



**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

Supreme Court No. S-1-SC-40162

**KATE FERLIC**, as the Personal Representative of the  
Wrongful Death Estate of **ISAAC BREALEY-ROOD**, a  
deceased minor, et al.,

Plaintiffs,

v.

**MESILLA VALLEY REGIONAL DISPATCH AUTHORITY, et al.**

Defendants.

United States District Court for the District of New Mexico: 2:22-cv-633  
Honorable David H. Urias, United States District Judge

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**PLAINTIFFS' ANSWER BRIEF  
QUESTION FOR CERTIFICATION  
FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW MEXICO**

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## I. Summary of the Proceedings<sup>1</sup>

### A. Nature of the Case.

The underlying case arises from the wrongful death of sixteen-year-old Isaac Brealey-Rood, in July 2021, due to law enforcement's unnecessary delays in properly responding to a mother's repeated 911 calls for emergency medical assistance, and law enforcement's failure to timely administer emergency medical aid. As a result of law enforcement's acts and/or failures, Plaintiffs filed suit against Defendants, including three (3) dispatchers, for violations of the New Mexico Tort Claims Act ("TCA").

### B. Course of the Proceedings.

On May 27, 2022, Plaintiffs filed suit for the wrongful death of Isaac Brealey-Rood against Defendants, including Mesilla Valley Regional Dispatch Authority ("MVRDA"), Dispatcher Daniel Gutierrez, Dispatcher David Woodward, and Dispatcher Quinn Patterson,<sup>2</sup> in the First Judicial District Court for the State of New Mexico. [RP I 79-122]. On June 9, 2022, Plaintiffs filed their First Amended Complaint. [RP I 6-49]. Then, on August 25, 2022, Defendant City of Las Cruces

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<sup>1</sup> The Brief in Chief fails to comply with the requirements of Rule 12-318, as mandated in the New Mexico Supreme Court's Order Accepting Certification [RP 194-195]; therefore, Plaintiffs have provided anew each section required by the Rule.

<sup>2</sup> Defendants Gutierrez, Woodward, and Patterson are also referred to as "dispatcher(s)", "call taker(s)", and "Defendant Dispatchers". Their actions, collectively, may also be referred to as "MVRDA" as Defendant Dispatchers were in the course and scope of their employment at all material times.

filed a Notice of Removal, removing the case to U.S. District Court for the District of New Mexico, based on the federal enclave doctrine. **[RP I 50-51]**.

Defendants subsequently filed Motions to Dismiss: On September 1, 2022, Defendant New Mexico Department of Public Safety (“NMDPS”) filed its Motion to Dismiss for Failure to State a Claim **[RP I 212-229]**; on September 1, 2022, Defendants Dona Ana County Board of County Commissioners (“DACBCC”), Adrian Herrera, and Arturo Herrera filed a Motion to Dismiss for Failure to State a Claim **[RP I 230-240]**; on February 13, 2023, Defendants MVRDA and Gutierrez filed a Motion to Dismiss for Failure to State a Claim **[RP II 280-292]**; and on February 22, 2023, Defendants Patterson and Woodward filed a Joinder to Defendants MVRDA and Gutierrez’s Motion to Dismiss for Failure to State a Claim. **[RP III 7-9]**. Plaintiffs filed Responses in opposition to the Motions to Dismiss: on September 15, 2022 to Defendant NMDPS **[RP I 298-321]**; on September 15, 2022 to Defendants DACBCC, Arturo Herrera, and Adrian Herrera **[RP I 322-341]**; and on March 27, 2023, to Defendants MVRDA, Gutierrez, Patterson, and Woodward. **[RP III 21-40]**. Defendants subsequently filed Replies supporting the Motions to Dismiss: on September 29, 2022, Defendant NMDPS filed its Reply **[RP II 199-207]**; on September 29, 2022, Defendants DACBCC, Adrian Herrera, and Arturo Herrera filed a Reply **[RP II 209-214]**; and on April 21, 2023, Defendants MVRDA, Gutierrez, Patterson, and Woodward filed a Reply **[RP III 44-49]**. On August 9,



2023, Defendants MVRDA, Gutierrez, Patterson and Woodward filed a Notice of Supplemental Authority to their Motion to Dismiss [RP III 53-77] and on August 16, 2023, Plaintiffs filed a Response to the Notice. [RP III 81-83]. On August 24, 2023, Judge David H. Urias of the District Court for the District of New Mexico held a hearing on the Motions to Dismiss briefings. [RP III 86-183].

C. Disposition in the Court Below.

On October 2, 2023, Judge Urias issued a Memorandum Opinion and Order *Sua Sponte* Certifying Question to the Supreme Court of New Mexico and Denying Pending Motions to Dismiss Without Prejudice. [RP III 184-193]. The Order presented for certification to the New Mexico Supreme Court whether:

Considering the Enhanced 911 Act, NMSA 1978 §§ 63-9D-1 to-11.1 (1989, as amended through 2017), and the Emergency Medical Services Act, NMSA 1978 §§ 24-10B-1 to-7 (1983, as amended through 2014), are 911 dispatchers immune from liability for negligence under the New Mexico Tort Claims Act?

[RP III 185].

D. Summary of Facts Relevant to the Issues Presented.

1) **Carissa Brealey's first 911 call to MVRDA provided vital information that her son was experiencing a life-threatening medical emergency and was in urgent need of emergency medical aid (10:16 a.m. to 10:41 a.m.):** On July 7, 2020, at approximately 10:16 a.m., Carissa Brealey dialed 911 because her son, Isaac Brealey-Rood, had become overheated, non-responsive, and lost control of

his bowels during a family hike on Baylor Canyon Pass Trail in Las Cruces, New Mexico. [RP I 17]. Carissa’s 911 call was answered by MVRDA Defendant Dispatcher Defendant Gutierrez. [See *id.*] According to MVRDA’s Computer Aided Dispatch (“CAD”) Report, the incident involving Isaac was also handled by MVRDA Defendant Dispatchers Woodward and Patterson. [See *id.*] Carissa promptly informed Defendant Gutierrez she was on a hike with her 16-year-old son, Isaac, they were located “on Baylor Canyon Pass Trail . . . about maybe three quarters of a mile from the trailhead”, Isaac had become “overheated”, was “not responsive right now”, had “lost control of his bowels”, and was in “need of medical assistance quickly.” [RP I 17-18]. During the first 911 call, MVRDA was advised it only took “a few minutes” to reach Carissa and Isaac from the trailhead parking lot. [*Id.*]. MVRDA’s dispatcher informed Carissa he was going to disconnect and Carissa asked: “Is there an ambulance coming that can take him to the hospital?” [*Id.*]. MVRDA’s dispatcher responded: “Yeah, I’m gonna talk with the dispatcher right now. Hold on one second for me, okay?” [RP I 19]. MVRDA’s dispatcher chose not to tell Carissa that MVRDA had cancelled the ambulance almost 20 minutes earlier at 10:23 a.m. [See *id.*].

- 2) **MVRDA misclassified the incident as a “search and rescue”, causing unnecessary delays in rendering emergency medical care to Isaac:** At 10:18 a.m., Defendant Woodard misclassified Isaac’s major medical event as a “search

and rescue” (“SAR”) despite Carissa clearly conveying their location, as “three-quarters of a mile from the trailhead” and only “a few minutes” from the parking lot at the trailhead. [RP I 18, 25, 27]. A MVRDA dispatcher informed NMDPS dispatch, “[t]hey can’t get off the trail because they have heat stroke. **They know exactly where they are.**” [RP I 25]. Despite this knowledge, Defendant Gutierrez also mischaracterized the incident by misinforming Fire Prevention Specialist Defendant Herrera (1773) during their first phone call “[w]e got a call for search and rescue.” [RP I 25]. Yet, at 10:49 a.m., Defendant Patterson documented in MVRDA’s CAD System “1773 Hold off on 55 for now since the pt is still on the mountain.” [RP I 25]. MVRDA’s misclassification of Isaac’s emergency medical condition as “search and rescue” required MVRDA to contact NMDPS Dispatch. [RP I 27]. NMDPS Dispatch then contacted Mesilla Valley Search and Rescue, which rejected the call because the incident did not meet SAR criteria as it was a medical emergency, not a lost hiker. [RP I 27].

- 3) **MVRDA misclassified Carissa’s 911 call as a “minor medical” event causing unnecessary delays in rendering emergency medical care to a child suffering heat stroke:** At 10:20 a.m., Defendant Woodward misclassified Carissa’s call for emergency medical assistance as a “minor medical” event, contrary to MVRDA’s knowledge that Isaac was in medical distress, suffering from “possible heat stroke” and had “lost control of his bowels.” [RP I, 18, 25, 27]. The MVRDA

Dispatcher's classification error caused needless delays and was a cause of Isaac's wrongful death. [RP I 27-28].

**4) MVRDA wrongly referred Isaac's medical emergency to a Fire Prevention**

**Specialist:** At 10:21 a.m., MVRDA Defendant Gutierrez referred Isaac's medical emergency to Dona Ana County Fire Prevention Specialist Defendant Arturo Herrera (1773) – this was the first phone call MVRDA had directly with any outside agency personnel. [RP I 23]. There was no legitimate reason for MVRDA to contact a fire prevention specialist, instead of notifying the nearest, most qualified fire departments that are routinely contacted and prepared to promptly respond to emergency situations involving lost or injured hikers. [RP I 24] Defendant Gutierrez's referral of this call to Defendant Herrera, a fire prevention specialist, is inexplicable and not in accordance with MVRDA's safety policies or protocols. [RP I 24, 32-33].

**5) MVRDA failed to adequately convey Isaac's symptoms to first responders:**

During MVRDA Defendant Gutierrez's initial phone call with Fire Prevention Specialist Defendant Herrera (1773) at 10:21 a.m., he did not adequately convey Isaac's symptoms, i.e. he was "unresponsive", had "lost control of his bowels", was "no longer sweating" and was suffering "possible heat stroke." [RP I 24].

**6) Ambulances were dispatched twice to the trail but MVRDA dispatch cancelled each dispatched ambulance, in violation of MVRDA's safety**

**policy:** At 10:20 am, MVRDA's Defendant Woodward dispatched an ambulance to the trail. [RP I 28]. At 10:22 a.m., MVRDA's Defendant Gutierrez *cancelled* the ambulance, at the direction of Fire Prevention Specialist Defendant Herrera (1773), despite MVRDA's knowledge that Isaac was suffering possible heat stroke. [RP I 28]. At 10:47 a.m., MVRDA's CAD Report indicates "NMSP requests fire/55 [ambulance] be dispatched now". [RP I 29]. Despite the clear directive from NMDPS to dispatch an ambulance due to Isaac's heat stroke, at 10:49 a.m., MVRDA's Defendants Patterson and/or Woodward *cancelled* the ambulance a *second* time, again at the direction of Defendant Herrera, who was not on scene. [RP I 30]. In doing so, the Defendant Dispatchers violated MVRDA's Standard Operating Procedure for Public Safety Call Taking and Dispatch, a safety policy, by cancelling the ambulances *twice* at the directive of Defendant Herrera, who was not on scene and who was a not medically trained first responder. [RP I 30].

- 7) **Carissa Brealey's second 911 call informed dispatchers that Isaac's medical situation was increasing in urgency and that she could see first responders gathered in the parking lot, but they had not made contact with her (11:10 a.m. to 11:12 a.m.):** At 11:10 a.m., approximately thirty (30) minutes after Carissa's first 911 call concluded, she dialed 911 a second time and was connected to the same MVRDA dispatcher. [*Id.*]. Carissa told MVRDA she could

see first responders gathering in the parking lot and knew “the search and rescue team is in the parking lot.” [RP I 19, 27.]. A fact confirmed by the MVRDA dispatcher. [*Id.*]. Carissa also advised MVRDA “[Isaac’s] eyes are getting swollen . . . like he can't close his eyes”, and he “[is] moaning a lot but he’s not responsive.” [*Id.*].

8) **Defendants’ delays caused Isaac’s prolonged exposure to elements:** Despite Isaac’s proximity to the trailhead and parking lot, his location was not timely or accurately communicated by MVRDA to first responders or NMDPS’ dispatch. [RP I 20]. Despite more than a dozen first responders gathered in the parking lot at Baylor Canyon Pass Trail on July 7, 2020 between 10:47 a.m. and 11:59 a.m., inexplicably none of these responders ran or walked the “three quarters of a mile” to Isaac’s location on the trail, instead they told his brother Aidan they were waiting on a UTV. [RP I 21-22]. At 11:37 a.m., 81 minutes after Carissa’s first call to MVRDA, emergency personnel finally reached Isaac. [*Id.*]. The next day, Isaac died of multi-organ failure due to hyperthermia (heat stroke ). [RP I 23].

## II. Argument

### A. Standard of Review for Certified Questions.

On February 5, 2024, the Supreme Court accepted the certified question posed from the United States District Court for the District of New Mexico, Judge David H. Urias, in the same form as it was presented. *See* [RP III 194-195]; *see also* [RP

III 190-191]; *contra Spurlock v. Townes*, 2016-NMSC-014, ¶ 11, 368 P.3d 1213 (exercising discretion to reformulate the question). In analyzing the question presented, the New Mexico Supreme Court’s “goal ... is not to finally dispose of all relevant issues in a case”, but rather, is to resolve “unsettled matters of New Mexico law.” *City of Las Cruces v. El Paso Elec. Co.*, 1998–NMSC–006, ¶¶ 17, 24, 124 N.M. 640, 954 P.2d 72 (concluding this Court need not resolve the merits of a question certified by a federal court where the New Mexico Legislature enacted a statute that rendered the question moot).

#### B. Plaintiffs’ Contentions.

Plaintiffs contend Defendant Dispatchers are not entitled to immunity for their negligence under the New Mexico Tort Claims Act, Sections 41-4-1 to -30 (1976, as amended through 2024), the Emergency Medical Services Act, Sections 24-10B-1 to-7 (1983, as amended through 2014), or the Enhanced 911 Act, Sections 63-9D-1 to-11.1 (1989, as amended through 2017).<sup>3</sup>

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<sup>3</sup> Defendants raise the issue of whether “NMDPS are law enforcement officers ... [though] [t]he issue is not addressed in the Memorandum Opinion[.]” [**BIC 3**]. As the issue was not certified by the federal court, nor modified by this Court, nor addressed within the Brief in Chief itself, Plaintiffs have not addressed this detractor argument. The claims in this case have been tendered against three (3) dispatchers employed by MVRDA: Defendants Gutierrez, Patterson and Woodward. *See [RP I 21]*.

C. Statement as to How the Matters were Preserved Below.

Plaintiffs preserved their arguments on the certified issue below via their Complaint [RP I 79-122], First Amended Complaint [RP I 6-49], Plaintiffs' Response in Opposition to Defendant NMDPS' Motion to Dismiss First Amended Complaint [RP I 298-321], Plaintiffs' Response in Opposition to Defendants DACBCC, Arturo Herrera, and Adriana Herrera's Motion to Dismiss in Lieu of Answer [RP I 322-341], Plaintiffs' Response to Defendant NMDPS' Opposed Motion to Stay Discovery [RP II 173-193], Plaintiffs' Response to Defendants' MVRDA, Gutierrez, Patterson and Woodward's Motion to Dismiss [RP III 21-40], Plaintiffs' Response to Defendants' Notice of Supplemental Authority [RP III 81-83], and at the August 24, 2023 proceedings on the Motion to Dismiss briefings. [RP III 86-183].

D. The Purpose and Function of 911 Dispatchers.

Dispatchers are vital to law enforcement's ability to serve and protect our communities. Dispatchers are critical to governmental agencies' ability to respond promptly and accurately to citizens in need of fire, medical or other emergency aid. They are an indispensable conduit to gather and convey crucial information, and to provide instructions to ensure the health and safety of citizens. There is an established social contract to provide for the safety, health, and welfare of the public, wherein when law enforcement assistance is sought, the public dials 911 with the



expectation they will speak with dispatch who will provide immediate assistance and guidance.<sup>4</sup> Dispatch is expected to listen to the caller's conveyed need, collect information to address the need, synthesize and determine relevant information, and accurately convey pertinent information (location, emergency situation, etc.) to the appropriate first responder agencies. When a dispatcher negligently performs their job functions, unnecessary delays and harm are likely to result because of dispatcher's vital role as a conduit for citizens in need of police, fire and/or ambulance services.<sup>5</sup> Dispatchers are vital in determining whether an individual receives first responder assistance or not. Dispatcher conveyance of information to and amongst first responders dictates the subsequent response from the law enforcement chain, including speed of response, location of response, resources allocated to the response, and which agencies respond to the scene.<sup>6</sup> [RP I 17-20, 23-31]. Likewise, dispatch provides a critical service connecting the public with police, fire and/or ambulance. Citizens who need police, fire and/or ambulance rarely, if ever, contact the agencies directly; instead, they are taught from early on to

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<sup>4</sup> Indeed, Plaintiff Carissa Brealey called MVRDA and conveyed to dispatchers her son Isaac's urgent need for emergency assistance on July 7, 2020. [RP I 17-19].

<sup>5</sup> In the underlying case, Plaintiffs alleged exactly this – due to dispatcher negligence, amongst other factors, Isaac Brealey-Rood suffered loss of chance and wrongful death. [RP I 6-49].

<sup>6</sup> Here, the acts and omissions by MVRDA dispatchers (i.e. a “torrent of mistakes”) included a delayed response, minimization of Isaac's dire medical situation, misinformation about Isaac's location and close proximity to the trailhead, and the cancellation of two ambulances dispatched for Isaac. [RP I 16-26].

dial 911. The public relies on dispatch to provide instructions on how they should act and to gather critical eyewitness information while they wait for help to arrive.<sup>7</sup> First responders depend on dispatch to provide life-saving instruction and obtain crucial information from callers promptly and accurately so they can provide the necessary emergency assistance. Simply put, it would be impossible for first responders to adequately function without dispatchers. The New Mexico Court of Appeals has fortified this principle, recognizing “the Legislature has determined that combined 911 services are a critical component of the ability of local governments to fulfill their most basic responsibility: protecting the health and safety of their citizens.” *Gebler v. Valencia Reg’l Emergency Communs Ctr.*, 2023-NMCA-70, ¶ 9, 535 P.3d 763.

MVRDA has also held itself out as a conduit to maintain public order and provide for the protection of the general public within its jurisdictional reach.<sup>8</sup> In its Mission Statement, MVRDA states, “[t]he mission of the Mesilla Valley Regional Dispatch Authority (MVRDA) is to provide 911 emergency and non-emergency

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<sup>7</sup> Plaintiffs allege in the underlying matter that, due to dispatcher direction and/or misdirection, Carissa was falsely informed first responders were on their way to the scene causing Carissa to remain on the trail (and her other son Aidan to remain in the parking lot, as instructed by dispatch) and cease attempting to seek emergency aid for Isaac. [**RP I 18-19**].

<sup>8</sup> Though these actions occurred on federal land, the *only* law enforcement agencies that respond to incidents in this area are state governmental agencies, including those named as defendants in the underlying wrongful death lawsuit. [**RP III 174**].

communications services to our public safety partner agencies and community so they can both deliver and experience a safe, accurate and timely response.” About Us, Mesilla Valley Regional Dispatch Authority, <https://www.mvrda.org/about-us> (last visited Mar. 24, 2023). **[RP III 28]**.<sup>9</sup> Defendant MVRDA has further highlighted its role as an integral part of law enforcement by elaborating:

Mesilla Valley Regional Dispatch Authority provides dispatch and emergency communications functions for all emergency response agencies of the City of Las Cruces, City of Sunland Park, City of Anthony, Town of Mesilla, Village of Hatch, and Doña Ana County. Mesilla Valley Regional Dispatch Authority provides personnel, training, and equipment necessary to ensure the most rapid response possible to any threat to life, limb, or property to the citizenry of Doña Ana County.

In addition, Mesilla Valley Regional Dispatch Authority provides necessary National Crime Information Center data to all officers requesting such assistance, and possessing the statutory authority to do so.

In the event of a natural or man-made disaster, Mesilla Valley Regional Dispatch Authority performs in the role of the Emergency Communications Network for disaster response, relief, and recovery.

The first and foremost priority for Mesilla Valley Regional Dispatch Authority and its employees will always be Emergency Responder Safety. Additionally, Mesilla Valley Regional Dispatch Authority will never lose sight of the fact that the citizens of Doña Ana County entrust their safety and wellbeing to our care.

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<sup>9</sup> Since the March 27, 2023 filing of Plaintiffs’ Response to Defendants Dispatchers’ Motion to Dismiss **[RP III 21-40]**, Defendant MVRDA has removed its Mission Statement from its website. *See* About Us, Mesilla Valley Regional Dispatch Authority, <https://www.mvrda.org/about-us> (last visited Apr. 11, 2024).

[*Id.*].<sup>10</sup> Defendant Dispatchers do not dispute they have held themselves out as an integral, not distinct, part of law enforcement. [RP III 44-48]. The policies developed and implemented by MVRDA promote the function and purpose of dispatchers as a vital component of law enforcement’s response to maintain public order. [RP III 28-31, 36].

Though Defendants attempt to minimize the essential role of dispatchers in the emergency response process, equating them to “food inspectors”, “ticket taker[s] at the State Fair who keep[] people from bringing drinks in”, and “mechanics”, these comparisons are untenable. [RP III 129]; [BIC 7]. Defendants’ examples involve individuals who are dispensable or tangential to law enforcement’s ability to function. Without the presence of the individuals in Defendants’ examples, law enforcement would still be able to adequately maintain public order, however, without dispatchers, the law enforcement chain would be unable to carry out their duties to assure the “safety and wellbeing of [citizens]”. About Us, Mesilla Valley Regional Dispatch Authority, <https://www.mvrda.org/about-us> (last visited Mar. 24, 2023). Without dispatchers, the public would have no way to reach emergency services, and those agencies would have no ability to respond promptly and accurately to the public’s calls for service. Defendants’ strained analysis disregards

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<sup>10</sup> This self-explanation has also been removed from MVRDA’s current website since the filing of Plaintiffs’ Response to Defendants Dispatchers’ Motion to Dismiss. *See id.*; *see also* [RP III 21-40].

the vital role of dispatchers as a necessary and irreplaceable part of the law enforcement process, who coordinate public and first responder action and/or inaction, provide crime information to first responders from the NCIC database, and are “entrusted [with the] safety and wellbeing [of citizens].” [RP III 28].

E. The New Mexico Tort Claims Act has Waived Dispatcher Immunity.

Section 41-4-4(A) provides that governmental entities and public employees acting within their scope of duty “are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12.” N.M.S.A. 1978, § 41-4-4(A). Thus, the TCA shields governmental entities and public employees from tort liability unless immunity is specifically waived. *See Wittkowski v. State*, 1985-NMCA-066, ¶ 12, 103 N.M. 526, 710 P.2d 93, *cert. quashed*, 103 N.M. 446, *overruled on other grounds by Silva v. State*, 1987-NMSC-107, ¶ 15, 106 N.M. 472, 745 P.2d 380.

The TCA defines a governmental entity as “the state or any local public body as defined in Subsections C and H of this section.” N.M.S.A. 1978, § 41-4-3(B). Subsection C then defines a local public body as “all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978[.]” N.M.S.A. 1978, § 41-4-3(C). *See Gebler*, 2023-NMCA-70, ¶ 12 (holding that Valencia Regional Emergency Communications Center is an instrumentality under the TCA). Defendants do not dispute that MVRDA is a governmental entity under

the terms of the TCA. *See generally* [BIC]. The TCA also defines a “public employee” as “an officer, employee, or servant of a governmental entity[.]” N.M.S.A. 1978, § 41-4-3(F). Dispatchers, as full time, salaried public employees, working in the scope of duty, fall under the TCA definition of a “public employee”.<sup>11</sup> *See* [RP III 25-26]. Defendants did not dispute this in oral argument in front of Judge Urias, nor have they disputed it in their Brief in Chief. *See generally* [RP III 86-183]; [BIC].

- i. Dispatchers are law enforcement officers under Sections 41-4-12 and 41-4-3(D) of the TCA, and as such, their immunity is waived under the Act.*

Section 41-4-12 waives liability for law enforcement officers who cause “personal injury, bodily injury, [or] wrongful death ... resulting from ... failure to comply with duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico” while acting within the scope of their duties. N.M.S.A. 1978, § 41-4-12.

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<sup>11</sup> Defendants’ Brief in Chief states, “Section 41-4-12 does not waive immunity for negligence claims” and in doing so, misrepresent the law. [BIC 4]. New Mexico’s caselaw states, “we continue to hold there is no waiver of immunity under Section 41–4–12 for mere negligence of law enforcement officers that does not result in one of the enumerated acts.” *Blea v. City of Espanola*, 1994-NMCA-008, ¶ 12, 117 N.M. 217, 870 P.2d 755.

However, both the TCA and the courts have abstained from providing an absolute list of individuals who are considered law enforcement officers under the TCA. In fact, the New Mexico Court of Appeals has cautioned against a comprehensive list, stating, “[w]e cannot, and should not, attempt to provide an exhaustive list of activities that fit within the law enforcement mold. Determination in each case is fact specific, but informed by a practical, functional approach as to what law enforcement entails today.” *Coyazo v. State*, 1995-NMCA-056, ¶ 18, 120 N.M. 47, 897 P.2d 234. “[T]he duties of law enforcement officers are subject to change in a changing world and that the analysis of the term “law enforcement officer” under the [NM]TCA must account for such changes.” *Rayos v. State ex rel. N.M. Dep’t of Corr., Adult Probation & Parole Div.*, 2014-NMCA-103, ¶ 25, 336 P.3d 428 (internal citation omitted). Therefore, this Court must turn to the TCA’s statutory definition of “law enforcement officer” for guidance. The TCA defines a “law enforcement officer” as a “full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, **to maintain public order** or to make arrests for crimes, or members of the national guard when called to active duty by the governor[.]” N.M.S.A. 1978, § 41-4-3(D)(bolding added). Though the TCA does not further define the term “to maintain public order”, the Court of Appeals for the State

of New Mexico set forth guidance for its interpretation, stating, “we must determine the duties upon which the employee spends the majority of his or her time (principal duties) and consider the character of those principal duties ‘against the admittedly amorphous standard of the duties and activities traditionally performed by law enforcement officers.’ ... Public employees whose principal duties under law fall within any of the categories enumerated in Section 41–4–3(D) are ‘law enforcement officers’ for the purposes of the TCA.” *Rayos*, 2014-NMCA-103, ¶ 9 (internal citations omitted).

Similar to the facts at issue in this wrongful death case, a “student’s death occurred as the result of a cascade of bad decisions, acts, and failures to act” as a result of dispatchers’ failure to abide by established safety protocols and their negligent use of equipment. *Gebler*, 2023-NMCA-70, ¶ 29 (discussing *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 13, 140 N.M. 205, 141 P.3d 1259). Dispatchers are a necessary, and irreplaceable, part of the law enforcement chain, attending to “[t]he peace or tranquility of the community in general” and assuring “[t]hat invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted[.]” *Baptiste v. City of Las Cruces*, 1993-NMCA-017, ¶ 7, 115 N.M. 178, 848 P.2d 1105.

In *Baptiste*, the Court of Appeals examined whether an Animal Control Officer (“ACO”) fell within the TCA statutory definition of a law enforcement



officer. *See* 1993-NMCA-017. The Court of Appeals reasoned, “the statutory definition of law enforcement officer distinguishes between the duty ‘to maintain public order’ and the duty ‘to make arrests for crimes.’ This distinction clarifies the task of maintaining public order can be accomplished without the power to arrest.” *Id.* ¶ 6 (internal citation omitted). The Court of Appeals further explained “the terms ‘public order’ and ‘public peace’ capture the same concept and a violation of either is a breach of the peace.” *Id.* ¶ 7. Though the Court of Appeals stated it did not have enough information to determine whether an ACO is a law enforcement officer, it stated “an ACO is a ‘law enforcement officer’ only if the majority of the ACO’s time is devoted to the duties of maintaining public order.” *Id.* ¶ 9. (internal citations omitted).

As explained herein, the majority of dispatchers’ time and principal duties are devoted to maintaining public order and dispatchers share the same duties as law enforcement officers: To ensure the citizens within their jurisdiction are safe and able to receive public safety assistance. *Compare Dunn v. McFeeley*, 1999-NMCA-084, ¶ 25, 127 N.M. 513, 984 P.2d 760 (emphasizing, “the person’s duties must directly impact public order”) *with Rayos*, 2014-NMCA-103, ¶ 10 (where statutory law was relied on to determine the chief function of probation and parole officers).<sup>12</sup>

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<sup>12</sup> Defendants rely on *Leyba versus City of Santa Fe*, 198 F. Supp. 3d 1254 (D.N.M. 2016), for the principle that dispatchers are immune under the TCA, however, a decision by a federal magistrate judge is not binding on a federal district court or our

MVRDA has also held itself out as a conduit to maintain public order and provide for the protection of the general public within its jurisdictional reach.<sup>13</sup> Defendant Dispatchers do not dispute they have held themselves out as an integral, not distinct, part of law enforcement. [RP III 44-48]. Therefore, dispatcher immunity is waived under Sections 41-4-12 and 41-4-3(D).

- ii. *Dispatcher negligence in the operation of any machinery or equipment is subject to TCA's waiver of immunity under Section 41-4-6.*

Section 41-4-6 provides that public employees can be sued for damages resulting from wrongful death caused by the negligence of employees acting within the scope of their duties in the operation of any machinery or equipment. N.M.S.A. 1978, § 41-4-6. Generally, “the negligent ‘operation or maintenance’ must create a dangerous condition that threatens the general public[.]” *Upton*, 2006-NMSC-040, ¶ 8.

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State appellate courts. Further, state law controls in this case because removal of this wrongful death action was based solely on the federal enclave doctrine. *See Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1164-65 (D.N.M. 2018). Notably, *Leyba* relied on an overly strict interpretation of *Rayos* and failed to account for that court’s heavy reliance on statutory law which dictated the function of the individuals subject to the law enforcement analysis. Here, there is no statutory law which controls in the same manner as in *Rayos*, therefore, *Leyba* is distinguishable. Additionally, *Leyba* failed to examine the Emergency Medical Services Act, and thus, the analysis is incomplete, and the conclusion is based on partial information.<sup>13</sup> Though these actions occurred on federal land, the *only* law enforcement agencies that respond to incidents in this area are state governmental agencies, including those named as defendants in the underlying wrongful death lawsuit. [RP III 174].

In *Upton*, a young girl who suffered from asthma was forced into strenuous physical exercise by a substitute teacher. 2006-NMSC-040, ¶ 3. After gym class, the girl collapsed and a teacher attempted to administer inhaler treatments. *See id.* ¶ 4. Another teacher, as well as the school secretary, also attempted to administer aid by checking vitals and asking the office to call 911. *See id.* The girl was placed in a wheelchair in the hallway, but no one ever administered CPR or other emergency protocol to her. *See id.* Approximately fifteen (15) minutes later, a police officer who found her in the hallway called 911; however, by the time first responders arrived, she had ceased breathing and died. *See id.* ¶ 5.

The Supreme Court in *Upton* recognized the school had appropriate policies and procedures in place but failed to follow them. *See id.* ¶ 14. The Court stated, “a school simply cannot operate in a safe, reasonable, and prudent manner without affording, at the very least, the health and safety services that students have been promised, and upon which parents have relied.” *Id.* ¶ 13. The Court continued, “[the] [f]ailure to respond appropriately ... is a potential threat to every student in school because such a situation can occur at any time[.]” *Id.* ¶ 24. Emphasizing the breadth of harm, the Court reasoned, “[t]he school’s failures ... with regard to emergency responsiveness, [created a dangerous condition] for every student at the school.” *Id.* Accordingly, the Court held that “[Plaintiffs] have stated a claim, which, if proven, constitutes negligence in the operation or maintenance of a building within the

waiver of tort immunity set forth in Section 41-4-6.” *Id.* ¶ 25. Likewise, dispatchers’ negligent use of equipment, in violation of established safety policies and protocols, to respond properly “to an emergency medical situation is a potential threat to every [citizen] because such a situation can occur at any time[.]” *Id.* ¶ 24. Similar to the cascade of failures in *Upton*, when dispatchers fail to abide by established protocols and negligently use equipment, they cease to afford “the health and safety services that [citizens] have been promised, and upon which [citizens] have relied[.]”, thus their immunity is waived under Section 41-4-6. *Id.* ¶ 13.

MVRDA’s liability extends to all regions it is responsible for providing dispatch, including Doña Ana County, Las Cruces, City of Sunland Park, City of Anthony, Town of Mesilla, and Village of Hatch, and is not simply confined to the building from which MVRDA issues dispatch. *See Sanders v. New Mexico Corr. Dep’t*, 2023-NMCA-030, ¶ 9, 528 P.3d 716 *cert. granted sub nom. Sanders v. NM Corr. Dep’t*, 2023-NMCERT-003 (explaining that Section 41-4-6, while “termed a premises liability statute”, “ ‘applies to more than the operation or maintenance of the physical aspects of the building,’ and includes failures to follow appropriate safety protocols.”)(internal quotation marks omitted)(quoting *Upton*, 2006-NMSC-040, ¶¶ 9, 12-13). *Cf. Chavez v. Convergys Corp.*, 2023-NMCA-067, ¶ 18, 535 P.3d 721 (noting that the Court of Appeals has recognized “the traditional rule that one who owns or controls a property has a duty to refrain from creating or permitting

conditions on such property that will foreseeably lead to an unreasonable risk of harm to others beyond the property's borders.”)(quotation marks omitted).

In *McCurry versus City of Farmington*, the Court of Appeals held a city could be liable for the negligent operation of machinery and equipment, when city firefighters used their trucks and equipment to set fire to cars and then extinguished the fires as part of a training exercise. *See* 1982-NMCA-055, 97 N.M. 728, 643 P.2d 292. In *McCurry*, there was no suggestion of a flaw in the equipment itself, only that its was used in a way that negligently caused harm to the plaintiff. *See id.* ¶¶ 2-7. Likewise, when dispatchers use equipment in a negligent manner, such as improper collecting, synthesizing, assessing, disseminating, and responding to information provided to them, the individuals seeking help may be negligently harmed. [RP III 33].

As discussed above, similar to the facts at issue in this wrongful death case, the Supreme Court has previously found that, where there is a cascade of failures, when dispatchers fail to abide by established protocols and negligently use equipment, they cease to afford “the health and safety services that [citizens] have been promised, and upon which [citizens] have relied[.]”, thus their immunity is waived under Section 41-4-6. *Upton*, 2006-NMSC-040, ¶ 13. *See Vanhorn as Next Friend of Vanhorn v. Carlsbad Mun. Sch. Dist.*, 2024-NMCA-035, ¶¶ 13-25, 545 P.3d 1182 (affirming that, under *Gebler*, 2023-NMCA-070, and *Upton*, 2006-

NMSC-040, where Defendants' actions are "not a single isolated negligent decision" and "[i]nstead, is a pattern of actions by multiple actors", that create an "operational failure in [a defendant's] policies and procedure pursuant to the building waiver of the TCA" can be a basis for liability).

In *Thompson versus Torrance County Board of Commissioner*, a mother experienced a psychotic episode and walked down the highway naked with her infant son, eventually leading to his death. *See* No. 30,537 (N.M. Ct. App. Sept. 21, 2011) (non-precedential) at ¶ 4. An onlooker called 911 and informed the dispatcher of the mother and child's location, but the dispatcher described the wrong location to the state police. *See id.* State police did not locate the child before he died from exposure to the elements. *See id.* The Court of Appeals held the plaintiff properly stated a claim for the negligent operation of the 911 equipment. *See id.* at ¶¶ 13-14. *Thompson* solidified the standard that dispatchers who act negligently while using their machinery and equipment have their immunity waived under the TCA.

In *Thompson*, the Court of Appeals addressed dispatcher liability under Section 41-4-6 and held that Section 41-4-6 permits a 911 dispatcher to be sued for failing to exercise reasonable care in conveying information while using dispatching equipment as a result of inadequate policies, training, and supervision. No. 30,537 (N.M. Ct. App. Sept. 21, 2011) (non-precedential). *Cf. Leyba v. City of Santa Fe*, 198 F. Supp. 3d 1254 (D.N.M. 2016) (in contrast to *Thompson*, Magistrate Judge

Lynch concluded that negligent communication of information using 911 equipment does not fall within Section 41-4-6's waiver of immunity in the absence of evidence that the dispatchers violated particular policies).

Defendants' Brief in Chief relies on a *single* case, *Gebler versus Valencia Regional Emergency Communications Center*, for the proposition that "[the Court of Appeals] found that immunity is not waived for employee negligence." 2023-NMCA-70; [BIC 8]. In making this argument, Defendants have taken the court's narrowly construed decision and drastically extrapolated its scope. [BIC 8] In *Gebler*, the plaintiff claimed dispatchers failed to record all the information conveyed by the caller during an emergency situation, causing damages to the plaintiff. *See id.* at ¶¶ 3-5. The Court of Appeal's analysis made important distinctions, stating, "[t]his scenario is materially different from the one in *Upton* where the defendants first failed to follow the safety protocols in place for the student and thereafter repeatedly failed to follow safety protocols in place for all students suffering medical distress. The errors committed by the dispatchers [here, in *Gebler*] do not rise to the level of the torrent of mistakes committed by the school personnel in *Upton*. Plaintiff simply did not receive the information." *Id.* at ¶ 33. Defendants in this matter miss this important distinction. Rather than the Court of Appeals stating (as Defendants allege in the Brief in Chief) that "immunity is not waived for employee negligence" the court *actually* stated, "Section 41-4-6 does not apply in

*these* circumstances.” *Id.* (italics added); [BIC 8]. The *Gebler* court left open that if a “torrent of mistakes” occurred, such as the “cascade of bad decisions” in *Upton*, dispatchers may be held liable. *Id.* Plaintiffs contend the “cascade of bad decisions” that began with the MVRDA dispatchers’ acts and failures to act, including violations of safety policies and protocols, expose dispatchers to liability under Section 41-4-6.

Dispatchers may be sued under Section 41-4-6 when they act negligently in the operation of their equipment, in contravention to established policies and procedures, and place the public at risk of harm. [RP III 33]. See *Upton*, 2006-NMSC-040, ¶ 13 (a school must afford the health and safety services that students have been promised and upon which parents relied). In the underlying case, dispatchers did not properly assess, document, and convey information about Isaac’s condition or location to first responders, causing unnecessary delays in first responders reaching, and rendering aid to, Isaac, including but not limited to two classification errors, to wit, identifying the incident as a “search and rescue” and as a “minor medical” event. [RP III 29-34, 107]. In addition, the dispatchers in the underlying case *prevented* emergency medical aid from reaching Isaac through their negligent use and operation of the machinery/equipment by cancelling ambulances that were dispatched to the trailhead on *two* separate occasions, despite knowing Isaac was suffering “possible heat stroke” and in violation of MVRDA’s safety



policy. [RP III 29-34]; [RP I 30-31]. These acts and failures by MVRDA dispatchers, including failing to follow proper safety policies and protocols, caused and contributed to a “cascade of bad decisions”, which hindered the timely rendering of emergency medical aid to Isaac Brealey-Rood, leading to his ultimate death. These same acts and failures pose a significant danger to the public at large who is dependent on dispatchers to receive timely emergency aid. [RP III 29-34, 112].

#### F. Statutory Interpretation and Rules of Construction.

“In addressing issues of statutory interpretation, [the Court] must determine and effectuate the intent of the legislature, using the plain language of the statute as the primary indicator of legislative intent. The words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary.” *Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308, 850 P.2d 1011 (internal citations omitted). *See* N.M.S.A. 1978, § 12-2A-19 (1997, as amended through 1997) (“The text of a statute or rule is the primary, essential source of its meaning.”). A plain language reading of the statute should “examine an act in its entirety, ‘constru[ing] each part in connection with every other part to produce a harmonious whole, ... and consider[ing] the practical effects of our interpretation.’” *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 41, 147 N.M. 512, 226 P.3d 611 (internal quotation marks and citation omitted). However, should a plain language approach not be possible or logical, a statute may

be examined through a secondary approach, aptly classified as “rejection-of-literal-language”, which has been set forth by the New Mexico Court of Appeals as “not add[ing] words except where necessary to make the statute conform to the obvious intent of the legislature, or to prevent its being absurd.” *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶¶ 2-3, 117 N.M. 346, 871 P.2d 1352 (internal quotations omitted).

G. The Emergency Medical Services Act Waives Immunity for Dispatchers.

In their Brief, Defendants concede “the Legislature ... intended to subject all emergency services providers to Tort Claims Act liability as of 1983 [due to the passage of the Emergency Medical Services Act].”<sup>14</sup> [**BIC 10**]. Plaintiffs agree the Emergency Medical Services Act waives immunity for dispatchers. The Emergency Medical Services Act is an explicit recognition by the Legislature of the waiver of dispatcher immunity under the TCA.

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<sup>14</sup> Defendant Dispatchers’ Motion to Dismiss argues that Sections 24-10B-1 to-7 (1983, as amended through 2014) is subject to the *intentional* acts standard of Sections 63-9D-1 to-11.1 (1989, as amended through 2017), but provide no authority as to why “intentionality” should be read into the Emergency Medical Services Act. [**RP II 289-290**]; [**RP III, 189**]. *But see State v. Elliott*, 1977-NMSC-002, ¶5, 89 N.M. 756, 557 P.2d 1105 (“Statutes are to be given effect as written and, where free from ambiguity, there is no room for construction.”). Defendants appear to have abandoned this approach, as the Brief in Chief concedes that the Emergency Medical Services Act was “intended to subject all emergency services providers to Tort Claims Act liability as of 1983.” [**BIC 10**].

The Emergency Medical Services Act, Sections 24-10B-1 to -7 (1983, as amended through 2014), provides:

In any claim for civil damages arising out of the provision of emergency medical services by personnel described in Section 24-10B-5 NMSA 1978, those personnel shall be considered health care providers for purposes of the Tort Claims Act if the claim is against a governmental entity or a public employee as defined by that act.

N.M.S.A. 1978, § 24-10B-8. An “emergency medical dispatcher” is one of the “personnel described” in Section 24-10B-5. N.M.S.A. 1978, § 24-10B-5. An “emergency medical dispatcher” is defined by Section 24-10B-3(J) of the Emergency Medical Services Act as “a person who is trained and licensed pursuant to Subsection F of Section 24-10B-4 NMSA 1978 to receive calls for emergency medical assistance, provide pre-arrival medical instructions, dispatch emergency medical assistance and coordinate its response.” N.M.S.A. 1978, § 24-10B-3(J). The plain language of the Emergency Medical Services Act evidences the New Mexico Legislature’s intent to subject dispatchers to liability for negligence under the TCA.

**[RP III, 39]**

H. The Enhanced 911 Act Does Not Provide Immunity to Dispatchers.

The Enhanced 911 Act was enacted by the New Mexico Legislature in 1989, six (6) years *after* the Emergency Medical Services Act. *See* N.M.S.A. 1978, §§ 63-9D-1 to -11.1 (1989, as amended through 2017); NMSA 1978 §§ 24-10B-1 to-7 (1983, as amended through 2014). In establishing the Enhanced 911 Act, the

Legislature provided no indication that its purpose was to either repeal the Emergency Medical Services Act or undo the immunity waiver provided by the TCA under Sections 41-4-6, 41-4-10, 41-4-12. *See* N.M.S.A. 1978, §§ 63-9D-1 to-11.1 (1989, as amended through 2017).

There is no need to speculate on legislative intent or question the plain language of the Enhanced 911 Act. The “Findings and Purpose” clause of the Enhanced 911 Act provides irrefutable evidence that the Act is focused only on enhanced 911 systems:

It is the purpose of the Enhanced 911 Act to further the public interest and protect the safety, health and welfare of the people of New Mexico by **enabling the development, installation and operation of enhanced 911 emergency reporting systems** to be operated under shared state and local governmental management and control.

N.M.S.A. 1978, § 63-9D-2(B) (bolding and emphasis added). *See Gebler v. Valencia Reg'l Emergency Communications Ctr.*, 2023-NMCA-070, ¶ 9, 535 P.3d 763 (quoting the purpose of the Enhanced 911 Act while recognizing “the VRECC was a governmental entity under the TCA”). *See also State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346 (recognizing judicial interpretation to ascertain legislative intent is permitted if there is “*any doubt*” as to the meaning of statutory language)(citation omitted and italics in original). In this statement of the Act’s purpose, the New Mexico Legislature clearly stated the focus of the Enhanced 911 Act is on infrastructure; the Enhanced 911 Act does not obfuscate or undo the

waiver of dispatcher immunity under the TCA, as further confirmed by the Emergency Services Act.<sup>15</sup>

A plain language reading<sup>16</sup> of the Enhanced 911 Act’s immunity provision unambiguously provides that immunity applies only to *contracting* or *infrastructure* related to the provision of enhanced 911 systems, not to dispatchers.<sup>17</sup> The immunity provision reads:

Enhanced 911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for the public health, welfare and safety. In contracting for such services or the provisioning of an enhanced 911 system, except for intentional acts, the local governing body, public agency, equipment supplier, communications service provider and their officers, directors, vendors, employees and agents are not liable for damages resulting from installing, maintaining or providing enhanced 911 systems or transmitting 911 calls.

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<sup>15</sup> Absent from the findings and purpose is any statement that relates to dispatchers and/or dispatcher liability. N.M.S.A. 1978, § 63-9D-2 (1989).

<sup>16</sup> Defendants assert, “[t]he language of Section 63-9D-10 is precise” but ignore the foundational legal concept that precise statutory language should be ascribed ordinary meaning and need not be analyzed according to *intent*. [BIC 17]. Defendants provide a lengthy “jumping through hoops” analysis to distract from the statute’s ordinary meaning that favors dispatcher waiver. *See* [BIC 10-17].

<sup>17</sup> This Court does not need to examine any non-binding authority as there is a clear and unambiguous meaning to the Enhanced 911 Act. *See* NMSA 1978, §§ 63-9D-1 to-11.1 (1989, as amended through 2017). Defendants do not address a plain reading of the Enhanced 911 Act; instead, they attempt to distract by relying on out-of-state authorities, which are distinguishable from the Enhanced 911 Act’s immunity provision (i.e., absence of “operation” in N.M.S.A. 1978, § 63-9D-10, and that immunity provision’s introductory clause confining it to *infrastructure*), to show “trade-offs inherent in an enhanced 911 system”. *See* [BIC 10-14].

NMSA 1978, § 63-9D-10 (2017). The first sentence of the provision establishes enhanced 911 systems are subject to the governing entity providing services for “public health, welfare and safety.” *See id.* The second sentence of the provision is best examined in subparts as follows: i. “In contracting for such services or the provisioning of an enhanced 911 system,”; ii. “except for intentional acts,”; iii. “the local governing body, public agency, equipment supplier, communications service provider and their officers, directors, vendors, employees and agents”; iv. “are”; v. “not”; vi. “liable for”; vii. “damages resulting”; viii. “from installing,”; ix. “maintaining or”; x. “providing enhanced 911 systems or”; xi. “transmitting 911 calls.” *See id.*; *Wilson v. Denver*, 1998-NMSC-016, ¶ 16, 125 N.M. 308, 961 P.2d 153 (“When appropriate, we will rely on rules of grammar to aid our construction of the plain language of a statute.”) (internal citation omitted); *State v. Clark*, 1969-NMSC-078, ¶ 9, 80 N.M. 340, 455 P.2d 844.

Subsection i is the foundation for the Court’s analysis, as it is an **introductory clause**,<sup>18</sup> and each subsequent subsection is informed by its constraints. Section 63-9D-10. The beginning of subsection i states, “[i]n contracting for such services or the provisioning of an enhanced 911 system,” – “contracting”, refers to hiring by

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<sup>18</sup> “An introductory clause or phrase acts as a qualifying or clarifying statement about the main sentence.” Writing Guide, Utah State University, <https://tinyurl.com/mb8s2669> (last visited Apr. 15, 2024).

contract<sup>19</sup> and “services” are defined in the prior sentence as “public health, welfare and safety.” *See id.* The remaining language of the introductory clause reads, “or the provisioning of an enhanced 911 system,” – this language must be examined in light of the “enhanced 911 system” definition set forth within the Act. *See* N.M.S.A. 1978, § 63-9D-3(M) (2017). Importantly, this definition contains its own **introductory clause** – “regardless of the *technology* used,” which informs the remainder of the definition. *Id.* (bolding and italics added). As the definition’s introductory clause refers to *infrastructure* (technology and equipment) components of an enhanced 911 system<sup>20</sup> and the remainder of the definition must be read within the confines of that introductory clause; it is clear and unambiguous that the Legislature’s definition of an enhanced 911 system is confined to *infrastructure* of a 911 system. *See id.*

A complete reading of the sentence’s introductory clause for subsection i shows immunity applies to *contracting* for services of public health, welfare and safety or providing the *infrastructure* of an enhanced 911 system. *See* N.M.S.A. 1978, § 63-9D-10. As the introductory clause pertains to contractors and infrastructure but does not implicate *dispatchers*, the Court can conclude dispatchers are not granted immunity under the Enhanced 911 Act. *See id.*

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<sup>19</sup> *Contract*, MERRIAM-WEBSTER DICTIONARY, <https://tinyurl.com/4xm3bysc> (last accessed Apr. 15, 2024).

<sup>20</sup> The Enhanced 911 Act’s definition section is sparse of any reference to dispatchers.

The ordinary duties and responsibilities of dispatchers do not include care and upkeep of anything – property, equipment, or other objects. As dispatchers do not do maintenance, they cannot be implicated by this modifier. Subsection x, referring to “providing enhanced 911 systems or” is also a misplaced modifier. *See* N.M.S.A. 1978, § 63-9D-10. Similar to the prior modifiers, this modifier only functions to modify the indirect object clause and is subject to the constraints imposed by the introductory clause; thus, as the introductory clause does not relate to dispatchers, neither can this misplaced modifier. Further, the appearance of this misplaced modifier is the second time the reference of “provision[] of a 911 system” is specified within the immunity provision. *Id.* With consideration of the Act’s definition for “an enhanced 911 system”, the second appearance of this term in relation to damages emphasizes the Legislature intent for immunity to apply *only* as to the infrastructure necessary for an enhanced 911 system. *See* Section 63-9D-3(M). Again, as the introductory clause does not relate to dispatchers, neither can this misplaced modifier. Further, though the Enhanced 911 Act lacks a definition for “transmitting”, Black’s Legal Dictionary’s states “transmit” means “[t]o send or transfer (a thing) from one person or place to another.” *Transmit*, BLACK’S LAW DICTIONARY, (11th ed. 2019). In line with the grammatical construction of the prior portions of the immunity provision, and in accordance with the legal rules of statutory construction to not read in absent words, “to send or transfer” must be analyzed in context of the



*infrastructure* of the system. *See* N.M.S.A. 1978, § 63-9D-10. The plain language analysis clearly and unambiguously demonstrates the Enhanced 911 Act’s immunity provision is *only* intended to apply to contractors and infrastructure of enhanced 911 systems. *See Perea v. Baca*, 1980-NMSC-079, ¶ 22, 94 N.M. 624, 614 P.2d 541 (“Courts must take the act as they find it and construe it according to the plain meaning of the language employed.”) (internal citation omitted).

There is no need to speculate on legislative intent or question the plain language of the Enhanced 911 Act. The New Mexico Legislature clearly stated the focus of the Enhanced 911 Act is on infrastructure; the Enhanced 911 Act does not obfuscate or undo the waiver of dispatcher immunity under the TCA, as further confirmed by the Emergency Services Act.<sup>21</sup>

#### I. Conclusion and Request for Relief.

In considering the Enhanced 911 Act, Sections 63-9D-1 to 11.1 (1989, as amended through 2017) and the Emergency Medical Services Act, Sections 24-10B-1 to -7 (1983, as amended through 2014), this Court should determine 911 dispatchers are **not** immune from liability for negligence under the New Mexico Tort Claims Act.

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<sup>21</sup> Absent from the findings and purpose is any statement that relates to dispatchers and/or dispatcher liability. *See* N.M.S.A. 1978, § 63-9D-2 (1989).

## STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G), N.M.R.A., Plaintiffs' counsel certifies that the total word count contained in the body of the Answer Brief, as defined in Rule 12-318(F)(3), is 8,707 as determined by Microsoft Word for Microsoft 365, and certifies that the Answer Brief uses 14-point proportionately spaced Times New Roman font.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2024, the foregoing was filed electronically via EFS and served via email to counsel for Defendants:

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