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

BRIEF OF STATE ETHICS COMMISSION AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

Cases from Other Jurisdictions

Constitutional Provisions

Statutes

Regulations and Rules

Other Authorities

STATEMENT OF INTEREST

The State Ethics Commission is an independent state agency established by Article V, Section 17 of the New Mexico Constitution and enabled by the State Ethics Commission Act, NMSA 1978, §§ 10-16G-1 to -16 (2019).[1] The Commission exists to promote the integrity of state government through the interpretation, enforcement, and improvement of New Mexico's campaign finance, lobbying, procurement, and governmental conduct laws. Under NMSA 1978, Sections 10-16-14(E), 10-16-18(B), and 10-16G-9(A)(6), the State Ethics Commission has jurisdiction to enforce applicable civil compliance provisions of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (2019), for state officials, state employees, and others. This case implicates the

[1]The Commission's attorneys authored this brief in whole. The Office of the Attorney General did not participate in the preparation of this brief. Nor did the Commission receive any remuneration from the Office of the Attorney General or any other person in exchange for the preparation of this brief. While preparing this brief, the Commission's attorneys received their salary, which is duly budgeted by the Commission and expended from appropriations received pursuant to the 2019 General Appropriations Act. The Commission's attorneys are state employees, and, as such, the State of New Mexico pays their salary. All parties received timely notice of the Commission's intent to file this brief. *See* Rule 12-320(C) & (D)(1) NMRA. This brief complies with Rule 12-318(F)(3) NMRA. Its body contains 8970 words. The word count was obtained from Microsoft Word. Rule 12-318(G) NMRA.

Governmental Conduct Act's enforceability and, therefore, bears upon the Commission's jurisdiction.

SUMMARY OF PROCEEDINGS

The State Ethics Commission adopts the State of New Mexico's summary of proceedings. *See* State's Br. in Chief at 3-6, *State v. Padilla*, No. A-1-CA-38283 (N.M. Ct. App.).

SUMMARY OF ARGUMENT

This Court should reverse the district court's order dismissing charges against Defendant-Appellee Demesia Padilla under subsections 10-16-3(B) and (C) of the Governmental Conduct Act. As a matter of statutory construction, those subsections impose enforceable duties on public officials, and section 10-16-17 imposes criminal liability for knowing and intentional violations. As a matter of constitutional due process, subsections 10-16-3(B) and (C) and section 10-16-17 provided Padilla with fair warning that her alleged predicate conduct was both prohibited and subject to criminal enforcement, and these provisions create no realistic likelihood of standardless or *ad hoc* prosecutions. Nor is the Act unconstitutionally overbroad. In the alternative, the Court can avoid any constitutional challenge to the Act by affirming on (or remanding for consideration of) a limited, statutory basis.

ARGUMENT

I. The Governmental Conduct Act's Text, Structure, and Purpose Establish that Subsections 10-16-3(A), (B) and (C) Impose Enforceable Duties on Legislators, Public Officials, and Public Employees.

Subsections 10-16-3(A), (B) and (C) impose three distinct enforceable duties on legislators, public officials, and public employees. These three duties are found in the statutory text, and they are not difficult to state.

First, under subsection (A), legislators, public officers, and public employees must not use the powers and resources of public office "to obtain personal benefits or pursue private interests." NMSA 1978, § 10-16-3(A) (2011). The statute describes this duty as "a public trust," reflecting public officials' and employees' fiduciary responsibility to act in their official capacity for the public interest only. *Id.*; *cf. State v. Whitaker*, 1990-NMCA-014, ¶ 14, 110 N.M. 486, 797 P.2d 275 (concluding that a county manager had a "fiduciary duty" and "position of public trust" that could appropriately be considered as aggravating circumstance in sentencing).

Second, subsections (B) and (C) combine to impose a duty on legislators, public officers, and public employees to disclose real or potential conflicts of interest. Subsection (B) details the duty's scope of application (*i.e.*, to whom the duty applies), and subsection (C) provides the duty's specific content (*i.e.*, what the duty requires). *See* NMSA 1978, § 10-16-3(B) (2011) ("Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people"); NMSA 1978, § 10-16-3(C) (2011) ("Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct"); *see also State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.'" (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05, at 165 (6th ed., rev. 2000)); *State v. Ramos*, 1993-NMCA-089, ¶ 17, 116 N.M. 123, 860 P.2d 765 (holding that two statutory sections, read together, gave defendant sufficient notice).

Third, legislators, public officers, and public employees must make reasonable efforts to avoid "undue influence" and the "abuse of office" while in public service. *See* § 10-16-3(C). The phrase "abuse of office" describes a known evil, and the phrase is not unique to subsection 10-16-3(C). *See, e.g.*, NMSA 1978, § 7-1B-3 (2015) (providing that chief hearing officer may be removed for "abuse of office"); *see also, e.g.*, La. Rev. Stat. Ann. § 134.3 ("Abuse of Office"); Tex. Penal Code Ann. § 39 ("Abuse of Office"); Navajo Nation Code 17 § 364 ("Abuse of Office"). Subsection (C) requires "reasonable efforts shall be made to avoid . . . abuse of office in public service," and subsections (A) and (B) indicate that legislators, public officers, and public employees are the individuals who must avoid the abuse of office. § 10-16-3(A)-(C); *see also Baker v. Hedstrom*, 2013-NMSC-043, ¶ 26, 309 P.3d 1047 ("[A]ll provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent.").

A. The text of subsections 10-16-3(A), (B) and (C) demonstrates that those provisions impose duties on legislators, public officials, and public employees.

Subsections 10-16-3(A), (B) and (C) establish duties, not hopes.[2] The statute provides that legislators, public officers, and public

[2]In her motion-to-dismiss papers below, Padilla argued that the district court should dismiss counts 4 through 8 of the Second Amended Criminal Information on constitutional and not statutory grounds. Padilla argued that criminal enforcement of subsections 10-16-3(B) and (C) was unconstitutional on due process and First Amendment overbreadth grounds. She did not argue in her papers that, as a matter of correct statutory interpretation, those subsections failed to establish duties or corresponding criminal offenses; to the contrary, she suggested that the statutory provisions establish duties. *See* D. Padilla's First Mot. To Dismiss Counts 4-8 **[RP 257-267]** at 8 (noting that violations could support civil and administrative remedies). The district court considered this statutory argument, however. **[05-24-2019 CD 2:59:56-3:00:12]** It was also offered by the defendants in *State v. Gutierrez*, No. A-1-CA-36096 (N.M. Ct. App.), *State v. Johnston*, No. A-1-CA-37585 (N.M. Ct. App.), and *State v. Estevez*, No. A-1-CA-37270 (N.M. Ct. App.), each pending this Court's decision on appeal. *See* Ans. Br. at 8, *State v. Johnston*, No. A-1-CA-37585 (N.M. Ct. App. May 20, 2019) ("Johnston Ans. Br.") ("[T]he two statutory provisions in issue in this case [subsections 10-16-3(A) and (B)] were not enacted as criminal statutes, but rather are legislatively adopted introductory ethical principles."); Ans. Br. at 9, *State v. Estevez*, No. A-1-CA-37270 (N.M. Ct. App. Mar. 21, 2019) ("Estevez Ans. Br.") ("[Section] 10-16-3(A) and (B) are not intended to establish criminal liability by the New Mexico Legislature."); Ans. Br. at 2-4, *State v. Gutierrez*, No. A-1-CA-36096 (N.M. Ct. App. Aug. 22, 2017) ("Gutierrez Ans. Br.") (arguing that subsections (A), (B) and (C) "are not intended to establish criminal liability"). In view of the canon of constitutional avoidance and this Court's power to affirm a district court's order as right for any reason, the State Ethics Commission addresses the statutory argument that violations of subsections 10-16-3(A), (B) and (C) do not establish duties or corresponding criminal liability. *See, e.g.*, *State, et al. v. Pangaea Cinema LLC*, 2013-NMSC-044, ¶ 23, 310 P.3d 604 (canon of constitutional avoidance); *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 313, 76 P.3d 626 (right of any reason doctrine). This statutory argument does not provide grounds to affirm.

employees "shall" use the powers of public office "not to obtain personal benefits or pursue private interests," § 10-16-3(A), and "shall" make reasonable efforts "to avoid undue influence and the abuse of office in public service," § 10-16-3(C). The Uniform Statutory Construction Act, NMSA 1978, §§ 12-2A-1 to -20 (1997), and binding case law require the Court to interpret the word "shall" in subsections 10-16-3(A), (B) and (C) to impose legal duties on legislators, public officials, and public employees. *See* NMSA 1978, § 12-2A-4(A) (1997) ("'Shall' and 'must' express a duty, obligation, requirement or condition precedent."); *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 ("It is widely accepted that when construing statutes, 'shall' indicates that the provision is mandatory"); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 114 (2012) ("[W]hen the word *shall* can reasonably be read as mandatory, it ought to be so read").

Under *Marbob Energy*, New Mexico courts assume that the Legislature intended the word, "shall," "to be mandatory absent a[] clear indication to the contrary." 2009-NMSC-013, ¶ 22. The remainder of the

Governmental Conduct Act provides no "clear indication" that subsections 10-16-3(A), (B) and (C) are precatory. *Id.* Rather, sections 10-16-17 and 10-16-18(B) support the mandatory and enforceable character of subsections 10-16-3(A), (B) and (C). *See* NMSA 1978, § 10-16-17 (1993) (authorizing criminal penalties for knowing and willful violations of "*any of the provisions* of th[e] act") (emphasis added); NMSA 1978, § 10-16-18(B) (1995) (authorizing "a civil action in district court if a violation has occurred or to prevent a violation of *any provision* of the Governmental Conduct Act") (emphasis added). Similarly, the New Mexico Legislative Ethics Guide, published by the Legislative Council Service, advises that legislators' compliance with section 10-16-3(A) is "required." *See* N.M. Leg. Ethics Guide at 4, (Leg. Council Serv. Dec. 2016), https://tinyurl.com/sthtkwj; *see also* 3 *Sutherland Statutory Construction* § 57:14 (7th ed) ("Where statutes provide for performance of acts or the exercise of power or authority by public officers . . . in the public interest, they are mandatory.").

The title of Section 10-16-3 provides no "clear indication to the contrary." *Marbob Energy*, 2009-NMSC-013, ¶ 22. The district court

below considered—and defendants in related cases have argued—that section 10-16-3's title suggests subsections 10-16-3(A), (B) and (C) do not establish criminal liability. *See* **[05-24-2019 CD 2:10:36-3:07:45]**; Johnston Ans. Br. at 14; Estevez Ans. Br. at 7; Gutierrez Ans. Br. at 2; *see also Tri-State Gen. & Trans. Ass'n Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 18, 289 P.3d 1232 (concluding that courts may look to a statutory title to discern legislative intent). Section 10-16-3's title, however, does not indicate that subsections (A), (B) & (C) are aspirational only. The Legislature titled Section 10-16-3 "Ethical principles of public service; *certain official acts prohibited*; penalty." § 10-16-3 (emphasis added). Section 10-16-3 has four subsections, and only subsection (D) imposes a separate penalty for its violation. While "penalty" in the title must refer exclusively to subsection (D), there is no suggestion that the title language "*certain official acts prohibited*" also exclusively refers to subsection (D). To the contrary, subsections 10-16-3(A), (B) & (C) "prohibit" several kinds of "official acts"—namely, using public resources to obtain a private benefit, failing to disclose conflicts of interest, and abusing a public office. Under both Section 12-2A-4(A) of the Uniform

Statutory Construction Act and *Marbob Energy*, this Court should interpret the mandatory language "shall" in subsections 10-16-3(A), (B) & (C) to impose enforceable duties on legislators, public officials, and public employees to act and to refrain in specified ways.

Put differently, subsections 10-16-3(A), (B) and (C) are not merely purposive or declaration-of-policy provisions. The Legislature has enacted several such policy provisions in the New Mexico Statutes Annotated, and they read nothing like the subsections at issue here. *E.g.*, NMSA 1978, §§ 10-8-2 (Per Diem and Mileage Act); 10-9-2 (Personnel Act); 13-1-29(C) (Procurement Code); 13-1C-2 (State Use Act); 14-2-5 (Inspection of Public Records Act). Unlike subsections 10-16-3(A), (B) and (C), purposive or declaration-of-policy provisions do not contain the illocutionary word "shall," and do not require specific conduct of discrete categories of persons. *Compare* § 10-16-3(A)-(C), *with* §§ 10-9-2; 13-1-29(C); 13-1C-2 & 14-2-5. Subsections 10-16-3(A), (B) and (C) do not declare legislative purposes; they impose duties that effectuate legislative purposes. *See Miller v. N.M. Dep't of Transp.*, 1987-NMSC-

081, ¶ 8, 106 N.M. 253, 741 P.2d 1374 ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals.").

B. The Governmental Conduct Act's structure and purpose demonstrate that subsections 10-16-3(A), (B) and (C) impose duties on legislators, public officials, and public employees.

The Governmental Conduct Act's structure and purpose further reflect that subsections (A), (B) and (C) create duties and not aspirations. In 1993, the Legislature enacted the Governmental Conduct Act to regulate "the conduct of government officials in ways that go beyond conflicts of interest." Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations*, at 17 (N.M. Legislative Council Service Info. Memo. No. 202.90785, Jan. 27, 1993). The Act was meant to ensure that "government and elected officials are conducting themselves in a straightforward, honest and ethical manner" and to "instill confidence in the public" that government in New Mexico operates free from corruption. *Id.* at 4. Subsections 10-16-3(A), (B) and (C) promote these statutory purposes by imposing duties that are distinct from the remainder of the Governmental Conduct Act's duties in two ways.

First, different sections of the Act apply to different persons. Subsections 10-16-3(A), (B) and (C) create duties for legislators, public officers, and public employees. Other proscriptions do not apply to legislators. *Compare* § 10-16-3(A) (prohibiting legislators, public officers, and public employees from using the powers and resources of public office only to obtain personal benefits or pursue private interests), *with* § 10-16-4 (prohibiting public officers and employees from taking official acts for primary purpose of directly enhancing their financial interest); *compare also* § 10-16-3(B) & (C) (requiring legislators, public officers, and public employees to disclose real or potential conflicts of interest), *with* § 10-16-4.2 (requiring public officers and employees to disclose non-state employment). Subsections 10-16-3(A), (B) and (C) therefore play an important role in the Governmental Conduct Act by extending the Act's reach to legislators. *See Janet v. Marshall*, 2013-NMCA-037, ¶ 17, 296 P.3d 1253 ("The GCA applies ethical rules across the board to any 'legislator or public officer or employee'" (quoting § 10-16-3(A)).

Second, subsections 10-16-3(A), (B) and (C) define duties at a higher level of generality than other, more specific Governmental Conduct Act

provisions. As such, subsections 10-16-3(A), (B) and (C) proscribe more conduct than other, similar Governmental Conduct Act provisions. For example, subsection 10-16-3(A) prohibits a public employee from using the powers and resources of public office to obtain personal benefits. Subsection 10-16-4(A), by contrast, proscribes the more limited conduct of taking an official act for the primary purpose of directly enhancing the employee's financial position. Subsection 10-16-3(A) is the more general duty, prohibiting public employees from using the powers of public office to obtain personal benefits other than by taking official acts for financial gain. *Compare* § 10-16-3(A), *with* § 10-16-4(A).

Similarly, subsection 10-16-3(C) prohibits a public officer from abusing their office while in public service. Subsection 10-16-6 prohibits a public officer from using confidential information acquired by virtue of their office for their or another's private gain. Again, subsection 10-16-3(C) creates the more general duty, prohibiting a public employee from abusing their office in ways other than by using confidential information for private gain. *Compare* § 10-16-3(C), *with* § 10-16-6.

The Legislature's choice to frame the duties set out in Subsections 10-16-3(A), (B) and (C) at a high level of generality does not indicate an intent that these provisions be merely aspirational. Rather, the Legislature may select a general provision to address a general, multifaceted concern—like public corruption—for which the Legislature would struggle to define every each and every occurrence. *Cf. N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, ¶ 13, 88 N.M. 201, 539 P.2d 221 ("In order to give effect to these broad legislative concerns, however, it is necessary that the standards developed . . . be somewhat general.").[3] And, as it commonly does, the Legislature may enact two statutory provisions—one more general and one more specific—that proscribe the same conduct. *Cf. State v. Cleve*, 1999-NMSC-017, ¶ 17, 127 N.M. 240, 980 P.2d 23 (providing the general/specific canon of construction).

[3]Other statues exemplify the Legislature's choice to regulate many species of disfavored conduct by broadly drawing a statute. Prohibitions on "conduct unbecoming" of an officer or a professional is one example. *E.g.*, NMSA 1978, §§ 20-12-65 (national guard) (prohibiting "conduct unbecoming an officer and a gentleman"); 29-2-11(A) (removal of New Mexico state police officer for "conduct unbecoming an officer"); 61-4-10(A)(16)(q) (licensed chiropractors) (permitting license revocation of licensed chiropractor for "conduct unbecoming a person licensed to practice chiropractic [medicine] or detrimental to the best interests of the public").

II. Affirmance would hamper efforts to fight corruption and official misconduct among legislators, public officials, and public employees.

Under the Governmental Conduct Act, the Legislature established a framework for violations of subsections 10-16-3(A), (B) and (C) that extends well beyond criminal prosecutions by the Attorney General. For any violation of the Act, the Legislature authorized criminal, civil, and administrative sanctions to be enforced by an array of state agencies. For violations of the duties set out in subsections 10-16-3(A), (B) and (C), the Governmental Conduct Act authorizes: (i) all state agencies to impose discipline on agency employees;[4] (ii) the Attorney General, a District Attorney, or the State Ethics Commission to institute a civil action in district court;[5] (iii) the State Ethics Commission to recommend

[4]*See* § 10-16-14(D) ("Violation of *the provisions* of the Governmental Conduct Act by any public officer or employee, other than those covered by Subsection C of this section [i.e. public officers removable only by impeachment], is grounds for discipline, including dismissal, demotion or suspension.") (emphasis added).

[5]*See* § 10-16-18(B) ("The state ethics commission may institute a civil action in district court or refer a matter to the attorney general or a district attorney to institute a civil action in district court if a violation has occurred or to prevent a violation of *any provision of the Governmental Conduct Act*.") (emphasis added).

impeachment, the House of Representatives to impeach, and the Senate to remove officers subject to impeachment;[6] (iv) the State Ethics Commission to forward findings and evidence of the violation by a legislator to the appropriate legislative chamber, which may then impose discipline, including expulsion;[7] and (v) the Attorney General or a District Attorney to prosecute misdemeanor criminal charges for knowing and willful violations.[8] The Governmental Conduct Act's overlapping enforcement regime is well within the Legislature's power to

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[6]*See* § 10-16-14(C) ("If the state ethics commission determines that there is sufficient cause to file a complaint to remove from office a public officer removable only by impeachment, the commission shall refer the matter to the house of representatives of the legislature."); *see also* N.M. Const. Art. IV, § 35 ("The sole power of impeachment shall be vested in the house of representatives, and a concurrence of a majority of all the members elected shall be necessary to the proper exercise thereof.").

[7]*See* §§ 10-16-14(A) ("The state ethics commission may investigate suspected violations of the Governmental Conduct Act and forward its findings and evidence to . . . [a] legislative body for enforcement."); 10-16-14(B) ("Violation of the provisions of the Governmental Conduct Act by any legislator is grounds for discipline by the appropriate legislative body."); *see also* N.M. Const. Art. IV, § 11 ("Each house . . . may, with the concurrence of two-thirds of its members, expel a member").

[8]*See* § 10-16-17 ("Unless specified otherwise in the Governmental Conduct Act, any person who knowingly and willfully violates *any of the provisions* of that act is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than one year or both.") (emphasis added). In addition to the misdemeanor offense that Section 10-16-17 creates, the Governmental Conduct Act specifies two fourth degree felony offenses, at sections 10-16-3(D) and 10-16-4(A).

create. The Legislature may affix criminal, civil, and administrative sanctions for the same conduct or omission. *See, e.g.*, *City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 7, 132 N.M. 187, 46 P.3d 94.

An appellate court ruling that subsections 10-16-3(A), (B) and (C) are merely precatory and impose no enforceable duties on legislators, public officials or public employees would nullify the entire regulatory regime for these subsections. Similarly, a ruling that subsections 10-16-3(A), (B) and (C) are unenforceable on constitutional grounds would also nullify all enforcement for these subsections. Under either statutory or constitutional ruling, state agencies, the State Ethics Commission, District Attorneys, the Attorney General, and the House of Representatives would each lose their respective abilities to enforce remedies for the abuse of office in public service and nondisclosure of conflicts of interest.

For example, if the Court held subsections 10-16-3(A), (B) and (C) unenforceable, a state agency would be unable to discipline under section 10-16-14(D) a supervising employee who abuses their office by hiring an

individual because he or she is a romantic interest and pursuing that interest in an unwelcome and harassing manner. *See* § 10-16-14(D) (providing that "[v]iolation of the provisions of the Governmental Conduct Act . . . is grounds for discipline").[9]

In her papers below, Padilla suggested otherwise. "Granting Defendant Padilla's motion to dismiss," she argued, "would not necessarily preclude [Subsections 10-16-3(B) or (C)] from . . . receiving consideration in civil or administrative matters such as employee discipline." D. Padilla's First Mot. To Dismiss Counts 4-8 **[RP 257-267]** at 8.

But it is difficult to understand how an affirmance of the district court's ruling on vagueness grounds would not also void civil and administrative enforcement for subsections 10-16-3(B) and (C). If a statutory duty to which the Legislature affixes both criminal and civil penalties is impermissibly vague, then it is unlikely that the

[9]To be sure, if the Court held subsections 10-16-3(A), (B) and (C) unenforceable, state agencies could still discipline classified employees for "misconduct." *See* 1.7.11.10(B) NMAC (defining "just cause" for classified employee discipline to include "misconduct"). But that single word in the rule's definition of "just cause" provides much less warning regarding the available bases for discipline than subsections 10-16-3(A), (B) and (C) provide.

constitutional deficiency resides only with criminal enforcement. Vagueness is a deficiency in the definition of the statutory duty, not the penalty. *See generally Sessions v. Dimaya*, 138 S. Ct. 1204, 1228-29 (2018) (Gorsuch, J., concurring). Moreover, the New Mexico courts apply the same analysis to evaluate vagueness challenges to civil and criminal statutes alike. *Compare State v. Chavez*, 2019-NMCA-068, ¶¶ 9-20, 451 P.3d 115 (considering and rejecting vagueness challenge to supervised probation statute), *with State ex rel. CYFD v. Shawna C.*, 2005-NMCA-066, ¶¶ 33-38, 137 N.M. 687, 114 P.3d 367 (considering and rejecting vagueness challenge in civil abuse and neglect proceedings).[10] The Court is not compelled, however, to tear out the Governmental Conduct Act's graded enforcement regime for subsections 10-16-3(A), (B) and (C). Those

[10]On this point, New Mexico appellate decisions anticipate the federal Supreme Court's movement toward a uniform vagueness analysis in civil and criminal contexts. *See Dimaya*, 138 S. Ct. at 1213 (applying the same vagueness analysis applicable to criminal cases for civil removal cases); *id.* at 1231 (Gorsuch, J., concurring in judgment) (concluding that the same fair notice standard applies for vagueness challenges to civil and criminal provisions); *but cf. Tri-State Gen.*, 2012-NMSC-039, ¶ 57 ("Generally, a civil statute without direct penalties requires less precision under a facial vagueness challenge.") (citing *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 (1982)).

provisions are not unconstitutionally vague, either on their face or as applied to Padilla's conduct.

III. Subsections 10-16-3(B) and (C) are not impermissibly vague or overbroad.

This Court "review[s] a vagueness challenge de novo in light of the facts of the case and the conduct which is prohibited by the statute." *Chavez*, 2019-NMCA-068, ¶ 9 (internal quotation marks and citation omitted). "[A] strong presumption of constitutionality underl[ies] each legislative enactment, and [the d]efendant has the burden of proving the statute is unconstitutional beyond all reasonable doubt." *Id.* (second alternation original, internal quotation marks and citation omitted). To prevail, Padilla must show either (1) "the statute fails to allow individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited," or (2) "the statute permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards or guidelines and therefore allows, if not encourages, subjective and *ad hoc* application." *Id.* (internal quotation marks and citation omitted).

A. Subsections 10-16-3(B) and (C) gave Padilla fair warning that her conduct, as the State alleged, was prohibited.

The first kind of vagueness challenge requires a showing that subsections 10-16-3(B) and (C) do not give "individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited." *Chavez*, 2019-NMCA-068, ¶ 9; *accord State v. Laguna*, 1999-NMCA-152, ¶ 25, 128 N.M. 345, 992 P.2d 896. This is not an issue that this Court decides "in the abstract." *State v. Perea*, 1999-NMCA-138, ¶ 23, 128 N.M. 263, 992 P.2d 276. "Instead, this Court considers the validity of the statute 'in light of the facts of the particular case before [the Court] and in light of the prohibited act with which a defendant is charged.'" *Id.* (citation omitted); *see also Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis."). To sustain her vagueness challenge, Padilla therefore must demonstrate that subsections 10-16-3(B) and (C) did not give *her* fair notice that *her conduct* was prohibited. This is because "a defendant may not succeed on a vagueness claim if the statute clearly applies to the defendant's

conduct." *State v. Garcia*, 2013-NMCA-005, ¶ 25, 294 P.3d 1256; *see also Perea*, 1999-NMCA-138, ¶ 22 ("A [defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" (alteration added) (citation omitted)); *accord Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (same); *United States v. Williams*, 553 U.S. 285, 304 (2008) (same); *Hoffman Estates*, 455 U.S. at 495 n.7 (same and collecting cases); *State v. Ebert*, 2011-NMCA-098, ¶ 21, 150 N.M. 576, 263 P.3d 918 (same).

"In light of the facts of th[is] case," Padilla cannot show that subsections 10-16-3(B) and (C) failed to provide *her* with fair warning. *Chavez*, 2019-NMCA-068, ¶ 9. Subsections 10-16-3(B) and (C) allow an individual of ordinary intelligence in Padilla's shoes to know that the statutory provisions prohibit the Secretary of the Taxation and Revenue Department ("TRD") from misusing the powers and resources available to that office to access confidential taxpayer information for another's private benefit, including for their spouse's private tax-preparation business. Anyone who is the TRD Secretary would know that the conduct

the State alleges Padilla committed was an "abuse of office in public service." § 10-16-3(C).[11]

For the TRD Secretary, what constitutes "abuse of office in public service" is not an amorphous and hopeless inquiry. The powers and duties of the TRD Secretary are defined by law.[12] The myriad statutes that apply to the TRD Secretary enlighten the meaning of "abuse of office in public service" in this case and as applied to Padilla. *See Shawna C.*,

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[11]*See* N.M. Resp. to Def. Demesia Padilla's 1st Mot. To Dismiss Counts 4 Through 8 **[RP 268-283]** at 1-3 (alleging that Defendant used GenTax to obtain records of her former business partner and former clients that employed Defendant's husband for tax-return-preparation services). The State Ethics Commission takes no position on the truth of the State's allegations and does not endorse the allegations in the criminal information.

[12]*See*, *e.g.*, NMSA 1978, §§ 9-1-5(B)(5) (requiring cabinet secretaries to "assure implementation and compliance with the provisions of law with the administration or execution of which he is responsible"); 9-11-6(A) ("The [TRD] secretary is responsible to the governor for the portion of the department. It is the secretary's duty to manage all operations of the department and to administer and enforce the laws with which the secretary or the department is charged."); *see also* §§ 7-1-4.2(H) (recognizing a taxpayer's "right to have the taxpayer's tax information kept confidential unless otherwise specified by law"); 7-1-8(A) ("It is unlawful for any person other than the taxpayer to reveal to another person the taxpayer's return or return information, except as provided [by law]."); 3.28.2.8(O) NMAC (providing that all employees of TRD's fraud investigations division "will not use their position or permit use of their position for personal or financial gain whether directly or indirectly for themselves or any other individual or group"). In addition to her statutory duties, the TRD Secretary is also aware of the Governor's Code of Conduct, which is "based on the principles set forth in the Governmental Conduct Act," and which the TRD Secretary must review "prior to or at the time of being hired." § 10-16-11(A), (B).

2005-NMCA-066, ¶ 36 (claimant's prior history relevant to whether statute provided fair notice (citing *United States v. Corrow*, 941 F. Supp. 1553, 1562 (D.N.M. 1996) (defendant's own experience with Navajo culture informed whether the term "cultural patrimony" failed to give him notice of what items were protected))); *see also State v. Jensen*, 681 N.W.2d 230, 238-239 (Wis. Ct. App. 2004) (taking judicial notice of applicable statutes on legislators when rejecting a vagueness challenge to a statute prohibiting "the exercise of a discretionary power in a manner inconsistent with the duties of an officer's office"). Further, the TRD Secretary is presumed to know the power and duties of the office and, hence, that access to confidential taxpayer information for another's private benefit fairly constitutes an abuse of that office. *See Screws v. United States*, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring) ("Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it.").

In addition to the ancillary statutes that give definition to the TRD Secretary's office, the language, "abuse of office," is not simply open-

ended. Particularly when read alongside subsection 10-16-3(A)'s prohibition on using the powers and resources of public office to pursue private interests, the phrase "abuse of office" signals what conduct it prohibits, including the alleged predicate conduct here. *See Ramos*, 1993-NMCA-089, ¶ 17 (concluding that two sections, when read together, sufficiently placed defendant on notice, defeating vagueness challenge). Moreover, "abuse of office" is an operative term in other provisions of the New Mexico Statutes Annotated. *See, e.g.*, § 7-1B-3 (providing that chief hearing officer may be removed for "abuse of office"). And it is a common occurrence in the criminal law. *See, e.g.*, La. Rev. Stat. Ann. § 134.3 ("Abuse of office"); Tex. Penal Code Ann. § 39 ("Abuse of Office"); Navajo Nation Code 17 § 364 ("Abuse of Office"); Tenn. R. Crim. P. 6(e)(6) ("It is the duty of the grand jury to . . . inquire into any state or local officers' abuse of office").

Thus, the State's prosecution of misdemeanor charges under subsections 10-16-3(B) and (C) against Padilla involves no element of surprise and no break with any "'ordinary notions of fair play.'" *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (quoting *Connally v.*

General Constr. Co., 269 U.S. 385, 391 (1926)). In view of the statutory definition of the TRD Secretary's office and the everyday meaning of "abuse of office," a person of ordinary intelligence serving as TRD Secretary would fairly know that subsections 10-16-3(B) and (C), by prohibiting the "abuse of office in public service," necessarily prohibit the misuse of the TRD Secretary's powers to access confidential taxpayer information for her or another's private benefit. Furthermore, the Governmental Conduct Act's criminal enforcement provision plainly says, unless otherwise specified, it applies to the knowing and willful violation of "*any of the provisions of that act* . . . ." § 10-16-17 (emphasis added). Accordingly, Padilla cannot show that subsections 10-16-3(B) and (C) and section 10-16-17 failed to provide *her* with fair warning that her conduct, as the State alleges it, was prohibited and subject to prosecution. Necessarily, she cannot show the statute is vague in all applications and her constitutional challenge fails.

This Court has not yet addressed a void-for-vagueness challenge to the Governmental Conduct Act. Nor has it decided on appeal a Rule 5-601 motion challenging the application of subsections 10-16-3(B) and (C)

to a defendant's alleged conduct. *See, e.g.*, *State v. Foulenfont*, 1995-NMCA-028, ¶ 6, 119 N.M. 788, 895 P.2d 1329 (concluding district court had authority under Rule 5-601 to consider purely legal question whether the factual predicate underlying criminal charges fits within the statutory definition of the offense). Consequently, affirmance on vagueness grounds is not only error but also premature. *See Johnson*, 135 S. Ct. at 2558 (("[T]he failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1925))). The Court, however, has rejected vagueness challenges to statutes with similar scope for reasons that apply to the provisions of the Governmental Conduct Act challenged here.

For example, in *Shawna C.*, the Court of Appeals upheld a statute permitting the termination of parental rights where the parent is unable to provide "proper parental care" to a child because of the parent's "faults or habits," "mental disorder," or a "risk of . . . serious harm." 2005-NMCA-066, ¶ 31. The Court noted that the mother failed to raise "any serious doubt that the phrases "proper parental care" or "risk of serious

harm" are not understandable and sensible when considered in light of common understanding and practices regarding parenting." *Id.* ¶ 37. So too here: there is no serious doubt about what "abuse of office in public service" prohibits when considered in light of the TRD Secretary's duties and a person-on-the-street's understanding of how the TRD Secretary should treat confidential taxpayer information.

Courts in other jurisdictions addressing criminal prohibitions in ethics statutes have upheld those statutes against void-for-vagueness challenges. The pathbreaking case in this area is *State v. Jensen*, 681 N.W.2d 230 (Wis. Ct. App. 2004). In *Jensen*, the defendants (state legislators), were alleged to have directed legislative employees "to recruit and otherwise directly assist candidates for political office as candidates." 681 N.W.2d at 236-37. They were charged with violating a statute that "prohibits the exercise of a discretionary power in a manner inconsistent with the duties of an officer's office." *Id.* (emphasis added). The Wisconsin Court of Appeals upheld the statute against the defendants' void-for-vagueness challenge, reasoning that the duty imposed by the statute was sufficiently specific, and defendants were

fairly on notice that their conduct could give rise to criminal liability. This conclusion was based on the Court taking judicial notice of applicable statutes, legislative rules and guidelines, and the Assembly Employee Handbook, all of which prohibited the use of a public official's position "to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family," or to "an organization with which the official is associated." *Id.* at 238-239.[13] Just as the Wisconsin Court of Appeals held that a statute proscribing "the exercise of a discretionary power in a manner inconsistent with the duties of an officer's office" fairly prohibited legislators from misusing legislative staff to assist candidates, this Court should consider the laws applicable to the TRD Secretary and hold that subsections 10-16-3(B) and

[13]Other state appellate courts have reached similar conclusions. *See, e.g.*, *State v. Chvala*, 678 N.W. 2d 880, 889 (Wis. Ct. App. 2004) (holding that statute "precluding officeholders from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates" put a "reasonable legislator" on notice that "directing [state employees] to engage in political campaign activity with state resources is inconsistent with the rights of others and is intended to obtain a dishonest advantage"); *Com. v. Habay*, 934 A.2d 732, 738-39 (Pa. Super. Ct. 2007) (rejecting void-for-vagueness and overbreadth challenge to legislator's conviction under conflict-of-interest statute for directing state-paid employees under his authority to conduct campaign and/or fundraising-related work, during state-paid time, for his personal benefit).

(C), which proscribe "abuse of office in public service," fairly prohibit the TRD Secretary from misusing the powers of that office to access confidential taxpayer information for her or another's private benefit.

"In challenging a law as unduly vague, 'the complainant must demonstrate that the law is impermissibly vague in all of its applications.'" *Climax Chem. Co. v. N.M. Envt'l. Imp. Bd.*, 1987-NMCA-065, ¶ 10, 106 N.M. 14, 738 P.2d 132 (quoting *Hoffman Estates*, 455 U.S. at 497). Padilla cannot make that demonstration, because she cannot even show that the law is impermissibly vague as to her. In subsections 10-16-3(B) and (C), the Legislature prohibited the TRD Secretary from abusing her office in public service. That proscription, in conjunction with the Act's criminal misdemeanor provision and Padilla's substantive legal duties as TRD Secretary, gave *her* fair warning as to what conduct could result in potential criminal liability under subsections 10-16-3(B) and (C).

B. Subsections 10-16-3(B) and (C) are not susceptible to arbitrary or discriminatory enforcement by prosecutors or juries.

Subsections 10-16-3(B)-(C) are not susceptible to arbitrary or discriminatory enforcement by prosecuting authorities or juries. For

Padilla to prevail on this second kind of vagueness challenge, which sounds in the separation of powers, she would need to show that the relevant provisions of the Governmental Conduct Act "encourage or permit police officers, prosecutors, judges or juries to engage in arbitrary or discriminatory enforcement or to permit standardless or *ad hoc* determinations." *State v. Greenwood*, 2012-NMCA-017, ¶ 46, 271 P.3d 753 (quoting *Laguna*, 1999-NMCA-152, ¶ 33). She cannot make that showing. Subsections 10-16-3(B) and (C) are not subject to arbitrary criminal enforcement under section 10-16-17.

First, the range of discretion for enforcement of the Governmental Conduct Act is necessarily limited. The Act does not apply to the public at large; by its own terms, it is limited to legislators, public officers, and public employees. *See* §§ 10-16-2 (I) (defining "public officer or employee"); 10-16-3 (applying to legislators, public officers and public employees). Even within its limited range of application, criminal enforcement for violations of subsections 10-16-3(B) and (C) is not standardless or open to *ad hoc* determinations. Rather, criminal enforcement of subsections 10-16-3(B) and (C) is limited to those cases

where a legislator, public officer, or public employee "knowingly and willfully" abused their office in public service. § 10-16G-17. *See State v. Cumpton*, 2000-NMCA-033, ¶ 14, 129 N.M. 47, 1 P.3d 429 ("A statute requiring the fact-finder to determine whether a defendant committed a knowing and willful violation is less likely to be found vague because the jury must determine scienter.") (internal quotation marks and citation omitted); *State v. Gattis*, 1986-NMCA-121, ¶ 18, 105 N.M. 194, 730 P.2d 497 (rejecting vagueness challenge where the statute included a specific intent requirement). Accordingly, criminal enforcement of subsections 10-16-3(B) and (C) is not standardless or *ad hoc*; rather, it is statutorily affixed to knowing and willful violations.

Second, New Mexico courts have evaluated this second kind of vagueness challenge by inquiring whether the defendant's guilt depends on an executive officer's unfettered decision that effectively satisfies a statutory element of the offense. In *Bokum Resources Corp. v. New Mexico Water Quality Control Commission*, the Supreme Court invalidated regulations permitting the director of the Commission's Environment Improvement Division to determine whether a chemical

discharge was a "toxic pollutant" capable of causing "death, disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations" based solely "on . . . information available to the director or the commission." 1979-NMSC-090, ¶ 11, 93 N.M. 546, 603 P.2d 285. The Court held these regulations impermissibly vague, because, under the statute, "a person could find himself in jail or violating totally unreasonable requirements, that are supported by crank mail in the Director's files, without the discharger of water having any prior notice or knowledge of the information's nature or availability to the Director." *Id.*

Similarly, in *State v. Jaramillo*, the Court of Appeals invalidated a statute prohibiting "remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use." 1972-NMCA-071, ¶ 1, 83 N.M. 800, 498 P.2d 687. The Court held the statute was "without sufficiently definite standards to be enforceable and, thus, an unlawful delegation of legislative power . . . ." *Id.* The Court reasoned

that "the attempted delegation to the custodian of the authority to cause the 'remaining in or occupancy' of a public property to become a crime fails because no standards have been provided." (citation omitted). *Id.* ¶ 6. Unlike the statutes in *Jaramillo* and *Bokum*, the completion of the statutory elements of the Governmental Conduct Act offenses at issue does not depend on the unguided or hidden decision of another executive officer. Whether Padilla is guilty of violating subsections 10-16-3(B) and (C) depends on whether a jury, applying instructions given to it by a judge, finds that *her conduct* and *her mental state* amounted to a violation.

The larger point is that criminal prosecutions for subsection 10-16-3(B) and (C) do not offend the separation of powers. First, ordinary prosecutorial discretion does not support a vagueness challenge. *State v. Fleming*, 2006-NMCA-149, ¶ 5, 140 N.M. 797, 149 P.3d 113. Second, in a subsection 10-16-3(B) and (C) case, a judge might interpret the statutory meaning of "abuse of office in public service" in the context of a Rule 5-601 motion that the statutory terms do not apply to the defendant's conduct. *Cf. Foulenfont*, 1995-NMCA-028, ¶ 6. Third, if the

State's prosecution survives a Rule 5-601 motion, then a neutral trier of fact—not an unchecked executive officer—determines whether subsections 10-16-3(B) and (C) have been violated, applying a standard whether a defendant "knowingly and willfully" abused their office in public service. § 10-16-17. These are core exercises of the respective judicial and jury functions; neither involves the untoward delegation of a legislative function, and neither supports a due process/separation of powers challenge.[14]

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[14]In addition to her federal due process claim, Padilla argued in district court that Article II, Section 18 of the New Mexico Constitution provides a basis to hold subsections 10-16-3(B) and (C) void for vagueness. *See* D. Padilla's First Mot. to Dismiss Counts 4-8 **[RP 257-267]** at 3. New Mexico's due process vagueness doctrine has not been interpreted differently than the federal analogue, *see, e.g.*, *State v. Ramos*, 1993-NMCA-089, ¶ 16, 116 N.M. 123, 860 P.2d 765 (rejecting federal and state vagueness challenge by same analysis), notwithstanding Padilla's suggestion that the federal courts might abandon the void for vagueness doctrine under the Fourteenth Amendment's due process clause—which the Supreme Court has not done, *see* D. Padilla's First Mot. to Dismiss Counts 4-8 **[RP 257-267]** at 10; *compare Sessions v. Dimaya*, 138 S. Ct. 1204, 1210-23 (2018) (plurality opinion), *and* 138 S. Ct. at 1223-34 (Gorsuch, J. concurring in part and in judgment), *with* 138 S. Ct. at 1242-59 (Thomas, J., dissenting). Accordingly, Padilla did not take the necessary steps to preserve a separate state constitutional challenge—namely, "assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision." *State v. Gomez*, 1997-NMSC-006, ¶ 23, 122 N.M. 777, 932 P.2d 1. Padilla noted only that New Mexico cases, applying federal caselaw, "evince a strong tradition of strictly applying all three requirements of the void-for-vagueness doctrine." *See* D. Padilla's First Motion to

C. Subsections 10-16-3(B) and (C) are not overbroad because they do not implicate government officials' protected First Amendment rights to speech.

In the district court, Padilla also challenged subsections 10-16-3(B) and (C) as unconstitutionally "overbroad" because of an asserted lack of "time, place, or manner restrictions limiting their reach to particular kinds of official acts with a nexus to a particular proceeding." D. Padilla's Second Motion to Dismiss Counts 4-8 **[RP 246-256]** at 4. Padilla's overbreadth argument fails because Subsections 10-16-3(B) and (C) do not implicate personal rights to Free Speech under the First Amendment.

A statute is only unconstitutionally overbroad "if it criminalizes speech that is protected by the [F]irst [A]mendment." *Gattis*, 1986-NMCA-121, ¶ 10; *see also State v. Garcia*, 2013-NMCA-005, ¶ 23, 294 P.3d 1256 ("Under the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech beyond that needed to achieve the statute's proper purpose.") (internal

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Dismiss Counts 4-8 **[RP 257-267]** at 10. Padilla's perfunctory invocation of the New Mexico constitution is not enough to preserve the issue of whether New Mexico's due process clause admits of a more expansive void for vagueness doctrine than the federal counterpart. The federal and state constitutional due process vagueness doctrines are one and the same, and Padilla's challenge fails under it.

quotation marks omitted). If a statute does not impair speech that is protected by the First Amendment, it is not overbroad. *See Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad."); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 168 (1972) ("While the doctrine of 'overbreadth' has been held by this Court in prior decisions to accord standing by reason of the 'chilling effect' that a particular law might have upon the exercise of the First Amendment rights, that doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment.").

Because the Governmental Conduct Act does not prohibit speech, let alone speech protected by the First Amendment, Padilla's overbreadth challenge is a nonstarter. Padilla states that "[c]harging someone with criminal violations of Subsections 10-16-3(B) and/or (C) . . . sweeps much innocent, constitutionally protected speech, association, symbolic expression, and routine governmental functions within the reach of criminal penalties." *See* D. Padilla's Second Motion to Dismiss Counts 4-8 **[RP 246-256]** at 4. But this is just a conclusion. Padilla offers no

explanation for how the Governmental Conduct Act's prohibition on the "abuse of office in public service" proscribes core First Amendment-protected speech. It does not; nor is Padilla facing prosecution for any protected speech. *Cf. Commonwealth v. Orie*, 88 A.3d 983 (Pa. Super. Ct. 2014) ("[The conflict of interest prohibition] places no restrictions on a public official's federal or state protected rights of expression and association, but only prohibits officials from using state-funded resources for non-de minimis private pecuniary gain.").

Even if subsections 10-16-3(B) and (C) potentially impair speech, those statutes prohibit speech that a legislator or public officer might make by virtue of their public office only—*e.g.*, a vote or an official press release. Such a constraint does not implicate any First Amendment protection. *See*, *e.g.*, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011) ("[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."); *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006) ("Restricting

speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). Defendant's First Amendment overbreadth challenge invites error.[15]

IV. In the alternative, the Court should affirm based on (or remand for consideration of) statutory grounds that avoid constitutional issues.

Enforcement of subsections 10-16-3 (B) and (C) is not unconstitutional. The Court, however, may affirm on (or remand for consideration of) one of two grounds that avoid constitutional review of the Governmental Conduct Act. *Cf. Maralex Res.*, 2003-NMSC-023, ¶ 13

[15]Like with her due process claim, Padilla did not preserve a separate state-constitutional overbreadth challenge. New Mexico courts do not appear to apply a different overbreadth analysis for conduct protected by the First Amendment, on the one hand, and Article II, Sections 4, 11, and 17, on the other. *See Ramos*, 1993-NMCA-089, ¶ 11 (rejecting by same analysis overbreadth challenge brought under state and federal constitution); *cf. Vill. of Ruidoso v. Warner*, 2012-NMCA-035, ¶¶ 5-10, 274 P.3d 971 (detailing First Amendment overbreadth analysis without mention of state counterpart); *cf. also City of Farmington v. Fawcett*, 1992-NMCA-075, ¶ 47, 114 N.M. 537, 843 P.2d 839 (holding that Article II, Section 17 provides more protection that the federal First Amendment in regards to prohibitions of obscene material only). Accordingly, to preserve a separate state constitutional claim, Padilla was required to "assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision." *Gomez*, 1997-NMSC-006, ¶ 23. She did not. *See* D. Padilla's Second Motion to Dismiss Counts 4-8 **[RP 246-256]** at 1-10. Applicable First Amendment doctrine therefore ends her overbreadth claim.

(noting the right for any reason doctrine). Customarily, courts take this route when available. *Cf. Pangaea Cinema LLC*, 2013-NMSC-044, ¶ 23 ("When possible, we must construe a statute or ordinance so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." (quotation marks and citations omitted)); *accord United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (same).

First, the Court may affirm the dismissal of the subsection 10-16-3(B) and (C) counts because (or remand for the district court to consider whether) the State did not charge Padilla with an available, more specific provision of the Governmental Conduct Act. Subsections 10-16-3(B) and (C) create a general duty that a public officer not abuse their office in public service. *See* § 10-16-3(B)-(C). Section 10-16-6 creates a specific duty that a public officer not abuse their office by "us[ing] or disclos[ing] confidential information acquired by virtue of the . . . public officer's . . . position with a state agency . . . for the . . . public officer's or . . . another's private gain." § 10-16-6. The Court may fairly read both subsections 10-16-3(B) and (C) and section 10-16-6 to reach the conduct that the State alleges. *See* N.M. Resp. to Def. Demesia Padilla's 1st Mot. To Dismiss

Counts 4 Through 8 **[RP 268-283]** at 1-3 (alleging that Defendant used GenTax to obtain records of her former clients that employed Defendant's husband for tax-return-preparation services); 2nd Am. Crim. Info. **[RP 218-255]**, Count 1 (charging "Engaging in an Official Act for Personal Financial Gain" contrary to section 10-16-4(A)).

If the Court construes subsections 10-16-3(B) and (C) and section 10-16-6 to reach the same predicate conduct in this case, then the Court may apply a long-established corollary rule to the general/specific canon of statutory construction that would require to State to have charged section 10-16-6 as the more specific offense. Under the New Mexico Supreme Court's guidance in *State v. Cleve*, "[i]f two statutes, one general and one special, punish the same criminal conduct, special law operates as an exception to the general law 'to the extent of compelling the state to prosecute under' the special [more specific] law." 1999-NMSC-017, ¶ 17 (quoting *State v. Blevins*, 1936-NMSC-052, 40 N.M. 367, 368-69, 60 P.2d 208); *see also State v. Santillanes*, 2001-NMSC-018, ¶ 11, 130 N.M. 464, 27 P.3d 456 ("The goal of the general/specific statute rule in the context of criminal law is to determine whether the Legislature intends

to punish particular criminal conduct under a specific statute instead of a general statute."). The corollary rule to the general/specific canon provides a limited basis to affirm (or remand) that avoids the constitutional issues that Padilla raises.

Second, while subsection 10-16-3(B) and (C) are not vague as applied to Padilla, if the Court perceives insurmountable ambiguity whether the statutory terms apply to Padilla's conduct, then the proper remedy is the application of another available canon of statutory construction—the rule of lenity. *See State v. Ogden*, 1994-NMSC-029, ¶¶ 25-26, 118 N.M. 234, 880 P.2d 845. Subsections 10-16-3(B) and (C) are not insurmountably ambiguous as applied to Padilla's conduct. If the Court concludes otherwise, however, a lenity holding would be limited to the criminal enforcement of subsections 10-16-3(B) and (C) and, therefore, would avoid broader constitutional rulings that jeopardize the *civil and administrative* enforcement of subsections 10-16-3(A) through (C) by state agencies and, in the impeachment context, the House of Representatives. *See generally Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting) (explaining the difference between the traditional rule of

lenity and the modern vagueness doctrine). Enforcement of subsections 10-16-3(A), (B) and (C) is not unconstitutional. But the Court may avoid the issue entirely by resorting to statutory grounds that fairly dispose of Padilla's motion to dismiss the counts under subsection 10-16-3(B) and (C).

CONCLUSION

The Court should reverse the district court's order dismissing counts 4-8 of the State's criminal information because subsections 10-16-3(B) and (C) of the Governmental Conduct Act impose enforceable duties and are not unconstitutionally vague or overbroad.

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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