



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

**MAGGIE TOULOUSE OLIVER, in her  
official capacity as Secretary of State of the  
State of New Mexico,**

**No. S-1-SC-39426**

Petitioner,

**vs.**

**THE OTERO COUNTY COMMISSION**

Respondent.

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**EMERGENCY VERIFIED PETITION  
FOR WRIT OF MANDAMUS TO COMPEL CERTIFICATION OF  
ELECTION RESULTS**

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*Submitted by:*

**Dylan K. Lange**  
General Counsel  
Office of the Secretary of State  
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*Attorney for Office of the New Mexico  
Secretary of State.*

**NEW MEXICO SECRETARY OF STATE Maggie Toulouse Oliver** (the “Secretary” or the “SOS”), pursuant to Rule 12-504 NMRA, through her General Counsel, respectfully petitions this Court to issue a Writ of Mandamus compelling certification of the election returns against Respondent, the Otero County Commission, acting as the ex officio county canvass board (“Canvassing Board” or “Respondent”) who failed to certify the canvass results of the 2022 primary election without any basis in law. As set forth in the body of this Petition, the Canvassing Board met on June 13 and voted not to certify the election results.<sup>1</sup> At the meeting they identified no deficiency in the election results, but rather made unsubstantiated claims about the voting systems in use throughout the state. By the express language of the election code, “the county canvassing board *shall* meet to approve the report of the canvass of the returns and declare the results no sooner than six days and no later than ten days from the date of the election.” NMSA 1978, Section 1-13-13(A). The Canvassing Board met on the sixth day and voted to not certify the election results and will not do so without a Writ of Mandamus compelling their action. Therefore, the Secretary requests this Court enter a Writ of Mandamus commanding Respondent to comply with its ministerial duty to certify the election results

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<sup>1</sup>*Otero County Declines to Certify New Mexico Primary Election Results, Cites Voter Fraud Concerns*: <https://www.alamogordonews.com/story/community/2022/06/13/otero-county-certify-2022-primary-election-results-new-mexico-politics/7609828001/> (last viewed on June 13, 2022).

and otherwise comply with the procedures set forth in the Election Code.<sup>2</sup> We further state that there is a statewide attempt to influence other County Canvassing Boards who are meeting to certify this week and we assume other Counties will be noncompliant with this provision which jeopardizes the general election ballot for all candidates.<sup>3</sup> Indeed, the Torrance County Canvassing Board tabled a vote on certification of the election results on June 13, 2022, over concerns not related to the election returns of the canvass.

### **INTRODUCTION**

Elections are the “bedrock” of our democratic system. *See Lubin v. Parish*, 415 U.S. 709, 714, 94 S. Ct. 1315 (1974). In this dispute, the Respondent has violated its duties under state law to certify the election as mandated by the Legislature. The citizens of Otero County are entitled to have their votes certified and their representatives nominated for the 2022 general election without further delay. The mandatory provisions of certification have not been followed by the Canvassing

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<sup>2</sup> **EXPEDITED RELIEF** is required in this case. Otero County has a statutory deadline of June 17 to meet and certify their election results. NMSA 1978, Section 1-13-13(A). The State Canvassing Board is scheduled to meet on June 28, 2022, to approve the report of the canvass and declare the results of the election for all statewide and multi-county candidate contests. They cannot do that without county certified election results. As such, the Secretary requests expedited briefing and relief in this time sensitive matter.

<sup>3</sup> Audrey Trujillo for NM Secretary of State’s Facebook page: <https://www.facebook.com/100063037849794/posts/404971834947408/> (last viewed on June 14, 2022)

Board, as set forth in the Article 13 of the state Election Code. The relevant facts in this case are that:

1. On June 13, 2022, the Otero County Clerk presented her findings to the County Canvassing Board for the Board's Consideration and approval.
2. The Otero County Clerk recommended certification of the canvass results.<sup>4</sup>
3. After debate the Canvassing Board voted against certifying the election results.
4. The Canvassing Board did not explain their votes in detail, but the discussion before the vote centered around questions about the voting systems or vote tabulators used to canvass the election.
5. The Canvassing Board did not find conclusively any deficiency in the election returns.
6. No summons has been issued directed to any precinct board commanding them to appear and make necessary corrections or supply omissions in the election returns pursuant to NMSA 1978, Section 1-13-5.
7. As of the filing of this Petition, twelve County Canvassing Boards have certified the results of the canvass pursuant to Section 1-13-13.

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<sup>4</sup> *June 13 Otero County Canvassing Board Meeting Agenda:*

<https://agendasuite.org/iip/otero/file/getfile/23295>; and the *Agenda Submittal for Otero County Commission*; <https://agendasuite.org/iip/otero/file/getfile/23292> (last viewed on June 14, 2022).

## **PARTIES AND STANDING**

The Secretary of State is a constitutional officer of the State of New Mexico who has pledged to “support the constitution of the United States and the constitution and laws of [New Mexico], and... faithfully and impartially discharge the duties of [her] office to the best of [her] ability.” N.M. Const., Art. XX, § 1. The Secretary is defined by law as the “chief elections officers” who “shall obtain and maintain uniformity in the application, operation and interpretation of the Election Code.” NMSA 1978, § 1-2-1. Further, she shall “generally supervise all elections... [and] advise county clerks [and] boards...as to the proper methods of performing their duties prescribed by the Election Code.” *See* § 1-2-2 NMSA 1978. The Election Code also provides that “[n]o forms or *procedures* shall be used in any election held pursuant to the Election Code without prior approval of the secretary of state.” (*emphasis added*) *Id.*

This action is being brought against Otero County in the name of the Board of County Commissioners of the County of Otero in accordance with NMSA 1978 § 4-46-1. Defendant Board of County Commissioners of Otero County is the governing body of Otero County, New Mexico, a subdivision of the State of New Mexico. Pursuant to NMSA 1978, Section 1-13-1(A), “the board of county commissioners is ex officio the county canvassing board in each county.”

The Canvassing Board has failed to comply with its mandatory, non-discretionary duty to certify the 2022 primary election results pursuant to NMSA 1978, Section 1-13-13(A). This jeopardizes all the countywide candidate's placement on the general election ballot and affects the certification of all statewide and multi-county candidates who the State Canvassing Board certify the nomination for. This is because county canvassing boards certify the nominations of county officers, magistrates, and to members of the legislature elected from districts wholly within one county pursuant to Section 1-13-13(C). After certification of these contests, county canvassing boards must send the certified results to the State Canvassing Board for their certification of the statewide and multi-county candidate contests. NMSA 1978, Section 1-13-15(A).

Given the foundational importance of elections in our electoral democracy, and that this case involves a first impression interpretation county certification of election results, the Secretary submits that this matter constitutes a "matter of great public importance." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 11, 149 N.M. 207, 247 P.3d 286; *State ex rel. Sugg v. Oliver*, 2020-NMSC-002, ¶ 7-8, 456 P.3d 1065.

### **JURISDICTION AND VENUE**

This Court has original jurisdiction over petitions for writ of mandamus against state officers, boards, or commissions, and the power to issue all other writs

necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same.”<sup>5</sup> N.M. Const. art. VI, § 3. This Court has found that: “The right of qualified electors to vote is fundamental to the integrity of state government.” *State ex rel. League of Women Voters v. Advisory Comm. to the N.M. Compilation Comm'n*, 2017-NMSC-025, ¶ 10, 401 P.3d 734. N.M. Const. art. VI, § 3 jurisdiction may be exercised even where the district courts have concurrent jurisdiction over the action. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15, 125 N.M. 343, 961 P.2d 768.

The Court’s power to issue writs of mandamus encompasses orders prohibiting public officials from taking unlawful official actions. “Prohibitory mandamus may well have been a part of New Mexico jurisprudence even before statehood.” *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562, 904 P.2d 11. “This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.” *Id.*; *see also State ex rel. Edwards v. City of Clovis*, 1980-NMSC-039, ¶ 12, 94 N.M. 136,

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<sup>5</sup> Even if the Respondents are not generally deemed a state officer, county clerks and county canvassing boards undeniably exercise the legal power of the state in administering statewide elections and the Respondent’s delegated role by the legislature to ensure the constitutional right to vote is protected is a general, public action that may be enjoined by this Court. As the Court discussed in *State ex rel. Ward v. Romero*, 1912-NMSC-011, ¶ 23, 17 N.M. 88, 125 P. 617 (quoting *Burch v. Hardwicke*, 71 Va. 24, 32 (1878)) (finding when a public official’s duties are public or general nature, they are considered state officers, whether the Legislature itself makes the appointment or delegates its authority).

607 P.2d 1154 (“Once petitioner showed that there was a valid ordinance in existence and that it was being violated, the duty cast upon the City became ministerial and subject to enforcement by mandamus.”). The judicial power to issue writs of mandamus extends to writs against mayors and county clerks. *See, e.g.*, NMSA 1978, Section 1-14-21 (If a county clerk fails to perform any act pertaining recounts, the applicant may apply to the supreme court of New Mexico for Writ of Mandamus to compel performance). Understanding the importance of election certification, the Election Code also allows for the New Mexico Courts to “issue a writ of mandamus to the county canvassing board to compel it to approve the report of the canvass and certify the election.” NMSA 1978, Section 1-13-12.

Mandamus lies only to “compel [or prohibit] the performance of a ministerial act or duty that is clear and indisputable.” *New Energy Econ., Inc.* 2011-NMSC-006 ¶ 10. “A ministerial act is an act which an officer performs [or is prohibited from performing] under a given state of facts, in a prescribed manner, in obedience to a mandate [or prohibition] of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.” *Id.*

In these proceedings, a Writ of Mandamus is a proper and a necessary exercise of the Court’s jurisdiction. First, Respondent has already acted in nonconformance with a mandatory, ministerial act required in the election code. The Canvassing Board has not approved the report of the county canvass and voted not to certify the



election results. Second, there is little basis for disagreement over the salient facts in this dispute. To wit, that the Canvassing Board has not identified any defective returns that would necessitate not certifying the elections in Otero County. Third, the disputed actions of the Canvassing Board are subject to a clear legal duty, without regard to the exercise of the Canvassing Board's judgement. Fourth, the Election Code's post-election provisions and procedures in Article 13 of the election code govern the certification of the elections, and they must be strictly followed. Finally, this failure to act affects the certification not only of the county and countywide candidate contests but also all statewide and multi-county contests which are statutorily required to be certified on June 28, 2022. § 1-13-15(C) and § 1-13-15(A). Without certification of the county, the Secretary cannot meet her statutory obligation to issue certificates of nomination for any winning candidate or move forward with the preparation of the ballot content for the upcoming General Election. § 1-13-15(C) and NMSA 1978, Section 1-13-16(B).

### **GROUND FOR ISSUING THE WRIT**

#### **I. The Plain Language of the Election Code Renders the Board's Action Unlawful.**

New Mexico courts generally give the statutory language its "ordinary and plain meaning unless the Legislature indicates a different interpretation is necessary." *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382.

The election code is straight forward on how election returns are certified at the county level after an election. First, the county clerk must “prepare the report of the canvass of the election returns by carefully examining the returns of each precinct to ascertain if they contain the properly executed certificates required by the election Code and ascertain whether any discrepancy, omission or error appears on the face of the election returns.” NMSA 1978, Section 1-13-4(A). Then, the county clerk “must also present the report of the canvass to the county canvassing board for consideration and approval.” § 1-13-4(B).

Then the county canvassing board “shall meet to approve the report of the canvass of the returns and declare the results no sooner than six days and no later than ten days from the date of the election.”<sup>6</sup> § 1-13-13(A). Further, the county canvassing board, “immediately upon approval of the report of the canvass of the returns of an election, shall issue a certificate of canvass of the results of the election.” § 1-13-13(B). The county canvassing board then will “immediately after completion of the canvass, shall declare the results of the election and of all ballot questions affecting only precincts within the county.” § 1-13-13(C).

The only discretionary power the county canvassing board has is to “summon a precinct board to appear before it to correct or supply omissions found” pursuant

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<sup>6</sup> NMSA 1978, Section 1-1-3 states “As used in the Election Code... “shall” is mandatory and “mat” is permissive.”

to Section 1-13-5(A). This power is limited to a discrepancy within the election returns itself and in the precinct itself. *Id.* Although the Canvassing Board may issue a summons to correct a deficient return, the Canvassing Board must still proceed with the canvass of all correct election returns by at least ten days after the election. § 1-13-5(C), § 1-13-13.

On June 13, 2022, the Otero County Clerk presented the results of the canvass, found no discrepancies in the results, and recommended approval to certify the canvass report. The Canvassing Board did not vote to certify the election results; indeed, they took affirmative action *not* to certify the results. It is important to also remember that the Canvassing Board has issued no summons and has identified no omissions or discrepancies on the face of any election returns. As such, the plain language of the election code commands that the Canvassing Board proceed with the canvass of all correct returns and certify the election results by June 17, 2022.

## **II. The Existing Statutory Scheme Governing Canvassing an Election Must Hold and Prevail.**

As certification was just denied, no written account has been made available of the Canvassing Board's decision, but upon belief and based on the Canvassing Board's comments at the meeting, Respondent has no issue with the election returns in Otero County in the 2022 Primary Election specifically. Rather, they have a general grievance with the voting machines or voting systems themselves and have

directed the County to pursue alternative recount methods before they certify, potentially seeking a hand recount of all election returns. This alternative counting of ballots is not proper in time or in substance and the Canvassing Board not complementing its ministerial duty to certify the election returns is unlawful.

To begin with, our appellate courts recognize that “[d]eparture from the strict letter of a statute should . . . be undertaken with great caution. In particular, one must be careful not to underestimate the purposes served by strict compliance with the letter of the statute.” 1996-NMCA-023, 121 N.M 414, ¶ 18. The admonition to be careful in deviating from the explicit requirements of the statute is especially important when dealing with the Election Code. The rules governing elections must be clear both so that the Secretary can fairly and objectively enforce them and so that candidates, parties, and voters understand how a candidate gets on the ballot.

The election code does not allow for a hand recount of election results at this stage of the election process and the Secretary has not approved such a process. What the election code does allow for is for Candidates to contest or pay for election recounts, and even has an automatic recount process in law. *See generally*, NMSA 1978, Sections 1-14-1 to 24. These are the procedures in place mandated by the Legislature to recount election returns. It goes beyond the legislative authority to perform a hand recount or a recount otherwise at this stage of the election process at

the whim of a county canvassing board with no issue with the election returns specifically.

The New Mexico Constitution is unequivocal that it the “legislature shall have the power to require the registration of the qualified electors as a requisite for voting and shall regulate the manner, time and places of voting.” N.M. Const. art. VII, § 1. Further the Constitution states that “[t]he legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise.” *Id.* Therefore, the statutory framework of the election code makes clear that election administrators and county canvassing boards must follow the election code, and do not have the power to change its mandatory provisions. *Herrera*, 2009-NMSC-003, ¶ 12, 145 N.M. 563, 203 P.3d 94; *see, e.g.*, § 1-2-1(B) (stating that the Secretary's responsibilities as chief election officer include “obtain[ing] and maintain[ing] uniformity in the application, operation and interpretation of the Election Code” and “mak[ing] rules pursuant to the provisions of, and necessary to carry out the purposes of, the Election Code”); §§ 1-2-2(B)-(D) (stating that the Secretary's election-related duties include “supervis[ing] all elections by administering the Election Code,” advising county clerks and election officials and workers “as to the proper methods of performing their duties prescribed by the Election Code,” and “report[ing] possible violations of the Election Code” to prosecuting authorities).

Any alternative relief the Respondent seeks to justify their unsubstantiated claims related to the certified voting machines should be dismissed as not relevant; and most importantly, is not a remedy available under the express provisions of the election code. Ordering such relief by the Canvassing Board or Supreme Court counters the legislative mandates and is an improper overreach of the Canvassing Board and the Court. This is because when legislation governs an area of law, the Courts equitable powers are “concurrent or supplemental to the legal remedy created by statute.” *Sims v. Sims*, 1996-NMSC-078, ¶ 29, 122 N.M. 618, 624, 930 P.2d 153, 159. In those situations, Courts only fashion remedies that “fill[s] in the interstices” of the legislation “in accordance with those legal concepts, principles, or objectives which may apply to the situation and that are in harmony and legally compatible with” the legislation. *Gunaji*, 2001-NMSC-028, ¶ 21, 130 N.M. 734, 31 P.3d 1008 (internal quotation marks omitted) (quoting *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 580 (N.D. 1983)).

This Court’s equitable powers do not extend so far as to allow it to disregard procedures set forth by statute or to rearrange the Election Code. *State v. Roy*, 1936-NMSC-048, ¶ 73, 40 N.M. 397, 60 P.2d 646 (“We are committed by our Constitution to the doctrine of separation of powers. It is fundamental that no one of the three branches of government can effectively delegate any of the powers which peculiarly

and intrinsically belong to that branch. The power to make law is reserved exclusively to the Legislature.”).

Our office believes that any issues raised regarding voting machines, alternative ways to canvass, and procedures for recounts are all specifically addressed in the election code and Respondent interjecting with its own procedures goes against legislative mandates when certifying election results pursuant to Section 1-13-13 and must be prohibited. The existing statutory scheme should hold and prevail and none of these issues potentially raised by the Canvassing Board are germane to the Canvassing Board’s mandatory, ministerial duty to certify the election results.

### **STATEMENT OF RELIEF SOUGHT**

As this Petition makes clear, the Canvassing Board has failed to undertake its statutory duty to approve the canvass report and certify the election. Respondent has not pointed to any discrepancies in the election results and have not issued any summons to that effect as mandated by statute.

Pursuant to her duty to “obtain and maintain uniformity in the application, operation and interpretation of the Election Code,” § 1-2-1, the Secretary asks this Court to enforce the Legislature’s plain language directives in certification of the election results. By so doing, the Court will also safeguard the county and state

election results and set a precedence to all other County Canvassing Boards refusing to certify the election results due to political biases.

Accordingly, the Secretary asks that the Court issue a Writ of Mandamus to Respondent compelling the certification of the 2022 Primary Election in Otero County by July 17, 2022, their statutory deadline, as Respondent has a nondiscretionary duty to follow the election procedures set forth in the Election Code when certifying the election results, and not to deviate from those procedures.

Respectfully Submitted,

MAGGIE TOULOUSE OLIVER  
SECRETARY OF STATE

By: *Dylan K. Lange*

Dylan K. Lange

General Counsel

Office of the Secretary of State

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14 day of June 2022, a true and correct copy of the foregoing *Emergency Verified Petition* has been sent via certified mail and electronic mail to the offices of the Respondents as follows:

Otero County Commission  
C/O RB Nichols  
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**/s/ Dylan K. Lange**  
Dylan K. Lange

**VERIFICATION**

I, Mandy Vigil, State Election Director, hereby affirm and swear under penalty of perjury under the laws of the State of New Mexico, that I have reviewed the *EMERGENCY VERIFIED PETITION FOR WRIT OF MANDAMUS TO COMPEL CERTIFICATION OF ELECTION RESULTS*, and that the representations therein are true and correct to the best of my knowledge, information, and belief.

**Date: June 14, 2022**



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Mandy Vigil  
State Election Director

## **STATEMENT OF COMPLIANCE**

Pursuant to Rule of Appellate Procedure 12-504(H), I certify that this brief complies with the type-volume requirement of Rule of Appellate Procedure 12-504(G). It contains 3,431 words in the body of the petition, according to a count by Microsoft Word.

*/s/Dylan K. Lange*  
Dylan K. Lange