Alternatively, should the Court affirm the district court’s dismissal for lack of subject-matter jurisdiction, the Court should still reach this issue, as this is the second time Plaintiffs have sued the Governor for refusing to use her clemency powers in the manner in which they would like, and there is no reason to doubt they will do so again once they exhaust their administrative remedies.

## **BACKGROUND**

### **I. Executive Order 2020-021**

On March 11, 2020 the Governor declared a public health emergency pursuant to the Public Health Emergency Response Act, NMSA 1978, §§ 12-10A-1 to -19 (2007), and invoked her authority under the All Hazards Emergency Management Act, NMSA 1978, §§ 12-10-1 to -13 (2007), due to the exponential spread of the virus that causes the novel coronavirus disease 2019 (“COVID-19”).<sup>1</sup> Recognizing that COVID-19 may spread more rapidly through close contacts and mass gatherings, the Governor issued Executive Order 2020-021 on April 6, 2020 commuting the sentences of incarcerated individuals who meet certain criteria and instructing the New Mexico Corrections Department (“NMCD”) to release those

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<sup>1</sup> Governor Michelle Lujan Grisham, *Executive Order 2020-004* (March 11, 2020), [https://www.governor.state.nm.us/wp-content/uploads/2020/04/EO\\_2020\\_021.pdf](https://www.governor.state.nm.us/wp-content/uploads/2020/04/EO_2020_021.pdf).

individuals from its facilities.<sup>2</sup> Specifically, the Governor ordered the early release of incarcerated individuals if:

- A. The person's release date is no more than thirty (30) days away and the person has any necessary parole plan in place;
- B. The person is not serving a felony sentence for driving under the influence of intoxicating liquor or drugs;
- C. The person is not a sex offender;
- D. The person is not serving a sentence for domestic abuse;
- E. The person is not serving a sentence for assault on a peace officer; and
- F. The person is not serving any enhanced term of the person's sentence pursuant to NMSA 1978, Section 31-18-16.

Executive Order 2020-021, *supra* note 2. Persons satisfying the above criteria continue to be released at the nearest practicable time on a rolling basis.

## **II. This Court's ruling in *New Mexico Law Offices of the Public Defender v. State of New Mexico***

Less than two weeks after the Governor issued Executive Order 2020-21, the New Mexico Law Offices of the Public Defender, along with Plaintiffs in the current action, the New Mexico Criminal Defense Lawyers Association and the American Civil Liberties Union of New Mexico, requested this Court to issue a writ of mandamus and/or a writ of habeas corpus commanding all Defendants, including the Governor, implement "dramatic reductions in the prison population" in response to the current pandemic, claiming their continued incarceration constituted cruel and

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<sup>2</sup> Governor Michelle Lujan Grisham, *Executive Order 2020-021* (April 6, 2020), <https://cv.nmhealth.org/wp-content/uploads/2020/04/2020-021.pdf>.

unusual punishment. *See* Emergency Petition for Writ of Mandamus and/or Habeas Relief, at 1, *New Mexico Law Offices of the Public Defender v. State of New Mexico (LOPD)*, No. S-1-SC-38252 (N.M. Sup. Ct. April 14, 2020). In response, the Governor argued, *inter alia*, that the petition violated separation of powers, as it requested the Court to command the Governor to effectuate mass releases of inmates through use of her clemency powers. *See* Governor’s Response to Emergency Petition for Writ of Mandamus and/or Habeas Relief, at 17-19, *LOPD*, No. S-1-SC-38252 (N.M. Sup. Ct. Apr. 23, 2020). This Court never had the opportunity to address the argument, however, as it unanimously denied the petition holding that the petitioners had failed to demonstrate that Defendants were “deliberately indifferent” to the health and safety of the inmates. *See* Order, *LOPD*, No. S-1-SC-38252 (N.M. Sup. Ct. May 4, 2020).<sup>3</sup>

### **III. Plaintiffs’ claims against the Governor in the instant case**

In late August, Plaintiffs brought the instant class action against the Governor and the State Defendants, seeking substantially the same relief denied by the Court in *LOPD*. *Compare* [1 RP 59-116] *with* Emergency Petition for Writ, *LOPD*, No. S-1-SC-38252. Plaintiffs continued to claim that the detention of inmates during the

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<sup>3</sup> *See also* New Mexico in Focus, *New Mexico Supreme Court Hears Petition for Inmate Release*, at 2:35:00-36:30, YouTube (May 4, 2020), <https://www.youtube.com/watch?v=zJUhsKgBtq0>.



pandemic constitutes cruel and unusual punishment and violates substantive due process under the New Mexico Constitution. **[1 RP 97-105]** Plaintiffs also claimed their freedom of speech under Article II, Section 17 of the New Mexico Constitution has been violated by NMCD officials allegedly prohibiting inmates from accessing telephones during the pandemic. **[Id. at 101-05]**

Although Plaintiffs submitted a lengthy complaint, the only allegations it contained regarding the Governor pertain to her decision to provide clemency to inmates in Executive Order 2020-021. **[1 RP 84-85, 88]** Specifically, Plaintiffs alleged that the Governor’s Executive Order 2020-021 is insufficient to decrease prison population to effectively address the current pandemic. **[1 RP 88-89]** Based on their disagreement with the Governor’s use of her clemency powers, Plaintiffs asked the district court to command the Governor to “reduce the number of incarcerated individuals in New Mexico Corrections Department facilities to safeguard the health and safety of Named Plaintiffs and Class Members.” **[1 RP 106]** Plaintiffs also requested a declaratory judgment stating Executive Order 2020-021 is arbitrary because “it limits consideration of early release to persons whose release date is no more than thirty (30) days away, in contradiction to established New Mexico law (NMSA § 33-2A-6 [of the Correction Population Control Act (“CPCA”), NMSA 1978, Sections 33-2A-1 to -8 (2002)]) providing for

consideration for early release any person whose release date is 180 days or less[.]”<sup>4</sup>

**[*Id.*]**

The Governor and the State Defendants filed several motions to dismiss, including two for lack of subject matter jurisdiction. As relevant to this brief, the Governor filed a motion to dismiss herself as a party because Plaintiffs’ suit and requested relief violated separation of powers. **[1 RP 230-240]** Specifically, the Governor pointed out that the only basis for Plaintiffs’ complaint against her was for the failure to exercise her discretionary clemency powers in a way that Plaintiffs wanted. **[*Id.*]** The Governor also asserted that the CPCA was irrelevant because nothing in that act required the Governor to order the release of inmates. **[1 RP 238-39]**

In response, Plaintiffs asserted that their requested relief did not implicate the Governor’s clemency powers because they were merely asking for “declaratory judgments that [the Governor] has violated the Plaintiffs’ . . . state constitutional rights, will continue to violate those rights absent a reduction in the numbers of incarcerated individuals within the prisons, and that Executive Order 2020-021 is arbitrary and overly burdensome in violation of the New Mexico constitution.” **[4**

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<sup>4</sup> Section 33-2A-6 applies only when “[w]hen the inmate population of female correctional facilities or male correctional facilities exceeds one hundred percent of rated capacity for a period of thirty consecutive days.” **[1 RP 106]** The Governor assumes Plaintiffs meant to cite Section 33-2A-7, which specifically applies to the Governor.

**RP 712]** Plaintiffs claimed their action was proper because courts have the ability to “say what the law is” and “remediate . . . unconstitutional conditions of confinement.” *[Id.]* While Plaintiffs also argued that “[r]elease of inmates does not necessarily implicate the Governor’s clemency powers” they failed to cite to any provision of law granting the Governor authority to release inmates other than through her clemency powers. **[1 RP 714]**

Further, Plaintiffs argued that the CPCA was relevant to the question of whether Executive Order 2020-021 is arbitrary because it demonstrated that the Governor was not using her powers to the fullest extent possible. **[4 RP 715-17]** In essence, Plaintiffs claimed that Executive Order 2020-021’s rolling 30-day limit was arbitrary simply because it was less than the 180-day limit provided in Section 33-2A-7(A), which permits the Governor to “order the [Secretary of Corrections]<sup>5</sup> . . . to consider the release of nonviolent offenders who are within one hundred eighty days of their projected release date.” *[Id.]*

The district court set a hearing for the parties’ motions to dismiss. **[4 RP 759-61]** Although the parties were prepared to argue the Governor’s motion at the hearing, the district court dismissed the entire action for lack of subject matter jurisdiction before reaching the parties other motions. **[Tr. 2:1-4:11, 37:1-40:25; 5**

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<sup>5</sup> Pursuant to Section 33-2A-8, the corrections population control commission was terminated as of June 30, 2007, and the Secretary of Corrections has assumed the duties and responsibilities of the commission.

RP 974-79] This appeal followed.

## STANDARD OF REVIEW

Whether Plaintiffs' action against the Governor is barred by separation of powers is an issue of law, which this Court reviews de novo. *See State v. Tafoya*, 2010-NMSC-019, ¶ 24, 148 N.M. 391, 237 P.3d 693.

## DISCUSSION

### **I. The Court should address the propriety of Plaintiffs suit against the Governor regardless of its decision on the district court's dismissal for lack of subject-matter jurisdiction**

The Court should affirm the district court's dismissal for lack of subject-matter jurisdiction because Plaintiffs failed to exhaust the NMCD's emergency internal grievance procedures for the reasons discussed in the State Defendants' answer brief. However, should the Court reverse this district court's dismissal, it should nonetheless affirm the dismissal of the Governor as a party under the right for any reason doctrine. Although the district court did not rule on the Governor's motion to dismiss her as a party because it dismissed the entire suit for lack of subject-matter jurisdiction, the parties fully briefed the issue. **[1 RP 230-240; 4 RP 709-18, 905-15]** Given this, and given that the propriety of Plaintiff's suit against the Governor may be resolved as a matter of law, the Court may affirm the district court's dismissal as it pertains to the Governor. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264 (stating that appellate courts may affirm a district

court's ruling on a ground not relied on if "(1) reliance on the new ground would not be unfair to the appellant, and (2) there is substantial evidence to support the ground on which the appellate court relies" (alterations, internal quotation marks, and citation omitted)).

Alternatively, should this Court affirm the district court's dismissal for lack of subject-matter jurisdiction, it should also affirm the dismissal as it pertains to the Governor, as this issue is likely to reoccur. This is the second time that Plaintiffs have sued the Governor in an attempt to force her to use her clemency powers. Both times, the Governor argued that Plaintiffs' basis for suit against the Governor violated separation of powers. *See* Governor's Response, at 17-19, *LOPD*, No. S-1-SC-38252; [1 RP 230-240, 4 RP 905-15] Plaintiffs nevertheless continue to assert their action against the Governor is proper. [4 RP 709-18] Hence, there is every reason to believe that Plaintiffs will sue the Governor again after they exhaust the NMCD's emergency internal grievance procedures. The important nature of the issue and likelihood that it will arise again in Plaintiffs' post-exhaustion suit dictates that the Court should address the merits of Plaintiffs' claims against the Governor even if it affirms the district court's dismissal for lack of subject matter jurisdiction. *Cf. State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 37, 136 N.M. 309, 98 P.3d 699 (addressing an issue likely to recur on remand in order to provide guidance to the district court).

## **II. Plaintiffs' suit against the Governor is barred by separation of powers clause**

### **A. Plaintiffs' lawsuit and requested relief is a clear violation of separation of powers**

The New Mexico Constitution vests the Governor with authority “to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment.” N.M. Const. Art. V, § 6. These clemency powers are discretionary and solely the Governor’s prerogative. As this Court has stated, “There may be regulations by law of the manner of its exercise, but the ultimate power and right to pardon is granted, unrestrained by any consideration other than the conscience and wisdom and the sense of public duty of the Governor.” *Ex parte Bustillos*, 1920-NMSC-095, ¶ 11. “No other board or person is to be consulted, nor is their approval to be obtained. The decision rests solely with the executive.” *Id.*

Plaintiffs seek to have the Court disregard these principles and command the Governor to effectuate mass releases of inmates through use of her clemency powers. Among other things, Plaintiffs request a declaratory judgment be entered ordering a reduction “in the number of incarcerated individuals in New Mexico Corrections Department facilities to safeguard the health and safety of Named Plaintiffs and Class Members.” [1 RP 106] As applied to the Governor, those requests violate separation of powers.

Article III, Section 1 of the New Mexico Constitution provides that “no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others.” And while “the three department of government are coordinate,” they should “not interfere with or encroach on the authority or within the province of the other.” *Mowrer v. Rusk*, 1980-NMSC-113, ¶ 28, 95 N.M. 48, 618 P.2d 886 (internal quotation marks and citation omitted). This doctrine is a fundamental precept of our State and federal government, *id.* at ¶ 23, and necessarily circumscribes the court’s ability to oversee “how the executive, or executive officers, perform duties in which they have a discretion.” *Marbury v. Madison*, 5 U.S. 137, 170 (1803). Thus, the manner of carrying out duties “which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Id.*

The State’s separation of powers doctrine is directly at issue in this case because the invocation and exercise of the Governor’s powers to grant “reprieves and pardons” is committed solely to her discretion. As this Court has noted, “[t]he [pardon] power granted is of such a nature as to require no regulation. It is simply a one-man power, depending for its execution upon nothing more than the stroke of the pen of the Governor.” *Ex parte Bustillos*, 1920-NMSC-095, ¶ 29. The decision as to whether to issue a pardon or commute a sentence for state criminal convictions is the Governor’s decision alone. *Id.* at ¶ 11. Plaintiffs’ assertion that they do not

request an order regarding the Governor’s clemency pardons is inaccurate, as it is only through the clemency powers provided by Article V, Section 6 of the New Mexico Constitution that the Governor could effectuate the release of inmates that Plaintiffs request if ordered to do so.<sup>6</sup> See N.M. Const. Art. V § 6; *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 44, 120 N.M. 562, 904 P.2d 11 (“The Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it.”). Therefore, the separation of powers clause prohibits any court from assessing or dictating how and when the Governor may exercise her discretionary power regardless of type of relief Plaintiffs request in this case.

Indeed, other courts across the country have dismissed complaints and petitions requesting the release of persons in correctional facilities due to concerns regarding COVID-19 on the grounds of separation of powers. In *Foster v. Commissioner of Correction (No. 2)*, 146 N.E.3d 408, 410-11 (Mass. June 2, 2020) plaintiffs sought a declaratory judgment and injunctive relief to compel Governor Baker to use his authority to order a reduction in the prison population. *Id.* at 410-11. The Supreme Judicial Court of Massachusetts held the plaintiffs failed to state a claim for relief against Governor Baker. In so holding, the Court observed that “the

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<sup>6</sup> Contrary to what Plaintiffs may argue, Section 33-2A-7(A) of the CPCA does grant the Governor authority to release any inmate, but merely to “order the [Secretary of Corrections] . . . to *consider* the release of nonviolent offenders who are within one hundred eighty days of their projected release date.” (Emphasis added).



complaint claims that the Governor is liable for things he has *not* done. First, it alleges that he is responsible for failing to reduce the prison population by failing to exercise his executive authority to pardon and grant clemency. Second, it alleges that he has failed to exercise his emergency powers to mitigate the situation.” *Id.* at 1061.

However, the Court concluded, “[t]hese are not actionable claims.” *Id.* In addressing the governor’s failure to exercise his authority to grant clemency, the Court noted “it is well settled that the Governor’s authority to grant pardons and other clemency is exclusively an executive authority” and the court “cannot compel him to exercise it.” *Id.* And with regard to the plaintiffs’ claims that the governor failed to utilize his emergency powers to mitigate the situation, the court cautioned that it “should tread lightly in telling any Governor when or how to exercise his or her powers. It is one thing for a court to order a Governor to cease engaging in action the court has found to be unconstitutional; it is quite another for a court affirmatively to direct a Governor how to act.” *Id.* at 1062. For that reason, the court reasoned, it has “historically . . . been unwilling to order a Governor to act where the relief sought, if deserved, can be provided by means of a court order against some defendant other than the Governor.” *Id.*

Similarly, the Washington Supreme Court denied a petition for writ of mandamus requesting Governor Jay Inslee and the secretary of the department of correction reduce the prison population by ordering the immediate release certain

categories of offenders due to the conditions in prisons regarding COVID-19. *Colvin v. Inslee*, 467 P.3d 953, 957 (Wash. July 23, 2020). The Washington Supreme Court denied the writ, holding that it would encroach on the executive branch’s authority and exceed the court’s authority “in direct violation of the long recognized separation of powers principles.” *Id.* The court also rejected the petitioners’ argument that the governor’s current order to release prisoners did not go far enough to protect them from COVID-19. *Id.* at 963. “Because the constitution and laws of our state entrust the governor with the discretion to pardon those offenders and commute those sentences that he thinks proper, this court has no power to dictate how the governor may exercise that discretion—even in an emergency.” *Id.*

This case law is directly on point and highlights the role that the separation of powers doctrine plays in ensuring that “neither department [of government] may . . . control, direct or restrain the action of the other.” *Mowrer*, 1980-NMSC-113, ¶ 30 (internal quotation marks and citation omitted)). Plaintiffs’ Amended Complaint contains few references to the Governor<sup>7</sup> and omits any allegations that the Governor affirmatively took an unconstitutional action. [***See generally* 1 RP 59-116**] Plaintiffs’ entire basis for claims against the Governor is that the existing Executive Order “is not sufficient to provide the decrease in prison population required to

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<sup>7</sup> In fact, the Amended Complaint only specifically refers to the Governor or her actions in six of the 266 paragraphs. [**1 RP 63, 81, 84, 85, 88**]

effectively address the current pandemic crisis in the New Mexico prison system” and asks this Court to invalidate the order because it is “arbitrary,” “unduly burdensome,” and “overly restrictive.” [1 RP 88-89, 106-07] This Court should reject Plaintiffs request to interfere with the Governor’s clemency powers and make policy decisions on behalf of the executive branch.

Moreover, the Governor’s proactive exercise of her discretionary clemency power to facilitate the early release of hundreds of inmates to date, alone, is sufficient to refute Plaintiffs’ claims that she is being “deliberately indifferent.” *See Colvin*, 467 P.3d at 953 (finding no evidence of deliberate indifference in responding to the COVID-19 pandemic when “[t]he governor has issued proactive orders to reduce prison populations and to protect offenders incarcerated in prison [and the state corrections department] has implemented a multifaceted strategy designed to protect offenders housed at various facilities, increasing those protections as more information becomes available about the virus and its risks”). But the Governor’s failure to use her clemency powers to release more inmates provides no basis for a claim against her. *See Foster*, 146 N.E.3d at 411-12 (reasoning “the complaint claims that the Governor is liable for things he has *not* done . . . that he is responsible for failing to reduce the prison population by failing to exercise his executive authority to pardon and grant clemency. . . . These are not actionable claims”).

Plaintiffs requested relief would require the judiciary to encroach on the Governor's power to pardon. The Governor's only power to release incarcerated individuals is through her clemency powers, and Plaintiffs ask the court to usurp that authority by entering an order requiring the Governor reduce the number of incarcerated individuals. Yet the "court's equitable powers may not be used to provide relief that is contrary to statutory or constitutional requirements." *McCarthy v. Governor*, 27 N.E.3d 828 (Mass. 2015); *see also Immigration & Naturalization Serv. v. Pangilinan*, 486 U.S. 875, 883 (1988) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law" (citation omitted)); *Sims v. Sims*, 1996-NMSC-078, ¶ 33, 122 N.M. 618, 930 P.2d 153 (stating New Mexico courts may not apply their inherent equitable powers when a statute provides "express language or necessary implication" to the contrary). Therefore, Plaintiffs claims against the Governor must be dismissed.

**B. The CPCA is inapplicable to Plaintiffs claims regarding the Governor**

Plaintiffs only allegation as to why Executive Order 2020-021 is arbitrary is that the Order improperly "limits consideration of early release to persons whose release date is no more than thirty (30) days away, in contradiction to established New Mexico law (NMSA § 33-2A-6) providing for consideration for early release any person whose release date is 180 days or less." [1 RP 106] But this ignores the fact that Executive Order 2020-021 was enacted solely on the Governor's

discretionary clemency powers. Despite Plaintiffs' assertions, there is no authority demonstrating the CPCA regulates the Governor's clemency powers or requires the Governor enact any population reduction provisions in general.

The purpose of the CPCA is to “establish a corrections population control commission . . . [that] shall develop and implement mechanisms to prevent the inmate population from exceeding the rated capacity of correctional facilities and shall take appropriate action when necessary to effect the reduction of the inmate population.” Section 33-2A-2. There is no implication to the Governor's clemency powers in this stated purpose nor any other section of the CPCA. Instead, the CPCA only requires to the Secretary of Corrections to take appropriate action when necessary to reduce the inmate population under specific circumstances. *See id.*; § 33-2A-6.

Plaintiffs may argue, as they did below, [4 RP 715] that the Governor's general executive function stated in Article V, Section 4 to “take care that the laws be faithfully executed” requires the Governor implement the population reduction measures provided in the CPCA. But the plain language of the CPCA is clear. The CPCA leaves whether the Governor may require the Secretary to consider the release of nonviolent offenders entirely up to the Governor's discretion. Section 33-2A-7(A) (“The governor *may* order the [secretary] . . . at any time to consider the release of nonviolent offenders who are within one hundred eighty days of their projected

release date.” (emphasis added)); *cf. Cerrillos Gravel Prods. v. Bd. of Cty. Comm’rs*, 2005-NMSC-023, ¶ 12, 138 N.M. 126, 117 P.3d 932 (“By using the word ‘may,’ instead of ‘shall,’ the Legislature indicated it was being permissive, granting the County discretionary authority to enforce violations of ordinances by quasi-criminal prosecution subject to fines and imprisonment.”). For these reasons, Plaintiffs’ reliance on the CPCA is misplaced.

**C. Without another basis for a cognizable claim against the Governor, Plaintiffs are not entitled to any relief from her**

Plaintiffs may argue, as they did below, that because the “[r]elease of inmates does not necessarily implicate the Governor’s clemency powers” and courts have the ability to “say what the law is” and “remediate . . . unconstitutional conditions of confinement.” [4 RP 713-15] While that may be true, Plaintiffs are not entitled to any relief from the Governor in the absence of allegations that the Governor violated the law other than by refusing to use her clemency powers in the way Plaintiffs would like (i.e., to release more inmates). It is axiomatic that a party cannot obtain declaratory or injunctive relief against a party who has not, and is not, violating the law. *Am. Linen Supply of N.M., Inc. v. City of Las Cruces*, 1963-NMSC-176, ¶ 7, 73 N.M. 30, 385 P.2d 359 (“[U]nless a valid cause of action is stated under the rules of substantive law, there can be no recourse to declaratory judgment procedure to reach the desired end.”); *Franklin v. District of Columbia*, 333 U.S. App. D.C. 334, 163 F.3d 625, 630 (1998) (“Without liability there would be no basis for injunctive

relief.”); *cf. Doctor’s Assocs. v. Reinert & Duree, P.C.*, 191 F.3d 297, 306 (2d Cir. 1999) (“If an injunction to prevent [the defendant] from multiplying improper lawsuits is justified, then it is [the defendant] who should be enjoined, not innocent franchisees.”). As Plaintiffs cannot demonstrate that the Governor violated the law, their claims against her must be dismissed.

### CONCLUSION

For all the foregoing reasons, should the Court reverse any portion of the district court’s dismissal for lack of subject-matter jurisdiction and remand for further proceedings, it should affirm the district court’s dismissal as it pertains to the Governor. Alternatively, should this Court affirm the district court’s dismissal for lack of subject-matter jurisdiction, it should also affirm the dismissal as it pertains to the Governor, as this issue is likely to reoccur.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that, according to Rule 12-318(F) NMRA, this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure. The body of this brief employs 14-point Times New Roman font and contains 4,485 words, counted using Microsoft Office Word.

*/s/ Holly Agajanian*

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Holly Agajanian



## CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, I filed the foregoing through the New Mexico Electronic Filing system, which caused all counsel of record to be served by electronic means.

/s/ Holly Agajanian  
Holly Agajanian