IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
KARL REIFSTECK, Director,
Administrative Office of the Courts,

Petitioner.

vs. No. S-1-SC-40592

WAYNE PROPST, Secretary of Finance
and Administration,

Respondent.

RESPONSE TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

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Introduction

Petitioner Reifsteck's petition seeks to compel Respondent Propst by writ of mandamus to implement a paid time off ("PTO") policy for employees of the judiciary. Respondent has declined to do so, on the ground that the policy violates legislative restrictions on the expenditure of public funds. While the petition depicts this case as a violation of separation of powers that infringes upon the powers of the judicial branch, the situation is exactly the opposite: granting the petition would deny the Legislature "its exclusive power of deciding how, when, and for what purpose . . . public funds shall be applied." *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 14, 120 N.M. 820 (internal quotation marks & citation omitted).

The petition should be denied for two primary reasons. First, the petition does not present the sort of situation that is appropriately addressed by this Court's exercise of its mandamus jurisdiction in the first instance. Second, Petitioner's argument based on a constitutional separation of powers analysis lacks merit.

Respondent has also raised practical objections to implementing the PTO policy, while Petitioner has depicted the policy as advantageous. But the wisdom and efficacy of the PTO policy are not at issue here; the legality of the policy is the sole question for this Court to determine. And, while separation of powers concerns are not the only basis for questioning the validity of the PTO policy at

least in some applications, they are the concerns most directly implicated by the petition and are the principal focus of this response. The petition should be rejected on the following grounds.[1]

I. PETITIONER HAS NOT DEMONSTRATED CIRCUMSTANCES JUSTIFYING ISSUANCE OF A WRIT OF MANDAMUS BY THIS COURT IN THE FIRST INSTANCE.

As initial matter, Petitioner fails to identify any "emergency," despite styling the petition as an "Emergency Verified Petition for Writ of Mandamus." Petitioner does not explain why this matter must be heard on an emergency, expedited basis. Exhibits 1 and 2 to the petition unequivocally show that there is no emergency; Petitioner waited three months to file the petition after sending a letter to Respondent giving him a deadline to respond of July 10, 2024. In addition, the Department of Finance and Administration has been making leave payouts comporting with the statutes limiting sick leave hereinafter discussed, while withholding any payouts exceeding those limitations. As such, judicial employees are receiving the payments they are entitled to under the existing statutory scheme. There is no reason here to circumvent the normal procedures for adjudicating

[1] This Court directed Respondent to file a response to the petition by October 8, 2024, effectively allowing Respondent just five business days to respond to a pleading that had likely taken a considerably longer time to prepare. Because the opportunity to prepare and defend against the allegations of an opponent is part of "[t]he essence of due process," *Miller v. Tafoya*, 2003-NMSC-015, ¶ 16, 134 N.M. 335, Respondent requests an opportunity to brief this matter more fully should it proceed beyond the petition stage.

petitions for writs of mandamus. Petitioner's failure to justify his emergency request should not be excused. To permit otherwise unreasonably deprives Respondent of the due process required in important issues such as those presented in this proceeding.

Importantly, Petitioner cannot meet the high standard required for a writ of mandamus. "Mandamus is a *drastic remedy* to be invoked only in *extraordinary circumstances*." *Quality Auto. Ctr., LLC v. Arrieta*, 2013-NMSC-041, ¶ 19, 309 P.3d 80 (emphases added). Petitioner does not explain why this case involves extraordinary circumstances warranting a drastic remedy. This case is about additional leave payouts for judicial employees. If the Court ultimately rules in Petitioner's favor, employees will be able to receive such payments. There is no reason this matter cannot proceed as other civil cases do, via a declaratory action in the district court. *See id.* ¶¶ 19-20 (a writ shall not issue where "there is a plain, speedy and adequate remedy in the ordinary course of law.") (citing NMSA 1978, § 44-2-5); *see also Citizens for Fair Rates & the Env't. v. N.M. Pub. Reg. Comm'n*, 2022-NMSC-010, ¶ 22, 503 P.3d 1138 (". . . [C]onstitutional challenges to a legislative enactment may be brought in declaratory action under the original jurisdiction of the district court. However, the district court's jurisdiction over these challenges is not exclusive. For example, this Court may exercise its original jurisdiction, such as in mandamus . . ., concurrently with the original jurisdiction of

the district court.") (citations omitted). Pursuing the ordinary course would allow the development of a full factual record and consideration of the matter by the district court and Court of Appeals prior to this Court's review, enabling the Court ultimately to reach a more informed decision.

A writ seeking to prohibit unlawful or unconstitutional official action must satisfy all of the following elements:

> [it must] present[] a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

Indigenous Lifeways v. N.M. Compilation Comm'n Advisory Comm., 2023-NMSC-010, ¶ 12, 528 P.3d 678. Petitioner fails to explain how he satisfies these elements, particularly how this case involves a pure legal issue concerning a non-discretionary duty that can be answered based on virtually undisputed facts, and that calls for an expeditious resolution that cannot be obtained through other channels.

Respondent has no clear, existing, and nondiscretionary duty to spend public monies to pay judicial employees differently from other state employees. *See Kiddy v. Bd. of Cnty. Comm'rs of Eddy Cnty.*, 1953-NMSC-023, ¶ 7, 57 N.M. 145 ("Mandamus traditionally lies to direct performance of nondiscretionary tasks.").

To the contrary, this case is about a *new* judiciary policy that does not bind Respondent and that violates New Mexico law.

Nor does Petitioner have a "clear legal right" to a particular remedy based on a "clear legal duty to perform" a particular act by Respondent. *Quality Auto. Ctr., LLC*, 2013-NMSC-041, ¶ 19. *See also New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207 (explaining that mandamus lies when there exists an "act or duty that is clear and indisputable.").

Here, the Court's March 10, 2023 Administrative Order ("AO") approved the Administrative Office of the Courts' recommended paid time off amendments for judicial personnel. As the petition acknowledges, the AO imposes duties on *Petitioner*. (Pet. at 3). It does not mention Respondent, does not bind Respondent, does not require him to do anything and is not enforceable against Respondent.[2]

Respondent was neither party or privy to, nor had any opportunity to participate in the proceedings leading to the AO's issuance. "It is an acknowledged

[2] Petitioner argues that for a period of time starting in May 2023 Respondent processed leave for judicial employees as Petitioner wanted. (Pet. at 7). During that time, Respondent was attempting to come to a resolution with Petitioner and also sought advice from the Attorney General's office about the lawfulness of the PTO Policy. Once Respondent received the June 2024 AG Opinion stating that the PTO Policy contravened New Mexico law and Respondent should not make payments, the Respondent stopped doing so. Notably, legislative officials have since inquired about recouping these monies, suggesting that the Legislature also deems the PTO Policy to be violative New Mexico's statutory scheme for payments to state employees.

general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right." *Rice v. Schofield*, 1898-NMSC-003, ¶ 2, 9 N.M. 314 (quoting *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466 (1830) (internal quotations omitted)).

Petitioner overlooks the constitutional maxim that lawmaking is reserved solely to the legislature. N.M. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and house of representatives, which shall be designated the legislature of the state of New Mexico . . . ."). In other words, the petition does not raise a legal issue to be resolved by this Court. If Petitioner seeks to change established laws in the state, its efforts should be directed at petitioning the Legislature to amend its laws.

Indeed, the New Mexico Attorney General, reviewing the PTO policy, expressly stated that Respondent "may not permissibly implement the judiciary's PTO policies under existing law." *See* N.M. Att'y Gen., No. 24-07 (Jun. 13, 2024); *see also United States v. Reese*, 2014-NMSC-013, ¶ 36 (observing that although Attorney General opinions do not have the force of law, they are entitled to great weight). Despite this clear directive, Petitioner seeks to force Respondent to make payouts under the judiciary's PTO policies. Petitioner has not met the standard for

issuing a writ. Worse, as explained further below, Petitioner seeks to force Respondent to act contrary to New Mexico law.

II. IMPLEMENTING THE PTO POLICY WOULD INFRINGE UPON THE LEGISLATURE'S EXCLUSIVE POWER OVER EXPENDITURES OF PUBLIC FUNDS, IN VIOLATION OF THE CONSTITUTIONAL SEPARATION OF POWERS.

Except as otherwise provided in the state Constitution, the departments of government are "distinct," and no branch of government "shall exercise any powers properly belonging to either of the others." N.M. Const. art. III, § 1. In the most basic terms, "[t]he Legislature makes, the executive executes, and the judiciary construes, the laws." *State v. Fifth Jud. Dist. Ct.*, 1932-NMSC-023, ¶ 9, 26 N.M. 151.

"[I]t is well established that the power of controlling the public purse lies within the legislative . . . authority." *Schwartz*, 1995-NMSC-080, ¶ 8 (internal quotation marks & citation omitted). The Legislature thus holds the "exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government." *Id.* (internal quotation marks & citation omitted). *See also Kelly v. Marron*, 1915-NMSC-092, ¶ 5, 21 N.M. 239 (stating that the judiciary "has no power to interfere, nor is it concerned, with the enactment of laws by the legislative department").

The Legislature has specifically addressed the "how, when, and for what" aspects of public funds expenditures with respect to making payments to state employees for unused sick leave. NMSA 1978, § 10-7-10 (1984) authorizes payment for accumulated sick leave in excess of 600 hours at half the employee's hourly wage rate, with a maximum payout of 120 hours of sick leave per fiscal year. NMSA 1978, § 10-7-11 (1983) authorizes payment for accumulated sick leave upon the employee's retirement under similar terms, with a maximum payout of 400 hours of sick leave. Petitioner argues, without citing any authority, that Sections 10-7-10 and 10-7-11 do not apply to judicial employees. But both these statutes apply to any "employee of the state," without qualification by branch of government.

Petitioner cannot credibly argue that PTO reimbursable under the PTO policy is not "sick leave" covered by Sections 10-7-10 and 10-7-11. While neither of these provisions defines "sick leave," the term has a well understood common meaning that is reflected elsewhere in New Mexico statutory law. *Black's Law Dictionary* 1414 (Deluxe 8th ed. 2004) (defining "sick leave" to mean "[a]n employment benefit allowing a worker time off for sickness, either with or without pay, but without loss of seniority or other benefits."). The Legislature has defined "sick leave" to mean "a leave of absence from employment for which a state agency or public school pays an eligible employee due to illness or injury or to

receive care from a licensed or certified health professional," NMSA 1978, § 10-16H-2(C) (2019), and "time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as an employee normally earns during hours worked and is provided by an employer to that employee for the purposes" of medical care or a health condition or injury. NMSA 1978, § 50-17-3(C) (2021). There is little question that PTO meets these definitions because it not only includes leave previously earned as sick leave but also may be used for medical care with different requirements than for its use for personal reasons.

As outlined in the Judicial Branch Personnel Rules, PTO essentially combines annual leave, sick leave, and a personal holiday and unquestionably retains a sick leave component. The amount of PTO accrued equates to a combination of former accrual rates for annual leave, sick leave, and a personal holiday. *See* NMJBPR § 5.14(M). In addition, the PTO policy expressly provides that PTO "may be used for personal or medical reasons." NMJBPR Glossary of Terms, at 78 (defining "paid time off"). Further, PTO includes formerly accrued sick leave, both for employees working for the judiciary at the time of the PTO policy's enactment, NMJBPR § 5.14, and for employees that transfer from other branches, NMJBPR § 5.14(D). Finally, the Judicial Branch Personnel Rules expressly allow the use of PTO for medical reasons and include additional requirements for its use, such as a health care provider's certificate and a medical

release for the return to work under certain circumstances. NMJBPR § 5.14(R). PTO may be denied for failing to comply with these additional requirements. NMJBPR § 5.14(R)(4). PTO, at least in part, is sick leave.

The PTO policy violates Sections 10-7-10 and 10-7-11 because it does not limit payouts to accumulated hours over six hundred, it compensates employees at a full rate of pay for unused hours instead of the legislative maximum of fifty percent of the employee's hourly wage, and, in the case of retirement, it does not limit the number of hours subject to a payout to four hundred as required by Section 10-7-11. The PTO policy therefore provides for a greater payout to judicial employees, and a greater expenditure for employee benefits, than the Legislature allowed. The PTO policy also creates a gross disparity by providing greater benefits for unused leave to judicial branch employees than to other state employees despite the Legislature's intent for a maximum benefit applicable equally to all state employees.

Sections 10-7-10 and 10-7-11 are but two of numerous laws enacted by the Legislature governing various aspects of state employment. These laws cover employee conduct, *e.g.*, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2019) (Governmental Conduct Act), working conditions, *e.g.*, NMSA 1978, §§ 50-9-1 to -25 (1972, as amended through 2017) (Occupational Health and Safety Act), and, of particular relevance here, employment benefits. The

Legislature created a retirement system for state employees, NMSA 1978, §§ 10-11-1 to -143 (1987, as amended through 2024), provided for employees to have access to group health insurance and life insurance, NMSA 1978, § 10-7-4(E) (2023), and established a deferred compensation plan, NMSA 1978, §§ 10-7A-1 to -12 (1981, as amended through 2017). All of these laws governing employee benefits apply to judicial employees and executive employees, that is, employees of the other branches of government. *See* § 10-7-4(E); NMSA 1978, §§ 10-7A-2(E) (2017), 10-11-2(H) (2024). In fact, the Legislature has created a specific retirement plan for judges, NMSA 1978, § 10-12B-1 to -19 (1992, as amended through 2023). Historical practice and current law therefore indicate that Petitioner's claim of unconstitutional infringement on the powers of the judiciary is not well founded.

The principle of separation of powers establishes the judiciary as an independent branch of government, not an independent government unto itself. This Court's opinion in *Mowrer v. Rusk*, 1980-NMSC-113, 95 N.M. 48, is not to the contrary. In *Mowrer*, this Court held that employees of the municipal court of the City of Albuquerque could not be subjected to the City's merit ordinance and that the court could not be required to submit its budget for the mayor's approval before the budget was submitted to the City Council for appropriation. *Id.* ¶ 6. The Court observed that the municipal court administrator, who was employed by

the executive and was not supervised by the municipal judges, was vested with "broad discretion, authority and power . . . relating to the hiring, supervising and discharging of personnel working for the municipal court and relating to certain administrative functions of the court." *Id.* ¶ 29. The municipal court's inherent authority was infringed because the executive held "the power to coerce the judiciary into compliance with the wishes or whims of the executive." *Id.* ¶ 30.

The *Mowrer* Court noted that the "line of separation or demarcation" between the powers of one or another branch of government "is difficult to definitely and specifically define." *Id.* ¶ 24. "[S]ome overlap," however, is a practical necessity. *Id.* ¶ 25. In later decisions, the Court has held that "the proper inquiry focuses on the extent to which the action by one branch prevents another branch from accomplishing its constitutionally assigned functions." *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 34, 120 N.M. 562.

The executive actions in *Mowrer* are far different than those of Respondent. By enforcing a legislative limitation on leave payouts, Respondent in no way seeks to exercise the inherent power of the judiciary. Nor has Respondent disrupted or interfered with the inherent powers and functions of the judiciary so as to prevent the judiciary from accomplishing its constitutionally assigned functions. *See also Aguilar v. City Comm'n*, 1997-NMCA-045, ¶ 9, 123 N.M. 333 (upholding ordinance under which City Commission compiled a list from which municipal

judge had to choose a replacement, distinguishing *Mowrer*; "The ordinance does not give the City Commission the power to interfere with the municipal court's control over its employees or its day-to-day administrative functions, nor does the ordinance in any way preclude the Supreme Court or the district court from exercising their superintending or supervisory authority over the municipal court.").

III. THE LEGISLATURE HAS AUTHORITY OVER STATE EMPLOYMENT BENEFITS.

Given the Legislature's vast power over public policy and the protection of the public fisc, there is no question that the Legislature's authority over state employment benefits extends to restrictions on leave payouts. And like other limitations on benefits, such as the maximum percentage a public employer may pay for group health premiums, Section 10-7-4(E), this legislative power extends to employees of the other two branches of government. In exercise of this power, the Legislature has restricted payment for unused sick leave to fifty percent of an employee's hourly wage and only for accumulated amounts above six hundred hours. §§ 10-7-10 to -11. By applying to "an employee of the state," these statutes apply to judicial employees. *See* NMSA 1978, § 34-6-21 (1968) ("Personnel of the district court are subject to all laws and regulations applicable to state offices and

agencies and state officers and employees except where otherwise specifically provided by law.").

Accordingly, Petitioner's assertion that judicial employees cannot be subject to "general laws governing public employment" is without merit. (Pet. 14) It is well-settled that public policy decisions are the province of the Legislature. *See Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 11, 134 N.M. 43 ("[I]t is the particular domain of the [L]egislature, as the voice of the people, to make public policy.") (quoting *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609). The Legislature has made policy choices about the type of employee actions that rise to the level of misconduct or a criminal offense, about the type of working conditions that must be maintained in offices, and about employee benefits. These are core legislative decisions. This Court has long held "that every presumption is to be indulged in favor of the validity and regularity of legislative enactments." *City of Raton v. Sproule*, 1967-NMSC-141, ¶ 9, 78 N.M. 138. Petitioner provides no reason why judicial employees are an exception to the rule.

Indeed judicial employees are not immune from the Governmental Conduct Act or exempt from the Gift Act. NMSA 1978, § 10-16B-1 (2019). The judiciary does not have its own retirement plan or group health insurance for employees. And judicial employees receive their salaries "in accordance with rules issued by

the department of finance and administration" just like all other state employees. NMSA 1978, § 10-7-2(A) (2005).

IV. THE PTO POLICY IS CONSTITUTIONALLY IMPERMISSIBLE UNDER ARTICLE IV, SECTION 27.

In addition to invading the legislature's prerogative to make law and the executive's duty to enforce the laws, the PTO policy is constitutionally infirm in its application. "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made . . . except as otherwise provided in this constitution." N.M. Const. art. IV, § 27. The constitutional proscription against providing extra compensation after services are rendered or contract made applies not only to "officers," but also to public servants, agents or contractors. *Id.; State ex rel. Hudgins v. Pub. Employees Retirement Bd.,* 1954-NMSC-084, ¶ 8, 58 N.M. 543 (explaining that Article IV, Section 27 prohibits "giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made."). The PTO policy's attempt to allow a payout for leave accrued as sick leave before its enactment that would not have been compensable at the time of accrual, that is, to allow for retroactive payment, violates this provision. *Id.; see also* N.M. Att'y Gen., 77-18 (June 7, 1977) (concluding that school boards can include a benefit of unused sick leave as part of a compensation plan as long as the benefit complies

with statutes and regulations and does not apply retroactively in violation of Article IV, Section 27). The PTO policy's increased payouts to current and retired employees exceeding what they were entitled to at the time they became employed by the judiciary is clearly unconstitutional "extra compensation" and, in the instance of retired employees, constitutes compensation for work that was already performed. *State ex rel. Sedillo v. Sargent*, 1918-NMSC-042, ¶ 8, 24 N.M. 333 ("[O]ur constitution . . . prevents the giving of any extra compensation to a contractor, public officer, etc., after the services are rendered or the contract made, and necessarily refers to extra compensation for that which is contracted to be performed or for which the services are required."); *see also State ex rel. Sena v. Trujillo,* 1942-NMSC-044, ¶¶ 22-23, 46 N.M. 361, 129 P.2d 329 (concluding that a retired supreme court clerk could not benefit from a new pension program because "Sec. 27 of Art. IV and Sec. 31 of Art. IV of the Constitution prohibit the giving of extra compensation, 'after services are rendered', and appropriations 'to any person, corporation, association, institution or community, not under the absolute control of the state,' respectively.").

Because the increased payouts to judicial employees effectuated by the PTO policy represent extra compensation to employees for previously-rendered services within their ordinary scope of employment and/or to persons who are no longer employed by the state, they are barred by Article IV, Section 27 of the New

Mexico Constitution and the authorities cited above. Thus, the Court should deny Petitioner's attempt to make payouts to judicial employees in excess of what is permitted by statute.

V. POTENTIAL BIAS REQUIRES THE RECUSAL OF NON-RETIRED JUSTICES AND JUDGES.

Respondent respectfully questions whether the petition is properly resolved in the manner contemplated by the Court. Petitioner acts only "under the supervision and direction of the supreme court." NMSA 1978, § 34-9-3 (2019). As such, the Court both supervised and directed the filing of the petition, and it is effectively a petition of this Court. The issues asserted here should not be resolved in the same Court that directed the filing of the petition, and certainly not without the recusal of the full Court and without the participation of any non-retired members of the judiciary. Recusal of all non-retired justices and judges is necessary because the petition raises an issue that directly impacts current and future justices and judges and their employees and prospective employees, and is mandated by the Code of Judicial Conduct and constitutional due process requirements.

The New Mexico Code of Judicial Conduct requires that judges uphold and promote the independence, integrity, and impartiality of the judiciary and avoid impropriety and the appearance of impropriety. Rule 21-100 NMRA. *See also* Rule

21-102 NMRA ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."); Rule 21-200 NMRA ("A judge shall perform the duties of judicial office impartially, competently, and diligently."). Rule 21-202 NMRA ("A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially."). In any proceeding where a judge's impartiality *might* reasonably be questioned, the judge *shall* recuse himself or herself. Rule 21-211 NMRA.

The petition presents at least the risk of bias in that two of this Court's sitting justices will participate in deciding whether the Court had the authority to implement the PTO policy that it adopted. As sitting justices, it is not unreasonable to believe that they have an interest in the outcome of this case or that it is inevitable that they will rule in the Court's favor. At a minimum, this risk requires *all* the sitting justices of this Court to recuse themselves from this case. Appointing a sitting Court of Appeals judge does not help to eliminate the risk of a biased tribunal because such a judge is also charged with complying with and enforcing the PTO policy. To eliminate the risk of a biased tribunal, then, recusal of all non-retired justices and judges and appointment of a panel consisting entirely of retired justices or judges is necessary.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *cf. In re Estrada*, 2006-NMSC-047, ¶ 31, 140 N.M. 492 ("Our system of justice is built on the assumption that trials are fair."). The fairness mandated by constitutional due process proscribes not only "actual bias" but also "the probability of unfairness" in the adjudication of cases. *Murchison*, 349 U.S. at 136. The United States Supreme Court has explained:

> To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Murchison, 349 U.S. at 136.

The United States Supreme Court continues to hold that due process requires "the appearance of neutrality" and that "the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 579 U.S. 1, 15-16 (2016). The Court explained:

> A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

Id.

Binding precedents require recusal in circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009) (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)). The question is not "whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881.

In light of the potential for bias here, and given the due process guarantee that "no man can be a judge in his own case," the Court should disqualify from adjudicating the petition all members of the judiciary who participated in the adoption of the PTO policy or that may be tasked with enforcing it, that is, any non-retired justice or judge. *Williams*, 579 U.S. at 9 (the "objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome'")

(quotation, citation omitted); *see also Rippo v. Baker*, 580 U.S. 285, 287 (2017) (*per curiam*) (applying the foregoing principles and precedents).

The due process clause of the New Mexico Constitution, N.M. Const. art. II, § 18, cannot be deemed to require less "fairness" in adjudications than does the federal counterpart. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

VI. SUMMARY.

A writ of mandamus may issue "to force a clear legal right against one having a clear legal duty," *Quality Auto.*, 2013-NMSC-041, ¶ 19 (internal quotation marks & citation omitted), or to compel an official to refrain from "unlawful or unconstitutional official action," *Johnson*, 1995-NMSC-048, ¶ 19. Respondent's duty in this instance is to comply with legislative restrictions on the expenditure of public funds, not to comply with a PTO policy that – no matter how well intentioned – violates them. Determining when public funds may be paid out to state employees in exchange for unused sick leave is exclusively a legislative function that cannot be overridden by the judiciary. Article III, § 1 – the very

provision underlying the petition here – prohibits such a result. The petition for writ of mandamus therefore should be denied.

Conclusion

For the foregoing reasons, Respondent requests that the Court deny the petition.

Respectfully submitted,

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RULE 12-504(H) NMRA STATEMENT OF COMPLIANCE

The body of this *Response to Emergency Petition for Writ of Mandamus* uses a proportionally spaced typeface (Times New Roman), contains 4,948 words, as counted by Microsoft Word 2021, and thus complies with the limitations of Rule 12-504(G)(3) NMRA.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of October 2024, the foregoing was filed and served electronically through the Odyssey File & Serve System and caused to be served, via electronic mail, a copy of the foregoing upon:

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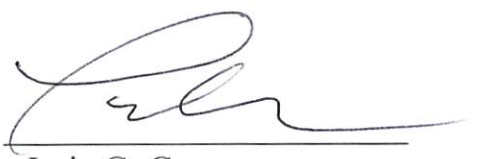
By: 
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