

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No.

STATE OF NEW MEXICO,

Petitioner,

v.

OFFICE OF THE STATE TREASURER,

Respondent.

SUPREME COURT OF NEW MEXICO
P.T.R.D.
SEP 22 2005
Patricia A. Madrid

**VERIFIED EMERGENCY PETITION
FOR TEMPORARY RECUSAL**

After being duly sworn upon oath, Petitioner, through Patricia A. Madrid, Attorney General for the State of New Mexico, states as follows:

1. Bill Richardson is the duly elected Governor of the State of New Mexico.
2. Patricia A. Madrid is the duly elected Attorney General of the State of New Mexico.
3. Robert Vigil is the duly elected State Treasurer of the State of New Mexico.
4. This Court has original jurisdiction pursuant to N.M. Const., Art. VI, Sec. 3 to issue extraordinary writs of injunction in accordance with N.M.R.A. 12-504.
5. Pursuant to N.M.R.A. 12-504 (C)(3)(d), this Court may take any action which it deems appropriate under the circumstances.
6. Robert Vigil has been indicted on certain federal charges related to alleged conduct by Mr. Vigil in the course of his duties as State Treasurer of the State of New Mexico and Mr. Vigil is presumed innocent unless proven guilty.

7. Mr. Vigil wants to recuse himself temporarily from the duties of State Treasurer in order to defend himself against the federal charges.
8. It would be an undue burden on Mr. Vigil to perform the duties of State Treasurer while defending himself against the federal charges.
9. In consideration for this immediate action by the State Treasurer and because Mr. Vigil is presumed innocent unless proven guilty, Mr. Vigil should continue to receive his salary while pending federal charges against him remain unresolved.
10. An Acting Treasurer should be appointed by Governor Richardson, pursuant to the order of this Court, to fulfill the duties of Mr. Vigil until the federal charges against Mr. Vigil are resolved in his favor or until further order of this Court or until a successor State Treasurer is duly elected.
11. This Petition is being filed in the New Mexico Supreme Court because this matter involves the duties and responsibilities of constitutionally elected officers of the State of New Mexico.

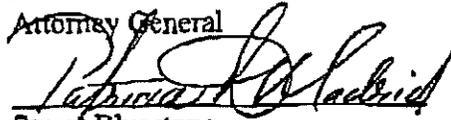
RELIEF

The parties respectfully request that this Court enter a Stipulated Extraordinary Writ of Injunction in the agreed to form, which is submitted by the parties. The stipulated extraordinary writ allows Mr. Vigil to recuse himself temporarily from the duties of State Treasurer, with pay; would order Governor Richardson to appoint an Acting Treasurer to fulfill the duties of the State Treasurer; and the Stipulated Extraordinary Writ of Injunction would expire upon

the resolution of the federal charges against Mr. Vigil in his favor or until further order of this Court or until a successor State Treasurer is duly elected.

Respectfully submitted,

Patricia A. Madrid
Attorney General



Stuart Bluestone
Deputy Attorney General
Glenn Smith
Deputy Attorney General
Christopher D. Coppin
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87102
505-827-6000

VERIFICATION

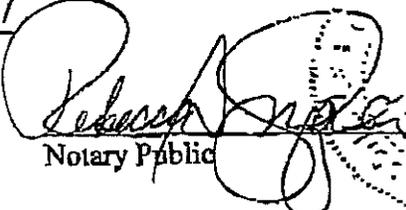
I, Patricia A. Madrid, Attorney General for the State of New Mexico, verify under oath that I have read the foregoing Verified Emergency Petition for Temporary Excusal and its contents are true and correct to the best of my knowledge.



Patricia A. Madrid

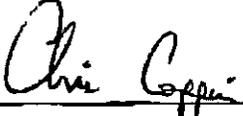
Subscribed and sworn to before me this 22nd day of September, 2005.

My commission expires: 10-17-07


Notary Public 

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above pleading was hand-delivered to counsel for the State Treasurer, Sam Bregman, on September 22, 2005.



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No.

STATE OF NEW MEXICO,

Petitioner,

v.

OFFICE OF THE STATE TREASURER,

Respondent.

SUPREME COURT OF NEW MEXICO
PT 68

SEP 22 2015

Robert Vigil
Go Nelson

STIPULATED EXTRAORDINARY WRIT OF INJUNCTION

This matter having come before the Court upon the Verified Emergency Petition for Temporary Recusal filed by Petitioner through Attorney General Patricia A. Madrid, the Court finds as follows:

1. This Court has original jurisdiction pursuant to New Mexico Const., Art. VI, Sec. 3 to issue extraordinary writs of injunction.
2. This Court should assume jurisdiction over this matter because of the extraordinary circumstances involved.

IT IS THEREFORE ORDERED:

3. Robert Vigil shall be allowed to recuse himself temporarily from all duties as the State Treasurer of the State of New Mexico, with pay.
4. Robert Vigil shall not assume the duties of the State Treasurer of the State of New Mexico and shall have no further contact whatsoever with the State Treasurer's Office with respect to such duties until the federal charges against him are resolved in his favor or until further order of this Court. This is not

EXHIBIT

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B

intended to limit or interfere with Robert Vigil's defense against the federal charges.

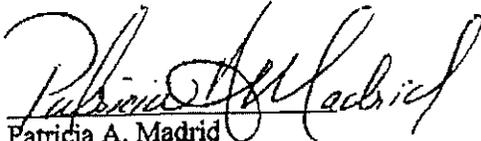
5. Governor Bill Richardson shall immediately appoint an Acting State Treasurer to fulfill the duties of the State Treasurer of the State of New Mexico until the federal charges against Robert Vigil are resolved in his favor or further order of this Court or until a successor State Treasurer is duly elected.
6. Governor Bill Richardson shall immediately report to this Court the name of the person appointed as Acting State Treasurer.

RICHARD C. BOSSON
CHIEF JUSTICE

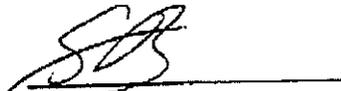
Stipulated to:



Bill Richardson, Governor
State of New Mexico



Patricia A. Madrid
Attorney General
State of New Mexico
Counsel for Petitioner



Sam Bregman
Attorney for Robert Vigil, Treasurer
State of New Mexico

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 29464

STATE OF NEW MEXICO

Petitioner,

v.

OFFICE OF THE STATE TREASURER

Respondent.

SUPREME COURT OF NEW MEXICO
FILED
SEP 23 2005
Patricia Madrid

MEMORANDUM IN SUPPORT OF VERIFIED EMERGENCY
PETITION FOR TEMPORARY RECUSAL

I. STATEMENT OF THE CASE

This case comes before the Court on Petitioner State of New Mexico's Verified Emergency Petition for Temporary Recusal of the State Treasurer, Mr. Robert Vigil, and the Stipulated Extraordinary Writ of Injunction¹, executed by Governor Bill Richardson, Attorney General Patricia Madrid and counsel for Mr. Vigil.

On September 16, 2005, Mr. Vigil was indicted by a federal grand jury in Albuquerque, NM, on charges of violating the Hobbs Act, 18 U.S.C. Section 1951. United States v. Robert Vigil, U.S.D.C.N.M., Criminal No. 05-2051JP. The charges relate to acts allegedly performed by Mr. Vigil in the course of his duties as State Treasurer. The Emergency Petition states the federal criminal charges pose an undue burden on Mr. Vigil performing his duties as State Treasurer, and Mr. Vigil agrees to recuse himself temporarily from being State Treasurer in order to defend himself against the federal charges.

¹ Attached as Exh. B originally filed September 22, 2005

The Emergency Petition requests that Governor Richardson be allowed to appoint an Acting State Treasurer, pursuant to order of this Court, "until the federal charges against Mr. Vigil are resolved in his favor or until further order of this Court or until a successor State Treasurer is duly elected." See Emer. Pet. at Para 10.

The Stipulated Extraordinary Writ of Injunction relieves Mr. Vigil temporarily of all duties as State Treasurer, with pay, and provides that once ordered by this Court the Governor shall immediately appoint an Acting State Treasurer. In support of the request for this extraordinary relief, Petitioner State of New Mexico submits this Memorandum in Support of Verified Emergency Petition for Temporary Recusal. In further support of the Emergency Petition the State submits with this Memorandum the accompanying Affidavit of James C. Jimenez, Secretary of the New Mexico Department of Finance and Administration.

II. JURISDICTION

A. This Court Has Broad Jurisdiction To Grant This Emergency Petition

Under Article VI, Section 3, of the New Mexico Constitution, the Supreme Court of New Mexico "shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions...it shall also have power to issue writs of mandamus, error prohibition, habeas corpus certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." Id. This Court has "regularly exercised original jurisdiction . . . [and Rule 12-504 NMRA (2005)] has given force and effect to the policy behind the statute, by requiring that an original petition which could have been brought in a lower court must

set forth the circumstances necessary or proper to seek the writ in the Supreme Court." State ex rel. Clark v. Johnson, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995) (internal quotation marks and citation omitted).

This Court has explained that the circumstances that would justify bringing a petition for an extraordinary writ before this Court in the first instance include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 694-95, 448 P.2d 799, 800-01 (1968). Indeed, this Court has explained that where a proceeding implicates the constitution and matters of great public importance, where an early resolution of a dispute is desirable, and where the relevant facts are virtually undisputed and the purely legal issues presented require no factual development in the district court, it is proper for the Court to exercise its original constitutional jurisdiction. See Clark, 120 N.M. at 569, 904 P.2d at 18.

This case presents such a matter. See Argument Below and Affidavit of James Jimenez attached as Exh. A. The necessity of an early decision and disposition is outlined by the affidavit provided, and the proceeding involves matters of great public importance.

III. ARGUMENT

A. The Indictment of the State Treasurer Presents an Extraordinary Emergency

The parties here come together before this Court to seek extraordinary relief to address compelling circumstances that arise as a consequence of the recent criminal indictments filed by the U.S. Attorney for the District of New Mexico against the State Treasurer, Mr. Robert Vigil. While Mr. Vigil is entitled to due process and is presumed innocent unless proven guilty, the cloud of suspicion and lack of public trust that has

been created by these serious allegations has effectively incapacitated the sitting State Treasurer. It is acknowledged by the stipulated parties that the State Treasurer cannot perform his duties with the focus and confidence necessary to protect best the financial interest of the State and the citizens of New Mexico.

Moreover, the State Treasurer will need to concentrate his energies to mount a defense against these federal criminal charges. See, Petition at Para 7. The State Treasurer recognizes that it would be an undue burden to perform his duties while he is defending himself against these serious charges. See, Petition at Para 8. He thus admits that there will soon exist a palpable absence of effective leadership at the State Treasury. If the State Treasury is allowed to flounder rudderless, the ship of state could experience substantial damage. See Affidavit of the Secretary of the Department of Finance and Administration attached hereto as Exhibit A.

It is imperative, therefore, that this Court exercise its extraordinary writ powers to remedy this *de facto* vacancy of the Office of the State Treasurer. Under controlling law, the Governor is vested with the authority to fill a vacancy such as this by appointment. As set forth below, this Court can grant the needed relief and order the Governor to appoint an Acting Treasurer, who will serve on a temporary basis.

B. The State Treasurer's Recusal From His Official Duties Creates a De Facto Vacancy and This Court Should Order the Governor to Appoint an Acting State Treasurer

In order that the Governor might confidently appoint an interim Acting State Treasurer with full and unquestioned authority to act in the place of State Treasurer Vigil during Mr. Vigil's absence from office, it is important that this Court exercise its unquestioned authority to determine that, in the circumstances presented here and subject

to the limitations described in the Stipulated Writ, a constitutional "vacancy" exists that permits the Governor to exercise his constitutional authority to appoint an interim Acting State Treasurer.

Article V, § 5 of the New Mexico Constitution provides, in part: "Should a vacancy occur in any state office, except lieutenant governor and member of the legislature, the governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term." In this case, a "de facto" vacancy exists, which is caused by the State Treasurer's temporary recusal from office as set forth in the Stipulated Writ. "De facto" means: "Existing in fact." Concise Oxford English Dictionary 375 (10th ed., revised, 2002).

According to the Stipulated Writ, Mr. Vigil will be absent in fact because he agrees to be recused from all duties as State Treasurer and agrees further to have no contact with the Treasurer's Office with respect to performing his duties while the criminal charges against him are pending.

Article V, § 5 has been interpreted in other contexts to address the meaning of "vacancy" in a variety of constitutional circumstances. For example, in an original writ proceeding in this Court, in Denish v. Johnson, 121 N.M. 280, 910 P.2d 914 (1996), this Court held that certain Regents of the New Mexico Institute of Mining and Technology were entitled to remain in office until their successors were chosen in the manner required by the Constitution. In so holding, the Court concluded that no vacancy existed, which would permit the appointment of a successor under Article XX, § 5. Distinguishing between the terms expiration and "vacancy," this Court stated: "A

vacancy occurs when an appointee leaves office before the completion of his or her constitutional or statutory term." Id. at 286, 910 P.2d at 920 (emphasis in original.); see also, Stafford v. Cook, 252 S.W. 597 (Ark. 1923) (explaining that a "vacancy in office involves the absence of an incumbent of the office who has been legally inducted therein"); State ex rel. Rives v Herring, 57 N.M. 600, 608-609, 261 P.2d 442 (an office "is vacant in the eyes of the law whenever it is unoccupied by a legally qualified incumbent..."). Given the circumstances here, Mr Vigil will, at least temporarily, leave his office for all intents and purposes before the expiration of his term. This creates a constitutional vacancy for purposes of Article V, Section 5. Such a vacancy then gives rise to the appointive power in the Governor to fill the office, in this case, on an interim basis as set forth in the Stipulated Writ.

C. The Stipulated Writ of Injunction Agreed to By All Parties Should Be Given Effect By This Court

The Stipulated Extraordinary Writ of Injunction now before the Court is a settlement agreement that has been agreed to by the parties: the Governor, the Attorney General and the State Treasurer. Courts enforce settlement agreements according to their terms. In Burden v. Colonial Homes, Inc., 79 N.M. 170, 173, 441 P. 2d 210, 213 (1968), this Court observed that, "We are bound by the unambiguous language of the settlement agreements." Also see, Woodson v. Lee, 73 N.M. 425, 389 P. 2d 196 (1964); Fuller v. Crocker, 44 N.M. 499, 105 P. 2d 472 (1940). As the Court of Appeals noted in Board of Education for the Carlsbad Municipal Schools v. New Mexico State Board of Education, 128 N.M. 398, 993 P.2d 112, 1999-NMCA-156, "public policy encourages, and we have a duty to enforce, settlement agreements." (internal citations omitted).

A stipulated injunction is valid and enforceable. In Attorney General v. Montoya, 126 N.M. 273, 968 P.2d 784, 1998-NMCA-149, the district court approved a stipulated permanent injunction enjoining defendant from doing business as a mortgage loan broker. Defendant violated the injunction. The district court enforced the stipulated injunction by holding defendant in criminal contempt and sentencing him to a term of imprisonment.

Accordingly, the Court should enter and give effect to the Stipulated Extraordinary Writ of Injunction agreed to by the parties.

D. This Temporary Remedy In No Way Conflicts With the Separation of Powers Doctrine and the Legislature Remains Free to Impeach and Remove the State Treasurer From Office

The Stipulated Extraordinary Writ of Injunction is a temporary solution to an emergency situation that respects the independence of the executive, legislative and judicial branches of government. The Executive branch is confronting the crisis by arranging, subject to approval of the Judicial branch, for an Acting Treasurer to be appointed to fill the de facto vacancy created by the temporary recusal of the State Treasurer from office. Nothing in this arrangement precludes or affects the Legislative branch from exercising its constitutional right to impeach and remove permanently from office the duly elected State Treasurer.

Consistent with settled constitutional principles of separation of powers, See Article III, Section 1, the power to impeach and remove a state elected officer rests exclusively with the State Legislature. Article IV, Sections 35 and 36. "The sole power of impeachment shall be vested in the [H]ouse of [R]epresentatives . . . [and] [a]ll impeachments shall be tried by the [S]enate." Article IV, Section 35.

The Stipulated Extraordinary Writ of Injunction removes the State Treasurer from his duties on a temporary basis “until the federal charges against him are resolved in his favor or until further order of this Court”. Stipulated Writ at Paragraph 4. The Writ also provides that Mr. Vigil shall continue to be paid his State Treasurer salary. Therefore, nothing in the Writ and its temporary relief precludes the Legislature from exercising its exclusive constitutional authority to impeach and remove Mr. Vigil permanently from office as the State Treasurer.

Impeachment by the House and conviction by the Senate would remove Mr. Vigil from office permanently, immediately terminate his right to any pay, and disqualify Mr. Vigil from holding “any office of honor, trust or profit” in the state “or to vote under the laws of this state”. Article IV, Section 36. In this manner, the Stipulated Writ is fully consistent with and honors the basic principle of separation of powers engrafted in our Constitution.

IV. CONCLUSION

A unique and extraordinary event has occurred affecting the operation of state government. In these emergency circumstances, the Petitioner is obligated to seek extraordinary relief from this Court in order to best protect the citizens of the State. Thus, Petitioner respectfully requests that this Court grant the relief requested and enter the Stipulated Extraordinary Writ of Injunction.

Respectfully Submitted,

PATRICIA A. MADRID
New Mexico Attorney General
Attorney for Petitioner

By 

Stuart M. Bluestone
Chief Deputy Attorney General
Glenn R Smith
Deputy Attorney General
Christopher D. Coppin
David K. Thomson
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-7416

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September 2005, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF VERIFIED EMERGENCY PETITION FOR TEMPORARY RECUSAL was filed in the New Mexico Supreme Court and faxed upon counsel of record as follows:

Sam Bregman
Bregman Law Firm PC
111 Lomas Blvd. #230
Albuquerque, NM 87102-2307

Hilary C. Tompkins
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87501-2704



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO

Petitioner,

v.

No. 29464

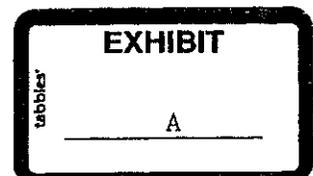
OFFICE OF THE STATE TREASURER,

Respondent.

AFFIDAVIT OF JAMES C. JIMENEZ

James C. Jimenez, Cabinet Secretary, New Mexico Department of Finance Administration, being duly sworn, upon oath deposes and states as follows:

- 1) I was appointed Cabinet Secretary of the New Mexico Department of Finance Administration in 2003; and



- 2) I have extensive experience in advising governments on financial matters since 1986, including serving as a fiscal analyst and deputy secretary for the New Mexico Department of Finance Administration and serving as finance director and city manager for the City of Rio Rancho; and
- 3) In addition to serving as the Chief Financial Officer of the State, I serve on a number of boards and commissions. I am a member of the State Investment Council and the New Mexico Finance Authority and I serve as the Executive Secretary of the Board of Finance; and
- 4) With the recent federal indictment of State Treasurer Robert Vigil, among other individuals, it is imperative that the daily operations and investment activity of the Office of the State Treasurer continue in a prudent and fiscally sound manner; and
- 5) While to the best of my knowledge there has been no financial instability, executive branch staff has assisted the Office of the State Treasurer to implement interim measures and safeguards to ensure the fiscal integrity and stability of the state's investments, which currently totals more than \$3 billion; and

- 6) Despite these prudent measures, it is critical that an independent and knowledgeable individual assume the position of State Treasurer immediately and that he or she be given full authority to conduct the daily affairs and operations of that Office until the matters involving the State Treasurer are resolved; and

- 7) The need for this interim appointment is based on the significant financial activity and short-term investment practices of the Office of the State Treasurer. For instance, the Office invests in overnight securities which must be monitored and maintained on a continual basis. The Office also invests in funds for local governmental entities. Currently, that investment pool is over \$1 billion, further demonstrating the magnitude of the financial responsibility held by the Treasurer's Office; and

- 8) Continuing uncertainty regarding the management of the Office of the State Treasurer could potentially create the appearance of instability that could detrimentally impact the financial ratings and investments of the State of New Mexico and local governments; and

- 9) For these reasons, I believe that it is vital that the Governor be authorized to make an interim appointment of the State

Treasurer to ensure that the fiscal integrity of the state's finances
be maintained.

Further affiant saith not.

James C. Jimenez
James C. Jimenez

Subscribed and sworn to before me this 23rd day of September, 2005 by James C.
Jimenez, the affiant herein.

John M. [Signature]
Notary Public
My commission expires: 11/29/08

1 justiciable case or controversy for this Court to resolve. All parties agree with both the
2 allegations and the relief requested in the Petition. No one has sought to oppose the Petition.
3

4 It has long been an established principle of our law that courts do not issue advisory
5 opinions. See *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640,
6 954 P.2d 72 (“We avoid rendering advisory opinions.”); *State v. Wyrostek*, 117 N.M. 514, 523,
7 873 P.2d 260, 269 (1994); *Bell Telephone Labs., Inc. v. Bureau of Revenue*, 78 N.M. 78, 84,
8 428 P.2d 617, 623 (1966) (holding court does not give advisory opinions). Yet that is exactly
9 what this Petition appears to request. The parties have reached an agreement and do not set
10 forth a justiciable dispute requiring resolution by this Court.
11
12

13 The New Mexico Constitution vests in this Court judicial power similar, though not
14 identical, to that conferred on federal courts by Article III of the United States Constitution.
15 See N.M. Const. art. VI, § 1; *John Does I through III v. Roman Catholic Church of the*
16 *Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 26, 122 N.M. 307, 924 P.2d 273. Thus,
17 New Mexico courts use federal law as guidance when dealing with issues of this nature. *Id.*;
18 *see also New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶ 2-3, 126 N.M.
19 788, 975 P.2d 841 (the Court “should be guided by prudential considerations”). Under long-
20 settled federal law, the judiciary’s power is “limited to determining rights of persons or of
21 property, which are actually controverted in the particular case before it” *Swift & Co. v.*
22 *Hocking Valley Ry. Co.*, 243 U.S. 281, 290 (1917) (citations omitted). “No stipulation of
23 parties or counsel, whether in the case before the court or in any other case, can enlarge the
24 power, or affect the duty, of the court.” *Id.*; *see also* Laurence H. Tribe, *American*
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1 *Constitutional Law* 362 (3d ed. 2000) (stating that when a party agrees to the opposing party's
2 position regarding the result of litigation there is no case or controversy).
3

4 The case and controversy requirement limits the judicial power reposed in our courts by
5 the people. This requirement, in turn, limits the business of the courts to "questions presented
6 in an adversary context." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). "The fact that it would be
7 convenient for the parties and the public to have promptly decided whether the [matter] assailed
8 is valid, cannot justify a departure from these settled rules" *Ashwander v. TVA*, 297 U.S.
9 288, 345 (1936) (Brandeis, J., concurring); *see also Kremens v. Bartley*, 431 U.S. 119, 136, 97
10 S.Ct. 1709, 1718-19 (1977) (noting that these limitations apply in the context of ripeness). For
11 these reasons, we find no controversy here and decline to issue an advisory opinion regarding
12 the agreement reached by the parties.
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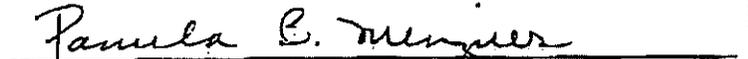
14 Additionally, the Verified Emergency Petition for Temporary Recusal does not state any
15 claim that is cognizable within the powers granted this Court. The Constitution, Article 6,
16 Section 3, grants this Court power to issue various extraordinary writs that pertain specifically
17 to public officials, yet this Petition does not state a claim thereunder. *See* Rule 12-504 NMRA
18 2005. An action for an injunction is only appropriate when the parties have otherwise stated
19 a valid legal claim under New Mexico law, something this Petition has not done. Consistent
20 with the judicial restraint imposed on this Court by law, we cannot review this matter
21

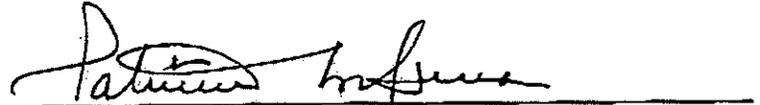
22 Accordingly, the Verified Petition for Temporary Recusal is hereby **DENIED**
23 for the reason that this Court lacks the authority under the Constitution and laws of New
24 Mexico to consider it.
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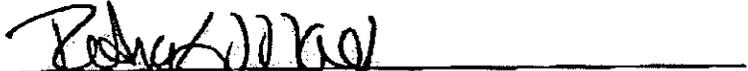
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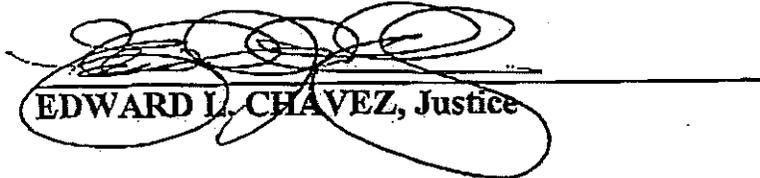
IT IS SO ORDERED.


RICHARD C. BOSSON, Chief Justice


PAMELA B. MINZNER, Justice


PATRICIO M. SERNA, Justice


PETRA JIMENEZ MAES, Justice


EDWARD L. CHAVEZ, Justice