IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

REP. JAMES G. TOWNSEND,
New Mexico House of Representatives
Minority Leader,
REP. ROD MONTOYA,
New Mexico House of Representatives
Minority Whip, and
REP. LARRY SCOTT,
New Mexico House of Representatives

Petitioners,

v. **No. S-1-SC-38660**

BRIAN EGOLF, in his official capacity as Speaker of the New Mexico House of Representatives, and NEW MEXICO LEGISLATIVE COUNCIL,

Respondents.

RESPONSE OF THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE NEW MEXICO LEGISLATIVE COUNCIL TO THE EMERGENCY VERIFIED PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND REQUEST FOR STAY

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CERTIFICATE OF COMPLIANCE

I certify that, according to Rules 12-504(G) and 12-305 NMRA, this brief complies with the type-volume size, and word limitations of the New Mexico Rules of Appellate Procedure. The body of this brief uses a proportionally spaced type style and contains 5,209 words. The numeric count is obtained from Microsoft Office Word 2019.

/s/ Thomas M. Hnasko
Thomas M. Hnasko

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RESPONSE OF THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE NEW MEXICO LEGISLATIVE COUNCIL

Representative Brian Egolf, Speaker of the New Mexico House of Representatives, and the New Mexico Legislative Council submit this response to the petition within the time directed by this Court's order of February 1, 2021.

INTRODUCTION

The Petition requests this Court to take the extraordinary step of instructing a co-equal branch to overturn rules governing the procedures for conducting the legislative session during the Covid-19 pandemic. Preliminarily, the deficient Petition is directed against the wrong parties, neither of which could legally implement the requested relief. More importantly, however, even if the Petition were directed against the House of Representatives – the only body constitutionally empowered to consider its rules of procedure – mandamus it is not available to contest the procedural decisions of the legislature. The Court should therefore decline petitioners' invitation to upset a bedrock principle of our system of government – the separation of powers – by invalidating rules promulgated under the authority vested exclusively in "each house" of the legislature. *See* N.M. Const. Art. IV, § 11.

As set forth below, House Resolution 1 (referred to as "HR-1" or the "House Rule")[1] properly effectuates the constitutional function of the legislature to be "present" at the "seat of government," through the use of modern electronic and telephone devices, and also ensures that the sessions of the House shall be "public." The amended rules, adopted as a temporary measure to address unavoidable constraints imposed by the pandemic, have been carefully designed to ensure that a quorum can be ascertained at any time, at the request of any member, including petitioners. Finally, petitioners' due process concerns are wholly illusory: the House Rule has facilitated an increase in public participation during the legislative session, far beyond what has historically been achieved through in-person attendance. The Petition is deficient on multiple levels and should be dismissed.

ARGUMENT

I. The Petition Should be Dismissed Because The Legislative Council and the Speaker of the House Are Not Proper Parties.

The New Mexico Legislative Council (the "Council") is not a proper party and could not lawfully perform the acts requested by the petitioners. The Council

[1] All citations to HR-1 are to the final adopted version found at https://www.nmlegis.gov/Sessions/21%20Regular/Amendments_In_Context/HR01.pdf

acts during the interim as a representative of the legislative body. *See* NMSA 1978, § 2-3-1, et seq. Even when acting in that limited capacity, the Council is statutorily prohibited "from advocating or opposing the introduction or passage of legislation." NMSA 1978, § 2-3-3(F). Once the legislature is in session, however, the House and Senate supplant the functions of the Council and exclusively "determine the rules of [their] procedures." *See* N.M. Const. Art. IV, § 11; *see also,* Legislative Council Policy No. 12 (detailing authority of Council to control use of capitol "[d]uring periods when legislature is not in session."). The Council has no authority, under the state constitution or the controlling statute, to act during the session and adopt any rule, repeal any rule, or prevent any duly enacted rule from being enforced. Only the House itself, through a vote of the majority in compliance with the applicable procedural rules adopted by that body, could consider the relief requested here. *See* House Rule 24-1, ¶ 2, 2021.

Similarly, the Speaker of the House has no authority to alter, amend, or prevent enforcement of a duly enacted rule by the majority of the House. To the contrary, the Speaker is under a duty to sign a duly passed resolution and to enforce the rules of the House. *See* House Rule 4-4, 2021 (the Speaker "*shall* sign all bills, *resolutions* and memorials . . . . ")(emphasis added). The Speaker, just as each petitioner here, possesses only one vote and has no independent authority to alter or suspend the Rules of the House. *See* House Rule 24-1, ¶ 2, 2021 (requiring two-

thirds supermajority to suspend House Rules). Thus, the requested writ is nonsensical because it would command the Speaker to perform an *ultra vires* action, precisely the opposite of the *proper* use of mandamus, which is to enforce a "clear legal right." *State ex rel. Coll v. Johnson,* 1999-NMSC-036, ¶ 12, 128 NM 154. Consequently, the Council and the Speaker are not proper parties and the writ, on that basis alone, should not issue.

II. Mandamus is Inappropriate to Contest Procedural and Discretionary Acts of the Legislature.

Even if the Petition were directed to the House of Representatives – the only entity with authority to adopt or amend its rules – mandamus would be inappropriate because adopting or amending House rules is a matter of pure discretion. This Court has succinctly articulated the mandamus standard, explaining that "[t]he writ lies only to enforce a clear legal right and against one whose duty it is to perform the act necessary to the enjoyment of such right." *Laumbach v. Board of County Com'rs of San Miguel County*, 1955-NMSC-096, ¶ 12, 60 N.M. 226. Thus, "[t]he writ applies only to ministerial duties and it will not lie when the matter has been entrusted to the judgment or discretion of the public officer." *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 11, 140 N.M. 168.[2] The well-established rule is

[2] Significantly, the New Mexico Constitution does not grant mandamus jurisdiction over the New Mexico House of Representatives. Article VI, Section 3 grants the Court "original jurisdiction in quo warranto and mandamus against all state officers, boards, and commissions…" The House is not a state officer. See N.M. Const. Art.

therefore that a writ of mandamus "cannot control discretion lawfully vested in the official functions of a state official." *State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2020-NMSC-018, ¶¶ 11-15, 476 P.3d 896 (citing *Territory ex rel. Castillo v. Perea*, 1900-NMSC-026, ¶ 12, 10 N.M. 362). In this case, the Petition ignores these standards and improperly invites an intrusion into the House's sole and separate sphere – our state constitution specifically grants the House the authority and the discretion to set its own procedure and thus determine how its members may be present at the seat of government. *See* N.M. Const. Art. IV, § 11 ("Each house may determine the rules of its procedure…").

The United States Supreme Court, in a case examining the quorum clause of the U.S. Const., Art. I, §5, recognized this broad discretion held by legislative bodies and upheld Congress's independent determination of how to meet the constitutional quorum requirement. *United States v. Ballin*, 144 U.S. 1, 5 (1892). The Court reasoned that, "all matters of method are open to the determination of the house" and "*beyond the challenge of any other body or tribunal*." *Id.* (emphasis in original). In light of this standard, the Court refused to intrude on the legislative body's chosen method of determining the presence of a majority, concluding that because "[t]he

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IV, § 9 ("The legislature shall select its own officers…"). The House is also not a "board" or "commission" – bodies that are separately addressed in the state constitution such as the public regulation "commission," or state canvassing "board." *See* N.M. Const. Art. XI, § 1; see also N.M. Const. Art. XX § 7.

Constitution has prescribed no method of making this determination," it is "within the competency of the house to prescribe *any method which shall be reasonably certain to ascertain ... the presence of a majority*, and thus establishing the fact that the house is in a condition to transact business." *Id.* at 6 (emphasis added).

For this reason, the discretionary decision of the House to promulgate HR-1 and give effect to the undefined "presence" concept under the New Mexico Constitution is beyond challenge through a petition for a writ of mandamus. Consistent with *Ballin*, the House's action is "reasonably certain to ascertain" the presence of legislators sufficient to constitute a quorum and place the House "in a position to do business." Moreover, as further discussed below, the House has prudently exercised its discretion – the changes protect members from the extremely serious health risks brought about by the pandemic, they are carefully crafted to ensure the presence of a quorum, and they will terminate after the end of the current legislative session. *See* HR-1 at 13 (stating that the amended rules are "effective only for the first session of the fifty-fifth legislature...").

III. The Petition Requests a Judicial Encroachment on Separation of Powers.

A. The Rules Challenged by the Petition Serve a Unique Legislative Function.

Modern courts, including this Court, have recognized that context is critical when examining questions of separation of powers and that careful judgments must be made to protect against the twin evils our constitutional order was designed to

prevent: undue "aggrandizement" of power by one branch over another, and "encroachment" by one branch on the essential functions of another. *See, e.g., State ex rel. Taylor v. Johnson,* 1998-NMSC-015, ¶ 23, 125 N.M. 343 ("Such an infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions."). While a petition for a writ of mandamus is "particularly appropriate" to *enforce* the principles of separation of powers, it is particularly inappropriate when requesting, as in this case, an *encroachment* on the powers specially vested in one branch of government. *See State ex. rel. Egolf v. New Mexico Pub. Regulation Comm'n,* 2020-NMSC-018, ¶ 15, 476 P.3d 896. As the Supreme Court of the United States expressed in *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (emphasis added):

> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches *or that undermine the authority and independence of one or another coordinate Branch. . . .*

At the core of the legislature's "essential functions" is the exclusive power granted to each chamber to fashion the rules under which that legislative body will function. *See* N.M. Const. Art. IV, § 11. Just as the power of this Court to establish

its own procedural rules and superintending authority over the courts under its domain is essential to the "authority and independence" of the judiciary, *see Mowrer v. Rusk*, 1980-NMSC-113, ¶¶ 30-32, 95 N.M. 48, the rule-making function of the House is equally essential to its "authority and independence" as a legislative body.

This Court has traditionally respected the procedures adopted by the legislature and has declined, based on separation of powers concerns, to consider constitutional challenges to those procedures. For example, the Constitution provides that all bills passed by the legislature must be "enrolled and engrossed" to become effective. *See* N.M. Const. Art. IV, § 20. However, this Court has uniformly recognized that it is without authority to entertain challenges to that procedure, holding that an enrolled and engrossed bill properly signed and authenticated, approved by the governor and deposited with the secretary of state, is conclusive as to the regularity of its enactment, and that the Court will not examine the journal entries or other procedures to ascertain whether constitutional requirements have been met. *Thompson v. Saunders*, 1947-NMSC-075, 52 N.M. 1, 189 P.2d 87; *State ex rel. Wood v. King*, 1979-NMSC-106, 93 N.M. 715, 605 P.2d 223; see also *Smith v. Lucero*, 1917-NMSC-069, 23 N.M. 411, 168 P. 709; *Kelley v. Marron*, 1915-NMSC-092, 21 N.M. 239, 153 P. 262. Consequently, separation of powers concerns militate strongly in favor of honoring the exclusive rule-making power of the legislative bodies, particularly where, as in the present circumstances, the legislative

body deems the rule necessary for the protection of its members and the public during an unprecedented pandemic.

B. The House Has the Sole Power to Determine its Procedure.

Rather than allege an actual, substantive constitutional violation, Petitioners' requested remedy seeks unprecedented harm to the bedrock of our constitutional system, separation of powers. *See State ex rel. Taylor v. Johnson,* 1998-NMSC-015, ¶ 17, 125 N.M. 343 ("The balance of governmental power is of great public concern."). Petitioners have not provided an example where any court in the nation has dictated matters of *procedure* to a state legislature, a co-equal branch of government. This dearth of authority is readily explainable: from the time of the nation's founding to the present, American courts have uniformly rejected the notion that a writ of mandamus can be directed to a legislature when it acts within its proper constitutional sphere by exercising purely legislative functions. *See, e.g., Clough v. Curtis,* 134 U.S. 361 (1890); *see also* 136 A.L.R. 677, Mandamus to Members or Officer of Legislature (stating that "[t]he general principle is well settled that a court will not issue the writ of mandamus to compel a state legislature or an officer of such legislature to exercise their legislative functions or to perform duties involving the exercise of discretion.").

Even before American independence, the King of England was not empowered to issue a writ of mandamus to parliament or to the independent

judiciary. *See generally, People ex rel. Broderick v. Morton*, 156 N.Y. 136, 50 N.E. 791 (1898) (discussing history of mandamus in British and American colonial law). Thus, it would be unthinkable for a court to order a legislature to enact a certain statute or a particular rule governing the method by which its members participate in the legislative process.

When the state constitution clearly and unequivocally provides the legislature with certain powers, it is immune from interference with the exercise of those powers by the coordinate branches of government. *See Kelley v. Marron*, 1915-NMSC-092, ¶ 8, 21 N.M. 239. Here, our constitution provides the House with the power to "determine the rules of its procedure," which Petitioners concede. N.M. Const. Art. IV, § 11. It is therefore within the sole and distinct power of the House to determine when, and in what manner, its members are "present" and how its sessions shall be held at the "seat of government" in order to satisfy the constitutional grant of authority over its own rules.

Our Court of Appeals examined a nearly identical issue in *New Mexico Gamefowl Ass'n, Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758 . In *King*, members of the public brought an action to declare that an act of the legislature, restricting cockfighting, was void because the legislature allegedly did not comply with the procedural provisions of Article IV, Section 15 of the New

Mexico Constitution (requiring three public readings in each house for a bill to become law).

The Court in *King* rejected the plaintiffs' argument that a court-ordered remedy would be appropriate, or even possible, under our constitution. Instead, the Court reaffirmed the longstanding holding in *Kelley*, 1915-NMSC-092, ¶ 8, that "[t]he only interpretation which is consistent with the equality and independence of the three departments of government is that such constitutional provisions are directed to them severally, and that upon the department to which the provision is directed rests the responsibility and duty of interpreting and complying therewith." *King*, 2009-NMCA-088, ¶ 6. The Court thus rejected the notion that a lack of judicial review would leave plaintiffs without remedy, or somehow violate due process because "if members of the Legislature violate their constitutional duties on adjournment, they can be defeated the next time such offices come up for election, but the remedy is not for the courts." *Id.* at ¶ 7 (citing 1 Norman J. Singer, *Statutes and Statutory Construction* § 15:3, at 822 (6th ed. 2002)).

The court in *King* also reaffirmed the rule, which has been in place since the early years of statehood, that New Mexico courts follow the conclusive presumption that acts of the Legislature are valid and not open to attack on procedural grounds. *See id.*, ¶ 11. This principle is determinative in this case because HR-1 imposes no threat to the validity of any laws that the legislature might pass and thus causes no

articulable harm to the public or to any person. Petitioners' complaints are therefore ineffectual and meaningless challenges to the House's exclusive right to adopt procedural rules – a challenge that must fail as an improper attempt to intrude on the House's constitutional power.

Moreover, following petitioners' logic would lead this Court, and this state, down a path that is antithetical to our republican system of government. This Court in *Kelley* succinctly and powerfully summarized the dangers inherent in petitioners' position:

> The very statement of the assumption of the right of either of the other departments to question the acts and judgments of the judiciary is so shocking to the mind that it demonstrates the fallacy of the proposition that the judicial department has the power to go behind the duly and properly authenticated act of the Legislature to see whether there has been compliance with constitutional directions as to its method of procedure.

Kelley, 1915-NMSC-092, ¶ 7.

This reasoning is as valid today as it was when the Court issued its opinion over a century ago. The petitioners, who contend that they seek enforcement of the state constitution, have ignored one of its most fundamental precepts: the legislature itself, without influence from any other branch, has the exclusive constitutional right to develop procedures governing the attendance of legislators and how it holds its session at the seat of government.

C. The House Acted Lawfully and Reasonably, with Respect to Both Procedure and Substance, to Discharge its Constitutional Function.

Though petitioners contend that HR-1 requires most legislators to participate in the 2021 session via face-to-face video conferencing and thereby "significantly restricts" petitioners' "full participating rights,"[3] the petition does not provide any explanation of how these rights are restricted and how requiring members to be physically present during the session would ameliorate these concerns. As amplified above, it is for the House to determine its procedure and whether members are "present." In this case, the House has determined that it would be best to conduct its business using the procedures outlined in HR-1. This determination is not only fully within the House's power to make, but also eminently reasonable. HR-1 protects the members' health consistent with guidance provided by the New Mexico Department of Health, it ensures that a quorum will be available during the session, it ensures that a quorum can be readily ascertained, and it provides a reasonable and practical interpretation of the term "present." *See* Affidavit of Representative Daymon Ely, Chair of the House Rules Committee at 2-4, 6 (attached as Exhibit ("Exh.") A).

[3] HR-1 does not prohibit members from appearing on the floor. However, if a member chooses to enter onto the floor, the member must use computer audio for communications and debate.

Petitioners emphasize that the New Mexico Senate has adopted an alternative procedure as evidence to allegedly support their claims. This fact is not only irrelevant based on our constitution's grant of separate authority to determine procedure to "[e]ach house," it ignores the fact that the House has nearly twice the number of members as the Senate and a chamber of substantially the same physical size. Granting petitioners' requested relief would lead to the possibility of 70 house members gathering simultaneously in the chamber. The current "Red to Green Framework" established by Governor Lujan-Grisham's executive orders regarding the pandemic restrict mass gatherings for counties in "red" to *5 persons*. *See* Red to Green Framework, available at https://cv.nmhealth.org/public-health-orders-and-executive-orders/red-to-green/. Santa Fe County, similar to nearly every other county in New Mexico, is currently subject to the "red," or the highest level, restrictions. *Id.* The legislature certainly has the independent authority to enact *temporary* rule changes that are consistent with the recommendations and expertise of the Department of Health to protect the public.

Further, it is common knowledge that at least one member of the House has recently tested positive for Covid-19. The risk of an outbreak at the Capitol is a far greater threat to members' "full participating rights" than allowing members to attend the session via a videoconferencing service. Requiring in-person sessions could very well result in the incapacity of a substantial number of members due to

illness and the possible recess of the House for inability to meet the quorum requirements. Under these dire circumstances, the House has determined that the risk is unacceptable and has chosen to adopt a temporary definition of "present" that both protects members' health and their ability to participate fully and freely in the legislative process. *See* Affidavit of Daymon Ely, Exh. A at 2-3, 6.

The House's determination that it may satisfy "presence" in accordance with HR-1 is also reasonable and supported by the precedent of our sister states. The New Hampshire Supreme Court recently examined whether "holding a session of the New Hampshire House of Representatives remotely, either wholly or in part, whereby a quorum could be determined electronically, violate[d] Part II, Article 20 of the New Hampshire Constitution?" *Opinion of the Justices (Quorum under Part II, Article 20),*Request of the House of Representatives, No. 2020-0414, 2020 W.L. 6750797. The provision the New Hampshire court addressed provided: "A majority of the members of the House of Representatives shall be a quorum for doing business: But when less than two thirds of the Representatives elected shall be *present*, the assent of two thirds of those members shall be necessary to render their acts and proceedings valid." *Id.* (emphasis added). Thus, the Court was asked, similar to this Court, to determine whether the state constitution's reference to members "present" requires physical attendance.

The New Hampshire court first examined the history of the quorum requirement in federal and state constitutions and noted that "[t]he evident principal aim of the majority quorum requirement…is to ensure that a certain number of members are present before the House can transact business." *Id.* at 6 (quoting 48 Wm. & Mary L. Rev. 1025, 1032 (2006)). This requirement was critical to ensure that legislatures did not act without a sufficient number of members present, when, in earlier times, it could take months for state legislatures and the federal Congress to assemble. This is not a concern under HR-1, which provides an intricate and readily ascertainable method for determining presence.

Additionally, the New Hampshire court also relied on the historical definition of "present," as it was understood at the time of the founding, to mean "not absent; being face to face; being at hand." *Id.* Thus, the court reasoned, that if members are not absent, and are at hand, the members are "present" within the meaning of the New Hampshire constitution, whether they attend the session physically or virtually. *Id.* In the present case, the House, in enacting its internal methods to conduct business, has acted reasonably on the merits in concluding that face-to-face video conferencing, combined with the procedures in HR-1, sufficiently satisfies the House's constitutional function to be "present."

The procedure used to adopt the temporary rule change was also lawful and conducted in full compliance with the previous House rules, which *did require*

physical presence. Petitioners suggest that the representation by the Council, in its Response to the Emergency Verified Petition for Writ of Mandamus or Prohibition in *Pirtle v. Legislative Council,* No. S-1-38356, that members "will have full participatory rights during the legislative session" has somehow not been honored. This unsupported accusation is belied by the procedure used to adopt HR-1. As explained in the Council's brief in the *Pirtle* matter, the previous House rule required the physical presence of representatives and would require an amendment to effectuate remote attendance to satisfy the constitutional requirement of "presence." As stated then by the Council, any such amendment:

> would require both chambers to examine each particular rule to determine if a revision were necessary to accommodate a "remote, electronic means without requiring the physical presence of the legislators," or develop and enact emergency sets of rules permitting members to participate in the process without being physically present.

The House meticulously followed that procedure to amend its rules to allow virtual attendance – the House met in person, debated the issue, and the majority adopted the changes outlined in HR-1. *See* Affidavit of Daymon Ely, Exh. A at 2-4. Accordingly, there is no basis to claim that any legislator has lost any participation right or to suggest that any rule of the House was breached in the enactment of the amendments.

Further, and equally important, the rule changes are carefully designed to ensure that a quorum can be ascertained at any time, upon the request of any member. Under HR-1, such a request may be made once *every hour*. House Rule 7-3, 2021. If any member makes the request, it triggers a public roll call vote of *yeas* and *nays*. *Id.* The rule does not place any restriction on members' participation rights, as members are allowed to participate either virtually or in person, at each member's discretion.

For these reasons, petitioners' contention that their participation rights have been curtailed is without merit. The House has made a decision - well within its plenary power - based on the current health crisis that is fully consistent with and similar to restrictions placed on the general public by the executive and on the conduct of judicial proceedings by this Court. The House's determination of "presence" is also a reasonable exercise of its discretion, as confirmed by the well-reasoned opinion of the New Hampshire Supreme Court. The amendments were made in full compliance with House rules, after open debate, and HR-1 is designed to ensure that a quorum may be readily ascertained. Thus, on the merits, the House has acted lawfully, reasonably, and within its constitutional prerogative. *See* Affidavit of Daymon Ely, Exh. A at 2-3.

IV. The Newly Enacted House Rules Do Not Implicate Due Process Concerns, and the Opportunities for New Mexico Citizens to Participate in the Legislative Session Have Been Fully Protected.

The Petition asserts that the newly enacted House Rules, designed to conform House procedures to protect against the pandemic, somehow violate the due process rights of anonymous and non-identified members of the public.[4] However, this Court already addressed the same argument in *Pirtle, et al. v. Legislative Council Committee [sic] of the New Mexico Legislature,* No. S-1-SC-38356 ("First *Pirtle* Petition for Writ of Mandamus") and squarely rejected the claim that due process rights of the public are violated when the legislature enacts procedures to safeguard both the legislators and the public during the pandemic. Moreover, petitioners wholly fail to identify any individualized due process claim and, as a result, lack standing to assert such a claim.

A. The Petition Does Not Assert any Cognizable Due Process Violations.

As in the First *Pirtle* Petition for Writ of Mandamus, the current Petition wholly fails to assert any individualized due process claim. Instead, the Petition makes the extraordinarily broad and inaccurate statement that "[w]hen the legislature convenes for the purposes of drafting, amending or repealing legislation it does, *by*

[4] The Petition makes a passing reference, on page 3, to petitioners' due process rights, asserting a violation as a basis for the Petition. The body of the Petition, however, does not develop this argument or cite any authority to support it.

definition, affect the rights to life, liberty, or property of the residents of this state." Petition at 16 (emphasis added).

While particular statutes passed into law may implicate individual rights, an affected individual has the right to challenge the governmental action taken pursuant to those laws. In so doing, the individuals must necessarily establish a protected liberty interest and a governmental infringement of that interest, *see, e.g., New Mexico Gamefowl Ass'n, Inc.* 2009-NMCA-88, ¶ 9, and also demonstrate standing to challenge a particular statute before it is fully applied to them. *See* Legislative Council's Response brief in *Pirtle,* at 7-8. But none of those issues are even remotely implicated by Petitioners' attempted challenges to the procedural rule changes worked by HR-1, which have preserved and enhanced the opportunities for public participation.

B. The Opportunities for New Mexico Citizens to Participate in the Legislative Session have been Fully Protected.

Petitioners assert, without showing any direct connection to individual due process claims, that the amended rules "fail to give the residents of this state a meaningful opportunity to participate in a meaningful way in the House's consideration of legislation during the First Session of the 55th Legislature." Petition at 16. This is the same argument rejected by this Court in *Pirtle* and it is demonstrably contrary to the facts demonstrating robust and heightened public participation in the current legislative session.

In promulgating HR-1, the Rules Committee, and the House itself, consciously and carefully provided extensive vehicles to assure that the public would have every reasonable opportunity to follow and participate in the actions of the legislature during the current session. *See* Affidavit of Daymon Ely, Exh. A, at 3, 6-7. The House assured that its deliberations would be monitored and recorded, and the data indicate that thousands of New Mexico residents utilized all of the available outlets for observing and participating in hearings and debates of interest to them.[5]

The data show that over 15,200 individuals took advantage of the opportunity to observe committee hearings during the first week of the 2021 legislative session through live stream or video-on-demand ("VOD") webcast recordings. *See* Exhibit B (Live Stream Webcast Observation of House Committees from Jan. 19, 2021 – Jan. 29, 2021); Exhibit C (Video-on-Demand Observation of House Committees from Jan. 19, 2021 – Jan. 29, 2021). This is an impressive number of participants, particularly considering the limited number of substantive proceedings held during that period.[6]

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[5] Exhibit 1 to the Petition references a floor session that was briefly delayed due to technical problems. This is consistent with HR-1, which requires that the proceedings stop until the technical issues are resolved.

[6] An additional 8,300 individuals observed activity on the House floor through live stream or video-on-demand webcast. *See* Exhibit D (Live Stream and Video-on-Demand Webcast Observation of House Floor from Jan. 19, 2021 – Jan. 29, 2021).

The legislative committees promoted and made public participation available through Zoom technology, by using both internet and telephone access. During the first week of the 2021 session, 2,450 individual participants engaged in committee hearings via Zoom.[7] *See* Exhibit E (Participation in House Committees via Zoom from Jan. 19, 2021 – Jan. 29, 2021). As a result, more members of the public participated in most committee proceedings than could have been physically present in the committee rooms and galleries had the Capitol been open to the public. The data also show that the extensive number of participants in the legislative process represent a broad cross-section of our State, coming from 31 of our 33 counties. Consequently, these participation statistics demonstrate the fallacy and lack of merit to petitioners' contrived due process claims - participation has markedly increased as a result of the prudent procedures adopted to respond to the pandemic.

VI. Conclusion

For the reasons set forth above, respondents request that the Court dismiss the Petition and decline to issue the requested writ.

[7] The analytics program utilized to gather this data identified more than 4,000 total participation records; however, removal of "non-public" participants, such as legislative members and staff, duplicate entries whereby a person joined more than one hearing, and out-of-state participants, reduced that total to approximately 2,450.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2021, a true and complete copy of the foregoing was filed and served through the Tyler/Odyssey File and Serve system.

/s/ Thomas M. Hnasko
Thomas M. Hnasko