IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM, Governor of New Mexico; and KATHYLEEN KUNKEL, Secretary of the New Mexico Department of Health,

Petitioners,

vs. No. S-1-SC-38396

THE HONORABLE RAYMOND L. ROMERO,

Respondent,

and

OUTLAW MEATS, LLC, a New Mexico Limited Liability Company; F-2 ENTERPRISES, INC. d/b/a TEXAS CLUB GRILL & BAR, a New Mexico Corporation; K-BOBS OF RATON, INC., a New Mexico Corporation; K-BOBS OF LAS VEGAS, INC., a New Mexico Corporation; B.M.B. FINANCIAL, LLC, d/b/a TRINITY HOTEL, a New Mexico Limited Liability Company; RED RIVER BREWING COMPANY, LLC, a New Mexico Limited Liability Company; and the NEW MEXICO RESTAURANT ASSOCIATION,

Real Parties in Interest.

BRIEF OF *AMICI CURIAE* REPUBLICAN PARTY OF NEW MEXICO, HOUSE MINORITY LEADER JIM TOWNSEND, AND SENATE MINORITY LEADER STUART INGLE

Carter B. Harrison IV
HARRISON & HART, LLC
1001 Luna Circle NW
Albuquerque, New Mexico 87102
Tel: (505) 295-3261
Fax: (505) 341-9340
carter@harrisonhartlaw.com

Attorney for the Amici Curiae[1]

[1] Pursuant to Rule 12-320 NMRA, undersigned counsel states that he authored this brief in its entirety and that, other than the named *amici*, no monetary contribution was made to fund the preparation or submission of this brief.

There is little doubt that our State now faces exceptionally important and difficult policy decisions about how to balance the competing interests of public health (which aggressive virus-mitigation measures, including business shutdowns, may serve effectively) with other aspects of the public's welfare (best served by, *e.g.*, reducing unemployment and small-business bankruptcies), as well as questions about how to allocate the burdens of necessary public health measures among the different industry sectors, businesses, and individuals across the state. There is also little doubt that these are decisions that should be made by the Legislature. *See*, *e.g.*, *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343 ("We have said that only the legislative branch is constitutionally established to create substantive law. . . . 'Elected executive officials and executive agencies also make policy, but to a lesser extent, and only as authorized by the constitution or legislature.'" (brackets and citations omitted)). Most[2] of the restrictions contained in the Executive's PHEOs to date would pass constitutional muster if they had been enacted by the Legislature.

[2] A few of the restrictions implicate specific rights — like the First Amendment's arguable infringement by church closures — that are irrelevant to the vast majority of the other restrictions in the PHEOs. *Compare Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (ruling that the closure of churches the day before Easter did not violate the First Amendment because the State "asserted a plausible, religion-neutral justification"), *with Calvary Chapel Dayton Valley v. Steve Sisolack*, No. 19A1070 (U.S. July 24, 2020) (publication in 591 U.S. forthcoming) (4 justices dissenting from denial of certiorari and indicating their desire to hold church-closure measures unconstitutional; 5 justices declining to hear the issue). This brief takes no position on such matters.

Given the practical realities of a part-time citizen Legislature, and given the broad entrustment of interstitial authority by the Legislature to the Executive[3] under the Public Health Act, NMSA 1978, §§ 24-1-1 to -40, the Executive is not powerless to respond quickly to emergencies. But as the tenor and pace of these policy decisions shift from emergency response to longer-term visions of 'the new normal,' and as the tolls of well-intentioned public health measures build from temporary inconveniences and setbacks to the widespread infliction of permanent personal ruin, these choices *must* be owned by the Legislature. *See Unite New Mexico v. Oliver*, 2019-NMSC-009, ¶ 8, 438 P.3d 343 ("'Legislative power cannot be delegated, and the Legislature cannot confer upon any person, officer, or tribunal the right to determine what the law shall be. This is a function which the Legislature alone is authorized under the Constitution to exercise.'" (alteration omitted) (quoting *State v. Spears*, 1953-NMSC-033, ¶ 10, 57 N.M. 400, 259 P.2d 356)). This burden could not be shifted even if the Legislature wanted to avoid the issue — but the fact that the Legislature has not yet spoken on COVID-19 is itself attributable to the Governor, who has the unilateral authority to call a special session and specify with exclusivity the topics to be legislated. *See* N.M. Const. art. IV, § 6 ("Special sessions

[3] This brief uses the term "the Executive" to refer to the Governor and her subordinate officers — most notably the Secretary of the Department of Health — whose powers derive from the Governor's as a constitutional matter, but who are often the ones statutorily assigned certain powers and duties. *See* NMSA 1978, § 24-1-3.

of the legislature may be called by the governor, but no business shall be transacted except such as relates to the objects specified in this proclamation."). She has used this authority to call for "[a]n act that provides the Governor with expanded powers during the pendency of a public health emergency," but not to request substantive input or procedural guidance. Governor's Proclamation of 1st Special Session ¶ 2 at 2 (dated June 18, 2020), https://www.nmlegis.gov/Publications/2020_Special_Session_Proclamation.pdf (last visited July 28, 2020).[4]

The Executive's authority to respond to the COVID-19 virus is informed and affirmed by, but does not arise from, the broad statements in § 3 of the Public Health Act. If it were otherwise, it would mean that the Executive would be unable to respond to any public health crisis had the Act not passed. And since the Act requires no declaration of emergency, provides no procedural rules for decision-making within the Executive nor for judicial review thereafter, gives no substantive guidance on when and how to impose restrictions, and makes no distinction between a one-day measure and a one-year shutdown, it would also mean that the Executive could

[4] The Governor's Proclamation additionally made four specific requests for additional power, all of which were put into bills but ultimately failed to pass. *See* S.B. 2 (2020 Special Sess.) (Sen. Papen) (titled "Governor's Emergency Powers"), https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=2&year=20s (last visited July 28, 2020); H.B. 3 (2020 Special Sess.) (Rep. Maestas & Sen. Papen) (titled "Remote Notarial Acts"), https://www.nmlegis.gov/Legislation/Legislation?chamber=H&legType=B&legNo=3&year=20s (last visited July 28, 2020).

impose these restrictions in response to any illness or safety threat for any length of time without affording citizens recourse.

The Public Health Act's one-off reference to closures of public places[5] merely codifies reasonable expectations about the Executive's power and responsibility to respond immediately to an imminent public health threat (including by creating strictly stopgap policies), and assigns principal leadership of the response effort to the Department of Health, until the Legislature can fill what is fundamentally its core constitutional role. The alternative construction, urged here by the Executive itself, results in the Executive having sole, plenary authority to create without explanation, change at will, and discretionarily enforce policies with serious ramifications for the daily lives and livelihoods of every person in the State — and, in this arena of singular importance, relegates legislators into spectators whose role is to stay home

[5] The term "public place" is not defined in the Public Health Act, nor in any other generally applicable definitions statute or case law, and it is possible that the statute is referring simply to publicly *owned* places — which of course would be consistent with the complete lack of procedural protections or substantive guidance attendant to the provision. *See Black's Law Dictionary* (11th ed. 2019) (defining "public place" as "[a]ny location that the local, state, or national government maintains for the use of the public, such as a highway, park, or public building," but noting the modern "tendency" to include "any place where the public congregates, even if they are provided commercially, such as department stores, factories, theatres, sports grounds, etc."); *Ballentine's Legal Dictionary & Thesaurus*, 539 (1995) (defining "public place" as "[a] place commonly used by the general public or that the public has a right to use," and giving, as the only examples, "a park; a street; a community swimming pool"). A narrow construction of this language is proper, but is not centrally important to *amici*'s argument here, since the provision should be read as affirming the Executive's constitutional prerogative to promulgate and enforce policy that is strictly reactive and temporary, whatever the locations impacted.

and watch. Even if the Legislature intended to abdicate its authority when it passed the Public Health Act (and *amici* contend it did not), that abdication would run headlong into this Court's nondelegation precedent, and thus must be averted as a matter of constitutional avoidance. *See State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 4, 120 N.M. 820, 907 P.2d 1001 ("[W]hen the legislature purports to delegate authority [given to it by the New Mexico Constitution], it must provide reasonable standards as a guide to the exercise of the discretionary powers conferred." (citation omitted)).

Amici respectfully suggest that this Court review the Executive's existing PHEOs under a deferential arbitrary-and-capricious standard for the time being,[6] but that it also order a reasonable end date to the Executive's authority to unilaterally impose at least the most drastic measures found in the PHEOs — those shutting down businesses wholesale, or otherwise creating conditions prone to bankrupting the people and entities. The Legislature is perfectly capable of convening and enacting legislation that furnishes substantive guideposts and rulemaking procedures sufficient to satisfy this Court's nondelegation doctrine, along with citizen-invokable procedural protections proportionate to the interests involved and sufficient to provide due process to those facing government-imposed devastation.

[6] The basis for the application of arbitrary-and-capricious review are adequately covered by the Real Parties in Interest and will not be repeated here.

Recent experience shows not only that the Legislature will take such action when called upon insistently to do so, but that the product of their deliberation may well turn out to be very different from what the Executive claims the assembly has already ratified through its erstwhile inaction. *See* Stipulated Writ Petition of County-Clerk Petitioners & Respondent Secretary of State, *State ex rel. Riddle v. Oliver*, No. S-1-SC-38228 (Mar. 30, 2020) (asserting that "a Special Session is not feasible in the midst of a viral pandemic," and asking the Court to create a vote-by-mail procedure to replace existing statute, with the implicit argument being that the Legislature would adopt such a process if it had the opportunity to convene); Order, *id.* (Apr. 16, 2020) (denying the petition); Proclamation of Special Session ¶ 1, at 2 (calling for the Legislature to pass "[a]n act that provides for temporary procedures for conducting the 2020 general election in light of the current pending health emergency"); S.B. 4, Amendments in Context (2020 Special Sess.) (Sen. Ivey-Soto et al.), https://www.nmlegis.gov/Sessions/20%20Special/Amendments_In_Context/SB0004.pdf (illustrating in redline the introduction of a temporary election bill with automatic vote-by-mail provisions, and the removal of those provisions via amendment in the Senate Rules Committee). In the absence of action by "the legislature, as the voice of the people," it is inappropriate to allow the full distribution of powers — which should be spread out among three branches — to settle permanently in the hands of the unitary Executive, for no other reason than the

fact that the Executive's status as a full-time official and day-to-day actor allow it to serve as a sink for those powers left temporarily unexercised by its coordinate branches. *Taylor*, 1998-NMSC-015, ¶ 21.

LEGAL BACKGROUND

1. The Executive's Express & Inherent Powers Under the State Constitution

Although a substantially longer document than its federal analogue, the New Mexico Constitution devotes far fewer words to the powers of its chief executive. The primary discrete powers of the Governor are the pardon power, *see* N.M. Const. art. V, § 6, the appointment-and-removal power, *see id.* § 5, and the power to call the legislature into a special session and set the exclusive agenda therefor, *see id.* Art. IV, § 6.

The primary and most open-ended grant of power to the Governor provides that "[t]he supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." N.M. Const. art. V, § 4. This Court has consistently read the Take Care Clause as a restriction on, not a grant of, gubernatorial power. *See, e.g., Am. Fed'n of State, Cnty. & Mun. Employees v. Martinez*, 2011-NMSC-018, ¶ 6, 150 N.M. 132, 257 P.3d 952 (holding that even the Governor's express constitutional power to remove executive personnel was subject to the requirement that it be exercised in a manner consistent with the purpose of the statutory scheme creating the office in question, and stating that "the Governor is

required to apply his or her full energy and resources to ensure that the intended goals of duly enacted legislation are effectuated" (citation omitted)); *cf.* 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* § 7.6 (5th ed. 2020) ("This clause is not a general grant of broad power. Rather, it reads like a restriction on Presidential power — an obligation imposed on the President to execute the laws faithfully, which is the way the courts have often interpreted it.").

In terms of true inherent powers — meaning powers not enumerated in the Constitution's text, but nonetheless vested in the Executive beyond the Legislature's power to remove or curtail — this Court does not appear to have ever held that the Executive has any at all. This Court's predecessor, the Territorial Supreme Court,[7] explicitly disclaimed the existence of such powers. *See Territory ex rel. Wade v. Ashenfelter*, 4 N.M. 93, 894, ¶ 51, 12 P. 879 (N.M. Terr. 1887) ("Under our governmental system all power is inherent in the people, and the executive has the express and incidental powers conferred by law, and no more."). This Court has also held that no common-law powers inhere in the office of the Attorney General or the

[7] "All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state." N.M. Const. art. V, § 4. This includes both statutory law and "the construction thereof by the territorial supreme court." *Mallory v. Pioneer Sw. Stages*, 54 F.2d 559, 562 (10th Cir. 1931) (citation omitted).

Secretary of State.[8] *See State ex rel. Att'y Gen. v. Reese*, 1967-NMSC-172, ¶ 20, 78 N.M. 241, 430 P.2d 399 (rejecting the Attorney General's contention that "that he is vested with common-law powers and, accordingly, the powers and duties in connection with instituting the case below were inherent in him," and reaffirming the earlier "holding of this court … [that] unequivocally stated that 'no common-law powers were confirmed in the office of Attorney General by our Constitution'" (quoting *State v. Davidson*, 1929-NMSC-016, ¶ 9, 33 N.M. 664, 275 P. 373)); Hal Stratton, *Office of the Attorney General: History, Powers & Responsibilities*, § II.A, at 84 ("New Mexico is one of only ten States which deny the Attorney General common law powers." (footnote omitted)); Charles E. Smith, *The New Mexico State Constitution*, art. V, § 1, at 80 ("The secretary of state has no inherent powers, but only those assigned by the constitution or statute." (citing *Weldon v. Sanders*, 1982-NMSC-136, ¶¶ 31-35, 99 N.M. 160, 655 P.2d 1004)).

Despite the nature of the office and the constitutional investiture of "supreme executive power," which would seem to make the Executive well suited to exercise emergency powers when appropriate, the Constitution grants no such powers expressly, *see* Part 3, *infra*, and this Court has not to date attributed any implied emergency powers to the Executive.

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[8] The Attorney General and Secretary of State are also principal officers of the "executive department" under the state Constitution's 'fractured executive' approach. *See* N.M. Const. art. V, § 1. *But see* note 3, *supra* (described this brief's usage of "the Executive").

2. The Separation of Legislative & Executive Powers & the Nondelegation Doctrine in New Mexico

Unlike the federal Constitution, the New Mexico Constitution contains an explicit horizontal separation-of-powers provision. *See* N.M. art. III, § 1. Perhaps in part for that reason, the New Mexico courts have built up a much more robust nondelegation doctrine than their federal counterparts. Interpreting whether the Legislature has provided "reasonable standards as a guide to the exercise of the discretionary powers conferred," our courts have not hesitated to strike down impermissible delegations of the legislative power that would have probably passed muster under the federal system's anemic "intelligible principle" standard. *Schwartz*, 1995-NMSC-080, ¶ 4 (citation omitted).

In *State ex rel. Holmes v. State Board of Finance*, 1961-NMSC-172, 69 N.M. 430, 367 P.2d 925, this Court struck down a statute authorizing the state Board of Finance "to reduce all annual operating budgets authorized herein not to exceed ten percent" as an unconstitutional delegation of the Legislature's appropriations power. *Id.* ¶ 2. Rejecting an argument from the Board of Finance that it in fact applied stringent standards on itself in determining how to reduce budgets (and that the Legislature presumably knew and approved of those standards when it passed the law), the Court stated that "self-imposed restraints can in no way serve to supply what has been omitted[, because it] is not what has been done but what can be done under a statute that determines its constitutionality." *Id.* ¶ 30. Because the

Legislature's delegation was "totally devoid of restraints, direction, or rules" — except that the total reduction had to stay under ten percent — it was unconstitutional. *Id.*

In *Schwartz*, this Court addressed Governor Gary Johnson's reliance on a statute providing that he could "regulate the periodic allotment of funds to state agencies" to justify an across-the-board 2.5% reduction in appropriations. 1995-NMSC-080, ¶ 2. The Court adopted the Alaska Supreme Court's sliding-scale approach (which it has reaffirmed since) for assessing nondelegation claims, holding that "the constitutionality of a delegation is determined on the basis of the scope of the power delegated and the specificity of the standards to govern its exercise. '*When the scope increases to immense proportions . . . the standards must be correspondingly more precise.*'" *Id.* ¶ 16 (emphasis added) (citation omitted) (omission in original). *Schwartz* is further instructive in that the Court questioned whether the statute was really a delegation of discretion at all, or whether it simply allowed "the Governor [to] make allotments based on regularly-recurring needs of governmental agencies to meet the legislature's choice of purpose." *Id.* ¶ 2. (The Governor's reason for the reduction was simply that he anticipated lower total appropriations in the coming year and wanted to "encourage spending patterns that anticipate [those] reductions by the legislature." *Id.* ¶ 1.) The Court ultimately rejected the Governor's arguments on both a constitutional-avoidance and a

legislative-intent basis: (1) if the statute gave the Governor discretion to anticipate future legislative appropriations, it would be an unconstitutional delegation, so the Court would read it as a non-discretionary provision that just allowed the Governor to keep paying for the "regularly-recurring needs" of his agencies; and (2) as a matter of legislative intent, the "purported delegation of authority to the Governor" did not make sense and would clearly run afoul of *Holmes*, so the Court would not infer that the Legislature intended to make such a delegation.

In *Taylor*, this Court struck down Governor Johnson's welfare-reform scheme (and held him in contempt) for again encroaching on legislative power. After a bill to implement the program died in the Legislature, the Governor enacted it via administrative rulemaking in the Human Services Department so that New Mexico could remain eligible for federal funding. The Court found the Department's involvement irrelevant to the separation-of-powers analysis, noting that "the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature." 1998-NMSC-015, ¶ 22. The Court described its analysis as follows:

> The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches. If a governor's actions infringe upon the essence of legislative authority — the making of laws — then the Governor has exceeded his authority. A violation occurs

> when the Executive, rather than the Legislature, determines how, when, and for what purpose the public funds shall be applied in carrying on the government. In addition, infringement upon legislative power may also occur where the executive does not execute existing New Mexico statutory or case law [and rather attempts] to create new law.

Id. ¶ 24 (internal quotation marks, first alteration, and citations omitted) (brackets in original).

The Court repeated the sliding-scale approach from *Schwartz* in *Cobb v. State Canvassing Board*, 2006-NMSC-034, 140 N.M. 77, 140 P.3d 498, striking down an amendment to the Election Code that stated "[t]he state canvassing board may condition the issuance of the summons on a receipt of a portion of or the full estimated costs of the recount or recheck to ensure sufficient security"; the Court held that the Board was given "no standards to guide its discretion in requiring advance payment of any costs." *Id.* ¶¶ 35-36 (citation omitted). It added that "[t]he essential inquiry is whether the specified guidance sufficiently marks the field within which the administrator is to act so that it may be known whether [the administrator] has kept within it in compliance with the legislative will." *Id.* ¶ 41 (internal quotation marks and citations omitted).

Most recently, in *Unite New Mexico v. Oliver*, this Court rejected a claim by the Secretary of State that "the Legislature delegated to her the authority to make the binary choice of whether to embrace straight-ticket voting or not," characterizing her argument as one entitling her "to decide what the [substantive] election law shall

be." 2019-NMSC-009, ¶ 9. Much like in *Schwartz*, the Court held that the Legislature had not actually delegated this decision to the Secretary, but that, if it had, the "result [would be] a violation of the separation of powers." *Id.*

3. Express Emergency Powers Under the State Constitution

The only constitutional provision expressly referring to emergency powers is Article IV, § 2, which deals with "enemy attack[s] of such magnitude that a state of martial law is declared to exist in the state." Although inapplicable by its terms to a pandemic, it should be noted that in the circumstances it describes, the emergency powers all go exclusively to the Legislature, "which shall remain in *continuous session* during the disaster emergency." N.M. Const. art. IV, § 2 (emphasis added). The Executive's only role is to assist in declaring the emergency in the first instance. *See id.*

4. Statutory Emergency Powers (*i.e.*, PHERA)

There are emergency powers outlined in the New Mexico Statutes, located primarily in the Emergency Powers Code, which is the collective name for Articles 10, 10A, 11, and 12 of Chapter 12. *See* NMSA 1978, §§ 12-9B-1. There are two types of "emergencies" that the Governor can "proclaim" (or "declare") under New Mexico law, each of which triggers the availability of its own set of emergency powers.

First, an emergency under the Riot Control Act, NMSA 1978, §§ 12-10-16 to -21, requires that the authorities of the local municipality or county in which the emergency powers are to be exercised *request* that the Governor proclaim the emergency, *see id.* § 12-10-17. Once proclaimed, the emergency lasts a maximum of three days, *see id.* § 12-10-19, and grants the Governor the power to impose curfews and ban weapons, alcohol, and public assemblies, *see id.* § 12-10-18(A). This provision is agreed to not be applicable to the present case.[9] Second, the Governor may declare a "public health emergency" upon the "occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent," *id.* §§ 12-10A-3(G) &-5(A), triggering the emergency powers of the Public Health Emergency Response Act, NMSA 1978, §§ 12-10A-1 to -19 ("PHERA"), most of which are vested in the Secretary of the Department of Health.

PHERA essentially focuses on quarantine and isolation,[10] and it contains ample substantive guidelines and procedural protections — *e.g.*, the government

[9] The only locality in which such a proclamation of emergency has been made is the City of Gallup. *See* N.M. Executive Order 2020-027 (dated May 1, 2020), https://www.governor.state.nm.us/wp-content/uploads/2020/05/Executive-Order-2020-027.pdf (last visited May 20, 2020).

[10] "Isolation" is the segregation of individuals known to be infected, while "quarantine" is the precautionary segregation of individuals not known to have been infected but believed to have been exposed. NMSA 1978, § 12-10A-3(F) & (I). In addition to isolation and quarantine, PHERA also gives the Executive a handful of other relatively specific powers relating to the commandeering and rationing of health facilities and supplies and the safe disposal of human remains. *See id.* § 12-10A-6.

must obtain an individualized court order either before imposing quarantine or isolation or, in emergency situations, within 24 hours of imposing it — to leave no doubt that it is intended to be a fully self-executing law. *See* NMSA 1978, §§ 12-10A-7(A) & -9(B). Although the Petitioners have taken the position in other litigation pending before this Court, *see Lujan Grisham v. Reeb*, No. S-1-SC-38336, that any violation of the Governor's PHEOs subjects the violator to PHERA's penalties[11] — necessarily implying that the authority for the issuance of all the PHEOs derives from PHERA in some way — the Petitioners, tellingly, do not cite PHERA in this case at all.

5. <u>The Public Health Act</u>

In addition to the aforementioned emergency powers, the Public Health Act outlines a broad array of powers and responsibilities of the Department of Health, none of which are expressly predicated on the existence or proclamation/declaration of an emergency or public health emergency, but several of which are clearly relevant to the PHEOs — and, by their literal terms, come much closer to authorizing them than PHERA does.

Although not technically the organic or primary enabling statute of the Department of Health — that would be Article 7 of Chapter 9, which is largely

[11] PHERA contains a provision authorizing civil penalties of up to $5,000 per violation, *see* NMSA 1978, § 12-10A-19, while violations of the Public Health Act are punishable exclusively as petty misdemeanors, *see id.* § 24-1-21.

devoted to the Department's internal structure and operations — the Public Health Act (Article 1 of Chapter 24) lays out the bulk of the Department's duties and powers. Section 3 of the Act sets forth twenty-six broad "[p]owers and authorit[ies]" granted to the Department, which range from the specific (*e.g.*, "regulate the practice of midwifery") to the vague and potentially capacious (*e.g.*, "maintain and enforce rules for the control of conditions of public health importance"). The full list is instructive, but the powers potentially relevant to the PHEOs are reproduced below:

> The department has authority to:
>
> …
>
> C. investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health;
>
> D. establish, maintain and enforce isolation and quarantine;
>
> E. close any public place and forbid gatherings of people when necessary for the protection of the public health;
>
> F. respond to public health emergencies and assist communities in recovery;
>
> …
>
> Z. do all other things necessary to carry out its duties.

NMSA 1978, § 24-1-3. Many of the listed powers, including the power to close public places and forbid gatherings, have no further substantive or procedural restrictions in the Public Health Act or any other statute. Although three cases exist

citing § 24-1-3, it has never been meaningfully interpreted by any court. As such, it remains undecided whether it is a grant of plenary authority to the Department of Health to exercise each and every power on the list without restrictions on its discretion, or merely a prefatory statutory outline of the types of tasks the Department should aspire to take on and the powers that subsequent, more detailed grants of authority (and accompanying, proportionate statutory safeguards) will impart.

ARGUMENT

Depending upon one's factual assumptions and philosophy of statutory construction, § 24-1-3(C)-(F), and particularly subsection (E), can be argued to have been intended to encompass government acts of varying levels of intrusiveness, *e.g.*, closing government-owned property upon the discovery of pathogens in the water, or shutting down a business with a localized outbreak of a disease. But no fair interpretation of its terms gives the Executive unfettered authority to make long-term front-page policy determinations that bankrupt literally thousands of businesses, cost literally billions of dollars, and put literally hundreds of thousands of people out of work — and, more unsettling still, to decide unilaterally *who* suffers those consequences, without any check on the obvious potential for abuse in the form of

political favoritism or spite.[12] If the statute did give the Executive that power, it would be unconstitutional. *See Schwartz*, 1995-NMSC-080, ¶ 16; *Unite New Mexico*, 2019-NMSC-009, ¶ 9.

Three things should be kept in mind when examining § 24-1-3. First, it is not at all unusual for an act devoted to the activities of a single agency to contain a section laying out "powers," "authority," or "duties" of the agency in broad terms, which are ultimately designed to describe the agency's purpose and aspirational functions, not to serve as robust and definite grants of power in themselves. *See*, *e.g.*, NMSA 1978, § 9-21-7(B)(1) (directing the Indian Affairs Department to "act upon the entire subject of Indian conditions and relations within New Mexico," which is presumably not a self-executing authorization for the Department to, *e.g.*, offer large-scale repatriation of state land); *id.* § 9-8-7.1(D) (authorizing the Human Services Department to "implement adult mental health and substance abuse services," an undefined term that nonetheless cannot extend to, *e.g.*, public-assistance programs, *cf. Taylor*, 1998-NMSC-015, ¶ 22); *id.* § 50-9-8(A) (directing the Department of Environment to "prevent or abate detriment to the health and safety of employees arising out of and in the course of employment," which is even

[12] *Amici* are not arguing that this potential has been realized, but note that a prevalent view within certain affected industries and regions is that they have been "targeted" by the Governor. Whether these fears are well-founded or not, the consolidation of decision-making power in one person undermines the appearance of, and public confidence in, fair governmental process, which is itself a nontrivial justification for separation of powers and a plural legislature.

more facially capacious than the Public Health Act); *id.* § 9-15-54(B)(2) (providing that the Economic Development Department may "do all other things necessary and proper to effectuate the purpose of the Minority Business Assistance Act").

These sections largely fall into the category what the statutory-interpretation treatises call "administrative sections," which are those parts of a "statute extending a regulation into new areas [that] create or extend existing administrative organizations to enforce the new law," *i.e.*, that are concerned more directly with the creation and description of a government agency than they are with controlling the agency's work product or establishing standards of conduct for ordinary citizens to abide by. 1A Norman Singer et al., *Sutherland Statutes & Statutory Construction* § 20:14 (7th ed. 2019) (placing, in the "Structure of a Statute" chapter, administrative sections immediately after the sections on short title, policy, and definitions, and before standards of conduct and penalties); *id.* § 20:15 (setting out a sample-form powers-and-duties administrative section that is strikingly similar to § 24-1-3, and stating: "In establishing powers and duties, certain duplication is both desirable and essential. All the powers and duties which a department exercises should be set forth in a single section so a correlation of departmental function is apparent both to the administrator and to the court. *The details of exercising power should thereafter be set forth in separate sections so the precise method of operation may be apparent.*" (emphasis added)); *see generally* N.M. Legislative Council

Service, *Legislative Drafting Manual* 216 (2015) (stating that administrative sections creating a new board or commission should describe "the powers and duties of the board," and that "[i]t is good drafting practice to separate the 'housekeeping' functions, *e.g.*, how members are appointed, terms, meetings and payment, from the *purpose,* e.g., *the powers and duties*, of the board" (emphasis added)).

Second, at first glance, the authority to "close [] public place[s] and forbid [mass] gatherings" may seem specific to the point of prescience — the Public Health Act was passed back in the 1970s,[13] and most laypeople only started hearing about "social distancing" and the like for the first time during COVID-19 — and of course specific grants of obscure powers are generally assumed to be more apt to be self-executing that, say, general statutory exhortations about "promoting the public health," etc. But in fact, social distancing, mask-wearing, and shelter-in-place orders have long been stock population-level interventions against air- or droplet-borne contagions, *see* Liam Otten, *A History of Social Distancing*, Wash. Univ. in St. Louis (Mar. 16, 2020), https://source.wustl.edu/2020/03/washu-expert-histories-of-contagion/ (last visited July 28, 2020), and just as likely to be included as generic mitigation instruction in a public health law as, *e.g.*, burning personal effects thought

[13] It is noteworthy, however, that the Act was just amended in 2017 to "provide[additional] due process protections for [] person[s] subject to [its] procedures" and orders. Fiscal Impact Report ¶ 10, at 2, S.B. 223 (2017 Reg. Sess.) (Sen. Ivey-Soto), https://www.nmlegis.gov/Sessions/17%20Regular/firs/SB0223.PDF (last visited July 28, 2020); *id.* ¶ 18, at 3.

to be contaminated by disease. The applicability of such measures to the pandemic response is not the same as — nor a substitute for — specificity in the statute, which fails to define "public places" or describe what it means by "gatherings."

Third, and relatedly, § 24-1-3 gives the Executive no "reasonable standards as a guide to the exercise of the discretionary powers conferred." *Schwartz*, 1995-NMSC-080, ¶ 4 (citation omitted). It is "totally devoid of restraints, direction, or rules," *Holmes*, 1961-NMSC-080, ¶ 30, which is entirely unacceptable when, as here, "the scope of the power delegated . . . [has] increase[d] to immense proportions[, thus necessitating] standards [that] must be correspondingly more precise," *Schwartz*, 1995-NMSC-080, ¶ 16. Today the Governor alone is making decisions far more important, and affecting a far greater number of people far more deeply, than self-imposed budget cuts to executive programs, the structure of election ballots, or the standards used by the State Canvassing Board to waive recount and recheck costs after an election.

Even if there were perfect ideological agreement about how to balance public health with economic wellbeing, and perfect scientific and economic agreement about the medical efficacy and financial impact of each proposed virus-mitigation measure, there would still remain disagreements about how to allocate the necessary burdens among public. That is, if everyone agreed that the proper balance involved reducing the R_0 value of the virus to below 1 at a cost of $\$x$ billion in GDP, and it

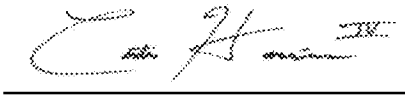
were somehow further known and agreed that closing down movie theaters entirely would cost $*a* and reduce the R_0 value by .4, limiting them to 50% occupancy would cost $0.4*a* and reduce the R_0 by .15, and closing down restaurants would cost $*b* and reduce the R_0 value by .5, and so forth, an *irreducibly political* decision would still have to be made about which alternatives to pursue, and who should shoulder these burdens. In this way, a broad instruction allowing the Executive to close down public places and limit mass gatherings as she sees fit is a far more extreme delegation of legislative power than those this Court has rejected in the past.

CONCLUSION

"[W]hat the Legislature cannot do is delegate the right to determine, in the first instance and wholesale, what [a statutory] scheme, policy, or purpose will be." *Unite New Mexico*, 2019-NMSC-009, ¶ 8 (citation omitted). Here, the Legislature did not and could not constitutionally delegate to the Executive the powers she claims. It is now the Legislature's duty to replace temporary stopgap measures with lasting ones.

Respectfully submitted,

HARRISON & HART, LLC

By: 

Carter B. Harrison IV
1001 Luna Circle NW
Albuquerque, NM 87102
Tel: (505) 295-3261
Fax: (505) 341-9340
carter@harrisonhartlaw.com

Attorney for the Amici Curiae

STATEMENT OF COMPLIANCE

I certify that the body of this Brief contains 5,751 words and is thus in compliance with the type-volume limitation of Rule 12-504(G)(3) NMRA.

HARRISON & HART, LLC

By: */s/ Carter B. Harrison IV*
Carter B. Harrison IV

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2020, I submitted the foregoing Response electronically via the Court's Odyssey filing system and selected the option for electronic service, which will, on the date that the clerk's office formally accepts the document for filing, cause a certified copy of the document to be served via email upon all counsel of record.

HARRISON & HART, LLC

By: */s/ Carter B. Harrison IV*
Carter B. Harrison IV