



IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

NO. S-1-SC-40411

LUIS PENA, JR.

Petitioner-Appellee

vs

RIO ARRIBA COUNTY COMMISSIONER ALEX NARANJO

Respondent- Appellant

APPELLEE'S ANSWER BRIEF

Appeal from the First Judicial District Court
The Honorable Judge Marie C. Ward
(sitting by designation)
D-117-CV-2023-00373

Respectfully Submitted,

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STATEMENT REGARDING REFERENCES TO THE RECORDED TRANSCRIPT

Pursuant to Rules 12-318(A)(1)(a) and (b) NMRA, Respondent's citations to the recorded hearing transcripts in this matter, via Compact Disc, are made pursuant to the rules set forth in the Appendix to Rule 23-112 NMRA. These audio discs were to be provided to the Court as part of the record below by Appellant. Citations to the recorded transcript are made by reference to the hearing date, Compact Disc number, track number, by elapsed time from the start of the recording (e.g., the March 19, 2024, hearing on Compact Disc 3, track 1, at counter 0:13:25 is cited [**3-19-24 3-track 1 CD 0:13:25**]). The Compact Discs were played on an Apple Desktop computer through Apple Music.

Appellee used the same three audio discs that Appellant used in the Brief in Chief. In fact, counsel for Appellant was kind enough to send them to the undersigned after the District Court gave the undersigned four audio discs of the hearing testimony so that both parties would be using the same audio discs. Appellant's citations are all based on those three audio discs that are cited by Appellee.

Although the Notice of Appeal was filed by Appellant on May 22, 2024, the District Court did not deliver the audio discs and exhibits to the Clerk of the Supreme Court until September 3, 2024. The reasons for this delay are unknown to Appellee. On September 4, 2024, the undersigned counsel checked out the record

from the Clerk's Office. Appellee's Answer brief is due on September 9, 2024 and was completed on September 4, 2024. The undersigned counsel has a Mac computer which cannot download the program used on the official audio disc. The undersigned counsel is a sole practitioner with no co-counsel on this case. He is unable to obtain access to a computer with a Windows program where he can download the disc, listen to all the tracks and then change all the citations in the few days remaining before the Answer is due.

However, the type of citations to the several audio discs provided by the District Court Clerk to counsel for Appellant and provided by counsel for Appellant to the undersigned that appear in Appellee's Answer brief are identical to the type of citations used by Appellant in the Brief-in-Chief, filed on August 19, 2024.

s/Richard Rosenstock

SUMMARY OF THE PROCEEDINGS

Petitioner/Appellee Antonio DeVargas, deceased, filed his original Complaint, *pro se*, asking the First Judicial District Court to allow him to circulate a Petition to Recall Rio Arriba County Commissioner Alex Naranjo on October 11, 2023. The Petition was based on Article X, Section 9 of the New Mexico Constitution. [1 RP 1-2]. The Petition alleged, inter alia, that Appellant violated the New Mexico Open Meetings Act when he and the other County Commissioners made the decision to take the statue of Don Juan de Onate out of storage outside of an open, public meeting. 1 RP 1 ¶¶ 1-5].¹

After obtaining counsel, Appellee filed an Unopposed Motion for Leave to File an Amended Complaint on January 10, 2024. [1 RP 26-32]. The case was ultimately assigned to the Honorable C. Ward of the Second Judicial District. [1 RP 35-36]. Judge Ward granted Appellee's Motion for Leave to File an Amended Complaint on January 31, 2024, and he filed his Amended Complaint on February 5, 2024. [1 RP 37-42].

The Amended Complaint alleged, inter alia, there was probable cause to believe that Appellant violated the New Mexico Open Meetings Act because he

¹ Appellee also alleged that Appellant's criminal indictment for perjury along with other misconduct on his part documented by a Special Grand Jury Report while serving in his capacity of as the chairman of the Rio Arriba County Commission as chairman of the North Central Solid Waste Authority. The District Court dismissed these allegations after the March 19, 2024 hearing.

(and the other members of the Commission) made the decision to reinstall the Onate statue outside of an open, public meeting. **[1 RP 39-42]**.² Appellant Naranjo filed his Answer to Appellee's Amended Complaint on February 19, 2024. **[1 RP 48-49]**.

On March 19, 2024, the District Court conducted an evidentiary hearing to determine whether there was probable cause to support any or all of Appellee's allegations. Witnesses were heard and exhibits entered into the record. **[1 RP 54]**. On May 2, 2024, the District Court entered its order finding probable cause to believe that Appellant violated the Open Meetings Act and granting Appellee leave to circulate a petition to seek sufficient signatures to recall Appellant Naranjo as a Rio Arriba County Commissioner. **[2 RP 258]**. The District Court found there was not probable cause to proceed on the allegations relating to Appellant's indictment for perjury and other acts of misconduct a Special Rio Arriba County Grand Jury found he had engaged in. **[2 RP 255-60]**.

Numerous witnesses explained why the decision to install the Onate statue in front of the County Office Complex raised extremely sensitive issues of cultural

² Mr. DeVargas did not seek to recall either of the other two commissioners because, inter alia, they were not involved in the acts of alleged malfeasance that Appellant engaged in with the North Central Solid Waste Authority and, as set forth below, Appellant led the move to re-stall the Onate statue. Additionally, Mr. DeVargas did not observe the same level of dissatisfaction among the constituents of the other two commissioners.

and social public policy³. Antonio DeVargas, deceased, the original Petitioner, was a life-long resident of Rio Arriba County. **[3-19-24 2-track 1 CD 0:40:08-40:18]**. Mr. DeVargas explained the reason for the long history of controversy and protests surrounding the statue, including the 2020 protest that resulted in the statue being taken down from its site in rural Alcalde, New Mexico and why the decision in 2023 was a matter of intense public concern and raised important issues of cultural and social public policy: “The history of Onate was a brutal one against indigenous people of New Mexico and led to the Pueblo Revolt that ended up costing hundreds of lives of the Hispanic residents...and was a direct result of the enslavement of the indigenous people and the brutality that was inflicted on them.”

³ Appellee does not, as Appellant has done, recite the statements made by the parties in the briefs they filed in the District Court. It is the evidence introduced at the hearing and whether that evidence supports the decision of the District Court that is relevant. Appellee’s Answer Brief focuses solely on the evidence in the record regarding the sole issue before this Court- whether the District Court’s decision to allow Appellee to proceed with the recall process because there is probable cause to believe Appellant violated the New Mexico Open Meetings Act is supported by the facts produced at the hearing and by the law. Significantly, Appellant’s Brief-in-Chief Summary omits the material testimony introduced by Appellee showing that the decision to re-install the Onate statue presented issues of cultural and social public policy. Perhaps more significantly, Appellant’s Summary omits the content of the documentary evidence that expressly proved that around the time of the event at issue, the Rio Arriba County Manager repeatedly wrote to different individuals and expressly stated that the decision to re-stall the statue was made by Appellant and the Rio Arriba County Commission. Mr. Maestas’ contemporaneous statements were admitted as exhibits the hearing and were relied on by the District Court in finding that Mr. Maestas’ March 2024 testimony that he, not the County Commission, made the decision was not credible. **[2 RP 258]**.

Mr. DeVargas explained the decision was very sensitive and controversial. He noted that there were strong views on both sides of the issue surrounding the Onate statue. **[3-19-24 2-track 1 CD 0:46:45-49:10]**.

Mr. DeVargas testified that unlike the rural Alcalde location where persons had to drive off the main highway to see it, all the County offices are at the Annex Building, in Espanola, New Mexico and that Rio Arriba residents, would, at one point or another have to go there. **[3-19-24 2-track 1 CD 0:50:10-52:01]**. He stated that because of the brutal history of Onate towards the Pueblo people, placing the Onate statue in front of the County Office Complex was “like poking a finger in the eyes of our neighbors at the Pueblo”. **[3-19-24 2-track 1 CD 0:52:10-52:50]**

Mr. DeVargas testified that the decision raised sensitive issues of social and cultural public policy and that because of the controversial nature of the proposed action and the use of public monies in furtherance of it, people should have been allowed to comment on it, one way or the other. **[3-19-24 2-track 1 CD 0:54:15-55:05]**

Nathana Bird is a life resident and member of the pueblo of Ohkay Owingeh. She has a Master’s Degree and the director of Tewa Women United. **[3-19-24 1-track 2 CD 0:45-1:57]**. Ms. Bird testified that Juan de Onate is a very controversial figure because of his history. She explained that the history of Onate

involved “historical trauma” in her community, that there was a “deep wound in our community” and that to place the Onate statue in front of the County Office Complex would result in anger and fear “that comes with ripping the bandage off a wound.” She testified that the decision whether to do so involved issues of social and cultural public policy. **[3-19-24 1-track 2 CD 0:5:19-6:20]**.

Ms. Bird further testified that this was not simply her viewpoint. She explained that the All-Pueblo Indian Governor’s Council had publicly posted a statement on their social media site that complained about the lack of public input and tribal involvement in the decision⁴. **[3-19-24 2-track 1 CD 0:17:11-19:35]**

Petitioner Luis Pena Jr. is a life-long resident of Rio Arriba County who currently resides in the Santa Clara Pueblo. He is employed as a Senior Application Analyst for Los Alamos County. **[3-19-24 1-track 2 CD 0:21:18-22:10]**. Mr. Pena called the County Annex Building the “apex” of the County because anyone who does business with any of the County offices has to go there and would have to “interact” with the statue if it was placed in front of the building. **3-19-24 1-track 2 CD 0:25:50]**.

He testified about the 2020 protests. He explained that there are extremely controversial public policy issues surrounding the Onate statue **[3-19-24 1-track 2**

⁴ The All-Pueblo Council of Governors consists of the governors and lieutenant governors of the nineteen Pueblos in New Mexico and the governor and lieutenant governor of Ysleta del Sur, a Pueblo located near El Paso, Texas.

CD 0:24:10] because of Onate despotic conduct, not only towards the surrounding Pueblos but to his own people. He noted the historical fact that Onate was tried and sentenced by the Spanish Crown and exiled from New Mexico for life. **[3-19-24 1-track 2 CD 0:24:15-25:00]**.

Mr. Pena further testified he attempted to get on the agenda at a County Commission meeting to discuss but was told that he would not be allowed to do so. **[3-19-24 1-track 2 CD 0:39:00- 41:19]**. He stated that he called Mr. Maestas to try and speak with him about the matter and that Mr. Maestas would not return his calls. He stated that at one point prior to the planned installation date, he contacted Mr. Maestas' office and was told by a secretary to speak with Appellant. He met with Appellant and presented him with a petition with 4000 signatures opposed to having the Onate statue on County property. He testified that Appellant told him something to the effect of "the train had left the station." **[3-19-24 1-track 2 CD 0:26:00-29:26]**.

Even Rio Arriba County Manager Jeremy Maestas, called as a witness by Appellee, supported Appellee's position on this point by expressing the other cultural viewpoint that Mr. DeVargas had alluded to. Mr. Maestas testified there were people who wanted the Onate statue put back up because they felt that because Onate's was a conquistador, the statue represented traditional Hispanic

culture in northern New Mexico. He said he understood there were people who were opposed to this.⁵ [3-19-24 3-track 1 CD 0:16:50-18:00].

Appellant presented *no evidence* to dispute the testimony that showed the decision to install the Onate statue at the County Office Complex involved sensitive matters of cultural and social policy. Moreover, Appellant did not dispute that the decision to take the Onate statue out of storage and install it in front of the County Office Complex was not done at an open, public meeting. Thus, the issue at the hearing was whether Appellant, along with the other two County Commissioners, made the decision.

A June 2020 newspaper article from the Santa Fe New Mexican was admitted into evidence. **Hearing Exhibit 5**. The article was discussed the public controversy, the historical background to the controversy and the opposition to the presence of the Onate statue in Alcalde. The articles discussed the Rio Arriba County's subsequent decision to take the Onate statue down. It quoted the statement the County Commission posted on its Facebook page where the Commission stated that then County Manager Tomas Campos had authorized the removal of the statue. The statement by the County Commission said it welcomed

⁵ Mr. Maestas further testified that \$2500 of public funds were spent on the project and that another \$1600 were to be spent had the statue been installed. [3-19-24 3-track 1 CD 0:29:45-30:00].

discussions from County residents about the future of the Onate statue. County Manager Campos told the reporter that *the monument's future will depend on a decision by the Rio Arriba County Commission*. **Id.** Neither County Manager Maestas or Sheriff Merrifield knew whether Mr. Campos had been directed by the Commission to have the statue removed. **[3-19-24 3-track 1 CD 0:56:50-57:50]; [3-19-24 3-track 1 CD 0:36:45-38:45].**

During the June 2022 Primary Election, Appellant had told the people of Rio Arriba County that, if elected, he intended to take the Onate statue out of storage and place it at the County Office Complex. Mr. DeVargas testified that he heard Respondent make that promise during a radio broadcast. **[3-19-24 2-track 1 CD 0:49:25-50:10)].**

On August 25, 2023, Mr. Maestas wrote Ryan Martinez of Albuquerque⁶ that the County Commission had “definitely” decided it wanted the Onate statue re-stalled and were looking at locating it at the Rio Arriba Annex Building. **Hearing Exhibit 6, p.1; [3-19-24 3-track 1 CD 0:20:15-23:15)].**

On August 29, 2023, Appellant announced at the County Commission meeting that the statue would be installed, that he wanted it done within the next thirty days and that the Commission “needed to have protection in place.” The

⁶ Ryan Martinez is the individual Appellant refers to at page 7 of her Brief-in-Chief who drove up on September 28, 2023, and shot and seriously wounded Jacob Johns at the proposed installation site.

minutes showed there was no discussion or vote on the matter. **Hearing Exhibit 8, Rio Arriba County Commission meeting minutes; [3-19-24 1-track 2 CD 0:35:40-0.36:00].**

Two weeks later, on September 14, 2023, County Manager Maestas sent an email to Rio Arriba County Sheriff Billy Merrifield about the Onate statue. Mr. Maestas told Sheriff Merrifield that he was reaching out on behalf of Appellant to request assistance from the Sheriff's Department at an event planned for September 28, 2023. Mr. Maestas told the sheriff that the *County Commission has made the decision* to install the Onate statue in front of the County Office Complex. **Hearing Exhibit 12, p. 1; [3-19-24 3-track 1 CD 0:36:45-38:45];**

On September 20, 2023, Mr. Maestas wrote Santa Fe New Mexican reporter Nicolas Gilmore and instructed Mr. Gilmore to contact Appellant and the other two commissioners regarding any inquiries about the re-installment of the Onate statue" because "*this is a decision they made.*" **[Hearing Exhibit 14; p. 2; 3-19-24 3-track 1 CD 0:31:24-32:45]).**

The following day, September 21, 2023, Mr. Maestas instructed KRQE reporter Natalie Wadas to speak with Appellant regarding any inquiries about the re-installment of the Onate statue. *Mr. Maestas told her that Appellant could give her "a better idea" how the decision was made than he could because "[T]his is a*

decision the Commission made. Hearing exhibit 15, p. 1; [3-19-24 3-track 1 CD 0:33:45-35:30].

In the face of ongoing protests against the installation that were occurring at the proposed site, in the late afternoon of September 26, 2023, Sheriff Merrifield was told by County Commissioner Bustos and County Manager Maestas that the County Commission had met and voted 2-1 to cancel the installation of the Onate statue. **Hearing Exhibit 12, p. 1.** Sheriff Merrifield testified that Appellant was the sole vote to go ahead and install the statue regardless of public sentiment. **[3-19-24 3-track 1 CD 0:4:57-6:15]).**

Mr. Maestas had been hired as County Manager shortly after Appellant took office. **[3-19-24 3-track 1 CD 0:1:15-1:35.]** He admitted the position had not been advertised and that not only did he not have to go through a normal hiring process before being hired but that he was hired by Appellant and the Commission without even submitting an application for the job. **[3-19-24 3-track 1 CD 0:2:00-3:37.]**

At the March 19, 2024, hearing Mr. Maestas now claimed that he, not Appellant and the County Commission, the County Commission. **[3-19-24 3-track 1 CD 0:23:16-24:04].** Significantly, Appellant did not take the witness stand to corroborate this testimony or to state that the content of these repeated

contemporaneous statements by their County Manager were incorrect. Nor did he call either of the other two Commissioners to do so.

Appellant raised the following arguments in his Closing Argument brief as the basis for dismissal of the Petition:

1. “Petitioner failed to establish Commissioner Naranjo took any action regarding replacing the Onate statue, much less any action which violated the Open Meetings Act. **[1 RP 222-24]**.”
2. Petitioner also failed to demonstrate the decision to replace the statue was one which required a Commission decision or action. *While the issue of whether the Onate statue should be replaced might be an issue of public concern or debate, the disposition of a piece of County property is not something that requires the County Commission to act.* **[1 RP 223-24]**.
3. That the 2020 decision to take down the Onate statue did not have County Commission involvement and that Petitioner did not complain the County Manager made that Mr. Maestas’ made the decision to cancel the re-installation plan or that he had the authority to do so. **[1 RP 223-24]**.

On May 19, 2024, the District Court entered its Order on this matter. **[2 RP 255-260]**. The District Court found there was probable cause to believe that Appellant had violated the New Mexico Open Meetings Act and that the recall process could proceed. **[2 RP 257]**. The District Court found that “the decision to place a controversial statue on display in a public location” was “a matter of public policy and thus implicated the Open Meetings Act.” **[2 RP 257]**. The District Court specifically noted the undisputed evidence that the Onate statue was removed from public display in 2020 and placed in storage “amid public

controversy and significant media attention” and that the decision to reinstall the statue, once known to the public, “was highly controversial and led to protests both in favor of and opposed to the decision.” **[2 RP 258]**.

The District Court rejected Appellant’s assertion that an act involving the use of County property cannot be a matter of public policy and that the Open Meetings Act does not apply to decisions involving the use of public property. The District Court held that it is [T]he nature of the act is what determines whether a decision is subject to the Open Meetings Act” and that the controversial issue of the re-installment of the Onate statue raised a matter of public policy. **[2 RP 258]**.

The District Court relied on the repeated contemporaneous statements made by County Manager Maestas that the County Commission made the decision to reinstall the statue and rejected Mr. Maestas’ hearing testimony, given seven months after his contemporaneous statements, that he and not Appellant and the County Commission made the decision at issue: “The Court finds the testimony lacking credibility and contrary to Mr. Maestas’ contemporary communications.” **[2 RP 258-259]**. The District Court also noted the evidence showing that Appellant wanted the statue reinstalled and that, even in the face of the protests, he voted at a meeting of the County Commission where two of the Commissioners voted to cancel the installation, to go ahead with it regardless of the public controversy. **[2 RP 258-259]**.

The District Court concluded that the evidence demonstrated there was probable cause that Appellant committed malfeasance or misfeasance by making the decision or allowing the decision to be outside an open public meeting. **[2 RP 263]**.

The District Court also concluded that the evidence, including the evidence cited, above supported a finding that Appellant committed malfeasance or misfeasance because the conduct was done with the improper motive of shielding a controversial decision from public scrutiny. **[2 RP 263]**.

Appellant filed his Notice of Appeal on May 22, 2024. **[2 RP 263]**.

Appellant's Certificate of counsel was filed shortly thereafter. **[RP 278-288]**

STANDARD OF REVIEW.

This is an appeal under 12-603 NMRA (1978). This rule governs the following:

(1) appeals taken under Section 1-8-18 NMSA 1978, Section 1-8-35 NMSA (1978), Section 1-14-5 NMSA, Section 22-7-9.1 NMSA and Section 22-7-12 NMSA (1978).

and

(2) appeals from final orders of the district court in election recall proceedings involving elected county officials initiated under Article X, Section 9 of the New Mexico Constitution.

The same provisions of this Rule apply to all such appeals. Appeals from district court decisions involving recall petitions for county officials and appeals from district court decisions involving recall petitions for school board members are

both analyzed under Rule 1-096.1 NMRA (1978) and an appeal from such district court decision is governed by the provisions of Rule 12-603 NMRA.

The finding of the district court will be reversed only if it is not based upon substantial evidence. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” Under this standard, this Court resolves all factual disputes and indulges all reasonable inferences in favor of the party who prevailed in the trial court. *Ruiz v Giron*, 2008-NMSC-063 ¶13, 145 NM 280 (citations omitted). (An appeal under Rule 12-603(A)(1) NMRA) of a case brought under Section 1-8-35 NMSA (1978.)

Do%25na Ana Clerk v Martinez, 2005 NMSC 037 ¶6, 138 NM 575 was an appeal of a decision in a case brought under Section 22-7-1 NMSA (1978). In affirming the district court decision, this Court held the district court had found that sufficient facts present to support allow the recall process to continue against four of the five school board members for alleged violation of the Open Meetings Act. The Supreme Court reviewed the evidence and found the district court had “a sufficient factual basis to support the charges that the Open Meetings Act had been violated.” While not explicitly stating the standard of review, this Court clearly reviewed the district court proceedings under the substantial evidence test.

Appellant does not dispute that there is substantial evidence in the record to support the District Court decision. Instead, Appellant seeks to have this Court

abandon the substantial evidence standard and apply and review the facts and the inferences that may reasonable be drawn from those facts de novo, claiming, without any legal support that “this is a matter of first impression’ and therefore the appropriate standard of review is de novo. **Brief-in-Chief, p.23.** This argument is without merit. As the Pennsylvania Supreme Court has stated: “A case of first impression is one that presents an “entirely novel question of law,” which “cannot be governed by any existing precedent.” BLACK’S LAW DICTIONARY 635 (6th ed.1990). *Fiore v White*, 562 Pa. 634,645, 757 A.2d. 842 (Pa. Sup. Ct. 2000). That is not the case here. The issue at bar was squarely decided almost twenty years ago when this Court ruled that the recall process of a local official may proceed when substantial evidence demonstrates probable cause that an official acted in violation of the Open Meetings Act. *Do%25na Ana Clerk v Martinez*, 2005 NMSC 037 ¶6, 138 NM 575.

Appellant further asserts that the substantial evidence test should be abandoned for his appeal because he alleges that the case “involves a substantial amount of statutory interpretation regarding the provisions of the Recall Act.” **Brief-in-Chief, p. 24.** However, Appellant did not raise any arguments below regarding the interpretation of any provisions of the Recall Act. Nor does the Brief-in-Chief does not demonstrate, or even discuss, how the District Court failed to properly interpret any provisions of the Recall Act or what “substantial amount

of statutory interpretation” was required. Appellant’s bare, unsupported effort to escape the substantial evidence standard of review is without merit.

Appellant further argues that this Court is required to review the entire issue of probable cause de novo, citing *O’Brien v. Behles*, 2020-NMCA-032, ¶¶23, 464 P.3d 1097. **Brief-in-Chief, p. 24.** However, this case does not support Appellant’s claim. An appellate court required to view all facts in light most favorable to the non-movant. In *O’Brien, supra*, the Court of Appeals stated that “if factual issues relevant to the probable cause analysis are not in dispute, the court makes its determination...However, if there are material disputes of fact relevant to the existence of probable cause, the jury must resolve them...” *Id. at* §§39-42(citations omitted). In the instant case, there was no jury and there was a dispute of material fact regarding whether Appellant and the County Commission made the decision or whether the county manager acted on his own. The District Court heard the evidence and resolved the conflicting evidence in Appellee’s favor. Again, there is no basis for a de novo review of this appeal.

- 1. There was substantial evidence to support the District Court’s conclusion that there was probable cause to believe the decision of Appellant Naranjo and other County Commissioners to bring the Onate statue from storage and place it in the front of the Rio Arriba County Office Complex in Espanola, New Mexico, violated The New Mexico Open Meetings Act.**

An election county official is subject to recall by the voters of the county for acts of malfeasance or misfeasance in office. Article 10, Section 9(A) of the New Mexico

Constitution. “Malfeasance” means wrongful conduct that affects, interrupts or interferes with the performance of official duties; provided that if the act is discretionary, the act was performed with an improper or corrupt motive.” Section 1-2-25(F) NMSA (1978). “Misfeasance” means performing a legal act in an improper or illegal manner and the conduct evinces an improper or corrupt motive” Section 1-2-25(G) NMSA (1978).

The New Mexico Open Meetings Act, Section 10-15-1 (A) NMSA (1978) states:

... it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. *The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.* (emphasis added).

Subsection (B) of that Act, inter alia, *prohibits the formulation of public policy and the discussing of public business or taking any action within the authority of the board of commission by a quorum of any public board or commission or other policymaking body of any county outside of an open, public meeting.* Subsections (C) and (D) set out the requirements for notice of meetings and the publication of an agenda. Compliance is mandatory, not discretionary.

“The purpose of the [OMA] is to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret.”

Kleinberg v. Bd. of Educ., 1988-NMCA-014, ¶ 18, 107 N.M. 38 (citations and

quotation marks omitted). A public body may not evade its obligations under the OMA by delegating decisions to others. *See Benevidez v Bernalillo Cnty. Bd. Of Comm'rs*, 2021-NMCA-029 ¶51, 493 P.3d 1024. A violation of the Act constitutes malfeasance and is a sufficient basis to support a recall petition. *Do%25na Ana County Clerk v Martinez*, 2005-NMSC-037, ¶¶5,6, 138 NM 575.

A. It Was Undisputed that the decision to re-install the Onate statue raised highly controversial and sensitive issues of cultural and social public policy.

“[P]ublic policy concerns what is right and just and what affects the citizens of the [s]tate collectively...” *Palmateer v International Harvester*, 421 N.E.2d. 876 at 878-79, 85 Ill.2d 124 (Ill. Supreme Court 1981). *Black's Law Dictionary* 1426 (10th ed. 2014) defines “public policy” as: “[t]he collective rules, principles, or approaches to problems that affect the commonwealth or [especially] promote the general good; [specifically], principles and standards regarded by the [L]egislature or by the courts as being of fundamental concern to the state and the whole of society.” The testimony and exhibits at the hearing demonstrated that the decision at issue surrounding the Onate statue was clearly one that was “of fundamental concern” to and impacted the residents of Rio Arriba County.

Mr. DeVargas explained the history of the controversy and protests over the placement of the Onate statue on County property, including the protests that occurred during 2020 that led to the statue being taken down from its rural Alcalde,

New Mexico site. He explained the reasons behind the long history of controversy over the statue prior to its being removed from its site in rural Alcalde, New Mexico: “The history of Onate was a brutal one against indigenous people of New Mexico and led to the Pueblo Revolt that ended up costing hundreds of lives of the Hispanic residents... and was a direct result of the enslavement of the indigenous people and the brutality that was inflicted on them.” the decision was very sensitive and controversial and there were strong views on both sides of the issue. **[3-19-24 2-track 1 CD 0:46:45-49:10]. Hearing exhibit 5** exemplified some of the media attention surrounding those protests.⁷

Mr. DeVargas testified that unlike the rural Alcalde location where persons had to drive off the main highway to see it, all the County offices are at the Annex Building, in Espanola, New Mexico and that Rio Arriba residents, would, at one point or another have to go there. **[3-19-24 2-track 1 CD 0:50:10-52:01]**. He stated that because of the brutal history of Onate towards the Pueblo people, placing the Onate statue in front of the County Office Complex was “like poking a finger in the eyes of our neighbors at the Pueblo”. **[3-19-24 2-track 1 CD 0:52:10-52:50]** He testified that the decision raised sensitive issues of social and cultural public policy and that because of the controversial nature of the proposed action

⁷ Exhibit 5 was not an outlier. Even a cursory internet search shows numerous media reports about this event including from national news media such as the New York Times’ June 15, 2020 edition.

and the use of public monies in furtherance of it, people should have been allowed to comment on it, one way or the other. **[3-19-24 2-track 1 CD 0:54:15-55:05]**.

Mr. DeVargas testified that prior to the 2022 primary election, he heard Appellant on a radio program tell listeners that if elected as commissioner, he intended to re-install the Onate statue on county property. **[3-19-24 2-track 1 CD 0:49:28-50:10]**.

Nathana Bird, a life resident and member of the pueblo of Ohkay Owingeh, **[3-19-24 1-track 2 CD 0:45-1:57]**. Ms. Bird testified that Onate is a very controversial figure because of his history. She explained that the history of Onate involved “historical trauma” in her community. She said that there was a “deep wound in our community” and that to place the Onate statue in front of the County Office Complex would result in the anger and fear “that comes with ripping the bandage off a wound.” She testified that the decision to do so involved issues of social and cultural public policy. **[3-19-24 1-track 2 CD 0:5:19-6:20:00]**.

Ms. Bird further testified that this was not simply her viewpoint. She explained that the All-Pueblo Indian Governor’s Council had publicly posted a statement on their social media site that complained about the lack of public input and tribal involvement in the decision. **[3-19-24 2-track 1 CD 0:17:11-19:35]**.

Petitioner Luis Pena Jr., a life-long resident of Rio Arriba County who currently resides in the Santa Clara Pueblo. **[3-19-24 1-track 2 CD 0:21:18-**

22:10]. He testified about the 2020 protests. He explained that there are extremely controversial public policy issues surrounding the Onate statue **[3-19-24 1-track 2 CD 0:24:10]** because of Onate despotic conduct, not only to the surrounding Pueblos but to his own people. He noted the historical fact that Onate was tried and sentenced by the Spanish Crown and exiled from New Mexico for life. **[3-19-24 1-track 2 CD 0:24:15-25:00]**.

Mr. Pena testified that he had attempted to get on the agenda for a commission meeting to discuss this issue but was told he would not be allowed to. **[3-19-24 1-track 2 CD 0:39:00 41:19]**. He testified that he met with Appellant prior to the planned installation date of September 27, 2023, and presented him with a petition with 4000 signatures opposing having the Onate statue on County property and was told “the train had left the station” and there would be no further discussion about it. **[3-19-24 1-track 2 CD 0:26:00-29:26]**.

Mr. Pena described the County Annex Building as the “apex” of the County because anyone who does business with any of the County offices has to go there and would have to “interact” with the statue if it was placed in front of the building. **3-19-24 1-track 2 CD 0:25:50]**.

Appellant presented *no evidence* to dispute the testimony that showed the decision to install the Onate statue at the County Office Complex involved

sensitive matters of cultural and social policy⁸. Nor did he argue this in his closing argument. Rather, Appellant argued that this issue was immaterial because the County Commission did not make the decision at issue and the use of county property does not require the Commission to act. [1 RP 222-24].

Rio Arriba County Manager Jeremy Maestas was called as a witness by Appellee, supported Appellee's position that this issue involved a matter of cultural and social public policy. setting forth the other side of the issue, stating there were people who wanted the Onate statue put back up because they felt as a conquistador, his statue represented traditional Hispanic culture in northern New Mexico. He recognized that there were people who were opposed to this. [3-19-24 3-track 1 CD 0:16:50-18:00]. Mr. Maestas further testified that \$2500 of public funds were spent on the project and that another \$1600 were to be spent had the statue been installed. [3-19-24 3-track 1 CD 0:29:45-30:00].

B. The District Court's Finding that Appellant and the other County Commissioners made the Decision is supported by substantial evidence.

It was undisputed that: a) the decision to take the Onate statue out of storage and place it in front of the County Office Complex was not made at an open public meeting; b) that there was no agenda or notice published announcing that a

⁸ Indeed, Appellant's Brief-in-Chief, p. 6, recognizes that by stating that Onate "had a complex and controversial relationship and history with New Mexico's native and indigenous peoples including the Ohkay Owingeh people."

discussion and c) that there was no vote on the issue held at an open commission meeting. There was merely an announcement by Respondent at the end of the August 29, 2023, that the decision had been made. The issue in this case is whether the County Commission made the decision.

A plethora contemporaneous evidence showed the decision to take the Onate statue out of storage and place it in front of the County Office Complex was made by the County Commission. Indeed, all the contemporaneous evidence showed this. During June 2020, then County Manager Campos stated that the County Commission would decide the future of the Onate statue. **Hearing Exhibit 5.** The undisputed testimony showed that during his 2022 primary election campaign, Appellant had publicly stated his intention to have the statue re-installed. **[3-19-24 2-track 1 CD 0:49:28-50:10].**

The exhibits admitted at the hearing demonstrate that at the time the issue was occurring County Manager Maestas wrote *multiple emails* to other county officials and news media personnel specifically stating that the Rio Arriba County Commission made the decision. On September 14, 2023, Mr. Maestas told Rio Arriba Sheriff Merrifield that: “*The Rio Arriba County Commission has made the decision to relocate the statue of ‘Don Juan de Onate’...The statue will be relocated to the front of the County Annex Building.*” **Exhibit. 12.** Hearing Recognizing the controversial nature of the decision, the County sought police

protection for the installation ceremony. On September 20, 2023, Mr. Maestas told reporter Nick Gilmore: *“I will refer all questions to the County Commissioners as this was a decision they made. Below is their contact information.”* *Hearing Exhibit 14.* On September 21, 2023, Mr. Maestas instructed KRQE News: *“I would refer you to the Chairman of the Commission, Alex Naranjo to answer these questions. This was a decision the Commissioners made and I think he could give you better answers on how this move was decided.”* **Hearing Exhibit 15.**⁹

The sole evidence offered to dispute the contemporaneous evidence was the testimony of Mr. Maestas, that he and not the Commission made the decision. **[3-19-24 3-track 1 CD 0:19:55-20:05]; [3-19-24 3-track 1 CD 0:23:16-24:04].**

There was sufficient evidence to support the District Court finding that his testimony was not credible. *All the documents Mr. Maestas created prior to the September 28, 2023 shooting*, unambiguously stated that the Commissioners made the decision. **Hearing exhibits 12, 14 and 15.** His testimony was unsupported by any document. The District Court was able to observe his demeanor on the witness stand as he attempted to explain away his contemporaneous prior, conflicting

⁹ In fact, there was evidence showing that by August 25, 2023, the County Commission had “definitely” decided it wanted the Onate statue re-stalled and that they “are currently looking at locating him at the Rio Arriba Annex Building” and Mr. Maestas so informed Ryan Martinez on that day by email in response to Mr. Martinez’s request for information about re-stalling the Onate statue. **Hearing Exhibit 6, p.1; [3-19-24 3-track 1 CD 0:20:15-23:15]).**

statements. The District Court was not required to believe him. Indeed, as this Court has noted in a different context: “the passage of time, however, affords the declarant an opportunity to alter or misrepresent his perception of the event. *State v Sisneros*, 2013 -NMSC- 049 ¶10314 P.3d 665.

Moreover, the failure of Appellant to testify and corroborate Mr. Maestas’ current version of events was telling. Rather than face cross-examination, Appellant chose not to testify and not to call the other county commissioners to testify and to leave Mr. Maestas’ story uncorroborated.

Additionally, the evidence surrounding his hiring strongly suggested that Mr. Maestas was a biased witness who indebted to Appellant and the other commissioners for his job and had a motive to change his story about who made the decision once the issue ended up before a court. He was hired as County Manager after Appellant took office without even submitting an application, no less going through a normal hiring process. It is reasonable to infer that he is indebted to Appellant. **[3-19-24 3-track 1 CD 0:2:00-3:37.]**

The District Court heard the testimony, reviewed the exhibits and observed Mr. Maestas’ demeanor and found that Mr. Maestas’ hearing testimony was not credible **[2 RP 258-259]**. On appeal, the appellate court defers to the district court’s determinations regarding credibility of a witness, including the evaluation of witness demeanor. “As a reviewing court we do not sit as a trier of fact; the

district court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses.” An appellate court is “unable to view the witness's demeanor or manner of speech, and therefore [is] not in a position to evaluate many of the aspects of witness credibility that the trier of fact may evaluate.” *State v Martinez*, 2018-NMSC-007 ¶12, 410 P.3d 186 (**citations omitted**). If the district court does not make explicit credibility findings, “we will indulge in all reasonable presumptions in support of the district court's ruling.” *Id. at* ¶13. The district court’s determination on Mr. Maestas lack of credibility was supported by substantial evidence and it is hornbook law that this is not an issue that can be evaluated by an appellate court.

Appellant further argues that the District Court did not address his unsupported assertion that actions involving the use of county property such as the Onate statue, do not require action by the county commission. **Brief-in-Chief p. 25.** Because the District Court found that the Rio Arriba County Commission had, as Mr. Maestas repeatedly stated in September 2023, made the decision to take the statue out of storage and install it in front of the County Office Complex and that this decision involved a matter of public policy, there was no need for the District Court to address Appellant’s assertion that the County Manager had the discretion to do whatever he chose with County property.

However, the District Court did, in fact, address that issue and correctly held that “the nature of the act is what determines whether a decision is subject to the OMA. *Benavidez v Bernalillo Cnty. Bd. Of Comm’rs*, 2021-NMCA-029, ¶ 51, 493 P.3d 1024. The nature of the act here was the decision to place a controversial statue on display in a public location. This decision was a matter of public policy and thus implicated the OMA.” **[2 RP 258]**.¹⁰

Moreover, under state law, the power to make decisions regarding property belonging to the county is vested in the board of county commissioners, §4-38-13 NMSA (1978). A county manager is employed by the board of county commissioners and serves, inter alia, a property custodian empowered to aid and assist the board in the board’s exercise of its duties. §4-38-19(B) NMSA (1978). Under Appellant’s theory, a county manager could decide on the use or disposition of any and all county property on his or her own and a county manager would be

¹⁰ The decision on whether to install statues of controversial historical figures has been recognized by other entities as involving a matter of public policy that requires the transparency of an open public meeting. For example, on May 30, 2024, the Santa Fe City Council held a public meeting to discuss the issue of whether to re-install statues of Don Diego DeVargas, who crushed the Pueblo Revolt and led the reconquest of New Mexico and of the Pueblo Revolt Runners. Citizens were able to make their opinions known. On June 12, 2024, the City Council, after working with Pueblo leaders, voted at an open public meeting to display both statues at the Convention Center.

free to sell off the county office complex without the board of county commissioners' decision to do so. State law makes it clear that this is not the law and that the board of county commissioners, not a county manager, is empowered to make decisions regarding the use of county property. Moreover, Mr. Maestas's effort to portray the decision about the placement of the highly controversial and culturally sensitive Onate statue decision like an administrative decision to install a swing set on a playground was not credible and, was, in fact, insulting.

As discussed above, the District Court found that the decision to place the controversial statue on display in a public location was a matter of public policy and thus implicated the Open Meetings Act, and that evidence showed that Respondent and the County Commission had made the decision outside of an open, public meeting. The District Court further found that "probable cause supports the allegation that Respondent's conduct was "done with the improper motive of shielding a controversial decision from public scrutiny." [2 RP 258].

Although the duty to comply with the Open Meetings Act is mandatory, the District Court went ahead to address another issue - the issue of Respondent's motive and intent in the decision to avoid holding an open meeting to allow the public to discuss the issue of the re-installation of the Onate statue in front of the County Office Complex where the commissioners would have to vote after such discussion.

As used in the New Mexico Recall Act, “malfeasance” that will support a recall includes actions which are discretionary when the wrongful conduct effects the performance of an official duties and “was performed with an improper or corrupt motive.” Section 1-25-2(F) NMSA (1978).

Appellant incorrectly argues that Appellee presented no evidence during the evidentiary hearing regarding Appellant Naranjo’s motives. The District Court appears to have simply assumed the decision not to take County Commission action related to the statue was one that was based on an improper motive to avoid public scrutiny, when the weight of the evidence suggested that decision was in full accordance with past and subsequent practice related to the statue. **Brief-in-Chief, p. 27-28.**

In fact, there was substantial evidence, both direct and indirect, that supported this finding of the District Court. It is well established that a finding that a party’s explanation for an action is unworthy of credence is one form of circumstantial evidence that allows the trier of fact to reasonably infer from the falsity of the explanation that an improper motive was the reason for the act at issue. *See, e.g. Reeves v Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097, 2108-2109, 530 U.S. 133 (2000).

In the instant case there was direct evidence in the form of contemporaneous statements made by the County Manager for Appellant and the County

Commission that Appellant made the decision at issue without having an open meeting for the improper purpose of avoiding a meeting where those opposed to a project he had been planning since 2022 would have the opportunity to be heard. There was substantial indirect evidence to support the District Court's finding regarding motive and intent including: a) Appellate was well aware of the cultural and social policies implicated in the decision and stated at the August 29, 2023 Commission meeting that they "needed to have protection in place." **Hearing Exhibit 8, Rio Arriba County Commission meeting minutes**; b) Appellant instructed Mr. Maestas to contact the Sheriff for law enforcement assistance at the planned installation which Mr. Maestas did on September 14, 2023, telling Sheriff Merrifield that Appellant had asked him to reach out to the Sheriff because "we have had some individuals who are sharing their displeasure with this decision and the Commission wants to ensure everything goes smoothly during this event"; c) the inconsistent and conflicting hearing testimony of Mr. Maestas that the District Court reasonably found was not credible and d) the testimony of Mr. Pena he had attempted to get on the agenda at a County Commission meeting to discuss but was told that he would not be allowed to do so. **[3-19-24 1-track 2 CD 0:39:00-41:19]**.

Additionally, Appellant's assertion that "the weight of the evidence suggested that decision was in full accordance with past and subsequent practice related to the statue" **Brief-in-Chief, p. 27-28**, is incorrect. There was no

testimony or evidence at the hearing that the 2020 decision to take the Onate statue down was not taken down pursuant to the instruction of the County Commission. Rather, the article from The New Mexican simply stated that then County Manager Campos had authorized the workers to take it down. Both Mr. Maestas and Sheriff Merrifield testified they did not know if the County Commission had instructed Mr. Campos to take the action. **[3-19-24 3-track 1 CD 0:56:50-57:50]; [3-19-24 3-track 1 CD 0:36:45-38:45]**. Moreover, the County Commission posted on its website that it welcome community involvement in deciding what to do with the statue and Mr. Campos stated that any decision on the future of the statue would be made by the County Commission. **Hearing Exhibit 5.**

Additionally, contrary to Appellant's assertion, the evidence showed that the decision to cancel the installation of the statue was, in fact, made by at a meeting of the County Commission on September 26, 2023, with Appellant casting the sole vote against doing so. **Hearing Exhibit 16, [3-19-24 3-track 1 CD 0:4:57-6:15]**).

CONCLUSION AND REQUESTED RELIEF.

Few issues have raised more sensitive issues of cultural and social public policy over the past few years than those surrounding the installation and/or the removal of statues of certain historical figures. Don Juan de Onate, because of his brutal conduct toward the Pueblo people in New Mexico, has been such a figure. There was substantial evidence that the decision to reinstall his statue in front of

the County Office Complex involved a matter of cultural and social public policy. There was substantial evidence that Appellant, acting in concert with the other County Commissioners made this decision and made it outside of an open, public meeting. The District Court's decision is supported by the evidence and the law. Respondent/Appellant's arguments are not well-taken and this Court should affirm the district court.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of September 2024, the foregoing pleading was filed electronically through the Odyssey File and Serve system and caused all parties or counsel of record to be served by electronic means.

/s/ Richard Rosenstock