



Administrative Office of the Courts

FOR IMMEDIATE RELEASE

June 30, 2021

Contact: Barry Massey, public information officer

bmassey@nmcourts.gov

505-470-3436

Supreme Court concludes NM Constitution is unclear on whether in-person public attendance is required for legislative sessions

SANTA FE – There was no "clear and indisputable legal duty" by the Legislature to permit in-person public attendance at a special session last year during the COVID-19 pandemic, the state Supreme Court concluded in an opinion issued today.

The opinion provides the detailed legal reasoning for the Court's divided decision – announced from the bench last June after hearing oral arguments – that allowed the Legislature to bar the public from entering the Capitol to attend the special session. The public was able to watch legislative proceedings online and remotely offer testimony at committee hearings.

A majority of the five-member Court rejected a legal challenge brought by a group of mostly Republican lawmakers and former State Land Commissioner Aubrey Dunn, who asked the court to nullify the restrictions imposed by the Legislative Council, a committee of lawmakers that includes the top legislative leaders. To issue such an order – a writ of mandamus – the Court explained, it must find there were "clear-cut grounds" for requiring a governmental entity to carry out a plainly required legal duty. Additionally, courts traditionally give deference to the Legislature – a co-equal branch of government – in governing its affairs unless there is a clear constitutional violation.

In an opinion written by retired Justice Judith K. Nakamura, the Court concluded that the New Mexico Constitution – Article IV, Section 12 – was ambiguous on whether it required the Legislature to allow the physical attendance of the public at its sessions. The constitutional provision states, "All sessions of each house shall be public." The provision also requires the Legislature to keep a written journal of its proceedings. Chief Justice Michael E. Vigil and Justice Barbara J. Vigil joined in the majority opinion. Justice Nakamura retired from the Court in late 2020, several months after the case was heard.

The Court's majority, in analyzing the "plain language" of the constitution, concluded "there is simply no clear or explicit constitutional mandate to be found in the public sessions provision

that would justify mandamus relief in the form of 'judicial nullification' of the attendance restrictions imposed by the Council's directive."

Constitutions in New York and Wisconsin, unlike New Mexico, contain language that "makes plain the public's right to physically attend legislative proceedings," the Court's majority noted. Additionally, there were competing dictionary definitions of the term "public" at the time of the New Mexico Constitution's adoption. The Court wrote that "arguably the most prominent" of the definitions of public is that something is generally "known or notorious." An alternative definition is that public means something is open or accessible.

"Nothing in the textual language of the public sessions provision clearly conveys the drafters' intent to provide the public with a right of in-person attendance at legislative sessions," the Court's majority concluded.

To decide the case, the majority explained, the Court need not go beyond legal arguments by those challenging the restrictions, including their "ultimately unconvincing plain-language, *textual* analysis of the term 'public.'" The majority declined, on its own initiative, to go beyond the arguments of the parties and undertake a more expansive historical analysis to interpret the constitution provision.

"We conclude without hesitation that judicial guidance on the intended meaning of the term 'public' as used in Article IV, Section 12 must await the proper case or controversy," the Court's majority wrote.

The Court rejected arguments that the special session's attendance restrictions deprived New Mexicans of a due process right to participate in the legislative process. Previous federal and state court rulings, the Court explained, do not recognize a due process right to attend legislative sessions. The majority also concluded that state statutes gave the Council the authority to establish restrictions on public attendance at the special session during the pandemic. Under the law, the Council is responsible for the "safety, care and preservation" of Capitol buildings and grounds.

"The Legislature's inclusion of the word *safety* materially alters the equation because that term, when used in relation to buildings or property, readily encompasses the safety of those who occupy or visit a building," the Court's majority reasoned.

In a dissenting opinion, Justices C. Shannon Bacon and David K. Thomson concluded that the state Constitution "limits the Legislature's authority to exclude the public from individually attending the sessions in person." However, the justices wrote that "based on the facts of this case, online or virtual access exceeds the constitutional minimum required" by the provision mandating House and Senate sessions "be public."

"The 'public clause' of Article IV, Section 12 is a limitation on the authority of the Legislature," the justices wrote in their dissent. "Therefore, construed with a modicum of common sense, 'public' must be read broadly to limit the Legislature's ability to lock and bar the doors of the Capitol in a manner that minimizes citizen participation."

Additionally, the dissenting justices determined that the Council "lacked the legislative authority to make the important public policy decision to exclude the public from the Capitol during the special session." The statutory history of the Council "indicates legislative intent for the Council to have custodial control of the capitol building" rather than having the "ability to make policy decisions on behalf of the Legislature."

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To read the decision in *Pirtle v. Legislative Council*, No. S-1-SC-38356, please visit the New Mexico Compilation Commission's website using the following link:

<https://nmonesource.com/nmos/nmsc/en/item/499580/index.do>