

IN THE NEW MEXICO SUPREME COURT

DAVID COBB and MICHAEL BADNARIK

Petitioners,

Vs.

No. _____

**STATE CANVASSING BOARD OF THE STATE OF
NEW MEXICO; REBECCA VIGIL-GIRON, in her capacity
As Secretary of State, BILL RICHARDSON, in his capacity
As Governor; PETRA JIMINEZ MAES, in her capacity as Chief
Justice;**

and

CAROL VIGIL, Judge of the First Judicial District,

Respondents.

**VERIFIED PETITION FOR MANDAMUS; VERIFIED PETITION FOR
SUPERINTENDING CONTROL or PROHIBITION
and
REQUEST FOR IMMEDIATE HEARING**

Petitioners David Cobb and Michael Badnarik, presidential nominees of the Green and Libertarian parties, respectively, petition the Court for a Writ of Mandamus, Prohibition and/or Superintending Control pursuant to NMSA 1-14-21 against Respondents, the State Canvassing Board and its three members, compelling performance of their statutory duty to commence the recount and recheck of the November 2, 2004 presidential election following Petitioners' timely written request and posting of the statutory deposit. These respondents first delayed, and have now refused, by vote taken at a meeting on December, 14, 2004, performance of this duty. Unless this Court acts immediately, Petitioners will be deprived of any meaningful relief. A recount and recheck of the presidential election is involved, and while the electoral college has already

voted, the Congress meets on January 6, 2005 to determine whether to accept those votes. That date is now fast approaching. The State Canvassing Board and its members should be ordered to set a date for commencement of the recount and recheck no later than Friday, December 17, 2004, and to issue a summons directed to the precinct boards commanding them to appear on the appointed date to conduct the recount and recheck.

Alternatively, Petitioners seek the issuance by this Court of a Writ of Superintending Control or Prohibition against Respondent Carol Vigil, Judge of the First Judicial District Court. In an order issued from the bench on December 15, 2004, Judge Vigil denied a Petition for Writ of Mandamus filed by Petitioners Cobb and Badnarik, seeking the same relief that they now seek from this Court. The lower court acted in direct contravention of the statutory command of NMSA 1-14-21, which requires courts to grant applications for writs of mandamus if a county or state canvassing board fails or refuses to act according to law, as the defendant members of the State Canvassing Board have in this case. In doing so, the District Court contravened the explicit and mandatory requirements of NMSA 1-14-15, which establish by clear formula the security deposit a candidate must pay to obtain a recount.

The District Court ratified the State Canvassing Board's extra-statutory and unlawfully-imposed requirement that the petitioners post not only the bond required by the foregoing statute (which petitioners deposited, and the Secretary of State accepted some time ago), but also post an additional amount well in excess of one million dollars as a precondition to a recount/recheck. This requirement is nowhere contained in, or suggested by, or permitted by any statute, and it directly contravenes NMSA 1-14-14 (A), which sets out in explicit detail the bond requirements for a recount. The lower court's ruling violates fundamental canons of statutory construction and does violence to the plain language and legislative intent of the statute. This case fits squarely within this

Court's jurisdiction to hear petitions for writs of superintending control. See argument, *infra*, at page 5, *et seq.*

A. Writ of Mandamus

The jurisdiction of this Court in this matter is set forth in NMSA 1-14-21, which provides:

If the state canvassing board, the county canvassing board, secretary of state, county clerk or any member of a precinct board fails or refuses to do or perform any of the acts required of them pertaining to recounts or rechecks, the applicant for recount or recheck may apply to any district court, the court of appeals or the supreme court of New Mexico for writ of mandamus to compel the performance of the required act and such court shall entertain such application.

FACTUAL AND LEGAL BACKGROUND

Petitioners right to a recount and recheck is set forth in NMSA 1-14-14, which provides in relevant part as follows:

A. Whenever any candidate for any office for which the state canvassing board or county canvassing board issues a certificate of nomination or election believes that any error or fraud has been committed by any precinct board in counting or tallying the emergency paper ballots or absentee ballots, in the verification of the votes cast on the voting machines or in the certifying of the results of any election whereby the results of the election in the precinct have not been correctly determined, declared or certified, the candidate, within six days after completion of the canvass by the proper canvassing board, may have a recount of the emergency paper ballots or absentee ballots, or a recheck of the votes shown on the voting machines, that were cast in the precinct.

B. In the case of any office for which the state canvassing board issues a certificate of nomination or election, application for recount or recheck shall be filed with the secretary of state.

Petitioners timely filed their written requests for a statewide recount and recheck of the November 2, 2004 election of presidential electors with Secretary of State Rebecca Vigil-Giron on November 29, 2004, pursuant to NMSA 1-14-

14(A) & (B). A deposit of \$114,400 was submitted at the same time, a figure that exceeded slightly the amount mandated by NMSA 1-14-15, which provides in relevant part as follows:

A. An applicant for a recount shall deposit with the proper canvassing board or, in the case of an office for which the state canvassing board issues a certificate of nomination or election, with the secretary of state fifty dollars (\$50.00) in cash, or a sufficient surety bond in an amount equal to fifty dollars (\$50.00), for each precinct for which a recount is demanded. An applicant for a recheck shall deposit with the proper canvassing board or, in the case of an office for which the state canvassing board issues a certificate of nomination or election, with the secretary of state ten dollars (\$10.00) in cash, or a sufficient surety bond in an amount equal to ten dollars (\$10.00), for each voting machine to be rechecked.

B. The deposit or surety bond shall be security for the payment of the costs and expenses of the recount or recheck in case the results of the recount or recheck are not sufficient to change the results of the election.

C. [omitted]

D. If no error or fraud appears to be sufficient to change the inner, the costs and expenses for the recount or recheck shall be paid by the applicant. Costs shall consist of any docket fees, mileage of the sheriff in serving summons and fees and mileage of precinct board members, at the same rates allowed witnesses in civil actions. If error or fraud has been committed by a precinct board, they shall not be entitled to such mileage or fees.

The filing of the requests and deposit by Petitioners triggered a non-discretionary duty on the part of the State Canvassing Board to commence the recount and recheck. That duty is set forth in NMSA 1-14-16, which provides in relevant part:

A. Immediately after filing of the application for recount or recheck, the state canvassing board shall issue a summons directed to the precinct board of each precinct specified in the application commanding it to appear at the county seat of the county wherein the precinct is situated on a day fixed in the summons, which date shall not be more than ten days after the filing of the application for a recount or recheck. The summons shall be forwarded to the county clerk of the concerned county.

B. Upon receipt of the summons, the county clerk shall deliver it to the sheriff who shall forthwith personally serve it upon each of the precinct board members. The county clerk shall thereupon send notices by registered mail of the date fixed for recount or recheck to the district judge for the county and to the county chairman of each of the political parties that participated in the election in that precinct.

C. The precinct boards, district judge and the county clerk shall meet at the county courthouse at 10:00 a.m. on the date fixed for the recount or recheck, and the ballot boxes or voting machines of the precincts involved in the recount or recheck shall be opened. The precinct boards shall recount and retally the emergency paper ballots or the absentee ballots, or recheck the votes cast on the voting machine, as the case may be, for the office in question in the presence of the county clerk, district judge or person designated to act for him, and any other person who may desire to be present.

The New Mexico State Canvassing Board has failed to perform these acts, acts that are mandatory whenever a candidate makes timely request and submits the required deposit.

The State Canvassing Board, comprised of the Secretary of State, the Governor and the Chief Justice of the Supreme Court of New Mexico, took no action in response to Petitioners' request for over two weeks. At a meeting held at 5:00 p.m. on December 14, 2004, after the 10-day deadline in NMSA 1-14-16(A) for the recount to begin had passed, the State Canvassing Board voted unanimously to deny Petitioner's application for recount and recheck of the 2004 presidential election. The Board then took a second, unanimous vote, this time to grant the application, but subject to the unlawful condition that Petitioners post a deposit or surety bond of an *additional* \$1.4 million no later than 10 a.m. on Thursday, December 16, 2004.

B. Superintending Control

"The power of superintending control is an extraordinary power. It is hampered by no specific rules or means of its exercise." Albuquerque Gas & Electric Co. v. Curtis, 43 N.M. 234, 235, 89 P.2d 615, 616 (1939) (sets forth the

elements of the Writ); see also Richard C. Bosson and Steven K. Sanders, The Writ of Prohibition in New Mexico, 5 N.M. L.Rev. 122-24 (1974). This Court decided long ago that:

“It is well established that it is not a writ of right, granted *ex debito justitiae*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. . .” State ex rel. Harvey v. Medler, District Judge, 53 N.M. 367, 378, 208 P.2d 1073.

“A writ is appropriate when a remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense.” State ex rel. Transcon Bus Serv. V. Carmody, 53 N.M. 367, 378, 208 P.2d 1073.

In a hearing in Case No. D-0101-CV-2004-02396 on the morning of December 15, 2004, Respondent District Judge Carol Vigil denied the Petition for Writ of Mandamus filed by Petitioners in that court, seeking essentially the same relief sought in the instant petition. Judge Vigil stated from the bench that, applying the statutory construction canon of *in pari materia*, she interpreted NMSA 1-14-15(B) as permitting the State Canvassing Board to condition granting an application for recount and recheck on advance payment of the estimated full costs and expenses of the recount.

The lower court’s construction of NMSA 1-14-15 is an arbitrary abuse of discretion with no basis in law. Under the principle of *expression unius est exclusion alterius*, the express provision in NMSA 1-14-15(A) of a formula for calculating the amount of the security deposit referenced in NMSA 1-14-15(B) precludes reading into the statute another formula for calculating the amount of the security deposit. Neither the State Canvassing Board, as an administrative body, nor a court may enlarge or alter the statutory formula as prescribed by the

Legislature. Fancher v. Board of Com'rs of Grant County, 28 N.M 179, 190, 210 P.2d 237 (1922) (where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to being done in that mode, and all other modes are excluded); Carrillo v. Compusys, Inc., 132 N.M. 710, 713-714, 54 P.3d 551 (Ct. App. 2002) (administrative body has no power to promulgate a rule or regulation that overrides a specific statutory scheme governing fee shifting); accord Brusteuen v. Secretary of HHS, 1992 U.S. Cl. Ct. LEXIS 315, 21-22 (Ct. Cl., 1992) (a statutory formula may not be modified by other factors, even though such factors might as a matter of logic be very relevant, in the absence of a Congressionally prescribed formula); Daley v. State Dep't of Social Welfare, 276 Cal.App.2d 801, 804-805 (Cal. Ct. App., 1969) (a change in a statutory formula , "whatever its justification in logic or intuitions of fairness," must be addressed to the Legislature as a reason for amending the law).

FIRST CAUSE OF ACTION
(Mandamus, NMSA 1-14-21)

1) NMSA 1-14-21 provides in its entirety as follows:

If the state canvassing board, the county canvassing board, secretary of state, county clerk or any member of a precinct board fails or refuses to do or perform any of the acts required of them pertaining to recounts or rechecks, the applicant for recount or recheck may apply to any district court, the court of appeals or the supreme court of New Mexico for writ of mandamus to compel the performance of the required act and such court shall entertain such application.

2) Petitioners having met all requirements for a recount and recheck, Respondents, the State Canvassing Board and its members, Rebecca Vigil-Giron in her capacity as Secretary of State, Bill Richardson in his capacity as Governor, and Petra Jimenez Maes in her capacity as Chief Justice, have failed and refused to perform their duty under NMSA 1-14-16(A) to set a date within 10 days following the application for recount and recheck and to issue a summons

to the precinct boards to appear on that date to commence the recount and recheck.

3) Unless ordered to do so, Respondents will continue to fail and refuse to perform their statutory duties with respect to the recount and recheck of the November 2, 2004 presidential election.

4) Petitioners have no plain and speedy alternative remedy at law.

SECOND CAUSE OF ACTION
(SUPERINTENDING CONTROL)

1) Respondent Carol Vigil, District Judge, abused her discretion and acted arbitrarily in denying the Petition for Writ of Mandamus sought by Petitioners in Case No. D-0101-CV-2004-02396.

2) The construction of NMSA 1-14-15 adopted by Judge Vigil, permitting imposition of a requirement for a security deposit above and beyond that specified in NMSA 1-14-15(A) is contrary to law;

3) Absent relief by this Court, Petitioners will be irreparably injured if they are forced to resort to appeal of the trial court's decision as their only remedy.

PRAYER FOR RELIEF

WHEREFORE,

Petitioners pray that this Court immediately issue its writ of mandate, commanding Respondent State Canvassing Board and its members forthwith to issue summonses to all precinct boards throughout the State of New Mexico, commanding the precinct boards to appear on a date that is no more than Friday, December 17, 2004; or in the alternative, immediately issue its writ of superintending control to Respondent District Court, commanding the District Court forthwith to issue its writ of mandamus, requiring the Respondent State Canvassing Board to proceed with the recount/recheck as required by NMSA 1-14-14.

DATED: December 15, 2004

Respectfully submitted,

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Justice;**

and

CAROL VIGIL, Judge of the First Judicial District,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the *Verified Petition for Mandamus, Verified Petition for Superintending Control or Prohibition and Request for Immediate Hearing* to be served by hand on the Attorney General as counsel for the Secretary of State, Rebecca Vigil-Giron, on the Office of the Governor, on the Chief Justice by leaving a copy with the Clerk of the Court, and on Judge Carol Vigil by leaving a copy at her chambers.

Respectfully submitted,

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Respondents.

WRIT OF MANDAMUS

Respondents, State Canvassing Board of the State of New Mexico, Rebecca Vigil-Giron, Bill Richardson, and Petra Jiminez Maes are commanded forthwith to issue summonses to all precinct boards throughout the State of New Mexico, commanding the precinct boards to appear on or before December 14, 2004, to commence the recount and recheck of the November 2, 2004 presidential election.

IT IS SO ORDERED,

Judge of the District Court