

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Docket Number: S-1-SC-35524

**STATE OF NEW MEXICO, ex rel.,
LEAGUE OF WOMEN VOTERS OF NEW MEXICO,**

Petitioner,

vs.

**ADVISORY COMMITTEE TO THE
NEW MEXICO COMPILATION COMMISSION,**

Respondent.

**BRIEF *AMICUS CURIAE* OF COMMON
CAUSE NEW MEXICO IN SUPPORT OF
PETITIONER**

SUPREME COURT OF NEW MEXICO
FILED

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
STATEMENT OF INTEREST.....	vi
INTRODUCTION.....	1
ARGUMENT.....	2
I. The <i>Verified Petition</i> is Not an Election Contest, and Therefore is Not Time-barred.....	2
II. The Amendments Do Not Restrict Elective Franchise Rights Created by Article VII, Section 1, Thus They Need Not be Ratified by Three-Fourths of Electors, and May be Compiled Because They Were Ratified by a Majority of Electors.....	3
a. Allowing School Elections To Be Held in Conjunction With Other Non-Partisan Elections Will Likely Increase Voter Participation and Will Enhance, Rather Than Restrict, Elective Franchise Rights.....	4
b. Removing The Words “Idiots, Insane Persons” From the Description of Persons Qualified to Vote Will Likely Increase Voter Participation and Will Enhance, Rather Than Restrict, Elective Franchise Rights.....	13
c. Because the Amendments Enhance, Rather Than Restrict, Elective Franchise Rights, They Need Not be Ratified by Three-Fourths of Electors, and May be Compiled Because They Were Ratified by a Majority of Electors.....	13

CONCLUSION.....14

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Las Cruces School Election Voter Data, *generally available at* <https://donaanacounty.org/elections/results/archive>..... 8

Legislative Education Study Committee analysis of House Bill 143 (2016), *available at* <https://www.nmlegis.gov/Sessions/16%20Regular/LESCAnalysis/HB0143.PDF>..... 12

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STATEMENT OF INTEREST

Amicus curiae Common Cause New Mexico is a nonpartisan, grassroots organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people. Founded by John Gardner in 1970 as a “citizens lobby,” Common Cause has over 400,000 members nationwide and local organizations in 35 states. Common Cause is a leader in the fight for open, honest, and fair elections throughout the United States, including in New Mexico through its New Mexico chapter. Common Cause has long supported efforts to protect voting rights and enhance voter participation. The work done by Common Cause’s New Mexico chapter to protect voting rights in recent years has included (1) furnishing poll watchers and telephone hot-lines for voters on election days, (2) successful legislative advocacy for voter registration on-line and through the MVD, (3) successful advocacy in opposition to repeated efforts to impede the exercise of the voting franchise through photo-ID requirements and similar restrictive proposals, and, (4) of greatest pertinence to the present case, support and advocacy for the three proposed constitutional amendments that are now the subject of this proceeding.¹

¹ No party’s counsel authored this brief in whole or in part. No party, no party’s counsel, nor any other person, other than Amici, their members, or their counsel, contributed money for the preparation or submission of this brief.

INTRODUCTION

The *Verified Petition* in this matter seeks to have compiled and recognized as law certain amendments to Article VII, Section 1 of the New Mexico Constitution that received more than a majority but less than three-fourths of the vote of the qualified electors voting on each question at their respective general elections in 2008, 2010, and 2014. The 2008 and 2014 constitutional amendments are identical changes to the timing of school elections;¹ the 2010 constitutional amendment is a modernization of the constitutional elective franchise language granting the right to vote.² All three amendments were ratified by a majority of the electors voting on the amendments, but were not compiled because they failed to receive three-fourths of the vote statewide.

The *Verified Petition* raises a number of issues for the Court. Common Cause New Mexico will address only two issues: First, Common Cause New Mexico believes that the present action is not time-barred. This action is not an election contest, and should not be deemed untimely under the thirty-day limitation on bringing election contests found in NMSA 1978, §1-14-3 (1971). Second, the amendments at issue do not restrict the elective franchise rights

¹ The 2008 and 2014 amendments would allow school elections to be held in conjunction with other non-partisan elections.

² The 2010 amendment would remove the words “idiots, insane persons” from the description of persons who are not qualified to vote, aligning Article VII, Section 3 of the New Mexico Constitution with federal law.

created by Article VII, Section 1 of the New Mexico Constitution; therefore the amendments need not be ratified by three-fourths of the electors voting on the amendment, and should be compiled because they received a majority vote statewide.

ARGUMENT

I. The Petition is Not an Election Contest, and Therefore is Not Time-Barred.

NMSA 1978, §1-14-3 (1971) states: “Any action to contest an election shall be commenced by filing a verified complaint of contest in the district court of the county where either of the parties resides. Such complaint shall be filed no later than thirty days from issuance of the certificate of nomination or issuance of the certificate of election to the successful candidate.” In New Mexico, an election contest is “a challenge to the result of an election, as well as a challenge to the inherent validity of an election when the challenge would necessarily require overturning the results or effects of the election.” *Glaser v. Bus*, 2012-NMCA-028, ¶20, 274 P.3d 114. An election contest “must contain an assertion that the underlying claim in the complaint would have changed the result of the contested election.” *Id.*, 2012-NMCA-028, ¶17 (citing *Heth v. Armijo*, 1972-NMSC-011, 83 N.M. 498, 494 P.2d 160).

In contrast, the *Verified Petition* in this case contains no assertion that the underlying claims in the *Petition* would have changed the results of the 2008, 2010

or 2014 elections. The *Petition* does not challenge the results of the elections, does not claim that the elections were procedurally flawed, does not seek to have the elections deemed invalid. *C.f.*, *Glaser v. Bus*, 2012-NMSC-012, ¶10, 276 P.3d 959 (holding that a lawsuit that alleged that an election was procedurally flawed and sought a declaration that the election was invalid constituted an election contest). This action simply seeks to clarify and apply constitutional provisions to uncontested election results. This action is not an election contest and should not be time-barred.

II. The Amendments Do Not Restrict Elective Franchise Rights Created by Article VII, Section 1; Thus They Need Not be Ratified by Three-Fourths of Electors, and May be Compiled Because They Were Ratified by a Majority of Electors.

Common Cause New Mexico agrees with Petitioner's position that this Court should read Article VII in the context of the current language in Article XIX and hold that, as long as no rights are restricted, the so-called unamendable sections of the New Mexico Constitution may be amended by a majority vote of the people – especially where the people vote to expand rights. See Brief in Chief at ¶¶83-99. As explained below, Common Cause New Mexico believes that the specific amendments at issue in this case will increase voter participation and will enhance, rather than restrict, elective franchise rights.

a. **Allowing School Elections To Be Held in Conjunction With Other Non-Partisan Elections Will Likely Increase Voter Participation and Will Enhance, Rather Than Restrict, Elective Franchise Rights.**

In a political system based on an informed and active citizenry, low and declining participation rates are a great concern. One of the greatest barometers for waning civic engagement in American politics is declining voter turnout. There are many potential contributing factors: general cynicism about government and elected officials, a decline in investment in civics education, and an increasingly transient society. Yet there is one major contributing factor to low voter turnout – the timing of elections. The Public Policy Institute of California surveyed 350 California cities and found that simply moving an election to be synchronized with the even year state elections can result in a 21-36 percent boost in voter turnout for municipal and other local elections.³

Article VII, Section 1 of the New Mexico Constitution currently states:

“All school elections shall be held at different times from other elections.”

This language has the effect of making every school election across the state “off-

³ See Research Brief, *Increasing Turnout in City Elections: Is Timing Everything?* Public Policy Institute of California (March 2002), available at: http://www.ppic.org/content/pubs/rb/RB_302ZHRB.pdf (last accessed May 17, 2016) (last accessed May 17, 2016). See also, Zoltan L. Hajnal, Paul G. Lewis, Hugh Louch, *Municipal Elections in California: Turnout, Timing, and Competition*, Public Policy Institute of California (2002), available at: http://www.ppic.org/content/pubs/report/R_302ZHR.pdf (last accessed May 17, 2016)

cycle” – requiring elections to be held at odd times and requiring voters to make a separate trip to the voting booth.

The 2008/2014 amendments sought to strike “other” and insert “partisan”, so that the sentence would read: “All school elections shall be held at different times from [~~other~~] partisan elections.” Thus, the effect of 2008/2014 amendments would be to take school elections – which are currently required to be off-cycle⁴ – and consolidate them with non-partisan elections, such as municipal elections. This consolidation will likely have a significant impact on voter turnout.

A new report by Rice University found that in California cities where mayoral elections coincide with the presidential elections, voter turnout is more than double compared with cities where mayoral elections are conducted off-cycle, according to a new report from the Center for Local Elections in America Politics, part of Rice University’s Kinder Institute for Urban Research.⁵

Political Scientist Sarah Anzia, Ph.D.⁶ is the current national specialist on the impact of timing on voter turnout in school elections. Dr. Anzia’s review of

⁴ An “off-cycle” or “nonconcurrent” election refers to an election that is held on a different day than other elections that attract greater political participation.

⁵ Press Release and Report, *In California elections, turnout improves locally during presidential election year*, Rice University Kinder Institute for Urban Studies (Mar. 21, 2016), <http://news.rice.edu/2016/03/21/in-california-elections-turnout-improves-locally-during-presidential-election-years/> (last accessed May 17, 2016)

⁶ <https://gspp.berkeley.edu/directories/faculty/sarah-anzia>

turnout research in general shows that concurrent elections consistently lead to high voter turnout.⁷ For example, voter turnout in municipal elections held on days other than presidential, congressional, and gubernatorial elections is typically 25 to 35 percentage points lower than turnout in municipal elections held concurrently with one of those elections.⁸

Dr. Anzia found that, consistent with the literature on election timing and turnout, voter turnout in a Minnesota median school district election in 2006 (concurrent with congressional and state elections) was a full 23 percentage points higher than the off-cycle median school district election held in 2007.⁹ Similarly, another study found that the average turnout rate for Michigan school board elections held at off-times in 2000 was just 7.8% of registered voters — compared to a typical turnout of about 65% of Michigan registered voters in presidential elections.¹⁰

Looking at California, Dr. Anzia found that “average voter turnout in off-cycle city elections is 35 percentage points lower than turnout when city elections are held at the same time as presidential elections. Furthermore, election timing

⁷ See generally, Anzia, Sarah F. 2014. *Timing and Turnout: How Off-Cycle Elections Favor Organized Groups*. Chicago: The University of Chicago Press. See also, Anzia, Sara F. 2010. *Election Timing and the Electoral Influence of Interest Groups*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480428 (last accessed May 18, 2016).

⁸ Anzia, 2010 at p.8.

⁹ *Id.* at p. 19.

¹⁰ *Id.* at p. 20.

alone explains two-thirds of the variation in voter turnout across city council elections in California. To predict turnout, timing matters more than even how competitive elections happen to be.”¹¹

Dr. Anzia rightly described the 13% turnout during Minnesota’s 2007 off-cycle school elections as “paltry”.¹² New Mexico’s turnout is even worse. Voter turnout for school elections in New Mexico is exceptionally low.¹³ In the last decade, the highest voter turnout for an Albuquerque school election was in 2005, with 10% turn out.¹⁴ Turn out has gone down steadily since that time, with 6%

¹¹ <http://journalistsresource.org/studies/politics/elections/how-election-timing-affects-voter-turnout-outcomes> (last accessed May 17, 2016)

¹² Anzia, 2010 at p. 20.

¹³ Unfortunately, the voter turnout data available to Common Cause New Mexico is imperfect. Despite these imperfections, Common Cause New Mexico believes that the New Mexico school election turnout percentages cited herein are accurate, if not exact, approximations of the percentage of registered voters who participated in school elections. For each of the percentages cited, unless the County Clerk’s canvass documents calculated the school election turnout as a percentage of overall eligible voters, Common Cause New Mexico compared the number of votes cast with the number of registered and eligible voters for that election, using verbal information provided by the County Clerks’ offices.

¹⁴ See http://www.bernc0.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Unofficial_Election_Results_for_Bernalillo_County_aps_tvi_2005.pdf (last accessed May 17, 2016)

turnout in 2007,¹⁵ 2% turnout in 2009,¹⁶ 2% turnout in 2011,¹⁷ 3.59% turnout in 2013,¹⁸ and 2.52% turnout in 2015.¹⁹ This low level of voter participation in school elections is not specific to Albuquerque. In Las Cruces, school election turnout was 3% in 2015²⁰ and 3.4% in 2016.²¹ In Santa Fe, school election turnout

¹⁵ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Unofficial_Election_Results_for_Bernalillo_County_aps_cnm_2007.pdf (last accessed May 23, 2016)

¹⁶ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Unofficial_Election_Results_for_Bernalillo_County_aps_cnm_board_2009.pdf (last accessed May 23, 2016)

¹⁷ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/APS_CNM_Feb_2011.pdf (last accessed May 23, 2016)

¹⁸ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/APS_CNM_Elec_Feb_5_2013.pdf (last accessed May 23, 2016)

¹⁹ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Official_Canvass_Document.pdf (last accessed May 23, 2016)

²⁰ See https://donaanacounty.org/sites/default/files/election_results/LCPS_School_Board_Election_2015_Official_Results_0.pdf (last accessed May 23, 2016)

²¹ See https://donaanacounty.org/sites/default/files/election_results/LCPS_2016.pdf (last accessed May 23, 2016)

was .03% in 2007,²² 6.2% in 2009,²³ 8% in 2011,²⁴ 6.8% in 2013,²⁵ 5.2% in 2015,²⁶ and .06% in 2016.²⁷

Non-partisan municipal elections in Albuquerque, Las Cruces and Santa Fe had markedly higher turnout each year: In Albuquerque in 2005, when 10% of voters turned out for the school election, 31% turned out for the municipal election.²⁸ In 2007, 11% turned out for the municipal election, compared to 6% for the school election.²⁹ In 2009, 26% turned out for the municipal election,

²² See http://www.santafecountynm.gov/userfiles/Final_School_Results_2007.pdf (last accessed May 23, 2016)

²³ See <http://www.santafecountynm.gov/userfiles/09SS.PDF> (last accessed May 23, 2016)

²⁴ See [http://www.santafecountynm.gov/userfiles/sfps\(1\).pdf](http://www.santafecountynm.gov/userfiles/sfps(1).pdf) (last accessed May 23, 2016)

²⁵ See <http://www.santafecountynm.gov/userfiles/SFPSResCanvass.pdf> (last accessed May 23, 2016)

²⁶ See <http://www.santafecountynm.gov/userfiles/SFSSFCCResults.pdf> (last accessed May 23, 2016)

²⁷ See <http://www.santafecountynm.gov/media/files/SFPS%20Election%20Canvass%202-5-16.pdf> (last accessed May 17, 2016)

²⁸ See http://www.berncogov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Unofficial_Election_Results_for_the_City_of_Albuquerque_regular_municipal_2005.pdf (last accessed May 23, 2016)

²⁹ See http://www.berncogov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Unofficial_Election_Results_for_reg_municipal_2007.pdf (last accessed May 23, 2016)

compared to 2% for the school election.³⁰ In 2011, 12% turned out for the municipal election, compared to 2% for the school election.³¹ In 2013, 20% turned out for the municipal election, compared to 3.59% for the school election.³² In 2015, 8.24% turned out for the municipal election, compared to 2.52% for the school election.³³

In Las Cruces, where school election turnout was 3% in 2015 and 3.4% in 2016, municipal election turnout was 24% in 2007,³⁴ 18.86% in 2011,³⁵ and 18.62% in 2015.³⁶

³⁰ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Unofficial_Election_Results_for_regular_municipal_election_2009.pdf (last accessed May 23, 2016)

³¹ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Election_Results_for_city_election_october_2011.pdf (last accessed May 23, 2016)

³² See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/Albuquerque_City_Election_oct_2013.pdf (last accessed May 23, 2016)

³³ See http://www.bernco.gov/uploads/FileLinks/79348cd740e345bea002a370926b6cc0/City_Election_October_6_2015.pdf (last accessed May 23, 2016)

³⁴ See <http://nmpolitics.net/index/2015/11/will-voter-turnout-rise-or-drop-in-las-cruces-predictions-are-mixed/> (last accessed May 23, 2016)

³⁵ See <http://nmpolitics.net/index/2015/10/low-voter-turnout-is-becoming-the-norm-what-can-we-do-about-it/> (last accessed May 23, 2016)

³⁶ See <http://nmpolitics.net/index/2015/11/in-a-time-of-declining-voter-turnout-las-cruces-holds-the-line/> (last accessed May 23, 2016)

In Santa Fe in 2006, when 30% of voters turned out for the municipal election, as compared to .03% in 2007 for the school election.³⁷ In 2010, 27% turned out for the municipal election, compared to 6.2% for the school election in 2009 and 8% in 2011.³⁸ In 2012, 21% turned out for the municipal election and in 2014 27% turned out for the municipal election, compared to 6.8% for the school election in 2013.³⁹ In 2016, 15% turned out for the municipal election, compared to 5.2% for the school election in 2015.⁴⁰

Admittedly, much of the research in this area has focused on the effect of consolidating off-cycle elections with on-cycle, partisan elections. The 2008/2014 amendments would consolidate school elections with non-partisan elections, not partisan elections, but the difference between voter turn out for non-partisan municipal elections and school elections throughout the state suggests that consolidation, even with non-partisan elections, would have a significant impact on voter turnout.

This is not simply a hypothetical, academic exercise. New Mexico's body politic is already acting in response to the uncompiled 2008/2014 amendments. Evidently proceeding on the assumption that the Compilation Commission would

³⁷ Municipal data based upon verbal statements from County Clerk's office to Executive Director of Common Cause.

³⁸ See fn 38, *supra*.

³⁹ See fn 38, *supra*.

⁴⁰ See fn 38, *supra*.

ultimately do the right thing and allow these amendments to be compiled, the House of Representatives at the last legislative session passed House Bill 143, which would have allowed school elections to be held at the same time as other elections in the state. The Legislative Education Study Committee’s (“LESC”) analysis of HB 143⁴¹ stated:

Currently, the School Election Law requires school board elections to be held only on the first Tuesday in February of odd-numbered years. By placing regular school district elections in November and holding non-regular school district elections in accordance with the Mail Ballot Election Act, CS/HB 143 could allow the state to take advantage of greater voter turnout of school district elections[.]⁴²

The LESC also cited the National School Boards Association’s finding that school elections “suffer from low-voter turnout when separated from general elections (for example, districts that hold their elections on the same day as national or state elections report turnouts up to 18 percent higher)[.]”⁴³ The Legislature is already moving forward, regardless of the bureaucracy that has delayed the compilation of the 2008/2014 amendments.

⁴¹ Available at <https://www.nmlegis.gov/Sessions/16%20Regular/LESCAnalysis/HB0143.PDF> (last accessed May 24, 2016).

⁴² *Id.*, at p. 3.

⁴³ *Id.*, at p. 4.

b. Removing The Words “Idiots, Insane Persons” From the Description of Persons Qualified to Vote in Article VII, Section 3 of the New Mexico Constitution Will Likely Increase Voter Participation and Will Enhance, Rather Than Restrict, Elective Franchise Rights.

Common Cause New Mexico agrees with and supports Amicus Disability Rights New Mexico’s (“DRNM”) analysis, found in Section V of DRNM’s Amicus Brief, which states that the 2010 amendment protects already existing voting rights and elective franchise and also confers more meaningful voter rights than the current outdated constitutional language. Common Cause New Mexico refers the Court to DRNM’s Amicus Brief on this point.

c. Because the Amendments Enhance, Rather Than Restrict, Elective Franchise Rights, They Need Not be Ratified by a Three-Fourths of Electors, and May be Compiled Because They Were Ratified by a Majority of Electors

Petitioner argues that, when read together, the amendment language in Article VII, Section 3 and Article XIX, Section 1 requires a majority vote for amendments that do not restrict rights. Common Cause New Mexico supports Petitioner’s assertion. The 2008/2014 amendments provide a practical, effective solution to the problem of low voter participation in school elections, and data from around the country indicates that consolidating school elections with elections that have higher levels of voter turnout will result in higher levels of voter turnout for school elections.

This simple change will increase voter participation and will enhance, rather than restrict, elective franchise rights. Similarly, the 2010 amendment protects already existing voting rights and elective franchise and also confers more meaningful voter rights than the current outdated constitutional language. Neither the 2008/2014 amendments, nor 2010 amendment, restrict elective franchise rights. Therefore, the 2008/2014 amendments and the 2010 amendment only require a majority vote to pass.

CONCLUSION

If low turnout for school elections is a problem, concurrent elections are a big step in the right direction. The 2008/2014 amendments provide a practical, effective solution to the problem of low voter participation in school elections. This simple change is unlikely to banish political apathy, but it will significantly increase the likelihood that citizens will make their voices heard on school issues. Common Cause New Mexico believes that the 2008/2014 and 2010 amendments will increase voter participation and will enhance, rather than restrict, elective franchise rights. Therefore, the 2008/2014 and 2010 amendments only require a majority vote to pass, and should be compiled despite not receiving three-fourths of the vote. Finally, this action is not an election contest and should not be time-barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May 2016, pursuant to Rule 12-504(E) NMRA, Common Cause New Mexico served a true and correct copy of the foregoing pleading by electronic mail on Petitioner, Respondent, and the following amici curiae. A conformed copy will be delivered upon filing.

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