ORIGINAL

IN THE NEW MEXICO SUPREME COURT

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.

VERIFIED EMERGENCY PETITION
FOR ORIGINAL WRIT OF MANDAMUS

HINKLE SHANOR LLP
Thomas M. Hnasko
P.O. Box 2068
Santa Fe, NM 87504-2068
(505) 982-4554
thnasko@hinklelawfirm.com

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

Counsel for Petitioner

April 21, 2017

TABLE OF CONTENTS

Statement of Compliance

The New Mexico Legislative Council's Verified Emergency Petition for Writ of Mandamus complies with the limitations of Rule 12-504(G)(3). The body of the Petition uses a proportionally-spaced type style and is 3,385 words.

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

New Mexico Statutes

New Mexico Rules

New Mexico Constitution

Other Jurisdictions - Cases

Other – New Mexico Attorney General Opinions

Other Authorities

I. Introduction.

Petitioner seeks an Extraordinary Writ from this Court pursuant to Rule 12-504 NMRA and respectfully requests that the Court act on an emergency basis. This petition is directed primarily to the Governor of New Mexico, whose line-item vetoes of the General Appropriation Act of 2017 seek to defund and thereby effectively abolish the Legislative Branch of government and all constitutionally-created and statutorily-authorized public institutions of higher education, together with several other critical constitutionally-created departments, agencies, and institutions of state government, including Carrie Tingley Hospital, the New Mexico School for the Deaf, the New Mexico School for the Blind and Visually Impaired, and the Department of Agriculture. The Governor's actions violate the New Mexico Constitution's principles of separation of powers and the checks and balances on which our system of representative democracy has been based since 1911. Petitioner requests that the Court issue an Extraordinary Writ invalidating the challenged vetoes and directing the Secretary of the Department of Finance and Administration to effectuate and administer the appropriations authorized under the improperly-vetoed provisions of the General Appropriation Act.

II. Summary of the Bases for the Writ.

The undue encroachment by one co-equal branch of government upon another, through the imposition of improvident vetoes which attempt to eviscerate

the ability of the other branch to perform its essential functions, violates the essence of the constitutional doctrine of separation of powers. In the present circumstances, the challenged line-item vetoes, which purported to remove all funding for the Legislative Branch, violate the doctrine of separation of powers and also are in derogation of Article IV of the New Mexico Constitution, which *obligates* the Legislature to fund the expenses of the Legislative, Executive, and Judicial Branches.

The Constitution also prohibits the wholesale defunding, through a purported line-item veto, of our constitutionally-enabled and statutorily-authorized institutions of higher education and other constitutionally-created departments, agencies, and state government institutions. As amplified below, a Writ of Mandamus is necessary and appropriate to invalidate the challenged vetoes and to restore the funding set forth in the General Appropriation Act.

III. Jurisdiction of the Court.

Petitioner invokes the original jurisdiction of this Court pursuant to Article VI, Section 3 of the New Mexico Constitution. This is an action to declare unconstitutional the attempted vetoes, and to compel Respondents to perform their clear, ministerial duties to carry out the duly enacted laws.

The issues set out in this Petition and in controversy between Petitioner and Respondents are of the greatest public importance and interest to the citizens of

this State. This Court has traditionally and often taken original jurisdiction under Article VI, Section 3 in such matters. *See, e.g., State ex rel. Cisneros v. Martinez,* 2015-NMSC-001, 340 P.3d 597; *State ex rel. Coll v. Carruthers,* 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380; *State ex rel. Sego v. Kirkpatrick,* 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975.

Mandamus is the proper procedure "to test the constitutionality of vetoes or attempted vetoes by the Governor." *Sego,* 1974-NMSC-058, ¶ 6. Moreover, this Court has declared that a Writ of Mandamus will not be deferred until such time as the Legislature attempts to override the unsound vetoes. *Coll,* 1988-NMSC-057, ¶ 9, *quoting with approval, Colorado Gen. Assembly v. Lamm,* 704 P.2d 1371, 1377 (Colo. 1985) ("the delicate constitutional balance between the executive and the legislative branches of government would be upset if we were to hold that the legislature may not challenge a gubernatorial veto until it has attempted by a two-thirds vote to enact a law which it initially was authorized to accomplish by a simple majority").

IV. Parties.

Petitioner Legislative Council, created by NMSA 1978, Section 2-3-1 (1951), is comprised of sixteen members – eight from each house – and includes the bipartisan leadership and a proportionate number of members from the majority and minority parties. In an interim period, when the Legislature is not in session,

the Council acts on behalf of the Legislature. At its last meeting on April 12, 2017, the Council authorized the filing of this petition on behalf of the Legislature. The Council is the real party in interest, acting on behalf of the Legislative Branch, whose members represent the people of the State of New Mexico.

Respondents the Honorable Susana Martinez, Governor of the State of New Mexico, and Secretary Dorothy "Duffy" Rodriguez are named in their official capacities. Secretary Rodriguez oversees and supervises the Department of Finance and Administration concerning the expenditure of State funds authorized pursuant to duly executed appropriation acts of the State.

V. Grounds for the Petition.

A. Factual Background.

1. During the immediate past regular session of the Fifty-Third Legislature of the State of New Mexico, the Legislature duly passed with bipartisan support House Appropriations and Finance Committee Substitute for House Bills 2 and 3, officially denominated "the General Appropriation Act of 2017," *see* Exhibit A, the "General Appropriation Act."

2. In response to the passage of the General Appropriation Act, Governor Martinez undertook unprecedented executive action by purporting to line-item veto the entire appropriation for the Legislature, thereby defunding and

effectively eliminating the Legislative Branch of government. *See* Exhibit A, p. 5, lines 19-25 and p. 6, lines 1-18, line-item vetoes of General Appropriation Act.

3. As a justification for the purported evisceration of the Legislative Branch, Governor Martinez asserted that the Legislature, which appropriates for its expenses no more than one-half of one percent (0.5%) of the entire state budget, failed to impose upon itself the same level of spending reduction as the legislature had imposed on the executive agencies. Based on this erroneous reasoning,[1] the Governor attempted to justify the wholesale extinguishment of the Legislative Branch's ability to function through the following veto message:

> Throughout the legislative session, and others, I have heard a great deal of discussion about how the Legislative and Judicial branches are separate but co-equal branches of government. While true, it apparently does not apply when they are considering reductions to their budgets. Every time the Legislature imposes across-the-board reductions the Legislature exempts both itself and the Judiciary from the same level of reductions that most of our agencies face. The Legislature has done it again; they have refused to bear their fair share of the burden, despite my recommendation to reduce legislative spending at a level that is similar to the reduction for the Executive agencies. Not only did they refuse to cut spending, the Legislature added $120,000 additional

[1] While Governor Martinez's justification for her attempt to dismantle the Legislature and its ability to function cannot withstand constitutional scrutiny under any appropriate analyses, it is noteworthy that this justification is also demonstrably incorrect. The Legislature has reduced its budget from the Fiscal Year 2016 level. *See* Exhibit B, Affidavit of Rául E. Burciaga, Director of the Legislative Council Service.

> funding to the budget for the LFC, putting that budget above its FY 17 revised operating budget.
>
> Further, its appropriations, as are those for the district courts, are done in a "lump sum" fashion while our Executive agencies are appropriated by specific categories. This certainly does not lend itself to ensuring ". . . accountability through the effective allocation of resources for all New Mexicans," to quote from the LFC's mission statement.

Exhibit C, House Executive Message No. 56 at 2.

4. In addition to defunding the Legislative Branch, Governor Martinez sought by executive fiat to extract the funding necessary for operations of the entire group of constitutionally and legislatively-authorized entities of higher education, as well as several other constitutionally-created and legislatively-authorized departments, agencies, and institutions of state government. Governor Martinez struck by line item veto all of the appropriations for these higher education institutions and other departments, agencies, and institutions. *See* Exhibit A, General Appropriation Act, line item vetoes, p. 135, line 7 through p. 163, line 1.

5. Governor Martinez's asserted basis for the wholesale elimination of the funding for higher education and other governmental entities and functions had no relationship whatsoever to the appropriation itself, which was essentially the exact amount that Governor Martinez had proposed for legislative action. *See* Exhibit D, Affidavit of David Abbey. Instead, Governor Martinez, through an

executive message, attempted to conjoin and pre-condition executive approval of all higher education funding by requiring Senate confirmation of the regents she had nominated. The message stated:

> The Senate refused to hold a hearing for nominated Regents for several higher education institutions. This is a clear violation of its constitutional duty. When the Senate appropriated three quarters of a billion dollars to these institutions, it also took the unprecedented step of refusing to hold a hearing for those responsible for the oversight of the appropriated public dollars. Both the funding for our higher education institutions and the confirmation of well-qualified regents can be addressed in the upcoming special session.

Exhibit C, House Executive Message No. 56 at 7.

6. Following this precipitous and ill-advised executive action, the Council of University Presidents cautioned Governor Martinez that the alleged line-item veto of all funding for New Mexico's constitutionally and statutorily-authorized higher education institutions would result in dire social and economic consequences and that the extraction of funding had already caused immediate and irreparable injury with respect to faculty and student recruitment and retention. The University Presidents warned that high-quality faculty members "are now looking at employment where there is more certainty in higher education" and that "there is concern that many of our brightest students will move to other states to pursue their higher education." *See* Exhibit E, Letter from Council of University Presidents to Governor Martinez, dated April 13, 2017.

B. Relevant Law.

1. Article III, Section 1 of the New Mexico Constitution articulates the general principle of separation of powers: "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial." It further defines that principle by declaring that "no person or collection of persons charged with the exercise of powers belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution is otherwise expressly directed or permitted." N.M. Const. art. III, § 1.

2. The purpose of separation of powers as a constitutional doctrine "[is] not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments to save the people from autocracy." *Myers v. United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). However, from the earliest days of our nation, it was recognized that the doctrine was never intended to isolate the branches of government from one another:

> [T]he legislative, executive and judiciary powers ought to be kept as separate from, and independent of each other, as the nature of a free government will admit; or as is consistent with that chain of connections that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.

The Federalist No. 47 (Random House ed.) at 316; *see Buckley v. Valeo,* 424 U.S. 1, 120-24 (1976). As noted by Justice Jackson in his seminal opinion on the subject:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. Thus, modern courts have recognized that context is critical when examining questions of separation of powers. Often there is no formula which can be easily applied to resolve such cases; rather, hard judgments must be made to protect against the twin evils our constitutional order was designed to prevent: undue "aggrandizement" of power by one branch over another, and "encroachment" by one branch on the essential functions of another. As the Supreme Court of the United States observed in *Mistretta v. United States,* 488 U.S. 361, 382 (1989):

> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed

> the outer limits of its power." Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. . . . By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.

4. Given the critical importance of separation of powers to the proper functioning of the constitutional order, it ultimately falls to this Court "to resolve conflicts between the legislative and executive branches." *State ex rel. Coll,* 1988-NMSC-057, ¶ 7. In *State ex rel. Sego*, 1974-NMSC-059, this Court acknowledged that all constitutionally conferred powers, including the executive power to veto, must be exercised consistently with constitutional restraints:

> The power of veto, like all powers constitutionally conferred upon a governmental officer or agency, is not absolute and may not be exercised without any restraint or limitation whatsoever. The very concept of such absolute and unrestrained power is inconsistent with the concept of "checks and balances," which is basic to the form and structure of State government created by the people of New Mexico in their constitution, and is inconsistent with the fundamental principle that under our system of government no man is completely above the law.

Id. ¶ 5.

5. In accordance with this underlying principle of constitutional restraint, this Court in *Sego* articulated the following principles to govern the evaluation of

challenges to the exercise of the gubernatorial line-item veto under the separation of powers doctrine:

A. Although the essential power of the Governor is executive in nature, she also participates in the legislative function in so far as Article IV, Section 22 confers on her the power to veto "part or parts" or "item or items" of "any bill appropriating money." *Id.* ¶ 12.[2]

B. "The power of partial veto is . . . a negative power . . . and is not a positive power. . . . Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature . . ." *Id.* ¶ 18.

---

[2] New Mexico's item veto provision is typical of the item veto provision in most states.

> Forty-three states provide for the item veto, including every state admitted to the Union since the Civil War and every state but one west of the Mississippi. In forty-two of those states, the item veto is limited to bills making appropriations. . . . At least ten states allow governors to reduce as well as disapprove items. Many states permit governors to veto general legislation that the legislature has incorporated in an appropriations bill, although other states limit the item veto to monetary items.

Richard Briffault, *The Item Veto in State Courts,* 66 TEMPLE L. REV. 1171, 1175-76 (1993).

C. Judicial review of a line-item veto does not merely look at what the governor sought to delete, without reference to what the legislature had sought to enact. Thus, the Court in *Sego* established that "the Governor may not properly distort legislative appropriations or arrogate unto [herself] the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation." *Id.* ¶ 12.

6. The item veto provision has also been recognized as an express exception to the traditional prohibition against the exercise of legislative authority by the executive branch. *See* N.M. Att'y Gen. Op. 79-13 (1979). Although the Governor's item veto authority resides in the legislative article of the Constitution, an exercise of the item veto is constitutionally infirm where it exceeds the limits of the specific grant of authority. *See Sego,* 1974-NMSC-059, ¶ 12.

7. The effect of an item veto, or, as in this instance, the collective effect of several item vetoes, undermines the essence of separation of powers when the result is to preclude or limit the ability of another branch, a constitutional entity, or a statutorily-created entity from performing its essential functions. *See State ex rel. Brotherton v. Blankenship,* 207 S.E. 2d 421, 431 (W. Va. 1973) ("We adhere to the maxim that the judiciary department possesses the inherent power to determine its needs and to obtain the funds necessary to fulfill such needs" and "the Governor's act of effectively abolishing the aforesaid constitutional offices [of

the Treasurer and Secretary of State] is an act in excess of his constitutionally granted powers").

8. In the present case, the Governor's debilitating vetoes seek to abolish funding for the entire Legislative Branch, our institutions of higher learning, and other constitutionally-created or statutorily-authorized departments, agencies and institutions of state government. It is difficult to conceive of any circumstance where the executive has sought more "aggrandizement" of power against which the Supreme Court cautioned in *Mistretta,* 488 U.S. at 382. Consequently, Governor Martinez's attempt to eliminate the funding for, and the ability of, a co-equal branch of government and constitutionally and statutorily-created institutions to perform their essential functions constitutes a violation of separation of powers.[3]

9. In addition to a violation of the constitutional separation of powers doctrine, the improvident vetoes also violate other provisions that are critical to the function of the Legislature. As noted, the line-item veto is a quasi-legislative act authorized in the legislative article of the Constitution. As that article also provides, the Legislature is constitutionally duty-bound to fund all three branches

[3] The same type of impermissible interference with an essential governmental function has occurred as a result of the Governor's veto of the special appropriation to the Legislative Council Service for "capitol repairs, security and infrastructure upgrades." *See* Exhibit A, p. 169, lines 3-5 (vetoing appropriation for functions that are necessary to carry out the Legislative Council's statutory responsibilities under its "exclusive care, custody and maintenance of the building in which the legislature is housed." NMSA 1978, § 2-3-4 (1967).

of government, a duty which the Governor cannot abrogate through line-item veto. *See, e.g.,* N.M. Const., art. IV, §16 ("[G]eneral Appropriation bills *shall embrace* . . . appropriations for the expense of the executive, legislative and judicial departments.") (emphasis added). *See also id.* § 9 (The legislature *shall* select its own officers and employees and fix their compensation.") (emphasis added); *id.* § 10 ("Each member of the legislature *shall* receive . . . per diem" [at a constitutionally fixed rate].) (emphasis added). *See also*, NMSA 1978, § 2-3-13 (1955) requiring the Legislative Council to "fix the compensation of each employee [of the Legislative Council Service] *within the appropriations made by the legislature* for the use of the legislative council.") (emphasis added); NMSA 1978, § 2-3-8 (1955) (requiring the Legislative Council Service "to assist the legislature of the State of New Mexico in the proper performance of its constitutional functions").

10. This Court has recognized the fundamental principle that no one branch may act unilaterally to preclude another branch or other constitutional or statutory entity from performing its essential functions under the law. *See, e.g., Thompson v. Legislative Audit Comm'n,* 1968-NMSC-184, 79 N.M. 693, 448 P.2d 799 (legislature could not abolish the constitutionally established office of State Auditor, by taking away its fundamental functions or not properly funding the office); *State ex rel. Prater v. State Board of Finance,* 1955-NMSC-013, ¶11, 59

N.M. 121, 279 P.2d 1042 (were the appropriation for the Barbers' Board so reduced "as to put it out of business as effectively as if repealed . . . [it would violate] the constraining influence of Const. Art. IV, 16."); *Mowrer v. Rusk,* 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886 (it is a violation of separation of powers to allow the city executive to control court personnel).

11. In this case, the foregoing principles underlying the doctrines of separation of powers and checks and balances provide the critical protection against the encroachment of one branch of government to the detriment of another branch and for the protection of other essential functions of constitutionally or statutorily-authorized governmental entities. *See, e.g., State ex rel. Nunez v. Baynard,* 15 So.2d 649, 659 (La. Ct. App. 1943) (upholding a writ to compel the State fiscal officers to honor the relator's warrant for his salary as an Assistant District Attorney where the Governor acknowledged that "[n]o constitutional and statutory salaries can be vetoed. The judiciary cannot be vetoed. Appropriations for constitutional agencies cannot be vetoed"). New Mexico law compels the same conclusion to protect the essential functions performed by the Legislature, our institutions of higher education, and the constitutionally-created and statutorily-authorized departments, agencies and institutions of our State. Accordingly, the Governor's collective item vetoes should be stricken and declared void *ab initio* as attempted unconstitutional repeals of the Legislative Branch of government, the

entire higher education system, and other constitutionally-created and statutorily-authorized departments, agencies and institutions.

VI. The Relief Sought.

For the foregoing reasons, Petitioner respectfully requests the Court to advance this matter on its calendar and issue a Writ of Mandamus invalidating 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. Additionally, Petitioner requests that the Writ of Mandamus direct the reinstatement of those improvidently-vetoed items of appropriation and further direct the Secretary of the New Mexico Department of Finance to supervise and administer the expenditure of State funds pursuant to those properly enacted items of appropriation.

Respectfully submitted,

HINKLE SHANOR LLP

Thomas M. Hnasko
P.O. Box 2068
Santa Fe, NM 87504-2068
(505) 982-4554
thnasko@hinklelawfirm.com

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

Counsel for Petitioner

VERIFICATION

State of New Mexico)
)ss.
County of Dona Ana)

I, Senator Mary Kay Papen, President Pro Tempore of the New Mexico Senate, and Co-Chair of the Legislative Council, Relator in the foregoing Verified Petition for an Original Writ of Mandamus, being first duly sworn upon oath, state that I have read the petition and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

Sen. Mary Kay Papen,
President Pro Tempore of the New Mexico Senate

Subscribed and sworn before me, this 19th day of April, 2017

Notary Public

My Commission Expires:

January 30, 2021

OFFICIAL SEAL
ANGELA WILLIAMS
NOTARY PUBLIC-State of New Mexico
My Commission Expires 1-30-21

VERIFICATION

State of New Mexico)
)ss.
County of Santa Fe)

I, Representative Brian Egolf, Speaker of the New Mexico House of Representatives, and Co-Chair of the Legislative Council, Relator in the foregoing Verified Petition for an Original Writ of Mandamus, being first duly sworn upon oath, state that I have read the petition and that the statements contained therein are true and correct to the best of knowledge, information, and belief.

Rep. Brian Egolf, Speaker of the New Mexico House of Representatives

Subscribed and sworn before me, this 19th day of April, 2017

Notary Public

My Commission Expires:

May 24, 2018

OFFICIAL SEAL
LISA M. ORTIZ MCCUTCHEON
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 05/24/18

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, a copy of the foregoing Verified Emergency Petition for an Original Writ of Mandamus, together with the separately filed compendium of Petitioner's Exhibits in Support of its Petition, has been served by hand delivery to the offices of the Respondents and to the Attorney General as follows:

Office of the Governor,
4th Floor, State Capitol Building
Santa Fe, NM 87501

Office of the Secretary of Finance and Administration
Bataan Memorial Building
407 Galisteo Street, #166
Santa Fe, NM 87501

Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501

Thomas M. Hnasko