



Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO
ex rel. HECTOR BALDERAS
Attorney General, State of New Mexico,

Petitioners,

vs.

No. **S-1-SC-38412** _____

Corey Helton, Sheriff, and
Lea County Sheriff's Office

Respondents.

**EMERGENCY VERIFIED PETITION
FOR WRIT OF MANDAMUS AND REQUEST FOR STAY**

INTRODUCTION

New Mexico and the United States face the greatest public health crisis of the past 100 years. Already more than 4 million Americans have been diagnosed with COVID-19, and almost 147,000 Americans have died from the virus.¹ Locally, over 19,000 New Mexicans have been diagnosed and more than 600 New Mexicans have died as a result of COVID-19.² In the last few weeks, the epidemic has reached an apex, with record numbers of cases diagnosed in both the United States and New Mexico.³ This includes Lea County, where cases have rapidly increased this month.⁴

New Mexico, through the actions of the Governor and Department of Health, has declared a state of emergency and issued public health emergency orders to contain the spread of the pandemic and protect the lives of New Mexicans.

¹ Statistics current as of July 27, 2020, from Johns Hopkins University of Medicine Coronavirus Resource Center, <https://coronavirus.jhu.edu/>

² <https://cv.nmhealth.org>, accessed July 27, 2020.

³ “U.S. Coronavirus Cases Soar as 18 States Set Single-Day Records This Week,” N.Y. Times, July 25, 2020, <https://www.nytimes.com/2020/07/25/world/coronavirus-covid-19.html> (describing record numbers of cases around the country, including in New Mexico).

⁴ See <https://cvprovider.nmhealth.org/public-dashboard.html> (historical county data for Lea County, showing number of cases by day increasing from 134 on July 1 to 571 on July 28); <https://www.nytimes.com/interactive/2020/04/23/upshot/five-ways-to-monitor-coronavirus-outbreak-us.html> (listing daily cases for Hobbs Metropolitan Area, which consists of Lea County).

These actions have helped to “flatten the curve” of COVID-19’s exponential growth, offering a hope that the numbers of new cases may begin to decrease, hospitals will be able to provide optimal care for patients, and the virus will be able to be traced and contained. However, recent increases in the spread of COVID-19 have forced the State to reimpose some public health measures, including restrictions on indoor dining and greater capacity restrictions on gyms and salons.⁵ And like many other states, New Mexico has needed to delay in-person instruction at public schools, until at least after Labor Day.⁶

Despite the spike in new cases, Respondent Corey Helton, the Sheriff of Lea County, and his deputies have requested that restaurants open their facilities in violation of the State’s public health emergency orders. According to television reports, the Sheriff’s Office patronized local restaurants that have opened despite public health orders, and that are operating without a valid food service permit.⁷ These actions of Sheriff Helton and the Lea County Sheriff’s Office (“LCSO”)

⁵ Office of the Governor, “State Re-Enacts Certain Public Health Restrictions,” July 13, 2020, <https://www.governor.state.nm.us/2020/07/13/state-re-enacts-certain-public-health-restrictions/>

⁶ N.M. Dep’t of Educ., “State Updates School Reopening Guidance, Hits Pause on ‘Hybrid Model’ for Start of School Year,” July 24, 2020, <https://www.newmexico.gov/2020/07/24/state-updates-school-reopening-guidance-hits-pause-on-hybrid-model-for-start-of-school-year/>

⁷ KRQE News, July 21, 2020, <https://www.krqe.com/news/new-mexico/lea-county-deputies-dining-in-at-restaurants-despite-public-health-order/>

threaten to further propel the spread of COVID-19 in Lea County and across New Mexico. Not only does this risk the health and lives of New Mexicans, but it also makes it more likely that school and business closures will need to be prolonged undermining the Sheriff's purported purpose of supporting local businesses. Additionally, the LCSO's actions misleadingly and unlawfully communicate to the public that they should not follow the State's directives to maintain social distancing and close certain businesses, including indoor dining. The LCSO's announcement of public health directives that contradict State law is in clear violation of the Court's order to local officials in *State ex rel. Balderas v. Hicks*, No. S-1-SC-38279, and should be enjoined by the Court.

Therefore, the State, through its Attorney General, petitions the Court for a writ of mandamus, directing Sheriff Helton and LCSO to cease violating the State's executive and public health emergency orders, including by issuing orders to city businesses that countermand state law.

FACTUAL BACKGROUND

The COVID-19 Public Health Emergency and New Mexico's Response

1. COVID-19 is a disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). "The severity of COVID-19 symptoms can range from very mild to severe. People who are older or who have existing chronic

medical conditions, such as heart disease, lung disease, diabetes, severe obesity, chronic kidney or liver disease, or who have compromised immune systems may be at higher risk of serious illness.”⁸

2. “The virus that causes COVID-19 is spreading very easily and sustainably between people.”⁹ “The virus spreads by respiratory droplets released when someone with the virus coughs, sneezes or talks.”¹⁰ Preventing the transmission of the virus is particularly challenging because people can be contagious before they develop any symptoms. In fact, a “study in *Nature Medicine* ... found that people were most infectious right before they started to show symptoms.”¹¹

3. After the first case of COVID-19 was diagnosed in New Mexico, Governor Michelle Lujan Grisham issued an executive order declaring a public

⁸ Mayo Clinic, “Coronavirus disease 2019 (COVID-19),” <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>

⁹ CDC, “How COVID-19 Spreads,” <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (updated June 16, 2020)

¹⁰ Mayo Clinic, “Coronavirus disease 2019 (COVID-19),” <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>

¹¹ Katherine Harmon Courage, “How People Are Spreading COVID-19 Without Symptoms,” *Vox*, Apr. 22, 2020, <https://www.vox.com/2020/4/22/21230301/coronavirus-symptom-asymptomatic-carrier-spread> (citing Xi et al., “Temporal Dynamics in Viral Shedding and Transmissibility of COVID-19,” *Nature Medicine*, Apr. 15, 2020, <https://www.nature.com/articles/s41591-020-0869-5>)

health emergency in the State.¹² Among other actions, the order invoked the governor’s authority under the All Hazard Emergency Management Act, NMSA 1978, Sections 12-10-1 through 12-10-10 (2007), and proclaimed a public health emergency under Section 12-10A-5 of the Public Health Emergency Response Act.¹³ The Governor directed the Department of Health and the Department of Homeland Security and Emergency Management to “collaborate to provide an effective and coordinated response to this public health emergency....”¹⁴

4. Following this declaration of a public health emergency and consistent with the powers provided to her during such an emergency under the Public Health Act, All Hazards Emergency Management Act, and Public Health Emergency Response Act, the Secretary of Health has issued a series of Public Health Emergency Orders (PHEOs). These orders severely restrict public gatherings as a necessary measure to slow the spread of COVID-19 and to mitigate its devastating potential impacts on public health. *See* NMSA 1978, § 24-1-3(E) (2017) (Department of Health has authority to “close any public place and forbid gatherings of people when necessary for the protection of the public health”). The

¹² Exec. Order 2020-04, Mar. 11, 2020, <https://cv.nmhealth.org/wp-content/uploads/2020/03/Executive-Order-2020-004-r.pdf>. All of the State’s executive orders and public health orders related to the COVID-19 emergency are available at <https://cv.nmhealth.org/public-health-orders-and-executive-orders/>

¹³ *Id.*, ¶¶ 1, 2.

¹⁴ *Id.*, ¶ 3.

Governor and Secretary have issued a series of Executive Orders and PHEOs between March 11 and the present.¹⁵

5. The Secretary of Health’s April 11, 2020, PHEO prohibits “mass gatherings,” which are defined as “any public or private gathering that brings together five (5) or more individuals in a single room or connected space, confined outdoor space or an open outdoor space where individuals are within six (6) feet of each other....” Exempted from this prohibition are the “necessary operations of essential businesses,” which are categories of businesses needed to sustain New Mexicans’ fundamental needs, like hospitals, grocery stores, and pharmacies.¹⁶ “All public and private employers are required to comply with this Order and any instructions provided by State departments or agencies regarding COVID-19.”¹⁷

6. The April 11 Order’s “mass gathering” provision has since been renewed and amended but has not been rescinded. See July 13, 2020 PHEO, listing the totality of the Orders still in effect.

7. In recognition of these public health risks, the April 11 Order authorized restaurants to open but limited restaurant operations to delivery or carry-

¹⁵ See generally <https://cv.nmhealth.org/public-health-orders-and-executive-orders/>. See also Exec. Order 2020-022, Apr. 6, 2020 (renewing state of public health emergency and all related prior executive orders).

¹⁶ Pub. Health Order, Apr. 11, 2020, ¶ 1, https://cv.nmhealth.org/wp-content/uploads/2020/04/04_11_20_PHO_Amended.pdf

¹⁷ *Id.*, ¶ 11.

out service.¹⁸

8. The State’s efforts to quickly implement measures to restrict mass gatherings have proven effective in slowing the growth of COVID-19 cases that would otherwise occur in the State. As the New York Times reported, “‘Hundreds of lives were saved because of what the state did early on, and that’s using conservative estimates,’ said Helen Wearing, a mathematician specializing in disease ecology at the University of New Mexico.”¹⁹

9. Restaurants, bars, and other venues where food is served present a significant risk of acting as a vector for transmission of COVID-19. In recognition of this fact, the Centers for Disease Control (CDC) on May 18, 2020 issued “Considerations for Restaurants and Bars” explaining that the risk of COVID-19 spread “increases in a restaurant or bar setting,” with the lowest risk being “food service limited to drive-through, delivery, take-out, and curbside pick up,” while on-site dining with indoor and outdoor seating poses the highest risk. Restaurants make up the largest segment of “rapid responses” where the Department of Health has identified a COVID-19 case at a workplace.²⁰

¹⁸ <https://cv.nmhealth.org/> (last visited July 27, 2020)(“NM DOH”),

¹⁹ See Simon Romero, “How New Mexico, One of the Poorest States, Averted a Steep Death Toll,” *N.Y. Times*, Apr. 24, 2020, <https://www.nytimes.com/2020/04/24/us/coronavirus-new-mexico.html>

²⁰ Pilar Martinez & Anthony Jackson, “Restaurants Have Highest Rapid Response Rate,” *Albuquerque J.*, July 26, 2020, <https://www.abqjournal.com/1479706/restaurants-have-highest-rapid-response->

10. On May 27, 2020, the previous Order was amended to allow restaurants to also offer dine-in service in outdoor seating areas at up to 50% of their outdoor area fire code occupancy, if applicable.²¹ The restriction on indoor dine-in service continued. Under the order, outdoor dine-in service could be provided to patrons seated at tables placed at least six feet apart with no more than six patrons seated at any single table.

11. The Order again was amended on June 30, 2020 to allow indoor dining at 50% capacity.²² But soon thereafter the numbers of COVID-19 diagnoses in New Mexico began to increase, including more than doubling the daily rate of diagnoses in Lea County.²³

12. Following this increase in cases, on July 13, 2020, the Order was amended to reinstate the restriction on indoor dining. Restaurants were permitted to continue to offer service in outdoor seating areas at up to 50% of their outdoor area

[rate.html](#)

²¹Pub. Health Order, May 27, 2020, <https://cv.nmhealth.org/wp-content/uploads/2020/05/PHO-5-26-2020.pdf>

²² Pub. Health Order, June 30, 2020, <https://cv.nmhealth.org/wp-content/uploads/2020/07/063020-PHO-1.pdf>

²³ Compare Department of Health weekly reports, logging two Lea County cases July 1, 2020, <https://cv.nmhealth.org/2020/07/01/updated-new-mexico-covid-19-cases-now-at-12276/> with five on July 13, 2020. <https://cv.nmhealth.org/2020/07/13/updated-new-mexico-covid-19-cases-now-at-15291/>

fire code occupancy.²⁴

LCSO's Actions Violate and Sanction Violation of the State's Public Health Emergency Orders

13. Upon information and belief, LCSO is requiring at least one restaurant in Lea County to serve its officers in the restaurant's interior dining area in violation of the executive orders and the PHEOs.

14. Despite the State's declaration of an emergency and issuance of orders to protect public health, LCSO has taken actions to violate the State's public health emergency orders and to encourage city businesses and residents to violate the orders as well.

15. Neither Sheriff Helton nor LCSO has sought an exception, injunction, or other legal authority to excuse himself or his deputies from complying with the State's public health emergency orders.

16. Instead, LCSO continues to violate the orders by eating in the interior dining areas of restaurants in direct violation to the Public Health Order and by patronizing restaurants that have had their food service permit suspended.²⁵ The LCSO's violation of the Order—and promotion of this violation— encourages city

²⁴ Pub. Health Order, June 30, 2020, <https://cv.nmhealth.org/wp-content/uploads/2020/07/7.13.20-PHO-1.pdf>

²⁵ See KRQE coverage July 21, 2020, <https://www.krqe.com/news/new-mexico/lea-county-deputies-dining-in-at-restaurants-despite-public-health-order/>

businesses and residents to violate the orders.

17. Casey's Restaurant (Casey's), operated by Paula Manis, is located at 209 W. Broadway in Hobbs, New Mexico, and is currently open and currently serving customers indoors.

18. Casey's was issued Food Service Permit #001787 for this location by the NMED Environmental Health Bureau.

19. Despite the July 13, 2020, PHEO prohibiting indoor dining, Casey's Restaurant is serving patrons in its interior dining areas.

20. On July 16, 2020, an NMED Food Specialist suspended Casey's food service permit for violating the Food Service and Sanitation Act, operating in a manner presenting a "substantial danger of illness, serious physical harm or death to consumers who patronize the food service establishment for dine in service given the public health emergency."

21. To date, Casey's permit is still suspended.

22. Despite the Notice served on Casey's by NMED, the restaurant continues to operate, and ownership has affirmatively refused to abide by the Order. Casey's continues to operate, despite the food permit suspension, and the restaurant continues to utilize its interior dining areas to serve customers.

23. Even though Casey's is operating in violation of the PHEOs and NMED's order, the LCSO is patronizing Casey's, dining indoors, directing the

restaurant to serve them, and promoting this violation of state law on the LCSO's official social media.²⁶ Despite the fact that the State environment department on July 13, 2020 suspended the food service permit of Pizza Inn in Hobbs, #001542, for opening in violation of the health order, LCSO officers have dined inside, joining members of the local SWAT team.²⁷

24. To date, the Hobbs Pizza Inn permit is still suspended.

25. The patronage of LCSO officers of restaurants operating in violation of the PHEOs is, on information and belief, a coordinated effort by Sheriff Helton and LCSO. This is evidenced by LCSO's statements to the press and on social media. For example, on July 21, 2020, LCSO posted on Facebook "Do not be alarmed when you see LCSO Deputies enter local restaurants. We're not there to enforce the Governor's mandate. We're there to grab a bite and support our local businesses!"²⁸

JURISDICTION

The Court has original jurisdiction over mandamus actions against state

²⁶ See KRQE coverage July 21, 2020, <https://www.krqe.com/news/new-mexico/lea-county-deputies-dining-in-at-restaurants-despite-public-health-order/>

²⁷ See July 21, 2020 Facebook post of Pizza Inn staff, <https://www.facebook.com/PizzaInnHobbsNM/posts/3137295016385553>

²⁸

<https://www.facebook.com/Lea.County.Sheriff.Office/photos/a.673109072788814/2691307827635585/?type=3&theater>

officers, boards, or commissions, and to exercise and determine its jurisdiction. N.M. Const. art. VI, § 3. This jurisdiction may be exercised even where the district courts have concurrent jurisdiction over the action. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15, 125 N.M. 343, 961 P.2d 768. In determining whether to exercise this jurisdiction, the “Court applies a multi-factor test under which we will assume jurisdiction when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.” *State v. Oliver*, 2020-NMSC-002, ¶ 7, 456 P.3d 1065 (filed 2019) (quoting *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878).

The Court’s power to issue writs of mandamus encompasses orders prohibiting public officials from taking unlawful official actions. “Prohibitory mandamus may well have been a part of New Mexico jurisprudence even before statehood.” *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562, 904 P.2d 11. “This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.” *Id.*; see also *State ex rel. Edwards v. City of Clovis*, 1980-NMSC-039, ¶ 12, 94 N.M. 136, 607 P.2d 1154 (“Once petitioner showed that there was a valid ordinance in

existence and that it was being violated, the duty cast upon the City became ministerial and subject to enforcement by mandamus.”).

The judicial power to issue writs of mandamus extends to writs against sheriffs and city officials. Sheriffs are considered state officers because their powers and duties are defined by the Legislature, and cannot be changed by county officials. *Sanchez v. Bd. of County Comm’rs of Valencia County*, 1970-NMCA-058, ¶ 16, 81 N.M. 644, 471 P.2d 678. But even if the Lea County Sheriff is not deemed a state officer, and even if the Court would not otherwise have jurisdiction, the Sheriff’s attempt to assume the State’s police powers is a general, public action that may be enjoined. As the Court discussed in *State ex rel. Ward v. Romero*, 1912-NMSC-011, ¶ 23, 17 N.M. 88, 125 P. 617 (quoting *Burch v. Hardwicke*, 71 Va. 24, 32 (1878)):

The distinction ... is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character, they are state officers, whether the Legislature itself makes the appointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime and in the preservation of peace and good order and in protecting the rights of persons and property. No duty is more general and all pervading than this. It extends alike to towns and cities as to the country. ... The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected.

PARTIES

A. Petitioner Attorney General Hector Balderas is the chief law

enforcement officer of the State of New Mexico and is authorized to act on behalf of New Mexicans when, in his estimation, doing so serves the public good. NMSA 1978, § 8-5-2(A) & (J).

B. Respondent Lea County Sheriff Corey Helton was elected to a four-year term as sheriff in 2018; his term expires in 2022.

C. Governor Michelle Lujan Grisham is a real party in interest. She is the head of the State's Executive Branch and possesses the general authority to preserve the public peace and welfare. *See* N.M. Const., art. V, § 4. Specifically, she may declare a state of public health emergency, Section 12-10A-5, which she has done here by executive order.

D. Secretary of Health Kathyleen "Kathy" Kunkel is a real party in interest. She has authority to issue orders closing public places and preventing gatherings when necessary for the protection of public health. NMSA 1978, § 24-1-3(E) (2017). She has used that authority to issue the public health emergency orders that are the subject of this litigation.

ARGUMENT

The State seeks a writ of mandamus enjoining Sheriff Corey Helton and the sheriff's office of Lea County, a political subdivision of New Mexico, from violating valid public health orders, tolerating and encouraging LCSO officers to do the same, and to require him to perform his lawful duties to comply with

COVID-19 public health orders. Specifically, the State requests that the Court direct Sheriff Helton and LCSO, pursuant to the All Hazards Emergency Management Act, to “comply with and enforce all executive orders and rules made by the governor or under the governor’s authority pursuant to law.” NMSA 1978, § 12-10-10. The State further requests that the Court issue a writ prohibiting the Sheriff and deputies from using their authority to violate the State’s public health emergency orders, whether directly, or through the instruction of restaurant employees. The Court’s action is necessary to stop Sheriff Helton and LCSO from blatantly violating and sanctioning the violation of public health orders. These actions risk the public health and undermine the rule of law for the residents and employees of Lea County.

1. Sheriff Helton and LCSO’s Actions Endanger Public Health and Require Immediate Action by the Court.

Sheriff Helton and LCSO’s actions to direct and sanction restaurants’ violation of the State’s public health emergency orders endanger the lives and health of New Mexicans while undermining the rule of law in Lea County. This emergency warrants the immediate issuance of a writ of mandamus. The basic requirements for mandamus are met. *See State v. Oliver*, 2020-NMSC-002, ¶ 7.

First, the petition “implicates fundamental constitutional questions of great public importance.” *Id.* The relative authority of State and municipal officials to

exercise police powers in the protection of public health is a crucial dispute that is animating much of the confusion in Lea County and elsewhere in the State as to which orders businesses and residents should follow. Sheriff Helton attempted on Facebook to justify his violations of the public health orders by dining tables inside restaurants whose food service permits have been pulled as “support” for local businesses.²⁹ However, such “support” not only defies state law grounded in the measured assessments of public health experts, but could cause illness and tragedy for restaurant employees, and customers, and the general public infected either directly by non-symptomatic carriers or indirectly by the acceleration of the virus’s spread. Furthermore, Sheriff Helton and LCSO’s patronage, sanctioning, and encouragement of restaurants that violate public health orders erodes the rule of law in Lea County. Notwithstanding this Court’s order in *State ex rel. Balderas v. Hicks* making clear that local officials’ actions cannot supersede state public health orders, the dispute between state and local officials remains live and prominent in public discussions of the public health emergency.

Second, the petition “can be answered on the basis of virtually undisputed facts.” *State v. Oliver*, 2020-NMSC-002, ¶ 7. The history of Sheriff Helton and the LCSO’s actions is documented in contemporaneous media accounts. The Court is well-positioned to resolve the dispute of whether the Sheriff Helton and LCSO’s

²⁹ See Facebook posts, *Id.*

actions violating the PHEOs and directing and encouraging others to violate the PHEOs are legal.

Finally, the dispute “calls for an expeditious resolution that cannot be obtained through other channels.” *State v. Oliver*, 2020-NMSC-002, ¶ 7. As discussed in the Factual Background, there is a public health emergency in the State, unprecedented for a century. *See supra* Introduction, Fact Nos. 1 & 2. The State’s public health orders are critical to alleviating the emergency, especially in Southeast New Mexico including Lea County, where the State is seeing a sharp increase in the number of positive cases. *See* Fact Nos. 10 & 11. In addition to risking the spread of COVID-19, every day the Sheriff Helton and LCSO flout the State’s PHEOs, Lea County languishes in a state of conflict between the proper legal authority of the State and the contrary, improper attempts by Sheriff Helton and LCSO to violate and direct local residents and businesses to violate state law. The Court should act to clarify for Lea County--and other cities and local governments--the preemptive authority of the State’s public health emergency orders.

2. As the Court Has Recognized, the State Has Unmistakable Authority to Issue Public Health Orders That Supersede Municipal Actions.

The New Mexico Constitution vests the governor with the supreme executive power of the state and directs the governor to take care that the laws be faithfully executed. N.M. Const., art. V, § 4. Notwithstanding, as head of the executive branch, the governor’s powers are limited to those granted by the constitution or statute. *See*

N.M. Const, art. III, § 1; *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, 36 N.M. 151, 9 P.2d 691. *See also State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 5, 86 N.M. 359, 524 P.2d 975 (“The power of veto, *like all powers constitutionally conferred upon a government officer or agency*, is not absolute and may not be exercised without any restraint or limitation whatsoever.”) (emphasis in original). Thus, while the governor has broad authority over the executive power over the State, the governor’s actions will be invalid if they are outside her constitutional or statutory authority.

With respect to public health emergencies, the Legislature has granted the governor explicit authority to issue orders protecting public health. The Public Health Emergency Response Act, NMSA 1978, §§ 2-10A-1 to -19 (2003, as amended through 2015), authorizes the governor to declare a state of public health emergency “upon the occurrence of a public health emergency.” § 12-10A-5(A). The Act defines “public health emergency” as “the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population of New Mexico or any portion thereof.” § 12-10A-2 (G). It further defines a “threatening communicable disease” as “a disease that causes death or great bodily harm that passes from one person to another and for which there are no means by which the public can reasonably avoid the risk of

contracting the disease.” The Act requires the governor to consult with the secretary of health prior to making such a declaration. *Id.* And, upon making the declaration, the Act allows the governor to confer upon the secretaries of health, public safety, and homeland security and emergency management the authority to coordinate a response to the public health emergency. The Act also mandates that the governor’s declaration of a state of public health emergency be by an executive order that specifies:

- (1) the nature of the emergency;
- (2) the areas of the state affected by the emergency;
- (3) its causation;
- (4) its expected duration, if less than thirty days;
- (5) the public health officials needed to assist in coordinating a response to the emergency; and
- (6) any other provisions necessary to implement the order.

See § 12-10A-5(B).

With an executive order in place, then, the Public Health Act authorizes the Department of Health to, among other things:

- (C) investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health;
- (D) establish, maintain and enforce isolation and quarantine;
- (E) close any public place and forbid gatherings of people when necessary for the protection of the public health; and
- (F) respond to public health emergencies and assist communities in recovery.

See § 24-1-3 (emphasis added).

In addition to the authority granted the governor and the secretary of health by these public health laws, the laws also clearly direct political subdivisions to

follow the executive branch's public health orders. Section 12-10-10 of the All Hazard Emergency Management Act states that "it is the duty of all political subdivisions of the state ... to comply with and enforce all executive orders and rules made by the governor or under the governor's authority pursuant to law."

Furthermore, the Legislature's grant of authority to the governor and secretary of health to issue orders responding to public health emergencies is a constitutional exercise of the State's police power. That power, reserved to the States by the Tenth Amendment to the United States Constitution, includes the authority to regulate certain activity for the protection of public health against the spread of infectious disease. "The United States Supreme Court has declared that the 'structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Florida v. United States HHS*, 648 F.3d 1235, 1305 (11th Cir. 2011) (alterations in original) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006)). This Court has recognized that "[l]aws providing for preservation of the public peace, health and safety are essentially police measures and represent an exercise of this inherent power. It is the broadest power possessed by governments and rests fundamentally on the ancient maxim 'salus populi est suprema lex.'" *State ex rel. Hughes v. Cleveland*, 1943-NMSC-029, ¶ 34, 47 N.M. 230, 141 P.2d 192. In keeping, "[n]umerous Supreme Court decisions have identified the regulation of

health matters as a core facet of a state’s police powers.” *Florida*, 648 F.3d at 1305 (citing various Supreme Court cases discussing the latitude of States to regulate matters of health); *see also Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) (“It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state’s police power.”); *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (“a community has the right to protect itself against an epidemic of disease which threatens the safety of its members”).

The State’s emergency public health orders were valid exercises of its inherent power to protect the health and welfare of the public in the face of a global pandemic. The Governor and Secretary of Health’s public health emergency orders were properly issued pursuant to the authority granted them by the Legislature to implement the State’s public health laws. There is no legal basis for Sheriff Helton to declare those orders invalid or direct county officials and the public to follow his contradictory directives. Indeed, in a similar conflict between the State’s orders and local officials’ defiance of the orders, the Court recognized the Public Health Emergency Orders as valid and preemptive over conflicting local orders. *State ex rel. Balderas v. Hicks*, No. S-1-SC-38279, ord. at 2 (May 28, 2020) (granting the Attorney General’s previous pandemic-related petition for mandamus against the mayor of Grants, NM; prohibiting the mayor from operating city facilities in a

manner that violates the public health emergency orders, from issuing directives and orders that contradict the public health emergency orders and ordering that public health emergency orders issued by the Secretary of the New Mexico Department of Health concerning the COVID-19 pandemic supersede contrary orders and directives).

3. The Court Should Issue a Writ of Mandamus Prohibiting Sheriff Helton and LCSO From Violating the Public Health Orders and from Directing Others to Do the Same

The Court has jurisdiction over this Petition pursuant to art. VI, § 3 of the N.M. Constitution, which provides original jurisdiction over mandamus against all parties and authority to issue writs as necessary to exercise the Court's jurisdiction. See *Taylor v. Johnson*, 1998-NMSC-015, ¶15, 125 N.M. 343, 961 P.2d 768; see also *Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶¶10-11, 127 N.M. 272, 980 P.2d 55. Issuing a writ of mandamus is the appropriate relief to restrain public functionaries 'from doing what they know is an illegal act.'" *Stanley v. Raton Bd. of Educ.*, 1994-NMSC-059, ¶ 5, 117 N.M. 717, 876 P.2d 232 (quoting *Kiddy v. Bd. of County Comm'rs*, 1953-NMSC-023, ¶ 13, 57 N.M. 145, 255 P.2d 678); see also *supra* Jurisdiction (discussing mandamus standards and authority).

As detailed in the Factual Background above, Sheriff Helton is knowingly and intentionally violating the State's public health emergency orders by flouting the public orders himself, bringing LCSO officers with him into restaurants in violation

of the orders, and directing restaurants to serve them. He is encouraging city businesses to remain open in violation of the PHEOs and in violation of the Food Service Sanitation Act, including through official communications through the press and social media.

Petitioner urges the Court to issue its writ of mandamus in order to protect the residents of Lea County--and of the broader New Mexico public--from the health hazards likely to occur by the unregulated return to “business as usual” where a virulent infection is not yet under control. Without the requested prohibitive writ of mandamus, death and serious illness are likely to increase in Lea County, and in the counties surrounding Lea County.

Petitioner also requests that the Court make clear the rule of law in Lea County, that state public health emergency orders trump any contrary directives by Sheriff Helton and the LCSO. Until then, Lea County businesses and residents will be faced with law enforcement officers that violate--and indeed, sanction and promote the violation of--the very laws they are charged to enforce.

Without the Court’s mandate enforcing the Governor’s Public Health Emergency Orders as effective across all municipalities and counties within the state, New Mexico will be unable to mount the unified public health effort needed to quell COVID-19. Instead, public health measures will have piecemeal enforcement, with unpredictable, erratic, and unlawful actions by local officials.

Given the contagious nature of the virus, even successes in tamping transmission in some counties will be undermined by a failure to follow public health law in other counties. The SO's actions in Lea County risk accelerating the spread of a deadly, contagious disease both locally and across the state.

4. The Court Should Issue a Stay of Respondents' Actions Violating the Public Health Emergency Orders Pending the Resolution of This Petition.

For the same reasons that an emergency writ of mandamus is warranted--namely, the public health emergency and the ongoing confusion as to the rule of law in Lea County--the Court should also issue a stay of Sheriff Helton and LCSO's actions violating the PHEOs pending the resolution of this petition. *See* Rule 12-504(D)(2)(a) NMRA (stay proper where "irreparable injury, loss, or damage will result to the petitioner before the respondent ... can be heard in opposition"). Every day that the LCSO violates and directs others to violate the PHEOs risks worsening the COVID-19 pandemic. The Attorney General will informally notify Respondents and the Real Parties in Interest of this petition at the time of filing and serve the petition as soon as possible thereafter.

WHEREFORE, for the foregoing reasons, the State, through its Attorney General, respectfully requests this Court: (1) hold that the State's Public Health Emergency Orders concerning the COVID-19 pandemic supersede contrary orders and directives set by Sheriff Helton and the LCSO concerning the legality of mass gatherings and the exceptions provided for essential services; (2) prohibit Sheriff

Helton and his deputies from patronizing restaurants that open in violation of public health orders and in violation of the Food Service Sanitation Act and directing such restaurants to serve them; (3) comply with the Public Health Emergency Orders and the Governor's Executive Orders addressing the COVID-19 pandemic; and (4) grant such other relief as the Court considers appropriate.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Rule of Appellate Procedure 12-504(H), I certify that this brief complies with the type-volume requirement of Rule of Appellate Procedure 12-504(G). It contains 5,526 words in the body of the petition, according to a count by Microsoft Word 2016.

/s/Cholla Khoury
Cholla Khoury

VERIFICATION

I, Cholla Khoury, attorney for Petitioner, being duly sworn upon my oath, state that I have read this *Emergency Verified Petition for Writ of Mandamus and Request for Stay*, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: July 29, 2020

/s/Cholla Khoury
Cholla Khoury

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Emergency Verified Petition for Writ of Mandamus and Request for Stay* was served by email on July 29, 2020, on the following persons and entities:

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/s/Cholla Khoury
Cholla Khoury


Joey D. Moya

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **May 28, 2020**

3 **NO. S-1-SC-38279**

4 **STATE OF NEW MEXICO ex rel.,**
5 **HECTOR BALDERAS,**
6 **New Mexico Attorney General,**

7 Petitioners,

8 v.

9 **MARTIN "MODEY" HICKS,**
10 **Mayor of Grants, New Mexico,**

11 Respondent,

12 and

13 **MICHELLE LUJAN GRISHAM,**
14 **Governor of New Mexico,**
15 **KATHYLEEN "KATHY" KUNKEL,**
16 **Secretary of the New Mexico Department of Health,**

17 Real Parties in Interest.

18 **ORDER**

19 WHEREAS, this matter came on for consideration by the Court upon
20 petition for writ of mandamus, responses, and reply, and the Court having
21 considered the foregoing and being sufficiently advised, Chief Justice Judith K.
22 Nakamura, Justice Barbara J. Vigil, Justice Michael E. Vigil, Justice C. Shannon
23 Bacon and Justice David K. Thomson concurring;

24 NOW, THEREFORE, IT IS ORDERED that the petition is GRANTED and

1 a writ of mandamus shall issue to Respondent, Mayor Martin “Modey” Hicks, that
2 (1) prohibits Respondent from operating city facilities in a manner that violates the
3 public health emergency orders issued by the Secretary of the New Mexico
4 Department of Health, and (2) prohibits Respondent from issuing directives and
5 orders that contradict the public health emergency orders issued by the Secretary of
6 the New Mexico Department of Health;

7 IT IS FURTHER ORDERED that public health emergency orders issued by
8 the Secretary of the New Mexico Department of Health concerning the COVID-19
9 pandemic shall supersede contrary orders and directives by Respondent concerning
10 the legality of mass gatherings and the exceptions provided for essential services;
11 and

12 IT IS FURTHER ORDERED that the stay of directives issued by
13 Respondent that conflict with public health emergency orders issued by the
14 Secretary of the New Mexico Department of Health shall remain in effect.

15 IT IS SO ORDERED.



WITNESS, the Honorable Judith K. Nakamura,
Chief Justice of the Supreme Court of the State of
New Mexico, and the seal of said Court this 28th
day of May, 2020.

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

I CERTIFY AND ATTEST:
A true copy was served on all parties
or their counsel of record on date filed.
Joey D. Moya
Chief Clerk of the Supreme Court
of the State of New Mexico