

LFC Requester:	Hilla, Emily
-----------------------	---------------------

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

AgencyAnalysis.nmlegis.gov

{Analysis must be uploaded as a PDF}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment** _____
Correction _____ **Substitute** _____

Date 1/23/24
Bill No: SB 38

Sponsor: Sen. Bill B. O'Neill
Short Title: Primary Election Changes

Agency Name and Code AOC
Number: 218
Person Writing Kathleen Sabo
Phone: 505-470-3214 **Email** aoccaj@nmcourts.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
None	None	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
Unknown	Unknown	Unknown	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Unknown	Unknown	Unknown	Unknown	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None.

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 38 enacts statutory sections within the Election Code, Section 1-1-1 NMSA 1978 et. seq., as follows:

- **Section 1-4-15 NMSA 1978**, governing registration and change of party affiliation, to permit a voter without party affiliation to participate in a primary election of one party without the voter's certificate of registration being changed to reflect an affiliation unless requested by the voter.
- **Section 1-6-4 NMSA 1978**, governing mailed ballot application, to include an option on the form requesting a mailed ballot in a primary election to request the ballot of one of the parties participating in the primary election, when the voter has registered without party affiliation.
- **Section 1-6-22.1 NMSA 1978**, governing mail ballot election precinct and absentee voting in lieu of polling place, to require the notice sent to an unaffiliated voter or a voter affiliated with a party other than a major political party, inform the voter of the voter's ability to affiliate with a major party for a primary election by returning the card and indicating affiliation or by indicating affiliation online to request a major political party's ballot for the primary election.
- **Section 1-12-7 NMSA 1978**, to govern persons permitted to vote upon choosing to affiliate with a party, to permit an unaffiliated voter or one affiliated with a party other than a major political party to affiliate with a major political party in a primary election by requesting a major political party's primary election ballot and to require that the person be permitted to vote for the candidates on that party's ballot.
- **Section 1-12-7.1 NMSA 1978**, to govern voter lists, signature rosters and checklists of voters, and their use during an election, to require the judge or election clerk to determine that a voter is an unaffiliated voter or one affiliated with a party other than a major political party choosing to affiliate with a major political party for a primary election by requesting a ballot of a party designated on the primary election ballot.
- **Section 1-12-7.2 NMSA 1978**, governing voters whose name is not on a voting list or roster, to permit an unaffiliated voter or a voter affiliated with a party other than a major political party to affiliate with a major political party for a primary election by requesting the ballot of a party participating in the primary.
- **Section 1-12-20 NMSA 1978**, governing conduct of election and interposing challenges, to permit a challenge to be interposed when a person desiring to vote has designated an affiliation with a major political party represented on the ballot, but the

- person requests a ballot for a party with which the person is not affiliated.
- **Section 1-15A-2 NMSA 1978**, governing voting in a presidential primary, to provide that a voter may vote in a presidential primary election on the ballot of only one of the parties participating in the primary election in accordance with the provisions of Section 1-12-7 NMSA 1978.

The effective date of the Act is July 1, 2024.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions, as well as constitutional challenges to the law. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

- 1) Section 1-6-4 NMSA 1978 provides a fourth-degree felony penalty for a person who willfully and with knowledge and intent to deceive or mislead any voter, election board, canvassing board, county clerk or other election official and who falsifies any information on an absentee ballot request form or who affixes a signature or mark other than the person's own on a mailed ballot request form.

Section 1-20-1 NMSA 1978 provides that the penalties imposed by Sections 1-20-3 through 1-20-223 NMSA 1978 do not apply to offenses for which penalties are otherwise provided in the Election Code.

While no other provision amended by SB 38 specifies a penalty for violation, Section 1-20-3 NMSA 1978 provides a fourth-degree felony penalty for a registration offense, Section 1-20-7 NMSA 1978 provides a fourth-degree felony penalty for unlawful possession of an absentee ballot; Section 1-20-8 NMSA 1978 provides a fourth-degree felony penalty for false voting; Section 1-20-8.1 NMSA 1978 provides a fourth-degree felony penalty for fraudulent and double voting; etc.

- 2) In *Crum v. Duran*, 2017-NMSC-013, the petition, David Crum, contended that the Free and Open Clause of Article II, Section 8 of the New Mexico Constitution entitled him to vote during primary elections without registering with a major political party because he was a qualified voter under Article VII, Section 1. The Supreme Court disagreed, noting that “[a]lthough the Free and Open Clause is intended to promote voter participation during elections, the Legislature has the constitutional power to enact laws that ‘secure the secrecy of the ballot and the purity of elections and guard against the abuse of [the] elective franchise.’” See *Crum v. Duran* at <https://law.justia.com/cases/new-mexico/supreme-court/2017/36-030.html> .

It is therefore likely that the adoption of an open primary system will be challenged in court. See the FIR for 2021's HB 79 at <https://www.nmlegis.gov/Sessions/21%20Regular/firs/HB0079.PDF> .

- 3) In the FIR for 2023's HJR 12, proposing to amend Article 7 of the Constitution of NM to allow all voters to vote in the primary election of a political party of their choice, the

Office of the NM Attorney General raised first amendment issues re: the impingement of freedom of association rights.

See <https://www.nmlegis.gov/Sessions/23%20Regular/firs/HJR12.PDF> .

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

See “Fiscal Implications,” above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS