

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KAREN DESOTO;

RAYMOND SAVEDRA;

Petitioners,

v.

No. S-1-SC-35563

RETTA WARD, in her
Official Capacity as Cabinet Secretary of
The New Mexico Department of Health,

Respondent.

VERIFIED PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF COMPLIANCE

The petition is 3,193 words and in compliance with 12-305 NMRA and with length limitations enumerated in 12-305(G) NMRA.

Jason Flores-Williams, Esq.

PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

The New Mexico Department of Health is exacerbating an entrenched, historic inequity in the remote, western sector of this State by denying its residents access to evolving and proven medical resources and health care. Fortunately, the solution is straightforward.

The New Mexico Department of Health recently licensed 12 cannabis production centers and storefront dispensaries in this State. However, the new licensees are overwhelmingly located in the cluster of population centers found in the Santa Fe, Albuquerque corridor, leaving the traditionally underserved patients of Western New Mexico without the ability to obtain their medicine with the same level of convenience, economy and safety available to their urban counterparts. It is an undisputed fact that Western New Mexico has historically lacked the medical, educational, commercial and other fundamental services available to most New Mexicans.

According to the list of existing and newly licensed production centers and storefront dispensaries released by the Department of Health in September 2015, the closest medical cannabis dispensary to the city of Grants, an acknowledged hub of business and social service activity in the region, is located in Gallup, a city in McKinley County that is more than an hour and twenty minutes away. Yet,

potentially, the Gallup dispensary would become the nearest and only facility to serve the western region defined as Grant, Cibola, Catron and Hidalgo counties. (See Exhibit A).

Distance is only one of many factors determining the efficacy of travel to distant locations for medical treatment. Western New Mexico is characterized by remote towns linked by an often unattended secondary road system, severe seasonal weather events and, importantly, by the overall, lower economic status of its residents. Let's be frank: along with denying patients of this region medicine, the Department, in effect, is also punishing them for being poor. Many of the citizens of Western New Mexico are elderly and living on fixed incomes. They cannot afford the travel expenses, delivery costs and/or home visit fees that are required for them to gain access to medicinal relief to which they are legally entitled pursuant to the Lynn and Erin Compassionate Use Act, NMSA 1978, 26-2B-1 *et seq.*

Although the number of registered medical cannabis users in the four-county area currently stands at fewer than 500, the numbers were expected to increase when patients were offered a caring, familiar environment providing education, support and acceptance. Education is critical. Open access is critical. Many of the workers of Western New Mexico have given their lives to the uranium, coal and

other extraction industries that have financially benefited the entire state.¹ Many of these workers were left with debilitating respiratory illnesses, cancers and other painful conditions whose symptoms and treatment side effects significantly could be eased by access to medical cannabis. It is a disgrace that they have been forgotten by the New Mexico Department of Health, as this is a well-known, health-related issue affecting Western New Mexico. They should have been the first to be considered, but once again have been the last.

Matthew 20:16 states: “The last shall be first and the first shall be last,” so that all shall be rectified in the afterlife, but our courts exist to address discrimination and inequality in the here and now. This is why the writ of mandamus exists, and why this court has jurisdiction over it. Pursuant to Rule 12-504 NMRA, Petitioners Karen DeSoto and Raymond Savedra, respectfully petition this Court to issue a writ of mandamus against Respondent Retta Ward, in her official capacity as Secretary of the New Mexico Department of Health, requiring the Department to issue a nonprofit cannabis producer’s license to a qualified nonprofit producer applicant located in proximity to Grants, New Mexico.

¹ See Radiation Exposure Compensation Act. (RECA).

JURISDICTION

1. This Court has original jurisdiction to issue writs of mandamus “against all state officers, boards and commissions.” N.M. CONST. art. VI, § 3; *State ex rel Sandel v. Pub. Util. Comm.*, 1999-NMSC-019, ¶ 11, 127 N.M. 272. Pursuant to 12-504 (B)(4) NMRA it is necessary and proper that Petitioners seek the writ in the New Mexico Supreme Court as the matter harms hundreds, if not thousands, of New Mexicans and concerns a state-wide program.

THE PARTIES

2. Petitioner Karen DeSoto is a known community leader and activist for medical services in the Western New Mexico region. She is the founder of Viridescent, a nonprofit producer applicant based in Grants that was denied licensure by the New Mexico Department of Health.
3. Petitioner Raymond Savedra is a registered patient in the New Mexico Medical Cannabis Program. Mr. Savedra suffers from miner’s lung disease contracted by prolonged exposure to radiation. He worked at the Anaconda Mine in Grants, New Mexico for 12 years. Mr. Savedra also suffers from Post Traumatic Stress Disorder as a result of his military service in

Vietnam. He depends on medical cannabis to relieve pain and symptoms associated with his disease and treatments.

4. Secretary Retta Ward is the Secretary of the New Mexico Department of Health.

UNDISPUTED FACTS RELEVANT TO PETITION

5. The Lynn and Erin Compassionate Use Act, NMSA 1978, 26-2B-1 *et seq.*, went into effect July 1, 2007 in the State of New Mexico.
6. The purpose of the Act is to provide qualified patients throughout the State with medical cannabis. Specifically, pursuant to 26-2B-2: “The purpose of the Lynn and Erin Compassionate Use Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.”
7. The New Mexico Department of Health is expressly tasked with enforcement of the Act. *Id.*
8. Upon information and belief, the New Mexico Department of Health did not license a new nonprofit cannabis producer in Western New Mexico in 2015. (See Exhibit A.)
9. The population of Cibola County is 27,300.

10. The population of Grants, New Mexico (in Cibola County) is close to 10,000.
11. The total number of medical cannabis patients in Cibola County, Catron County, Grant County and Hidalgo County is close to 500.
12. Upon information and belief, there is no medical cannabis storefront or free delivery in Cibola, Catron, Grant or Hidalgo counties.²
13. The total population of these counties is about 65,000 people.
14. Western New Mexico is an area where there are many retired coal and uranium workers suffering from mining-related illnesses.
15. Upon information and belief, the closest licensed medical cannabis dispensary is located in Gallup, New Mexico, which is more than 70 miles away from the Grants area. This dispensary does not deliver.
16. The licensing process has been performed without much transparency, resulting in litigation and a rewriting of the rules midstream. Petitioners have done due diligence in trying to ascertain whether there is a nonprofit producer in another area of New Mexico willing to deliver to the Grants area, but have not found one that is responsive.

² The Department of Health may assert that it licensed G&G Genetics in the Grants area in 2009, but they are not operating a storefront dispensary or any publicly identifiable medical cannabis operation.

ARGUMENT

This Court's Original Mandamus Jurisdiction Is Proper

17. This Court may exercise its original jurisdiction in mandamus if the petitioner presents (A) a purely legal issue concerning a non-discretionary duty of a governmental official that (B) implicates fundamental constitutional questions of great public importance, (C) can be answered on the basis of virtually undisputed facts, and (D) calls for an expeditious resolution that cannot be obtained through other channels such as direct appeal. *State ex rel. King v. Lyons*, 2011-NMSC-004, 149 N.M. 330; *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; see also N.M. CONST. art. VI, § 3 ("The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions . . ."). Petitioners meet all conditions necessary to invoke this Court's original jurisdiction.

A. The Issues Here are Legal and Involve the Non-Discretionary Duty of Public Officials

18. Discrimination is not discretionary. The Department of Health has an obligation to apply this legislative enactment—the Lynn and Erin Compassionate Use Act—in a manner that is constitutional. The Department of Health has not been empowered to deprive the people of

Western New Mexico of their rights. “Mandamus is defined to include an order directing the restoration of the complainant to rights and privileges to which he has been deprived.” *State ex rel. Bird v Apodaca*, 91 N.M. 279, 282, 573 P. 2d 213, 216 (1978). *See also State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P. 2d 975, 979 (1974).

B. This Petition Involves Fundamental Constitutional Questions of Great Public Importance to New Mexicans

19. Sick, suffering New Mexicans are being denied access to legal medicine.

An entire region of the state is being affected. An unequal application of the law is causing pain. This is a matter of sufficient public importance so that consideration and issuance of the writ here, by this Court, is appropriate. “When issues of sufficient public importance are presented which involve a legal and not a factual determination, we will not hesitate to accept the responsibility of rendering a just and speedy resolution.”

King, 2011-NMSC-004, ¶ 23 (citing *State ex rel Bird v. Apodaca*, 91 N.M. 279, 282, 573 P. 2d 213 (1977)).

C. The Questions Posed by The Petition Can Be Answered On Undisputed Facts

20. The facts set herein are all that are necessary to the adjudication of this

matter. (See Exhibit A.) The residents of Western New Mexico have either

no access or extremely limited access to medical cannabis, in contrast to those patients residing in Bernalillo or Santa Fe counties.

D. The Issues Need An Expeditious Resolution That Cannot Be Adequately Obtained By Appeal

21. The Department of Health has established itself as a monarchy. There are no reviews of its decisions, no appeals, no transparency. Nearly every other state agency in New Mexico has an appeals process. The Department of Health has forced Petitioners to come before this Court.

22. Furthermore, this is a statewide matter that affects the health, well-being and constitutional rights of a region of our State. It requires and is amenable to an expeditious resolution by the Supreme Court of this State.

EQUAL PROTECTION

A. The Secretary's Failure to Ensure The Presence Of A Medical Cannabis Dispensary in Western New Mexico Violates The Equal Protection Rights of its Residents

23. "Equal protection, both federal and state, guarantees that the government will treat individuals similarly situated in an equal manner." *Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 333; *See also Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 34, 122 N.M. 524, 928 P.2d 250. ("The threshold question in analyzing all equal protection

challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly.”) *Madrid*, 1996-NMSC-064, ¶ 35.

24. We have two groups: medical cannabis patients in the Albuquerque-Santa Fe corridor and medical cannabis patients in Western New Mexico. The former is being given access; the latter is being denied access. This is an equal protection violation and the court should issue the writ of mandamus solely on these grounds.³

25. *Assuming arguendo*, that respondent asserts that there is a dispensary willing to deliver medical cannabis to Western New Mexico from Albuquerque, then this nonetheless remains a denial of equal access and an invidious form of discrimination.

26. If you are a patient in Bernalillo County, then you have wide-ranging access to medical cannabis. You can drive a few minutes to get it, go to a dispensary, ask questions, confer with the medical cannabis specialist, and then comfortably choose from among a range of medicines that will change the quality of your life.⁴ But if you are a patient in Western New

³ Of course the former has a greater population and so should have more dispensaries. No one is arguing that point. But take pharmacies as an example. Albuquerque should have more pharmacies than Grants, but Grants should have at least one pharmacy.

⁴ The New Mexico Constitution’s Due Process Clause is clear concerning the deprivation of “life.” N.M. CONST. art. II § 18. A group of patients being denied

Mexico, then this access is unavailable to you. Again, let's be frank: this is a medicine that has been stigmatized by a 50-year drug war. There are senior citizens—veterans, coal miners—in Western New Mexico who could benefit from this medicine, but who won't be able to use it unless they are provided community-based access and support. The Equal Protection clause of the New Mexico Constitution states that: “[n]o person shall be . . . denied equal protection of the laws.” N.M. CONST. art. II § 12. Similarly, the Fourteenth Amendment to the United States Constitution states that: “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

27. These clauses are almost identical, but this Court has interpreted the equal protection clause of the New Mexico Constitution to afford more protection than federal equal protection, which is especially appropriate here as this is a New Mexico law, i.e. the Lynn and Erin Compassionate Use Act. *See Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 336. While New Mexico courts “take guidance from the Equal Protection clause of the United States Constitution and the federal courts interpretation of it, [New Mexico Courts] will nonetheless interpret the

meaningful access to a medicine that will make their lives tolerable is a deprivation.

New Mexico Constitution’s Equal Protection Clause independently when appropriate.” *Id.*

28. This is a New Mexican law in its infancy, so that it is appropriate and timely here that this Court interpret it within the context of regional/historical state disparities.

LEVEL OF SCRUTINY

29. Discrimination does not need to be based on characteristics, but on groups being similarly situated. In deciding whether two groups of people are similarly situated, New Mexico courts have looked “beyond the classification to the purpose of the law.” *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 40, 126 N.M. 788. Here, the purpose of the law is to provide medicine, fair access to which is a fundamental right. It is a “basic necessity of life.” *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974.) As a fundamental right, this court should apply strict scrutiny to this analysis. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974.)

30. That said, should this Court perform its analysis along the lines of region rather than the fundamental right of access to medicine—and therefore utilize intermediate or “rational basis” scrutiny—then the lack of storefront

dispensaries in Western New Mexico still remains a violation of equal protection and due process. *See San Antonio Independent School District v. Rodriguez*, 411, U.S 1, 1973 (discussing the proper application of scrutiny standards.) *See also Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050 (discussing appropriate levels of scrutiny and employing rational basis.)

31. The lack of storefront dispensaries forces Western New Mexicans to pay for travel expenses and extra fees to gain access to their medicine. From consideration of poll taxes to court costs, courts have repeatedly held that to force the poor to pay for access to their rights is unconstitutional. *Harper v. Virginia Board of Election*, 383 U.S. 663 (1966) (poll tax); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (right to transcripts); *Bullock v. Carter*, 405 U.S. 134 (1972) (extra fees to run for office); *Turner v. Fouche*, 396 U.S. 346 (1970) (court held under rational basis that denying the landless access to public office violated equal protection.)

32. In this case, Mr. Savedra is a senior citizen on a fixed income, as are many seniors (and veterans) in Western New Mexico. To make this group pay for travel expenses, delivery costs, home visits—when similarly situated groups don't have to pay these fees—is a violation of equal protection. *Harper v. Virginia Board of Election*, 383 U.S. 663 (1966); *M.L.B. v.*

S.L.J., 519 U.S. 102 (1996); *Bullock v. Carter*, 405 U.S. 134 (1972);
Turner v. Fouche, 396 U.S. 346 (1970).

33. Finally, Petitioners would have presented these facts to the Department of Health and saved this Court time, but the Department of Health has designed an opaque process with no means of appeal.

34. When the lack of process results in the denial of fundamental access, then there is a violation of procedural due process. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

SUMMARY AND SOLUTION

35. The solution here is simple. The Court does not have to involve itself other than issuing an order. The people of Western New Mexico need a storefront dispensary so that they have equal access to their medicine.

REQUEST FOR ORAL ARGUMENT

36. Petitioners request oral argument should this Court deem it efficient and helpful to its determination.

PRAYER FOR RELIEF

Wherefore, Petitioners pray that the Court:

37. Issue a writ of mandamus requiring the Department of Health issue a license to a community-based cannabis producer in Cibola County that will

provide delivery service to the underserved counties of Western New Mexico.

38. Issue a writ of mandamus ordering the New Mexico Department of Health institute an appeals process to denied applicants.

39. Order costs of suit, including but not limited to attorney's fees.

40. Order such further relief as the Court deems proper and the law allows.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, a hand-delivered copy of the foregoing Petition for Writ of Mandamus was served on the following:

Retta Ward
Cabinet Secretary
The New Mexico Department of Health
1190 S. St. Francis Drive
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Jason Flores-Williams, Esq.
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VERIFICATION

I, Karen De Soto, a citizen of New Mexico, being sworn under oath, state that I am a named Petitioner herein and that I have read the foregoing Writ of Mandamus and the factual allegations are true and correct to the best of my knowledge and belief.

Date: 10/19/15

Karen DeSoto, Petitioner

VERIFICATION

I, Raymond Savedra, a citizen of New Mexico, being sworn under oath, state that I am a named Petitioner herein and that I have read the foregoing Writ of Mandamus and the factual allegations are true and correct to the best of my knowledge and belief.

Date: 10/19/15

Raymond Savedra, Petitioner