


Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

DEMESIA PADILLA,

Defendant-Appellee.

No. A-1-CA-38283

First Judicial District Court

Santa Fe County

District Judge Marlowe

Sommer

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF BY STATE ETHICS COMMISSION¹**

The State Ethics Commission respectfully moves for leave to file an amicus curiae brief in this case. *See* Br. of the State Ethics Comm'n as Amicus Curiae, conditionally filed herewith. The Court regularly has allowed the participation of amici, *see, e.g., Bounds v. Hamlett*, 2011-NMCA-078, ¶ 36, 150 N.M. 389, 258 P.3d 1181; *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 2, 133 N.M. 669, 68 P.3d 909, and, in view of Rule 12-320(A) NMRA, the Court should allow the Commission's participation here.

¹Pursuant to Rule 12-309(C), the State Ethics Commission sought the concurrence of the parties to file this motion. The Commission received the concurrence of the State's counsel. Defendant-Appellee Demesia Padilla's counsel, by contrast, opposes the motion.

I. The Commission has an interest in this dispute and offers a brief that would assist the Court.

The Commission's interest in this dispute arises from its jurisdiction to adjudicate administrative complaints alleging violations of the Governmental Conduct Act, *see* NMSA 1978, §§ 10-16-14 & 10-16G-9(A)(6); to enforce the civil provisions of the Act through state court actions, *see* § 10-16-18(B); and to educate persons subject to the Act of the duties it imposes, *see* § 10-16-13.1(A). This case concerns the enforceability of subsections 10-16-3(B) and (C) and, therefore, implicates the Commission's jurisdiction. To be sure, this is a criminal matter and the Commission lacks jurisdiction to enforce the Act's criminal provisions; nevertheless, the statutory and constitutional issues that the parties raise, and the Court's resolution of those issues, could affect the Commission's ability to enforce subsections 10-16-3(A) through (C) in civil, administrative, impeachment, and expulsion proceedings. Accordingly, the Commission has an interest in this dispute.

Furthermore, the Commission's amicus brief is desirable, and its arguments address the issues as framed by the parties. First, the amicus brief explains why, properly interpreted, subsections 10-16-3(A) through (C) create enforceable duties for legislators, public officials, and public

employees. Second, the brief explains how the Governmental Conduct Act creates an enforcement framework that extends beyond criminal prosecutions and why affirmance would hamper efforts across state government to address public corruption and misconduct by legislators, public officials, and public employees. Third, the brief explains why subsections 10-16-3(B) and (C) are not impermissibly vague or overbroad. Last, the amicus brief provides the Court with reasons to affirm based on (or remand for consideration of) statutory grounds that avoid constitutional issues.

II. There is no sound basis for the Court to deny the Commission's participation as amicus curiae.

First, the Commission necessarily seeks to participate as a friend of the Court and not as an interested party. The Commission has no jurisdiction for Padilla's conduct, which occurred before July 1, 2019. *See* Laws 2019, ch. 86, § 40 (providing that the provisions of the State Ethics Commission Act, NMSA 1978, §§ 10-16G-1 to -16 (2019), apply only to conduct occurring on or after July 1, 2019). The Commission has no possible interest in any civil enforcement action against Padilla.

Second, the Commission's amicus participation does not unfairly prejudice Padilla. The Commission offers arguments addressed to the

statutory and constitutional issues as framed by the parties. *See, e.g., New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶ 45, 274 P.3d 53 (“Amicus must accept the case on the issues as raised by the parties”) (internal quotation marks and citation omitted). What’s more, the Commission offers arguments for *both* reversal *and*, in the alternative, affirmance on statutory grounds that avoid constitutional adjudication.

Third, the Commission’s amicus participation, in addition to the Attorney General’s representation of the State as a party, is neither untoward nor unusual. Both this Court and the Supreme Court routinely allow the participation of state agencies in criminal or contempt prosecutions in which the Attorney General represents the State. *E.g. State v. Strauch*, 2015-NMSC-009, 345 P.3d 317 (Children, Youth and Families Department); *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1 (Department of Health), *rev’d on other grounds*, 564 U.S. 647 (2011); *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Environment Department), *aff’d in part, rev’d in part on other grounds*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017; *State v. Julia S.*, 1986-NMCA-039, 104 N.M. 222, 719 P.2d 449 (Administrative Office of

District Attorneys). The interests and insights of the more than one hundred and twenty state agencies that comprise the State are not the same; accordingly, New Mexico appellate courts allow amicus participation by state agencies, even where their participation supports the position of another state agency that is a party. *See, e.g., Kerr v. Parsons*, 2016-NMSC-028, ¶ 15, 378 P.3d 1 (accepting amicus participation of Legislative Finance Committee where the Department of Finance and Administration, the Commission for the Law Office of the Public Defendant, and the Law Office of the Public Defender were all represented state-agency parties); *U.S. Xpress, Inc. v. N.M. Tax. & Rev. Dep't*, 2005-NMCA-091, 138 N.M 55, 116 P.3d 846 (accepting amicus participation of Department of Transportation where the Taxation and Revenue Department was a represented party), *rev'd on other grounds by U.S. Xpress, Inc. v. N.M. Tax. & Rev. Dep't*, 2006-NMSC-017, 139 N.M 589, 136 P.3d 999 (accepting amicus participation of Department of Transportation and Office of Attorney General where the Taxation and Revenue Department was a represented party).

Fourth the Commission's responsibilities to enforce and to promote the Governmental Conduct Act are broader than the Attorney General's

responsibility of criminal enforcement. *See, e.g.*, §§ 10-16-11(C) (Commission is repository of codes of conduct required by Act); 10-16-13.1(A) (Commission must educate persons subject to Act of duties it imposes); 10-16-14(C) & (E) (Commission has investigatory and enforcement role regarding officers subject to impeachment); 10-16-14(D) (Commission has administrative adjudicatory role for complaints against state employees). In view of its broader interests, the Commission advances arguments, not offered by the Attorney General, to preserve the duties that subsection 10-16-3 creates from affirmance on premature and erroneous constitutional grounds. And while the Attorney General and the Commission both enforce the Act's civil provisions, the overlap in interests does not support denial of the Commission's motion. The New Mexico appellate courts regularly grant amicus participation where the interests of the amicus and a party overlap. *See, e.g.*, Order, *Albuquerque Journal, et al. v. Bd. Of Educ. of Albuquerque Pub. Schs.*, S-1-SC-37420 (N.M. Apr. 26, 2019) (granting leave to state school board association to participate as amicus even though one of the association's members was a party); *Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411 (allowing

amicus participation of New Mexico Municipal League even though a party represented a member's interests).

Fifth, Padilla might oppose the Commission's amicus participation because it complicates her briefing. The extra burden on the parties is not, however, a sound basis to deny the Court the potential benefit of amicus participation. The Rules of Appellate Procedure contemplate that burden and allow opposing parties to respond substantively to the arguments that amici provide. *See* Rule 12-320(D)(2)(b) & (c) NMRA. Rule 12-320(D)(2) ensures that the Commission's participation is not unfair.

Last, while New Mexico appellate courts routinely grant amicus participation, the courts deny motions for leave to participate as amicus curiae when such motions are untimely or moot. *E.g., United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 139 n.49, 96 N.M. 155, 629 P.2d 231 (denying motion for leave to file amicus brief where the motion was filed over "one year after the case had been argued to th[e] Court"); *Reule Sun Corp. v. Valles*, 2008-NMCA-115, ¶ 31, 144 N.M. 736, 191 P.3d 1197 (denying "motion for leave to file brief of amicus curiae as moot"), *rev'd on other grounds*, 2010-NMSC-004, ¶ 31, 147 N.M. 512, 226

P.3d 611; *see also Coslett v. Third St. Grocery*, 1994-NMCA-046, ¶ 36, 117 N.M. 727, 876 P.2d 656 (noting “that it is uncertain whether after an opinion has been filed one can seek amicus status”). That is not the case here; the issues are ripe for decision, and the Commission’s participation is timely.

Accordingly, the Court should grant the Commission’s motion for leave to file the attached amicus brief in this matter. *See* Rule 12-320(A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 24, 2020, I filed the foregoing electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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