IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE REPUBLICAN PARTY OF NEW MEXICO, JIM TOWNSEND, Minority Leader of the New Mexico House of Representatives, STUART INGLE, Minority Leader of the New Mexico Senate, KEITH MANES, Lea County Clerk, DAVE KUNKO, Chaves County Clerk, KEITH RIDDLE, Catron County Clerk, and WHITNEY WHITTAKER, Lincoln County Clerk,

Petitioners,

vs. No. _____

MAGGIE TOULOUSE OLIVER, New Mexico Secretary of State,

Respondent.

EMERGENCY VERIFIED PETITION FOR EXTRAORDINARY WRIT ESTABLISHING UNIFORM S.B. 4 ABSENTEE-BALLOT PROCEDURES (IMMEDIATE HEARING NEEDED)

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Oral Argument Is Requested

This summer, in response to the COVID-19 pandemic, the Legislature passed Senate Bill 4 ("S.B. 4"), a bill that radically changed the processes for handling absentee ballots for the 2020 election.[1] These provisions, which sunset automatically after this election, are codified at NMSA 1978, § 1-12-72 (titled "Conduct of election; 2020 general election; special provisions and contingencies"). Since the processes laid out in S.B. 4 began to roll into action, the Petitioners have observed alarming disparities among counties — and sometimes even within a single county — in the interpretation and implementation of S.B. 4.

Respondent Secretary of State just yesterday issued her most comprehensive guidance on the new procedures, which attempts to answer some, but not all, of the questions raised here. *See* 2020 General Election Absentee Ballot Qualification & Processing Guidance (dated Oct. 23, 2020) (Exhibit 1 to this Writ Petition) ("SOS Guidance"). This Writ Petition seeks to challenge some of the interpretations outlined in that document and asks the Court to resolve the remaining areas of ambiguity.

Resolving these issues ***now*** has become an urgent priority, as the implementation of S.B. 4 continues to shift less than two weeks before the general

[1] Section 1 of S.B. 4 — the first 3.5 pages of the 15-page bill — amends NMSA 1978, § 1-4-5.7 and is permanent. The remainder of the bill is devoted to creating the 2020-only § 1-12-72. Section 1-12-72 is not entirely devoted to absentee voting, but, understandably given the context of the pandemic, most of the more meaningful changes are.

election. *See* NMSA 1978, § 1-6-14(F) & (G) (providing that the absentee voter election boards begin working two weeks out from election day in counties with over 10,000 absentee ballots and five days out in counties with fewer ballots). The Petitioners have worked in the good faith to obtain answers from the Respondent, who is chiefly responsible for the uniform, statewide administration of S.B. 4, and the various county clerks, who are the on-the-ground actors actually implementing the law, regarding their interpretations and plans to implement various provisions of S.B. 4. While the Respondent has made an effort to engage the Petitioners on these issues, these efforts have failed to meaningfully unify the differing approaches of county clerks in implementing S.B. 4. The lack of accurate and specific guidance on the implementation of S.B. 4 is particularly concerning because there is no inertia of historical practice ensuring that any interpretation of S.B. 4's statutory provisions — even provisions that should be self-explanatory — will be uniformly implemented by all, or even most, of New Mexico's 33 counties. In fact, the inertia and embedded expectations of past law are now actually working against the consistent, transparent implementation of S.B. 4.

Only yesterday has the Respondent attempted to provide comprehensive answers to certain questions surrounding the proper implementation of S.B. 4. In some respects, the SOS Guidance is clear but incorrect — and in serious contravention of the most fundamental of good-governance principles — such as

when it states that "[c]hallengers [and other members of the public] are not allowed to monitor the initial qualification performed by the county clerk . . . ." SOS Guidance at 5. In other respects, however, the SOS Guidance remains ambiguous and self-contradictory: notably, the SOS Guidance states that "challengers are allowed to present a challenge for the [ ] reason[that] . . . the official mailing envelope does not contain the required voter identification (last 4 of SSN per SB4)," SOS Guidance at 5-6, but also states that "Challengers, Watchers, and Observers are not allowed to view a voter's full date of birth or any portion of the voter's social security number," SOS Guidance at 2. The SOS Guidance fails to explain how challengers can possible present a challenge for failure to "contain the required voter identification" if challengers are prohibited from ever viewing that information.

Because the issues presented by this Writ Petition do not involve the substantive standards for qualifying ballots (but only the procedures for doing so), there would be no equal-protection problem posed by granting the relief sought. Even if there were equal-protection concerns at play, the current disparities among counties, and prior midstream process alterations undertaken by some counties, dwarf the problems inherent in a court granting relief after part of the process has begun. In order to facilitate the fastest possible resolution of these issues, undersigned counsel voluntarily subjects himself to the Rule 16-303(D) NMRA standard for briefing, and will endeavor to succinctly describe what he understands

to be the principal opposing argument to the answer preferred by the Petitioners to each of the questions below. S.B. 4 has no interpretive case law, and, more generally, little authority beyond its text to aid in the resolution of these issues.

JURISDICTION AND CIRCUMSTANCES NECESSITATING A WRIT

"The supreme court shall have . . . power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." N.M. Const. art. VI, § 3. "The New Mexico Constitution gives this Court the power to issue writs of mandamus against all state officers. The Secretary [of State] is a 'state officer.'" *Unite New Mexico v. Oliver*, 2019-NMSC-009, ¶ 2, 438 P.3d 343.

Because the issues raised in this proceeding are of statewide interest and importance, this action is an appropriate exercise of this Court's original jurisdiction. *See State of New Mexico, ex rel., Brandenburg v. Blackmer*, 2005-NMSC-008, ¶¶ 8 & 10, 137 N.M. 258. This Court routinely hears extraordinary-writ petitioners in election cases. *See, e.g., Unite New Mexico*, 2019-NMSC-009; *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 12, 145 N.M. 563, 203 P.3d 94.

In addition, this Court should exercise original jurisdiction because the issues raised present fundamental questions of great public concern, the relevant facts are undisputed and no further factual questions exist to be decided, the purely legal issue

eventually will have come before this Court, and an early resolution of these dispute is necessarily to the public interest and the interest of the Petitioners. *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 17, 120 N.M. 562.

ISSUES NEEDING IMMEDIATE CLARIFICATION

The basic procedure for processing returned absentee ballots under S.B. 4 involves a brand-new 'first-level,' 'pre-qualification' stage, in which the clerk's office reviews the inbound ballots for having proper voter identification — which is defined, for the first time and just for absentee ballots, as the last four digits of the voter's social security number, rather than as the voter's name, address, and year of birth.

> Upon receipt of a mailed ballot, the county clerk shall remove the privacy flap to verify that the voter signed the official mailing envelope and confirm that the last four digits of the social security number provided by the voter matches the information on the voter's certificate of registration. If the signature is present and the last four digits of the voter's social security number match, the county clerk shall note in the absentee ballot register that the ballot was accepted and shall transfer the ballot to the special deputy for mailed ballots for delivery to the absent voter election board. If either the voter's signature is missing or the last four digits of the voter's social security number are not provided or do not match, the county clerk shall reject the mailed ballot and make the appropriate notation in the absentee ballot register and shall transfer the ballot to the special deputy for mailed ballots for delivery to the absent voter election board. If the mailed ballot is rejected, the county clerk shall within one day send the voter a notice of rejection, along with information regarding how the voter may cure the reason for the rejection. The determination of the county clerk to accept or reject a mailed ballot is subject to a later interposition of a challenge before the absent voter election board. In addition to existing

> procedures in the Election Code for qualifying a previously rejected absentee ballot after election day, a previously rejected absentee ballot may be qualified by the presiding judge and election judges of the absent voter election board before the day of the 2020 general election if the ballot was rejected for the lack of a signature or missing required voter identification if the voter provides such information pursuant to procedures established by the secretary of state.

NMSA 1978, § 1-12-72(J); *compare id.* § -72(I) ("To return a mailed ballot, each voter shall provide in the space provided for that purpose under the privacy flap of the official mailing envelope the voter's signature on a line located under the required attestation and the last four digits of the voter's social security number, which shall constitute the required voter identification."), *with id.* § 1-1-24 (defining "required voter identification" as being, at the voter's option, either a physical ID or the provision of one's own name, address of voter registration, and year of birth).

After the first-level check, the ballot is transmitted to the presiding and election judges and party-appointed challengers for a second-level review that should mirror past practice, which is codified in the preexisting (pre-S.B. 4) statute governing the handling of absentee ballots:

> B. If the voter's signature or the required voter identification is missing, the presiding judge shall write "Rejected" on the front of the official mailing envelope. The judge or election clerk shall enter the voter's name in the signature rosters or register and shall write the notation "Rejected — Missing Signature" or "Rejected — Missing Required Voter Identification" in the "Notations" column of the register. The presiding judge shall place the official mailing envelope unopened in a container provided for rejected ballots.

> C. A lawfully appointed challenger may view the official mailing envelope and may challenge the ballot of any mailed ballot voter for the following reasons:
>
> (1) the official mailing envelope has been opened by someone other than the voter prior to being received by the absent voter election board;
>
> (2) the official mailing envelope does not contain a signature;
>
> (3) the official mailing envelope does not contain the required voter identification; or
>
> (4) the person offering to vote is not a voter as provided in the Election Code.
>
> D. If a challenge is upheld by unanimous vote of the presiding judge and the election judges, the official mailing envelope shall not be opened but shall be placed in a container provided for challenged ballots. If the reason for the challenge is satisfied by the voter before the conclusion of the county canvass or as part of an appeal, the official mailing envelope shall be opened and the vote counted.

NMSA 1978, § 1-6-14(B)-(D). In the past, this transfer from the clerk to the election board has corresponded with a physical, locational transfer from the clerk's office to an off-site warehouse.

The following questions about this process are vitally (and self-evidently) important, must be answered in a uniform statewide manner, and have to date produced answers that vary wildly from county to county. These questions are listed in the order in which they arise along the absentee-ballot assembly line.

I. At the first-level stage of absentee-ballot processing described in § 1-12-72(J), are a reasonable number of party-appointed individuals (a) entitled to be, (b) allowed to be, upon the negotiation of satisfactory terms with the county clerk, or (c) prohibited from being, present to observe the processing?

The Petitioners take the position that the unique two-level ballot-qualification process created by S.B. 4 renders the clerk's office employees who handle the first-level check "election clerks who are appointed to assist the presiding judge and election judges," and thus part of the election board. NMSA 1978, § 1-2-12(A)(3). This would mean that challengers are *entitled* to be present for the process, even if it is not yet appropriate to interpose actual 'challenges.' *See id.* § 1-2-23(A).

At the very least, nothing forbids the county clerks from negotiating with their local political parties to allow non-obtrusive observation of the first-level review — and the Petitioners propose that, in the name of transparency and to assuage the public's unusually acute skepticism in election integrity this year, such consensual arrangements should be encouraged. As a practical matter, the purpose of such observation would be twofold: **(1)** to ensure that the clerk's office is actually at least attempting to conduct a check of the SSN digits against the database for accuracy (the first-level check remains important even if the second-level participants are permitted to check the accuracy of the SSN digits, because, given the time constraints on the second level, it may end up being the case that nothing but a spot-

check of a portion of ballots is practical at the second level); and **(2)** to safeguard against the visibly disparate treatment of ballots.

The SOS Guidance takes the position that public observation of the first-level review is outright forbidden. *See*, *e.g.*, SOS Guidance at 5 ("[C]hallengers are not allowed to monitor the initial qualification performed by the county clerk . . . ."). This position appears to be based on privacy concerns, the lack of a clear, affirmative guarantee of a right to presence, and S.B. 4's provision that "[t]he determination of the county clerk to accept or reject a mailed ballot is subject to a *later* interposition of a challenge before the absent voter election board." NMSA 1978, § 1-12-72(J) (emphasis added).

The Petitioners note that some counties have been allowing party-appointed individuals (or just members of the public) to be present for the first-level review, and two large counties have gone from initially allowing the practice a few days ago to now forbidding it, presumably in response to the Respondent's directives.

II. When the clerk's office completes its first-level review of the ballots and transfers them to the presiding and election judges and challengers for second-level review, (a) are those ballots rejected at the first level but not yet rectified by their voters transferred to the judges and challengers but kept segregated from those ballots accepted at the first-level review, and (b) do the judges and challengers have the ability to overturn a first-level *rejection* and, if so, does it require a unanimous vote of the election board's judges?

The Petitioners' position is that the statutory provision that "[t]he determination of the county clerk *to accept or reject* a mailed ballot is subject to a later interposition of a challenge before the absent voter election board," implicitly requires the clerks to segregate and identify those ballots rejected at the first-level review, and explicitly allows challenges to first-level rejections. NMSA 1978, § 1-12-72(J) (emphasis added). Although the ordinary procedure is that a "a challenge [must be] upheld by unanimous vote of the presiding judge and the election judges," NMSA 1978, § 1-6-14(D), this (pre-S.B. 4) process only contemplated successful challenges as resulting in the rejection of a ballot, not the acceptance of one. The Petitioners respectfully submit that, if a challenge is interposed against a first-level-rejected ballot, at least a majority vote of the judges should be required to sustain the rejection, and a failure of majority support should result in the ballot being counted. That said, any such rule *must* be coupled with an affirmative answer to the question immediately below, *see* Issue III, *infra*, or the ultimate result would be the effective reading out of the voter-identification requirement.

The Petitioners have received different answers, and mostly non-answers, to this question. The SOS Guidance does not appear to speak to this issue.

III. At the 'second-level' stage of absentee-ballot processing described in § 1-6-14, are the (a) presiding and election judges, and (b) challengers entitled to compare the 4 SSN digits on each ballot to a roster containing the correct information, or are these individuals effectively limited to scanning the face of the ballot to see if *something* is written there?

The law makes three points clear: **(1)** "[a] lawfully appointed challenger may view the official mailing envelope and may challenge the ballot of any mailed ballot voter for . . . not contain[ing] the required voter identification," NMSA 1978, § 1-6-14(C)(3); **(2)** "the last four digits of the voter's social security number[ ] shall constitute the required voter identification" for this election, id. § 1-12-72(I); and **(3)** "[a] challenger, for the purpose of interposing challenges, may[ ] view the signature roster or precinct voter list for the purpose of determining whether the challenger desires to interpose a challenge when a signature roster or precinct voter list is used," *id.* § 1-2-23(B)(1). In order to give effect to all these provisions without creating conflicts or nullities, presiding and election judges and challengers must be permitted to compare ballots with a roster containing the correct SSN digits,[2] and they must be allowed to reject ballots and interpose challenges on the basis of

[2] This roster would presumably be the absentee ballot register, *see* NMSA 1978, § 1-6-6, although in the past these registers have not contained the last four digits of voters' SSNs. In any event, an appropriate roster must exist in order for the first-level check to be performed.

incorrect voter identification information — not merely the complete absence of any numbers in the appropriate field. The Legislature presumably weighed and accounted for voter privacy concerns with its imposition of reasonable safeguards, such as limiting the roster information to only the last four digits of the SSNs and prohibiting second-level participants from copying or removing the rosters. *Cf.* NMSA 1978, § 14-2-6(E)(1)(a) ("'[P]rotected personal identifier information' means . . . all but the last four digits of a . . . taxpayer identification number . . . .").[3]

As noted earlier, the SOS Guidance is unclear on this point.[4] The primary argument against the Petitioners' position is a pre-S.B. 4 statute providing that "[c]hallengers, watchers and county canvass observers shall . . . not be allowed to view a voter's full date of birth or any portion of the voter's social security number." NMSA 1978, § 1-2-25(A)(3). This statute appears to have been overlooked when the S.B. 4 procedures, which utilize SSNs in a new way than any previous election, were drafted.

[3] It should also be noted that, for the vast majority of voters, the digits written on the ballot will be the correct last-four digits of their social security numbers, so no privacy interests are being furthered by allowing challengers to view it there but not allowing them to view it on a roster.

[4] The Respondent's pre-SOS Guidance ruling on the matter appeared to tack — or was interpreted as matching — the Petitioners' interpretation. *See* NMAC § 1.10.15.9(B) ("A challenger will not be allowed to view a voter's full date of birth or any portion of the voter social security number *except as provided on the official mailing envelope pursuant to Subsection C of Section 1-6-14* NMSA 1978." (emphasis added)).

IV. At the (a) first- and (b) second-level review stages, is the right of the participants handling the ballots to contact voters with defective ballots limited to the one-time written notice described in § 1-12-72(J), and, if not, are there any limitations on the right of participants to contact such voters?

S.B. 4 provides that, "[i]f [a] mailed ballot is rejected, the county clerk shall within one day send the voter a notice of rejection, along with information regarding how the voter may cure the reason for the rejection." NMSA 1978, § 1-12-72(J). At the first-level review — which, after all, is a government-facilitated process in which fairness is expected — the Petitioners take the position that the mandated written notice must be delivered by mail,[5] and that any further attempts to contact such voters can be made only if uniformly applied to *all* voters whose ballots are rejected. That is, a county clerk could permissibly employ a system whereby it contacts voters with rejected ballots more than once by mail, or makes additional attempts by email or phone, but only provided that the number of contact attempts per method is fixed and that the email addresses and phone numbers come from a government-maintained database compiled using means that provide equal opportunity for all voters, regardless of political-party registration or of race, gender, or any other

[5] Some clerks have been using text messages — which the Petitioners believe to be a fine supplementary contact method, provided it is done for everyone — but far and away the most complete records are of addresses. The Petitioners submit that notice should be sent, at a minimum, to both the voter's registration mailing address and the address to which the voter asked the clerk to send the ballot (in the presumably substantial minority of cases where the two addresses are different).

suspect categorization. At the second-level check, challengers and judges should be entitled to contact voters by whatever means, and using whatever criteria, they see fit — provided, obviously, that they refrain from harassment, intimidation, and other improper or criminal behavior.

Except for one clerk who states that she will not send more than the single required notice, neither the Respondent nor the county clerks appear to have staked out a position on this set of issues. However, problematic disparities have arisen in the past in the treatment of different voters with rejected absentee ballots. Because there will likely be a sharp uptick in rejected ballots in this election (if only due to the dramatic increase in absentee voting overall), fair processes for affording voters an opportunity to rectify their ballots should be implemented.

CONCLUSION

In the midst of the COVID-19 pandemic and the resultant spike in absentee voting, the creation of an entirely new set of laws governing the administration of that type of voting presents inevitable last-minute issues. These are compounded in part by the widespread replacement of longtime election workers with a younger, less-experienced cohort, exacerbating the inconsistencies in the counties' procedures as described above. The Court should address these issues on the front end, rather than waiting until the only available remedy is the irrevocable rejection of ballots,

or — ultimately worse — the landslide-pace erosion of confidence in the integrity, fairness, and transparency of the electoral process.

Respectfully submitted,

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Exhibit List

Ex. 1: SOS Guidance (6 pages)

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure, specifically Rule 12-504(G)(3) NMRA. The body of this brief employs 14-point Times New Roman font and contains 4,046 words, counted using Microsoft Office Word.

HARRISON & HART, LLC

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

VERIFICATION

I, Carter B. Harrison IV, counsel for the Petitioners, being duly sworn upon my oath, state that I have read this Emergency Verified Petition for Superintending Control and Request for Stay, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: October 24, 2020

HARRISON & HART, LLC

By: 
Carter B. Harrison IV

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October 2020, a true and correct copy of the foregoing Writ Petition was served by email and U.S. Mail to Respondent Maggie Toulouse Oliver, the Secretary of State of New Mexico, by way of her office's general counsel, Dylan Lange, whose email address is Dylan.Lange@state.nm.us.

HARRISON & HART, LLC

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