
Joey D. Moya

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

STATE OF NEW MEXICO ex rel.
**THE NEW MEXICO LEGISLATIVE
COUNCIL,**

Petitioner,

vs.

No. S-1-SC-36422

HON. SUSANA MARTINEZ,
Governor of the State of New Mexico, and
DOROTHY “DUFFY” RODRIGUEZ
Secretary of the New Mexico Department
of Finance and Administration,

Respondents.

Original Proceeding on Mandamus

**RESPONSE TO
VERIFIED EMERGENCY PETITION
FOR ORIGINAL WRIT OF MANDAMUS**

Paul J. Kennedy
Arne R. Leonard
PAUL KENNEDY & ASSOCIATES, P.C.
201 Twelfth Street, N.W.
Albuquerque, New Mexico 87102
Ph: (505) 842-8662
Fax: (505) 842-0653

Steven Blankinship
Matthew J. Stackpole
General Counsel
OFFICE OF THE GOVERNOR
490 Old Santa Fe Trail #400
Santa Fe, NM 87501-2704
Ph: (505) 476-2200
Fax: (505) 476-2207

Counsel for Respondents

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF COMPLIANCE.....	ii
TABLE OF AUTHORITIES.	iii
INTRODUCTION.....	1
ARGUMENT.	4
I. The Legislative Council has not met the prerequisites for invoking this Court’s original jurisdiction in mandamus.....	4
II. The Governor’s exercise of her item veto authority does not violate the New Mexico Constitution.	7
III. The Legislative Council is not entitled to a judicial override of the Governor’s item vetoes in the appropriations bill for fiscal year 2018	19
CONCLUSION.	26
CERTIFICATE OF SERVICE.	28

STATEMENT OF COMPLIANCE

There are no references to audio, digital, or electronic recordings in this brief.

The body of this brief contains 5,993 words in Times New Roman typeface as counted using WordPerfect X5.

TABLE OF AUTHORITIES

NEW MEXICO CASES

ABCWUA v. PRC, 2010-NMSC-013, 148 N.M. 21, 229 P.3d 494.....	21
AFSCME v. Bd. of County Comm’rs of Bernalillo Cnty., 2016-NMSC-017, 373 P.3d 989.....	5
Brantley Farms v. Carlsbad Irr. Dist., 1998-NMCA-023, 124 N.M. 698, 954 P.2d 763.....	20, 21
In re Franchise Fees, 2000-NMSC-035, 129 N.M. 787, 14 P.3d 787.	22
Mowrer v. Rusk, 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886.....	23
New Energy Economy, Inc. v. Shoobridge, 2010-NMSC-049, 243 P.3d 746.....	6
New Energy Economy, Inc. v. Vanzi, 2012-NMSC-005, 274 P.3d 53.	21
Regents of Agric. Coll. v. Vaughn, 1904-NMSC-023, 12 N.M. 333, 78 P. 51. . .	5, 8
State ex rel. AFSCME v. Johnson, 1999-NMSC-031, 128 N.M. 481, 994 P.2d 727	4
State ex rel. Cisneros v. Martinez, 2015-NMSC-001, 340 P.3d 597 (per curiam)	7, 12, 13, 16, 18, 19, 20, 22, 25, 26
State ex rel. Coll v. Carruthers, 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380	13, 24, 25
State ex rel. Coll v. Johnson, 1999-NMSC-036, 128 N.M. 154, 990 P.2d 1277. . .	4
State ex rel. King v. Lyons, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878	5, 8, 20

State ex rel. Sandel v. N.M. Pub. Util. Comm’n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.	20
State ex rel. Smith v. Martinez, 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276	7, 10, 11, 12, 18, 19, 20, 25, 26
State ex rel. Stewart v. Martinez, 2011-NMSC-045, 270 P.3d 96. . .	6, 7, 9, 12, 19, 20
State ex rel. Stewart v. Martinez, No. 33,028, at 4-5 (Order filed July 5, 2011).	6, 9
State v. Montoya, 2013-NMSC-020, 306 P.3d 426.	25
Thompson v. Legislative Audit Comm’n, 1968-NMSC-184, 79 N.M. 693, 448 P.2d 799.....	9, 10, 11, 18

CASES FROM OTHER JURISDICTIONS

Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016).....	15, 23
Karcher v. Kean, 479 A.2d 403 (N.J. 1984).	24-25
State ex rel. Brotherton v. Blankenship, 207 S.E.2d 421 (W. Va. 1973)	14, 15, 16, 17, 18
State ex rel. Brotherton v. Blankenship, 214 S.E.2d 467 (W. Va. 1975)..	17, 18, 24
State ex rel. Greive v. Martin, 385 P.2d 846 (Wash. 1963).	16
State ex rel. Nunez v. Bayard, 15 So. 2d 649 (La. 1943).	14, 15, 16
People ex rel. Milner v. Russel, 142 N.E. 537 (Ill. 1924).....	15, 23
Thirteenth Guam Legislature v. Bordallo, 430 F. Supp. 405 (D. Guam 1977). . .	16
United States v. Martinez, 610 F.3d 1216 (10th Cir. 2010).	13

OTHER AUTHORITIES

Annotation, <i>Disapproval by Governor of Bill in Part or Approval with Modifications</i> , 87 A.L.R.6th 633 § 5 (2013).....	5
Richard Briffault, <i>The Item Veto in State Courts</i> , 66 Temple L. Rev. 1171, 1173-74 (Winter 1993).....	25
15 <i>Moore’s Federal Practice</i> § 101.76[1][a], at 101-312.2 (3d ed. 2015).....	5
N.M. Const. art. III, § 1.....	2, 3, 16
N.M. Const. art. IV, § 6.....	3, 19
N.M. Const. art. IV, § 22.....	1, 3, 13, 16, 24, 25
N.M. Const. art. VI, § 3.....	4
N.M. Const. art. IX, § 8.....	8
N.M. Const. art. XII, § 13.	8
W. Va. Const. art. VI, § 51.	14

INTRODUCTION

In the waning hours of the 2017 regular session, the Legislature passed an appropriations bill for Fiscal Year 2018. The bill's passage within the last three days of the legislative session meant the Governor had 20 days after the session's adjournment to exercise her line-item veto authority under Article IV, Section 22 of the New Mexico Constitution. Governor Martinez wrote a timely letter to the Legislature itemizing each part of the appropriations bill that she vetoed and sent the bill back to the Legislature with each of those parts stricken. The Governor's veto message stated her intent to call a special session. *See* Petitioner's Exhibits 1 and 2.

Without awaiting that call, the Legislative Council petitioned this Court for a judicial override that would "invalidate the collective item vetoes of the appropriations for the entire Legislative Branch, all of the public institutions of higher education, and other constitutionally and statutorily-authorized departments, agencies, and institutions of state government." (Petition at 16.) The Council cites three specific vetoes in the appropriations bill for Fiscal Year 2018 attached as Exhibit 1 to its petition: those pertaining to the Legislature on Page 4, Line 19 through Page 5, Line 18; those pertaining to state educational institutions on Page 135, Line 7 through Page 163, Line 1; and those pertaining to the Council on Page 169, Lines 3 through 5. (Petition at 5-6 & 13 n.3.) Presumably, the "other

constitutionally and statutorily-authorized departments, agencies, and institutions of state government” to which the petition generically refers are components of the Legislature itself or the educational institutions cited above.

Unlike past petitions heard by this Court in recent years, the Council’s petition does not complain that the language stricken by the Governor’s veto pen is insufficient to constitute an item veto, or that there is any ambiguity about what portions of the appropriations bill have been vetoed. This time around, the Legislature knows exactly which items were vetoed, because the Governor complied with the principles set forth in this Court’s past decisions to ensure that her item vetoes are clear in scope.

Instead of arguing that the Governor has not stricken enough language from the bill to constitute a valid item veto, the Council now switches to the “heads I win, tails you lose” argument that the Governor has violated the doctrine of separation of powers by striking *too much* language from the bill. Stated more precisely, the question presented is whether, during the bill-review period following a regular session of the Legislature, the Governor can veto items pertaining to the Legislature and state educational institutions in a general appropriations bill for the subsequent fiscal year without violating the principle of separation of powers stated in Article III, Section 1 of the New Mexico Constitution.

The answer is: of course she can. Article III, Section 1 does not state an absolute prohibition, but admits of exceptions “as in this constitution otherwise expressly directed or permitted.” N.M. Const. art. III, § 1. The item veto expressly provided in Article IV, Section 22 of the New Mexico Constitution is one of those exceptions. When, as here, the Governor exercises her veto authority during the bill-review period following a regular legislative session, the procedure expressly directed or permitted in the New Mexico Constitution is for a special session under Article IV, Section 6.

The Governor stated in her veto message and in the attached proclamation that she is calling a special session to address the vetoed appropriations. *See* Petitioner’s Exhibit 2; Respondent’s Exhibit A. The Governor never stated that she is abolishing the Legislature or any state educational institutions. Neither the legislative agencies nor the educational institutions have run out of funds, and there is still time to appropriate funds for the next fiscal year. *See* Respondent’s Exhibits B, C.

No constitutional provision authorizes this Court to override the Governor’s item vetoes under these circumstances. Far from curing an alleged violation of separation-of-powers by the Governor, such a judicial override would itself violate Article III, Section 1 by putting this Court in the position of exercising legislative powers when not expressly directed or permitted to do so.

The Court's *judicial* powers in this situation are limited to "the original jurisdiction in . . . mandamus against all state officers" that is expressly provided in Article VI, Section 3 of the New Mexico Constitution. But the prerequisites for exercising the *judicial* power by issuing a writ of mandamus are not satisfied here. A special session provides the adequate remedy at law, and the issue is not ripe for adjudication. The Governor has not violated a statutory or constitutional duty, and the Council does not seek a justiciable remedy.

ARGUMENT

I. The Legislative Council has not met the prerequisites for invoking this Court's original jurisdiction in mandamus.

The Court should begin its analysis of the Council's accusations against the Governor by examining the basis for its own exercise of judicial power. Regardless of the importance of the appropriations at issue here, "[t]his Court cannot override the Governor's vetoes, nor can the Court usurp the role of the Legislature in enacting new legislation." *State ex rel. AFSCME v. Johnson*, 1999-NMSC-031, 128 N.M. 481, 482, 994 P.2d 727, 728.

Exercising this Court's original jurisdiction in "[m]andamus is a drastic remedy to be invoked only in extraordinary circumstances." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277. "To ensure that the writ issues only in extraordinary circumstances, since before statehood this Court has required

(1) that a party seeking issuance have no other adequate means to attain the desired relief, and (2) the duty sought to be enforced is clear and undisputable.” *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 93, 149 N.M. 330, 248 P.3d 878 (Chavez, J., dissenting and citing *Regents of Agric. Coll. v. Vaughn*, 1904-NMSC-023, 12 N.M. 333, 342-43, 78 P. 51, 53).

The requirement that there be “no other adequate means to attain the desired relief” accords with the justiciability concerns expressed in *AFSCME v. Bd. of County Comm’rs of Bernalillo Cnty.*, 2016-NMSC-017, 373 P.3d 989. An important aspect of justiciability is the doctrine of ripeness. “The core policy concerns animating the ripeness doctrine are avoidance of unnecessary constitutional determinations and the establishment and maintenance of proper relationships between the judiciary and other branches of government.” *Id.* ¶ 18.

To determine ripeness, the Court must examine the fitness of the issue for judicial decision, which turns on “whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all.” *Id.* ¶ 20 (quoting 15 *Moore’s Federal Practice* § 101.76[1][a], at 101-312.2 (3d ed. 2015)). Ripeness is particularly relevant in a separation-of-powers dispute, because “the judicial power to resolve disputes in a government built upon a foundation separating the legislative, executive, and judicial functions should be guided by” prudential rules

of “judicial self-governance.” *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 243 P.3d 746.

So, for example, when the Legislature delegates rulemaking authority to an administrative agency, the agency is allowed to complete its rulemaking process before judicial review occurs. *See id.* ¶ 18. “Judicial action that disrupts the administrative process before it has run its course intrudes on the power of another branch of government.” *Id.* ¶ 19.

Similarly, when legislators complained that the Governor exceeded her item veto authority following the regular legislative session in 2011, this Court initially concluded that “the impending 2011 special legislative session” provided the opportunity for a plain, speedy, and adequate remedy “that preserves the constitutional process for enacting legislation.” *State ex rel. Stewart v. Martinez*, No. 33,028, at 4-5 (Order filed July 15, 2011) (copy attached as Respondent’s Exhibit D). The Governor’s veto message “also advised the Legislature that she intended to place the matter on the call of the upcoming special legislative session,” and the special legislative session was scheduled to occur before the effective date of the vetoed legislation. *Id.* at 5. Under those circumstances, the Court held the legislators’ petition in abeyance until after the special session concluded. *See id.*; *State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶ 8, 270 P.3d 96.

The Court should follow the same course here and either hold the Council's petition in abeyance or dismiss it without prejudice. The Governor's proclamation calls the Legislature into special session before the start of the next fiscal year. A special session provides for a plain, speedy, and adequate remedy at law, and prudential concerns about ripeness preclude premature judicial review of a separation-of-powers dispute. Under these circumstances, the requirements for issuing an extraordinary writ of mandamus are not satisfied, and it would be an abuse of judicial power to issue any relief to the Council.

II. The Governor's exercise of her item veto authority does not violate the New Mexico Constitution.

The item vetoes in the general appropriations bill for Fiscal Year 2018 comply with this Court's recent decisions on the subject. Those decisions involved instances where the Court held the Governor did not strike enough language from a bill to make her partial veto effective. *See State ex rel. Smith v. Martinez*, 2011-NMSC-043, ¶ 10, 150 N.M. 703, 265 P.3d 1276 (failure to strike whole number from amount appropriated); *State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶ 7 (failure to strike language delaying onset of a formula-based contribution schedule for unemployment insurance); *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, ¶ 35, 340 P.3d 597 (per curiam) (failure to strike all sections of bill in which judicial salary increases were implicitly included). This time around, the Legislature makes no such

complaint. The item vetoes at issue strike every digit of every number and do not leave interrelated sections of a vetoed appropriation in the bill. There is no question or ambiguity as to which appropriations were vetoed.

Instead, the Council now asks the Court to draw the unsupported inference that the Governor's otherwise valid item vetoes of appropriations for the next fiscal year mean that she is permanently abolishing the Legislature and state educational institutions. Piling one unsupported inference upon another, the Council then seeks to impose a duty on this Court to bypass the special session and judicially override the Governor's item vetoes.

The Court should reject the Council's petition, because it does not even come close to showing that "the duty sought to be enforced is clear and indisputable." *Lyons*, 2011-NMSC-004, ¶ 93 (Chavez, J., dissenting and citing *Regents of Agric. Coll.*, 1904-NMSC-023, ¶ 13). Far from a writ of mandamus, what the Council really asks for here is a free pass to shirk its own legislative duties, which include enacting a *balanced* budget as required under Article IX, Section 8 of the New Mexico Constitution, and completing the process for confirming appointments of regents under Article XII, Section 13 to faithfully manage funds appropriated to educational institutions.

The doctrine of separation of powers provides no basis for granting such

extraordinary relief. The fact that the Governor exercised her item veto authority with respect to Fiscal Year 2018 appropriations for the Legislature and state educational institutions does not support a reasonable inference that she meant to abolish them. On the contrary, the Governor is following “the constitutional process for enacting legislation” spelled out in this Court’s Order in *Stewart* (Respondent’s Exhibit D).

How could it be “clear and indisputable” that the Governor’s item vetoes abolish the Legislature when the Governor is calling that branch of government into special session to responsibly exercise its constitutional duties--including the duty to produce a balanced budget and to hold confirmation hearings for gubernatorial appointees to state educational institutions? *See* Petitioner’s Exhibit 2; Respondent’s Exhibit A. Calling special sessions to resolve vetoed appropriations for a branch or institution of state government between the end of the regular session and the start of the fiscal year is an established part of the constitutional process in this State. As shown on the chart attached as Respondent’s Exhibit E, that process has been employed in past years without judicial intervention or the abolition of other branches of government.

If the Governor truly meant to abolish another branch or institution of state government, then one would expect her to follow the path the Legislature itself charted in *Thompson v. Legislative Audit Comm’n*, 1968-NMSC-184, 79 N.M. 693,

448 P.2d 799. That case arose from a series of statutes which transferred functions away from the State Auditor. *See id.* ¶¶ 5-7. The final statute in the series provided “for a transfer from the state auditor to the legislative audit commission of all equipment, supplies, records, and any other property or thing held by him in his official capacity,” *id.* ¶ 2, and “completely deprived” the state auditor “of all remaining statutory duties devolving upon him as an auditor,” *id.* ¶ 7, leaving only a nominal salary of \$1.00 and a couple of board memberships, *id.* ¶¶ 2, 7. This Court struck down the statute because it violated the constitutional provision expressly establishing the auditor as an independent state official. *See id.* ¶ 17.

In *Thompson*, there were two important facts supporting the inference that the Legislature’s decision to set the State Auditor’s budget at \$1.00 was intended to abolish that constitutional office. First, the Legislature had the authority to appropriate a larger amount and chose not to. Second, the Legislature’s funding choice was accompanied by legislation transferring all of the State Auditor’s functions and property elsewhere.

Those key facts are absent from the Governor’s item vetoes in this instance. This Court’s recent decisions would not allow the Governor to choose any number she wants and insert it into an item in the general appropriations bill. In *Smith*, 2011-NMSC-043, ¶ 10, this Court only allowed the Governor to approve or disapprove the

number proposed by the Legislature. Thus, in the post-*Smith* era, the decision to exercise an item veto simply indicates the Governor's disagreement with the number the Legislature proposed for that item. Vetoing the number the Legislature proposed does not necessarily mean the Governor believes the proper number should be zero. Each veto must be analyzed in the context of the appropriations bill where it appears, taking into account whether the bill produces a balanced budget and is accompanied by legislative action to ensure appropriated funds are managed responsibly.

Unlike the statute at issue in *Thompson*, the Governor's item vetoes do not include language which transfers legislative or educational functions to another branch of government and deprives existing institutions of all their "equipment, supplies, records, and any other property." *Thompson*, 1968-NMSC-184, ¶ 2. Again, this Court's recent decisions are unlikely to permit the addition of such language to an appropriations bill by means of an item veto, and the Governor has not attempted to add that kind of language here.

Far from supporting an inference that the Governor's item veto is an attempt to abolish the Legislature or state educational institutions, the Council's petition supports the opposite inference: that the Council is trying to abolish the Governor's item veto power and transfer complete control of the state's appropriation process to the Legislature itself--with the Court's assistance. The Council's "heads I win, tails

you lose” argument goes as follows.

First, if the Governor attempts to trim the budgets of other branches or institutions of government by striking less than whole numbers or striking only some parts of a related appropriation, then the Council argues her actions are insufficient to constitute a valid item veto under *Smith*, 2011-NMSC-043, ¶ 10; *Stewart*, 2011-NMSC-045, ¶ 24; and *Cisneros*, 2015-NMSC-001, ¶ 35. *Cisneros* goes a step further insofar as it allows the Legislature to include funds in appropriations bills “that are earmarked for certain purposes but that are not identified in separate lines or items,” *id.* ¶ 40, reasoning that “[n]othing in the New Mexico Constitution requires the Legislature to make appropriations easy to veto by identifying each appropriation in a separate line or item in an appropriations act,” *id.* ¶ 41. In the Councils’s view, this reasoning reduces the Governor’s item veto authority to a choice between striking the few lump-sum amounts for a particular branch or institution that the Legislature has seen fit to itemize in its appropriations bill, or accepting those lump-sum figures with all their unidentified earmarks included. *See id.* ¶ 39.

But the Council now takes the position that even that limited form of item veto is not an option. If the Governor chooses to veto the related items identifying appropriations for another component of state government, then according to the Council her veto is *still* invalid because it violates separation-of-powers requirements.

So the end result is the Governor has no veto power at all and no choice but to accept the appropriations bill presented to her by the Legislature. Even if the Governor were to veto the *entire* general appropriations bill, such a veto would run afoul of the novel constitutional doctrine the Council’s petition is advocating, because vetoing the entire bill would necessarily affect appropriations for constitutionally prescribed offices.

That is an absurd result which sharply conflicts with the plain language and purpose of Article IV, Section 22 of the New Mexico Constitution. *Cf. Cisneros*, 2015-NMSC-001, ¶ 41 (purporting to reject an interpretation that would produce absurd results). “The major factors which prompted drafting of constitutions to include the item-veto were: To prevent corruption, to prevent hasty and ill-conceived legislation, and most importantly, to prevent ‘logrolling’ tactics by the legislature.” *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 8, 107 N.M. 439, 759 P.2d 1380. New Mexico is not immune from these evils. *See, e.g., United States v. Martinez*, 610 F.3d 1216, 1220-21 (10th Cir. 2010) (describing a conspiracy between a state senator and a court administrator to over-appropriate and over-bill on several courthouse construction projects funded by the Legislature). The remedy sought in the Council’s petition, however, would make it even easier to “logroll” and load a bill with questionable appropriations by inserting them within a larger lump-sum figure or interrelated line item for a constitutionally prescribed component of state government.

Once included in this manner, the Council takes the position that the Legislature's appropriation would be a *fait accompli*, because the Council argues the Governor cannot veto the lump-sum figures in line items for another branch or institution of state government without violating separation-of-powers principles.

As authority for taking this absurd and untenable position, the Council primarily relies on *State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 421 (W. Va. 1973) (*Blankenship I*), and *State ex rel. Nunez v. Bayard*, 15 So. 2d 649 (La. 1943). But the appropriations process described in those two cases differs from New Mexico law in several important respects.

Under West Virginia's "Modern Budget Amendment," the Governor is the only state official with the authority to submit the "budget bill" for the next fiscal year. *See* W. Va. Const. art. VI, § 51. The Legislature's authority to amend the Governor's budget bill is limited. *See id.* And the Governor still retains the power to "veto the bill, or . . . [to] disapprove or reduce items or parts of items contained therein." *Id.* West Virginia's Judiciary is expressly excepted so that other branches of government cannot reduce its budget. *See id.*

In *Blankenship I*, West Virginia's highest court decided whether the Governor's item veto authority allowed him to reduce the funds in the budget for the State Treasurer, the Secretary of State, and the State's public school system to zero,

and to reduce items in the State Judiciary's budget to a lesser degree. That court could invalidate partial reductions in the Judiciary's budget without relying on generalized maxims about separation of powers, because the West Virginia Constitution expressly precluded other branches from reducing the Judiciary's budget. *See Blankenship I*, 207 S.E.2d at 421.

In *Bayard*, 15 So.2d at 658-59, Louisiana's highest court was asked to decide whether the Governor could veto appropriations for assistant district attorneys when the Louisiana Constitution contained express provisions setting the amount of their salaries. The Louisiana court answered "no" based on those express provisions, without the need to reach broader principles of separation of powers. *See id.* But other courts answered the question differently, reasoning that a statute or constitutional provision establishing an office or institution does not amount to an appropriation of funds to pay for it during a particular fiscal year. *See People ex rel. Milner v. Russel*, 142 N.E. 537, 542-43 (Ill. 1924); *Homan v. Branstad*, 887 N.W.2d 153, 172 (Iowa 2016).

Neither *Blankenship I* nor the related holding in *Bayard* apply here, because the appropriations process in New Mexico's Constitution is structured differently. The 1943 Louisiana Constitution at issue in *Bayard* resembles *former* provisions of New Mexico's Constitution setting judicial salaries, which were removed in 1953.

See Cisneros, 2015-NMSC-001, ¶ 8. So *Bayard* is distinguishable on that point alone. The Council points to no express exceptions to the Governor’s item veto power for appropriations in the *current* New Mexico Constitution. Rather, the item veto power is itself an express exception to the separation-of-powers principles stated in Article III, Section 1.

The New Mexico Constitution is also distinct from West Virginia’s “Modern Budget Amendment.” Unlike West Virginia’s, New Mexico’s Constitution does not contain an express exception to the Governor’s item veto power concerning reductions in appropriations for the Judiciary. Absent such an exception, the language in Article IV, Section 22 establishing the item veto power is controlling. *See State ex rel. Greive v. Martin*, 385 P.2d 846, 850 (Wash. 1963) (concluding that “[s]ince the people, in adopting their constitution, made no exception to laws which are subject to the Governor’s veto, this court will not read an exception into” the item veto provision of the Washington Constitution); *Thirteenth Guam Legislature v. Bordallo*, 430 F. Supp. 405, 416 (D. Guam 1977) (rejecting the reasoning of *Blankenship I* insofar as it “smacks of outdated substantive due process notions which have served to rationalize courts’ elimination of governmental action which they deem unreasonable”).

Moreover, the Judiciary’s budget is not at issue in the present case, so the

Council's discussion of that issue in *Blankenship I* is inapposite. Notably absent from the Council's petition is a subsequent West Virginia case involving appropriations for that State's legislative branch. *See State ex rel. Brotherton v. Blankenship*, 214 S.E.2d 467, 478-79 (W. Va. 1975) (*Blankenship II*). Relying on provisions in the West Virginia Constitution which limited the Legislature's authority to amend the Governor's budget bill after it was introduced, West Virginia's highest court held that the Governor acted within his constitutional powers by partially vetoing those unauthorized amendments--even though they concerned appropriations for the Legislature. *See id.* Thus, the language the Council quotes from *Blankenship I* concerning reductions in appropriations for the West Virginia *Judiciary* does not necessarily apply to the West Virginia *Legislature*--much less any branch or institution of New Mexico's government.

Another difference between West Virginia and New Mexico is that the former state's highest court has allowed a governor to *reduce* as well as *disapprove* an amount itemized in an appropriations bill. So while West Virginia's Governor was constitutionally prohibited from reducing appropriations for public schools to zero, *see Blankenship I*, 207 S.E.2d at 436, "that case does not furnish authority to prevent or inhibit the Governor from exercising a veto by way of reasonable reduction of an item or part of an item," *see Blankenship II*, 214 S.E.2d at 490. Thus, West Virginia's

Governor acted within his constitutional authority by striking the amount the Legislature appropriated for public schools in a subsequent year's budget bill and replacing it with a lesser amount above zero. *See id.*

The basis for inferring an intent to abolish a branch or institution of state government by reducing its appropriations to zero is stronger when the one effecting that reduction has the option to choose a higher number. The West Virginia Governor had that option, because he could use the item veto to effect a more modest reduction of the public schools' budget as he did in *Blankenship II* instead of reducing it to zero as he did in *Blankenship I*. Similarly, the New Mexico Legislature had that option in *Thompson*, 1968-NMSC-184, because it could have set the appropriations for the State Auditor at a higher amount before sending its appropriations bill to the Governor.

But this Court's decisions in *Smith* and *Cisneros* do not give Governor Martinez the option of striking the amounts itemized in the appropriations bill for Fiscal Year 2018 and replacing them with a more modest number of her own choosing. For each related set of items, the only options this Court's recent decisions would seem to give the Governor are to approve the full amount selected by the Legislature or to veto that amount in its entirety. With only that limited menu to choose from, the Governor's decision to veto the full amount of an item in an

appropriation bill does not signal an intent to abolish the institution which is the subject of the veto. Rather, it evinces the pursuit of a more modest appropriation or additional oversight through an avenue left available to the Governor under the Court's recent decisions--calling a special session under Article IV, Section 6.

III. The Legislative Council is not entitled to a judicial override of the Governor's item vetos of the appropriations bill for Fiscal Year 2018.

The items at issue here differ significantly from previous item vetos invalidated by this Court. The effect of striking the Governor's item veto for the unemployment-compensation legislation in *Stewart*, 2011-NMSC-045, ¶ 5, was to set a "fixed contribution schedule" which resulted in one year of higher tax rates for employers. The effect of striking the Governor's item veto for the mortgage finance authority's appropriation in *Smith*, 2011-NMSC-043, ¶ 10, was to add one digit onto a single line item in the General Appropriations Act of 2011. The effect of interpreting item vetoes in *Cisneros*, 2015-NMSC-001, ¶ 48, was to restore an additional 3% pay raise for the Judiciary, totaling \$579,937 for Fiscal Year 2015.

If the Court were to strike all the item vetoes for the appropriations bill at issue in the Council's petition, the Court would be adding a total of **\$763,631,500** in state spending from the General Fund for Fiscal Year 2018--over 12.5 percent of the entire General Fund. See Petitioner's Exhibit 1 at 5, 163, 169. That amount is exponentially larger than the appropriations at issue in *Smith*, *Stewart*, or *Cisneros*.

It also comes at a time when the State is facing an unprecedented fiscal crisis due to shortages in revenue--a shortage which the Council's petition does not address. *See* Respondent's Exhibit B.

Under these circumstances, the Court should not answer the \$763 million question raised by the Council's petition based on the false pretense that it involves only a "clear and indisputable" issue of law to be adjudicated through expedited briefing and oral argument on a mandamus petition. The Court should deny the Council's extraordinary request to restore over \$763 million dollars in vetoed appropriations because the issue requires further development of a factual record. *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55 (requiring mandamus petitions to present questions that "can be answered on the basis of virtually undisputed facts"); *Lyons*, 2011-NMSC-004, ¶ 94 (Chavez, J., dissenting on the basis that "mandamus is inappropriate" when the question "requires the development of a factual record"); *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶¶ 17-21, 124 N.M. 698, 954 P.2d 763 (similar).

Further factual development would be required to determine both the procedural issue of predicting whether and how funding for the Legislature and state educational institutions will be affected by the upcoming special session, as well as the substantive issue of whether or to what extent a separation-of-powers crisis could

be averted by more modest appropriations and oversight that would not exacerbate the State's financial crisis. On the procedural issue, there is evidence that funding remains for the present fiscal year. *See* Respondent's Exhibits B and C. Appropriations disputes have been resolved through special sessions in prior years, and the Governor has called a special session before the end of this fiscal year. *See* Respondent's Exhibit A, E. Preliminary budgeting deadlines that fall before the start of the new fiscal year can be extended. *See, e.g.,* Respondent's Exhibit C-1.

Exactly how long it would take to turn the result of a special session into actual funding for the next fiscal year, and what measures would be required to expedite that process, are factual questions beyond the scope of the Council's petition. To the extent the Council disputes these matters, the Court cannot consider evidence submitted for the first time in a reply brief or an amicus brief, much less accept disputed evidence as true for purposes of ruling on the petition. *See ABCWUA v. PRC*, 2010-NMSC-013, ¶¶ 59, 75, 148 N.M. 21, 229 P.3d 494 (declining to decide issues raised for the first time in a reply brief); *New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶ 45, 274 P.3d 53 (collecting cases which preclude amici curiae from assuming the functions of a party); *Brantley Farms*, 1998-NMCA-023, ¶¶ 17-21 (denying a mandamus petition which failed to state all facts necessary to authorize the requested relief). Procedural issues concerning whether or how an agency could

tailor its budgeting deadlines in order to accommodate the special session do not rise to the level of “a fundamental question of great public importance” necessary for this Court’s exercise of original jurisdiction in mandamus. *See In re Franchise Fees*, 2000-NMSC-035, ¶ 20, 129 N.M. 787, 14 P.3d 787.

Another issue requiring further factual development that the Council’s petition fails to cogently address is severability. The legislation at issue contains a severability clause, *see* Petitioner’s Exhibit 1, at 196, and this Court recently upheld one item veto while invalidating another attempted veto in an appropriations bill, *see Cisneros*, 2015-NMSC-001, ¶ 48. The Council’s petition fails to address whether the alleged separation-of-powers violation could be averted by restoring less than \$763 million worth of vetoed line items in the present bill. Instead, the petition only argues for the blanket remedy of “invalidating the collective item vetoes” for all appropriations for the Legislature and state educational institutions in the bill resulting from the 2017 regular session.

Without an adequate factual record, does the Council’s petition prove the cost of averting a separation-of-powers violation is really \$763,631,500 and not a dollar less? Must legislative agencies receive each item included in the \$18,782,600 subtotal on Page 5 of the appropriations bill plus another \$1,000,000 for the item listed on Page 169 in order to avert a separation-of-powers violation? Which of the

line items are most essential to the exercise of legislative powers? Which branch of government suffers the consequences if there is insufficient revenue to pay for all these appropriations? Surely a decision-maker faced with such questions would benefit from more facts than are evident in the Council's petition. But it is too late to add them in a reply or amicus brief, because that deprives the Governor of a fair opportunity to respond.

Without an adequate factual record, does the Council's petition prove the full amount taken from the General Fund for each state educational institution listed on Pages 135-163 of the appropriations bill is really necessary to avert a separation-of-powers violation? Is each of these institutions of the same constitutional stature as the Legislature? Is each educational institution of the same constitutional stature as the others? Do they fall under a different branch of government than the Executive? The answer to these questions is "no," and there is authority holding that laws establishing or confirming the *existence* of an institution do not preclude governors from vetoing *appropriations* for that institution. *See, e.g., Homan*, 887 N.W.2d at 172; *Russel*, 142 N.E. at 542-43.

Hard political questions about which appropriations get priority are a topic of vigorous debate during the legislative session and subsequent bill-review period. And the Judiciary may submit its own budget requests into the fray. *See Mowrer v.*

Rusk, 1980-NMSC-113, ¶ 34, 95 N.M. 48, 618 P.2d 886. But no provision of our state constitution gives this Court final authority to decide which institutions get funding for the next fiscal year and in what amounts. Surely such a multi-million dollar decision cannot be made in the expedited context of an original proceeding on mandamus with no factual record.

The blanket remedy sought in the Council’s petition cannot be squared with the plain language and purpose of the item veto power in Article IV, Section 22. “New Mexico differs from most other states with item-veto provisions because it allows the broadest possible veto authority by additionally providing authority to veto ‘parts,’ not only ‘items.’” *Carruthers*, 1988-NMSC-057, ¶ 8. Yet this Court’s recent decisions on the subject seem to whittle the Governor’s veto power down to much less than that afforded to other governors. *See generally* Annotation, *Disapproval by Governor of Bill in Part or Approval with Modifications*, 87 A.L.R.6th 633 § 5 (2013); *see, e.g., Blankenship II*, 214 S.E.2d at 490.

The scope of the item vetoes about which the Council presently complains is a direct result of the Governor’s compliance with this Court’s recent decisions, which seem to discourage any other choice but to approve or veto the appropriations bill in its entirety. Narrowing the Governor’s veto options even more drastically, as requested in the Council’s petition, will result in exactly the type of logrolling and

stalemate that the item veto was supposed to prevent. *See Carruthers*, 1988-NMSC-057, ¶ 8 (explaining how item veto power is aimed to prevent logrolling); *Karcher v. Kean*, 479 A.2d 403, 416 (N.J. 1984) (explaining how item veto power aimed to “avoid a stalemate with the Legislature”).

While the Court can deny the Council’s petition based on existing precedents, a better rationale for denying the petition would include overruling or limiting this Court’s recent holdings on the item veto and restoring Article IV, Section 22 to the broad effect and established purpose articulated in *Carruthers*, 1988-NMSC-057, ¶ 8. Reviewing the factors considered in deciding whether to depart from *stare decisis*, *see State v. Montoya*, 2013-NMSC-020, ¶ 40, 306 P.3d 426, the Court should take this occasion to thoughtfully examine whether the cumulative impact of *Smith* and *Cisneros* is to leave the Governor and the Legislature in an unworkable stalemate with respect to timely funding each constitutionally prescribed branch and institution of state government in years when revenue falls short. The volume of recent veto litigation “is not necessarily a sign of a healthy state constitutional discourse” and instead evinces *ad hoc* decisions which result from “highly fact-specific balancing that fails to provide clear guidance for the resolution of future disputes.” Richard Briffault, *The Item Veto in State Courts*, 66 Temple L. Rev. 1171, 1173-74 (Winter 1993). The Court made a wrong turn when it decided *Smith* and continued down the

same path in *Cisneros*. Should it become necessary to reach the merits, this case presents an opportunity to circle back and find a different path that gives wider berth to the item veto power and thereby averts future disputes of this magnitude.

CONCLUSION

The Court should dismiss the Council's petition without prejudice or hold it in abeyance pending the outcome of the special session. To the extent the Court reaches the merits, the relief requested in the petition should be denied in its entirety. To the extent the Court is inclined to award any relief, the Court should provide an opportunity for supplemental briefing, then address severability, overrule or limit the holdings of *Smith* and *Cisneros*, and condition any relief on requirements for a balanced budget and legislative action on the Governor's nominations for regents of educational institutions.

Respectfully submitted,

PAUL KENNEDY & ASSOCIATES, P.C.

/s/ Paul J. Kennedy

Paul J. Kennedy

Arne R. Leonard

201 12th Street, N.W.

Albuquerque, New Mexico 87102

Ph: (505) 842-8662

Fax: (505) 842-0653

pkennedy@paulkennedylaw.com

aleonard@paulkennedylaw.com

Steven Blankinship

Matthew J. Stackpole

General Counsel

OFFICE OF THE GOVERNOR

490 Old Santa Fe Trail #400

Santa Fe, NM 87501-2704

Ph: (505) 476-2200

Fax: (505) 476-2207

Steven.Blankinship@state.nm.us

Matthew.Stackpole@state.nm.us

Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing response and the attached exhibits were served via e-mail and electronic transmission to the following counsel of record at the addresses listed below on this 5th day of May, 2017, and upon information and belief, the transmission was successful:

Jane B. Yohalem
P.O. Box 2827
Santa Fe, N.M. 87504
(505) 988-2826
jbyohalem@gmail.com

Michael B. Browde
1117 Stanford, NE
MSC 11 6070
Albuquerque, NM 87131-0001
(505) 277-5326
browde@law.unm.edu

Counsel for Petitioners

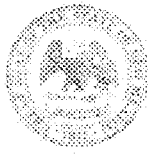
Regina Ryanczak
Director, Litigation Division
New Mexico Attorney General's
Office
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 490-4052
rryanczak@nmag.gov

Kevin K. Washburn
Regents Professor
UNM School of Law
1117 Stanford, NE
MSC 11 6070
Albuquerque, NM 87131-0001
washburn@law.unm.edu

Attorney to be noticed under Rule 12-
504(E)

Counsel for invited amicus curiae
Council of University Presidents

/s/ Arne R. Leonard
Arne R. Leonard



STATE OF NEW MEXICO EXECUTIVE OFFICE SANTA FE, NEW MEXICO

Proclamation

WHEREAS, ARTICLE IV, SECTION 6 OF THE CONSTITUTION OF NEW MEXICO PROVIDES THAT SPECIAL SESSIONS OF THE LEGISLATURE MAY BE CALLED BY THE GOVERNOR;

WHEREAS, ARTICLE IV, SECTION 6 OF THE CONSTITUTION OF NEW MEXICO FURTHER PROVIDES THAT NO BUSINESS SHALL BE TRANSACTED EXCEPT SUCH AS RELATES TO OBJECTS SPECIFIED IN THE PROCLAMATION ISSUED BY THE GOVERNOR;

WHEREAS, PASSAGE AND ENACTMENT OF A BALANCED BUDGET FOR FISCAL YEAR 2018 AND REPLENISHING GENERAL FUND RESERVES ARE CRITICAL TO THE OPERATION OF GOVERNMENT AND PRESERVATION OF THE ECONOMIC HEALTH, WELFARE, AND PUBLIC SAFETY OF NEW MEXICO AND ITS CITIZENS;

WHEREAS, IT IS INCUMBENT UPON STATE GOVERNMENT OFFICIALS TO BALANCE THE BUDGET, REPLENISH GENERAL FUND RESERVES, AND PROVIDE A FOUNDATION FOR ENDURING ECONOMIC STABILITY;

WHEREAS, IMMEDIATE CONSIDERATION OF ISSUES CRITICAL TO THE ECONOMIC HEALTH, WELFARE, AND PUBLIC SAFETY OF NEW MEXICO AND ITS CITIZENS IS NECESSARY AND SUCH CONDITIONS HAVE ARISEN SINCE THE CONCLUSION OF THE FIRST SESSION OF THE FIFTY-THIRD LEGISLATURE;

WHEREAS, ARTICLE IX, SECTION 8 OF THE CONSTITUTION OF NEW MEXICO REQUIRES THE STATE'S BUDGET TO BE BALANCED BY RESTRICTING STATE INDEBTEDNESS;

WHEREAS, THE FIRST SESSION OF THE FIFTY-THIRD LEGISLATURE ADJOURNED ON MARCH 18, 2017, WITH THE LEGISLATURE PASSING AN UNBALANCED BUDGET, THE GENERAL APPROPRIATION ACT OF 2017, FOR THE STATE OF NEW MEXICO FOR FISCAL YEAR 2018;

WHEREAS, THE GOVERNOR SIGNED THE GENERAL APPROPRIATION ACT OF 2017 PURSUANT TO ARTICLE IV, SECTION 22 OF THE CONSTITUTION OF NEW MEXICO;

WHEREAS, THE CERTAIN PART OR PARTS, ITEM OR ITEMS, OF THE GENERAL APPROPRIATION ACT OF 2017 THAT WERE VETOED BY THE GOVERNOR PREVENTED THE ENACTMENT OF AN UNBALANCED BUDGET FOR FISCAL YEAR 2018;

WHEREAS, THERE IS NOW AN ESSENTIAL AND IMMEDIATE NEED TO ENACT A MORE RESPONSIBLE BUDGET FOR THE NEW MEXICO HIGHER EDUCATION INSTITUTIONS AND THE LEGISLATIVE AGENCIES THAT ARE PROVIDED FOR IN STATE STATUTE TO ASSIST NEW MEXICO'S VOLUNTARY LEGISLATURE FOR FISCAL YEAR 2018, AND, IN ADDITION, TO PASS REASONABLE APPROPRIATIONS FOR THE JUDICIARY TO COVER A POTENTIAL SHORTFALL RELATED TO MAGISTRATE COURT LEASES;

WHEREAS, THE FISCAL YEAR 2018 BUDGET FOR PUBLIC EDUCATION IS NOT BALANCED WITHOUT AUTHORIZATION OF THE ISSUANCE OF SUPPLEMENTAL SEVERANCE TAX BONDS TO FUND THE PURCHASE OF INSTRUCTIONAL MATERIALS AND SCHOOL TRANSPORTATION NEEDS;

WHEREAS, HOUSE BILL 412 WOULD HAVE PROVIDED A COMPREHENSIVE TAX REFORM PACKAGE;

WHEREAS, HOUSE BILL 191, AS ORIGINALLY INTRODUCED, WOULD HAVE PROVIDED THE STATE WITH A TRUE RAINY-DAY FUND;

WHEREAS, THE STATE BUDGET SHOULD BE BALANCED BY MAKING FISCALLY RESPONSIBLE REDUCTIONS TO STATE EXPENDITURES AND THROUGH COMPREHENSIVE TAX REFORM WITHOUT RAISING TAXES;

WHEREAS, ARTICLE XII, SECTION 13 OF THE CONSTITUTION OF NEW MEXICO REQUIRES THE GOVERNOR TO NOMINATE AND, BY AND WITH THE CONSENT OF THE SENATE, APPOINT MEMBERS OF EACH BOARD OF REGENTS FOR STATE HIGHER EDUCATION INSTITUTIONS;

WHEREAS, THE CONTROL AND MANAGEMENT OF THE STATE HIGHER EDUCATION INSTITUTIONS, AS WELL AS THE DISBURSEMENTS AND EXPENDITURES OF FUNDS BY THOSE INSTITUTIONS, IS VESTED WITH EACH BOARD OF REGENTS;

WHEREAS, THE GOVERNOR DELIVERED TO THE SENATE THE NAMES OF EIGHTEEN NOMINEES FOR APPOINTMENT OR REAPPOINTMENT TO THE POSITION OF REGENT OF A STATE HIGHER EDUCATION INSTITUTION DURING THE FIRST SESSION OF THE FIFTY-THIRD LEGISLATURE;

WHEREAS, THE SENATE REFUSED TO HOLD HEARINGS TO CONSIDER THE QUALIFICATIONS OF EIGHT NOMINEES FOR REGENT OF A STATE HIGHER EDUCATION INSTITUTION DURING THE FIRST SESSION OF THE FIFTY-THIRD LEGISLATURE AND HAS SINCE FAILED TO HOLD INTERIM MEETINGS FOR THE PURPOSE OF CONFIRMATION HEARINGS TO CONSIDER THESE EIGHT NOMINEES;

WHEREAS, ARTICLE XII, SECTION 13 OF THE CONSTITUTION OF NEW MEXICO PROVIDES FOR THE STAGGERED TERMS OF UNIVERSITY REGENTS AND PREVENTS REMOVAL OF REGENTS BY THE GOVERNOR TO ENSURE CONTINUITY OF GOVERNANCE AND PREVENT DRAMATIC SHIFTS OR UNDUE INFLUENCE;

WHEREAS, INACTION ON SENATE CONFIRMATION UNDERMINES THE LETTER OF THE CONSTITUTION AND COMPROMISES THE POLICIES IT IS INTENDED TO PROMOTE;

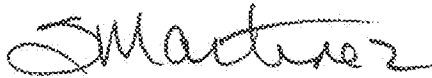
NOW, THEREFORE I, SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO, BY VIRTUE OF THE AUTHORITY VESTED IN ME PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW MEXICO, DO HEREBY CALL THE FIFTY-THIRD LEGISLATURE INTO SPECIAL SESSION AT NOON ON MAY 24, 2017, AT THE STATE CAPITOL IN SANTA FE. IN ACCORDANCE WITH ARTICLE IV, SECTION 6 OF THE CONSTITUTION OF NEW MEXICO, THIS SPECIAL SESSION IS CALLED FOR THE PURPOSE OF CONSIDERING AND ENACTING LEGISLATION CONCERNING THE FOLLOWING OBJECTS AND NO OTHERS:

1. A GENERAL APPROPRIATION ACT THAT PROVIDES SPECIFIC FUNDING FOR LEGISLATIVE AGENCIES AND INSTITUTIONS OF HIGHER EDUCATION;
2. LEGISLATION PROVIDING FOR COMPREHENSIVE TAX REFORM AS CONTAINED IN HOUSE BILL 412, INTRODUCED IN THE FIRST SESSION OF THE FIFTY-THIRD LEGISLATURE, WHICH, MOST SIGNIFICANTLY, BROADENS THE EXISTING GROSS RECEIPTS TAX BASE, PROVIDES RELIEF FROM BUSINESS TO BUSINESS TAX PYRAMIDING, AND LOWERS THE OVERALL GROSS RECEIPTS TAX RATE;
3. LEGISLATION REPEALING THE TAXPAYERS DIVIDEND FUND AND PROVIDING FOR REVENUE DISTRIBUTION IN EXCESS OF A FIVE-YEAR AVERAGE OF THE OIL AND GAS EMERGENCY SCHOOL TAX TO THE TAX STABILIZATION RESERVE AS WAS CONTAINED IN HOUSE BILL 191, AS ORIGINALLY INTRODUCED IN THE FIRST SESSION OF THE FIFTY-THIRD LEGISLATURE;
4. LEGISLATION AUTHORIZING THE ISSUANCE OF SUPPLEMENTAL SEVERANCE TAX BONDS TO RESTORE THE ALLOTMENTS FROM THE GENERAL FUND FOR CAPITAL PROJECT APPROPRIATIONS WHOSE EXPENDITURE PERIODS END ON OR BEFORE JUNE 30, 2016, FOR PLACEMENT INTO THE GENERAL FUND OPERATING RESERVE, FOR THE INSTRUCTIONAL MATERIAL FUND TO PURCHASE INSTRUCTIONAL MATERIAL IN ACCORDANCE WITH SECTIONS 22-15-1 THROUGH 22-15-31 NMSA 1978, AND FOR APPROPRIATION TO THE TRANSPORTATION DISTRIBUTION OF THE PUBLIC SCHOOL FUND;
5. LEGISLATION AUTHORIZING THE ISSUANCE OF SEVERANCE TAX BONDS APPROPRIATED TO THE PUBLIC SCHOOL CAPITAL OUTLAY COUNCIL TO IMPLEMENT THE PUBLIC SCHOOL CAPITAL OUTLAY ACT;

6. HEARINGS FOR NOMINEES FOR APPOINTMENT TO THE BOARD OF REGENTS FOR STATE HIGHER EDUCATION INSTITUTIONS;
7. LEGISLATION TO APPROPRIATE MONEY FROM THE LEGISLATIVE RETIREMENT FUND FOR PLACEMENT INTO THE GENERAL FUND OPERATING RESERVE;
8. LEGISLATION TO APPROPRIATE MONEY TO THE ADMINISTRATIVE OFFICE OF THE COURTS FOR A SHORTFALL IN FUNDING OF MAGISTRATE COURT LEASES; AND
9. A BILL PROVIDING NECESSARY FUNDS FROM LEGISLATIVE CASH BALANCES FOR THE OPERATION OF THE LEGISLATURE DURING THIS SPECIAL SESSION.

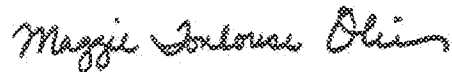
SIGNED AT THE EXECUTIVE OFFICE
THIS 5TH DAY OF MAY 2017.

WITNESS MY HAND AND THE GREAT SEAL
OF THE STATE OF NEW MEXICO.

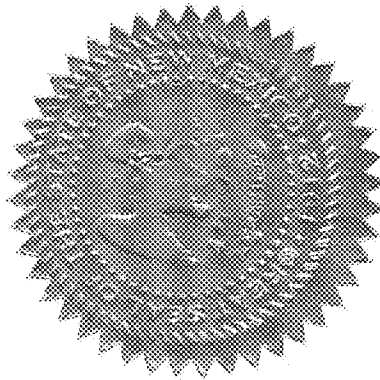


SUSANA MARTINEZ
GOVERNOR

ATTEST:



MAGGIE TOULOUSE OLIVER
SECRETARY OF STATE



STATE OF NEW MEXICO, ex. rel.
THE NEW MEXICO LEGISLATIVE COUNCIL,

Petitioner,

vs.

No. S-1-SG-36422

HONORABLE SUSANA MARTINEZ,
Governor of the State of New Mexico, and
DOROTHY "DUFFY" RODRIGUEZ,
Secretary of the New Mexico Department of
Finance and Administration,

Respondents.

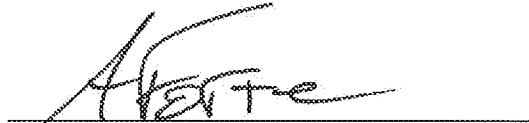
AFFIDAVIT OF ANTHONY FORTE

Anthony Forte, being first duly sworn, deposes and states as follows:

1. I am over the age of 18 years and am competent to make this affidavit. The matters set forth below are true based on my knowledge and experience.
2. I am now the Director of the State Budget Division (SBD), and a Deputy Cabinet Secretary of the Department of Finance and Administration (DFA).
3. DFA is a cabinet-level department in the executive branch created pursuant to NMSA 1978, Section 9-6-3. The State Budget Division operates primarily through NMSA 1978, Section 6-3, which is known as the "State Budget Act."
4. Among my job responsibilities as the Director of the State Budget Division, I ensure compliance with the State Budget Act, which requires extensive knowledge of the entire budgetary process, including statutory deadlines and status appraisals.
5. Part of this compliance is the requirement that I review budgets submitted pursuant to NMSA 1978, Section 6-3-7. These budgets contain, among other data, "anticipated receipts, expenditures and balances on hand..."
6. As Director of the SBD, I affirm that I receive, review, and approve the budgets submitted by state agencies in accordance with statute.

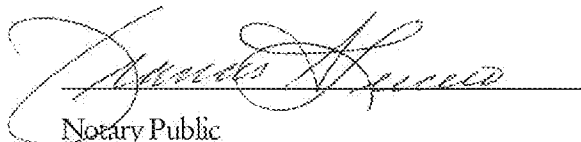
7. As a result, I am familiar with the financial affairs of the New Mexico Legislature.
8. As the administrative head of the SBD, I affirm that the New Mexico Legislature has been fully funded by the state of New Mexico, through appropriations for fiscal year 2017.
9. Fiscal year 2017 began on July 1, 2016, and ends on June 30, 2017.
10. The Consensus Revenue Estimating Group's projected recurring revenue estimate for Fiscal Year 2018 is \$5.9291 billion.
11. Based on the data available to SBD, the total proposed budget for fiscal year 2018 was \$6.0828 billion.
12. The vetoes for Higher Education and the Legislature totaled \$763.6 million.
13. If Governor Martinez had signed the General Appropriations Act of 2017 without issuing any line-item vetoes, the State of New Mexico would still be \$153.7 million dollars short of a balanced budget for fiscal year 2018. This significant revenue shortfall, precipitated primarily by falling oil and gas revenue, is unprecedented.
14. Fiscal year 2018 begins on July 1, 2017, and ends on June 30, 2018.

FURTHER AFFIANT SAYETH NAUGHT



Anthony Forte

SUBSCRIBED AND SWORN to before me this 5th day of May, by
Anthony J. Forte.


Notary Public

My commission expires:

June 12, 2020



MEMORANDUM

TO: Representative Patricia Lundstrom, Chair, House Appropriations and Finance Committee
 Senator John Arthur Smith, Chair, Senate Finance Committee

FROM: Elisa Walker-Moran, Chief Economist, Taxation and Revenue Department
 Clinton Turner, Chief Economist, Department of Finance and Administration
 Laura Bianchini, Chief Economist, Department of Transportation
 Jon Clark, Chief Economist, Legislative Finance Committee

SUBJECT: Consensus Revenue Estimating Group – 2017 Mid-Session Review of Revenues

Prior to the mid-point of each legislative session, the Consensus Revenue Estimating Group (CREG) meets to review updated economic indicators and the most recent tax receipt data to determine whether the consensus revenue estimate warrants updating. This memorandum summarizes the work and conclusions of the CREG, comprised of the Legislative Finance Committee (LFC), Department of Finance and Administration (DFA), Taxation and Revenue Department (TRD), and Department of Transportation (DOT).

After careful review of information newly available since the December forecast, CREG reached consensus to make no changes to the December 2016 forecast. The CREG would caution that though the forecast remains unchanged, there are upside and downside risks to this forecast.

December 2016 Consensus General Fund, Recurring Revenue Outlook (in millions of dollars)

<u>FY16</u>	<u>FY17</u>	<u>FY18</u>	<u>FY19</u>
\$5,708.8	\$5,600.2	\$5,929.1	\$6,142.4

In the December revenue forecast, FY17 ending reserve balances were projected to be negative 1.1 percent; however, due to solvency measures taken by the Legislature this session and already signed by Governor Martinez, the projected FY17 ending reserve balance is now projected to be 1.6 percent of recurring appropriations.

To determine potential changes in the forecast, CREG reviewed estimates for general sales taxes (including gross receipts and compensating tax), selective sales taxes (including motor vehicle, tobacco, liquor, and others), income taxes (including personal and corporate income), severance taxes, interest earnings, tribal revenue sharing, and rents and royalties. CREG also reviewed an additional quarter of actual receipts, including preliminary December revenue accruals, which indicated the state is tracking closely with the December 2016 consensus estimate.

CREG also considered revised national economic indicators – including gross domestic product, inflation rates, exchange rates, commodity prices, and federal funds rate – as well as revised New Mexico economic indicators – including growth in employment, personal income, total wages and salaries, housing permits, initial unemployment claims, and gross state product.

Changes in forecasts for oil and natural gas volumes were incorporated into the review. While prices were revised upward for FY17 and FY18, volumes expectations remained unchanged and the effects of price revisions were partially offset by negative changes in other revenue sources.

The average of the two economic forecasts (BBER and Moody's) used by CREG for New Mexico's non-agricultural employment growth in FY17 is 0.3 percent, down slightly from the 0.4 percent forecasted in the December estimate. Nominal personal income growth is now forecast at 1.9 percent in FY17 and 2.7 percent in FY18, down from a previous forecast of 2.3 percent and 2.9 percent in FY17 and FY18, respectively.

Although the average forecast shows a slightly more pessimistic outlook for employment growth and other economic factors compared with the December estimates, it is encouraging the two forecasts are much more in unison – the wide disparities seen previously have largely dissipated, lending a greater sense of certainty to the outlook for mild growth.

STATE OF NEW MEXICO, ex. rel.
THE NEW MEXICO LEGISLATIVE COUNCIL,

Petitioner,

vs.

No. S-1-SC-36422

HONORABLE SUSANA MARTINEZ,
Governor of the State of New Mexico, and
DOROTHY "DUFFY" RODRIGUEZ,
Secretary of the New Mexico Department
of Finance and Administration,

Respondents.

AFFIDAVIT OF DR. BARBARA DAMRON

Dr. Barbara Damron, being first duly sworn, deposes and states as follows:

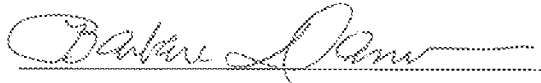
1. I am over the age of 18 years and am competent to make this affidavit. The matters set forth below are true based on my knowledge and experience.
2. I was appointed by the governor and confirmed by the senate pursuant to NMSA 1978, Section 9-25-5, as the Cabinet Secretary of the New Mexico Higher Education Department ("NMHED").
3. The NMHED is a cabinet level department in the executive branch created pursuant to NMSA 1978, Section 9-25-4.
4. By November 1 of each year the NMHED presents to the legislature a comprehensive funding request for all higher education pursuant to NMSA 1978, Section 9-25-9.
5. Pursuant to NMSA 1978, Section 21-1-26 (A)(2), the NMHED has the authority to receive, adjust and approve the budgets submitted by public higher education institutions designated by Article 12, Section 11 of the constitution of New Mexico and other public post-secondary educational institutions in the state, prior to the submission of these budgets to the state budget division of the Department of Finance and Administration.

6. On April 17, 2017, NMHED issued temporary suspension of the May 1 deadline for fiscal year 2018 budget submission. See Exhibit C-1.

7. For fiscal year 2017 the New Mexico institutions of higher education and associated entities have been funded by the state of New Mexico through appropriations.

8. Fiscal year 2017 began on July 1, 2016 and ends on June 30, 2017.

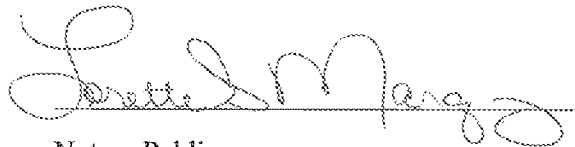
FURTHER AFFIANT SAYETH NAUGHT



Dr. Barbara Damron

SUBSCRIBED AND SWORN to before me this 3rd day of May, by

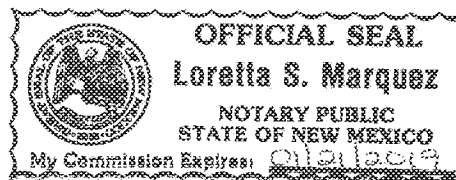
Barbara Damron.



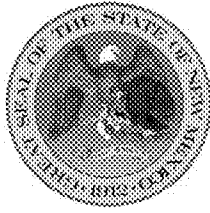
Notary Public

My commission expires:

01/21/2019



NEW MEXICO HIGHER EDUCATION DEPARTMENT



SUSANA MARTINEZ
GOVERNOR

DR. BARBARA DAMRON
CABINET SECRETARY

April 17, 2017

Dear Presidents, Directors and Higher Education Business Officers,

As you are aware the General Fund budget for higher education has not as yet been finalized. Pursuant to 5.3.4 NMAC the Higher Education Department (HED) is responsible for review of all higher education budgets prior to submission to the Department of Finance and Administration for final approval.

At this time HED is suspending its May 1 deadline for budget submissions until further notice. We will provide additional instructions as soon as the current situation with the budget is resolved. We will do all we can to work with your institutions in hope of having ample time for your budget preparation and our statutory review prior to the initiation of the new fiscal year.

Thank you for all you do for New Mexico, and I wish you, your staff and all of your students continued success.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara Damron".

Barbara Damron, PhD, RN, FAAN
Cabinet Secretary

2044 Galisteo Street, Suite 4, Santa Fe, NM 87505-2100
Phone: 505-476-8400 Fax: 505-476-8454
www.hed.state.nm.us

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 15, 2011

NO. 33,028

STATE OF NEW MEXICO ex. rel.,
HON. MIMI STEWART, HON. BEN LUJAN, JR.,
HON. ELEANOR CHAVEZ, HON. ANTONIO
LUJAN, HON. MIGUEL GARCIA, and HON.
CISCO MCSORLEY, members of the New Mexico
Legislature and citizens of New Mexico

Petitioners,

v.

HON. SUSANA MARTINEZ, Governor of the
State of New Mexico, HON. DIANNA J. DURAN,
Secretary of State of New Mexico, and HON.
CELINA BUSSEY, Secretary of New Mexico
Department of Workforce Solutions,

Respondents,

and

OFFICE OF THE ATTORNEY GENERAL,

Intervenor.

ORDER

WHEREAS, this matter came on for consideration upon petition for writ of mandamus and supplemental authority, response thereto, intervenor's brief, and oral argument by the parties, and the Court having considered said pleadings and oral argument and being sufficiently advised, Justice Patricio

Received
2011 JUL 19 PM 1:10
Office of the Governor

1 M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, Justice
2 Edward L. Chávez, and Judge Roderick T. Kennedy concurring;

3 WHEREAS, the New Mexico Legislature passed House Bill 59 during
4 the last three days of the 2011 legislative session. House Bill 59 sought to
5 amend five different sections of the Unemployment Compensation Law,
6 NMSA 1978, §§ 51-1-1 to -59 (2010), in order to address the impending
7 insolvency in the unemployment compensation fund. In relevant part, House
8 Bill 59 sought to reduce benefits to the unemployed and to increase employer
9 contributions to the unemployment compensation fund. Governor Susana
10 Martinez partially vetoed House Bill 59 by striking in its entirety the increase
11 in employer contributions that were set to commence on January 1, 2012, thus
12 leaving in limbo some employer contributions for calendar year 2012.¹

13 Governor Martinez also expressed her intent to include this issue on the
14 agenda of the upcoming 2011 special session on redistricting. Instead of
15 waiting for the special session, petitioners sought a writ of mandamus
16 invalidating Governor Martinez's partial veto;

17 WHEREAS, this Court has ruled on the constitutionality of a
18 governor's veto in past cases involving writs of mandamus. *See State ex rel.*

19
20
21
22
23
24
25
26
27
28

1. Governor Martinez left unchanged the amendment to Section 51-1-11(I)(2), which defines the schedule rate for certain employers, but which would go into effect beginning January 1, 2013.

1 *Sego v. Kirkpatrick*, 86 N.M. 359, 364, 524 P.2d 975, 980 (1974). The
2
3 general rules regarding mandamus apply equally to cases involving
4
5 challenges to a governor's exercise of veto authority. Thus, we must remain
6
7 mindful that "[m]andamus is a drastic remedy to be invoked only in
8
9 extraordinary circumstances" and when there is not "a plain, speedy and
10
11 adequate remedy in the ordinary course of law." *State ex rel. Coll v. Johnson*,
12
13 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277 (internal quotation
14
15 marks and citation omitted). In addition, "mandamus lies only to force a clear
16
17 legal right against one having a clear legal duty to perform an act." *State of*
18
19 *New Mexico ex rel. Richardson v. Fifth Judicial Nominating Comm'n*, 2007-
20
21 NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566 (internal quotation marks and
22
23 citations omitted); *see also Schreiber v. Baca*, 58 N.M. 766, 770, 276 P.2d
24
25 902, 905 (1954) ("It is a well-established doctrine in the law relating to
26
27 mandamus that only clear legal rights are subject to enforcement by the
28
writ."). Indeed,

[w]hile mandamus will not lie to correct or control the judgment
or discretion of a public officer in matters committed to his care
in the ordinary discharge of his duties, it is nevertheless well
established that mandamus will lie to compel the performance of
mere ministerial acts or duties imposed by law upon a public
officer to do a particular act or thing upon the existence of
certain facts or conditions being shown, even though the officer
be required to exercise judgment before acting.

State ex rel. Four Corners Exploration Co. v. Walker, 60 N.M. 459, 463, 292

1 P.2d 329, 331-32 (1956) (citations omitted).

2
3 WHEREAS, in this case there are three general substantive issues.

4 One, whether House Bill 59 is a bill appropriating money. If House Bill 59 is
5 not a bill appropriating money, then the Governor did not have constitutional
6 authority to partially veto the bill. *See Chronis v. State ex rel. Rodriguez*, 100
7 N.M. 342, 344, 670 P.2d 953, 955 (1983) (“[B]ecause the Act does not
8 appropriate money, we hold that the Governor’s veto power was invalidly
9 exercised in violation of Article IV, Section 22.”). Two, if House Bill 59 is a
10 bill appropriating money, the Governor must exercise the veto power in a way
11 that eliminates or destroys the whole of an item or part. The Governor’s veto
12 is unconstitutional if the Governor distorts the legislative intent, effectively
13 creating “legislation inconsistent with that enacted by the Legislature, by the
14 careful striking of words, phrases, clauses or sentences.” *Sego*, 86 N.M. at
15 365, 524 P.2d at 981. Three, if the Governor’s partial veto was not
16 constitutional under either analysis, whether the remedy is to reinstate House
17 Bill 59 as it was passed by the Legislature or invalidate the bill in its entirety;
18 and.

19
20
21
22
23
24
25 WHEREAS, a preliminary question for this Court is to consider
26 whether a plain, speedy, and adequate remedy in the ordinary course of law is
27 available to petitioners, which would caution against our exercise of
28

1 jurisdiction to decide the merits of this case. We conclude that there is such a
2 remedy, which is the impending 2011 special legislative session. Governor
3 Martinez announced in the veto message the reasons why she partially vetoed
4 the language in House Bill 59, but she also advised the Legislature that she
5 intended to place the matter on the call of the upcoming special legislative
6 session. The special session will take place before January 1, 2012, the
7 effective date of the language vetoed by Governor Martinez. In addition, this
8 is not a situation where the legislators must override the Governor's veto by a
9 two-thirds majority pursuant to Article IV, Section 22 of the New Mexico
10 Constitution. If a veto override were the only option available to legislators,
11 such an override may not constitute an adequate remedy if indeed the veto is
12 unconstitutional. However, the Governor has expressed her intent to place
13 this matter on the call of a 2011 special session. Thus, any legislation which
14 is introduced on this subject will only require a majority vote. We believe
15 this is a remedy that preserves the constitutional process for enacting
16 legislation, and because such a procedure will occur before the effective date
17 of the vetoed legislation, the remedy is adequate and timely.

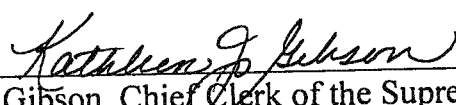
18
19
20
21
22
23
24
25 NOW, THEREFORE, IS IT ORDERED that for the foregoing reasons,
26 we hold this matter in abeyance pending notification by the parties that the
27 matter is ripe for decision or moot.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice
of the Supreme Court of the State of New Mexico, and
the seal of said Court this 15th day of July, 2011.

(SEAL)


Kathleen Jo Gibson, Chief Clerk of the Supreme Court
of the State of New Mexico

BUDGET HISTORY (1996 – 2017)¹

YR	GOV	REGULAR	ADJOURN	ACTION	DATE	REMARKS	SPECIAL / EXTRA-ORDINARY	ACTION	DATE	REMARKS
1996	Johnson	HB 2 – GAA	2/16/96	Partial sign/veto	3/4/96					
1997	Johnson	HB 2 – GAA	3/22/97	Partial sign/veto	3/19/97					
1998	Johnson	HB 2 – GAA	2/19/98	Partial sign/veto	3/11/98	Veto lines to judicial incl. salaries & benefits	HB 2 – GAA Special	Partial sign/veto	5/11/98	Restored funding to constitutional offices
1999	Johnson	SB 3 – EAA	3/20/99	Veto	3/11/99	Veto education budget	HB 9 – GAA Special	Partial sign/veto	5/13/99	Restored funding to constitutional offices
		SB 2 – GAA		Veto	3/16/99	Veto entire budget				
		SB 738 – GAA		Veto	4/8/99	Veto entire budget				
2000	Johnson	HB 2 – GAA	2/17/00	Veto	2/9/00	Veto entire budget	SB 15 – GAA Special	Partial sign/veto	4/13/00	Restored funding to constitutional offices
		SB 2 – GAA		Veto	3/8/00	Veto entire budget				
2001	Johnson	HB 2 – GAA	3/17/01	Partial sign/veto	3/16/01					
2002	Johnson	HB 2 – GAA	2/14/02	Veto	2/7/02	Veto entire budget	SB 1 – GAA Extraordinary	Veto	5/24/02 (veto) 5/28/02 (override)	<i>Veto override</i> to restore funding to constitutional offices
		SB 1 – GAA		Veto	3/6/02	Veto entire budget				
2003	Richardson	HB 2 – GAA	3/22/03	Partial sign/veto	3/21/03					
2004	Richardson	HB 2 – GAA	2/19/04	Partial sign/veto	3/9/04					
2005	Richardson	HB 2 – GAA	3/19/05	Partial sign/veto	3/17/05					
2006	Richardson	HB 2 – GAA	2/16/06	Partial sign/veto	3/8/06					
2007	Richardson	HB 2 – GAA	3/17/07	Partial sign/veto	3/15/07					
2008	Richardson	HB 2 – GAA	2/14/08	Partial sign/veto	2/12/08					
2009	Richardson	HB 2 – GAA	3/21/09	Partial sign/veto	4/7/09					
2010	Richardson	HB 2 – GAA	2/18/10			Legislature failed to pass the budget	HB 2 – GAA Special	Partial sign/veto	3/24/10	Restored funding to constitutional offices
2011	Martinez	HB 2 – GAA	3/19/11	Partial sign/veto	4/8/11					
2012	Martinez	HB 2 – GAA	2/16/12	Partial sign/veto	3/2/12					
2013	Martinez	HB 2 – GAA	3/16/13	Partial sign/veto	4/3/13					
2014	Martinez	SB 313 – GAA	2/20/14	Partial sign/veto	3/11/14					
2015	Martinez	HB 2 – GAA	3/21/15	Partial sign/veto	4/9/15					
2016	Martinez	HB 2 – GAA	2/18/16	Partial sign/veto	2/29/16					
2017	Martinez	HB 2 – GAA	3/18/17	Partial sign/veto	4/7/17	Veto lines to legislative agencies & higher ed institutions	TBD			

¹ Information contained herein was derived from www.nmlegis.gov. See, e.g., <https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=2&year=96>

² Every regular session of the legislature convening during an even-numbered year (1996, 1998, 2000, 2002, 2004, 2008, 2010, 2012, 2014, and 2016) shall remain in session not to exceed thirty days pursuant to N.M. Const. art. IV, Section 5.