



IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

LUIS PENA, JR.,

Petitioner-Appellee,

v.

No.: S-1-SC-40411

Dist. Ct. No.: D-117-CV-2023-00373

Rio Arriba County

RIO ARRIBA COUNTY COMMISSIONER

ALEX NARANJO,

Respondent-Appellant.

RESPONDENT-APPELLANT'S BRIEF-IN-CHIEF

Appeal from the First Judicial District Court

The Honorable Judge Marie C. Ward

(sitting by designation)

D-117-CV-2023-00373

Respectfully submitted,

SERPE ANDREWS, PLLC

Cody R. Rogers

Blade M. Allen

2540 El Paseo Rd., Ste D

Las Cruces, NM 88001

Telephone: (575) 288-1453

E: crogers@serpeandrews.com

E: ballen@serpeandrews.com

*Attorneys for Respondent-
Appellant Rio Arriba County
Commissioner Alex Naranjo*

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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, which were provided via Compact Disc, are made pursuant to the rules set forth in the Appendix to Rule 23-112 NMRA. 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 LG SP80NB80 Slim Portable DVD Writer.

SERPE ANDREWS, PLLC

/s/ Cody R. Rogers

Cody R. Rogers

Juan de Onate, a Spanish conquistador, was the colonial governor of what is now New Mexico from 1598 to 1606. [1 RP 73]. Onate had a complex and controversial relationship and history with New Mexico's native and indigenous peoples including the Ohkay Owingeh people. [1 RP 73-74]. Nonetheless, a statue was erected in the 1990s in Rio Arriba County to commemorate Onate's time as governor. [1 RP 73-74]. Although controversial, the statue remained in public view in Rio Arriba County for about thirty (30) years. [1 RP 73-74]. In June 2020, the Rio Arriba County Manager decided to remove the Onate statue from public view and place it in storage. [1 RP 130].

Alex Naranjo, Respondent-Appellant, began his current term as County Commissioner for Rio Arriba County on January 2, 2023. [1 RP 71]. Shortly after taking office, Mr. Naranjo began receiving comments from his constituents in support of reinstalling the Onate statue. [1 RP 130]. In May 2023, Mr. Naranjo had a conversation with the Rio Arriba County Manager Jeremy Maestas expressing his constituents' interest in replacing the statue. [1 RP 130]. In July 2023, County Manager Maestas attended the Fiesta Del Valle de Espanola where he also heard constituents express support for reinstalling the Onate statue. [1 RP 130]. After attending the Fiestas and without the Rio Arriba County Commissioners' input, County Manager Maestas decided to reinstall the Onate statue in front of the Rio Arriba County Annex building. [1 RP 130-31]. The statue was set to be reinstalled

on September 27, 2023, however, because of a peaceful protest, the reinstallation was cancelled. [1 RP 131]. Some of the protestors decided to stay at the relocation site overnight and into the next morning to ensure the statue was not reinstalled. [1 RP 131]. That next morning, Ryan Martinez drove from Albuquerque to the reinstallation site to see the reinstalled Onate statue. [1 RP 78]. After he saw the statue was not reinstalled, Mr. Martinez confronted the protestors and ultimately fired a gun into the crowd. [1 RP 78]. The Onate statue was never reinstalled. [1 RP 132].

SUMMARY OF PROCEEDINGS

Petitioner Antonio DeVargas filed his original Complaint, *pro se*, asking the First Judicial District Court to circulate a Petition to Recall Rio Arriba County Commissioner Alex Naranjo on October 11, 2023, based on Article X, Section 9 of the New Mexico Constitution. [1 RP 1-2]. Petitioner’s Complaint included five (5) allegations against Respondent Naranjo. [1 RP 1 ¶¶ 1-5]. First, petitioner claimed Respondent committed perjury while testifying during a Special Rio Arriba Grand Jury investigation into the North Central Solid Waste Authority (“NCSWA”). [1 RP 1 ¶ 1]. The second and fifth allegations against Respondent claim he violated the Open Meetings Act (“OMA”) by making a decision outside of an open, public, meeting to relocate the Juan de Onate statue at the Rio Arriba County Office Complex and, that decision, constituted gross negligence because Respondent knew

or should have known it was a highly controversial issue which could lead to a person becoming seriously injured. [1 RP 1 ¶¶ 2, 5]. The third and fourth allegations also claim Respondent Naranjo violated the OMA by deciding to hire a new County Manager outside of a County Commission Meeting and without allowing other potential applicants to apply for the position. [1 RP 1 ¶¶ 3-4].

Since this is an election recall case from the First Judicial District, District Judges Jason Lidyard and T. Glenn Ellington, based on Supreme Court Order 20-8110, were forced to recuse. [1 RP 11]. Accordingly, the District Court Clerk of Rio Arriba County Kathleen Vigil filed a Certificate with the Supreme Court Chief Justice for Judge Designation on October 20, 2023. [1 RP 11].

On November 17, 2023, Chief Justice C. Shannon Bacon designated the Honorable Benjamin Chavez of the Second Judicial District Court to preside over this case. [1 RP 18-19].

Respondent Naranjo filed his Answer to petitioner's Complaint on December 21, 2023. [1 RP 22-23]. In his Answer, Respondent denied each of petitioner's allegations and provided four affirmative defenses including: (1) petitioner failed to state sufficient factual allegations to show Respondent Naranjo committed any malfeasance or misfeasance in his official capacity; (2) petitioner failed to state sufficient factual allegations to show Respondent committed any violation of his oath of office; (3) petitioner failed to initiate district court review by failing to attach

a copy of the Proposed Recall Petition to his Complaint; and (4) no probable cause exists as grounds for recall. **[1 RP 22-23]**. Respondent cited Rule 1-096 1(C)(1) NMRA in support of his first and second affirmative defenses and Rule 1-096 1(B)(1) NMRA and Article X, Section 9 of the New Mexico Constitution for affirmative defenses three and four, respectively. **[1 RP 22-23]**.

After securing counsel, petitioner filed an Unopposed Motion for Leave to File an Amended Complaint on January 10, 2024. **[1 RP 26-32]**.

The Honorable Benjamin Chavez retired on January 20, 2024, and Chief Justice C. Shannon Bacon designated the Honorable Marie C. Ward of the Second Judicial District Court to preside over this case on January 26, 2024. **[1 RP 35-36]**.

Judge Ward granted petitioner's Motion for Leave to File an Amended Complaint on January 31, 2024, and petitioner filed his Amended Complaint on February 5, 2024. **[1 RP 37-42]**. The Amended Complaint included all five (5) of the previous allegations against Respondent Naranjo and included a copy of the Proposed Recall Petition. **[1 RP 39-42]**.

Respondent Naranjo filed his Answer to petitioner's Amended Complaint on February 19, 2024. **[1 RP 48-49]**. Respondent's Answer again denied all the allegations against him and provided the same affirmative defenses included in his previous Answer minus the third defense stating petitioner failed to attach a Proposed Recall Petition to his Complaint. **[1 RP 48-49]**.

Judge Ward scheduled an evidentiary hearing for March 19, 2024, to determine whether probable cause exists to support petitioner’s allegations. [1 RP 54].

In anticipation of the evidentiary hearing, petitioner filed his Memorandum on March 14, 2024. [1 RP 70-102]. In his Memorandum, petitioner provided historical facts surrounding the Juan de Onate statue in Rio Arriba County and regarding Respondent’s history as a politician and public servant. [1 RP 70-71]. Petitioner made three arguments in his Memorandum. [1 RP 70-79]. First, petitioner argued that probable cause existed to believe Respondent Naranjo committed malfeasance by committing perjury before the Special Rio Arriba County Grand Jury¹ investigating the NCSWA in spring 2023. [1 RP 71-73]. Petitioner cited the Grand Jury Report’s finding Respondent was guilty of malfeasance by his acts and omissions as an NCSWA Board member and finding probable cause to believe he lied during his testimony before the Grand Jury.² [1 RP 72]. Petitioner

¹ It is worth noting the Special Grand Jury was convened through the unusual avenue of a citizen petition filed by petitioner in this case, to investigate issues petitioner chose. *See* N.M. Const. art. II, Section 14; Rule 5-302 NMRA. This requires only the signatures of 2% of the registered voters of a county, or signatures from 200 registered voters, whichever is greater.

² The Special Grand Jury recommended that Respondent (and others) be indicted for these purported crimes; and the First Judicial District Attorney filed an indictment against Respondent on July 20, 2023, charging him with one count of perjury. The indictment was dismissed on December 19, 2023, because the special district attorney determined the Grand Jury exceeded their authority. [1 RP 119-21].

alleged that because perjury constitutes malfeasance, he could move forward with the recall petition. [1 RP 71-73]. Next, petitioner argued that probable cause existed to believe Respondent Naranjo made the decision to reinstall the Juan de Onate statue in violation of the Open Meetings Act. [1 RP 73-78]. In support, petitioner argued the Open Meetings Act requires public officials to hold open meetings on matters of public policy, that reinstalling the Onate statue was a matter of public policy because of the controversy surrounding Juan de Onate and the statues erected in his honor, and Respondent made the decision to reinstall the statue in Rio Arriba County. [1 RP 73-78]. Finally, petitioner argued that probable cause existed to believe Respondent Naranjo committed malfeasance or misfeasance in violating his oath of office. [1 RP 78-79]. To support his argument, petitioner again argued Respondent made the decision to reinstall the Onate statue which is a matter of public policy to be considered in an open and public meeting and in violating the Open Meetings Act Respondent violated his oath of office which constitutes either malfeasance or misfeasance. [1 RP 78-79].

In response to petitioner's Memorandum, Respondent Naranjo filed his own Memorandum of Law on March 19, 2024. [1 RP 125-206]. In his Memorandum of Law, Respondent made three arguments. [1 RP 128-34]. First, Respondent argued that neither his conduct as a Board Member of NCSWA nor testimony during the Special Rio Arriba County Grand Jury investigation could be characterized as

malfeasance or misfeasance. [1 RP 128-30]. To support his argument, Respondent explained the Grand Jury's indictment against him for perjury could not stand because it was premised on Respondent Naranjo's testimony that he had no knowledge regarding fraudulent credit card charges and missing cash deposits even though he later acknowledged and addressed past embezzlement in an NCSWA Board meeting. [1 RP 128-29]. However, during the NCSWA Board meeting, Respondent Naranjo also clarified he had heard about possible embezzlement, not that he had any actual knowledge related to the missing funds. [1 RP 128-29]. Respondent Naranjo further explained the fraudulent credit card charges occurred, and the cash deposits went missing in 2016. [1 RP 129]. Respondent did not become a NCSWA Board member and did not become aware of any fraud or possible embezzlement until 2018. [1 RP 129]. Even after he became a Board member, Respondent Naranjo addressed the possible embezzlement with the NCSWA Board, and they decided not to act. [1 RP 129]. Respondent's argument relied on the Recall Act's definitions of malfeasance which "means wrongful conduct that affects, interrupts or interferes with the performance of official duties; provided that is the act is discretionary, the act was performed with improper or corrupt motive" and misfeasance which "means performing a legal act in an improper or illegal manner and the conduct evinces an improper or corrupt motive." NMSA 1978, §§ 1-25-2(F) and (G). Next, Respondent Naranjo argued no probable cause existed to support the

allegation that he made the executive decision to reinstall the Juan de Onate statue in violation of the Open Meetings Act or his oath of office. [1 RP 130-32]. In support, Respondent explained the Rio Arriba County Manager Jeremy Maestas made the decision to reinstall the Onate statue, which did not require a County Commission vote, so the Open Meetings Act did not apply. [1 RP 131]. Since the OMA did not apply, Respondent Naranjo could not have violated its requirements, therefore, his actions could not be characterized as malfeasance or misfeasance. [1 RP 131]. Respondent also relied on the Recall Act's definition of violation of oath of office which "means to refuse or neglect to perform, without any just cause, any of the duties that are or shall be required by law of the named official" together with New Mexico law concerning County Commissioners' and County Manager's enumerated duties outlined in NMSA 1978, Sections 4-38-1 to -42 to support his argument. [1 RP 131-32]. Finally, Respondent argued there existed no probable cause to support petitioner's allegation Respondent Naranjo terminated and hired a County Manager in February 2023. [1 RP 133]. To support his argument, Respondent cited Rio Arriba County Commission meeting minutes and an agenda which show the Rio Arriba County Commissioners held a special meeting on February 10, 2023, to discuss personnel matters regarding the County Manager. [1 RP 133]. The documents show all three Rio Arriba County Commissioners were present at the meeting, they approved the agenda, went into executive session for

about three (3) hours, re-entered open session, one County Commissioner moved to remove the then-County Manager and appoint another, Respondent Naranjo seconded the motion, and the Commissioners held a vote. **[1 RP 133]**. Respondent also explained there is no requirement to allow others to apply for the County Manager position, but instead, the County Commissioners have the sole statutory authority to employ a County Manager. **[1 RP 134]**.

The District Court held an evidentiary hearing on March 19, 2024, to determine whether probable cause existed to support any of petitioner's allegations against Respondent Naranjo. **[1 RP 54]**.

During the hearing, petitioner called several witnesses to give testimony to support his allegations including himself, Nathana Bird, Luis Pena, Rio Arriba County Sheriff Billy Merrifield, and Rio Arriba County Manager Jeremy Maestas. **[RP 241-45]**. Petitioner testified the only time he heard Respondent Naranjo discuss the Juan de Onate statue was when Respondent spoke on a local radio station during the June 2022 primary election in Rio Arriba County. **[3-19-24 2-track 1 CD 0:52:50-53:50]**. Petitioner explained, while listening to the local radio station before the June 2022 primary election, he heard Respondent mention he wanted the Onate statue removed from storage and reinstalled in the County. **[3-19-24 2-track 1 CD 0:49:19-50:15]**. When asked for his opinion whether reinstalling the statue was an issue of social and cultural public policy and should have been the subject of an

open, public meeting, petitioner testified it is his opinion Respondent was behind the decision to reinstall the statue. **[3-19-24 2-track 1 CD 0:54:10-55:02]**. Petitioner ultimately testified he did not know who made the decision to reinstall the Juan de Onate statue, only that he believes it was Respondent because of the comments he made on the local radio station in June 2022 during the primary election. **[3-19-24 2-track 1 CD 1:05:55-06:40]**.

Nathana Bird, an Ohkay Owingeh resident, testified she never received notice of a Rio Arriba County Commission meeting to discuss reinstalling the Juan de Onate statue. **[3-19-24 1-track 2 CD 0:07:03-12]**. Miss Bird did not testify regarding any knowledge about who made the decision to reinstall the Onate statue. **[3-19-24 1-track 2 CD 0:00:50-19:50]**.

Luis Pena, a Rio Arriba County resident, testified he met with Respondent on September 21, 2023, to discuss the Onate statue's reinstallation in the next week and Respondent told him there was nothing that could be done to stop the reinstallation at that point in time. **[3-19-24 1-track 2 CD 0:26:45-29:36]**. Mr. Pena also testified he received a document from Rio Arriba County pursuant to an Inspection of Public Records Act request showing Respondent stated, during a County Commission meeting, the County Commission was going to reinstall the statue within thirty days. **[3-19-24 1-track 2 CD 0:35:15-36:30]**. Mr. Pena did not testify regarding any

knowledge about who made the decision to reinstall the Onate statue. **[3-19-24 1-track 2 CD 0:20:05-41:59]**.

Rio Arriba County Manager Jeremy Maestas testified the Rio Arriba County Commission did not decide to reinstall the Juan de Onate statue. **[3-19-24 3-track 1 CD 0:19:55-20:05]**. County Manager Maestas testified he made the decision to reinstall the Onate statue and informed each County Commissioner of his decision. **[3-19-24 3-track 1 CD 0:23:16-24:04]**. Although County Manager Maestas responded to inquires regarding the statue stating he and the County Commission made the decision, he clarified he assumed he had the County Commission's full support because he spoke with them each individually and did not receive any negative feedback or pushback. **[3-19-24 3-track 1 CD 0:22:30-24:45]**. When asked again if the Rio Arriba County Commission made the decision to reinstall the Onate statue, County Manager Maestas again stated they did not make the decision. **[3-19-24 3-track 1 CD 0:30:34-30:53]**. County Manager Maestas, asked about communications he made with local reporters regarding the Juan de Onate statue where he directed inquires to the County Commission, clarified the County Commission did not make the decision to reinstall the statue and he was only directing inquires to the County Commission because the County had been receiving numerous media inquiries. **[3-19-24 3-track 1 CD 0:31:56-36:15]**. County Manager Maestas further testified he began to assign blame to the County

Commission for the statue because he was receiving threats on social media and felt intimidated as a newly employed County Manager. [3-19-24 3-track 1 CD 0:52:35-58]. County Manager Maestas confirmed the Rio Arriba County Commission did not hold a vote to remove the Juan de Onate statue in 2020. [3-19-24 3-track 1 CD 0:47:45-57]. He also confirmed he, as County Manager, is authorized to make decisions regarding disposition of county property including the Onate statue. [3-19-24 3-track 1 CD 0:49:00-22].

Rio Arriba County Sheriff Billy Merrifield testified he had no personal knowledge of the decision to reinstall the Juan de Onate statue, nor did he have any conversations with Respondent regarding the statue. [3-19-24 1-track 1 CD 0:06:41-07:19].

Respondent relied on his written Memorandum of Law and exhibits filed just before the evidentiary hearing to support his arguments. [3-19-24 1-track 1 CD 0:08:23-09:21].

After both petitioner and Respondent rested, they agreed to file written closing arguments. [3-19-24 1-track 1 CD 0:10:55-11:13].

Petitioner filed his written Closing Argument on April 12, 2024. [1 RP 236-54]. In his closing, petitioner made three arguments. [1 RP 236-45]. First, he argued that the preponderance of the evidence showed there exists probable cause Respondent Naranjo committed malfeasance while serving on the North Central

Solid Waste Authority Board. [1 RP 236]. To support his argument, petitioner cited the Special Rio Arriba Grand Jury Report which recommended Respondent be indicted for perjury based on testimony he gave during the Grand Jury's investigation to show Respondent committed malfeasance. Petitioner also requested the District Court draw a negative inference from Respondent's choice not to testify during the evidentiary hearing. [1 RP 239]. Next, petitioner argued a preponderance of the evidence demonstrated probable cause to believe Respondent Naranjo and the other Rio Arriba County Commissioners' decision to reinstall the Juan de Onate statue violated the Open Meetings Act. [1 RP 241]. Petitioner cited his own testimony as well as testimony from Nathana Byrd of the Ohkay Ohwingeh Pueblo, Luis Pena, and County Manager Maestas to support his claim reinstalling the Onate statue was surrounded in controversy and diverging opinions which equates to a matter of public policy. [1 RP 242-45]. Petitioner explained, although County Manager Maestas testified he made the decision to reinstall the statue, his testimony was not credible, which he contended meant the County Commissioners made the decision to reinstall the statue. [1 RP 244]. Finally, petitioner argued a preponderance of the evidence showed Respondent's attempt to reinstall the Juan de Onate statue without allowing public input at an open meeting constituted either malfeasance or misfeasance. [1 RP 245]. Petitioner cited Respondent's instruction to County Manager Maestas to secure assistance from the Rio Arriba County

Sheriff's Department for the reinstatement as sufficient to show Respondent knew or should have known there was a potential for danger which is in turn sufficient to show probable cause Respondent committed acts of misfeasance. [1 RP 245].

Respondent filed his written Closing Argument on April 12, 2024. [1 RP 218-35]. Respondent Naranjo made four arguments in closing. [1 RP 218-25]. First, Respondent argued petitioner failed to meet his burden to show probable cause exists to support Respondent committed perjury during his testimony before the Special Rio Arriba County Grand Jury. [1 RP 219-22]. Respondent explained petitioner presented no evidence other than the Special Grand Jury Report, which is flawed both legally and factually, to support his allegation. [1 RP 219]. Respondent reiterated he was not on the NCSWA Board when the fraudulent credit card charges occurred, and the cash deposits went missing and cited NCSWA Board meeting minutes showing he was only tangentially aware of some potential embezzlement to support his argument. [1 RP 219-221]. Second, Respondent argued petitioner failed to demonstrate probable cause he violated the Open Meetings Act. [1 RP 222-24]. Respondent cited County Manager Maestas' testimony that he, and he alone, made the decision to reinstall the Onate statue and that he believed he had the authority to make the decision because it involved control of County property to support his argument. [1 RP 222-23]. Respondent also highlighted petitioner's failure to provide any evidence showing any of the Rio Arriba County Commissioners made

the decision to reinstall the Onate statue, much less Respondent Naranjo. [1 RP 223]. Respondent also explained all petitioner's evidence, including his own witness Luis Pena's testimony, showed the County Manager Jeremy Maestas made the decision to reinstall the Juan de Onate statue. [1 RP 223]. Respondent Naranjo further explained, based on County Manager Maestas' testimony, the disposition of county property does not require the County Commission to act which petitioner's own evidence confirmed in revealing the decision to remove the Onate statue in 2020 was made by the then-Rio Arriba County Manager and not subject to an open meeting, as was the decision not to proceed with reinstalling the statute in 2023. [1 RP 223-24]. Third, Respondent argued petitioner failed to demonstrate probable cause Respondent Naranjo committed any act of malfeasance or misfeasance related to the shooting. [1 RP 224]. In support of his argument, Respondent cited petitioner's failure to provide any evidence suggesting he took any action regarding the Onate statue and certainly did not provide any evidence showing Respondent Naranjo's actions or inactions caused an individual to drive to the reinstallation site the day after the reinstallation was set to occur with a gun and open fire into a crowd of people. [1 RP 224]. Finally, Respondent argued petitioner's remaining claim regarding terminating and hiring a County Manager were abandoned since petitioner provided no evidence to support and did not pursue the allegation during the evidentiary hearing. [1 RP 225].

The District Court entered its Order on May 2, 2024. [2 RP 255-60]. In its Order, the District Court concluded probable cause supported only one of petitioner's grounds for recall. [2 RP 257]. The District Court found probable cause supported the allegation Respondent Naranjo violated the New Mexico Open Meetings Act by making a decision outside of an open public meeting to place a statue of Juan de Onate in a public location. [2 RP 257]. In support of its conclusion, the District Court stated the nature of the act is what determines whether a decision is subject to the OMA. [2 RP 258]. Without citation to authority or the record, the District Court determined the nature of the act here was the decision to place a controversial statue on display in a public location and that decision was a matter of public policy to which the OMA applies. [2 RP 258]. The District Court cited Respondent's closing argument in which he acknowledged reinstalling the statue was a matter of public concern and debate to support its determination the decision to reinstall the statue should have been open to public scrutiny regardless of who had the authority to make the final decision. [2 RP 258]. The District Court explained probable cause supported its finding that Respondent Naranjo committed malfeasance or misfeasance by making the decision or allowing the decision to be made outside of a public meeting and that the conduct was done with the improper motive of shielding a controversial decision from public scrutiny. [2 RP 258]. The District Court refused to accept County Manager Maestas' testimony that he made

the decision to reinstall the statue because it found his testimony lacking credibility based on his communications concerning media inquiries. [2 RP 258]. Ultimately, the District Court relied on the following evidence in its probable cause determination: (1) the Onate statue was removed from public display in 2020 and placed in storage amid public controversy and significant media attention; (2) a decision subsequently was made to retrieve the statue from storage and return it to public display; (3) the decision to reinstall the statue was not made in a public meeting; (4) Respondent Naranjo was in favor of removing the statue from storage and returning it to a public location; (5) Respondent Naranjo admits in closing he was aware of public interest in the statue and aware of the controversy surrounding it; (6) County Manager Maestas testified at the hearing on March 19, 2024, that he, not Respondent Naranjo, made the decision; (7) County Manager Maestas' testimony that he made the decision is inconsistent with communications he made at the time in which he directed public inquires regarding the decision to Respondent Naranjo; (8) Mr. Pena testified that he attempted on several occasions, unsuccessfully, to have the matter placed on a County Commission agenda; (9) Mr. Pena testified he raised the matter directly with Respondent Naranjo and did not receive a response; (10) the decision to reinstall the statue, once members of the public learned of it, was highly controversial and led to protests both in favor and opposed to the decision; and (11) the decision to cancel installation of the statue-

unlike the decision to install it-was made in an open, public meeting, and Respondent Naranjo opposed cancelling the event. [2 RP 258-59]. The District Court either rejected or did not find probable cause to support any of petitioner’s other allegations. [2 RP 255-60].

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

ARGUMENT

STANDARD OF REVIEW

This is a matter of first impression. Since this is a matter of first impression, and the District Court made conclusions of law in its Order, the appropriate standard of review is de novo. Indeed, both questions of law and questions of first impression are reviewed de novo. *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, ¶ 5, 141 N.M. 387.

Respondent challenges the District Court’s finding that probable cause supported one of petitioner’s grounds for recall. [2 RP 257]. Although characterized as a finding, this determination actually functions as a conclusion of law. *See Webb v. N.M. Publ’g Co.*, 47 N.M. 279, 283 (1943) (determining that the finding that an injury was accidental was really a conclusion of law). “Conclusions of law by the trial court are reviewed de novo.” *Smart v. Carpenter*, 2006-NMCA-056, 4, 139 N.M. 524, 526 (citing *Gutierrez v. Connick*, 2004-NCMA-017, P7, 135 N.M. 272 (applying a de novo standard of review to errors of law in the trial court’s conclusions

or in those findings that function as conclusions); see *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717 (“If no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review.”)

This case also involves a substantial amount of statutory interpretation regarding the provisions of the Recall Act. See generally NMSA 1978, §§ 1-25-1 to -13. The “very essence of the appellate role in the context of statutory interpretation—even when undertaken by district courts exercising their limited appellate authority—is based on de novo review.” *Filippi v. Bd. of Cty. Comm'rs of Torrance Cty.*, 2018-NMCA-050, ¶ 16 (citing *State v. Trujillo*, 2009-NMSC-012, ¶ 9, 146 N.M. 14 (stating the principle that questions of statutory interpretation are matters of law and are review de novo)). Indeed, “[i]nterpretation of statutes and their application to facts require de novo review.” *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 17, 137 N.M. 26; see also *Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 12, 147 N.M. 157 (finding that the district court’s interpretation of Rule 1-023 is a question of law that is reviewed de novo, as are other questions of law.)

Additionally, in other civil contexts, when determining issues of probable cause, Courts apply de novo review. For example, in *O'Brien v. Behles*, the Court of Appeals explained the “sufficiency of evidence presented to support a legal claim

or defense is a question of law for the trial court to decide, and, on appeal, [the court] review[s] such questions de novo.” 2020-NMCA-032, P23, 464 P.3d 1097 (citing *Kelley-Hedicke v. Gunville*, 2003-NMCA-032, ¶ 9, 133 N.M. 335).

I. The District Court erred in finding probable cause to support Respondent Naranjo violated the Open Meetings Act.

The District Court did not address the issue of whether disposition of County property (including the Juan de Onate statue) required County Commission action and was thus subject to the OMA. [2 RP 257-59]. Instead, the District Court found because Commissioner Naranjo “acknowledged” in his closing argument the statue’s placement was a matter of significant public concern, “[t]his decision was a matter of public policy and thus implicated the OMA.” [2 RP 258]. The District Court cited no authority in support of this proposition.

First, closing arguments are just that; they are not evidence. *See* UJI 13-2007 NMRA; *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 25, 141 N.M. 808 (“Statements made during closing arguments are not evidence or rules of law.”) Thus, it was improper for the District Court to base its determination that the OMA applied on a purported “acknowledgment” in Respondent Naranjo’s closing. This error was magnified because there was utterly no evidence any prior or subsequent decisions about the statute were *ever* made in a public meeting or by the Rio Arriba County Commission. Instead, Petitioner’s own exhibits and witnesses demonstrated the 2020 decision to take the statue down was made solely by the then-County

Manager. There was no evidence the Rio Arriba County Commission (or any of the Commissioners) made the decision not to proceed with the September 27, 2023, reinstallation, in an open meeting or any other context.³ Even if the District Court were correct in determining the disposition of the statue was one which required County Commission action in an open meeting, that would not be a decision that could be applied retroactively to support a recall effort against a single member of a County Commission where all of the evidence about past practices related to the statue was to the contrary.

The District Court concluded County Manager Maestas’ testimony about his decision to reinstall the statue was “contradicted” by written communications he made in which he directed public inquiries regarding the statue’s reinstallation to Respondent Naranjo. [2 RP 259]. During the evidentiary hearing, petitioner introduced these written communications to undermine County Manager Maestas’ testimony that he alone made the decision to reinstall the statue. However, even assuming petitioner’s effort was successful, petitioner failed to introduce any evidence about who else allegedly made the decision. Simply put, petitioner offered no evidence to suggest it was Respondent Naranjo, either alone or in conjunction

³ The District Court found “[t]he decision to cancel installation of the statue-unlike the decision to install it-was made in an open, public meeting, and Commissioner Naranjo opposed cancelling the event.” [2 RP 259]. There was no evidence introduced to support this finding, including witness testimony, agendas, or meeting minutes.

with either of the other Rio Arriba County Commissioners. The District Court's erroneous evidentiary conclusion and inferences regarding Commissioner Naranjo's role in the process constitute reversible error.

II. The District Court did not find Respondent Naranjo acted with the requisite improper or corrupt motive, or, in the alternative, its findings were unsupported by the law or record evidence.

The District Court found “probable cause supports the allegation that Commissioner Naranjo committed malfeasance or misfeasance by making the decision or allowing the decision to be made outside a public meeting, and that the conduct was done with the improper motive of shielding a controversial decision from public scrutiny.” [2 RP 258]. As set forth above, the District Court's conclusion about the application of the OMA was legally flawed and factually unsupported. So too are its conclusions regarding “improper motive.” It is difficult to discern how the District Court concluded the question of the applicability of the OMA constituted “misfeasance” or “malfeasance” within the definitions outlined in the Recall Act. NMSA 1978, §§ 1-25-2(F) and (G) (2019). The District Court devoted only a single sentence to this issue. The District Court also found this “conduct was done with the improper motive of shielding a controversial decision from public scrutiny.” [2 RP 258]. Apparently, the District Court determined Respondent Naranjo's unspecified actions or inactions were “discretionary” as the term is used in the Recall Act's definitions of malfeasance and misfeasance. *See*

NMSA 1978, §§ 1-25-2(F) and (G) (2019). Again, this is difficult to square, both logically and factually. Was the decision whether to apply the Open Meetings Act to matters related to the Juan de Onate statue discretionary? If so, how could the exercise of said discretion support a recall effort? Petitioner presented no evidence during the evidentiary hearing regarding Respondent 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. It was improper for the District Court to substitute assumptions for evidence and to reject the only explanation supported by the evidence.

CONCLUSION

For the reasons presented herein, Respondent respectfully requests this Court reverse the District Court's ruling and remand this matter with instructions to the District Court to enter judgment in Respondent's favor.

Respectfully submitted,

SERPE ANDREWS, PLLC

/s/ Cody R. Rogers

Cody R. Rogers

Blade M. Allen

2540 El Paseo Rd., Ste D

Las Cruces, NM 88001

Telephone: (575) 288-1453

E: crogers@serpeandrews.com

E: ballen@serpeandrews.com

***Attorneys for Respondent-
Appellant Rio Arriba County
Commissioner Alex Naranjo***

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August 2024, I filed the foregoing through this Court's Odyssey e-filing system and caused a true and correct copy of the same to be served upon all parties of record as reflected more fully in the electronic Notification of Service.

/s/ Cody R. Rogers

Cody R. Rogers