IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

TODD LOPEZ, as Personal Representative of
the Wrongful Death Estate of Richard Paiz,
and LORETTA PAIZ, individually,

Plaintiffs–Respondents,

v. No. S-1-SC-40416

PRESBYTERIAN HEALTHCARE SERVICES,
SOUND PHYSICIANS HOLDINGS LLC,
KENNETH DALE,
KARAN MAHAJAN,

Defendants–Petitioners.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO
(Ct. App. No. A-1-CA-41177)

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# ANSWER BRIEF

(CONSOLIDATED)

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## INTRODUCTION

This appeal arises from the wrongful death of Richard Paiz. In their complaint, Plaintiffs-Respondents alleged that Mr. Paiz's catastrophic neurological injury and subsequent death were caused by the negligence of the Defendants-Petitioners in failing to take any steps to treat his stroke. **[1 RP 1-10]** Mr. Paiz's claims for redress were timely filed pursuant to the Wrongful Death Act, NMSA 1978, § 41-2-1 *et seq.* ("WDA"). **[*Id.*]** The Order at issue is the district court's dismissal of those claims. **[3 RP 525-528]** Even though Plaintiffs-Respondents properly filed the action within the statute of limitations, the district court ruled that the failure to secure appointment of the personal representative within the statute of limitations was fatal. **[*Id.*]** The district court believed that the absence of an appointed personal representative deprived the court of subject matter jurisdiction. **[*Id.*]** On that basis, the district court dismissed the claims for wrongful death, leaving only the loss of consortium claim of Mr. Paiz's widow, Loretta Paiz. **[*Id.*]**

The issues in this case, as framed by the District Court and by the parties below, were (a) whether the WDA's appointment of the Personal Representative ("PR") is in the category of "special cases and proceedings" as defined by Article VI, Section 13 of the New Mexico Constitution, otherwise called "statutory causes of action," and if so, (b) whether the appointment of the PR is a "jurisdictional prerequisite to an action." *ACLU of New Mexico v. City of Albuquerque*, 2008-

NMSC-045, ¶ 9 f.n. 1, 144 N.M. 471, 188 P.3d 1222 (quotation marks and quoted authority omitted). In addition, these case-specific issues were framed by this Court's recent jurisprudence on statutory causes of action generally. *See Deutsche Bank Nat'l Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 11, 369 P.3d 1046 ("*Deutsche Bank II*" or "*Johnston*") (stating that "when a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction").

Given this framing of the issues, the Court of Appeals below correctly decided this case. *See Lopez v. Presbyterian Healthcare Servs.*, 2024-NMCA-055, ¶ 22, 553 P.3d 481 (holding that the appointment of a PR is not jurisdictional and Rule 1-015 and Rule 1-017 may operate to correct and relate back any appointment errors."). In addressing the question, the Court of Appeals concluded that the cause of action for wrongful death does not belong to the PR but rather to the person who died from their injuries; therefore, the person who died from their injuries has standing, not the PR. *See id.* ¶ 16 (holding that "the injured deceased person, and not the PR, has standing to establish an action under the WDA"). Because the appointment of the PR does not pertain to standing (and therefore subject-matter jurisdiction), the Court of Appeals reversed the district court's dismissal of the wrongful death action for lack of subject-matter jurisdiction. *Id.* ¶ 23. This is clearly the correct result. The question in this appeal is whether it is the correct analysis.

At every stage, Plaintiffs-Respondents have contended that the district court's dismissal for lack of subject-matter jurisdiction flatly contradicts blackletter law as stated in *Chavez v. Regents of the University of New Mexico*, 1985-NMSC-114, N.M. 606, 711 P.2d 883. *Chavez* held that the appointment of the personal representative is not a jurisdictional prerequisite. *See id.* ¶ 5 (*overruling Mackey v. Burke*, 1984-NMCA-028, 102 N.M. 294, 694 P.2d 1359). By concluding that the WDA does not confer standing on the PR (and therefore does not affect subject-matter jurisdiction), the Court of Appeals ruling below harmonizes the *Chavez* line of cases—*Chavez; In re Estate of Sumler*, 2003-NMCA-030, 133 N.M. 319, 62 P.3d 776; and *Oakey Estate of Lucero v. Tyson*, 2017-NMCA-078, 404 P.3d 810—with the "jurisdictional prerequisite" line of cases—*ACLU*; *Johnston*; and *Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 2, 453 P.3d 434. Stated differently, the Court of Appeals navigated the two lines of cases and "admirably" circumvented any conflict between them. *Lopez*, 2024-NMCA-055, ¶ 25 (J. Bustamante, concurring). Plaintiffs-Respondents obviously have no quarrel with the Court of Appeals' reasoning or conclusions.

However, this Court having granted certiorari, Plaintiffs-Respondents respectfully suggest that this Court has three options (other than to quash the writ): (1) to uphold the Court of Appeals' holding that the WDA is a statutory cause of action but to reverse the Court of Appeals' holding that the appointment of the PR

is not jurisdictional, thereby overruling *Chavez* and its progeny, thereby affirming the district court; (2) to reverse the Court of Appeals' holding that the WDA is a statutory cause of action, thereby removing the WDA from the category of cases in which the issue of standing is "interwoven" with the issue of subject-matter jurisdiction, thereby reversing the district court on other grounds; or (3) to uphold the Court of Appeals' holding that the WDA is a statutory cause of action but otherwise to modify or overrule this Court's "standing as jurisdictional prerequisite" line of cases, thereby reversing the district court on other grounds.

Defendants-Petitioners urge this Court to overrule *Chavez*. However, Defendants-Petitioners have advanced no sound basis in law, policy or logic to overrule *Chavez*. Since *Chavez*, the case law has evolved methodically for over forty (40) years, and overruling it would cause disruption and unpredictability. Plaintiffs-Respondents respectfully urge this Court to keep *Chavez* and its progeny undisturbed.

Plaintiffs-Respondents discuss below what appear to be the Court's two other paths forward. The first path has the benefit of being quite narrow, but it would fail to address the "elephant in the room," i.e. the problem of conflating standing and subject-matter jurisdiction raised by Judge Bustamante in his concurring opinion. The second path is quite broad, but it would address that problem.

## ARGUMENT

### I. The Court's narrowest path is to decide this case on grounds specific to the WDA, namely, that the WDA did not create a new cause of action. The WDA merely lifted the common-law bar on a claim for damages for injury resulting in death and "transmitted" that claim to the personal representative.

The Court of Appeals began its analysis with the contention that the WDA is a statutory cause of action. *See Lopez*, 2024-NMCA-055, ¶ 17 ("We agree with the parties that the WDA is a statutory cause of action for which no remedy was available at common law.").[1] However, a close application of the *Johnston* Court's jurisdictional analysis to the WDA reveals that the WDA is not, in fact, a "statutory proceeding" and therefore does not fall under Article VI, Section 13 "special cases and proceedings" jurisdiction.

In *Johnston*, the defendant, a homeowner, refinanced his home by executing a promissory note and later defaulted on the loan. *See* 2016-NMSC-013, ¶ 2. Deutsche Bank, the purported successor mortgagee, brought a foreclosure action

[1] Plaintiffs-Respondents do not recall, but also do not dispute, conceding that the WDA is a statutory cause of action. However, this Court reviews matters of law *de novo* and is not bound by a concession of the parties on a point of law. *See NM-Emerald, LLC v. Interstate Dev., LLC*, 2021-NMCA-020, ¶ 10, 488 P.3d 707 ("Although the parties in this case assume that the economic loss rule also applies to construction defect cases, they have neither acknowledged nor briefed the matter as an issue of first impression in New Mexico. We are not bound by their interpretation or agreement."); *Tucson Elec. Power Co. v. Tax'n & Revenue Dep't*, 2020-NMCA-011, ¶ 10, 456 P.3d 1085 (stating that "while we generally look to parties' stipulations with favor, we are not bound by parties' stipulations as to applicable law, because we must conduct our own analysis") (internal quotation marks and quoted authority omitted); *Williams v. Mann*, 2017-NMCA-012, ¶ 30, 388 P.3d 295 ("Ordinarily, we would not be bound by parties' stipulations as to applicable law.").

against the homeowner, alleging that Deutsche Bank owned the mortgage through assignment and was a holder in due course of the note. *Id.* ¶ 3. The district court entered judgment in favor of Deutsche Bank. *Id.* ¶ 7.

The Court of Appeals reversed the district court, holding that Deutsche Bank lacked standing to foreclose because Deutsche Bank failed to show that it had possession of a properly indorsed note at the time it filed the complaint. *Deutsche Bank Nat. Tr. Co. v. Beneficial New Mexico Inc.*, 2014-NMCA-090, ¶¶ 15, 17, 335 P.3d 217 ("*Deutsche Bank I*"). The Court of Appeals held that "standing is a jurisdictional prerequisite for a cause of action and must be established at the time the complaint is filed." *Id.* ¶ 8.[2]

The Supreme Court granted certiorari to review, in relevant part, whether standing is "jurisdictional" in this case. *Johnston*, 2016-NMSC-013, ¶ 9. The Supreme Court held that "standing is not jurisdictional in this case because the cause

[2] At the risk of getting too far "into the weeds," so to speak, Plaintiffs-Respondents note that the case relied on by the Court of Appeals in *Deutsche Bank I* for the proposition that the lack of standing is a "potential jurisdictional defect" that may be raised at any time, *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008, was a case involving the question of who had the right, or "standing," to raise a constitutional claim; and the case cited by the *Gunaji* Court for the same proposition, *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 5, 120 N.M. 69, 898 P.2d 121, was a case involving the jurisdiction of a zoning board, as was the case cited by the *Town of Mesilla* Court for the same proposition, *Webb v. Fox*, 1987-NMCA-050, ¶ 9, 105 N.M. 723, 737 P.2d 82 (jurisdiction of zoning board). Plaintiffs-Respondents raise this observation merely to call attention to the fact that the word, "jurisdiction," has multiple meanings that depend on the context. It stands to reason that a local zoning board "lacks jurisdiction" to hear a claim where the party asserting the claim does not have standing to assert it, but the power of a local zoning board to hear a dispute has literally nothing to do with whether a district court has "jurisdiction" under Article IV, Section 13.

of action to enforce a promissory note was not created by statute." *Id.* ¶ 10. Because the cause of action was not created by statute, the Court applied "only prudential rules of standing." *Id.* Applying "prudential standing," the Supreme Court concluded that the unindorsed note attached to Deutsche Bank's original complaint was insufficient to establish standing. *Id.* ¶ 32.

The Supreme Court addressed the issue of standing as one key difference between original and statutory jurisdiction under Article VI, Section 13. The Court characterized standing as "not jurisdictional" where the court has original jurisdiction, and "jurisdictional" where the court has statutory jurisdiction, i.e. where a statute creates a cause of action and designates who may sue:

> As a general rule, standing in our courts is not derived from the state constitution, and is not jurisdictional. However, when a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.

*Id.* ¶ 11 (emphasis added) (quotation marks and quoted authority omitted).

To decide whether a cause of action to enforce a promissory note fell under the courts' original jurisdiction or statutory jurisdiction, the Court first discussed the history of the cause of action. *See id.* ¶ 12. In a nutshell: when the New Mexico Legislature adopted the Uniform Commercial Code ("UCC") in 1961, the cause of action to enforce a promissory note had already existed at common law. *Id.* The Legislature's adoption of the UCC "merely codified the [common-law] rights and

clarified their scope." *Id.* "Indeed, the UCC recognizes the continuing vitality of common law principles of law and equity which supplement its provisions." *Id.* (quotation marks and quoted authority omitted). "Thus, an action to enforce a promissory note fell within the district court's general subject matter jurisdiction in this case [i.e. "original" jurisdiction] because it was not created by statute." *Id.*

From the *Johnston* Court's discussion above, it is clear that for causes of action codified by statute, no bright line exists between such causes of action that trigger original jurisdiction and such causes of action that trigger statutory jurisdiction. Here, when presented with an action to enforce a promissory note—which is codified in the UCC—the Court concluded that it nevertheless fell within the court's original jurisdiction because the cause of action was not "created by statute." Even though the cause of action is codified in the UCC—and even though the statute both provides a "comprehensive remedy"[3] and designates who can sue[4]—nevertheless the Court found that the cause of action itself was not "created by statute," and therefore original, not statutory, jurisdiction applied. *Id.*

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[3] 1A C.J.S. Actions § 37 (2015) (noting that the UCC "has been held to displace common-law remedies even though it does not create new causes of action, where it provides a comprehensive remedy").

[4] The UCC provides that there are three scenarios in which a person is entitled to enforce a promissory note: (1) when that person is the holder of the note; (2) when that person is a nonholder in possession of the note who has the rights of a holder; and (3) when that person does not possess the note but is still entitled to enforce it subject to the lost-instrument provisions of UCC Article 3. NMSA 1978, § 55-3-301.

The Court considered several factors in deciding whether the cause of action was "created by statute." *Johnston*, 2016-NMSC-013, ¶ 12. First, even where the cause of action is codified in statute, the Court found that the statute nevertheless "did not create the rights and remedies associated with [the cause of action], but instead merely codified certain existing rights and clarified their scope…." *Id.* That the statute "merely codifie[s] certain existing rights and clarifies their scope" was one factor the Court addressed in concluding that the cause of action was not "created by statute" and that therefore original jurisdiction applied. *Id.*

Second, the Court noted that the statute "recognizes the continuing vitality of common law principles of law and equity which supplement its provisions." *Id.* (quotation marks and quoted authority omitted). The Court cited NMSA 1978, § 55-103(b), which states:

> Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause, supplement its provisions."

(Emphasis added.) That the UCC explicitly incorporated the common law as a "supplement" to its provisions is a second factor the Court considered in concluding the cause of action was not created by statute.

Finally, the Court quoted with approval *Venaglia v. Kropinak*, 1998-NMCA-043, ¶¶ 11-12, 125 N.M. 25, 956 P.2d 824, which stated: "There are two principal

sources of law governing the rights and duties of the parties with respect to a guarantee of a promissory note. One is Article 3 of the Uniform Commercial Code.... The other is the common law." *See Johnston*, 2016-NMSC-013, ¶ 12. That the statute adopts the common law as a "principal source[] of law governing the rights and duties of the parties," *id.* (quotation marks and quoted authority omitted), was another factor the Court considered in concluding that the cause of action for enforcement of a promissory note was not "created by statute" and therefore original jurisdiction applied.

In summary, the "created by statute" analysis in *Johnston* did not turn simply on whether the cause of action existed at common law or on whether the statute designates who may sue. The Court considered at least three other factors in analyzing whether the cause of action was "created by statute": (1) whether the statute "codified certain existing rights and clarified their scope," *id.* ¶ 12; (2) whether the statute acknowledged "the continuing vitality of common law principles of law and equity which supplement its provisions," *id.*; and (3) whether the common law was a "principal source of law governing the rights and duties of the parties," *id.* (quoted authority omitted). Applying these factors, the *Johnston* Court held that the cause of action to enforce a promissory note was not "created by statute" and therefore falls under the district courts' original jurisdiction. *Id.* ¶ 10.

Applying these same *Johnston* factors to the WDA shows that the cause of

action for wrongful death is not "created by statute." Section 41-2-1 states:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

(Emphasis added.) Stripping away the subordinate clauses, the core of this sentence is: "[T]he person who, or the corporation which, would have been liable … shall be liable to an action for damages." (Emphasis added.)

Applying the *Johnston* factors, first, the WDA codifies certain existing rights—i.e. the right to sue in tort—and clarifies the scope of those rights—i.e. that the recovery is "such damages, compensatory and exemplary, as [the jurors] deem fair and just, taking into consideration the pecuniary injury resulting from the death to the surviving party…." Section 41-2-3. Second, the WDA clearly acknowledges "the continuing vitality of common law principles of law and equity which supplement its provisions." *Johnston*, 2016-NMSC-013, ¶ 12. Indeed, the WDA explicitly adopts and incorporates the existing common-law "action for damages." Section 41-2-1. Third, it is clear that the common-law action in tort was a "principal source of law governing the rights and duties of the parties." The plain language of the WDA explicitly incorporates duty, breach of duty, causation, and damages—all

four elements of the common-law tort of negligence:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages….

Section 41-2-1 (emphasis added.)

That the WDA does not create a new cause of action is made clear in *Estate of Brice v. Toyota Motor Corp.*, 2016-NMSC-018, 373 P.3d 977. Nowhere does the *Brice* Court describe the WDA in such terms as an action "to enforce rights and remedies created by statute and which were unknown to the common law…." *In re Forest*, 1941-NMSC-019, ¶ 10, 45 N.M. 204, 113 P.2d 582. Instead, the *Brice* Court stated that the WDA "was intended to replace the common-law rule barring recovery in cases of wrongful death so as to allow recovery…." *Id.* ¶ 20 (emphasis added). The *Brice* Court described the common-law rule against wrongful death actions as a "bar" or "exception" to an otherwise existing action for damages in tort. The WDA does not create a new cause of action merely by lifting a bar to recovery of damages after death.

*Brice* contains another key to how the Supreme Court would rule on the issue: *Brice* expanded the three-year statute of limitations. *Brice*, 2016-NMSC-018, ¶ 43 ("We hold that the doctrine of fraudulent concealment may toll the three-year statute

of limitations for wrongful death actions in New Mexico."). If the cause of action for wrongful death were "created by statute," then the analysis would have been quite different: standing to bring the action would be "jurisdictional" and therefore not subject to judicial modification. Yet after an exhaustive review of the statute's legislative history and intent, the *Brice* Court held that the common-law doctrine of fraudulent concealment applies to the WDA's statute of limitations. *Id.* While not dispositive, the holding in *Brice* is yet another indication of the Supreme Court's view that the WDA is a common-law cause of action.

Next, the Court of Appeals below relied on *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 2014-NMCA-001, ¶ 6, 315 P.3d 298 for its conclusion that the WDA is a statutory cause of action. *See Lopez,* 2024-NMCA-055, ¶ 17. However, a close reading of *Krahmer* points to the opposite conclusion.

In *Krahmer*, the question presented was whether the personal representative of the wrongful death estate was bound by an arbitration agreement "that would have bound Krahmer had she lived." *Id.* ¶ 5. The Court reasoned: "The WDA permits a statutory personal representative to bring a cause of action, 'notwithstanding the death of the person injured.' " *Id.* ¶ 6 (quoted authority omitted) (emphasis added). "Under the strict construction of the Act … the same cause of action exactly as it would have been possessed by the decedent is what is transmitted to the personal representative, and any limitations on the decedent's personal right to maintain an

action will survive as well." *Id.* (emphasis added). In addressing this question, the *Krahmer* Court analyzed our early case law:

> Since the early days of statehood, New Mexico courts have characterized the Act as a statute that transmits the decedent's rights to file a claim to the representative of the wrongful death estate. In *Hogsett v. Hanna*, our Supreme Court addressed a wrongful death claim based in negligence resulting in death. 1936-NMSC-063, ¶ 1, 41 N.M. 22, 63 P.2d 540. Noting that our wrongful death statute is based on Missouri's statute, our Supreme Court stated that the Act does not create a new cause of action. *Id.* ¶ 9. Rather, "[i]t transmits to the designated persons a cause of action when the injured person would have had one had death not ensued." *Id.* (*citing Proctor v. Hannibal*, 64 Mo. 112 (1876); *White v. Maxcy*, 64 Mo. 552 (1877); *Crumpley v. Hannibal*, 98 Mo. 34, 11 S.W. 244 (1889)).

*Id.* ¶ 7 (underlined emphasis added). In short, the *Krahmer* Court concluded that the WDA merely "transmits" or "transfers" the same rights as would have been possessed by the decedent had they survived. *Id.*

Elsewhere, the Court of Appeals refers to the WDA as transferring an already existing cause of action: "If the injured person did not die, the injured person would possess the cause of action. The WDA permits the cause of action to survive." *Estate of Lajeuenesse ex rel. Boswell v. Bd. of Regents of Univ. of New Mexico*, 2013-NMCA-004, ¶ 10, 292 P.3d 485 (emphasis added). Relying on this passage from *Lajeuenesse*, the *Krahmer* Court concluded that "New Mexico courts have continued to characterize the [personal] representative's rights as derivative of the decedent's." *Id.* ¶ 8 (internal quotation marks and quoted authority omitted) (emphasis added).

In conclusion, the WDA is a *sui generis* cause of action that derives from and

is fundamentally joined to the common law. While there is no definitive statement from the Supreme Court on this question, the discussion above points to the following conclusions of law: that the WDA does not create a new cause of action; that the WDA incorporates both procedural and substantive elements of existing tort law; that the WDA merely permits the existing common-law rights of the injured person to survive their death; that the WDA abrogates the common law only in the sense that it "transmits" or "transfers" the cause of action to the personal representative; and that the personal representative's rights are "derivative" of the decedent's. The WDA is clearly not a creature of statute in any fundamental or important sense. Because the WDA does not create a new cause of action, the WDA is not in the category of "special cases and proceedings" described in Article VI, Section 13 of the New Mexico Constitution. Therefore, this Court should conclude that the WDA is not subject to the jurisdictional rule announced in *ACLU of New Mexico v. City of Albuquerque*.

## II. The second path is to overrule the single footnote in *ACLU* and its progeny and to clarify that subject-matter jurisdiction is not contingent on or related to the issue of standing, even in statutory causes of action.

This Court's second path is to clarify that in causes of action created by statute, the issue of standing and the issue of subject-matter jurisdiction are distinct; that the issue of standing is not "interwoven" with the issue of subject matter jurisdiction; and that standing is not a "jurisdictional prerequisite." The present case

illustrates the confusion created by the intertwining of these two concepts. Plaintiffs-Respondents respectfully urge this Court to disentangle them.

The concept of standing as "interwoven" with subject-matter jurisdiction first arose in footnote 1 of *ACLU*.[5] That footnote was clearly dicta because the issue of standing in cases created by statute was not squarely before the Court in *ACLU* and it was unnecessary to the holding of the case. *See State v. Sims*, 2010-NMSC-027, ¶ 20, 148 N.M. 330, 236 P.3d 642 ("[W]e strayed into dicta by addressing an issue that was not squarely before us, was not challenged by the parties, and was not necessary for decision in the case."); *Ruggles v. Ruggles*, 1993-NMSC-043, ¶ 22 n.8, 116 N.M. 52, 860 P.2d 182 (stating that statements "unnecessary to decision of the issue before the Court" are dicta); *Kent Nowlin Constr. Co. v. Gutierrez*, 1982-NMSC-123, ¶ 8, 99 N.M. 389, 658 P.2d 1116 ("Dictum is unnecessary to the holding of a case and therefore is not binding as a rule of law.").

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[5] The entire footnote states:

> We do note, however, that standing may be a jurisdictional matter when a litigant asserts a cause of action created by statute. As the Pennsylvania Superior Court explained: "When a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action." *In re Adoption of W.C.K.*, 748 A.2d 223, 228 (Pa.Super.Ct.2000) (quoted authority omitted) [now overruled].

*ACLU*, 2008-NMSC-045, ¶ 9 f.n.1.

If Plaintiffs-Respondents may be so bold,[6] the *ACLU* footnote was knowingly dicta ("We do note, however….") that was clearly extraneous. Further, it was "doubly" dicta because it employed the subjunctive mood, "may" ("…the issue of standing may be a jurisdictional matter…"), which by definition expresses uncertainty. This lack of clarity led later courts to look to and then adopt the quoted language from the Pennsylvania opinion, *In re Adoption of W.C.K.*, 748 A.2d 223, 228 (Pa.Super.Ct. 2000) ("When a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action."). Note that the verb, "interwoven," is also imprecise, almost oracular, rendering the *ACLU* footnote even more head scratching. Casting about for whatever clarity it can find, the mind latches onto the sentence, "standing then becomes a jurisdictional prerequisite to an action." That sentence at least is clear. However, that sentence states the very opposite of the text the footnote is attached to, which was: "We agree with Plaintiffs that standing in our courts is not derived from the state constitution, and is not jurisdictional." *ACLU*, 2008-NMSC-045, ¶ 9. In short, the *ACLU* footnote was not only confusing and irrelevant, but it contradicted the text to which it was attached. By planting this vague, unnecessary, but "jurisdictional" footnote, the

[6] Plaintiffs-Respondents criticize past opinions of this Court with great reluctance. The following discussion of the *ACLU* footnote and its progeny is intended with both respect and recognition that authors generally cannot control how their words are later interpreted.

Court buried a ticking time bomb, so to speak. Later courts would have to decide whether and how to defuse it.

This Court first cited the *ACLU* footnote in *Bank of N.Y. v. Romero*, 2014-NMSC-007, 320 P.3d 1. Inside a string cite, the *Romero* Court characterized the *ACLU* footnote as "recognizing standing as a jurisdictional prerequisite for a statutory cause of action." *Romero*, 2014-NMSC-007, ¶ 17 (emphasis added). However, this use of the *ACLU* footnote contained both internal and external inaccuracies. Externally, the *ACLU* footnote did not actually pertain to the text to which it was attached, which was: "The Bank of New York does not dispute that it was required to demonstrate under New Mexico's Uniform Commercial Code (UCC) that it had standing to bring a foreclosure action at the time it filed suit." *Romero*, 2014-NMSC-007, ¶ 17. This sentence, while accurate, does not mention jurisdiction; it merely addresses a requirement under the UCC to demonstrate standing.

Internally, the *Romero* Court's characterization of the *ACLU* footnote is inaccurate. The *ACLU* Court did not "recognize standing as a jurisdictional prerequisite" in the footnote; rather, the *ACLU* Court merely noted that "the issue of standing may be a jurisdictional matter." This was, again, dicta couched in the subjunctive verb, "may." In short, the *Romero* Court both mischaracterized the meaning of the *ACLU* footnote and mischaracterized the *ACLU* footnote as

established law.

*Romero* having ratified the *ACLU* footnote as established law, the Court of Appeals raised the stakes again in *Deutsche Bank I*. There, the Court of Appeals stated: "*Romero* clarified that standing is a jurisdictional prerequisite for a cause of action and must be established at the time the complaint is filed." *Deutsche Bank I,* 2014-NMCA-090, ¶ 8 (emphasis added). First, the *Deutsche Bank I* Court erroneously expanded the scope of the so-called "jurisdictional prerequisite" to include all causes of action. Further, the *Deutsche Bank I* Court made the same mistake as *Romero* when it both mischaracterized the content of the *Romero* citation (by conflating "standing" and "jurisdiction") and perpetuated the idea that the *Romero* citation was a statement of established New Mexico law.

Next, in *Deutsche Bank II* (i.e. *Johnston*), this Court revisited both *Romero* and the *ACLU* footnote. *See Johnston,* 2016-NMSC-013, ¶ 11. This Court even recognized that the authority quoted in the *ACLU* footnote had been abrogated by the Supreme Court of Pennsylvania. *See id.* At this point, the *Johnston* Court had the opportunity to correct the bedrock error in *ACLU* and *Romero* that conflated standing with jurisdiction.

Unfortunately, that did not happen. The *Johnston* Court instead chose to focus on a different error, in which *Romero* mistakenly identified an action to enforce a promissory note as a statutory cause of action. *See Romero*, 2014-NMSC-007, ¶ 17

("New Mexico's adoption of the UCC did not create the rights and remedies associated with actions to enforce promissory notes, but instead merely codified those rights and clarified their scope in the interest of attaining uniformity with other states that had adopted the UCC.") Accordingly, the *Johnston* Court held that "an action to enforce a promissory note fell within the district court's general subject matter jurisdiction in this case because it was not created by statute." *Johnston*, 2016-NMSC-013, ¶ 12. Although this Court had the opportunity to address head-on the earlier conflation of standing and jurisdiction in the *ACLU* footnote, it took an "off-ramp" by putting the cause of action to enforce a promissory note outside the category of statutory causes of action, thus circumventing the broader problem caused by the *ACLU* footnote: the conflation of standing and subject-matter jurisdiction.

Plaintiffs-Respondents pause at this point to acknowledge the irony of criticizing the Supreme Court on the one hand for avoiding the problem of the *ACLU* footnote and on the other hand urging the Court in Section I above to do exactly the same thing. If the Court accepts Plaintiffs-Respondents' invitation in Section I to categorize the WDA as a creature of common law rather than of statute, then the Court would be sidestepping the problem raised by the *ACLU* footnote.

However, the analysis in Section I of whether the WDA is fundamentally a common-law or a statutory cause of action reveals a deeper problem. The analysis

resembles in some ways the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 18, 142 S. Ct. 2111, 2126 (2022), concluding that "history and tradition" would determine whether laws regulating firearms are constitutional under the Second Amendment. Whatever one thinks of this approach as a policy matter, the approach faced immediate, harsh criticism as being a sweepingly vague and subjective rule of constitutional interpretation. As just one example, Judge Irene Berger of the Southern District of West Virginia defined the problem simply: *Bruen* "requires original historical research into somewhat obscure statutory and common law authority from the eighteenth century by attorneys with no background or expertise in such research." *United States v. Nutter*, 624 F. Supp. 3d 636, 640 f.n.6 (S.D.W. Va. 2022) (holding that a prohibition on possession of a firearm by persons convicted of a misdemeanor crime of domestic violence does not violate the Second Amendment).

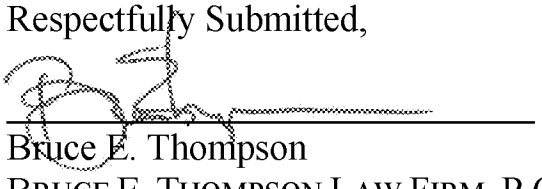
Obviously, the common-law versus statutory cause of action analysis here is categorically different from the *Bruen* analysis. At least here, lawyers can base their arguments in cases and statutes, and district court judges can apply reason and logic to those arguments. Nevertheless, the *Romero* and *Johnston* cases provide a perfect example of how a seemingly basic inquiry (Is an action to enforce a promissory note a creature of common law or statute?) can devolve into a maddening historical and textual analysis. Plaintiffs-Respondents respectfully propose that the approach taken

by Judge Bustamante in his concurrence is the correct one. This Court should follow *Sundance Mech. & Util. Corp. v. Atlas*, 1990-NMSC-031, ¶ 24, 109 N.M. 683, 789 P.2d 1250 ("…[T]he dicta … that the failure of a complaint to state a cause of action is jurisdictional, if read to mean that such a failure deprives the trial court of subject-matter jurisdiction, were ill-advised and inconsistent with other statements of the law[.]"). Or, as the Supreme Court of Pennsylvania simply put it, "[w]hether a party has standing to maintain an action is not a jurisdictional question." *Beers v. Com. Unemployment Comp. Bd. of Rev.*, 534 Pa. 605, 611, 633 A.2d 1158, 1161 f.n.6 (1993).

## CONCLUSION

This Court should affirm the Court of Appeals. In addition, following the lead of Judge Bustamente, this Court should reaffirm *Sundance* and clarify that standing and subject-matter jurisdiction are unrelated.

Respectfully Submitted,



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I CERTIFY that on this 23rd day of September 2024, Plaintiffs–Respondents filed the foregoing electronically through the Odyssey File & Serve System and served the following parties and counsel by email:

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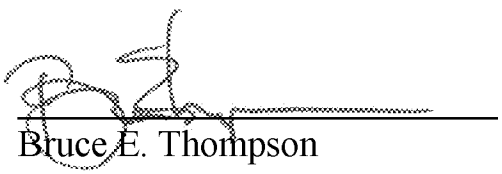

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