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MISSOURI SUPREME COURT

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JEFFERSON CITY  
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JEREMIAH W. (JAY) NIXON  
ATTORNEY GENERAL

January 15, 2004

Thomas F. Simon, Clerk  
Supreme Court of Missouri  
P.O. Box 150  
Jefferson City, MO 65102

re. *Brooks, et al v. State, et al*, Missouri Supreme Court, case no. SC85674

Dear Mr. Simon:

The Supreme Court of New Mexico today issued its opinion in the case referenced at page 32, footnote 6, of the State and Attorney General's second brief herein. A copy of the New Mexico court's opinion is enclosed. Please bring it to the attention of the Court.

Very truly yours,

JEREMIAH W. (JAY) NIXON  
Attorney General

A handwritten signature in black ink, appearing to read "Paul Wilson".

PAUL WILSON  
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cc (with enclosure):  
Burton Newman  
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Michael B. Minton  
Richard P. Cassetta  
Jason A. Wheeler  
Stephen P. Halbrook

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

2 Opinion Number: \_\_\_\_\_

3 Filing Date: \_\_\_\_\_

4 NO. 28,373

SUPREME COURT OF NEW MEXICO  
FILED

JAN 15 2004

5 STATE OF NEW MEXICO ex rel.  
6 NEW MEXICO VOICES FOR CHILDREN, INC.,  
7 A New Mexico Not for Profit Corporation, and  
8 DR. VICTOR LaCERVA, M.D.,

*Handwritten signature*

9 Petitioners,

10 vs.

11 JOHN DENKO, JR., SECRETARY  
12 OF THE NEW MEXICO DEPARTMENT  
13 OF PUBLIC SAFETY,

14 Respondent.

15 ORIGINAL PROCEEDING

16 Vogel, Campbell & Blucher, P.C.  
17 David S. Campbell  
18 Albuquerque, NM

19 for Petitioner

20 Patricia A. Madrid, Attorney General  
21 Jerome Marshak, Assistant Attorney General  
22 David K. Thomson, Assistant Attorney General  
23 John W. Wheeler II, Special Assistant Attorney General  
24 Santa Fe, NM

25 for Respondent

OPINION

2 **BOSSON, Justice.**

3 (1) Petitioners, New Mexico Voices for Children and Dr. Victor LaCerva, seek a writ  
4 of mandamus directing the Secretary of the Department of Public Safety, John Denko, to  
5 cease enforcing the provisions of the Concealed Handgun Carry Act, NMSA 1978, §§ 29-  
6 19-1 to -13 (2003), recently passed by the Legislature. Petitioners contend that Article II,  
7 Section 6 of the New Mexico Constitution prohibits carrying concealed weapons, and the  
8 Act violates this prohibition. As we indicated after oral argument on January 5, 2004, we  
9 deny the petition. We hold that Article II, Section 6 does not prohibit the carrying of  
10 concealed weapons, and the Act does not violate our Constitution.

11 **Standing**

12 (2) Petitioners seek to invoke this Court's constitutional power of original jurisdiction  
13 in mandamus. See N.M. Const. art. VI, § 3. "[W]e exercise our power of original  
14 jurisdiction in mandamus if the case presents a purely legal issue that is a fundamental  
15 constitutional question of great public importance." County of Bernalillo v. N.M. Pub.  
16 Regulation Comm'n (In re Adjustments to Franchise Fees), 2000-NMSC-035, ¶ 6, 129  
17 N.M. 787, 14 P.3d 525.

18 (3) Two years ago, we conferred standing on a petitioner who challenged the previous  
19 Concealed Handgun Carry Act because the validity of that Act raised a constitutional  
20 question of fundamental importance to the people of New Mexico. See Baca v. N.M.

1 Dep't of Pub. Safety, 2002-NMSC-017, ¶ 4, 132 N.M. 282, 47 P.3d 441 (per curiam). In  
2 Baca, we issued a writ of mandamus on the alternative ground that the 2001 Act  
3 unconstitutionally allowed municipalities and counties, as opposed to the state, to regulate  
4 an incident of the right to bear arms. Id. ¶ 6. We did not reach the argument that Article  
5 II, Section 6 prohibits the carrying of concealed weapons. Id. ¶ 12. The issue is again  
6 before us, and as in Baca, we confer standing in recognition of the importance of the  
7 constitutional question involved.

#### 8 **Constitutionality of the Concealed Handgun Carry Act**

9 (4) The Concealed Handgun Carry Act authorizes the New Mexico Department of  
10 Public Safety to issue concealed handgun licenses to qualified members of the public who  
11 satisfy the requisite education and training. See §§ 29-19-4, -6. The Act defines  
12 "concealed handgun" as "a loaded handgun that is not visible to the ordinary observations  
13 of a reasonable person." Section 29-19-2(D).

14 (5) Petitioners argue that licensing persons to carry concealed, loaded handguns violates  
15 Article II, Section 6 of the New Mexico Constitution. That provision states:

16 No law shall abridge the right of the citizen to keep and bear arms for  
17 security and defense, for lawful hunting and recreational use and for other  
18 lawful purposes, but nothing herein shall be held to permit the carrying of  
19 concealed weapons. No municipality or county shall regulate, in any way,  
20 an incident of the right to keep and bear arms.

21 N.M. Const. art. II, § 6. Petitioners focus on the phrase "nothing herein shall be held to

1 permit the carrying of concealed weapons." They interpret that language as a prohibition  
2 against carrying concealed weapons and a restriction on the Legislature from enacting laws  
3 allowing the carrying of concealed handguns.

4 (6) In reviewing a constitutional challenge to a statute, we do not pass judgment on the  
5 wisdom of the legislation. Instead, we measure the Act against the provisions of our state's  
6 Constitution to determine its validity. A statute is presumed constitutional. City of  
7 Albuquerque v. Jones, 87 N.M. 486, 488, 535 P.2d 1337, 1339 (1975). For the reasons  
8 that follow, we conclude that Petitioners' challenge has not overcome that presumption of  
9 constitutionality.

10 (7) As an initial point of inquiry, we note that the right to bear arms is located in Article  
11 II, the Bill of Rights section of the Constitution. Unlike its federal counterpart, the New  
12 Mexico Constitution grants the Legislature general police powers as long as their exercise  
13 does not violate the Constitution. See N.M. Const. art. IV, § 2 ("In addition to the powers  
14 herein enumerated, the legislature shall have all powers necessary to the legislature of a  
15 free state . . ."). Thus, Article II, Section 6 is designed to establish the right of individual  
16 citizens "to keep and bear arms," and to limit interference with that right. This right,  
17 however, is subject to a condition: the Constitution does not protect the carrying of  
18 concealed weapons. Just as there is no constitutional right to carry concealed weapons,  
19 though, there is also no constitutional prohibition against the Legislature providing so by

1 statute.

2 (8) Looking at the language of the Constitution, we find the word "herein" critical to  
3 our understanding of the phrase, "but nothing herein shall be held to permit the carrying  
4 of concealed weapons." Petitioners argue that the language, "but nothing herein" precludes  
5 any legislation that would permit the carrying of concealed weapons. As Respondent  
6 Denko counters, "nothing herein" means "nothing in this constitution," or nothing in  
7 Article II, Section 6. The constitutional provision, on its face, means nothing in Article  
8 II, Section 6 shall be held to permit the carrying of concealed weapons. The Constitution  
9 neither forbids nor grants the right to bear arms in a concealed manner. Article II, Section  
10 6 is a statement of neutrality, leaving it to the Legislature to decide whether, and how, to  
11 permit and regulate the carrying of concealed weapons. To read Article II, Section 6 as  
12 a prohibition against carrying concealed weapons, as Petitioners urge, would require us to  
13 excise the word "herein" from the face of the Constitution. It is not in our power to do so.

14 (9) We observe that in other provisions, the Constitution uses definite language to  
15 preclude legislative action on a subject. For example, Article IX, Section 5 uses "The  
16 legislature shall never enact any law," to expressly limit the Legislature's power. See also  
17 N.M. Const. art. IX, § 6 ("No law shall ever be passed by the legislature."). Even Article  
18 II, Section 6 itself unequivocally and expressly limits legislative activity relevant to the  
19 right to keep and bear arms: "No law shall abridge the right of the citizen to keep and bear

1 arms . . . . No municipality or county shall regulate, in any way, an incident of the right  
2 to keep and bear arms." (Emphasis added.) The remainder of Article II, Section 6 does  
3 not speak in the same language; it does not clearly proscribe anything in regard to the  
4 carrying of concealed weapons.  
5 (10) Our interpretation of Article II, Section 6 finds firm roots in New Mexico history.  
6 New Mexico has long regulated concealed weapons, allowing it in some circumstances and  
7 prohibiting it in others. At the time the Constitution was adopted, the territorial law of  
8 New Mexico had for many years prohibited the carrying of concealed weapons in most  
9 circumstances while allowing concealed weapons to be carried outside of settlements, at  
10 one's residence, in the lawful defense of person or property, for protection while traveling,  
11 and by law enforcement officers. See 1869 N.M. Laws, ch. 32, § 1, § 11; 1887 N.M.  
12 Laws, ch. 30, § 1, § 9, § 10; 1891 N.M. Laws, ch 63, §§ 1-6; 1907 N.M. Laws, ch. 36, §  
13 18. After approval of the Constitution, the statutes of 1915 substituted "state" for  
14 "territory," but otherwise remained essentially unchanged. See NMSA 1915, §§ 1701,  
15 1708, 1709. That same construct of generally prohibiting concealed weapons while  
16 creating limited exceptions for their use, has continued in effect to the present. See NMSA  
17 1978, § 30-7-2 (2001) (declaring it a crime to carry a concealed loaded firearm except in  
18 a persons's residence or real property, in a car, or by a peace officer). Under Section 30-7-  
19 2, the Concealed Handgun Carry Act does no more than add another exception to the

1 general prohibition against carrying concealed weapons: carrying with a concealed  
2 handgun license. See § 30-7-2(A)(5).

3 (11) Under Petitioners' reading of Article II, Section 6 none of these laws would be  
4 constitutional. If Article II, Section 6 were an absolute prohibition against carrying  
5 concealed weapons, the Legislature could not have permitted it in certain instances. Yet  
6 it has done so for over 100 years, even before Article II, Section 6 was originally enacted.

7 Our courts have addressed these same laws over the years without anyone questioning their  
8 constitutionality. See State v. Ramirez, 79 N.M. 475, 478, 444 P.2d 986, 989 (1968)  
9 (noting that statute allows carrying of an unloaded concealed weapon); Lopez v. Chewirwe,  
10 51 N.M. 421, 423, 186 P.2d 512, 513 (1947) (acknowledging that statutes permit carrying  
11 deadly weapons in residence or on estate and when traveling); State v. Starr, 24 N.M. 180,  
12 195, 173 P. 674, 679-80 (1917) (noting the right of travelers to carry weapons); State v.  
13 McDuffie, 106 N.M. 120, 121, 739 P.2d 989, 991 (Ct. App. 1987) (noting provision that  
14 home and vehicle owners may properly conceal weapons). This history demonstrates the  
15 novelty of Petitioners' reading, one that would put this Court at odds with at least a tacit  
16 understanding on the part of the people and the Legislature as to the clear meaning of  
17 Article II, Section 6 of the Constitution.

18 (12) Finally, we note that other states with constitutional provisions similar to New  
19 Mexico's have statutes allowing permits for concealed handguns. For example, Montana



1 has a constitutional provision nearly identical to New Mexico's, but also has a statute that  
2 provides for permits to carry concealed weapons. See Mont. Const. art. II, § 12 ("but  
3 nothing herein contained shall be held to permit the carrying of concealed weapons");  
4 Mont. Code Ann. § 45-8-321 (2003). Colorado's constitutional provision is also similar  
5 to New Mexico's, yet Colorado allows a person to obtain a permit to carry a concealed  
6 weapon. See Colo. Const. art. II, § 13 ("but nothing herein contained shall be construed  
7 to justify the practice of carrying concealed weapons"); Colo. Rev. Stat. § 18-12-201  
8 (2003).

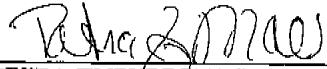
9 **Conclusion**

10 (13) Not being persuaded by Petitioners' argument, we hold that the Concealed Handgun  
11 Carry Act does not violate Article II, Section 6 of the New Mexico Constitution.  
12 Therefore, the petition for a writ of mandamus is denied.

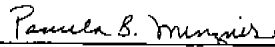
13 (14) **IT IS SO ORDERED.**

14   
15 RICHARD C. BOSSON, Justice

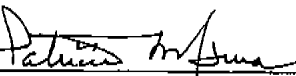
1 WE CONCUR:



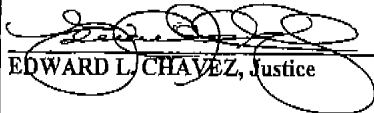
2 PETRA JIMENEZ MAES, Chief Justice



3 PAMELA B. MINZNER, Justice



4 PATRICIO M. SERÑA, Justice



5 EDWARD L. CHAVEZ, Justice