

SUMMARY OF AND ARGUMENTS



THE
CONSTITUTIONAL AMENDMENTS
PROPOSED BY THE LEGISLATURE
IN 2021 AND 2022

AMENDMENTS TO APPEAR ON THE
NOVEMBER 8, 2022
GENERAL ELECTION BALLOT

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Proposed Amendments to Appear
on the November 8, 2022 General Election Ballot
(ballot text)

Constitutional Amendment 1:

"PROPOSING AN AMENDMENT TO ARTICLE 12, SECTION 7 OF THE CONSTITUTION OF NEW MEXICO TO PROVIDE FOR ADDITIONAL ANNUAL DISTRIBUTIONS OF THE PERMANENT SCHOOL FUND FOR ENHANCED INSTRUCTION FOR STUDENTS AT RISK OF FAILURE, EXTENDING THE SCHOOL YEAR, TEACHER COMPENSATION AND EARLY CHILDHOOD EDUCATION; REQUIRING CONGRESSIONAL APPROVAL FOR DISTRIBUTIONS FOR EARLY CHILDHOOD EDUCATION."

Constitutional Amendment 2:

"PROPOSING TO AMEND ARTICLE 9, SECTION 14 OF THE CONSTITUTION OF NEW MEXICO TO ALLOW PUBLIC INVESTMENT TO PROVIDE ACCESS TO ESSENTIAL HOUSEHOLD SERVICES, INCLUDING INTERNET, ENERGY, WATER, WASTEWATER AND OTHER SIMILAR SERVICES AS PROVIDED BY LAW, UPON THE ENACTMENT OF GENERAL IMPLEMENTING LEGISLATION BY A MAJORITY VOTE OF THE MEMBERS ELECTED TO EACH HOUSE OF THE LEGISLATURE."

Constitutional Amendment 3:

"PROPOSING TO AMEND ARTICLE 6, SECTION 35 OF THE CONSTITUTION OF NEW MEXICO TO PROVIDE THAT AN APPOINTED JUDGE SERVE AT LEAST ONE YEAR BEFORE A GENERAL ELECTION IS HELD FOR THE OFFICE TO WHICH THE JUDGE WAS APPOINTED."

General Information

New Mexico voters will be asked in 2022 to consider three proposed amendments to the state's constitution. Constitutional Amendment 1 would provide for additional distributions from the land grant permanent funds for early childhood education and certain other educational purposes, Constitutional Amendment 2 would allow the use of state funds for essential services such as broadband internet, energy, water and wastewater and Constitutional Amendment 3 would delay the general election for a judge appointed by the governor until at least one year has passed since the appointment. All three amendments will appear on the November 8, 2022 general election ballot.

The Constitution of New Mexico provides that the legislature, by a majority vote of all members elected to each house, may propose amendments revising the constitution and that proposed amendments must then be submitted to the voters of the state for approval. A proposed amendment becomes part of the state's constitution if a majority of the votes cast in an election on the proposition is cast in its favor, unless the proposed amendment affects one of the sections for which a three-fourths' majority is required. (This year's proposed constitutional amendments do not affect one of those sections and, thus, need only a simple majority vote to be approved.) Proposed constitutional amendments become effective upon approval by the voters unless an effective date is provided within the text of the proposed amendment.

This publication contains a summary and the full text of the joint resolutions proposing the amendments, as well as background information and summaries of arguments for and against the passage of the amendments.

While the full text of the proposed amendments appears in this publication, the title, which appears in capital letters at the top of each joint resolution, is the *only* language that will appear on the ballot. New language that is proposed for insertion in the text is shown by underscoring, and language that is proposed for deletion is shown within brackets.

Disclaimer

The arguments for and against the proposed constitutional amendments in this publication do not necessarily reflect legislative deliberations undertaken at the time of the passage of the proposed amendments. They represent suggestions from the Legislative Council Service staff of arguments in support of and in opposition to the proposed amendments. No claim is made for the validity or consistency of these arguments. This is not an exhaustive list of all cogent and valid arguments. No attempt has been made to provide the same number of arguments for or against a particular

amendment, and the number of arguments does not indicate the weight that should be ascribed to a position for or against a proposed amendment.

HOUSE EDUCATION COMMITTEE SUBSTITUTE FOR
HOUSE JOINT RESOLUTION 1
55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

A JOINT RESOLUTION

PROPOSING AN AMENDMENT TO ARTICLE 12, SECTION 7 OF THE CONSTITUTION OF NEW MEXICO TO PROVIDE FOR ADDITIONAL ANNUAL DISTRIBUTIONS OF THE PERMANENT SCHOOL FUND FOR ENHANCED INSTRUCTION FOR STUDENTS AT RISK OF FAILURE, EXTENDING THE SCHOOL YEAR, TEACHER COMPENSATION AND EARLY CHILDHOOD EDUCATION; REQUIRING CONGRESSIONAL APPROVAL FOR DISTRIBUTIONS FOR EARLY CHILDHOOD EDUCATION.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 12, Section 7 of the constitution of New Mexico to read:

"A. As used in this section, "~~[fund]~~ land grant permanent funds" means the permanent school fund described in Article 12, Section 2 of this constitution and all other permanent funds derived from lands granted or confirmed to the state by the act of congress of June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states.".

B. The ~~[fund]~~ land grant permanent funds shall be invested by the state investment officer in accordance with policy ~~[regulations]~~ rules promulgated by the state investment council.

C. In making investments, the state investment officer, under the supervision of the state investment council, shall invest and manage the ~~[fund]~~ land grant permanent funds in accordance with the Uniform Prudent Investor Act.

D. The legislature may establish criteria for investing the ~~[fund]~~ land grant permanent funds if the criteria are enacted by a three-fourths' vote of the members elected to each house, but investment of the ~~[fund]~~ land grant permanent funds is subject to the following restrictions:

- (1) not more than sixty-five percent of the book value of the ~~[fund]~~ land grant permanent funds shall be invested at any given time in corporate stocks;
- (2) not more than ten percent of the voting stock of a corporation shall be held; and
- (3) stocks eligible for purchase shall be restricted to those stocks of

businesses listed upon a national stock exchange or included in a nationally recognized list of stocks.

E. All additions to the ~~[fund]~~ land grant permanent funds and all earnings, including interest, dividends and capital gains from investment of the ~~[fund]~~ land grant permanent funds shall be credited to the ~~[fund]~~ land grant permanent funds.

F. ~~[Except as provided in Subsection G of this section]~~ The annual distributions from the ~~[fund]~~ land grant permanent funds to the beneficiaries specified in the Ferguson Act and the Enabling Act shall be five percent of the average of the year-end market values of the ~~[fund]~~ land grant permanent funds for the immediately preceding five calendar years.

G. In addition to the annual ~~[distribution]~~ distributions made pursuant to Subsection F of this section, unless suspended pursuant to Subsection ~~[H]~~ I of this section, an ~~[additional]~~ annual distribution of one and one-fourth percent of the average of the year-end market value of the permanent school fund for the immediately preceding five calendar years shall be made ~~[pursuant to the following schedule]~~ as provided in Subsection H of this section; provided that ~~[no]~~ the additional distribution shall not be made ~~[pursuant to the provisions of this subsection]~~ in any fiscal year if the average of the year-end market values of the ~~[fund]~~ land grant permanent funds for the immediately preceding five calendar years is less than ~~[ten billion dollars (\$10,000,000,000)]~~ seventeen billion dollars (\$17,000,000,000).

~~[(1) in fiscal years 2005 through 2012, an amount equal to eight-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years; provided that any additional distribution from the permanent school fund pursuant to this paragraph shall be used to implement and maintain educational reforms as provided by law; and~~

~~(2) in fiscal years 2013 through 2016, an amount equal to one-half percent of the average of the year-end market values of the fund for the immediately preceding five calendar years; provided that any additional distribution from the permanent school fund pursuant to this paragraph shall be used to implement and maintain educational reforms as provided by law]~~

H. Unless suspended pursuant to Subsection G or J of this section, the additional distribution from the permanent school fund provided for in Subsection G of this section shall be as follows and as provided by law:

(1) forty percent of the additional distribution shall be for the public school permanent fund beneficiary for enhanced instruction for students at risk of failure, extending the school year and public school teacher compensation; and

(2) sixty percent of the additional distribution shall be for the provision

Note: underscored material = new language proposed for insertion ~~[bracketed material]~~ = existing language proposed for deletion

of early childhood education.

I. As used in this section, "early childhood education" means nonsectarian and nondenominational education for children until they are eligible for kindergarten.

~~[H.]~~ J. The legislature, by a three-fifths' vote of the members elected to each house, may suspend any additional distribution provided for in Subsection G of this section."

SECTION 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

SECTION 3. The distribution provided for in Paragraph (2) of Subsection H of Section 7 of Article 12 of the constitution of New Mexico shall not become effective without the consent of congress.

Note: underscored material = new language proposed for insertion ~~[bracketed material]~~ = existing language proposed for deletion

► **SUMMARY of Proposed Constitutional Amendment 1**

Constitutional Amendment 1 proposes to amend Article 12, Section 7 of the Constitution of New Mexico to provide additional distributions from the land grant permanent funds. These additional distributions would be in an amount of 1.25% of the average of the year-end market value of the Permanent School Fund for the immediately preceding five calendar years. Forty percent of the additional 1.25% distribution would be distributed to public schools for enhanced instruction for at-risk students, extending the school year and teacher compensation, and 60% of the additional 1.25% distribution would be to provide early childhood education, which is defined as nonsectarian and nondenominational education for children until they are eligible for kindergarten. Constitutional Amendment 1 would permit the legislature to suspend these additional distributions by a three-fifths' vote and also would automatically suspend the additional distribution if the five-year average market values of the land grant permanent funds fall below \$17 billion. If Constitutional Amendment 1 is approved by the voters, it would still require congressional approval prior to taking effect.

► **BACKGROUND AND INFORMATION**

As part of New Mexico's entry into statehood in 1912, the United States Congress granted to the state a large amount of public lands. The lands and the income from minerals generated from these lands, grazing rights and other uses were set aside to be held in trust pursuant to the federal Ferguson Act of 1898 and the federal Enabling Act of 1910. The trust income generated by the federally granted lands is held in several funds that are generally referred to as the land grant permanent funds, or more commonly, in the singular as the Land Grant Permanent Fund.

Currently, there are 21 beneficiaries of this trust fund, including public schools, higher education institutions, the New Mexico School for the Blind and Visually Impaired, the New Mexico School for the Deaf, penitentiaries and the state hospital. At this time, 5% of the five-year average of the fund is distributed among these beneficiaries. The Land Grant Permanent Fund is invested by the State Investment Council and money generated from investment is redistributed to the fund, and due to investment income outpacing the distributions, the fund has grown over time and thus distributions have also grown. One requirement of the federal legislation that created this trust fund is that congressional approval is required prior to altering or adding new beneficiaries.

The proposed Constitutional Amendment 1 is the culmination of a decade-long attempt to

provide a dedicated revenue stream for early childhood education from the Land Grant Permanent Fund. A catalyst for passage was undoubtedly the First Judicial District Court's finding in the *Yazzie v. State of New Mexico* and *Martinez v. State of New Mexico* consolidated lawsuit. The court determined that the State of New Mexico has failed to adequately provide education for at-risk students, English language learner students, Native American students and special education students. Additionally, the court suggested that overall education funding was also inadequate. In an attempt to address this funding deficiency, this proposed constitutional amendment was passed as a way to provide a dedicated funding stream to early childhood education and public schools.

The Land Grant Permanent Fund is currently valued at approximately \$21.6 billion. For fiscal year 2023, it was estimated that the 1.25% additional distributions would be over \$211 million. It must be noted that this distribution amount will change through the years based on size of the trust funds, which are highly dependent on investment returns and income generated by the trust lands.

► ARGUMENTS FOR

1. Would provide additional and needed funding for public schools and early childhood education.

With the proposed additional distribution from the Land Grant Permanent Fund in this constitutional amendment, public education and early childhood education programs will receive an increase in educational funding statewide from that fund. According to Legislative Finance Committee estimates, which are dependent on projected investment returns, the 1.25% distribution increase in the constitutional amendment could result in the distribution of an additional \$211.5 million in funding for education in fiscal year 2023. This would deliver approximately \$126.9 million for early childhood education and \$84.6 million for public education. The projected additional funding for early childhood education may help close the funding gap that the Early Childhood Education and Care Department presented in its recent finance plans, which estimated that an additional \$505 million was needed by fiscal year 2026 to provide New Mexico with universal access to early childhood services. Additionally, the funding for public education would be used for enhanced instruction for students at risk of failure, extension of the school year and public school teacher compensation.

2. Early childhood educational programming provides a significant benefit in student outcomes.

According to a 2020 report by the Legislative Finance Committee, pre-kindergarten programs are among the most effective education reform measures for improving student outcomes.¹ Low student achievement at an elementary level can lead to serious implications for future educational outcomes. Participation in pre-kindergarten led to higher high school graduation rates, and pre-kindergarten participation for students with special needs also led to improved outcomes. The Legislative Finance Committee, through its report, saw an increase in graduation rates for English language learners and low-income participants, a reduction in grade retention and a reduction in chronic absenteeism. Additionally, participation in pre-kindergarten programs correlated to higher test scores throughout students' academic careers.

3. Increased student outcomes provide direct benefits to taxpayers and the state.

Providing more high-quality early childhood education programs has not only been proven to have a greater impact on students' educational outcomes, but it also provides a significant return on investment. The benefit to taxpayers for pre-kindergarten programs is estimated at

¹Legislative Finance Committee Prekindergarten Quality and Educational Outcomes report; https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Prekindergarten%20Quality%20and%20Educational%20Outcomes.pdf.

\$16,000 per student.² These benefits are a result of those students on average earning higher lifetime wages and paying higher taxes, as well as savings resulting from lower crime and social program spending. Increased spending on early childhood education and public schools, as provided by this constitutional amendment, may further capitalize on this return on investment.

²[Id.](#)

► ARGUMENTS AGAINST

1. Other funding is available to accomplish the stated goal of the proposed constitutional amendment.

Funding provided by a new distribution provided in this proposed constitutional amendment may not be necessary to sufficiently fund early childhood programs. In 2020, as an alternative to a similar proposal as this constitutional amendment, the state created a new trust fund, the Early Childhood Education and Care Fund. The law provides that the fund distribute at least \$30 million for early childhood education and care services and programs every year. The Legislative Finance Committee projects that distributions from the fund for early childhood education and services will reach \$68.25 million in fiscal year 2024, \$127.97 million in fiscal year 2025 and \$173 million in fiscal year 2026, providing nearly three-fourths of the \$505 million the Early Childhood Education and Care Department estimates is needed by fiscal year 2026 to provide New Mexico with universal access to early childhood services. It is estimated that the proposal in the joint resolution will provide \$134.31 million in fiscal year 2024 and \$141.3 million in fiscal year 2025. Rather than risk the corpus of the Land Grant Permanent Fund and a possibly significant reduction in future distributions to existing beneficiaries, it may be more appropriate to rely on this existing resource to fund early childhood programs and to allow the continued growth of the hundreds of millions of dollars in benefits the Land Grant Permanent Fund already delivers to New Mexico schools every year.

2. The amendment will eventually cause diminishing distributions due to a smaller fund corpus.

As a trust fund, the Land Grant Permanent Fund is invested to ensure sustainable growth over time. A larger fund equates to a larger distribution since the distributions from the fund are based on a percentage of the overall size of the fund. If more money is distributed from the fund now, then less money will be available to invest and the fund will grow at a lower rate over time. The outcome is that, while more money will be distributed from the fund, eventually the distribution based on a larger percentage from a slower-growing fund will be lower than if the current distribution rates are maintained. This point in time is often referred to as the "tipping point" and is estimated to occur at some point in the 2040s.³ The time line for this tipping point is dependent on investment returns over time; however, it will eventually occur, and when it does, the diminished distribution will exist for the life of the fund.

³Legislative Finance Committee Fiscal Impact Report for HJR 1 (2021); <https://www.nmlegis.gov/Sessions/21%20Regular/firs/HJR01.PDF>.

3. Congressional approval is required and further legislative changes are likely necessary.

If this constitutional amendment were to be approved by voters, approval from the United States Congress is required prior to the changes taking effect. The Land Grant Permanent Fund was created when the State of New Mexico was established and is subject to the federal Enabling Act of 1910. This federal act requires that if the distributions to beneficiaries of the fund are changed, prior congressional approval is required. Further, the changes made in this constitutional amendment will likely require action by the New Mexico Legislature. Forty percent of the increased distribution is provided to the public school permanent fund beneficiary. This flow of funding already exists and provides a funding source for public schools. However, 60% of the new distribution is to be provided for the provision of early childhood education. It is statutorily unclear how this money would be used and what state department, agency or entity would receive this distribution. As noted by the staff of the Legislative Education Study Committee, public schools are the primary beneficiaries of the Permanent School Fund, but most of these schools do not provide early childhood services. The State Investment Council has also noted that while public schools may be able to provide some early education programs, more than one-half of the beneficiaries either are not educational facilities or do not have a mission related to early childhood education. Moreover, it may be unlawful to use money from a new distribution from the Permanent School Fund for many of the early childhood services that are currently provided by private entities through contracts with the state. According to the attorney general, funds from the Land Grant Permanent Fund are prohibited from being used for private schools or programs, including through contracts with a state agency, which the attorney general states "would simply be an artificial attempt to circumvent the prohibitions of the [Enabling] Act and state constitution".⁴

4. May not actually increase funding for public education or early childhood education.

This constitutional amendment will increase funding from the Land Grant Permanent Fund to be used for public education and early childhood education, at least in the short term. However, public education and early childhood education receive significant portions of their budgets from other sources, including other existing funds in state law and also General Fund appropriations that are made annually. This constitutional amendment does not ensure additional funding for at-risk students, additional school days, teacher compensation or early childhood education because nothing prevents the legislature from reducing the money it now provides for those purposes with appropriations for other purposes. This means that the state could lower distributions and appropriations from other funding sources for use elsewhere.

⁴2012 Op. Att'y Gen. No. 12-03; <https://nmonesource.com/nmos/ag/en/item/5937/index.do>.

While the potential freeing up of this funding for other uses could be framed as a benefit, the often-stated purpose of the constitutional amendment to increase funding for public education and early childhood education is not an inevitable outcome.

HOUSE JOINT RESOLUTION 1
55TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2022

A JOINT RESOLUTION

PROPOSING TO AMEND ARTICLE 9, SECTION 14 OF THE CONSTITUTION OF NEW MEXICO TO ALLOW PUBLIC INVESTMENT TO PROVIDE ACCESS TO ESSENTIAL HOUSEHOLD SERVICES, INCLUDING INTERNET, ENERGY, WATER, WASTEWATER AND OTHER SIMILAR SERVICES AS PROVIDED BY LAW, UPON THE ENACTMENT OF GENERAL IMPLEMENTING LEGISLATION BY A MAJORITY VOTE OF THE MEMBERS ELECTED TO EACH HOUSE OF THE LEGISLATURE.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 9, Section 14 of the constitution of New Mexico to read:

"Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through ~~[G]~~ H of this section.

A. Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

B. Nothing in this section prohibits the state from establishing a veterans' scholarship program for Vietnam conflict veterans who are post-secondary students at educational institutions under the exclusive control of the state by exempting such veterans from the payment of tuition. For the purposes of this subsection, a "Vietnam conflict veteran" is any person who has been honorably discharged from the armed forces of the United States, who was a resident of New Mexico at the original time of entry into the armed forces from New Mexico or who has lived in New Mexico for ten years or more and who has been awarded a Vietnam campaign medal for service in the armed forces of this country in Vietnam during the period from August 5, 1964 to the official termination date of the Vietnam conflict as designated by executive order of the president of the United States.

C. The state may establish by law a program of loans to students of the healing arts, as defined by law, for residents of the state who, in return for the payment of educational expenses, contract with the state to practice their profession for a period of years after graduation

Note: underscored material = new language proposed for insertion ~~[bracketed material]~~ = existing language proposed for deletion

within areas of the state designated by law.

D. Nothing in this section prohibits the state or a county or municipality from creating new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses if this assistance is granted pursuant to general implementing legislation that is approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall include adequate safeguards to protect public money or other resources used for the purposes authorized in this subsection. The implementing legislation shall further provide that:

- (1) each specific county or municipal project providing assistance pursuant to this subsection need not be approved by the legislature but shall be approved by the county or municipality pursuant to procedures provided in the implementing legislation; and
- (2) each specific state project providing assistance pursuant to this subsection shall be approved by law.

E. Nothing in this section prohibits the state, or the instrumentality of the state designated by the legislature as the state's housing authority, or a county or a municipality from:

- (1) donating or otherwise providing or paying a portion of the costs of land for the construction on it of affordable housing;
- (2) donating or otherwise providing or paying a portion of the costs of construction or renovation of affordable housing or the costs of conversion or renovation of buildings into affordable housing; or
- (3) providing or paying the costs of financing or infrastructure necessary to support affordable housing projects.

F. The provisions of Subsection E of this section are not self-executing. Before the described assistance may be provided, enabling legislation shall be enacted by a majority vote of the members elected to each house of the legislature. This enabling legislation shall:

- (1) define "affordable housing";
- (2) establish eligibility criteria for the recipients of land, buildings and infrastructure;
- (3) contain provisions to ensure the successful completion of affordable housing projects supported by assistance authorized pursuant to Subsection E of this section;
- (4) require a county or municipality providing assistance pursuant to Subsection E of this section to give prior formal approval by ordinance for a specific affordable housing assistance grant and include in the ordinance the conditions of the grant;
- (5) require prior approval by law of an affordable housing assistance grant by the state; and

Note: underscored material = new language proposed for insertion ~~bracketed material~~ = existing language proposed for deletion

(6) require the governing body of the instrumentality of the state, designated by the legislature as the state's housing authority, to give prior approval, by resolution, for affordable housing grants that are to be given by the instrumentality.

G. Nothing in this section prohibits the state from establishing a veterans' scholarship program, for military war veterans who are post-secondary students at educational institutions under the exclusive control of the state and who have exhausted all educational benefits offered by the United States department of defense or the United States department of veterans affairs, by exempting such veterans from the payment of tuition. For the purposes of this subsection, a "military war veteran" is any person who has been honorably discharged from the armed forces of the United States, who was a resident of New Mexico at the original time of entry into the armed forces or who has lived in New Mexico for ten years or more and who has been awarded a southwest Asia service medal, global war on terror service medal, Iraq campaign medal, Afghanistan campaign medal or any other medal issued for service in the armed forces of this country in support of any United States military campaign or armed conflict as defined by congress or by presidential executive order or any other campaign medal issued for service after August 1, 1990 in the armed forces of the United States during periods of armed conflict as defined by congress or by executive order.

H. Nothing in this section prohibits the state from expending state funds or resources for the purpose of providing essential services primarily for residential purposes if the assistance is granted pursuant to general implementing legislation approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall provide for accessibility to essential services primarily for residential purposes and include safeguards to protect public money and other public resources used for the purposes authorized in this subsection. As used in this subsection, "essential services" means infrastructure that allows internet, energy, water, wastewater or other similar services as provided by law.

SECTION 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

Note: underscored material = new language proposed for insertion [~~bracketed material~~] = existing language proposed for deletion

► SUMMARY of Proposed Constitutional Amendment 2

Constitutional Amendment 2 would amend Article 9, Section 14 (commonly referred to as the "anti-donation clause") of the Constitution of New Mexico to allow the legislature to enact statutes that authorize the state to spend money to assist in the construction of utility lines or other infrastructure for energy, internet, water, wastewater and similar services for primarily residential purposes. If enacted, these statutes would be required to include provisions to safeguard public money and resources used for the utility line projects. Any provisions specifying the criteria, limitations or scope for such projects would be left to the implementing legislation.

► BACKGROUND AND INFORMATION

In response to the economic and political dominance of the railroad industry in the late 1800s, many states adopted an "anti-donation clause" or a "gift clause" in their constitutions to prohibit the use of state resources to aid private entities. In New Mexico, Article 9, Section 14 of the Constitution of New Mexico is the state's anti-donation clause. The anti-donation clause prohibits the state, a county, a school district or a municipality from directly or indirectly lending or pledging its credit or making any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad, unless a constitutional exception exists.

Over time, many states have found that anti-donation clause prohibitions against state assistance to any non-governmental entity were too restrictive, and those clauses have been amended or construed to give state legislatures more flexibility. Some states have fairly broad exceptions to their constitutional anti-donation or gift prohibitions that allow the state to provide public assistance to private entities if the expenditure is for a "public benefit" or a "public purpose". For example:

- Arizona's "gift prohibition" has been construed to allow state expenditures for the "public benefit" as long as it does not unreasonably subsidize a private entity;
- California's anti-donation prohibition has a broad exception for "public purposes" and specific exceptions for aid to orphans or physically disabled individuals; and
- Colorado's anti-donation clause has been interpreted as allowing state expenditures for a "public purpose".

While New Mexico does not have a broad public purpose or public benefit anti-donation clause exception, there are several specific exemptions in the Constitution of New Mexico that allow the

provision of public assistance to private entities, including:

- college tuition scholarships for qualified military veterans of the United States armed forces;
- public assistance to private businesses to foster job and economic development opportunities. The assistance must be provided pursuant to a local government ordinance that is enacted in compliance with an implementing statute, which is the Local Economic Development Act;
- public assistance for affordable housing projects. Like the assistance to private businesses, the assistance must be provided pursuant to an implementing statute, in this case the Mortgage Finance Authority Act;
- tuition loan assistance for health care providers who contract to provide health care service to the state; and
- for the care and maintenance of sick and indigent persons.

The proposed amendment would establish an additional exemption to the state's anti-donation clause and allow the state, pursuant to implementing legislation that includes safeguards to protect public money and other public resources, to provide state funds and other resources for the purpose of providing essential services primarily for residential purposes, including infrastructure for internet, energy, water, wastewater or other similar services.

► ARGUMENTS FOR

1. The amendment would increase access to essential utility services.

Broadband internet, energy, water and wastewater services are essential utility services in today's world, and some communities in New Mexico still lack these basic services. The private sector on its own has been unwilling or unable to invest in utility service line build-outs in many, particularly rural, communities. Unless the current constitutional prohibition on the use of public funding is lifted to allow the state to address this problem, it may never be solved by the private sector. The proposed amendment would not only authorize direct state investment to ensure access to essential utility services by all New Mexicans, but would also allow for the possibility of the creation of public-private partnerships to provide access for these services.

2. May assist the state with leveraging federal funding.

The current anti-donation prohibition limits New Mexico's ability to compete with other states regarding rural development and to access federal funding for such development projects. As an example, the communities connected to Interstate 395 along the eastern side of the Sierra Nevada mountain range in California face very similar geologic and population density challenges as many of New Mexico's mountainous areas. However, California was able to implement a program called "Digital 395" that used state dollars to leverage a federal assistance program created in 2009 for private, nonprofit internet providers to develop internet infrastructure connecting those communities. Because of anti-donation clause prohibitions, New Mexico was not able to implement a similar program to leverage the 2009 federal broadband money. The proposed amendment may give New Mexico the best chance to leverage its share of federal dollars to achieve the broadest access to internet service throughout the state and to access federal funding for the provision of other essential household services.

3. May assist with ensuring that all New Mexicans have access to the internet.

Adoption of the proposed amendment could be particularly helpful with regard to building high-speed broadband internet infrastructure throughout the state. Now more than ever, access to high-speed internet is essential for distance learning, telemedicine and remote work. However, the Department of Information Technology, in its *State of New Mexico Broadband Strategic Plan and Rural Broadband Assessment* published in June 2020, reported that "a conservative analysis of State, ISP, and federal data identifies an estimated 196,000 locations in New Mexico that are unserved by broadband, or 20 percent of the State's approximately 940,000 homes and businesses". This means that one-fifth of the state's residents are unable to continue with their studies through remote learning, to work remotely or to access needed health care, not to mention accessing myriad other public and private resources found online.

The proposed amendment would allow the state to invest in the broadband infrastructure that is needed for the full participation of all of New Mexico's residents in the modern world.

4. The contours of the implementing legislation would be vetted through the public legislative process.

Unlike a blanket "public benefit" exception that some states have applied to their anti-donation exemptions, adoption of the proposed amendment would be just the first step in a lengthy process to allow the use of public funds to provide access to essential household services. Similar to the exceptions that created the Local Economic Development Act and mortgage finance programs, both chambers of the legislature would need to pass implementing legislation for a utility assistance program to take effect. The proposed amendment also requires the implementing legislation to "include safeguards to protect public money and other public resources used for the purposes authorized", and a considerable amount of deliberation will go into developing them. Before the implementing legislation reaches the floor of each house, it will go through the committee process, where it will be debated by the members after ample opportunity for public comment and be subject to amendment throughout the process.

► ARGUMENTS AGAINST

1. The proposed amendment lacks clarity and leaves too much discretion for future legislatures in enacting the implementing legislation.

The proposed amendment lacks clarity and leaves the details of the exception to implementing legislation enacted by a future legislature. For example, it is not clear from the text of the amendment exactly what projects state funds will be allowed to be used for, as those specifics will be laid out in the implementing legislation. Further, while the proposed amendment specifically enumerates internet, energy, water and wastewater as essential services, it also includes "other similar services as provided by law". This broad provision will be subject to wide interpretation by the legislature enacting the implementing legislation or its execution. This language leaves the door open for the provision of public assistance to private entities for services not contemplated in the adoption of the amendment and could be changed based on the political winds of future legislatures.

2. Public money may not be adequately safeguarded.

The anti-donation prohibition serves a valuable purpose, and any proposed exception should be viewed with caution. The purpose of an anti-donation clause is to ensure that taxpayer money is not being used to support or subsidize private gains without the state receiving something of value in exchange for the transfer of money or property. However, this proposed amendment does not specify how the implementing legislation is to "safeguard public money" nor is there inclusion of a spending cap, so the actual fiscal implications for the state are unknown and could be far reaching. This lack of direction on specific requirements to safeguard public money could result in the legislature enacting implementing legislation that allows the use of state funds to provide a greater benefit to contractors and other businesses providing essential services rather than to the state residents who are in need of those services. Such effect would be contrary to the purpose of the anti-donation clause.

3. The growing exceptions to the anti-donation clause are swallowing the rule.

New Mexico's anti-donation clause is being whittled away. Since 1971, it has been amended six times to create exceptions, including carveouts to allow public funds to be used for the care and maintenance of sick and indigent persons; to stimulate job creation; to provide scholarship programs for certain veterans; to provide scholarship programs for aspiring health care providers; and to support the development of affordable housing. The growing number of exceptions are swallowing up the rule that prohibits state aid to private entities. Carving out

more and more exceptions creates confusion regarding what is allowed and what is prohibited, and it begs the question of whether even more exceptions should be carved out or if it is time to get rid of the anti-donation clause in its entirety.

SENATE JOINT RESOLUTION 3
55TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2022

A JOINT RESOLUTION

PROPOSING TO AMEND ARTICLE 6, SECTION 35 OF THE CONSTITUTION OF NEW MEXICO TO PROVIDE THAT AN APPOINTED JUDGE SERVE AT LEAST ONE YEAR BEFORE A GENERAL ELECTION IS HELD FOR THE OFFICE TO WHICH THE JUDGE WAS APPOINTED.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 6, Section 35 of the constitution of New Mexico to read:

"There is created the "appellate judges nominating commission", consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as ~~chairman~~ chair of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on ~~this committee~~ the commission. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on ~~this committee~~ the commission shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated.

The commission shall actively solicit, accept and evaluate applications from qualified

Note: underscored material = new language proposed for insertion ~~bracketed material~~ = existing language proposed for deletion

lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of ~~his~~ the application.

Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court. ~~Any~~ The person appointed shall serve until the ~~next~~ first general election ~~That person's~~ following one year after appointment. The appointee's successor shall be chosen at such election and shall hold the office until the expiration of the ~~original~~ term in effect at the time of election."

SECTION 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

Note: underscored material = new language proposed for insertion ~~bracketed material~~ = existing language proposed for deletion

► **SUMMARY of Proposed Constitutional Amendment 3**

Constitutional Amendment 3 proposes one substantive change and several technical changes to Article 6, Section 35 of the Constitution of New Mexico. Substantively, Constitutional Amendment 3 proposes to delay the general election for a seat to which a judge is appointed until after that judge has served on the court for one year following appointment by the governor. Technically, this constitutional amendment proposes to use gender-neutral language in Article 6, Section 35, i.e., changing "his application" to "the application" and "chairman" to "chair", and it also replaces the term "committee" with "commission" in several instances for consistency.

► **BACKGROUND AND INFORMATION**

Originally, if a vacancy occurred in the office of district attorney, county commissioner, justice of the supreme court or judge of a district court between elections, the vacancy was filled by the governor without any oversight. The governor had absolute discretion in whom to choose to fill the vacancy, in which the judge would serve until the end of the current term. In 1988, the voters approved an amendment that changed the process by which any judicial vacancy was filled. The approved amendment created a nominating commission to recommend nominees. The governor would then appoint the judge from the list of nominees. The appointed judge would serve until the next partisan election, in which the winner of the election would serve out the remainder of the original term. Once the judge had been elected in a partisan election, the judge would only face elections by the voters to choose whether to retain or reject the judge on a nonpartisan ballot.

► ARGUMENTS FOR

1. Allows the public to evaluate an appointed candidate on the merits prior to election.

Across New Mexico, the public has expressed a desire for increasing transparency in government. Constitutional Amendment 3 provides a different transparency – that of the ability to evaluate a candidate for a judicial position prior to electing a candidate. Voters can face difficulties being informed about candidates and relevant information. If the proposed amendment is adopted, candidates appointed to fill a judicial seat will have at least one year to serve on the bench before they face a general election. Appointed candidates who do not otherwise have judicial experience will not only have time to hone their judicial skills, but the public will be better able to observe their conduct as a judge. Armed with the record of performance, voters will be able to make a more educated decision on whether to vote for or against the appointee at the general election. Ideally, this will result in a public that has more knowledge of candidates who were appointed by the time those candidates face election.

2. Enables greater access by judicial candidates to public financing.

Judicial candidates are authorized to access public financing for elections pursuant to the Voter Action Act. When a judicial appointee must run for the office in a partisan election shortly after being appointed, the time lines for complying with the Voter Action Act are compressed, and, depending on the time between the appointment and the election, the appointee may not be able to meet the deadlines to qualify for the public financing. A purpose of including judicial candidates in the Voter Action Act is to take the influence of big money out of judicial elections, ensuring an independent judiciary. However, this purpose is nullified when appointed judges are unable to qualify for the public financing because deadlines cannot be met due to the timing of the appointment and election. Requiring the election to be held at least one year after appointment provides ample time for an appointed judge to meet the deadlines of the Voter Action Act and qualify for the available public financing.

3. Helps with recruitment and diversity for judgeships.

Allowing an appointed judge to serve in the position for at least one year before having to run for the position in a partisan election will help with the recruitment of qualified, diverse applicants to the judgeship. Under the current language of Article 6, Section 35, the position will be subject to election at the next general election, which may only be a couple of months after appointment. Many people are unwilling to accept an appointment to a judgeship if they have to, for example, close down a private practice and wind up relationships with clients without some assurance of being in the position for the long term. Approval of this proposed

amendment would guarantee the appointee at least one year in the position before having to run for the office. This may be particularly beneficial to attorneys who work in private practice who otherwise may not choose to seek judicial positions, as these attorneys may be solo practitioners and might find it difficult to justify seeking appointment if they may serve for a short time.

► ARGUMENTS AGAINST

1. Delaying the election may have unintended consequences.

There could be unintended consequences if an election to fill the vacancy does not take place until the first general election following one year after appointment. For example, depending on when a vacancy is created and when the appointment to fill the vacancy is made, the appointee could serve up to three years in the position before the general election is held. Alternatively, because the person who wins the election serves out the remainder of the term that is in effect at the time of the election, if that term were to expire in December of the same year in which the election takes place, a scenario could be created in which the person who wins the election only serves a few weeks before the term ends at the end of the year, creating a new vacancy in the office that then would need to be filled by the governor. Additionally, a person running against an appointed judge in the general election may be disadvantaged by the appointee having more experience in the position before the election. The appointed judge may have greater name recognition, a record of performance known to the electorate and the benefit of being the incumbent by virtue of having been appointed to fill the vacancy in the position, which ordinarily would not be present in a partisan judicial race.

2. Unclear if the new language applies to judges other than appellate judges.

Article 6, Section 35 of the Constitution of New Mexico creates the Appellate Judges Nominating Commission, while Article 6, Section 36 and Article 6, Section 37 create the District Court Judges Nominating Committee and the Metropolitan Court Judges Nominating Committee, respectively. Both Section 36 and Section 37 state that "each and every provision of Section 35 of Article 6 of this constitution shall apply" to the respective nominating committee; however, it is not clear that the proposed amendatory language to Section 35, providing that a judge serve at least one year before a general election is held for the office to which the judge was appointed, equally applies to district court judges and metropolitan court judges. This is because the proposed amendatory language to Section 35 is not directly related to the duties of the respective nominating committees, but rather to when an election takes place after an appointment to fill a vacancy is made. This ambiguity could lead to litigation over the application of the amendatory language to district court and metropolitan court judges.

3. Removes an inherently political decision from the political process for a longer period than the Constitution of New Mexico currently provides.

A potential issue in this proposed amendment is its policy goal of reducing the partisan nature

of an inherently partisan, political process, while potentially increasing partisan division. Article 6, Section 35 of the Constitution of New Mexico requires diversity of "majority political parties" and the interests of the state with regard to those members of the Appellate Judges Nominating Commission who recommend appointments. Additionally, Article 6, Section 35 provides that the Appellate Judges Nominating Commission recommends candidates for appointment to the governor, but the governor ultimately appoints a successor in the event of a vacancy. Judicial candidates appointed by the governor face reelection at the next election. Thus, implied in Section 35 is a process that is political in nature, one that is reliant on partisanship, the decision of a governor, usually representing a major political party, and ultimately, the voice of the electorate. However, this amendment would require the public to refrain from participating in the political process for a year, at a minimum, prior to that appointed candidate facing the elective process. It is foreseeable that the public may ultimately associate its view of the appointed judge less on the judge's merits as shown in the year or more of service on the bench, and instead turn toward the partisan positions of the governor who appointed the judge. This may further politicize what was meant to be an appointment to address a vacancy. Justified by policy ostensibly aimed at increasing candidates from private interests and outcomes that are seemingly speculative, if not entirely aspirational, it is questionable whether this outweighs the interest of the public to provide a quick vote on what was meant to address a mere vacancy.