IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

EMILY KANE,

Petitioner/Appellee,

vs.

Ct. of Appeals No. 32,383
BCDC No. D-202-CV-2012-0575

THE CITY OF ALBUQUERQUE,

Respondent/Appellant.

APPELLEE'S ANSWER BRIEF

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ORAL ARGUMENT REQUESTED

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The Court of Appeals should affirm the preliminary and permanent injunction entered by the District Court. Although the Hazardous Duty Officers' Employer-Employee Relations Act's preemption of the City's Charter and Regulations provides sufficient grounds for affirmation, for the sake of conformity with the City's presentation in its brief, Appellee will begin with discussion of the City's Constitutional violations.

I. THE CITY'S PROHIBITIONS AGAINST EMPLOYEES SEEKING OR HOLDING ELECTIVE OFFICE OF THE STATE OR ANY OF ITS POLITICAL SUBDIVISIONS ARE UNCONSTITUTIONAL

Standard of Review

Injunctive relief is within the sound discretion of the trial court. *Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. In review of an abuse of discretion, the review of the application of law to facts is *de novo. New Mexico Right to Choose/NARAL v. Johnson*, 127 N.M. 654, 656, 986 P.2d 450, 452. Constitutional challenges are also reviewed de novo. *ACLU of NM v. City of Albuquerque*, 2006-NMCA-0 05, ¶ 10, 139 N.M. 761, 137 P.3d 1215.

Kane Has a Right to Candidacy, and the City's enactments are not narrowly tailored to a compelling government interest

The City of Albuquerque's ("City") Charter states at Article X, Section 3, "employees of the city are prohibited from holding an elective office of the State of New Mexico or any of its political subdivisions." The City's Personnel Rules and

Regulations state at Section 311.3, "No employee shall…Be a candidate for or hold an elective office of the State of New Mexico or any of its political subdivisions." These two attempts by the city to restrict the political activity of City employees violate the First Amendment of the United States Constitution.

The right to candidacy is far from a "well-settled" area of law. The Supreme Court decisions giving rise to the City's belief that no right to candidacy exists actually show an inability to come to consensus regarding candidacy as a First Amendment right. *Clements v. Fashing*, 457 U.S. 957 (1982), on which the City relies for its argument that candidacy is not a fundamental right, is only a plurality opinion. In Parts III and IV of that opinion, Justice Rehnquist wrote only for himself and Justices Burger, Powell, and O'Connor. It is from Part III, which represents the opinion of only four Justices, that comes the statement that candidacy is not a fundamental right. A subsequent Supreme Court opinion analyzing candidacy rights noted that *Clements* is only a plurality opinion: *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

United Public Workers v. Mitchell, 330 U.S. 75 (1957) has even less weight: Justices Murphy and Jackson did not even participate in the case, *Id.* at 104, Justices Black and Douglas dissented, *Id.* at 105, 115, Justice Rutledge "does not pass upon the constitutional questions" for reasons of jurisdiction, *Id.* at 104, and Justice Frankfurter also objected to jurisdiction but "under compulsion of the

Court's assumption of jurisdiction" concurred in the judgment only, *Id.* at 104. That leaves only three Justices who actually accepted the Constitutional analysis. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) then "upheld" *United Public Workers*, but affirming a decision and analysis fully endorsed by only three justices is shaky in itself.

Clements does not end the inquiry, in part because the right to "candidacy" is not the only one at issue. The Supreme Court has recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter,* 405 U.S. 134, 143 (1972). If candidacy restrictions "limit the field of candidates from which voters might choose[,]…[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Anderson* 460 at 786 (internal quotations omitted). When government attempts to restrict political candidacy, it places "burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Anderson* 460 at 787, quoting *Williams v. Rhodes,* 393 U.S. 23, 30-31(1968). *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) confirmed that in "*Bullock*

v. Carter, we minimized the extent to which voting rights cases are distinguishable from ballot access cases." The hybrid and overlapping nature of candidate and voter rights means that the analysis varies as the restrictions vary.

Clements itself acknowledged that the analysis would differ from the rational-basis scrutiny typically applied to non-fundamental rights. "Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions." *Clements* 457 at 963. At its core, the "inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Id.* at 964 (internal quotation marks omitted).

The Supreme Court solidified its analysis of candidacy restrictions in *Anderson v. Celebrezze* 460 at 789: the court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) used the same standard. Furthermore, "[w]hen the plaintiffs' rights are subject to 'severe' restrictions, those restrictions survive only if they are 'narrowly tailored and advance[ ] a compelling state interest.'" *Grizzle v. Kemp*, 634 F.3d 1314, 1322 (11th Cir. 2011) (internal citations and quotation marks omitted). *See also Burdick v. Takushi,* 504 U.S. 428, 434 (1992) ("severe" regulation must be "narrowly drawn to advance a state interest of compelling importance.") Alternately, if government imposes "reasonable" or "nondiscriminatory" restrictions on candidacy, the government's "important regulatory interests" will normally suffice. *Grizzle* at 1322.

Molina-Crespo v. U.S. Merit Systems Protection Bd., 486 F.Supp.2d 680 (N.D.Ohio 2007), rather than announcing unequivocal support for the City's position, adds a further wrinkle:

> There is an argument that strict scrutiny should be applied in this case; as Molina-Crespo argues, this is the *federal* government dictating to *state* employees, as opposed to the factual situations involved in *Mitchell, Letter Carriers,* and *Broadrick.* As such, a strong case can be made that the normal 'employer-employee' relationship generally analyzed in Hatch Act cases does not apply, and, therefore, neither would the lowered level of constitutional protections.

Molina-Crespo at 691-692 (emphasis in original). The court there found no binding case law which "analyzed the question therefore implicated; whether the *federal* Act applied to a *state* employee takes the analysis outside the realm of government employer-employee speech, and accordingly elevates the level of

speech protections (and, of course, the level of scrutiny)." *Id.* at 692 (emphasis in original). *Molina-Crespo* drew attention to the complications when different levels of government are involved. In *Molina-Crespo*, a federal act applied to a state employee running for a county office. Here, a city act applies to a city employee running for a state office. The *Molina-Crespo* court worried that the implication of the rights of another governmental entity (the state employing Mr. Molina-Crespo) affected the level of scrutiny. Here, the City's act implicates the right of another governmental entity—the State of New Mexico, which has many interests in candidates for *state* office and the rights of *state* voters. The Ohio District Court then did apply strict scrutiny. *Id.* at 693.

Since 1973's *Letter Carriers* opinion, the Supreme Court has also broadened the nature of public-employee First Amendment rights. In *Connick v. Myers*, 461 U.S. 138, 148 (1983), the Supreme Court announced, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." Additionally, the Court affirmed that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Id.* at 140. Although the government-as-employer may have interests in controlling the expression of its employees, courts must seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State as an

employer, in promoting the efficiency of the public services it performs." *Id.* at 142, quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The City has identified the Constitutional right at issue as a right to "candidacy." However, just as the rights of candidates and voters do not separate themselves easily, the right to candidacy implicates broader rights of commenting on matters of public concern. Candidates for public office necessarily will speak on matters of public concern—and speech on matters of public concern constitutes core political speech under the First Amendment.

We thus have precedent concerned only with "candidacy," precedent reviewing the Hatch Act, *and* precedent dealing with the broader right of a public employee to speak on matters of public concern. The Supreme Court has not reconciled these lines of theory, and because all these lines of theory implicate each other, the analysis appropriate to the current case is not clear. However, because the City has framed this case as turning on a right to candidacy, Respondent will focus its analysis on that theory.

The City's Charter and Regulations severely restrict candidacy rights of City employees. The Charter and Regulations do not differentiate between partisan and non-partisan elected offices (as the refined version of the Hatch Act reviewed in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) did). They do not differentiate between classified and non-

classified employees (as the Oklahoma law reviewed in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) did). They do not make an exception for *any* political office (as New Mexico's State Personnel Act does in excepting local school boards from the candidacy restriction). They do not address the rights of a present office-holder to run for different office (as the Texas law in *Clements* did). The plaintiffs in *Grizzle v. Kemp* argued that a Georgia law that prohibited any person from running for board of education who had an immediate family member working in school administration, *Grizzle* at 1316, operated as a "total ban" from elective office. *Id.* at 1324. The 11th Circuit did not agree, because plaintiffs "may run for any other elected office." *Id.* In contrast, the City's Charter and Regulations do operate as a total ban because they prevent City employees from running for "any" elected office.

Moreover, the Charter and Regulations restrict voters' rights. The Charter and Regulations prohibit candidacy for office of the State or any political subdivisions. This means that a *city* is restricting the rights of *state*, *county*, and *school district* voters to cast their votes effectively. A legislative district may represent constituents of different cities, a county commission district may overlap city lines, and a City employee may wish to run for a legislative district located entirely beyond City borders. The voters of those districts should make the decision about the names they wish to see on the ballot and the person they wish to

elect to represent them. The City's Charter and Regulations deny voters that right by essentially determining who can be on the ballot of non-City political subdivisions. If a City of Albuquerque employee wishes to run for Valencia County Commission because she actually lives in Valencia County, the voters of Valencia County have the right to decide if that person should hold elective office. However, because of the City of Albuquerque's blanket prohibition on candidacy for *any* elective office, the City of Albuquerque's decisions override those of Valencia County voters. By reaching beyond the borders of the City itself, the City's prohibitions infringe on the rights of voters to make decisions about their representation.

Because the City has severely restricted candidacy rights and because those restrictions impact the fundamental rights of voters, the City's Charter and Regulations can survive only if narrowly tailored to advance a compelling state interest. *See Anderson* at 1983 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," quoting *NAACP v. Button*, 371 U.S. 415, 438, (1963); "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties" *Id.*, citing *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)).

The District Court explicitly found that the City *does* have an interest in controlling who runs for *City* office but *does not* have an interest in controlling who runs for *state* office. RP: 132. It follows that the City's Charter and Regulations must be narrowly tailored to advance its interest in preventing City employees from running for *City* office. As detailed above, the Charter and Regulations use broad and clumsy brushstrokes and too broadly define what should be a narrow restriction. If the City mentioned only *City* elected office, the Charter and Regulations would survive Constitutional muster.

The City's claims that broad candidacy prohibitions are necessary to prevent the building of a "political machine" have no basis in fact or modern experience. The "political machine" language comes straight from the three-Justice-approved "majority" opinion in 1947's *United Public Workers* at 101: "government employees are handy elements for leaders in political policy to use in building a political machine." In that case, Justice Douglas in dissent did speak of the "evils of the 'spoils' system." *Id.* at 123. While corruption, patronage, and nepotism may have run rampant in the civil service in 1947, public sector employees in 2013 have standard employment applications, standard performance reviews, and standard disciplinary procedures. Governmental entities have merit system laws and administrative review procedures with impartial arbiters to assure that corruption and the spoils system do not poison the hiring, promotion, demotion,

and firing of public sector employees. These elements assure that public sector employees work in a merit-based system and that the governmental employer will not make employment decisions based on non-merit factors.

And should political patronage and spoils slip through the cracks, governmental entities always have at their disposal the availability of subsequent punishment (in contrast to prior restraint). Through such means as inspection of public records acts, whistleblower protection acts, qui tam actions, fundraising disclosure requirements, and a broad range of public corruption laws, government officials can be punished and corruption brought to light without harming the First Amendment rights of rank-and-file civil service employees.

The City's explanation of its interest further shows that its worry over conflicts of interest is largely imagined: the Charter and Regulations "avoid *potential* conflicts of interest resulting from legislative conduct that may be in the best interests of the elected official's constituents, but adverse and harmful to that same elected official's own employer" (City's brief page 19) and "The City has an interest in protecting itself against Kane *potentially* making decisions in elective public office that serve more to further her political ambitions than the responsibilities of her City employment" (City's brief page 19) (emphasis added).

Anderson requires that the government put forth "precise interests." See infra at page 4. The City has not pointed to a single legislative act or proposed act

that represents the danger it wants to avoid. That is, the City has not shown that its interest even exists. Moreover, the rest of the City's arguments belie the existence of conflict between a state legislator's constituents and the City of Albuquerque as an employer: the City has systematically argued that City enactments take precedence over state enactments and that the City has the protection of home rule and the Municipal Corporations Act, both of which protect the City from state decisions "adverse and harmful" to the City. Additionally, the City has already protected itself from its employees furthering their political ambitions rather than their City employment by agreeing in a Collective Bargaining Agreement to allow employees to take unpaid leave while serving in elected office.

The District Court made a specific finding that the City did not have an interest in preventing City employees from running for state office. RP:132. The City's only argument in rebuttal is that the "district court engaged in strained and illogical inferences." The City has not demonstrated that its Charter and Regulations are narrowly tailored, nor that they advance a compelling state interest, and therefore, they violate the First Amendment of the U.S. Constitution.

The too-broad nature of the City's rules provides another angle for Constitutional attack. The overbreadth doctrine allows litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause

others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* at 612. The doctrine reflects "the judgment of [the Supreme] Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Id.* at 612. If a court finds a statute overbroad, "any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 613.

The City's Charter and Regulations do not differentiate between partisan and non-partisan elected office. The law at issue in *Broadrick did* make that differentiation, and the Supreme Court found it not overbroad. The modified Hatch Act at issue in *Letter Carriers* also differentiated between partisan and non-partisan. The New Mexico State Personnel Act, which the New Mexico Supreme Court addressed in *State ex rel. Gonzales v. Manzagol*, 87 N.M. 230, 531 P.2d 1203(1975), makes exceptions for election to local school boards. These decisions suggest that non-partisan candidacy and exceptions for certain elected offices are constitutionally allowable.

And yet the City's rules sweep up non-partisan candidacy and *all* elected offices. This blanket prohibition deters and chills constitutionally protected expression. Such a total ban justifies the Court making the assumption that the

Charter and Regulations' very existence has a chilling effect on constitutionally protected expression. With such a draconian policy in question, the possibility of muting protected speech outweighs the possible harm of permitting some unprotected speech to go unpunished. For that reason, the Court should forbid the enforcement of the City's Charter and Regulations pending a limiting instruction or partial invalidation.

The City has also enforced its Charter and Regulations in a Constitutionally impermissible manner and has further infringed upon Respondent's First Amendment rights. The record suggests that the City did not threaten disciplinary action because of the mere fact of Ms. Kane's *candidacy*, but did so due to the *manner in which* Ms. Kane campaigned. This brings the issue out of the realm of mere candidacy and into the realm of pure political speech, similar to the case *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007). In that case, two employees who worked at a Kentucky Property Valuation Administration Office ran against each other for the office of Property Valuation Administrator. *Id.* at 448. After employee Murphy won the election, she terminated employee Cockrell. *Id.* at 449.

The Sixth Circuit analyzed the case under the following test: to demonstrate First Amendment protection, a public employee must show (1) that the speech at issue addresses a matter of public concern, and (2) that the employer had no overriding state interest in efficient public service that would be undermined by the

speech. *Id.* at 449. This is the test used generally for public-employee-speech cases and follows the Supreme Court analysis developed in *Connick v. Myers* and *Pickering*. The Sixth Circuit then reported that other circuits had found that "[d]isciplinary action discouraging a candidate's bid for elective office represent[s] punishment by the state based on the content of a communicative act protected by the First Amendment." *Murphy* at 450, quoting *Finkelstein v. Bergna,* 924 F.2d 1449, 1453 (9th Cir.1991).

This again begs the question of how to define the right at issue—is it merely the right to be a candidate, or is it the right to express all the political viewpoints that go hand-in-hand with candidacy? The *Murphy* court spoke of distinguishing "cases in which candidates had been singled out or treated differently based on their political viewpoints or expressions" rather than the mere fact of candidacy. *Murphy* at 451. The present case is one in which the City has singled out and treated differently a candidate based on political expression rather than the mere fact of candidacy.

Prior to the July 20, 2012 hearing on the City's motion for declaratory judgment and Ms. Kane's application for preliminary and permanent injunction, the City agreed to certain stipulated facts, RP: 125-127, including Facts 11 (City firefighter Eddie Torres ran for, was elected, and served as a councilor for the Village of Bernalillo without any objection from the City),12 (when Mr. Torres ran

for Mayor of Bernalillo, the City advised him that City policy did not permit his candidacy), 14 and 15 (the City did not discipline Torres for any of his political activities), 16 (the City allowed Lawrence Montoya to serve as Governor of Santa Ana Pueblo), and 19 (the City did not discipline Philip Luna for serving as Estancia Village Trustee). At the July 20, 2012 hearing, the City repeatedly argued that Ms. Kane's situation was "different" and also argued that this "difference" could impact what discipline Ms. Kane might receive.[1] Counsel for the City then stated, "Captain Kane is different in a couple of respects…She first brought her intentions to the administration and was told, upfront, as early as March 26th, shortly after she filed her candidacy, that the City believed it was improper for her to run." TR: 20-21. Counsel then compared Ms. Kane's situation to that of Eddie Torres and Philip Luna: "Again, these other individuals, we don't know whether they knew in advance, whether they paid attention to the personnel rules, whether they understood that perhaps they shouldn't [run for elected office]. There's no indication they asked for permission or brought their situation to the Department's attention in advance." TR: 21. However, "[i]n Ms. Kane's case, she did bring her intentions to the Department's attention, to the City's attention, and was told no. She was told no, in no uncertain terms. That may weigh on what type of discipline

[1] The City took a great deal of time in its brief explaining witnesses and attempting to argue that Ms. Kane did not show that the City knew of Mr. Torres' candidacy. However, the Stipulated Facts show that the City did know.

is appropriate for Ms. Kane." TR: 21. Later in the hearing Ms. Wardlaw again emphasized the uniqueness of Ms. Kane's situation: "As far as Torres and Luna go, the situations were different...Captain Kane has elevated her situation by the very virtue of the fact that the media is here." TR: 30.

The fact that the City views Ms. Kane as "different," the fact that it considers those differences relevant to discipline, and the fact (stipulated) that the City never disciplined Eddie Torres for any of his candidacies show that the City singled Ms. Kane out on the basis of her political viewpoints and expressions and not on the mere fact of candidacy.[2] If the City truly meted out discipline to politically active firefighters equally, the City would have also threatened Eddie Torres with termination or brought a declaratory judgment action against him. After all, the City's Charter and Regulations make no distinction between partisan and non-partisan elected office, nor any distinction between City elected office and non-City elected Office. If the City truly applied its discipline in an even-handed manner, it would have treated Mr. Torres' candidacy for a non-partisan, non-City office exactly the same as Ms. Kane's candidacy for a partisan, non-City office.

[2] To be clear, Respondent does *not* make an equal protection argument here. Rather, the argument, following *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007), is that if government threatens discipline of a public employee based on political activity in a way that suggests the discipline is directed at political *expression* instead of *mere candidacy*, the standard changes and level of scrutiny increases.

However, Ms. Kane did something Mr. Torres did not: she told the City. Instead of conducting her campaign as quietly as a church mouse, she boldly informed the City of her candidacy and sought media attention when the City threatened her political expression. To the City, this "elevates" the situation, even though by the terms of the Charter and Regulations, it should not. The Charter and Regulations make no distinction between bold, media-enhanced political activity and almost unnoticeable runs for mayors of small towns. From the City's characterization, it appears that Eddie Torres quietly ran for Bernalillo mayor and quietly lost. Ms. Kane, on the other hand, boldly ran for state legislature and, at the time of the July 20, 2012 hearing which led to this appeal, had just as boldly won her primary election.

This suggests that the City singled out Ms. Kane due to her political expression and viewpoints, not due to the mere fact that she placed her name for candidacy. In this kind of situation, to demonstrate First Amendment protection, a public employee must show (1) that the speech at issue addresses a matter of public concern, and (2) that the employer had no overriding state interest in efficient public service that would be undermined by the speech.

Ms. Kane's speech during her campaign for the New Mexico Legislature plainly addressed public concerns. The City had no overriding state interest in efficient public service that Ms. Kane's campaigning would undermine. No City

firefighter failed to rescue someone and no firefighters deserted their duties en masse because of Kane's candidacy. The Albuquerque Fire Department did not have to put down riots or deal with any civic disruption due to Ms. Kane's candidacy. Ms. Kane did the responsible thing and informed the City of her political intentions, and the City threatened her with discipline for it.

Although *State ex rel Harkleroad v. New Mexico State Police Board*, 103 N.M. 270, 705 P.2d 676 (1985) and *State ex rel. Gonzales v. Manzagol*, 87 N.M. 230, 531 P.2d 1203(1975) may initially seem to support the City's position, subtle differences make these two cases distinguishable from the present situation. In *Gonzales*, the employee worked for the State of New Mexico as a Water Resource Assistant in the Office of the Engineer. This was a non-exempt, classified position governed by the State Personnel Act. After an initial appointment to the Santa Fe City Council, Gonzales then sought election to the City Council. The Office of the Engineer then moved to dismiss Gonzales from his employment. *Id.* at 231, 1204. Gonzales framed his conflict differently than Ms. Kane and the City have framed the conflict here. Gonzales argued that requiring him to resign his State employment imposed an unconstitutional restriction on him as an elected public officer. *Id.* at 232, 1205. The New Mexico Supreme Court saw it differently: "No effort is being made to impose any restriction upon the elective public office which Petitioner holds or upon him as the holder of that office. It is his appointive

position as a 'public officer or employee' which is in danger by his persistent action in holding a 'political office.'" *Id.* at 232, 1205. The Supreme Court then stated that the Legislature of New Mexico "had the constitutional power…to thereby provide, as a qualification or standard for his continued employment by the State in a position covered by the State Personnel Act, that he not hold 'political office.'" *Id.* at 232, 1205. The Legislature had this power because of Article 7, Section 2(B) of the New Mexico Constitution, which states, "The *legislature* may provide by law for such qualifications and standards as may be necessary for holding an *appointive position* by any public officer or employee" (emphasis added).

The Supreme Court did *not* rule that the State could prevent an elected public officer from holding state employment. Rather, it instead found that because Gonzales held an "appointive position" as a "public officer or employee," the *Legislature* could, via the State Personnel Act, create the rule that anyone holding "appointive position" as a "public officer or employee" could not be an *elected* public officer. The difference between these two concepts is that the State derives authority for the latter from Article 7, Section 2(B) of the New Mexico Constitution. The City has not shown from where it would derive similar authority.

Mr. Gonzales did not argue a facial violation of the First Amendment, but only argued that the State Personnel Act was overbroad (as shown above, these are

two different analyses). The Court did not find the State Personnel Act overbroad, but as shown above, the State Personnel Act is not equivalent to the "total ban" of the City's Charter and Regulations. Moreover, the Office of the Engineer showed a much more cognizable, specific risk of conflict: "the fact that Petitioner is serving on the governing body of the City of Santa Fe may very well place him in a position of conflict with his state employment *in regard to water rights claimed by the City of Santa Fe*." *Id.* at 234, 1207 (emphasis added). Because both the State Office of the Engineer and the City Council of Santa Fe manage water rights, the state could identify a cognizable risk of conflict. Here, the City of Albuquerque Fire Department and the New Mexico House of Representatives do not both manage efforts to rescue people from burning buildings.

State ex rel Harkleroad v. New Mexico State Police Board, 103 N.M. 270, 705 P.2d 676 (1985) involved a challenge to a New Mexico State Police Department Rule. Mr. Harkleroad asserted that the Rule was vague and overbroad. The Court relied on 1973's *Letter Carriers,* 413 U.S. 548 (1973) in finding the Rule not vague or overbroad. The Court stated, "Furthermore, Rule 134 is not fatally overbroad because it does not proscribe constitutionally protected conduct" and then quoted from *Letter Carriers*: the "right to participate in political activities [was] not absolute in any event ... [P]lainly identifiable acts of political management and political campaigning on the part of federal employees may

constitutionally be prohibited." *Harkleroad* at 272, 678. In citing to only *Letter Carriers*, the Court ignored several other cases expanding upon or questioning *Letter Carriers*, such as *Clements v. Fashing*, 457 U.S. 957 (1982), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and also ignored the general line of public-employee-speech rights cases beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968). New Supreme Court precedent, including *Clements*, requires that any restriction on candidacy be considered in terms of its severity and impact on voters. The New Mexico Supreme Court did not do this in *Harkleroad*.

Harkleroad, just like *Gonzales*, identified a precise state interest: "The State of New Mexico and the New Mexico State Police have an imperative interest in prohibiting its police officers from running for an elective public office" because "the mission of the New Mexico State Police…is, among other things, to serve as conservators of the peace for the whole state." *Id.* at 272, 678. "As conservators of the peace, state police officers must enforce the laws in an impartial and uniform manner. There can be no situations where there may be an appearance of favoritism in dealing with the public or enforcing the laws." *Id.*

This suggests yet another way in which the City's Charter and Regulations are overbroad: they do not differentiate between employees who enforce laws and could appear to play favorites and those who do not. The New Mexico Supreme

Court found police officers' uniform enforcement of law a compelling state interest. The City of Albuquerque has made no suggestion as to how restrictions on *all* city employees—even those who have nothing to do with enforcing laws and do not serve in positions where they could appear to play favorites—advances the mission of the City. The City's Charter and Regulations have no "jurisdictional hook" or nexus, so to speak, to make this differentiation. Moreover, the City itself suggested that firefighters *are* different in terms of the availability of political opportunity when it entered into a Collective Bargaining Agreement that agreed to consider giving unpaid leave time to firefighters serving in elected positions.

The City does not have statutory standing to sue pursuant to the Hatch Act, and when a statute "designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9, n.1, 144 N.M. 471, 188 P.3d 1222. In cases where standing will affect jurisdiction, the issue of standing "may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008 (internal quotation marks and citation omitted).

The Hatch Act provides at 5 U.S.C. § 1504, 1505 that violations are to be reported to the U.S. Civil Service Commission. The Commission determines whether a violation has occurred, and the Commission's findings may be appealed to U.S.

District Court. 5 U.S.C. § 1508. "It is clear that the Civil Service Commission has the sole authority to enforce the provisions of the Hatch Act." *Brooks v. Nacrelli*, 331 F.Supp. 1350, 1354 (E.D.Pa.1971). "[R]egardless of whether plaintiffs have standing as aggrieved parties, it is obvious that to permit them to bring an action based on alleged Hatch Act violations would be to permit a bypass of the administrative procedure set forth by Congress. Accordingly we do not believe that plaintiffs can properly base their cause of action on alleged violations of the Hatch Act." *Id.*

The Temporary Injunction issued in favor of Appellee, RP:44, found, "No competent evidence has been provided at the hearing that this matter is governed by the federal 'Hatch Act.'" Still, the City persisted in raising the Hatch Act at the July 20, 2012 hearing, and although counsel for Appellee argued that the temporary injunction had made the Hatch Act moot, TR:70, the Court heard arguments anyway and, in the Permanent Injunction, RP: 132, stated, "The federal Hatch Act does not apply to this action as any federal grant money...is de minimis."

The District Court did not have subject matter jurisdiction to make that determination. On appeal, Appellee urges affirmation of the *result* the District

Court reached—that the Hatch Act does not apply—but on alternate grounds.[3] The Hatch Act does not apply to this action because the City lacks statutory standing to base a cause of action on violation of the Act.

Substantial Evidence

The District Court found that three other City firefighters "sought and held political office" and that the City "had actual knowledge" that they had done so. RP: 134. The City attempts to attack this finding by splitting hairs regarding whether "political" includes non-partisan office and whether "sought and held" includes non-elected positions.

On July 20, 2012, the City agreed to a set of Stipulated Facts. RP: 125.The Court of Appeals wrote in *Eldorado v. State ex rel. D'Antonio*, 2005-NMCA-041, ¶ 22, 110 P.3d 76, 137 N.M. 268, "we hold that the district court did not enter findings of fact that went beyond the stipulated facts and exhibits...We also conclude, therefore, that the district court's findings were supported by substantial evidence." This means that if the district court does not go "beyond the stipulated facts and exhibits," then substantial evidence supports its findings. In reviewing a "substantial evidence" claim, the reviewing court should "not reweigh the evidence nor substitute our judgment for that of the fact finder." *Las Cruces Prof'l Fire*

[3] The Court of Appeals "may affirm a trial court on an alternate ground where it has reached the correct result and where reliance on the alternate ground will not be unfair to the appellant." *McElhannon v. Ford*, 2003-NMCA-091, ¶ 14, 134 N.M. 124, 73 P.3d 827.

Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177.

Here, the evidence, in the form of Stipulated Facts, supports the decision of the District Court. Stipulated Facts 11, 12, 16, and 18 describe City firefighters seeking ("seeking" is not necessarily equivalent with "election;" although Santa Ana Pueblo did not hold an "election," it did "select" Lawrence Montoya as Governor, and regardless of whether Philip Luna stood for an election as Estancia Village Trustee, he "sought" that office) and "holding" offices. The Facts outlined "offices" of Bernalillo Village Councilor, Bernalillo Mayor, Santa Ana Pueblo Governor, and Estancia Village Trustee. The District Court interpreted these offices as "political," which is an entirely logical and reasonable interpretation.

Fact 12 describes the City "advising" Torres that City policy did not permit his candidacy. Fact 14 describes an agreement between the City and Mr. Montoya regarding his governorship. From this, the District Court inferred that the City "had actual knowledge" of the firefighters' political activity.

The District Court did not go beyond the stipulated facts, and therefore, substantial evidence supported its findings.

II. THE CHARTER PROVISION AND PERSONNEL RULE IMPOSE ADDITIONAL PUBLIC OFFICE ELIGIBILITY REQUIREMENTS IN VIOLATION OF THE NEW MEXICO CONSTITUTION

Failure to Preserve

Although the City in its brief has included the issue of eligibility requirements under Section A's general banner of "Constitutional" argument, Appellee believes that because the eligibility requirements argument involves the New Mexico constitution, rather than the United States Constitution, and involves the qualifications clause, not the First Amendment, the City should have to separately preserve the issue. Appellee argued that the Charter and Regulations imposed additional eligibility requirements in violation of the Qualifications Clause of the New Mexico Constitution in her response to the City's motion for declaratory judgment. RP: 81. The City did not argue the issue in its reply, RP: 110, nor did it raise the issue at the July 20, 2012 hearing. The City failed to preserve any error regarding the New Mexico Qualifications Clause, and for that reason alone, this Court should disregard the City's argument on appeal.

Argument

In *State ex rel Gonzales v. Manzagol*, although Gonzales argued that requiring him to resign his State employment imposed an unconstitutional restriction on him as an elected public officer, *Id.* at 232, 1205, the New Mexico Supreme Court essentially decided to answer a different question: "No effort is being made to impose any restriction upon the elective public office which Petitioner holds or upon him as the holder of that office. It is his appointive

position as a 'public officer or employee' which is in danger by his persistent action in holding a 'political office.'" *Id.* at 232, 1205. The Supreme Court then stated that the Legislature of New Mexico "had the constitutional power...to thereby provide, as a qualification or standard for his continued employment by the State in a position covered by the State Personnel Act, that he not hold 'political office.'" *Id.* at 232, 1205. The Legislature had this power because of Article 7, Section 2(B) of the New Mexico Constitution, which states, "The *legislature* may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee" (emphasis added).

Thus, the Supreme Court ignored Gonzales' contention, and instead found that because he held an "appointive position" as a "public officer or employee," the Legislature could, via the State Personnel Act, impose the qualification that he not be an *elected* public officer. Instead of considering whether the State *lacked* power to add qualifications on elected office under Article 7, Section 2(A), the Supreme Court found a *grant* of power to add qualifications on appointed positions under Article 7, Section 2(B). The City has neither contended nor shown that Respondent holds an "appointive position" as a "public officer or employee," which makes Article 7, Section 2(B), and by extension *Gonzales*, inapplicable.

That leaves *Cottrell v. Santillanes* and Article 7, Section 2(A). The City claims on page 28 of its brief that *Cottrell* says, "Article X, Section 3 of the City's Charter does not add qualifications for elective office beyond those contained in the state constitution." However, the Court of Appeals said that in the following context: "none of these existing charter amendments are challenged here, and our holding in this case in no way affects those amendments to the Albuquerque City Charter." *Cottrell* at 370-371, 788-789. What the City cites as unequivocal binding authority is in fact the Court of Appeals mentioning in passing a general statement about a provision that had not been challenged or argued, followed by a disclaimer that the case's holding does not affect that provision. The Court did not actually consider whether "being a city employee" is a "qualification." At most, the Court's statement about Article X, Section 3 is dictum.

Furthermore, *Cottrell* involved several Albuquerque City Councilors' challenge to an Albuquerque Charter provision affecting Albuquerque City elections. Here, the provision affects a *state* election. Because the sovereign rights of the State of New Mexico are now implicated, *Cottrell* deserves more exact review. The actual holding of *Cottrell*, "We hold that the Qualifications Clause, Article VII, Section 2 of the New Mexico Constitution, preempts a home rule municipality's power to adopt additional qualifications for elected office within the

state beyond those set forth in our Constitution," is the starting point. *Id.* at 367, 785.

In *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 836 (1995), the Supreme Court stated that a state creates a new "qualification" under the U.S. Constitution "when it has the likely effect of handicapping a class of candidates." The Court also warned against states trying to indirectly add qualifications they could not otherwise add directly. *Id.* at 830. *Cottrell* did not have the benefit of this rule and did not use it in its analysis, which again makes any dependence on *Cottrell* less than solid.

The City's Charter and Regulations have the effect of handicapping a class of candidates—City employees. Unlike petition signature requirements, filing fees, or residency requirements—all of which have been ruled not "qualifications"—the City's restriction of candidacy and office-holding has to do with *who an officeholder is*, not *what an officeholder or potential officeholder does.*

Court opinions deciding that the Hatch Act does not violate the *U.S.* Constitution's Qualifications Clause are of little relevance here because of the caveat in the *New Mexico* Constitution's qualifications clause: "Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office *except as otherwise provided in this constitution.*" (emphasis added) Until a ban on public employees

holding political office becomes part of the New Mexico Constitution, statutory and municipal attempts are futile.

City employment handicaps a class of candidates from elective public office, therefore it is a qualification, and therefore it violates *Cottrell* and the New Mexico Constitution.

III. HAZARDOUS DUTY OFFICERS ACT PREEMPTS AND VOIDS THE CHARTER

Standard of Review

Issues of statutory construction are reviewed de novo. *ACLU of NM v. City of Albuquerque*, 2006-NMCA-078 at ¶ 10. The "cardinal rule of statutory construction is to determine legislative intent." *D'Avignon v. Graham*, 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct. App. 1991). "True, legislative intent is first sought by reference to the plain meaning found in the language used by the legislature. However, both this court and the New Mexico Supreme Court have rejected formalistic and mechanistic interpretation of statutory language." *Id.* "We review the history and application of [the statute] to ascertain the proper construction of the language in issue." *Id.* Courts must "exercise caution in applying the plain meaning rule," *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994), and "it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute." *Id.* at 353, 1359. To do that, courts "may

substitute, disregard or eliminate, or insert or add words to a statute, if it is necessary to do so to carry out the legislative intent or to express the clearly manifested meaning of the statute," *Id.* at 352, 1358, quoting *National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,* 103 N.M. 707, 708, 712 P.2d 1369, 1370 (1986) and may "look to the legislative history of an act or contemporaneous statements of legislators." *Helman* at 355, 1361.

Intent of the HDOA

The Hazardous Duty Officers' Employer-Employee Relations Act (HDOA) intends to preempt and void municipal enactments. NMSA 1978 § 10-7F-9 as it stands now reads, "A hazardous duty officer shall not be prohibited by an employer from engaging in *any* political activity when the officer is off duty, except as otherwise provided by law" (emphasis added). Beginning with just this plain language, the word "any" suggests that the legislature intended to cover political activity of *all* degrees, kinds, and forms. "Any" political activity would include everything from canvassing on behalf of a candidate to becoming a candidate and running for elected office.

As shown above, to ascertain legislative intent, courts may look to the legislative history of an act. In its original form, as introduced as Senate Bill 60 of the Second Session of the 49th Legislature of New Mexico, § 10-7F-9 contained a sub-part B: "A hazardous duty officer who is an employee of a political

subdivision of the state shall not, as a condition of the employment, be prohibited from seeking election to, or serving as a member of, the governing body of any other political subdivision of the state." Additionally, the introduced Bill contained an "applicability" provision originally numbered as §10-7F-12: the HDOA "govern[s] the relationships between hazardous duty officers, as employees, and the state or any of its political subdivisions, including home rule municipalities." The Act's "definitions" section has always and currently does define a "hazardous duty officer" as an "individual who is employed full-time by the state or a political subdivision of the state as a firefighter, emergency medical technician or paramedic." This implies that the "employer" covered by the Act is the state or any political subdivision.

On February 3, 2010, the Senate Judiciary Committee passed the proposed bill without any changes to these two sections. On February 15, 2010, the House Judiciary Committee removed the two additional sections outlined above; no record exists as to why.

The question becomes whether removing the two sections altered the legislative intent. Did removing the "applicability" section make the statute *not* apply to home rule municipalities? If the legislature had intended that the statute *not* apply to home rule municipalities, it could have changed the "definitions" to read "employed full-time by the state or a political subdivision *except home rule*

municipalities." It could have also changed what is now 10-7F-9 to "A hazardous duty officer shall not be prohibited by an employer, *except a home rule municipality*..." Because legislators did not do this, it is more likely that the "applicability" section was superfluous. Instead of inserting contradictory language, the legislature removed superfluous language. This indicates that the legislature intended that the statute apply to home-rule municipalities.

Did striking 10-7F-9(B) make 10-7F-9's "political activity" phrase less broad? That is, does "seeking election to, or serving as a member of, the governing body of any other political subdivision of the state" contradict, compliment, or equal "political activity?" Again, if the legislature did not want to include "seeking election to, or serving as a member of, the governing body of any other political subdivision of the state" in the definition of "political activity," it could have modified 10-7F-9 to read, "A hazardous duty officer shall not be prohibited by an employer from engaging in any political activity *except for seeking election to a governing body*." Because legislators did not do this, it is more likely that the proposed § 10-7F-9(B) was superfluous. Instead of inserting contradictory language, the legislature removed redundant language. This indicates that the legislature intended that "political activity" include "seeking election to, or serving as a member of, the governing body of any other political subdivision of the state."

"Except as Otherwise Provided by Law"

Now the Court must glean the intent of the phrase "except as otherwise provided by law" as used in the HDOA. "New Mexico Courts have generally interpreted provisions 'except as … provided by law' to refer only to exceptions found in constitutional or other legislative provisions." *In re Camino Real Envtl. Ctr. Inc.*, 2010-NMCA-057, ¶ 15, 148 N.M. 776, 242 P.3d 343(ellipsis in original).[4]

The Home Rule Amendment of the New Mexico Constitution, Article X, § D, says that a home rule municipality "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." This means that valid expressions of home rule authority must "exercise" "legislative" power and not be expressly denied by law or charter. Because the HDOA is a general law that denies the City's legislative powers, the City's Charter and Regulations are not "laws" for the purposes of the phrase "except as otherwise provided by law."

The HDOA Is a General Law

A general law "applies generally throughout the state, relates to a matter of statewide concern, and impacts inhabitants across the entire state." *Smith v. City of*

[4] Other cases have defined "law" to include evidentiary privileges and regulations, but the City has not argued that its Regulations qualify as "law," and *City of Las Cruces v. Public Employee Labor Relations Board*, 121 N.M. 688, 690, 917 P.2d 451, 453 (1996) limited regulations carrying the force of law to those "promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute."

Santa Fe, 2006-NMCA-048, ¶ 9, 139 N.M. 410, 133 P.3d 866. The HDOA, by its very title, regulates the relations between hazardous duty officers and their employers. As shown above, the "definitions" section effectively defines "employers" as the state or a political subdivision of the state. This means that the HDOA impacts inhabitants—hazardous duty officers—across New Mexico and *all* of its political subdivisions. It also means that it applies generally *throughout* all political subdivisions. It does not single out any particular types of political subdivisions for specific treatment. By its definitions, it applies to full-time paramedics, firefighters, and emergency medical technicians and does not single out hazardous duty officers in any particular locality.

The HDOA relates to a matter of statewide concern. "[I]n characterizing the law as 'general,'" "we have in other cases focused on the impact of the law and whether it implicates matters of statewide concern." *State ex rel. Haynes v. Bonem*, 114 N.M. 627, 632, 845 P.2d 150, 155 (1992). The relation between hazardous duty officers—those who risk their own lives in service to *all* the citizens of the state—should and does concern the entire state. As disasters play out on television and hazardous duty officers and first responders receive more and more publicity, the public has become more aware of the dedication of these public employees and the dangers they face every day. As the members of the public served everyday by hazardous duty officers, New Mexicans in all four corners of the state deserve to

know that the relationship between these heroes and their employers is as respectful as possible. Additionally, hazardous duty employer-employee relations are of concern statewide because those hazardous duty officers may move from one employer to another, or may even be employed by multiple employers at once. In a state as large as New Mexico, hazardous duty officers may work for employers or serve public citizens across different political subdivisions, which necessitates a certain degree of standardization across the state. Similarly, the New Mexico Supreme Court recognized a general law in *Chapman v. Luna*, 101 N.M. 59, 62, 678 P.2d 687, 690 (1984) because "the people of the state have an interest in maintaining a uniform system of conditions and charges for operating motor vehicles in the state."

The Court phrased the question differently in *Haynes* at 634, 157: "Of what concern is it statewide what the [City of Clovis'] residents decide as to the number of commissioners they wish to serve on their city commission?" Here, what concerns do New Mexico residents have statewide as to whether hazardous duty officers have certain rights and privileges in their workplace? They have the concern of knowing that the men and women who risk their lives every day in service to New Mexico's residents—residents of any political subdivision and any ethnicity or gender or background—receive respectful treatment from employers and are not denied the full panoply of rights to which they are entitled.

The HDOA Denies the City's Power

To determine if a general law denies a home rule municipality's authority, a court must consider "(a) whether the statute evinces any intent to negate such municipal power; (b) whether the effect of the statute implies a clear intent to preempt that governmental area from municipal policymaking... (c) whether the grant of authority to another governmental body makes its exercise by [the City] so inconsistent with the [statute] that it is equivalent to an express denial." *Smith* at ¶ 10 (internal citations and quotation marks omitted). In considering "clear intent," "words or expressions which are tantamount or equivalent to such a negation are equally effective." *Id.*, quoting *Haynes,* 114 N.M. at 634, 845 P.2d at 157.[5]

One of the factors the *Haynes* court found persuasive was that the "district court stated that it found no legislative intent that Sections 3-10-1(B) and 3-14-6(A) should apply to home rule municipalities." *Haynes*, 114 N.M. at 630, 845 P.2d at 153. As shown above, the HDOA does contain legislative intent that it should apply to home rule municipalities.

In addition to the section on political activity, the HDOA currently contains sections on "investigations of hazardous duty officers" and requirements that the "officer shall be informed" of certain information. NMSA § 10-7F-3. It also

[5] Although *Smith* did not explicitly indicate whether all three conditions must be satisfied or whether one would suffice, it considered *each* factor labeled a, b, and c above, which indicates that the list is disjunctive.

outlines the rights of hazardous duty officers to produce evidence during employer-conducted investigations, the right to examine statements contained in employer-held personnel files, the right to be informed of Constitutional rights prior to commencement of criminal investigations, and the right to refuse to disclose certain financial information. NMSA § 10-7F-5 to 8. This suggests that municipalities or other political subdivisions had a record of abusing these rights of hazardous duty officers or that legislators had reason to believe that hazardous duty officers were in danger of being abused in such a way. The state legislature then decided to step in to set standards for all political subdivisions, and in doing so, it swept away whatever standards municipalities and other political subdivisions had previously used, or, if they had used none at all, set new standards applicable to all governmental entities. The Legislature thus removed from municipalities the task of setting standards for hazardous duty officer employee-employer relations and installed a state standard.

Similarly, in *ACLU v. City of Albuquerque,* 1999-NMSC-044, 128 N.M. 315, 992 P.2d 866, the state Children's Code preempted the City's Delinquency Act. The Supreme Court wrote that the municipality's attempt to create a delinquency act "would circumvent and thereby frustrate the Legislature's intent to protect children and uniformly enforce laws of a penal nature against them." *Id.* at ¶ 13. Here, any municipal attempt to regulate hazardous duty officer employer-

employee relations would circumvent and thereby frustrate the Legislature's intent to protect hazardous duty officers and uniformly enforce laws of an employment nature against them.

Because the HDOA preempts municipal authority and is a general law, the City's Charter provision regarding the political activity of City employees is not a valid exercise of authority under the Home Rule Amendment. It therefore does not qualify as "law" in the phrase "except as otherwise provided by law" and does not limit the application of § 10-7F-9.

The Municipal Charter Act Does Not Provide That the City's Charter Provision Prevails Over Any Inconsistent State Statute

The City has asserted that the Municipal Charter Act allows a city's Charter to prevail over state statute. The validity of this assertion depends on construction of NMSA § 3-15-13(A): "no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality." No New Mexico appellate decision has actually directly addressed this provision. The only consideration of 3-15-13(A) occurred in Footnote 6 of *Haynes*, which offered dictum on the issue:

> It is only the exercise of municipal legislative powers that the legislature recognizes as being subject to express denial by general law…Therefore, since [New Mexico statutes setting the number of officers and district requirements of commission-manager city governments] *pertain to governmental provisions and not to legislative powers*, to the extent those laws are inconsistent with the

> Clovis charter, the legislature did not intend that they apply to that municipality.
>
> (emphasis added)

The Municipal Charter Act uses the phrase "relating to municipalities." Footnote 6 of *Haynes* speculated that this phrase means "governmental provisions relating to municipalities," not "legislative provisions relating to municipalities." This reading conforms with § 3-15-13(*B*) and the home rule amendment, which specifically speak of state statute overriding "legislative" municipal provisions. It also conforms with the spirit and intent of the home rule amendment, which is to provide maximum self-government to home rule municipalities. Throughout the amendment, the statutes, and the court decisions, a pattern emerges: a city Charter is at its greatest autonomy in matters "governmental," but a Charter loses authority and state statute gains authority and takes precedence as Charter enactments become "legislative." This sets up the real question: is Article X, Section 3 of Albuquerque's Charter "governmental" or "legislative" in nature? The City argues that Article X, Section 3 of the Charter is "governmental," because it "is not a legislative act penalizing conduct as unlawful, or regulating conduct generally" and "manages conflict of interest issues in a manner 'expedient and beneficial to the people of the municipality'" (City's brief page 36).

In *Haynes*, the "governmental" state statutes set the number of officers for a commission-manager form of city government and required five single-member districts. *Haynes* at 629, 152. This suggests that "governmental" provisions have to do with how municipalities choose to set up their governments. In contrast, Black's Law Dictionary (9th ed. 2009) defines "legislative" as "of or relating to lawmaking or the power to enact laws." While Black's has no separate entry for "governmental," it defines "governmental function" as "A government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public." This suggests another definition of "governmental provisions:" those related to government functions. This would mean that "governmental provisions" include setting up a police force, arranging garbage pick-up, building community centers and parks, and running public transportation service—in short, all the *services* municipalities provide.

When city charters address governmental form, functions and services, the state will keep its hands off. However, when City Charters make law, they become subject to override by state statute.

When the City of Albuquerque says "employees of the City are prohibited from holding an elective office of the State of New Mexico or any of its political subdivisions," it does not regulate city government form, function, or services; it

makes law. "Law," in its most basic and primal sense, describes acceptable and inacceptable acts. Now, if the Charter read "employees of the City are prohibited from harassing City citizens while performing City functions," it might pass as "governmental." However, because the City attempts to prohibit conduct that has nothing to do with its municipal governing body, its municipal functions, or its municipal services—whether a City of Albuquerque accountant serves as a Torrance County Commissioner will not make the Albuquerque Police Department more or less responsive—its prohibition seems "legislative" than "governmental." It proscribes conduct not *necessarily* related to the government functions carried on *by the City of Albuquerque*, not necessarily related to the governing body *of the City of Albuquerque*, and not necessarily related to the municipal services provided *by the City of Albuquerque*.

Indeed, any other reading of § 3-15-13(A) would lead to absurdities: any time a home rule municipality did not like a legislative act of the State of New Mexico, it could simply add a new provision to its charter and supplant the sovereign legislative authority of the state.

Even *if* Article X, Section 3 of Albuquerque's Charter is "governmental," *Casuse v. City of Gallup*, 106 N.M. 571, 573, 746 P.2d 1103, 1105 (1987) states, "when two statutes that are governmental or regulatory in nature conflict, the law of the sovereign controls." The dicta in *Haynes*, which came five years after

Casuse, did not address this rule. This precedent is not harmonized and does require reconciliation.

The Charter Prohibition Is Not Incident To The Exercise Of An Independent Municipal Power

Article X, Section 6(D) of the New Mexico Constitution states, "This grant of powers [to home rule municipalities] shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power." The City asserts that Article X, Section 3 of its Charter is a "private or civil la[w] governing civil relationships" and is "incident to the exercise of an independent municipal power."

New Mexicans for Free Enterprise v. Santa Fe, 2006-NMCA-007, 168 N.M. 785, 126 P.3d 1149 dealt with Article X, Section 6(D), and its examination of "private or civil law" used the following standard: "private law has been defined as consisting 'of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another.'" *Id.* at ¶ 23, citing Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception,* 20 UCLA L.Rev. 671, 688.

The Court of Appeals found that Santa Fe's ordinance setting a minimum wage higher than the State minimum wage qualified as "private law." That ordinance applied to all businesses in Santa Fe. Article X, Section 3 of the City's

Charter does not apply between or among private entities. It applies between and among a *public* entity and public employees. By the plain terms of the definition, the City's Charter is not a "private or civil law."

The City tries to argue that the "Charter provision affecting the City's public employer relationship with its employees presents a situation akin to the private employer/private employee relationship and ordinance addressed in New Mexicans for Free Enterprise" (City's brief at 40). *New Mexicans for Free Enterprise* involved *private* employers and the "relationship" involved a financial transaction. Here, it is a *public* employer and the "relationship" involves First Amendment rights. Whether someone gets paid $5 or $6 an hour is simply not akin to whether someone has certain Constitutional rights, which is why no amendment to the United States Constitution gives citizens a right to a certain minimum wage.

Because the Charter provision does not qualify as "public or civil law," it is not valid even as incident to the exercise of an independent municipal power.

§ 3-17-1

NMSA § 3-17-1 provides that "a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico." Because it is a Charter and not an ordinance in controversy, any discussion of § 3-17-1 is redundant and irrelevant.

III. THE CITY'S CBA INDICATES ACQUIESCENCE TO FIREFIGHTERS HOLDING ELECTED OFFICE

Standard of Review

"We indulge every presumption in favor of the correctness of the findings, conclusions, and judgment of the district court." *Sanchez v. Saylor*, 2000–NMCA–099, ¶ 12, 129 N.M. 742, 13 P.3d 960.

The District Court's Finding

The District Court found that the City "entered into a Collective Bargaining Agreement [CBA] whereby it agreed that members of the firefighters' union may hold elected office." RP: 133. The City would like to rephrase this finding into "the CBA gives firefighters a contractual right to hold elective office." However, this distortion of the Court's findings is not necessary to support Respondent's position.

A government may acquiesce from enforcement of certain laws. The language in the CBA simply suggests that the City has acquiesced in its enforcement of the Charter's prohibition. Declining to enforce a law does not equate to giving a contractual right to take the action the law prohibits. In this sense, there is nothing "factually and legally erroneous" about the District Court's finding. The District Court did not find that the CBA created a contractual right. It did not find that the CBA operated in opposition to the City's Charter. Rather, it

found that the CBA evinced intent by the City to decline enforcement against firefighter union members in regards to the prohibition on holding elective office.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting injunctive relief and declaratory judgment in favor of Respondent Emily Kane.

Respectfully submitted,

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ORAL ARGUMENT

Oral argument is respectfully requested and would assist this court in reaching a decision because of the complexity of the facts.

STATEMENT OF COMPLIANCE

This brief complies with the limitation of Rule 12-213(F)(3) NMRA because this brief contains 10,992 words, excluding the parts of the brief exempted from 12-213(F)(1) NMRA, according to the word count obtained using Microsoft Word 2007.

This brief complies with the typeface requirements of Rule 12-305(C)(1) NMRA because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 font size Time New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief were served on the following by email and by U.S. Mail – First Class on March 25, 2013:

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