


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*,
M. KEITH RIDDEL, *et al.*,
In their official capacities as County Clerks,

Petitioners,

v.

No. S-1-SC-38228

MAGGIE TOULOUSE OLIVER,
In her official capacity as Secretary of State,

Respondent,

and

THE REPUBLICAN PARTY OF NEW MEXICO,
DAVE KUNKO, *et al.*,
SENATOR STUART INGLE, *et al.*,
REPRESENTATIVE JIM TOWNSEND, *et al.*

Intervenors.

**PUBLIC INTEREST LEGAL FOUNDATION'S
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

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Pursuant to Rule 12-320(A) N.M.R.A., the Public Interest Legal Foundation (the “Foundation”) respectfully moves this Court for leave to file an *amicus curiae* brief in the above-captioned case. The proposed brief and exhibits are attached to this motion. In support of this motion, the Foundations states the following:

1. The Foundation is a non-partisan, 501(c)(3) public-interest organization that is dedicated entirely to promoting the integrity of elections nationwide through research, education, remedial programs, and litigation. This matter presents issues that are at the core of the Foundation’s election-integrity mission—namely, the problems and risks attendant to mandatory vote-by-mail. The Foundation thus has a serious interest in the subject of this petition.

2. The Foundation believes the information presented in the Foundation’s proposed brief and exhibits will significantly aid the Court in the resolution of the questions raised herein.

3. As part of its mission, the Foundation studies, audits, and analyzes voter rolls throughout the country. At considerable expense, the Foundation compares voter roll data against federal and other public or commercial databases to flag registrations that may be incomplete, outdated, or no longer valid. For example, the Foundation uses verifiable death records such as the Social Security Death Index as well as other commercial databases to identify with a high degree of confidence active registrants who are deceased.

4. The Foundation submits its findings and leads to state and local election officials for further investigation in order to aid their voter roll maintenance programs.

5. The Foundation recently provided findings regarding errors, duplicate registrations, registrations at commercial addresses and deceased registrants to the New Mexico Secretary of State. A copy of that submission is attached to the Foundation's proposed brief.¹ While election officials alone determine whether an individual is eligible to vote, the Foundation believes this Court will benefit from understanding the condition of New Mexico's voter roll as it considers whether to order mandatory vote-by-mail for New Mexico's June 2 primary.

6. The information and data presented in the Foundation's brief will very likely not be presented by the existing parties or other *amici* because no other existing party or *amici*, to the best of the Foundation's knowledge, has invested the resources into examining this question.

7. Mindful of the Court's limited judicial resources, the Foundation does not seek to intervene as a party to make generalized arguments or receive any oral argument time. The Foundation wishes merely to direct the Court to concrete

¹ The Foundation has redacted as much personally identifying information in the copy of its submission filed in this Court as possible while still preserving the ability to review discrete records. The Foundation could of course file an unredacted copy of the data under seal should the Court order.

factual matters bearing on the issues presented. Permitting the Foundation to file the attached brief and exhibits will thus not prejudice any party or delay resolution of this matter.

8. Pursuant to Rules 12-320(D)(1) and 12-309 N.M.R.A., the Foundation attempted to give notice of the intention to file and to ascertain whether this motion will be opposed by any other party. Counsel for the Petitioners and Respondent oppose this motion. Counsel for Intervenors consents to this motion.

9. WHEREFORE, the Public Interest Legal Foundation requests leave to file the attached *amicus curiae* brief and exhibits.²

Dated: April 8, 2020.

Respectfully submitted,

/s/ Patrick J. Rogers

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² The Foundation's Exhibits total 132 pages. Because there were no lower court proceedings in this matter, the Foundation's brief is the only way to attach and present the pertinent exhibits to this Court.

CERTIFICATE OF SERVICE

I hereby certify that on Wednesday, April 8, 2020, I filed the foregoing Motion for Leave to File *Amicus Curiae* Brief using the Supreme Court of the State of New Mexico's electronic filing system, which will serve notice on all parties.

Dated: April 8, 2020.

Respectfully submitted,

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**BRIEF OF THE PUBLIC INTEREST LEGAL FOUNDATION
AS *AMICUS CURIAE***

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Voter Data Information, <https://www.sos.state.nm.us/voting-and-elections/data-and-maps/voter-data-information/> 2 n.4

INTRODUCTION

Those who have studied and advocate for vote-by-mail systems—like MIT professor Charles Stewart III¹—note that successful risk-management systems “took decades, not months” to develop.² With less than three months until New Mexico’s June 2 primary election, Petitioners seek relief that would require election officials to automatically mail a ballot to every active registrant in the state. Research conducted by proposed *amicus curiae* Public Interest Legal Foundation³ (the “Foundation”) and attached to this brief indicates that if such relief is granted, ballots have a high likelihood of being mailed to registrants who are deceased, some registrants may receive more than one ballot, and ballots may go to commercial addresses that cannot lawfully be used for voter registration purposes. Simply, such is the state of the voter rolls in New Mexico. This would undoubtedly sow confusion and potentially put ballots into the hands of those

¹ Professor Stewart’s biography is available at <https://polisci.mit.edu/people/charles-stewart-iii> (last accessed April 7, 2020).

² Burden, Stein, and Stewart III, *More voting by mail would make the 2020 election safer for our health. But it comes with risks of its own*, Washington Post, April 6, 2020, <https://www.washingtonpost.com/politics/2020/04/06/more-voting-by-mail-would-make-2020-election-safer-our-health-it-comes-with-risks-its-own/>.

³ No party’s counsel authored this brief in whole or in part. No party, no party’s counsel, nor any other person, other than the Foundation, contributed money for the preparation or submission of this brief.

ineligible to possess them, thereby jeopardizing the legitimacy of New Mexico's election.

Attached to this brief is research submitted by the Foundation to the New Mexico Secretary of State. The Foundation's research reveals thousands of potential errors, inaccuracies, and invalid entries on New Mexico's voter rolls. While election officials are the final judge of voter eligibility and are perfectly capable of replicating the Foundation's research, the Foundation believes this Court should be aware of significant problems with the voter rolls that could be exploited under the mandatory vote-by-mail system Petitioners seek.

ARGUMENT

I. The Foundation's Voter Roll Research and Submission of Findings to the New Mexico Secretary of State.

As part of its organizational mission, the Foundation analyzes voters rolls across the Nation to assess their health. In late October 2019, the Foundation purchased a copy of New Mexico's statewide voter roll.⁴ Then, at considerable expense, using detailed methodologies and matching techniques (described *infra* and in the attached letter) the Foundation flagged registrations that are potentially inaccurate, outdated, or no longer valid. In New Mexico, these registrations include the following: (1) registrations belonging to deceased individuals; (2) duplicated

⁴ See <https://www.sos.state.nm.us/voting-and-elections/data-and-maps/voter-data-information/> (last accessed April 7, 2020).

registrations (*i.e.*, the same person registered more than once); (3) registrations listing a commercial addresses as a residence; and, (4) registrants with ages over 100.⁵ On April 7, 2020, the Foundation sent a letter to the New Mexico Secretary of State that describes the Foundation’s methodology and findings and asks the Secretary to investigate and take corrective action where necessary. Exhibit A (hereafter, the “Letter”). The Foundation also submitted unredacted spreadsheets containing the voter registration data described in the Letter. Modified and redacted versions of that data are attached to this brief as Exhibits B, C, and D. Below is a summary of the research submitted to the Secretary.

A. The Foundation Matched 1,681 Registrants to a Verifiable Record of Death.

The Foundation’s research indicates that there are potentially 1,681 deceased individuals with an active registration in New Mexico. Letter at 2; Exhibit B. If the requested relief is granted, each of those potentially deceased individuals will receive a ballot in the mail for the June 2 primary election. *See* Petition at 26-27. The risks associated with such a scheme are obvious: relatives, caretakers, or anyone who stumbles upon the ballot, may not resist the temptation to vote in the name of a deceased family member, friend, or tenant. There is also a more

⁵ While someone over 100 is eligible to vote, this can be a useful threshold to carefully examine vital statistics databases to aid the accuracy of the rolls. This data was submitted to the Secretary of State, but is not attached to this brief.

fundamental legal problem: the deceased are not qualified electors under the New Mexico Constitution, *see* Art. VII, Section 1A, and are therefore not eligible to even receive a ballot.

In order to ensure a high degree of confidence, the Foundation matched voter roll data against the federally maintained Social Security Death Index (SSDI), and where possible, against the SSDI *and* printed obituaries and other public notices. Letter at 2. In the *two* instances where SSDI information was not available, the Foundation matched the registration data against obituaries *and* death verification records from the big three credit bureaus. Letter at 2. At least 87 percent of registrants matched against the SSDI apparently died in year 2018 or earlier, with some dates of death reaching as far back as 1980. Exhibit B at 29.

The true number of deceased registrants is likely even higher because the Foundation analyzed only registrants with active registrations. However, that limitation makes the Foundation's findings particularly tailored to the most troubling aspect of the requested relief—the request for an order compelling officials to *automatically* mail a ballot to all active registrants. Petition at 26-27. Regardless, concerns about fraud remain even for deceased registrants with an *inactive* registration because Petitioners further request that all inactive registrants

receive a forwardable notice that gives the recipient the option to request a mail-in ballot. Petition at 27. Unscrupulous actors could exploit such a scheme as well.⁶

B. The Foundation Identified 1,584 Registrants Who Appear to Be Registered More than Once at the Same Address.

The Foundation flagged for the Secretary of State an additional 1,584 registered voters who appear to be registered more than once at the same address. Letter at 2; Exhibit C.⁷ To ensure a high degree of confidence, the Foundation flagged only those registrations with identical addresses and dates of birth and nearly identical first and last names. Letter at 2. If relief is granted, individuals with duplicate registrations may receive more than one ballot, increasing the chance that illegal votes will be cast. *See* N.M. Stat. Ann. § 1-20-8.1 (“[E]very person who votes or offers to vote more than once at any one election, is guilty of a fourth degree felony.”).

The number of people with two or more registrations is likely even higher because the Foundation has not yet accounted for some well-known causes of

⁶ The Foundation flagged for the Secretary an additional 1,519 registrations listing a year of birth 100 or more years ago. Letter at 1. While there is nothing inherently suspect about these registrations, the Foundation flags them so election officials can periodically and easily match them against death records to help ensure accurate vote rolls. Given the nature of the requested relief, these registrations should be verified prior to automatically sending ballots by mail to all active registrants.

⁷ The first registrations appear on pages 1-37 of Exhibit C. The duplicated registrations appear on pages 38-74 of Exhibit C.

duplication, such as married-name confusion, which happens when a registrant becomes married and then submits a subsequent registration using a different last name. The Foundation has seen those circumstances result in significant numbers of likely duplicated registrations in other jurisdictions.

“The idea that every voter must be equal to every other voter when casting a ballot has its genesis in the Equal Protection Clause, U.S. Const. amend. XIV, § 1 (Equal Protection Clause), and is commonly referred to as the ‘one person, one vote’ doctrine.” *Maestas v. Hall*, 2012-NMSC-006, ¶ 1, 274 P.3d 66, 70. Without further investigation into these irregularities, there exists the real risk that this bedrock doctrine will be upended by the requested vote-by-mail scheme.

C. The Foundation Identified 188 Registrations Apparently Listing a Commercial Address as a Residence.

In New Mexico, the voter registration form requires the registrant to provide his actual “residence.” N.M. Stat. Ann. § 1-4-5.4(B). A “residence” is the place where the person’s “habitation is fixed, and to which, whenever he is absent, he has the intention to return.” N.M. Stat. Ann. § 1-1-7. Despite this requirement, the Foundation identified 188 registrations that appear to list a commercial address as a residence. Letter at 3; Exhibit D. The Foundation has asked the Secretary to investigate these registrations to determine if they meet the requirements of New Mexico law.

If relief is granted, each active registrant using a commercial address will automatically receive a ballot in the mail. This raises two primary concerns. First, if the listed address is not the registrant's legal residence, he or she might not be eligible to receive a ballot in the first place. Only authorized election officials can make that determination. Second, because businesses may have multiple people who check the mail, mandatory vote-by-mail raises the risk that a ballot will be obtained by someone other than the recipient. Because of these risks, it is paramount that the Secretary investigate these registrations in advance of the June 2 primary election.

II. The Foundation Invites the Court to Appoint an *Amicus Curiae* to Verify the Foundation's Research.

The Foundation's research can be replicated. The Foundation hopes that replication can resolve any doubts concerning ambiguities in the data. The Foundation believes its data are correct but invite the Court to verify it. The Foundation welcomes efforts to verify and improve upon its work so that the Court is working with the most accurate and up-to-date data when rendering a decision in this matter. For example, the Foundation invites the Court to appoint its own *amicus curiae* to perform this function, if the Court believes it is warranted, and the Foundation is happy to work with any such designee to assist in cataloging the numbers of deceased registrants, duplicated registrations, and invalid commercial addresses that would receive a mail ballot under the Petitioners' requested relief.

CONCLUSION

Inaccurate voter rolls create heightened risks when paired with mandatory vote-by-mail schemes. For that reason, the Foundation's research merits consideration and further investigation by election officials and this Court alike.

Dated: April 8, 2020

Respectfully submitted,

/s/ Patrick J. Rogers

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PUBLIC INTEREST

— LEGAL FOUNDATION —

VIA EMAIL, FACSIMILE AND CERTIFIED MAIL

April 7, 2020

The Hon. Maggie Toulouse Oliver
New Mexico Secretary of State
Elections Bureau & Ethics Division
325 Don Gaspar, Ste. 300
Santa Fe, NM 87501
Email: Sos.elections@state.nm.us

**Re: Statutory Notice of Violation of National Voter Registration Act
Request for Meeting**

Dear Secretary Toulouse Oliver:

Based upon our findings outlined below, I am required to write your offices pursuant to 52 U.S.C. § 205010(b) to notify you that it appears to us that the State of New Mexico is not in compliance in several respects with the requirements of Section 8 of the National Voter Registration Act of 1993 (“NVRA”). This federal statute requires election officials to make a reasonable effort to maintain voter registration lists that are free of dead registrants and registrants who have moved to other jurisdictions, and to systematically remove the names of other ineligible registrants. 52 U.S.C. §§ 20507(a)(3), (4)(A)-(B), 20507(c)(2)(A)-(B).

You are receiving this letter because, as New Mexico’s chief election official, you are ultimately responsible under state and federal law for maintaining accurate and current voter registration lists. We believe the problems identified in this letter can be resolved quickly and amicably. **We therefore request a meeting, via telephone or video, if necessary, with the New Mexico Secretary of State – Elections Bureau** to discuss our findings, identify why the violations are occurring, inspect supporting list maintenance records, and confirm how you plan to bring New Mexico back into compliance with state and federal law. We are hopeful that we may reach a curative plan so that we do not need to initiate litigation to cure these defects.

I. Evidence of Inadequate List Maintenance

1. Deceased Registrants and Implausible Dates of Birth

Our review of New Mexico’s official registration list indicates your office is not making a reasonable effort to remove the names of deceased registrants, as required by the NVRA. 52 U.S.C. § 20507(a)(4)(A). New Mexico law also requires that obituary notices or other probate records be used to make determinations of death prior to the cancellation of an affected registration record. N.M. Stat. § 1-4-25 (2018). Using the State’s official voter roll extract from October 2019, we identified more than **1,500** registrants aged older than 100 years (i.e. with years of birth listed as 1919 or earlier). Taken at face value, data suggest that the oldest registrants in the state are each roughly 120-years-old—most of which still carry “active” designations within the voter roll.

We matched the entire state’s “active” registry against various data sources containing records of death, primarily the Social Security Death Index. Our comparison yielded a substantial number of strong matches showing that active registrants remain on your rolls after they die. The statewide roll currently contains at least **1,681** registrants who are matched against the SSDI or published obituaries with corresponding dates of death on file at various credit reporting bureaus. At total of 58 percent matched registrants yielded concurrent dates of death between SSDI and published obituaries.

At least 87 percent of registrants matched against the SSDI apparently died in year 2018 or earlier, with some dates of death reaching as far back as 1983.

2. In-county Duplicate Registrations

Our analysis also found apparent duplicate registrations for the same person. Federal law requires that list maintenance be “conducted in a manner that ensures that ... duplicate names are eliminated from the computerized list” of registrants. 52 U.S.C. § 21083(a)(2)(B)(iii). Furthermore, New Mexico law states that a registrant voting more than once in a single election could be found guilty of a fourth-degree felony, thereby reasonably charging that voter registration officials act to limit any such opportunity thanks to duplicate registrations. N.M. Stat. § 1-20-8.1 (2018).

Notwithstanding these legal obligations, the Foundation identified at least **1,584** sets of matched duplicate voter registrations in New Mexico. This was a conservative sampling effort that only accounted for perfectly matched addresses, birth dates, and consecutive characters in name fields. Total figures of duplicate registrations in the state are likely higher, based on Foundation research elsewhere in the nation. All of these relied on the common denominator of exact match residential address identifiers in single-family residences or confirmed single units within multi-family buildings.

This is precisely the circumstance which the federally mandated statewide database was designed to prevent.

This suggest a harmful mix of large-scale human error and technical failures is at play. These results indicate your office is not doing an adequate job checking for existing registrations and/or not cancelling previous registrations when found.

The NVRA and New Mexico law require your office to make a reasonable effort to remove the names of registrants who have moved to a different jurisdiction or failed to respond to official mailings. 52 U.S.C. § 20507(a)(4)(B); When the same registrant is listed more than once on the official list of eligible registrants, it risks the possibility that the duplicate entry will not be flagged for cancellation. In that regard, the State of New Mexico’s failure to identify and investigate duplicate registrations is not “reasonable,” in violation of the NVRA. 52 U.S.C. § 20507(a)(4).

3. Apparent Use of Non-Residential Commercial Addresses for Voter Registration

Our research further identified nearly **190** instances where registrations were established at addresses apparently not intended for single- or multi-family residential use. As you know, the New Mexico-printed voter registration application document asks the user to state the “physical street address where you live now.” New Mexico statute further explains that such residences must be “the residence of a person is that place in which his habitation is fixed, and to which, whenever he is absent, he has the intention to return.” N.M. Stat. § 1-1-7

II. Notice of Violations and Curative Period

Given the nature of these findings, we are required to inform your office that this letter serves as your statutory notice pursuant to 52 U.S.C. § 20510(b) of violations of Section 8 of the NVRA, 52 U.S.C. § 20507. We do, however, believe these are best discussed directly and efficiently before any litigation or election contest complicates matters further.

Because the ongoing violations described herein are occurring within 120 days of an election for federal office, you may face federal litigation if the violations are not cured with 20 days of your receipt of this letter. 52 U.S.C. § 20510(b)(2).

III. Request for Meeting

Our representatives are available to meet with you, via telephone or video, if needed, to discuss our research and a remedial plan within the following month.

Please let us know which date(s) and time(s) you prefer.

Should you need to contact the Foundation regarding this matter, please contact me at lchurchwell@publicinterestlegal.org. Thank you for your service on this matter.

Sincerely,



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Enclosure
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