IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
THE LEGISLATIVE COUNCIL,

Petitioner,

v. **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.

On an Original Petition for an
Emergency Writ of Mandamus

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR EMERGENCY WRIT OF MANDAMUS

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Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

New Mexico Cases:

Federal Cases:

Page

Other State Cases:

Constitutional Provisions:

REPLY IN SUPPORT OF THE LEGISLATIVE COUNCIL'S VERIFIED ORIGINAL PETITION FOR EMERGENCY WRIT OF MANDAMUS

INTRODUCTION

By vetoing the entire appropriation for the legislative branch of government, the Governor has signed into law an appropriation act which violates the express provision of Art. IV, § 16, of the New Mexico Constitution requiring the legislature to pass a General Appropriation Act funding all three branches of government. A governor cannot exercise the limited legislative authority given to her by Art. IV, § 22, to do something that the legislature itself is prohibited from doing. Just as a failure by a legislature to fund either the executive or the judiciary would violate both Article IV, § 16 and the separation of powers mandated by Art. III, § 1, a governor's veto of all funding for the legislature cannot stand. Nor can either the legislature or the governor zero out institutions of higher education established by Constitution and statute. The Governor here has abused her quasi-legislative authority by doing both of these things. This Court should resolve the basic constitutional question now because of its importance and because to do so is the only way to restore both for today and the future the equal playing field central to our constitutional system of government.

ARGUMENT

I. THE GOVERNOR'S EXERCISE OF HER ITEM VETO VIOLATES THE NEW MEXICO CONSTITUTION.

The Governor's *Response* to this Court attempts to fit within established principles the extraordinary use of the line-item veto to eliminate a co-equal branch of government and an entire constitutionally-established state university system. There is no case in any state where the executive has used a line-item veto to zero-out a co-equal branch of government or to eliminate every state institution of higher education. The Governor's line-item vetoes so disturb the balance of power essential to our constitutional system of government that they threaten the continuation of the legislature in its role as a co-equal branch of government, and the constitutionally recognized system of higher education.

A. The Line-Item Veto Authority is Strictly Limited by Constitutional Separation of Powers Principles.

Our Constitution defines and limits the partial and line-item veto. Despite the Governor's claim otherwise, Petitioner does not seek to intrude upon the executive's legitimate constitutional authority; rather, Petitioner simply seeks to prevent the Governor from intruding on the Legislature's authority as a co-equal branch of government.

Although the veto power may be "legislative" in nature, giving such authority to the executive "is an exception to the separation of powers

otherwise required ... and is *in derogation of the general plan of state government*." *The Colorado General Assembly v. Lamm,* 704 P.2d 1371, 1383 (Colo. 1985) (emphasis added). It is therefore a power which must be evaluated against the backdrop of "general principles and purposes" which underlie its adoption — to prevent logrolling, to prevent the attachment of riders, and to avoid omnibus appropriation practices in the context of a general appropriation act (evils precluded in general legislation by the single subject rule). *See id.* But none of those evils are implicated in the present case where the wholesale and extraordinary use of item vetoes threaten and seek to destroy funding for the entire legislative branch.

The limited line-item veto power was never intended to upend the balance of powers established by Art. III, § 1. As this Court has stated, "[t]he power of the 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." *State ex rel. Sego v. Kirkpatrick,* 1974-NMSC-059, ¶ 5, 86 N.M. 359, 524 P.2d 975. The executive's line-item veto power is strictly limited by the concept of checks and balances, which is a concept rooted in separation of powers. *Id.* ¶ 7; Const. Art. III, § 1. It is settled law that the Governor cannot use the line-item veto in a way that encroaches on another branch of government or seizes power allocated to that other branch. *Id.*; *Mistretta v. United States,*

488 U.S. 361, 382 (1989); *State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶¶ 12, 14, 15, 270P.3d 96 ([t]he power of the partial veto ... is not the power to enact or create new legislation .... a partial veto must be so exercised that it ... does not distort the legislative intent, and create legislation inconsistent with that enacted by the Legislature").

B. The Governor's Line-Item Vetoes Violate Art. IV, § 16.

A governor cannot rewrite legislation to accomplish something the Constitution prohibits. Art. IV, § 16 of our Constitution explicitly provides that a general appropriation bill "shall embrace ... appropriations for the expense of the executive, legislative and judiciary departments." The General Appropriation Act passed by the Legislature and sent to the Governor complied with that requirement. What the Governor has done is to use the limited line-item veto power to rewrite the Appropriation Act to accomplish a purpose which Art. IV, § 16 forbids.[1]

Article IV, § 16 also requires funding for the expenses "required by existing law," including funding the operational expenses of those state government entities which are established by our Constitution. New Mexico's six state universities and other educational institutions are

[1] The Governor claims that she is being trapped into a "heads I win, tails you lose argument." *Resp*. 11-12. The Governor's argument misses the central point of this Court's decisions: the question is not whether the Governor has stricken too much or too little language; it is whether what is left behind continues to accurately reflect the legislative purpose and remains consistent with all provisions of the constitution.

established and "confirmed as state educational institutions" in Const. Art. XII, § 11. Each of those schools and entities must also be included in a General Appropriation Act under the requirement of Art. IV, § 16.

This Court has already made clear that the legislature is prohibited from defunding these institutions. They cannot be put out of business indirectly by the reduction of the appropriations on which they depend, just as the legislature cannot directly abolish them. As this Court has cogently stated:

> [b]ut for the constraining influence of Const. Art. 4, § 16, ... the appropriation on which administrative boards ... depend for existence and operation could be so reduced in a general appropriation bill as to put it out of business as effectively as if repealed [and] if it has this effect it violates this constitutional proviso.

State ex rel. Prater v. State Bd. of Finance, 1955-NMSC-013, ¶ 11, 59 N.M. 121, 279 P.2d 1042; *see also Thompson v. Legislative Audit Comm'n*, 1968-NMSC-184, ¶ 6, 79 N.M. 693, 448 P.2d 799.

The Montana Supreme Court addressed this very issue in the context of the State's higher education system in *Board of Regents of Higher Education v. Judge*, 543 P.2d 1323 (Mont. 1975). That court agreed with this Court's decision in *Prater*, holding that:

> the legislature cannot do indirectly through the means of line item appropriations and conditions what it is impermissible for it to do directly. Line item appropriations become constitutionally impermissible when the authority of the Regents to supervise, coordinate, manage and control the

> university system is infringed by legislative control over expenditures.

Id. at 1333.

In ruling upon questions involving the balance of powers, the role of this Court is to make sure that neither the legislature nor the governor exceeds the bounds of the constitution – the legislature in drafting legislation and the governor in exercising the veto. *See State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 24, 107 N.M. 439, 759 P.2d 1380 ("we seek to provide a balanced allocation of powers between the executive and legislative branch of government as contemplated in article III, section 1 of the New Mexico Constitution"). It is sometimes difficult to determine where to draw the line between the legitimate use of the line-item veto to reduce funding and a use which impairs the core functions of an agency or entire branch of government, essentially putting it out of business.

However, there is no such difficulty here. All funding has been zeroed out for our legislature and for all of its essential support systems: the Legislative Council, the committees that it must appoint by law, the administrative agencies of the legislature, and even the operation and maintenance of the building where the legislature meets to conduct its business. Similarly, every university and university-run program, every salary, and every institutional support for these universities and university-run programs has been zeroed-out. There can be no debate here about

whether the Governor's use of the veto crosses the line; it effectively puts the legislature and the state institutions out of business.[2]

C. The Governor Had Constitutional Alternatives Which She Chose Not to Exercise.

The Governor would have this Court believe that it is the Legislature that is trying to take away the executive's line-item veto power by petitioning for relief. The Governor claims that if these vetoes are not recognized as constitutional by this Court, a governor will have no alternative but to allow the legislature to unilaterally determine all appropriations: "So the end result is the Governor has no veto power at all and no choice but to accept the appropriation bill presented to her by the Legislature." *Resp.* 13.

This is plainly not the case because the Governor had several constitutional alternatives. If her purpose was to balance the budget, she was free to go through the budget and veto particular line items needed to

[2] The Governor's use of the line-item veto approximately 700 times to put the entire state education system out of business is much different from the normal give and take between the executive and the Senate over the appointment and confirmation of regents. *See* Pet. Ex. C, at p. 7. The Constitution anticipates that the Senate may not always act on new appointments in a limited session and addresses that by providing in Art. XX, § 2, for holding over current appointees until new ones are confirmed. For whatever reason a governor might wish to substitute for a holdover regent, "the state's education institutions must be free from the possibility of political manipulation; and the integrity and independence of the regents must be protected." *Denish v. Johnson*, 1996-NMSC-005, ¶ 54, 121 N.M. 280, 910 P.2d 914.

achieve that balance. There was absolutely no necessity to veto the operating budget for an entire branch of government or for the entire state university system.

The Legislature's funding was hardly an appropriate target for balancing the budget. The Legislature's entire budget, including all of the vetoed appropriations for the Legislative Council, the five legislative agencies it oversees, and other operating expenses amounts to 0.3% of the money appropriated by the Legislature for all of state government. Exs. 1 and 2 hereto. In her veto message to the Legislature, the Governor expresses concern about a $120,000 increase over last year in the appropriation for the Legislative Finance Committee. If that was her concern, there were line items which could have been vetoed to reduce the legislature's budget by the objectionable $120,000 without eviscerating an entire branch of government. Examples are found at Pet. Ex. A, p. 33, lines 14 and 21 and p. 34, lines 2, 4, dealing with dues and membership fees for conferences and for organizations of state legislators. The Governor vetoed these four listed items, but did not stop there, going on to veto all funding for the legislative branch.

The Governor's line-item vetoes of appropriations for higher education run for nearly 30 continuous pages and include hundreds of items. Pet. Ex. A, at pp. 134-162. Again, if the Governor's purpose was to

balance the budget, there were many opportunities to use the line-item veto selectively to achieve that goal. The Governor chose instead to destroy the entire state university system.

Moreover, if the Governor believed that the General Appropriation Act was so flawed that she could not correct the problems she saw with a properly employed line-item veto, then she had the alternative, consistent with Art. IV, § 22 of the Constitution, to veto the whole appropriation bill, an act that is far less draconian than eliminating all funding for a branch of government. A veto of the entire General Appropriation Act is the route New Mexico governors have taken in the past when a serious dispute has arisen between the branches of government. *See Resp.*, Ex. E (Governor Johnson vetoed the entire appropriation act six times and no petition to this Court was necessary).

Vetoing the whole appropriation bill is less draconian because it would have placed the Governor and the Legislature on an equal footing in a special session with both branches able to perform their appropriate functions. All funding for state government, including the executive department, the legislature, and the judiciary would have been on the table. As it is, the Legislature is limited in what it can accomplish by the Governor's vetoes which enacted into law appropriations to the executive departments totaling 87.5 % of the money available in the 2018 fiscal year.

The wholesale manner in which the line-item veto was exercised has disrupted the balance of powers and usurped the role of the legislature, the branch which is charged by our Constitution with deciding how to allocate funds. *State ex rel. Schwartz v. Johnson,* 1995-NMSC-080, ¶¶ 3, 8, 120 N.M. 820, 907 P.2d 1001 ("the power of controlling the public purse lies within legislative, not executive authority"); *State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶¶ 12, 14, 15, 270 P.3d 96 ([t]he power of the partial veto … is not the power to enact or create new legislation … a partial veto must be so exercised that it … does not distort the legislative intent, and create legislation inconsistent with that enacted by the Legislature").

Absent a ruling by this Court declaring the Governor's use of the veto unconstitutional, when disagreements as to appropriations arise in the future, as they inevitably will, governors will be able to threaten the very existence of the legislature and other essential state institutions. This ill-advised approach is plainly an unconstitutional intrusion on the role of the legislature and a significant disruption of the balance of powers intended by the drafters of the Constitution.

II. PETITIONER HAS PROPERLY INVOKED THIS COURT'S ORIGINAL JURISDICTION.

The Governor urges this Court to defer its exercise of jurisdiction on the basis that a special session announced on the day she filed her Response to the Petition (May 5, 2017) will allegedly afford the relief sought by the Legislature. Contrary to the Governor's argument, when this Court's "prudential rules of judicial self-governance," including standing, ripeness, and mootness are considered, it is apparent that this Court should exercise its broad discretion to decide the fundamental constitutional questions presented here. Absent this Court's intervention, the unconstitutional action threatens to irreparably and permanently disrupt the balance of powers between the legislature and the executive, which are central to our constitutional system of government.

First, "the New Mexico Constitution does not expressly impose a 'case or controversy' limitation on state courts like that imposed upon the federal judiciary by Article III, Section 2 of the United States Constitution." *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746. Rather, this Court properly imposes its own "prudential rules of judicial self-governance." *Id.* It does so with greater flexibility tailored to the particular circumstances of the case. So, with respect to the correlative prudential rule for standing, this Court has made clear that "when presented with issues of constitutional and fundamental importance

... [w]e simply elect to confer standing on the basis of the importance of the public issue involved." *State ex rel. Clark v. Johnson,* 1995-NMSC-048, ¶ 15, 120 N.M. 562, 904 P.2d 11, *citing State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 7. Furthermore, with respect to the ripeness doctrine, it is applied "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Rio Grande Kennel Club v. City of Albuquerque,* 2008-NMCA-093, ¶ 24, 144 N.M. 636, 190 P.3d 1131.

In this case, there is no question about the importance of the issue involved — whether it was unconstitutional for the Governor's use of the item veto to abolish the annual funding for the entire legislative branch and the entire higher education system in New Mexico in the General Appropriation Act. Furthermore, that issue is clearly presented here, and it is an issue upon which there is no "abstract disagreement." Rather, to the contrary, Petitioner believes that use of the line-item veto is unconstitutional and the Respondents believe it to be an appropriate use of the item veto, even though there are no cases where such an extraordinary use of the item veto has ever been so broadly extended.

This Court has always held that where a veto is invalid, the veto is a nullity, and no attempt to override that veto is required before the parties have recourse to this Court. S*ee State ex. rel. Coll v. Carruthers,* 1988-

NMSC-057, ¶ 9 (refusing to require attempted override before a constitutional challenge to an item veto because "a veto override is no substitute for unsound legislative enactments."). *See also, State ex rel. Cason v. Bond*, 495 S.W. 2d 385, 393 (Mo. 1973) ("invalid veto is a nullity" and, therefore, no attempt to override is required). As set forth above in Section I, the item veto abolition of all funding for the legislature and for the entire university system is unconstitutional and a nullity that cannot be allowed to stand.

Resolution of the constitutionality of the vetoes is necessary for the Legislature and the Governor to know how to approach the special session. The parties need to know whether the current appropriation bill with the Governor's vetoes is the law of New Mexico. Additionally, the parties need to know whether the Governor has the power to threaten the very existence of the Legislature to obtain the budget she wants or force the confirmation of her preferred candidates. Thus, resolution of this case now is appropriate to ensure that this further debate between the political branches takes place against the backdrop of what the law requires, without an existential threat looming over one branch of government.

Respondents root their adequate remedy at law/ripeness claim on the discretionary action of this Court taken in *State ex rel. Stewart v. Martinez,* Sup. Ct. No. 33,028 (Order of July 15, 2011 (Respondents' Exhibit D),

holding in abeyance the challenge to a Governor's line-item veto until after a special session in which the subject of that veto was included in the Governor's proclamation. *See Resp*. at 6-7. This case is nothing like *Stewart* which involved five line-item vetoes in a single piece of substantive legislation. *Id*. at 4. The questions raised could be easily resolved by a simple statutory fix, without causing any confusion in the law or damage to the political process. In that context, it was appropriate for this Court to initially abstain, even though the Court was ultimately required to finally resolve the question when the special session did not.

Here, in contrast, this Court is confronted by a constitutional question of critical importance to the operation of our system of government. This Court should resolve the basic constitutional question *now* because of its importance and because to do so is the only way to restore both for today and for the future the proper operation of our constitutional system of government.

CONCLUSION

The Petitioner asks this Court to restore the constitutional balance of power disrupted by the Governor's unconstitutional use of the line-item veto power. No coordinate branch of government should be permitted to conduct its affairs so that a co-equal branch is substantially deprived of a fair opportunity to exercise its constitutional prerogatives. *See Washington*

State Legislature v. Lowry, 931 P.2d 885, 892 (Wash. 1997). As the West Virginia Supreme Court recognized in *State ex rel. Brotherton v. Blankenship,* 207 S.E.2d 421, 433 (W.Va. 1973), a "Governor's act in reducing [the operating budget of an office] to zero … has effectively abolished the function of such offices" and, by doing so, undermined the delicate balance of powers on which government depends.

Petitioner asks this Court to issue a writ declaring unconstitutional the Governor's use of her line-item veto to zero-out the funding for our Legislature and our institutions of higher education.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic transmission and by email to the to the following opposing counsel on this the 10th day of May, 2017:

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