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FISCAL IMPACT REPORT

ORIGINAL DATE 02/15/21

SPONSOR Tallman LAST UPDATED _____ HB _____

SHORT TITLE Additional Oath of Office, CA SJR 10

ANALYST Gaussoin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
			See Fiscal Implications			General Fund
		\$150.0-\$200.0		\$150.0-\$200.0	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB331.

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)

State Ethics Commission (SEC)

Secretary of State (SOS)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 10 would ask voters to amend Articles 5 and 10 of the New Mexico Constitution to provide for nonpartisan elections for county clerks and the Secretary of State starting in 2023 and then every four years in odd-numbered years. In addition, those who hold those offices would be required to take an additional oath of office affirming they will execute the duties in a “fair and neutral manner,” provide equal and ample opportunities for all eligible citizens to register to vote if registration is required, and ensure the results of elections accurately reflect all “valid” votes.

The proposed constitutional amendment also makes some technical changes to the constitution, cleaning up language reflecting enactment dates of old constitutional amendments and replacing gendered terms with gender-neutral language.

Voters would consider the amendment at the next general election or at a special election called for the purpose of adopting the amendment.

FISCAL IMPLICATIONS

Constitutional Amendment. 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 them 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.

Regular Local Election Costs. Nonpartisan elections of local government body elected officials and local government ballot questions are held in odd-numbered years in November throughout the state under the Regular Local Election Act; however, these elections do not include the races for county clerk or secretary of state. While the Secretary of State indicated those races could be added to the regular local election if voters approved the constitutional amendment, it did not suggest the Secretary of State or counties would incur additional costs as a result. Nevertheless, additional costs are likely.

Not only would county clerks and the Secretary of State need to provide additional information and guidance to county clerks and voters, adding a statewide office to the local elections will almost certainly increase turnout. The most recent local election attracted 18 percent of voters, compared with a 55 percent turnout for the 2016 statewide election. The cost grows if absentee ballots remain popular. These costs, which would be incurred in FY24 if voters approved the change for the November 2023 election, are indeterminate but expected to be minimal.

SIGNIFICANT ISSUES

If adopted, the Election Code would need to be amended to allow for these candidate contest to appear during the Regular Local Election.

The Secretary of State notes an issue with term lengths: “If enacted, this constitutional amendment would serve to shorten the terms of currently serving county clerks and any new clerks or secretary of state elected in 2022. The sponsor should consider extending out the terms of current clerks to 2023 or newly elected clerks or SOS in 2022 to 2027.”

The State Ethics Commission raises additional issues, including concerns about whether the proposed amendment could be the subject of a constitutional challenge, although the question could be resolved in any enabling legislation. The commission argues:

The scope of the proposed constitutional amendments is unclear: does it merely affect a change to general election ballots so that the names of candidates show no partisan affiliation? Or does the amendment purport to forbid the Secretary of State from having a party affiliation? The proposed amendment’s “as provided by law” clause suggests that the Legislature may resolve this question and further determine the scope of the proposed amendment.

Should the amendment be interpreted to mean only that the election ballot cannot state the candidates' party affiliations, the commission contends the courts are likely to uphold the constitutional provision.

Courts have generally upheld laws that modify the general election ballot so that the names of judicial nominees are not accompanied by any partisan affiliation, “[i]n light of the different role that judges must play from that of their legislative and executive counterparts,” which gives rise to a “compelling state interest” in reducing partisanship in judicial elections. *Ohio Council 8 of State, County & Municipal Employees, AFL-CIO et al. v. Husted*, 814 F.3d 329, 339 (6th Cir. 2016). The Secretary of State has a duty to “obtain and maintain uniformity in the application, operation and interpretation of the Election Code,” suggesting New Mexico has a similar compelling interest in reducing partisanship in Secretary of State and county clerk elections.¹

However, the commission indicates, should the amendment be interpreted as disallowing the Secretary of State or county clerks from having a party affiliation, the amendment is likely unconstitutional. Further:

If the Legislature imposes additional restrictions on partisan political activity related to elections for secretary of state beyond the general election ballot itself (such as disallowing political parties from nominating a candidate for secretary of state), then a court would closely consider whether those restrictions justify any burden imposed on constitutionally-protected activities, such as a political party's right to nominate a candidate for the office of secretary of state or the right of secretary of state nominees to be a member of a political party.

The Ethics Commission notes, “No court has specifically considered whether nonpartisan elections for a Secretary of State are permitted under the United States Constitution. Oregon’s Secretary of State has advocated making secretary of state elections nonpartisan.² But it does not appear that any concrete efforts have been made in this regard.”

ADMINISTRATIVE IMPLICATIONS

If adopted and the Election Code amended, the Secretary of State likely would need to provide training and materials for the county clerks responsible for implementing the changes. It is assumed these responsibilities can be absorbed by the Secretary of State.

¹ See Phil Keisling & Sam Reed, “The Troubling Partisanization of Elections for Secretary of State,” *Governing* (December 10, 2014), <https://www.governing.com/columns/smart-mgmt/col-troubling-partisanization-elections-secretary-state.html>, which argues that statutory or constitutional amendments should be enacted to elect Washington’s secretary of state on a nonpartisan basis); see also the Columbian Editorial Board, “In Our View: Secretary of state should be nonpartisan office,” Sep. 1, 2020, <https://www.columbian.com/news/2020/sep/01/in-our-view-secretary-of-state-should-be-nonpartisan-office/>.

² See Mike Rogoway, “Oregon secretary of state may seek to make the office nonpartisan,” *The Oregonian* (Sep. 24, 2019), <https://www.oregonlive.com/news/2019/09/oregon-secretary-of-state-may-seek-to-make-the-office-nonpartisan.html>.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SJR10 relates to SB331, which amends statute to require the same additional oath of office for the Secretary of State and county clerks, as well as limit the ability of those elected officials to run for other offices or endorse candidates for other races.

Other election-related bills include HB74 concerning the voting rights of released inmates, HB79 concerning primary election voting by independent voters, HB153 concerning campaign finance reporting, SB14 concerning automatic voter registration, SB48 concerning same-day and absentee voting practices, SB100 concerning minor party candidates, SB160 and SB298 concerning public campaign financing, SB235 concerning absentee voting, SB266 on judicial terms, SB254 and SB286 concerning the election to fill an empty congressional seat, SB311 concerning campaign advertising, SB336 concerning voting for 16 year olds, SB356 concerning solicitation of campaign donations, and a number of bills on redistricting.

As of February 15, 28 resolutions had been introduced proposing to ask voters to amend the state constitution.

TECHNICAL ISSUES

NMAG notes the additional oath of office might be unnecessary.

Article 20, Section 1 of the New Mexico Constitution provides: “Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.”

HG/sb