

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

SPONSOR Tallman/Ely ORIGINAL DATE 01/25/20
LAST UPDATED _____ HB _____
SHORT TITLE Secretary of State Election Years, CA SB SJR 6
ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY20 - FY23 Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$125.0-\$150.0	\$125.0 - \$150.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

State Ethics Commission (SEC)

Secretary of State (SoS)

Office of the Attorney General (NMAG)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 6 proposes to amend Article 5, Section 1 of the constitution of New Mexico to provide that the next Secretary of State shall be elected in a nonpartisan election in 2023 and every four years thereafter in a nonpartisan election, as provided by law.

FISCAL IMPLICATIONS

Under Section 1-16-4 NMSA 1978 and the New Mexico constitution, the SoS is required to print the full text of each constitutional amendment, in both Spanish and English, in an amount equal to ten percent of the registered voters in the state. The SoS is also required to publish them once a week for four weeks preceding the election in one newspaper in every county in the state. The estimated cost per constitutional amendment is between \$125 thousand and \$150 thousand depending upon the size and number of ballots and if additional ballot stations are needed.

SIGNIFICANT ISSUES

According to the SoS, in *Sugg v. SOS* (S-1-SC-37723, 2019) the New Mexico Supreme Court

made clear that to alter the constitutionally prescribed terms of office of elected officials that the legislature must propose a constitutional amendment in which the voters would vote to adopt or not. SJR 6 would move the SoS's term to coincide with the non-partisan election, or Regular Local Election, held in November of odd years. The current SoS would remain in office until 2023.

PERFORMANCE IMPLICATIONS

The SEC provided the following comments:

Potential constitutional challenge depending on the effect of the proposed amendment and its enabling legislation. The scope of the proposed amendment to Article 5, Section 1 of the Constitution is unclear: does it merely affect a change to general election ballots so that the names of candidates show no partisan affiliation? Or does the amendment purport to forbid the Secretary of State from having a party affiliation? The proposed amendment's "as provided by law" clause suggests that the Legislature may resolve this question and further determine the scope of the proposed amendment.

The scope of the proposed amendment could determine whether a court would declare the amendment unconstitutional under either the federal or New Mexico constitutions. Determining the constitutionality of a state's election laws requires a court to balance "the character and magnitude of the asserted injury" to protected constitutional rights against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983); *see also Crum v. Duran*, 2017-NMSC-013, ¶ 10, 390 P.3d 971. If a regulation imposes "severe burdens" on a party's associational rights, it must be "narrowly tailored to serve a compelling state interest." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (citation omitted). "However, when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 586-587 (internal quotation marks omitted).

If, on the one hand, the amendment governs only the general election ballots so that secretary of state candidates' party affiliations do not appear, then a court is likely to uphold that ballot change as constitutional. Courts have generally upheld laws that modify the general election ballot so that the names of judicial nominees are not accompanied by any partisan affiliation, "[i]n light of the different role that judges must play from that of their legislative and executive counterparts," which gives rise to a "compelling state interest" in reducing partisanship in judicial elections. *Ohio Council 8 of State, County & Municipal Employees, AFL-CIO et al. v. Husted*, 814 F.3d 329, 339 (6th Cir. 2016). The Secretary of State has a duty to "obtain and maintain uniformity in the application, operation and interpretation of the Election Code," suggesting New Mexico has a similar compelling interest in reducing partisanship in Secretary of State elections. *See Phil Keisling & Sam Reed, The Troubling Partisanization of Elections for Secretary of State, Governing* (December 10, 2014), *available at* <https://www.governing.com/columns/smart-mgmt/col-troubling-partisanization-elections-secretary-state.html> (arguing that statutory or constitutional amendments should be enacted to elect Washington's secretary of state on a nonpartisan basis).

If, on the other hand, the constitutional amendment's scope disallows a secretary of state candidate from having a party affiliation, then the amendment's constitutionality presents a closer case. Further, if the legislature imposes additional restrictions on partisan political activity

related to elections for secretary of state beyond the general election ballot itself (such as disallowing political parties from nominating a candidate for secretary of state), then a court would closely consider whether those restrictions justify any burden imposed on constitutionally-protected activities, such as a political party's right to nominate a candidate for the office of secretary of state or the right of secretary of state nominees to be a member of a political party.

No court has specifically considered whether nonpartisan elections for a Secretary of State are permitted under the United States Constitution. It appears Oregon is the only other state actively considering whether to make secretary of state elections nonpartisan. *See* Mike Rogoway, *Oregon secretary of state may seek to make the office nonpartisan*, *The Oregonian* (Sep. 24, 2019), available at <https://www.oregonlive.com/news/2019/09/oregon-secretary-of-state-may-seek-to-make-the-office-nonpartisan.html>.

ADMINISTRATIVE IMPLICATIONS

If this constitutional amendment is passed by the voters, corrective language would be added to the Election Code to allow for this candidate contest to appear during the Regular Local Election.

OTHER SUBSTANTIVE ISSUES

A candidate in a partisan election receives party endorsements and contributions. In a nonpartisan election, candidates are not affiliated with a political party. Executive branch officers in New Mexico currently elected through the partisan process include the governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The office of the New Mexico Secretary of State would remain a partisan office.

AHO/rl