IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39546

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

Petitioners,

v.

NEW MEXICO COMPLIATION COMMISSION ADVISORY COMMITTEE,

Respondent.

ORIGINAL PROCEEDING ON PETITION FOR WRIT OF MANDAMUS

BRIEF OF INTERVENORS/AMICI RETAKE OUR DEMOCRACY AND INDIVISIBLE ALBUQUERQUE IN SUPPORT OF PETITIONERS

Scott Fuqua
FUQUA LAW & POLICY, P.C.
P.O. Box 32015
Santa Fe, NM 87594
(505)982-0961
scott@fuqualawpolicy.com

Attorney for Intervenors/Amici Retake Our Democracy and Indivisible Albuquerque

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF INTERVENORS/AMICI 1

INTRODUCTION 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. THE SUMMARY DESCRIPTION GIVEN TO NEW MEXICO VOTERS INADEQUATELY EXPLAINED THE IMPACT OF THE AMENDMENT 9

- A. The Description Failed to Inform Voters that Commissioners Were Democratically Elected and that the Amendment Would Remove that Electoral Requirement in Favor of Political Appointment 11
- B. The Description Failed to Inform Voters that They Would No Longer Be Guaranteed Regional Representation on the Commission Through the Election of Commissioners from Different Parts of the State 13
- C. The Description Failed to Inform Voters that the Amendment Would Permit the Appointment of Non-New Mexico Residents to the Commission 14
- D. The Description Failed to Inform Voters that the Amendment Would Permit the Governor to Remove Commissioners from Office at Any Time and for Any Reason 16

II. THE AMENDMENT CONSTITUTED IMPERMISSIBLE LOGROLLING 17

- A. No Provision of the Amendment Is Directly Related to Taking From Voters the Ability to Elect Commissioners 20
- B. No Provision of the Amendment is Directly Related to Dissolving the Geographic Districts Commissioners Previously Represented. 21

C. No Provision of the Amendment is Directly Related to Changing the Terms of Office of the Commissioners 21

III. THE AMENDMENT HAS CREATED THE POSSIBILITY OF APPOINTMENTS TO THE NOMINATING COMMITTEE THAT VIOLATE THE NEW MEXICO CONSTITUTION 22

IV. THE PETITION IS TIMELY 23

CONCLUSION 24

TABLE OF AUTHORITIES

New Mexico Cases

City of Raton v. Sproule, 1967-NMSC-141, 78 N.M. 138 17

City of Albuquerque v. State, 1984-NMSC-113, 102 N.M. 38 18

Crosthwaite v. White, 1951-NMSC-003, 55 N.M. 71 18

Dillon v. King, 1974-NMSC-096, 87 N.M. 79 10

Johnston v. Bd. Of Educ. Of Portales Mun. Sch. Dist. No. 1, 1958-NMSC-141, 65 N.M. 147 18

Pub. Serv. Co. Of N.M. v. N.M. Pub. Regulation Commn., 2019-NMSC-012, 444 P.3d 460 7

Ryan v. Gonzales, 1992-NMSC-052, 114 N.M. 346 10

State ex rel. *Chavez v. Vigil-Giron*, 1988-NMSC-103, 108 N.M. 45 .... 17, 18, 19, 24

State ex rel. *Clark v. State Canvassing Bd.*, 1995-NMSC-001, 119 N.M. 12 .... 18, 19, 24

State ex rel. *Gibson v. Fernandez*, 1936-NMSC-027, 40 N.M. 288 23

State ex rel. League of Women Voters v. Advisory Comm. to the N.M. Comp. Comm'n., 2017-NMSC-025, 401 P.3d 734 24

State v. Ingalls, 1913-NMSC-068, 18 N.M. 211 18

State v. Martinez, 2018-NMSC-031, 420 P.3d 568 3

Cases from Other Jurisdictions

Armstrong v. Harris, 773 So.2d 7 (Fla. 2000) 10

Askew v. Firestone, 421 So.2d 151 (Fla. 1982) 11

Anderson v. Celebrezze, 460 U.S. 780 (1983) 10

Grose v. Fireston, 422 So.2d 303 (Fla. 1982) 11

Parker v. Duran, 180 F. Supp. 3d 851 (D.N.M. 2015) 10

New Mexico Constitutional Provisions

N.M. CONST. art. IV, § 28 23

N.M. CONST. art. XI, § 1 6

N.M. CONST. art. XIX, § 1 17

New Mexico Statutes

NMSA 1978, § 1-8-18(A)(2) 2, 15

NMSA 1978, § 1-8-45(A)(1)(a) 2, 15

NMSA 1978, § 62-3-1(B) 7

NMSA 1978, § 62-19-4 .... 14, 15, 22

INTEREST OF INTERVENORS/AMICI

Proposed intervenor Retake Our Democracy is a New Mexico non-profit devoted to increasing participation in the democratic process through activism, outreach, and organization. In light of its core mission to make the democratic process work for New Mexico citizens, it is keenly interested in the structure of our democratic institutions and changes to that structure.

Proposed intervenor Indivisible Albuquerque is a 501(C)(4) entity based in Albuquerque. It advocates on behalf of citizens at the local, state, and national level on issues such as gun safety, healthcare, climate change, immigration, and voting rights. It is part of a national network of organizations, all bearing the "Indivisible" banner, advocating on such issues.

Both organizations operate with the purpose of safeguarding the health and functioning of our democracy. Both organizations bring the perspective of long-standing, active, and engaged participation in that democracy and its institutions. Both organizations have a particular interest in the work done by the Public Regulation Commission and its members. Both organizations recently sought leave to file an amicus brief in *Avangrid, Inc. v. N.M. Pub. Reg. Commn.*, Case No. S-1-SC-39152 in support of the PRC's denial of the proposed merger between Iberdrola, S.A., Avangrid, Inc., *et al*. and PNM Resources, Inc.

INTRODUCTION

The 2020 amendment to the New Mexico Constitution under consideration replaced New Mexico's elected five-member Public Regulation Commission ("Commission" or "PRC") of Commissioners from distinct geographically representative districts with a three-member PRC whose members will be nominated by a politically appointed committee and then ultimately appointed by the Governor. The three Commissioners will not will not represent particular districts and may not even be New Mexico residents. *See* Exhibit 1, September 28, 2022 Memorandum from the Attorney General's Office to the Public Regulation Nominating Committee, pg. 3 (advising the committee that a list sent to the Governor containing non-New Mexico residents would be lawful so long as the list otherwise contained the names of people from three different New Mexico counties).[1]

The Governor will have the power to remove any of the three Commissioners for any – or even for no – reason. (*Id.*, pg. 2) Both the bill proposing the ballot question by which the amendment passed and the ballot question itself were presented to voters as a way of "professionalizing" the

1 A non-New Mexico resident Commissioner is impossible with elected Commissioners because New Mexico's Election Code requires candidates for office to live in the district of the office sought. *See* NMSA 1978, §§ 1-8-18(A)(2) and 1-8-45(A)(1)(a).

PRC which, until this amendment, had been intended to be politically independent.[2]

In 2016, the legislature sought to learn how to improve the effectiveness and performance of the PRC. The legislature hired the National Regulatory Research Institute to examine PRC practices. The resulting report to the New Mexico Legislative Council Service, "Evaluation of Public Regulation Commission Staffing and Budget Allocation" (attached as Exhibit 2) advised the legislature, among other things:

> Good regulation also avoids excessive politicization, which weakens regulation as an institution and instrument of public policy. Politically expedient decisions tend to undermine the agency's commitment to promoting the long-term interests of the state.

Exhibit 2, pg. iii. A fundamental feature of "best practice" regulation is "trust and independence." The report continues:

> Independence is essential for allowing an agency to protect the general public in the face of strong economic and political pressures. Jeopardy of a commission's independence can originate from different parties: Utilities; the executive branch of state government; the state legislature; special interest groups; and the judicial branch.

---

2 *See State v. Martinez*, 2018-NMSC-031, ¶ 10, 420 P.3d 568 (The judicial branch must "vigorously protect[]" the "integrity and independence" of a constitutional institution because "its independence and functioning are matters of substantial public interest. An additional consideration is that conflicts between a statute, this Court's case law interpreting the statute, and this Court's procedural rules call for definitive resolution by this Court.").

*　　*　　*

> ***One real world condition for independence is the inability of the governor or legislature to remove a commissioner unless she is guilty of gross inefficiency, neglecting her duties, or violating the law.***

Exhibit 2, pg. 5 and n. 9 (emphasis added).

The amendment, by providing for the political appointment of Commissioners rather than their election and thereby ensuring that they serve at the pleasure of the Governor, directly contradicts the guidance of the report paid for by the New Mexico Legislative Council Service. It also effectively ended PRC independence and converted the Commission to a political entity subject to the same influences as the political officials who control its membership. The question now before this Court is whether the ballot question presented to voters in 2020 gave those voters a clear and fair understanding of what the effects of the amendment would be if they voted to adopt it. For a myriad of reasons, it did not.

First, the ballot question failed to alert voters that the existing PRC was an elected body of regional representatives, all of whom were New Mexico residents, and that the amendment would eliminate the constitutional requirement that the PRC be elected by the people. Second, the ballot question failed to inform voters that, at the time, they had the right to vote for

regional Commissioners and that they were giving up that right. Third, the ballot question failed to inform voters that the nomination and appointment process established by the amendment would be controlled by legislative representatives and the Governor who have received substantial political contributions from the industry players regulated by the PRC.[3] Fourth, the ballot question failed to alert voters that the constitutional amendment would permit the appointment of non-New Mexico residents to the Commission. (Ex. 1, pg. 3) Fifth, among the many ways the ballot question misled voters was by presenting the new Commission as "professional," thereby hiding numerous other changes unrelated to such professionalism, such as changing the terms of office of the Commissioners and narrowing the PRC's jurisdiction to only public utilities.

Beyond these omissions and the resulting confusingly misleading ballot text, the ballot provision had the necessary effect of converting the PRC from an independent Commission to a politically-appointed one. It is no surprise

---

3 *See* "Big donors giving most of the cash for governor's race," New Mexico In Depth, October 5, 2022, https://nmindepth.com/2022/big-donors-giving-most-of-the-cash-for-governors-race/; *See also*, "The New Mexico Oil and Gas Industry and Its Allies: Oceans of Oil, Oceans of Influence," Common Cause New Mexico and New Mexico Ethics Watch, March 2020, https://www.commoncause.org/new-mexico/resource/the-new mexico-oil-and-gas-industry-and-its-allies-oceans-of-oil-oceans-of-influence/, pp. 8, 13, 26.

that its passage was promoted and supported by the Public Service Company of New Mexico and its Parent Corporation, PNM Resources, Inc. (and Avangrid, who sought to merge), as well as its individual senior officers, including, CEO Patricia Vincent Collawn, who has supported the campaigns of Governor Lujan Grisham, House Speaker Brian Egolf, PACs associated with both, and, separately, to other legislators.[4] It is undeniable that public utilities are investing heavily to influence the executive and legislative branches. The principal vice of this amendment is that, under the guise of "professionalism," it now permits unfettered, direct political access to elected officials who control financial decision-making for the utilities whereas, before the adoption of the amendment, a Commissioner could be impeached for "accepting anything of value from a person or entity whose charges for service to the public are regulated by the commission." N.M. CONST. art. XI, § 1.

In 2013, the legislature exercised its constitutional authority to establish Commissioner qualifications. SB 8, passed in the 2013 legislative

---

4 Exhibit 3 includes: (1) PNM, PNMR officers', and Avangrid contributions reported to the New Mexico Secretary of State from 2017 to October 11, 2022 to candidate Michelle Lujan Grisham and PACs supporting her campaign, totaling $150,607.44; (2) PNM and PNMR officers' contributions reported to the New Mexico Secretary of State from 2017 to October 11, 2022 to Speaker Brian Egolf and his supporting PACs, totaling $42,000.00; and (3) reported contributions to New Mexico politicians and PACs by PNM, PNMR, their PACs, and Avangrid from 2017 to October 11, 2022 totaling $940,198.12.

session, required Commissioners to have at least ten years of professional experience in an industry regulated by the Commission or, alternatively, a combined ten years of professional experience and at least a bachelor's degree in a relevant discipline or field.

The 2018 election was the first to test the professional experience of Commissioners that SB 8 required, and the evidence of the last four years demonstrates that it has been a rousing success: the utilities have been held accountable by the PRC. The key to that success has been meaningful regulation that has created well-informed decisions directed at the public interest, and the necessary balancing of interests between the utility and ratepayers, codified as NMSA 1978, § 62-3-1(B) (2008) and articulated by this Court in *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n,* 2019-NMSC-012, ¶¶ 9-11, 444 P. 3d 460.

The ballot question at issue undermines the public interest and the careful balancing required of current Commissioners, giving way to the well-healed political industry corrosion that undermines trust and independence. It was a mechanism to take away New Mexicans' right to vote for the representatives of this important agency, which New Mexicans had, by constitutional amendment, reserved for themselves. The removal of this right

could have been accomplished lawfully by a ballot that provided the basic information voters needed to understand the implications of their vote; without that, the conversion to an appointed, politically-controlled PRC subverts our democracy.

SUMMARY OF THE ARGUMENT

The 2020 constitutional amendment is problematic for three primary reasons. First, the amendment was not described on the ballot to voters in a way that adequately informed those voters about what, exactly, they were potentially approving. In particular, the ballot question was misleading and deceptive by omission because it failed to inform voters that: (1) the Commission was, at the time, composed of democratically elected representatives; (2) the Commissioners, at the time, were residents of one of five geographic districts; (3) Commissioners would no longer need to be New Mexico residents; and (4) Commissioners would serve at the pleasure of the Governor and could, therefore, be removed at any time and for any reason.

Second, the constitutional amendment itself enacted several disparate reforms entirely unconnected to one another. Consequently, the amendment violated New Mexico's constitutional prohibition on logrolling.

Finally, through the creation of a nominating committee tasked with vetting and recommending Commissioners to the Governor for the Governor's appointment, the amendment created a situation in which it was possible for legislators to sit on the nominating committee in what appears to be a violation of the New Mexico Constitution.

ARGUMENT

I. THE SUMMARY DESCRIPTION GIVEN TO NEW MEXICO VOTERS INADEQUATELY EXPLAINED THE IMPACT OF THE AMENDMENT.

Intervenors recognize that practical necessity requires constitutional amendments to be summarized on the ballot. Typically, the full text of a proposed constitutional amendment would not reasonably fit on a ballot and an in-depth analysis of the potential consequences of any given constitutional amendment could be the subject of a 50-page law review article containing hundreds of footnotes. But New Mexico law and fundamental democratic norms require that voters be adequately informed about at least the principal effects or changes wrought by a proposed amendment to our constitution.

No New Mexico court has directly addressed the question of how specifically a ballot question must describe the underlying constitutional amendment or bond issue it presents. Information is the lifeblood of a healthy, functioning democracy: it is essential that the electorate know what,

exactly, it is voting for or against. In the context of condensing a constitutional amendment to a single sentence, the "claim that [a State] is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983).

This principle has found expression in New Mexico in a variety of ways. New Mexico's requirements that candidates for office gather petition signatures as a means of demonstrating a modicum of support to justify placement on the ballot is largely premised on the effort to avoid voter confusion by limiting the number of candidates who appear on the ballot. *See Dillon v. King*, 1974-NMSC-096, ¶ 12, 87 N.M. 79; *Parker v. Duran*, 180 F. Supp. 3d 851, 861 (D.N.M. 2015).

Intervenors support Petitioners' request that the Court make an affirmative finding upholding the legal principal of ballot accuracy. While it is appropriate to give deference to the legislature in crafting ballot questions proposing constitutional amendments, that ballot language cannot be misleading, and a favorable vote by the electorate does not cleanse the amendment of constitutional defect. *See Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000); *see also Ryan v. Gonzales,* 1992-NMSC-052, ¶ 8, 114 N.M. 346 ("[W]hile

we will accord strong deference to the [legislature], it is for this Court in the final analysis to rule on questions of constitutionality.")

The accuracy requirement in *Armstrong* imposes a strict minimum standard for ballot clarity. Most relevant for the case at bar, the ballot was not explicit that a vote for the amendment would nullify their rights thereby preventing voters from casting a ballot with eyes wide open. *See also Grose v. Firestone*, 422 So.2d 303 (Fla. 1982) (What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot: "[t]he wording of the ballot summary of proposed Amendment 2 is unambiguous and clearly states the amendment's chief purpose."); *see also Askew v. Firestone*, 421 So.2d 151, 154-55 (Fla. 1982) (noting that, in practice, the accuracy requirement functions as a kind of "truth in packaging" law for the ballot.) The amendment at issue here does not meet that standard and the Court should so rule.

A. The Description Failed to Inform Voters that Commissioners Were Democratically Elected and that the Amendment Would Remove that Electoral Requirement in Favor of Political Appointment.

First and foremost, the amendment failed to make clear that a Commission made up of "three members appointed by the Governor" represented a departure from the *status quo*, namely a Commission made up

of five members elected by New Mexico citizens through the democratic process. The text of the ballot question did inform voters that the Governor would appoint the members of the Commission, but did not inform voters that, at the time, those members were instead democratically elected. The ballot question could thus be read to propose to voters the creation of an entirely new entity the members of which would be vetted by a nominating committee and formally appointed by the Governor.

It is hard to overstate the importance of making clear to voters that by adopting a constitutional amendment they are ceding to the Governor their right to choose the governmental actors wielding the enormous power of the Public Regulation Commission. The Court is well aware of both the scope and depth of the Commission's authority, ranging from the regulation of taxi and limousine services to the price New Mexicans pay to power, cool, and heat their homes. Through our constitution, New Mexico's voters had previously reserved for themselves the sole power, through the ballot, to select the members of the Commission. It is critical that those same voters be given full and accurate information about a constitutional amendment that would strip of them of that power previously so reserved.

Simply put, the description on the ballot failed to do so. By not drawing any contrast with the manner in which, as of election day 2020, the Commission was constituted, the description did not make as clear as it should have that the proposed amendment represented a substantial change in the process by which Commissioners are selected. That failure is fatal to the amendment, and the Court should so hold.

B. The Description Failed to Inform Voters that They Would No Longer Be Guaranteed Regional Representation on the Commission Through the Election of Commissioners from Different Parts of the State.

Second, the description on the ballot did not inform voters that the now three member Commission would no longer be selected from legislatively drawn geographic districts. Before the 2020 amendment, Article 11, Section 1 of the New Mexico Constitution required that the five members of the Commission be "elected from districts provided by law." The amendment ends that representation effective January 1, 2023. In its place, the amendment leaves no guarantee of any kind that the members of the Commission be from geographically diverse areas of the State. Instead, the amendment leaves it to the legislature to put such a requirement in place if it so chooses.

In response, the legislature passed NMSA 1978, § 62-19-4, creating and establishing parameters for the nominating committee. The statute requires the committee, before January 1, 2023, to submit to the Governor a list of at least five candidates for appointment to the Commission. The list "shall be developed to provide geographical diversity, and nominees on the list shall be from at least three different counties." NMSA 1978, § 62-19-4(F). Thereafter, when preparing to fill a vacancy on the Commission, the nominating committee is to provide at least two names to the Governor of people "from diverse geographical areas of the state." NMSA 1978, §§ 62-19-4(G) and (H).

The problem is that, before the 2020 amendment, such geographic diversity was constitutionally guaranteed; the legislature was powerless to change it. After the amendment, that is no longer the case. So while the law, for now, provides a vague requirement of geographic diversity, the legislature may change that at will. The voters were never informed of any such consequence to the adoption of the 2020 amendment.

C. The Description Failed to Inform Voters that the Amendment Would Permit the Appointment of Non-New Mexico Residents to the Commission.

In response to a direct question from the new nominating committee, the Attorney General's Office has provided official guidance to the effect that

the nominating committee may provide to the Governor a list of potential Public Regulation Commissioners that includes non-New Mexico residents. In providing that guidance, the Attorney General's Office interpreted Section 62-19-4(F), which requires the nominating committee to submit to the Governor a list of "no fewer than five qualified candidates" who "provide geographic diversity." The statute further requires that "nominees on the list shall be from at least three different counties of the state."

Asked whether this would permit the nominating committee to submit the names of non-New Mexico residents, the Attorney General's Office answered in the affirmative: "the Committee may include nominees who are not New Mexico residents provided that the nominee list otherwise meets the requirement that nominees be from at least three different counties of the state." *See* Exhibit 1, pg. 1.

This represents a seismic shift in the makeup of the Commission. As elected officials, Commission members were required to live in the district they represented on the Commission. *See* NMSA 1978, §§ 1-8-18(A)(2) (political party candidates) and 1-8-45(A)(1)(a) (independent candidates). However one slices the ballot question presented to voters in 2020, that question does not even hint at the possibility that, since the Election Code no

longer applies to Commission members, those members need not even be residents of the State of New Mexico. All voters were told was that those Commission members would be "professionally qualified."

New Mexico law should and does require more. Voters simply must be adequately informed about the contents of the constitutional amendment on which they are voting. In this case, they were not.

D. The Description Failed to Inform Voters that the Amendment Would Permit the Governor to Remove Commissioners from Office at Any Time and for Any Reason.

Lastly, the ballot question presented to the voters failed to note that the appointed Commissioners would serve at the pleasure of the Governor and would therefore be subject to removal from the Commission at any time and for any reason. The official guidance from the Attorney General's Office to the nominating committee is that, pursuant to Article V, Section 5 of the New Mexico Constitution, because the Commissioners are appointed by the Governor and confirmed by the Senate, the Governor may remove them.

This, too, is a significant change about which voters were not informed. Previously, the only ways to remove a Commissioner were through impeachment, *quo warranto*, and at the ballot box. The Governor played no role of any kind in such removal. Yet, without being told that they were doing

so, New Mexico voters ceded to the Governor the ability to remove an appointed Commissioner at any time and for any reason.

Any of these failings are individually sufficient to invalidate the adoption of the 2020 amendment. Taken together they require such invalidation, and the Court should so hold.

II. THE AMENDMENT CONSTITUTED IMPERMISSIBLE LOGROLLING.

New Mexico law prohibits logrolling, or the joining of disparate, unconnected provisions into a single ballot measure. *See* N.M. CONST. art. XIX, § 1 ("If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately. . . ."). "[T]he particular vice in logrolling, or the presentation of double propositions to the voters, lies in the fact that such is inducive of fraud, and it becomes uncertain whether either two or more propositions could have been carried by vote had they been submitted singly." *City of Raton v. Sproule*, 1967-NMSC-141, ¶ 18, 78 N.M. 138. Ultimately, the question to be answered is "whether the legislature reasonably could have determined that a proposed amendment embraces but one object." *State* ex rel. *Chavez v. Vigil-Giron*, 1988-NMSC-103, ¶ 9, 108 N.M. 45. That inquiry, in turn, depends on whether there is a "direct, necessary, or logical connection" between the operation of "distinct changes

to the Constitution [that] are not dependent on each other." *Id.*, ¶ 12. *See also Johnston v. Bd. of Ed. Of Portales Mun. Sch. Dist. No. 1*, 1958-NMSC-141, ¶ 8, 65 N.M. 147 ("[T]he general rule to be gleaned from the authorities is that in order to constitute a single proposition or question there must exist a natural relationship between the objects covered by the ballot so they form but one rounded whole or single plan."); *City of Albuquerque v. State*, 1984-NMSC-113, ¶¶ 4, 5, 102 N.M. 38 (the title of a bill must accurately describe its contents and an act is unconstitutional if it goes far beyond what is described in its title; a title's length and specificity can, as it did here, conceal provisions of an act that are not mentioned); *Crosthwaite v. White*, 1951-NMSC-003, ¶ 20, 55 N.M. 71 ("Does the title fairly give such reasonable notice of the subject-matter of the statute itself as to prevent the mischief intended to be guarded against?" (internal quotes and citation omitted); *State v. Ingalls*, 1913-NMSC-068, 18 N.M. 211.

In *State* ex rel. *Clark v. State Canvassing Bd.*, 1995-NMSC-001, 119 N.M. 12, this Court reviewed a constitutional amendment that both created a statewide lottery and legalized video machine gambling. The Court found no direct, necessary, or logical connection between establishing a statewide lottery and legalizing video gambling, rejecting the argument that both

provisions of the amendment had as their general object the legalization of different forms of gambling. 1995-NMSC-001, ¶ 13.

The Court distinguished the gambling provisions of the amendment before it with the judicial reform amendment under consideration in *Chavez*, 1988-NMSC-103. In *Chavez*, the various provisions of the amendment established new procedures for selecting and retaining judicial officers, increased the number of judicial districts in the State, established new requirements for holding judicial office, and provided for periodic redrawing of the State's judicial districts. *Chavez*, 1988-NMSC-103, ¶ 5. The Court ultimately held that those provisions were all logically related to the overarching purpose of judicial reform. *Id.*, ¶ 14.

The gambling provisions in *Clark*, however, were not. As this Court noted, although both the lottery and video gambling provisions of the amendment under consideration related to "an overarching theme, more is required to demonstrate a single object." *Clark*, 1995-NMSC-001, ¶ 14. Specifically, the provisions must rationally relate to one another: "The requirement of a rational linchpin joining the various elements of an amendment serves to prevent the linking of independent propositions simply by selection of a sufficiently broad overarching theme." *Id.*

As discussed below, the several distinct provisions of this amendment bear no direct, necessary, or logical relation to one another. As such, they should have been submitted separately to the voters.

A. No Provision of the Amendment Is Directly Related to Taking From Voters the Ability to Elect Commissioners.

Most notably, the change from democratically electing Commissioners to politically appointing them is not related – directly or indirectly – to any other provision of the amendment. As pitched to the public, the amendment provided for a Commission of "professionally qualified" people to be appointed by the Governor. Those professional qualifications are not logically related to the manner in which the Commission members are selected. There is nothing about reducing the number of Commissioners from three to five that requires those Commissioners to be politically appointed rather than democratically elected. Nor does the dissolution of the geographic districts Commissioners previously represented require that those Commissioners be appointed rather than elected. The same is true of the change in Commissioners' terms of office from four to six years; they need not be politically appointed in order for that change to be effective. Simply put, the change from election to appointment of Commissioners stands conspicuously alone amongst the other changes wrought by the amendment. At a minimum,

the question of whether to give up the constitutional right to choose Commissioners through the electoral process should have been presented to voters independently. The decision to do otherwise violated Article XIX, Section 1 of the New Mexico Constitution.

B. No Provision of the Amendment is Directly Related to Dissolving the Geographic Districts Commissioners Previously Represented.

Similarly, the removal of the five geographic districts is not related to any other provision of the amendment, with the possible exception of the change in the number of Commissioners from five to three. The dissolution of those districts does not depend on and is not logically related to the qualifications required of Commissioners, their terms of office, or their selection through the electoral process.

C. No Provision of the Amendment is Directly Related to Changing the Terms of Office of the Commissioners.

There is also no direct or logical relationship between the increase from four to six years of a Commissioner's term of office and any other provision of the amendment. That change neither requires nor depends on the dissolution of geographic districts or selection through political appointment. It was thus a change that should have been presented separately to the electorate.

Ultimately, it is not hard to envision voters wanting some changes – most notably professional qualifications for Commissioners[5] – but not wanting others, such as losing the ability to directly elect those Commissioners. The amendment illegitimately packaged disparate and unrelated provisions into a single vote. And it did so in violation of the New Mexico Constitution. The amendment cannot stand.

III. THE AMENDMENT HAS CREATED THE POSSIBILITY OF APPOINTMENTS TO THE NOMINATING COMMITTEE THAT VIOLATE THE NEW MEXICO CONSTITUTION.

The amendment required the legislature to establish parameters for the nominating committee, which the legislature did. *See generally* 1978 NMSA, § 62-19-4. Those parameters include the manner in which members of the nominating committee are to be selected. Whether or not those selections

---

5 The fact that the requirement of professional qualifications had been established by the legislature seven years before serves only to highlight the overall misleading character of the ballot question presented to voters. That ballot question inevitably implies to voters that, if the amendment were to pass, it would for the first time establish requisite professional qualifications for Commissioners. Of course voters would favor such qualifications. But voters were also told that those professionally qualified Commissioners would be appointed by the Governor. Thus, at least to those voters who knew that, at the time, Commissioners were elected, the amendment functionally conditioned professional qualifications on giving up the right to elect those professionally qualified Commissioners. The misleading nature of that construction implicates both the clarity and logrolling concerns addressed in this brief.

have violated New Mexico law, the amendment and subsequent legislation have created precisely that possibility.

At present, Speaker of the House Brian Egolf sits on the nominating committee, possibly in violation of Article IV, Section 28 of the New Mexico Constitution which prohibits legislators, for a period of one year following their final term of office, from being "appointed to any civil office created" during that final term of office. According to Attorney General Opinion No. 63-23, "Article IV, § 28 prohibits a legislator from holding an appointive civil office." The opinion notes that the term "civil office" was defined in *State* ex rel. *Gibson v. Fernandez*, 1936-NMSC-027, 40 N.M. 288. Here, the very ballot language that lured voters to vote for a "professionally qualified" Commission may have already caused unprofessional (and unconstitutional) actions in the enactment of the amendment.

IV. THE PETITION IS TIMELY.

Petitioners filed their petition in this Court almost two years after the ballot measure they challenge was presented to voters. The petition is nonetheless timely. First, the amendment is not effective until January of next year; the Court has ample time to consider the issues presented by the petition and issue its ruling. Second, a logrolling challenge to an amendment

presents a "justiciable constitutional question[] not withstanding the absence of any challenge . . . until after voters have approved the amendment." *Chavez*, 1988-NMSC-103, ¶ 7. *See also Clark*, 1995-NMSC-001, ¶ 4 (noting that "voter approval of a challenged amendment gives rise to a presumption of validity but does not cure a violation of Article XIX of the New Mexico Constitution"). Indeed, in *State* ex rel. *League of Women Voters v. Advisory Comm. to the N.M. Compilation Comm'n.*, 2017-NMSC-025, ¶¶ 11-14, 401 P.3d 734, the Court determined that a post-election challenge to a constitutional amendment was not an election challenge subject to the thirty-day deadline for challenging the outcome of an election. Indeed, this Court held that it was required to address the constitutionality of an amendment – even years after the amendment's passage – and that the Compilation Commission Advisory Committee was a proper party because its duties include "advising and approving the compilation of duly ratified constitutional amendments." *Id*, ¶¶ 15-18. The issues before the Court have arrived in a timely fashion and the Court should address them on the merits.

CONCLUSION

The 2020 constitutional amendment providing for the appointment rather than the election of members of the Public Regulation Commission both

failed to adequately inform voters of its impact and constituted impermissible logrolling. The Court should accordingly invalidate that amendment and direct Respondent accordingly.

Respectfully submitted,

/s/ Scott Fuqua
Scott Fuqua
FUQUA LAW & POLICY, P.C.
P.O. Box 32015
Santa Fe, NM 87594
(505)982-0961 – Telephone
scott@fuqualawpolicy.com

Attorney for Intervenors/Amici
Retake Our Democracy and
Indivisible Albuquerque

CERTIFICATE OF SERVICE

I certify that on October 11, 2022, I served the foregoing on counsel of record via filing with the Odyssey e-filing system.

/s/ Scott Fuqua
Scott Fuqua

CERTIFICATE OF COMPLIANCE

I certify that this brief, composed using OpenOffice Apache 4.0, complies with the length limitations set forth in Rule 12-504(G)(3). The body of the brief contains 5,164 words.

/s/ Scott Fuqua
Scott Fuqua