FISCAL IMPACT REPORT

		LAST UPDATED	
SPONSOR	Harper/Dixon/Figueroa	**ORIGINAL DATE**	2/17/23
		BILL	House Joint
SHORT TITLE	Open Primary Elections, CA	**NUMBER**	Resolution 12
		ANALYST	Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Constitutional Question on Ballot	$150.0-200.0	$0.0	$0.0	$150.0-$200.0	Nonrecurring	General Fund
Ballot on Demand System	$0.0	$0.0	$500.0-$1,000.0**	$500.0-$1,000.0	Nonrecurring	Election Fund
Total	$0.0	$0.0	$500.0-$1,000.0	$650.0-$1,200.0		

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent version of this legislation.
**Incurred only if voters approve constitutional amendment

Relates to HB4, SB175 and SB180
Conflicts with HB54, SJR7 and SB73

Sources of Information

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
Secretary of State (SOS)
State Ethics Commission (SEC)

SUMMARY

Synopsis of House Joint Resolution 12

House Joint Resolution 12 proposes to amend Article 7 of the New Mexico Constitution to allow voters, regardless of political party affiliation or no political party affiliation, to vote in the state-sponsored and funded primary election of a political party of their choice. It also allows political parties the option of allowing only party members to participate in that party's nomination process if the party administers and pays all costs of that process.

HJR12 is to be submitted for approval by the people of the state in the next general election (November 2024) or any special election called for that purpose.

FISCAL IMPLICATIONS

Under Section 1-16-4 NMSA 1978 and the New Mexico Constitution, the Secretary of State (SoS) is required to print samples of the text of each constitutional amendment in both Spanish and English in an amount equal to 10 percent of the registered voters in the state. SoS is also required to publish the samples once a week for four weeks preceding the election in newspapers in every county in the state. The estimated cost per constitutional amendment is $150 thousand to $200 thousand depending on the size and number of ballots and if additional ballot stations are needed.

In the event the voters approve HJR12, all voters would be eligible to participate in primary elections, which could have an impact on voter turnout. In anticipation of a resulting increase in turnout at a state sponsored and funded primary, SOS has estimated the need for additional ballot on demand systems, which would be a nonrecurring cost of $500 thousand to $1 million, based on the real difference of ballot on demand costs from the 2022 primary.

SIGNIFICANT ISSUES

In the event HJR12 is approved by the voters, it is unclear how many individuals would be eligible to vote in a primary election who were not before. Pew Research finds 15 percent of New Mexican adults identify with no particular party, equating to roughly 315 thousand individuals who could now vote in a primary. This estimate aligns relatively closely with SOS's voter information data, which shows as of December 2022, 22.6 percent of registered voters in New Mexico were not affiliated with one of the three major parties–Democratic, Republican, and Libertarian. Therefore, under the provisions of HJR12, almost one quarter of the state's registered voters would now be able to vote in a primary election.

SOS provides these comments concerning an open primary:

> In the type of open primary proposed, all registered voters may choose in which primary to vote. More specifically, major party voters may choose which party's ballot to vote. Critics argue that this type of open primary dilutes the parties' ability to nominate. Supporters say this system gives voters maximal flexibility—allowing them to cross party lines—and maintains their privacy.

HJR12 provides political parties to run and pay for their own nominating process. As to this option, SOS warns:

> Election infrastructure is not provided to non-state-run elections in the state of New Mexico. As such, the security protections mandated in the election code would not need to be provided in these party paid primary elections, which raises several administration and subsequent public trust concerns in those elections.

Further, SOS believes that this new option would require a large number of conforming amendments to the Election Code. The language of HJR12 "as provided by law" indicates enabling legislation will be required to implement this option, in which these concerns could be

addressed.
NMAG raises these concerns:

> HJR12 could face a constitutional challenge from a qualified political party as potentially infringing on First Amendment rights. However, it is not clear that such a challenge would be successful. The First Amendment guarantees the right to freely associate with others for the purpose of collective expression. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958). In general, the constitutionality of open primaries appears to be a relatively open question that has thus far been approached as a fact-specific inquiry. *See California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (holding that California's blanket primary system, through which voters could choose between any candidate for any party for any office in a primary election violated the First Amendment by "forcing political parties to associate with those who do not share their beliefs"). *See also Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1123 (9th Cir. 2016) (observing that, in the wake of the Supreme Court's Jones decision, "the severity of the burden that a primary system imposes on associational rights is a factual, not a legal, question"). Although many states do have some form of open primary, courts have reached inconsistent conclusions as to whether these laws unconstitutionally interfere with political parties' First Amendment rights. *Compare Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) (holding that Virginia's open primary system was unconstitutional as applied) *with Nago*, 833 F.3d 1119 (9th Cir. 2016) (upholding Hawaii's open primary).

As to the party-run nomination process option, NMAG advises:

> While the legislation nominally protects the right to free association by allowing parties to engage in member-only nominations if the party pays for all costs, this creates an additional potential federal constitutional issue. Effectively, the legislation subsidizes parties that voluntarily forego their First Amendment right to freedom of association. This condition could be treated by a federal court as an impermissibly coercive condition in violation of the First Amendment. Governments conditioning receipt of funds upon a private party foregoing protected expressive activity may run afoul of the First Amendment. *See Agency for Int'l Dev. V. Alliance for Open Soc'y Int'l*, 570 U.S. 205 (2013) (holding that a federal grant conditioning receipt of funds upon program participants adopting an explicit policy opposing prostitution violated the First Amendment); *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." (internal quotation omitted)); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984) (holding as unconstitutional a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds.). However, again, it is not clear how this litigation would turn out. The caselaw on conditions upon state funding vary. *See, e.g., Regan v. Tax'n with Representation of Washington*, 461 U.S. 540 (1983) (upholding a federal statute prohibiting 501(c)(3) nonprofit organizations from engaging in substantial efforts to influence legislation).

ADMINISTRATIVE IMPLICATIONS

SOS reports that if HJR12 is approved by the voters and the major parties do not opt to run their own primary elections, the roster of eligible voters in each county would be required to include all registered voters, regardless of party affiliation. According to SOS, its current election management system is capable of generating this type of roster without any additional system enhancements. However, some changes to the ballot on demand systems are anticipated in order to allow for poll workers to issue ballots to unaffiliated voters. SOS does not anticipate these changes will cause an increase in costs.

CONFLICT, RELATIONSHIP

NMAG provides this summary of related or conflicting pieces of 2023 legislation:

Conflicts with SJR7. SJR7 proposes to amend the New Mexico Constitution to provide for nonpartisan primaries in which all candidates, regardless of party, would appear on a single primary ballot. The five candidates who receive the most votes, possibly including multiple candidates from the same party, would proceed to the general election. SJR7 also proposes ranked-choice voting in the general election.

HJR12 would constitutionalize open primaries and thus take precedence over conflicting statutory legislation. The following bills amend statutes, but are in conflict with or relate to HJR12:

Conflicts with HB54. HB54 proposes semi-open primaries in which only independent/DTS voters could cast a political party's ballot.

Conflicts with SB73. SB73 proposes semi-open primaries in which only independent/DTS voters could cast a political party's ballot.

Relates to SB175. SB175 amends statutory provisions to create open primaries.

Relates to SB180. SB180 proposes myriad changes to laws concerning election administration within the Election Code.

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