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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39546

INDIGENOUS LIFEWAYS;
NEW MEXICO SOCIAL JUSTICE
EQUITY INSTITUTE; &
THREE SISTERS COLLECTIVE,

Petitioners,

v.

NEW MEXICO COMPILATION COMMISSION
ADVISORY COMMITTEE,

Respondent,

and

MICHELLE LUJAN GRISHAM
in her official capacity as Governor
of the state of New Mexico,

Intervenor-Real Party in Interest.

BRIEF IN SUPPORT OF VERIFIED EXPEDITED PETITION FOR WRIT OF MANDAMUS DIRECTING REMOVAL OF AMENDMENT 1 FROM THE NEW MEXICO CONSTITUTION

Sarah L. Shore
Butt Thornton & Baehr PC
P.O. Box 3170
Albuquerque, NM 87190
sshore@btblaw.com

Attorneys for Petitioners

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INTRODUCTION

The Petition challenges a constitutional amendment that repeals fundamental rights of the people: rights to elect and be represented by Commissioners of the Public Regulation Commission (PRC). N.M. Const. art. XI, §1[1]; Pet. *Exhibit A*; *Exhibit B*, 13-16. Petitioners' opening brief establishes that this amendment, "Constitutional Amendment 1" (Amendment 1), coercively joins multiple disparate measures in one amendment, in violation of the constitutional proscription against logrolling. Pet. 11-17. It further establishes that Amendment 1's misleading ballot contributes to the logrolling of Amendment 1 and constitutes a violation of the implicit accuracy requirement arising from Article XIX, Section 1's voter ratification mandate. Pet. 16-22.

Neither Respondent New Mexico Compilation Commission Advisory Committee (Advisory Committee) nor Intervenor Governor Michelle Lujan Grisham (Governor) address, much less deny, the impact of Amendment 1 on New Mexico citizens—in particular, the impact on Native American communities, represented herein by Petitioners, whose lands are rich in energy resources and who comprise the overwhelming majority in one district from which Commissioners have been elected.[2] Yet, rather ironically, the Governor asserts that the Court should deny the Petition on grounds that invalidating "Constitutional Amendment 1" (Amendment 1) would "overturn[]" the will of the voters, explaining that the Court,

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[1]References to "Constitution" and "Const." are to the New Mexico Constitution.

[2]*See* NMSA 1978 §8-7-12 (repealed eff. 1/1/2023); *Exhibits C, D*; Rule 11-201(B), (C) NMRA; *Grisham v. Reeb*, 2021-NMSC-006, ¶23, 480 P.3d 852.

"like the Governor, should have faith that the voters … entered the voting booth informed." Gov. Resp. at 1-2.

But voter ratification does not cure a violation of Article XIX, Section 1. *State ex rel. Clark v. State Canvassing Bd.*, 1995-NMSC-001, ¶3, 119. N.M. 12. Thus, by enforcing the prohibition against logrolling, the Court does not "usurp the power of the [L]egislature or circumvent the will of the electorate." *Id.* ¶27. To the contrary, the Court "ensure[s] that voters are provided with the means to fully and accurately express their will on each and every issue that is presented to them as guaranteed by the New Mexico Constitution." *Id.* The Court secures the same constitutional guarantee by recognizing and enforcing a ballot accuracy requirement. Such judicial protection is particularly necessary where, as here, the constitutionally defective amendment took a power reserved to the people and transferred it to the Legislature and the Executive. Moreover, for the reasons discussed herein, neither the Governor nor the Advisory Committee present a convincing reason that the Court should decline to address on the merits the important issues raised in the Petition; the Petition is timely, and a writ of mandamus to the Advisory Committee is the proper remedy for the violations established in the Petition.

Therefore, Petitioners reiterate their request for the Court to issue a writ of mandamus, in the exercise of its original jurisdiction under Article VI, §3, that (1) declares Amendment 1's purported ratification a nullity; (2) declares constitutional provisions compiled pursuant to Article 1's ratification unconstitutional and void; and (3) directs Respondent to effectuate removal of these provisions from Article XI §§1 and 2 of the Constitution by advising the New

Mexico Compilation Commission (Commission) to do so and by approving that action. *State ex rel. League of Women Voters v. Advisory Comm., N.M. Compilation Comm'n*, 2017-NMSC-025, ¶¶17-18, 54, 401 P.3d 734 (*LOWV*); NMSA §§12-1-3 to -7. A peremptory writ of mandamus is proper and warranted, given Respondent's non-discretionary duty to effectuate removal of unconstitutional provisions from the Constitution. *See LOWV*, 2017-NMSC-025, ¶¶17-18, 54; NMSA §§12-1-3 to -7; NMSA §44-2-7.

ARGUMENT

A. The Petition Is Timely.

The Court should consider the Petition on the merits and reject Respondents' contention that the Petition is time-barred on statutory and equitable grounds. Petitioners' challenge does not present an election contest. Furthermore, the doctrine of laches should not be applied where, as here, Petitioners seek to vindicate fundamental constitutional protections, and granting the relief sought by Petitioners would pose no inequities. *See, e.g., Student Pub. Int. Rsch. Grp. of New Jersey, Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085 (D.N.J. 1986) (collecting cases); *O'Reilly v. Town of Glocester*, 621 A.2d 697, 703 (R.I.1993) (Courts should disfavor the defense of laches where public rights are at stake).

1. The Petition is Subject to No Statutory Bar.

Neither Petitioners' logrolling challenge nor their implicit accuracy challenge to Amendment 1 are subject to the Election Code's statute of limitations, NMSA 1978, §1-14-3 (1969) ("Any action to contest an election …shall be filed no later than thirty days from issuance of the certificate of nomination or issuance of the

certificate of election"). Respondent Advisory Committee characterizes the Petition as challenging "whether the [2020] election was properly conducted" or whether the "ballot initiative was impermissibly worded," and argues that, as such, the Petition presents an election contest. AC Resp. at 7-8 (citing, *inter alia*, *Denwiddie v. Bd. of Cty. Comm'rs*, 1985-NMSC-099, ¶7, 103 N.M. 442). But the Petition contests the *constitutional validity of Amendment 1*, not the validity of the 2020 election or its results.

First, while the proscription against logrolling is grounded in logrolling's coercive effect on voters, *State, ex rel. Chavez v. Vigil-Giron*, 1988-NMSC-103, ¶6, 108 N.M. 45, it is the combination of disparate measures in one amendment that is prohibited, *see* Art. XIX, §1. Even a flawless election and undisputed ratification of an amendment do not cure such a constitutional infirmity. *See*, *e.g.*, *Clark*, 1995-NMSC-001, ¶4 (holding that "Amendment 8 violates Article XIX of the Constitution," explaining that "voter approval of a challenged amendment … does not cure a violation of Article XIX"); *City of Raton v. Sproule*, 1967-NMSC-141, ¶11, 78 N.M. 138 (considering the "constitutional validity of the amendment" under Article XIX, Section 1). To the extent the Advisory Committee argues that *any* challenge to the constitutionality of a law enacted through an election is an election challenge, because the invalidation of such a law would amount to "overturning the results of an election," no New Mexico case supports such a broad interpretation of Section 1-14-3 or *Denwiddie*. Furthermore, neither Respondent nor the Governor point to a case where the Court considered a logrolling challenge to be an election contest, and—in at least one case—the Court considered a logrolling challenge to an

amendment that had been ratified over two years before the Court's decision. *Sproule*, 1967-NMSC-141, ¶¶1-2, 11-22 (considering, in an opinion issued in September of 1967, whether a 1964 constitutional amendment was logrolled, and whether related measures passed in 1965 were lawful).

Indeed, this Court has held that a petition raising the "substantive question" of whether certain constitutional amendments comported with constitutional voter ratification requirements did *not* pose an election contest subject to the thirty-day statute of limitations set forth in Section 1-14-3. *LOWV*, 2017-NMSC-025, ¶14 (explaining that the "petition seeks clarity about the meaning and effect of the uncontested certified results of the elections under our Constitution," i.e., whether the amendments were valid). Similarly, here, the substantive question of whether Amendment 1 comports with the requirements of Article XIX, Section 1 of the Constitution is addressed to the validity of the Amendment—not the results of the 2020 election.

Although the Court has not yet recognized an implicit accuracy requirement in Article XIX, Section 1's voter ratification mandate, that requirement also best understood as a constitutional prerequisite to a valid amendment—not as a challenge to the election itself. Indeed, Florida's Supreme Court has described a ballot accuracy challenge as a challenge to the *validity of an amendment*. *Armstrong v. Harris*, 772 So.2d 7, 13-14 (Fla. 2000). Notably, in *Armstrong*, although the petitioners' initial suit was brought just prior to the general election in 1998, it was dismissed prior to the election, and revived after the amendment was ratified in the general election; the Florida Supreme Court did not issue its decision declaring the

amendment void until nearly two years later. *Id.* at 20-21. And the cases cited by Respondent Advisory Committee regarding ballot challenges held to be election contests were brought under statutes explicitly subject to the election code—they were not challenges to the validity of an amendment whose ballot question failed to meet constitutional requirements. AC Resp. at 6 (citing *Shoemyer v. Mo. Sec'y of State*, 464 S.W.3d 171, 173-174 (Mo.2015) and *Chandler v. City of Winchester*, 973 S.W.2d 78, 81-82 (Ky. Ct. App.1998)). Regardless, since Petitioners' logrolling challenge is clearly *not* an election challenge, the Court may also consider the ballot accuracy issue in connection with that challenge. *See, e.g., Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir.1992) (holding that the court properly considered time-barred acts of harassment in assessing timely claims for which those acts were relevant).

2. The Petition is Not Time-Barred by the Defense of Laches.

The Governor's additional argument that the Petition is barred by the doctrine of laches should be roundly rejected. Gov. Resp. at 6-9. Laches is generally disfavored or unavailable as a defense to a suit to enforce a public right or protect a public interest. *Student Pub. Int. Rsch. Grp. of New Jersey, Inc.*, 627 F. Supp. at 1085 (collecting cases); *Lake Michigan Fed'n v. U.S. Army Corps of Engineers*, 742 F. Supp. 441, 446–47 (N.D. Ill. 1990) ("[T]he doctrine of laches is disfavored when the defense is raised against a plaintiff who is attempting to protect a substantial public interest."); *O'Reilly*, 621 A.2d at 703 ("Many courts faced with the application of laches have disfavored this equitable defense in situations wherein the plaintiff's lawsuit seeks to vindicate rights of the general public."). "[C]ourts have found that

laches does not operate as a defense in cases of public interest for two basic reasons: (1) the importance of rights at stake when the interests of the public are asserted and (2) the determination that those rights cannot be compromised or forfeited by the negligent or illegal acts of public officials who fail to carry out their government obligations." *O'Reilly*, 621 A.2d at 703. Here, Petitioners' suit asserts the interests of the public, since it alleges that fundamental state democratic rights were unconstitutionally repealed. Thus, the defense of laches should be deemed unavailable.

Even if the Court considered the elements of laches, an affirmative defense, the doctrine is "not favored" in New Mexico, and is applied only where the following elements are present: "(1) defendant's invasion of plaintiff's rights; (2) a delay in asserting plaintiff's rights, after having had notice and an opportunity to institute a suit; (3) lack of knowledge in the defendant that the plaintiff would assert his rights, and (4) injury or prejudice to the defendant in event relief is accorded to the plaintiff or suit is not held to be barred." *Butcher v. City of Albuquerque*, 1980-NMSC-127, ¶¶10-13, 95 N.M. 242. "[W]hile the lapse of time is one of the elements to be considered in applying laches to stale claims, … it is not ordinarily the controlling or most important one to be considered by the court." *Id.* at ¶¶11, 12. Prejudice is essential. *Id.* As such, the doctrine has been applied in cases involving both inexcusable delay *and* clear prejudice to the other party. *See*, *e.g.*, *Garcia v. Garcia*, 1991-NMSC-023, ¶35, 111 N.M. 581 (party's defense was unfairly prejudiced by plaintiff's failure to assert a claim for sixteen years, after which time important evidence was no longer available); *O'Reilly*, 621 A.2d at 702 (prejudice may arise

"from loss of evidence, change of title, intervention of equities and other causes," but must constitute a real injury).

Petitioners neither unreasonably delayed the bringing of this action, nor do intervening equities or prejudice warrant the application of the doctrine. As an initial matter, the Governor's assertion that Petitioners have been aware of Amendment 1 since 2019 has no basis in fact and appears to be founded only on the legislative history set forth in the Petition. Amendment 1 both coerced and "did not adequately inform the electorate," including the communities served by Petitioners, "of the purpose and effect of the measure upon which they were casting their votes." *Wadhams v. Bd. of Cnty. Comm'rs of Sarasota Cnty.*, 567 So. 2d 414, 417 (Fla.1990). That is precisely why post-election challenges to such unconstitutional amendments are permitted. *Id.*; *Clark*, 1995-NMSC-001, ¶4; *Chavez*, 1988-NMSC-103, ¶7 (charge of logrolling poses a justiciable constitutional question, "notwithstanding the absence of any challenge to the constitutionality until after the voters have approved the amendment"). This Court has considered at least one logrolling challenge filed well after the ratification of the constitutional amendment at issue, *Sproule*, 1967-NMSC-141, ¶¶1-2, 11-22, and has considered the constitutionality of amendments on other grounds many years after their ratification, *LOWV*, 2017-NMSC-025, ¶14. Courts have also invalidated amendments based on ballot inaccuracy well after the ratification of the amendment at issue. *Armstrong*, 772 So.2d 7, 20-21. In sum, the Governor's argument contending that people who were hoodwinked must realize that fact immediately and filed suit immediately, even

though ordinary lawsuits are rarely filed immediately following an injury, should be rejected.

Nor do intervening equities warrant barring Petitioners' claims here. Nothing about the passage of time has cured or altered the unconstitutionality of Amendment 1. Moreover, the Governor's claim that the "transition" to an appointed PRC is "nearly completed" is simply wrong. Gov. Resp. at 7. Amendment 1's major provisions, and the provisions in related statutes, take effect in 2023. *See* N.M. Const. Art. XI, §1 (beginning 1/1/2023, the Commission shall consist of three members appointed by the Governor; until 1/1/2023, the Commission shall continue to consist of five elected members); NMSA 1978, §62-19-1 to -3, and -5 to -24 (2020) (all but one of the recompiled and amended PRC-related statutes are effective 1/1/2023); NMSA 1978, §8-7-1 to -5, and -11 to -12 (repealed effective 1/1/2023).[3] The only exception is the formation of a voluntary (unpaid) nominating committee, which met for the first time in August 2022, the same month Petitioners initiated this

[3]Chapter 9, Sections 1 to 63 of New Mexico Laws of 2020 recompiled and amended PRC-related statutes into NMSA 1978, §62-19-1 to -24, contingent upon the adoption of Amendment 1, and repealed §8-7-1 to -5, and -11 to -12, also contingent upon the adoption of Amendment 1. If the Court grants the relief requested by Petitioners, these statutes are rendered void and unenforceable, and the previous statutory scheme remains. *See also, e.g.*, *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 423 (Wis.1953) (where constitutional amendment was void, statutes that relied on the amendment for their own constitutionality were "unconstitutional and void"); *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 349 (Minn.2005) ("[I]f a law is unconstitutional, only the latest amendment is severed and any previous version found constitutional remains in full force and effect."). But, to the extent the Court grants the Petition, and believes a declaration to that effect should be made, Petitioners ask the Court to so declare.

litigation.[4] *See* Const. Art. XI, §1 (2020); §62-19-4. Additionally, if the Court grants the relief sought by Petitioners, the two Commissioners whose terms began in 2021 would serve for four years. *See* Const. art. XI, §1 (2012). The Governor is empowered under Article V, Section 5 of the Constitution to appoint three other Commissioners on an interim basis (whether through continuing the service of some of the current Commissioners whose terms would otherwise expire this year, or appointing new Commissioners), until the next election. In short, declaring Amendment 1 void would not create uncertainty or inequity. And, to the extent the Governor suggests that the people's confidence in elections would be undermined by the invalidation of Amendment 1, that argument is contradicted by the very basis of the Amendment's invalidity, as discussed herein.

B. Amendment 1 is Logrolled.

If constitutional amendments in New Mexico require no "common objective," and misleading ballot language is irrelevant, Amendment 1 passes muster under Article XIX, Section 1. Petitioners contend that something more is required.

As a threshold matter, there are persuasive reasons to conclude that the Court should apply heightened scrutiny to Amendment 1. Government actions that impair fundamental rights or take power in a manner prone to abuse are subject to heightened scrutiny. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (applying

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[4]*See* New Mexico Public Regulation Commission Offers New Online Resource Dedicated to the Work of the PRC Nominating Committee (July 29, 2022), available at https://www.nm-prc.org/wp-content/uploads/2022/07/2022-07-29_PRC-Nominating-Committee-Webpage.pdf. (August 1, 2022 is the first meeting of PRC Nominating Committee).

heightened scrutiny to redistricting laws affecting the right to vote and the right to representation, because "a denial of constitutionally protected rights demands judicial protection"); *Kane v. City of Albuquerque*, 2015-NMSC-027, ¶9, 358 P.3d 249 (explaining that "the right to vote is fundamental" and that "restrictions on voters' rights can be subjected to heightened scrutiny."); *State ex rel. League of Woman Voters v. Herrera*, 2009-NMSC-003, ¶8, 145 N.M. 563 (Courts should "guard against voter disenfranchisement whenever possible"); *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 137 (2d Cir. 1984) (explaining that, to guard against abuse of power, FTC activities expanding the agency's traditional powers were subject to closer judicial scrutiny). If the taking of power by one branch of government from another is subject to greater judicial scrutiny, surely the taking of constitutional power from the people by the political branches, as Amendment 1 does, warrants such scrutiny. *See, e.g., Commc'ns Workers of Am., AFL-CIO v. Florio*, 617 A.2d 223, 232 (N.J.1992) ("[T]he taking of power" from one branch of government by another is "prone to abuse and therefore warrants an especially careful scrutiny.").

But even under the Court's traditional rational basis scrutiny of constitutional amendments challenged under Article XIX, Section 1, *Chavez*, 1988-NMSC-103, ¶¶7, 9, Amendment 1 is void because its measures do not share a "rational linchpin of interdependence," *Clark*, 1995-NMSC-001, ¶¶15-16. The Governor's conclusory defense of the constitutionality of Amendment 1 is telling: namely, that it "reform(s) the PRC in general." Gov. Resp. at 15. If "reform" only means "change," then this is correct. But even *Chavez*, which "test[ed] the limits of joinder," 1988-NMSC-103,

¶14, does not support such a broad definition of "reform"—particularly in light of *Clark's* admonition that "an overarching theme" is insufficient. 1995-NMSC-001, ¶14; *cf. Manduley v. Superior Ct.*, 41 P.3d 3, 37 (Cal.2002) ("[A]lmost any two … measures may be considered part of the same subject if that subject is defined with sufficient abstraction."), *as modified* (Apr. 17, 2002).

Closer inspection of the reform amendment in *Chavez* suggests that the Court used "reform" to mean a *change with a purpose*. There, the amendment added a method for selecting and retaining judges; increased the required minimum age and years of legal practice and minimum number of appellate judges; created legislative authority to redraw judicial districts annually, increase the number of judicial districts, and add judges; and created procedures for selecting chief justices. 1988-NMSC-103, ¶¶1, 5. Each of these changes were directly and logically related to improving and expanding the judiciary. *Id.* The Court later emphasized this quality of coherence in *Clark*, observing that these measures "were all interdependent and each was necessary to effectuate the desired reform." 1995-NMSC-001, ¶14 (emphasis added). By contrast, the two measures at issue in *Clark*—which the Court examined through a "highly fact specific" inquiry—had a distinct subject matter and purpose, were "not rationally interrelated," and did "not form an interlocking package necessary to effectuate a common object, as was the situation in *Chavez*." *Id.* ¶¶12-16.

Amendment 1 suffers from the same problem. To the extent the appointment process enacted by Amendment 1 has as its objective an independent and improved PRC, restricting the PRC's constitutional jurisdiction, and reducing the number of

Commissioners has no apparent connection—direct or ancillary—to such a purpose. Pet. *Ex.B*, 13-16.[5] The Governor essentially concedes this point. Gov. Resp. at 16. Furthermore, Amendment 1 does nothing but convey greater discretion to the Legislature to determine the qualifications of Commissioners, and there is no requirement that members of the PRC Nominating Committee be selected on a professional rather than political basis.[6] Additionally, depending on who you ask, Amendment 1 either restricts the removal of Commissioners to impeachment proceedings or permits the Governor to remove Commissioners at her pleasure. *Compare* Pet. *Ex.B* at 12-13 (the New Mexico Secretary of State's voter guide discusses "cons" associated with Amendment 1, including that "a commissioner may only be removed by impeachment"), *and Fancher v. Bd. of Comm'rs of Grant Cnty.*, 1921-NMSC-039, ¶11, 28 N.M. 179 ("Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded."),[7] *with* Amicus Br., Ex. 1 at 1-2 (Attorney General's

[5]Amendment 1 does not implement any reforms recommended in a study the Legislature commissioned in 2017—reforms which critics contended could have "more effectively improve[d] the PRC's operations." *Ex.B,* 10-11.

[6]That the Legislature has passed statutes outlining the method for appointing members of the PRC Nominating Committee is largely irrelevant, since these are not required by Amendment 1. The statutes only provide that the seven members of the Committee cannot themselves be nominees for the PRC, cannot have a contract with a regulated entity, and that they be "knowledgeable about public utility regulation," whatever that means. *See* §62-19-4(A). They are to be appointed by various members of the legislative and executive branch. *Id. See also* Pet. *Exs.E, F.*

[7]Commissioners were previously removable in the same manner as any public official—by impeachment or by this Court in *quo warranto*, *see* Const. art. IV, §35, art. VI, §3, art. XI, ¶1 (2012); NMSA §44-3-4; *State ex rel. King v. Sloan*, 2011-NMSC-020, ¶¶6-12, 149 N.M. 620. Particularly given this background, under the principle stated in *Fancher*, Amendment 1's description of both the authority for and

September 28, 2022, memorandum states that PRC Commissioners "serve at the pleasure of the Governor" under Amendment 1, meaning that "they can be removed by the Governor without any specified cause," citing Article V, Section 5 of the Constitution). Neither of these extremes appear calculated to improve the PRC. Restricting removal to impeachment would delay accountability, even for serious allegations of wrongdoing, and permitting the Governor to remove Commissioners without cause would overtly politicize the PRC, allowing Commissioners to be replaced whenever a new executive administration takes power.

The lack of interrelatedness or a common purpose among the measures in Amendment 1 highlights the concern underlying the proscription against logrolling: that voters "who support any one measure will feel obliged to vote for the others in order to secure passage of the measure they favor." *Chavez*, 1988-NMSC-103, ¶6; *see also Wirtz v. Quinn*, 2011 IL 111903, ¶13, 953 N.E.2d 899 ("[T]he single subject rule ensures that the legislature addresses the difficult decisions it faces directly and subject to public scrutiny, rather than passing unpopular measures on the backs of popular ones.") (internal quotation, citation omitted). Here, while voters likely support measures purportedly requiring professional qualifications and vetting of Commissioners, they are not necessarily likely to support repeal of their right to elect and be represented by district-based Commissioners, nor to support either stringent limitations on removing Commissioners or discretion in the Governor to remove

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mode of removal of Commissioners appears to restrict the removal of Commissioners to removal by impeachment.

Commissioners without cause. Amendment 1 impermissibly piggybacked the latter provisions onto the popularity of the former, violating Article XIX, §1.

C. Amendment 1's Ballot Is Misleading.

Here, as in *Clark*, misleading ballot language contributes to or exacerbates the logrolling of Amendment 1 by downplaying or omitting entirely less attractive measures and highlighting attractive ones. 1995-NMSC-001, ¶¶25-26. That is, the ballot fails to disclose the repeal of the constitutional right to vote from PRC Commissioners; the repeal of the constitutional right to geographic representation on the PRC; the reduction in number of Commissioners; the restriction of the PRC's constitutional jurisdiction; and removal of Commissioners by impeachment. Pet. *Ex.B* at 6. Instead, the ballot emphasizes appointment from a "list of professionally qualified nominees submitted to the Governor by a nominating committee as provided by law." *Id.* Thus, the ballot misleadingly suggests that Amendment 1's purpose is to improve and professionalize PRC, although its actual effect may be to the contrary, and its main effect is in fact to change the PRC from an elected body to an appointed body (though that *change* is nowhere disclosed). *Clark*, 1995-NMSC-001, ¶25.

The Governor argues that such language is not "affirmatively misleading," since voters should have understood the various omitted provisions by necessary implication from existing law, despite the fact that the sections of the Constitutional affected by Amendment 1 were not even listed on the ballot. Gov. Resp. at 19-22; *see Fine v. Firestone*, 448 So. 2d 984, 989 (Fla.1984) (A proposal to amend the constitution "should identify the articles or sections of the constitution substantially

affected. This is necessary for the public to be able to comprehend the contemplated changes[.]"). The Governor adds that voters are presumed to be thoroughly educated about the measures contained in a proposed amendment, citing *Chavez*, 1988-NMSC-103, ¶10 (quoting the Supreme Court of Hawaii for the proposition that "[i]t is incumbent upon members of the public to educate and familiarize themselves with the contents and effect of proposed amendments before expressing themselves at the polls.") (citation omitted). Gov. Resp. at 20.

The first obvious problem with the Governor's argument is that not even New Mexico public officials can agree about Amendment 1's effect on the removal of Commissioners; how can voters be expected to understand its meaning and implications? *See Detzner v. League of Women Voters of Florida*, 256 So.3d 803, 810 (Fla.2018) (where different officials "each give different meaning to" the language of an amendment, "logic dictates that the language is neither clear nor unambiguous," and "the voters cannot be said to have fair and sufficient notice to intelligently cast his or her vote"). Additionally, the Governor omits the next clause from the excerpt in *Chavez*—that "*where information placed before the electorate is neither deceptive nor misleading*, and they are given sufficient time within which to familiarize themselves with the contents and effect of proposed amendments, they will be deemed to have cast informed ballots." 1988-NMSC-103, ¶10 (emphasis added).[8] Indeed, since *Chavez,* the Supreme Court of Hawaii has explicitly rejected the notion that providing a voter guide cures a misleading ballot, stating that, "when

[8]Notably, the ballot language was not at issue in *Chavez*; the Court's discussion occurs in the context of its reasoning regarding the appropriate standard of review.

the ballot question fails to appropriately disclose the scope and effect of the proposed change, even providing supplemental voter materials will not serve to cure the deficiency." *City and County of Honolulu v. State*, 143 Haw. 455, 471 n. 26 (2018).

Clark teaches that ballots should be "free from any misleading tendency whether of *amplification*, *of omission*, or of fallacy," and makes no exception based on the existence of supplemental voting materials available to the public. 1995-NMSC-001, ¶25. Indeed, in considering whether the ballot in *Clark* contributed to the logrolled amendment, the Court could have held that the ballot language permitting "certain games of chance," was not misleading, since an "informed voter" would know this provision created a private right to wager on video games of chance. 1995-NMSC-001, ¶¶25-26. Instead, the Court concluded that such language impermissibly downplayed the less popular aspect of the amendment, perhaps recognizing, as the Supreme Court of Florida has, that dissemination of amendment information "via public hearings, pre-election publication, and other means," is no substitute for an inaccurate ballot; nor does "[t]he burden of informing the public" fall on "the press and opponents of the measure—*the ballot . . . summary must do this*." *Armstrong*, 773 So.2d at 20 (emphasis added) (quoting *Wadhams*, 567 So.2d at 417; citing James Bacchus, *Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith*, 5 Fla. St. U.L.Rev. 747, 802 (1977) ("[A] constitution which relies exclusively on legislative journals and legal advertisements to publicize proposed constitutional amendments guarantees little in the way of actual notice to a vast majority of the electorate.")). Some New Mexico voters lack basic internet access; the notion that all of them will be able to access pre-election

voting materials and remember the information when they are in the voting booth with a misleading ballot covering a multi-part, logrolled amendment is, at the very least, highly unrealistic. *See also Armstrong*, 773 So.2d at 12-13 ("Because voters will not have the actual text of the amendment before them in the voting booth when they enter their votes, the accuracy requirement is of paramount importance for the ballot title and summary."); *cf. Christian Civic Action Comm. v. McCuen*, 884 S.W.2d 605, 608 (Ark.1994) ("[T]he ultimate issue is whether the voter, *while inside the voting booth*, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote *based on the ballot title*.") (emphasis added).[9]

Additionally, under the implicit accuracy standard which Petitioners urge the Court to adopt as arising from the ratification requirement in Article XIX, Section 1, voters should not be required to surmise whether a fundamental right is being repealed through a constitutional amendment. *Armstrong*, 773 So.2d at 17 ("[W]here a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election."); *Smathers v. Smith*, 338 So.2d 825, 829 (Fla.1976) ("[Pe]ople who are asked to approve [constitutional changes] must be able to comprehend the sweep of each proposal from a fair notification in the proposition

[9]Cases cited by the Governor for the proposition that voters "must be deemed to understand the current law when entering the voting booth," Gov. Resp. at 21, are cases discussing the standard for judicial interpretation of initiatives—a wholly different context than cases analyzing the constitutional sufficiency of amendment and ballot language.

itself that it is neither less nor more extensive than it appears to be."); *Honolulu*, 143 Haw. at 466 ("When the major effect of a proposed measure would be a substantive change in existing law, the ballot [ ] should inform the reader of the scope of the change.") (quotation, citation omitted); *cf. Sprague v. Cortes,* 145 A.3d 1136, 1149-50 (Pa.2016) (Todd, J.) (To "assess the wisdom of a change . . . the people must be able to evaluate the effect of a proposed change against the Constitution's present design.").

The Governor attempts to downplay the importance of this issue by arguing that the right to vote for a PRC Commissioner is not an "independent fundamental state right akin to those contained in our bill of rights." Gov. Resp. at 22. This is wrong; the right to vote is considered fundamental because it preserves all other rights. *Calkins v. Stearley*, 2006-NMCA-153, ¶34, 140 N.M. 802 (M. Vigil, J., concurring in part and dissenting in part). The right is fundamental under state law, and in connection with state offices and regulatory bodies. *Id.* ("[T]he supreme right guaranteed by the Constitution of the state is the right of a citizen to vote at public elections."); *State v. Oliver*, 2020-NMSC-002, ¶9, 456 P.3d 1065 (considering the constitutionality of legislation "postponing the elections for and extending the terms of a number of vital public offices," in New Mexico, and explaining that "[t]hese issues implicate our citizens' fundamental right to vote"). Thus, the right to vote for PRC Commissioners is an independent fundamental state right. *Id.*; *see also Prince v. Bd. of Ed. of Cent. Consol. Indep. Sch. Dist. No. 22*, 1975-NMSC-068, ¶11, 88 N.M. 548 (recognizing the fundamental right to vote in school district bond elections); *Dool v. Burke*, 497 F. App'x 782, 787 (10th Cir. 2012) (explaining that

the right to vote is implicated whenever the public official whose election is at issue "has the power to affect the day-to-day affairs of the electorate").

The Governor also attempts to distinguish *Armstrong's* holding on grounds that, in that case, the ballot presented a misleading description of the changes proposed to Florida's Cruel or Unusual Punishments clause, whereas here, the ballot omits entirely to inform voters of the repeal of the constitutional right at issue. Gov. Resp. at 22. But the ballot in *Armstrong* was also inaccurate because it effectively failed to disclose that the "main effect" of the proposed constitutional amendment was to "nullify" a fundamental state right. 773 So.2d at 16-18, 21-22. The ballot for Amendment 1 is inaccurate for precisely the same reason: it does not indicate that a vote in favor means the surrender of the fundamental right to vote. It also fails to inform voters that a vote in favor means surrender of the electorate's constitutional right to PRC representation through geographical districts, including in predominately Native American lands of northwestern New Mexico. NMSA §8-7-12 (repealed eff. 1/1/2023); *see Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring) (the object of crafting voting districts "is to establish "fair and effective representation for all citizens") (citing *Reynolds*, 377 U.S. at 565-68); *In re 2012 Legislative Districting*, 80 A.3d 1073, 1075 (Md.Ct.App.2013) ("The right to formal political representation is fundamental to our state and national democracies."). The repeal of this right, and of geographic PRC representation, should have been made known to voters on the ballot. *Armstrong*, 773 So.2d at 17-18; *Bailey v. McCuen*, 884 S.W.2d 938, 942 (Ark.1994) (information that would

"give the voter serious ground for reflection on how to vote" is material; its omission renders a ballot title fatally defective).

In sum, as argued in the Petition, Amendment 1's text, as presented on the ballot, hides its chief purpose, and deceives and misleads voters as to scope and effect of the changes proposed, exacerbating the logrolled Amendment, and violating Article XIX, §1's implicit accuracy requirement. Amendment 1 should therefore be declared void and ordered stricken from the Constitution. *Clark*, 1995-NMSC-001, ¶28; *Armstrong*, 773 So.2d at 22.

D. A Writ Of Mandamus To The Advisory Committee Is Proper.

The Advisory Committee's argument that Petitioners have not demonstrated the appropriateness of mandamus relief, AC Resp. at 2-4, amounts to an argument on the merits of the Petition—an argument which the Advisory Committee wholly fails to support or develop. *Matter of Adoption of Doe*, 1984-NMSC-024, ¶2, 100 N.M. 764 (where briefs unsupported by authority, the Court assumes that none exists); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶70, 309 P.3d 53 (declining to develop a party's arguments for them). The Advisory Committee also emphasizes the ministerial nature of its duties, as though this renders mandamus inappropriate; but mandamus may be used to "compel the performance of a ministerial act or duty that is clear and indisputable." *New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ¶10, 149 N.M. 207; *see also Clark*, 1995-NMSC-001, ¶¶1, 28 (issuing a peremptory writ of mandamus nullifying a logrolled constitutional amendment). And the Court has already rejected the Advisory Committee's argument that the Committee is not a proper respondent where there is a dispute

about the constitutionality of a ratified amendment. *LOWV*, 2017-NMSC-025, ¶¶17-18, 54. Finally, the Advisory Committee conspicuously fails to suggest who *is* a proper respondent when it is contended that an existing constitutional amendment is void. The Legislature has no authority to address such a problem—nor does the New Mexico Secretary of State or the Canvassing Board. Accordingly, Petitioners respectfully requests that the Court reject the Advisory Committee's arguments regarding the propriety of the mandamus relief and issue the requested writ.

CONCLUSION

Petitioners reiterate their request for a peremptory writ of mandamus that (1) declares the purported ratification of Amendment 1 a nullity; (2) declares all amendments compiled pursuant to Article 1's ratification unconstitutional and void; and (3) directs Respondent to effectuate removal of these provisions from Article XI Sections 1 and 2 of the Constitution before January 1, 2023 by advising the Commission to do so and by approving that action. Should the Court determine that an alternative writ of mandamus or other relief is proper, Petitioners request that the Court grant the writ or relief it deems appropriate. *See* Rule 12-504(C)(4).

Respectfully Submitted,

BUTT THORNTON & BAEHR PC

/s/ Sarah L. Shore
Sarah L. Shore
P.O. Box 3170
Albuquerque, NM 87190
sshore@btblaw.com

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this Brief in Support of Verified Expedited Petition for Writ of Mandamus complies with Rule 12-318(G)(3)'s type-volume limitations in that it was prepared using a proportionally spaced typeface (Times New Roman) and contains 6,537 words in the body, as defined in Rule 12-318(G)(3), per the word-count feature of Microsoft Word.

/s/ Sarah L. Shore
Sarah L. Shore

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of this Brief in Support of Verified Expedited Petition for Writ of Mandamus Directing Removal of Amendment 1 from the New Mexico Constitution to be served this 17th day of November 2022 by email and first-class mail, postage pre-paid upon the following:

New Mexico Compilation Commission Advisory Committee
Attention: Paula Tackett, Chair
Ptackett13@gmail.com
4355 Center Place
Santa Fe, NM 87507-9706
Telephone: (505) 827-4821
Fax: (505) 827-4869

Office of the Attorney General
Attn: Mark Allen and Scott Cameron
Litigation Division
Galisteo Street
Santa Fe, NM 87054
Telephone: (505) 490-4060
mallen@nmag.gov
scameron@nmag.gov

General Counsel to Governor Michelle Lujan Grisham
Attn: Holly Agajanian and Kyle P. Duffy
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2200
holly.agajanian@state.nm.us
kyle.duffy@state.nm.us

Retake Our Democracy and Indivisible Albuquerque
Attn: Scott Fuqua
FUQUA LAW & POLICY, P.C.
P.O. Box 32015
Santa Fe, NM 87594
(505)982-0961
scott@fuqualawpolicy.com

/s/Sarah L. Shore
Sarah L. Shore