SUPREME COURT
STATE OF NEW MEXICO
COMMEMORATIVE
APPELLATE OPINIONS

VOLUME 1

JUSTICE EDWARD L. CHÁVEZ

2003–2018

DEDICATION

It has been the desire of the Supreme Court for some time to publish all of the opinions of a retired Justice in one volume of the New Mexico Reports. This is the inaugural publication, dedicated to the opinions of Chief Justice Edward L. Chavez.

During his tenure on the Supreme Court (2003-2018) Justice Chavez published over 200 opinions, an astonishing accomplishment in itself. To publish all of his opinions would have required not one, but three entire volumes. This volume only accounts for about one-fourth of his formal work, but we hope it captures the essence and significance of his work.

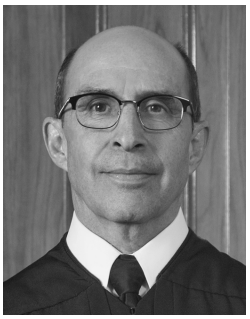
In many respects, Justice Chavez not only contributed to the growth and maturity of the law in New Mexico, he wrote the foundation of that law. Justice Chavez' opinions recognize the right of New Mexico citizens who do not speak English to sit as jurors; recognize the constitutional right of same sex couples to marry; declare that the right to have a jury decide the facts of a case is sacrosanct; recognize the right of a same sex partner to custody rights of an adopted child; establish the test to determine double jeopardy violations; determine that assisted suicide is not a constitutional right; protect the privacy of communications between a sex crime victim and therapist; require a jury to decide if a child will be required to serve an adult sentence in an adult prison; prohibit pretext stops by police officers under the New Mexico Constitution; and require that farm and ranch workers be treated the same as other workers under the New Mexico Constitution.

He also wrote the judicial reapportionment opinion for the Court in 2012, with the aim of protecting the precious constitutional right to vote for the candidate of one's choice.

His opinions also cover the gamut of common law, statutory law, and procedure. Examples include addressing the right to recover punitive damages in common law insurance bad faith cases; the proper rejection of uninsured motorist benefits (UM) coverage, and "stacking;" the consequences of breaching the consent to settle provisions of an insurance policy; the breach of the duty of fair representation by a union; whether a domestic partner is a "family member" in an insurance policy; whether an award of punitive damages is constitutional; whether firefighters have the right to recover damages for intentional infliction of emotional distress; what is a "trade secret" and its protection in discovery; requirements to certify class actions for declaratory and injunctive relief; whether public safety aids have statutory authority to make arrests; establishing that foreseeability does not define duty in tort law; establish that installment loans bearing interest rates of 1,147.14% to 1,500.00% are substantively unconscionable under the common law and statutory law; and defining the statutory elements of child abandonment.

In all his work Justice Chavez demonstrates a profound commitment to equal justice under law. Collegiality, modesty, and intelligence are his trademarks, punctuated by a genuine sense of humor. Justice Chavez is truly a "mensch"–a person of integrity and honor. A native New Mexican who went to school "back east" (Portales). Justice Chavez is another jewel in one of New Mexico's many treasures.

ABOUT THE AUTHOR



Justice Edward L. Chávez, a native New Mexican, was appointed to the New Mexico Supreme Court by Governor Bill Richardson in 2003 and was elected by the voters in 2004. He was also retained by the voters in his retention elections in 2006 and 2014. He served as Chief Justice of the New Mexico Supreme Court from January 2007 through early April 2010 and retired from the Supreme Court in 2018.

Justice Chávez was born in Santa Fe, New Mexico and is a product of the New Mexico public school system. He graduated from Santa Fe High School in 1974 when he was 16 years old. He graduated from Eastern New Mexico University in 1978 with a Bachelor's degree in Business Administration. He went to law school at the University of New Mexico School of Law and received his Juris Doctor in 1981.

He was committed to helping people throughout his 20 plus years in private practice, serving as President of the Legal Aid Society of Albuquerque and Chairman of the UNM Mental Health Center. He also chaired the Lawyer Disciplinary Board and has held memberships in numerous civic and professional organizations including serving as President of the New Mexico Trial Lawyers Association.

His courtroom experience prior to service on the Supreme Court earned him recognition as an elected member of the American Law Institute where he served on the Members Consultative Group for the Restatement of the Law Third, Torts, Liability for Physical and Emotional Harm. He was elected to the American College of Trial Lawyers (membership is limited to no more than 1% of the total lawyer population of any state), and the International Academy of Trial Lawyers (limited to 500 active trial lawyers in the United States).

His dedication to higher education afforded him the opportunity to serve as an Adjunct Instructor in Trial Practice and Evidence for a number of years at the University of New Mexico School of law and he was an invited guest lecturer on a variety of subjects while on the court. He was also a Fellow in the Advanced Science and Technology Adjudication Resource Center and was instrumental in bringing a national science school for Judges to New Mexico, where he had the opportunity to work with Scientists from both Los Alamos National Laboratory and Sandia National Laboratories. He worked with Los Alamos National Laboratory to develop the LANL Judges Science School.

Some of Justice Chávez's recognitions include receiving ENMU's Distinguished Alumni Award; UNM Law School's Distinguished Achievement Award; Outstanding Appellate Jurist Award from the New Mexico Chapter of the American Board of Trial Advocates; President's Award State Bar of New Mexico.

NEW MEXICO SUPREME COURT OFFICIAL CITATIONS

JUSTICE EDWARD L. CHÁVEZ

NEW MEXICO SUPREME COURT CASES REPORTED

JUSTICE EDWARD L. CHÁVEZ

Justice Edward L. Chávez

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-004

Filing Date: January 20, 2004

Docket No. 27,928

IN RE: JOSEPH EDWARD SLOAN, Debtor JOSEPH EDWARD SLOAN and BYRON Z. MOLDO, Chapter 7 Trustee,

Plaintiffs-Appellants and Cross-Appellees,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee and Cross-Appellant.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINION

CHÁVEZ, Justice.

{1} In this insurance-bad-faith case, arising from an insurance company's failure to settle a third-party lawsuit against its insured, we are asked to clarify whether a culpable mental state in addition to bad faith is required for the imposition of punitive damages. The following question was certified to us by the United States Court of Appeals for the Tenth Circuit, in accordance with Rule 12-607 NMRA 2003:

> Is an instruction for punitive damages required in every insurance bad faith case in which the plaintiff has produced evidence supporting compensatory damages as suggested by [UJI 13-1718 NMRA 2003], or is the New Mexico Court of Appeals correct that subsequent New Mexico Supreme Court authority requires a culpable mental state beyond bad faith for imposition of punitive damages in insurance bad faith cases? *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, [1999-NMCA-109, ¶¶ 76–90, 127 N.M. 603, 985 P.2d 1183].

Sloan v. State Farm Mut. Auto. Ins. Co. (In re Sloan), 320 F.3d 1073, 1073 (10th Cir. 2003).

{2} Exercising jurisdiction under NMSA 1978, § 39-7-4 (1997), we answer that under New Mexico law, a punitive-damages instruction should be given to the jury in every common-law insurance-bad-faith case where the evidence supports a finding either (1) in failure-to-pay cases (those arising from a breach of the insurer's duty to timely investigate, evaluate, or pay an insured's claim in good faith), that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded, or (2) in failure-to-settle cases (those arising from a breach of the insurer's duty to settle a third- party claim against the insured in good faith), that the insurer's failure or

refusal to settle was based on a dishonest or unfair balancing of interests. An insurer's frivolous or unfounded refusal to pay is the equivalent of a reckless disregard for the interests of the insured, and a dishonest or unfair balancing of interests is no less reprehensible than reckless disregard, which has historically justified an award of punitive damages. To ensure the jury has found a culpable mental state before awarding punitive damages, we modify UJI 13-1718 to reflect that punitive damages may only be awarded when the insurer's conduct was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton.

I.

{3} This matter comes to us in the course of an appeal from a jury trial in federal district court. The trial court granted Defendant State Farm's motion for judgment as a matter of law on Plaintiffs' claim for punitive damages against Defendant for bad-faith failure to settle. *Sloan*, 320 F.3d at 1074. The court submitted Plaintiffs' insurance- bad-faith claims to the jury without the instruction for punitive damages, UJI 13-1718 NMRA 2003. Even though Plaintiffs' claims primarily involved bad-faith failure to settle, the court included in its instructions to the jury both the bad-faith standard in a failure-to-settle action, that is, a dishonest or unfair balancing of interests (Jury Instruction No. 6, below), *and* the bad-faith standard in a first-party failure-to-pay action, that is, any frivolous or unfounded refusal to pay (Jury Instruction No. 8, below). Because the trial court gave the jury both instructions, we shall address the standard for punitive damages under both causes of action. The jury instructions relevant to Plaintiffs' bad-faith claim given at trial were:

Jury Instruction No. 6

> A liability insurance company has a duty to timely investigate and fairly evaluate the claim against its insured, and to accept reasonable settlement offers within policy limits.
>
> An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.

See UJI 13-1704 NMRA 2003.

Jury Instruction No. 8

> An insurance company acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.
>
> In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair investigation and evaluation of the claim.
>
> A failure to timely investigate, evaluate or pay a claim is a bad faith breach of the duty to act honestly and in good faith in the performance of the insurance contract.

See UJI 13-1702 NMRA 2003.

{4} The jury found that State Farm acted in bad faith in its dealings with Plaintiffs and that its bad faith proximately caused Plaintiffs' damages. The jury awarded Plaintiffs $600,000 in compensatory damages, later reduced to $540,000 on motion for remittitur. Plaintiffs appealed to the United States Court of Appeals for the Tenth Circuit, arguing that under New Mexico law, where there is sufficient evidence to submit an insurance-bad-faith claim to the jury, the jury must also receive an instruction on punitive damages. The Court of Appeals then certified the above question to us because it was unclear under New Mexico law whether

in an insurance-bad-faith action, a finding of bad faith, without an additional finding of a culpable mental state, permitted an award of punitive damages.

{5} This case presents an opportunity to assess the New Mexico Court of Appeals' holding in *Teague-Strebeck* that an award of punitive damages in an insurance-bad-faith case requires a culpable mental state in addition to the bad faith required for compensatory damages. *See Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 78, 127 N.M. 603, 985 P.2d 1183. Although we denied the petition for certiorari in that case, such denial in itself expresses no opinion on the merits of the case. *See State v. Breit*, 1996-NMSC-067, ¶ 13, 122 N.M. 655, 930 P.2d 792. In our denial of certiorari in *Teague-Strebeck*, we avoided having to reconcile various statements we have made about the standard for punitive damages in insurance-bad-faith claims. We now take the opportunity to clarify the law on this point.

{6} For the reasons that follow, we conclude that under New Mexico law, bad-faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve. To the extent *Teague-Strebeck* would, in every insurance-bad-faith case, require a showing of an additional culpable mental state to permit an instruction on punitive damages, *Teague-Strebeck* is overruled. In so holding, we reaffirm our statement in *Jessen v. National Excess Insurance Co.*, 108 N.M. 625, 627, 776 P.2d 1244, 1246 (1989) that "[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff's insurance-bad-faith claim is allowed to proceed to the jury. We do, however, somewhat limit the per se Jessen rule by affording the trial court the discretion to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages.

II.

{7} *Teague-Strebeck* held that in insurance-bad-faith cases, New Mexico requires "the presence of aggravated conduct beyond that necessary to establish the basic cause of action in order to impose punitive damages." 1999-NMCA-109, ¶ 78. In reaching this conclusion, the *Teague-Strebeck* court analyzed two New Mexico Supreme Court rulings, *Paiz v. State Farm Fire & Casualty Co.*, 118 N.M. 203, 880 P.2d 300 (1994) and *Allsup's Convenience Stores, Inc. v. North River Insurance Co.*, 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1, and determined from the language of those opinions that this Court intended to raise the standard of conduct required for an award of punitive damages in insurance-bad-faith cases. The *Teague-Strebeck* court determined that *Paiz* and *Allsup's* "superseded" the *Jessen* formulation and that "New Mexico now requires a showing of a culpable mental element to allow imposition of punitive damages." *Teague-Strebeck*, 1999-NMCA-109, ¶ 90.

{8} In its original opinion, the *Teague-Strebeck* court affirmed the trial court's denial of the plaintiffs' claim for punitive damages arising from an insurance-bad-faith claim. Id. ¶¶ 70–73. The plaintiffs had argued that they were automatically entitled to punitive damages once compensatory damages were awarded and that the trial court therefore misapplied the legal standard for the award of punitive damages. *Id.* ¶¶ 71- 72. *Teague-Strebeck* interpreted *Paiz* as requiring evidence of "an evil motive or a culpable mental state," in addition to bad faith, for a plaintiff to be entitled to punitive damages. Accordingly, it held the trial court did not abuse its discretion by refusing punitive damages. *Id.* ¶¶ 72–73.

{9} In a separate published order on rehearing, appended to the original published opinion, the *Teague-Strebeck* court reinforced its initial holding, and again relied on *Paiz* and *Allsup's* for the proposition that "there is a real distinction between 'bad faith' sufficient to support an award of compensatory damages and 'bad faith' meriting exemplary damages." *Id.* ¶ 85. The *Teague-Strebeck* court also noted that UJI 13-1718, as it

currently stands, "clearly contemplates the giving of a punitive damages instruction in every bad faith case submitted to a jury." Id. ¶ 82 n.1. The court then stated, "Given the holding in *Paiz*, and the language in *Allsup's*, upon which we rely, it would seem appropriate to reconsider this approach." *Id.*

{10} As we reconsider UJI 13-1718 and the law of punitive damages in insurance- bad-faith claims, we first consider the analyses of *Paiz* and *Allsup's* in *Teague-Strebeck*.

A.

{11} The *Teague-Strebeck* court began its analysis of *Paiz* by characterizing it as "a first party insurance-bad-faith case." 1999-NMCA-109, ¶ 79. Although *Paiz* began as an insurance-bad-faith case, by the time it reached the appellate courts it was reduced to a breach-of-contract case. At the trial level the plaintiffs had filed claims sounding in negligence, insurance bad faith, and breach of contract. Before submitting the case to the jury, however, the trial court directed a verdict against the plaintiffs with respect to their insurance-bad-faith claim. *Paiz*, 118 N.M. at 210, 880 P.2d at 307. The judge then submitted the case to the jury under a breach-of-contract theory and under the plaintiffs' tort claims of "negligent misrepresentation, negligent investigation, and negligent delay in making payment." Id. at 206, 880 P.2d at 303. The jury returned a verdict in favor of the plaintiffs. "[T]he trial judge viewed the damages awarded as arising from State Farm's breach of contract instead of from any of Defendants' various negligent acts." Id. at 207, 880 P.2d at 304. We agreed, holding the jury's award was "grounded in breach of contract and not as damages for commission of one or more torts." Id.

{12} Importantly, the claim of insurance bad faith was never raised as an issue on appeal. The plaintiffs did not appeal the directed verdict against them and therefore "conceded the correctness of the trial court's ruling" rejecting the bad-faith claim. Id. at 210, 880 P.2d at 307. "[C]ases are not authority for propositions not considered." *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 84 N.M. 343, 348, 503 P.2d 323, 328 (1972). We conclude *Paiz* ought not be relied upon in answering the certified question and was not dispositive in answering the question raised in *Teague-Strebeck*, because in *Paiz* this Court as well as the trial court focused on the contractual nature of the claims, rather than the degree to which they also sounded in tort.

{13} *Teague-Strebeck* interprets *Paiz* as directly applicable to the tort of insurance bad faith. *Teague-Strebeck*, 1999-NMCA-109, ¶ 79. As we read *Paiz*, however, the holding is more narrowly drawn: "[W]e hold that such [a punitive-damages] award for a breach of contract may no longer be based solely on the breaching party's 'gross negligence' in failing to perform the contract." *Paiz*, 118 N.M. at 204, 880 P.2d at 301. Because the tort of insurance bad faith is fundamentally distinct from a claim for breach of contract, and because insurance bad faith was not before the Court in that case, the opinion in *Paiz* is properly confined to the standard for punitive damages in a case for breach of contract.

B.

{14} The *Teague-Strebeck* court further advanced certain language from *Allsup's* as supporting its conclusion that this Court had raised the standard for punitive damages in insurance-bad-faith cases. *Allsup's* involved an insurer's appeal of a jury award of punitive damages in an insurance-bad-faith claim. 1999-NMSC-006, ¶ 44. The insurer, North River, argued its due process rights were violated by a jury instruction suggesting the jury would merely have to find unreasonable conduct, as opposed to bad faith, in order to be held liable for punitive damages. Id. The instruction at issue there, essentially identical to UJI 13-1705 NMRA 2003, read:

> Under the "bad faith" claim, what is customarily done by those engaged in the insurance industry is evidence of whether the insurance company acted in good faith.

> However, the good faith of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not. Industry customs or standards are evidence of good or bad faith, but they are not conclusive.

Allsup's, 1999-NMSC-006, ¶ 44. North River interpreted this instruction as permitting the slightest unreasonableness to render an insurance company liable for punitive damages. Id. ¶ 45. This, North River argued, conflicted with our statement in McGinnis v. Honeywell, Inc., 110 N.M. 1, 9, 791 P.2d 452, 460 (1990) that a culpable mental state is a prerequisite to punitive damages.

{15} To resolve the alleged conflict, we examined another jury instruction given at trial that stated in part, "*Allsup's* contends and has the burden of proving that any bad faith actions on the part of North River were malicious, reckless or wanton, and, therefore punitive damages should be awarded." 1999-NMSC-006, ¶ 46 (emphasis omitted). Reading the two instructions together, we concluded the jury must have found "malicious, reckless, or wanton conduct before it could award punitive damages." *Id.* Thus, *Allsup's* held, North River suffered no due process violation in the imposition of punitive damages. As we read *Allsup's*, its holding is strictly designed to resolve the question whether the jury was adequately instructed on the standard for punitive damages to survive a due process challenge. See id. ¶ 44. Accordingly, the presence of the second instruction on punitive damages enabled this Court to avoid the precise issue before us now, which is whether a greater standard than that required for compensatory damages in insurance-bad-faith litigation is required before instructing on punitive damages. As a result of these considerations, we believe the *Teague-Strebeck* court, understandably, may have been misled by our opinion in *Allsup's* in regard to what we now hold is the correct analysis of New Mexico law on the standard for punitive damages in insurance-bad-faith cases.

{16} In our current analysis, we conclude that *Allsup's* in fact supports our view that a punitive-damages instruction will ordinarily be given whenever the plaintiff is entitled to have the jury instructed on his or her insurance-bad-faith claim. In analyzing UJI 13-1705, the *Allsup's* court reasoned that "[w]hile bad faith and unreasonableness are not always the same thing, there is a certain point, *determined by the jury*, where unreasonableness becomes bad faith and punitive damages may be awarded." 1999-NMSC-006, ¶ 45 (emphasis added). In other words, there comes a point at which the insurer's conduct progresses from mere unreasonableness to a culpable mental state. Because the resolution of precisely where this point lies in each case depends on an assessment of the complex factual determinations surrounding the insurer's conduct and corresponding motives, such a question must ordinarily be reserved for the factfinder to resolve. As a general proposition, therefore, once a plaintiff has made a prima facie showing sufficient to submit his or her bad-faith claim to the jury, the determination whether the insurer's bad-faith conduct is deserving of punitive damages is for the jury to decide.

III.

{17} Although we overrule *Teague-Strebeck's* holding that an award of punitive damages in such cases always requires evidence of culpable conduct beyond that necessary to establish basic liability, we agree with its statement that "'bad faith' may include a culpable mental state, but it is not necessarily so." 1999-NMCA-109, ¶ 85. We agree with this statement because of the manner in which the jury instructions for basic liability, UJI 13-1702 and 13-1704, are currently written. While these instructions properly convey the two standards we have previously articulated for a finding of a culpable mental state—a frivolous or unfounded refusal to pay, *see* UJI 13-1702, and a failure to honestly and fairly balance the interests of the insured and its own, *see* UJI 13-1704—we acknowledge the instructions as written might be interpreted, in some circumstances, as permitting merely unreasonable conduct to support a finding of bad faith sufficient for an award of punitive damages. This is because these instructions,

particularly UJI 13-1702, include concepts of reasonableness along with concepts which may evince a culpable mental state. Because punitive damages are imposed for the limited purposes of punishment and deterrence, a culpable mental state is a prerequisite to punitive damages. *See McGinnis*, 110 N.M. at 9, 791 P.2d at 460. While the unreasonable conduct described in these instructions may support an award of compensatory damages, such conduct does not support an award of punitive damages. Thus, there may be cases in which a plaintiff, despite having advanced evidence sufficient to submit his or her bad-faith failure-to-pay claim to the jury, nevertheless fails to make a prima facie showing that the insurer's conduct exhibited a culpable mental state.

{18} Under New Mexico law, an insurer who fails to pay a first-party claim has acted in bad faith where its reasons for denying or delaying payment of the claim are frivolous or unfounded. *See State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 759, 527 P.2d 798, 800 (1974). In *Clifton* we concluded that in order to recover damages in tort under this claim, there must be evidence of bad faith or a fraudulent scheme. Id. We further announced that "bad faith" means "any frivolous or unfounded refusal to pay." Id. (internal quotation marks and quoted authority omitted). We have defined "frivolous or unfounded" as meaning an arbitrary or baseless refusal to pay, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim:

> "Unfounded" in this context does not mean "erroneous" or "incorrect"; it means essentially the same thing as "reckless disregard," in which the insurer "*utterly* fail[s] to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." [*Jessen*, 108 N.M. at 628, 776 P.2d at 1247.] It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous."

Jackson Nat'l Life Ins. Co. v. Receconi, 113 N.M. 403, 419, 827 P.2d 118, 134 (1992). By refusing or delaying payment on a claim for reasons that are frivolous or unfounded, the insurer has acted with reckless disregard for the interests of the insured; such reckless disregard supports a claim for punitive damages.

{19} We acknowledge, however, that the reasonableness of the insurer's conduct is generally an element of the jury's inquiry in determining whether compensatory damages should be awarded. For this reason, the bracketed second sentence of our jury instruction reads, "In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair [investigation or evaluation] of the claim." UJI 13-1702 NMRA 2003. In failure-to-pay claims, therefore, a plaintiff under these circumstances might make a proper showing that the insurer acted unreasonably in denying or delaying a claim, entitling the plaintiff to compensatory damages, without having made a prima facie showing that the refusal to pay was frivolous or unfounded. In such circumstances, it is proper for the trial court to submit the plaintiff's bad-faith claim to the jury for consideration of an award of compensatory damages but withhold the punitive-damages instruction.

{20} On the other hand, while New Mexico recognizes a common-law cause of action for bad-faith failure to settle within policy limits, we do not recognize a cause of action for negligent failure to settle. *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). To be entitled to recover for bad-faith failure to settle, a plaintiff must show that the insurer's refusal to settle was based on a dishonest judgment. By "dishonest judgment," we mean that an insurer has failed to honestly and fairly balance its own interests and the interests of the insured. An insurer cannot be partial to its own interests, but rather must give the interests of its insured at least the same consideration or greater. *See Lujan v. Gonzales*, 84 N.M. 229, 236, 501

P.2d 673, 680 (Ct. App. 1972). In caring for the insured's interests, "the insurer should place itself in the shoes of the insured and conduct itself as though it alone were liable for the entire amount of the judgment." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 14, 124 N.M. 624, 954 P.2d 56 (internal quotation marks and quoted authority omitted). As we stated in *Ambassador*, "[The insurer's] decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way." 102 N.M. at 31, 690 P.2d at 1025 (quoted authorities omitted). This element of a dishonest or unfair balancing of interests is the key element in determining whether, in bad-faith failure-to-settle claims, the insurer's conduct merits punitive damages.

{21} In such failure-to-settle claims, evidence of an insurer's negligence in researching a claim does not give rise to its own cause of action, but rather provides one possible means of demonstrating that an insurer acted in bad faith. As we said in *Ambassador*:

> [W]hen failure to settle the claim stems from a failure to properly investigate the claim or to become familiar with the applicable law, etc., then this is negligence in defending the suit (a duty expressly imposed upon the insurer under the insurance contract) and is strong evidence of bad faith in failing to settle. Here, basic standards of competency can be imposed, and the insurer is charged with knowledge of the duty owed to its insured. In this sense, such negligence becomes an *element* tending to prove bad faith, but not a cause of action in and of itself.

Id. at 31, 690 P.2d at 1025. Thus, if the insurer fails to meet "basic standards of competency" in investigating a claim or researching the applicable law, such conduct is "strong evidence" of bad faith, but is not in itself sufficient to support the plaintiff's bad-faith failure-to-settle claim.

{22} In *Ambassador*, we predicated an insurer's honest judgment on its diligent, competent investigation of the claim:

> In order that [the insurer's decision whether to settle] be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.
>
> This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated.

Id. (quoted authorities omitted). Our current uniform jury instruction reflects this standard of conduct when it states an insurer "has a duty to timely investigate and fairly evaluate the claim against its insured." UJI 13-1704 NMRA 2003. Nevertheless, we conclude the competence and timeliness of the insurer's investigation of the claim, while strong evidence of whether the insurer conducted itself fairly and in good faith, is not the dispositive element in a failure-to-settle claim. Even where the insurer's investigation was both competent and timely, the insurer is nevertheless liable for bad faith when its refusal to settle within policy limits is based on a dishonest judgment. In many respects, a dishonest judgment in these circumstances may be more reprehensible than where the insurer bases its decision not to settle on a negligent investigation. We conclude, therefore, in failure-to-settle cases, it is the insurer's failure to treat the insured honestly and in good faith, giving "equal consideration to its own interests and the interests of the insured," id., that renders the insurer liable for insurance bad faith and also merits an instruction on punitive damages.

IV.

{23} As a result of the foregoing analysis, we conclude that in most cases, the plaintiff's theory of bad faith, if proven, will logically also support punitive damages. To ensure, however, that a jury only awards punitive damages for bad-faith conduct manifesting a culpable mental state, and not for conduct that may fall short of such reprehensibility, we find it necessary to augment

the punitive-damages instruction to reflect the requisite standard for a culpable mental state. Accordingly, we modify the first sentence of UJI 13-1718 to read as follows:

> If you find that plaintiff should recover compensatory damages for the bad faith actions of the insurance company, and you find that the conduct of the insurance company was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton, then you may award punitive damages.

The trial court should include also the definitions of "dishonest judgment"—"a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured"—along with the definitions of "reckless," "malicious," "willful," and "wanton." *See* UJI 13-1827 NMRA 2003. We believe this revised instruction will ensure the jury will award punitive damages only in those cases where the insurer's conduct is shown to have manifested a culpable mental state.

{24} Finally, in answering as we do that a punitive-damages instruction will ordinarily be given every time the jury is instructed on the plaintiff's insurance-bad- faith claim, we acknowledge the prospect that in certain instances a plaintiff's evidence of bad-faith conduct, though sufficient to entitle the plaintiff to compensatory damages, may be, as a matter of law, insufficient to warrant a punitive-damages instruction. Where the trial court determines, based on the evidence marshaled at trial, that no reasonable jury could find the insurer's conduct to have manifested a culpable mental state, then the trial court may withhold the giving of a punitive-damages instruction. Accordingly, we also modify the Use Note for UJI 13-1718 to reflect that this instruction must ordinarily be given whenever UJI 13-1702, -1703, or -1704 is given; the instruction will not be given only in those circumstances in which the plaintiff fails to make a prima facie showing that the insurer's conduct exhibited a culpable mental state.

{25} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-013

Filing Date: April 19, 2004

Docket No. 28,277

KATHLEEN SALAZAR,

Plaintiff-Appellee,

v.

CITADEL COMMUNICATIONS CORP.,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Wendy York, District Judge

Rodey, Dickason, Sloan, Akin & Robb, P.A.
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Thomas L. Stahl
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Eckert Seamans Cherin & Mellott, L.L.C.
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Allan W. Brown
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for Appellant

Foster, Johnson, McDonald, Lucero & Koinis, L.L.P.
J. Douglas Foster
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Albuquerque, NM

for Appellee

OPINION

CHÁVEZ, Justice.

{1} Defendant-Appellant Citadel Communications (Company) provided Plaintiff-Appellee Kathleen Salazar (Salazar) with an Employment Handbook which, among other things, required binding arbitration of all disputes with the Company. According to the Handbook, the arbitration is to proceed in accordance with an Agreement to Arbitrate that is "annexed," or appended, to the Handbook. The Company simultaneously reserved the right to modify, unilaterally and at any time, any of the Handbook's provisions save the employee's at-will status. Because we conclude that this reservation extended to the arbitration provision of the Handbook, we further conclude that it and the annexed Agreement to Arbitrate represent an illusory and unenforceable promise. The District Court having reached the same conclusion, we affirm.

I. BACKGROUND

{2} Salazar filed a de novo appeal in District Court from an order of the New Mexico Human Rights Commission which denied her discrimination claim. She had alleged to the Commission that she was terminated from her employment at the Company because of her ethnicity and gender. The Company subsequently filed a motion to stay the District Court action and compel arbitration. The Company attached to that motion what it alleged to be a valid and enforceable agreement to arbitrate, signed by Salazar.

{3} The scope of this agreement would seem to cover Salazar's current claims against the Company. The agreement, made "in consideration of continued employment and the mutual agreement to arbitrate claims," provides that "[a]ll disputes, as defined below, between Employee and the Company . . . shall be resolved by final and binding arbitration in accordance with the provisions of this agreement." Disputes, in turn, are defined to "include all claims for legal or equitable relief based upon state, federal or local common or statutory laws." Although the agreement recognizes certain exceptions, none apply to this case.

{4} As the Company acknowledges, this Agreement was attached to the Employee Handbook, which sets forth many of the terms and conditions of employment. For example, the Handbook has sections on hours, pay, attendance, benefits, safety, conduct, and termination of employment. Additionally, the Handbook discusses the Company's dispute resolution policy and procedure, which includes a subsection on arbitration. That arbitration subsection provides, in part: "As a condition of employment with the Company, all employees and the Company agree to submit all disputes . . . to arbitration in accordance with the Agreement to Arbitrate Claims entered into between the Company and its employees, *the form of which is annexed to this Handbook*." (Emphasis added.)

{5} Although the Handbook instructs the employee to read it "so that you will know what the Company expects from you and what you can expect from the Company," it takes great pains to avoid creating a contractual relationship. The beginning of the Handbook, under a heading entitled "Important: Read Carefully" (emphasis omitted), informs the employee that the Handbook "is not intended to constitute a contract of employment between [the employee] and the Company." Furthermore, that same section states that the Handbook "supersedes and revokes all previous practices, procedures, policies, and other statements of the Company . . . that modify, supplement or conflict with this Handbook," but that it, in turn, "may be amended at any time, with or without advance notice." The Receipt and Acknowledgment form, signed by Salazar, repeats the assertions that the Handbook is not a contract and can be unilaterally modified at any time. Both the Handbook and the Receipt and Acknowledgment form, however, provide one exception to the Company's unfettered and unilateral right to alter the terms and conditions of Salazar's employment as set forth in the Handbook: the employee's at-will status can only be modified "by an express written employment agreement executed by a regional president of the Company or the general manager of the station" and the employee. (Emphasis omitted.) Nothing in the Agreement to Arbitrate expressly states that it, having been "annexed" to the Employee Handbook, is not also subject to the Company's right to unilaterally modify its provisions or that modifying the arbitration provision in the Handbook would not affect the annexed Agreement to Arbitrate.

{6} Salazar filed a brief in opposition to the Company's motion to compel arbitration, arguing that the Agreement to Arbitrate was illusory, that it lacked consideration, and that it was unconscionable. The District Court issued a letter decision, finding the Agreement to Arbitrate unenforceable. In that letter, the Court concluded that, "given all the language of the employee handbook and the Receipt and Acknowledgment form, the arbitration agreement was subject to unilateral modification and is, therefore, invalid." The Court noted that the Company limited its ability to modify the employee's at-will status, but provided no such limitation on the agreement to arbitrate or any of the other terms and conditions of Salazar's employment. Alternatively, she concluded that the documents were ambiguous as to whether the Company could unilaterally modify the Agreement and construed the ambiguity against it. She denied the other grounds for invalidating the agreement asserted by Salazar, finding them to be without merit.

{7} The Company appealed to the Court of Appeals. *See* NMSA 1978, § 44-7A-29(a)(1) (2001) (providing for an appeal following an order denying a motion to compel arbitration). The Court of Appeals, in turn, transferred the case to this Court sua sponte. *See* NMSA 1978, § 28-1-13(C) (1987); *Martinez v. City of Grants*, 1996-NMSC-061, ¶ 3, 122 N.M. 507, 927 P.2d 1045 (noting that this Court has exclusive jurisdiction over appeals from district court orders involving the New Mexico Human Rights Act). We affirm the District Court.

II. DISCUSSION

{8} Under the Federal Arbitration Act (FAA), a pre-dispute agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds

as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). Under recent United States Supreme Court cases, such agreements can even require a party to arbitrate statutory claims. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991). Of course, a prerequisite to compelling arbitration is the existence of a valid agreement to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 8, 134 N.M. 558, 80 P.3d 495. To determine whether the agreement to arbitrate is valid, courts look to general state contract law, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), with the caveat that state laws that are specifically hostile to arbitration agreements are preempted by the FAA, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

{9} Under general New Mexico contract law, an agreement that is subject to unilateral modification or revocation is illusory and unenforceable. *Bd. of Educ. v. James Hamilton Constr. Co.*, 119 N.M. 415, 420, 891 P.2d 556, 561 (Ct. App. 1994). This principle applies equally to agreements to arbitrate. *Heye*, 2003-NMCA-138, ¶¶ 11–12. The party that reserves the right to change the agreement unilaterally, and at any time, has not really promised anything at all and should not be permitted to bind the other party. The Employee Handbook undoubtedly qualifies as such an illusory promise; by its own terms it is not a contract, should not be interpreted as a contract, and can be unilaterally altered by the Company at any time, with or without notice. Thus, the exceedingly narrow question for us to decide is whether the Agreement to Arbitrate, the "form of which" was "annexed to" the Employee Handbook, is part of the Employee Handbook or whether, as the Company argues, it is an entirely separate agreement. If the Agreement to Arbitrate is part of the Employee Handbook, then it too is subject to the Company's unfettered right to unilaterally alter it and is, for that reason, illusory. The District Court concluded that, as a matter of law, the Agreement to Arbitrate is part of the Employee Handbook. Reviewing that legal determination de novo, *id.* ¶ 4, we affirm. *See also DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 4, 134 N.M.630, 81 P.3d 573, *cert, denied*, 2003-NMCERT-003.

{10} We primarily rely on the terms of the Employee Handbook itself. The Handbook, which covers most aspects of Salazar's employment, also provides for binding arbitration of disputes. That arbitration is to be accomplished "in accordance with the Agreement to Arbitrate Claims entered into between the Company and its employees." The "form" of this Agreement to Arbitrate is "annexed to" the Employee Handbook. We think it fair to say that under the common understanding of the word "annex," that which has been annexed to a larger unit has become part of that unit. *See, e.g.*, *The American Heritage Dictionary of the English Language* 73 (4th ed. 2000) (defining the verb "to annex" as "[t]o append or attach, especially to a larger or more significant thing," or "[t]o add or attach, as an attribute, condition, or consequence"); *Black's Law Dictionary* 87 (7th ed. 1999) (defining the noun "annex" as "[s]omething that is attached, such as a document to a report or an addition to a building").

{11} The Employee Handbook, therefore, provides for binding arbitration of disputes and annexes, or attaches, the form of an agreement which sets forth the manner in which the arbitration is to be accomplished. Because other language of the Employee Handbook gives the Company the right to modify any of its provisions unilaterally at any time, we conclude that the Company has retained the authority to unilaterally modify both the arbitration section of the Handbook and the annexed Agreement to Arbitrate, which is merely the form of the agreement set forth in the Handbook. For that reason, we hold the proffered Agreement to Arbitrate, when considered in the proper context of the Employee Handbook, is illusory and unenforceable. At the very least, as the District Court alternatively held, the fact that the Agreement to Arbitrate is expressly annexed to the Employee Handbook, a document which the Company may unilaterally modify, creates an ambiguity as to whether the Company also has reserved the right to unilaterally modify the arbitration agreement.

We construe ambiguities of such pre-printed contracts against the maker. *See Heye*, 2003-NMCA-138, ¶ 14.

{12} Like the District Court, we also find it significant that the Employee Handbook provides but one limited exception—the employee's at-will status—to the sweeping rule that any part of the Handbook can be unilaterally modified by the Company at any time. This exception shows that the Company, the drafter of the Employee Handbook, knew how to limit its authority to unilaterally modify any aspect of the Employee Handbook. That there is no similar exception for the arbitration portion of the Handbook in the Handbook itself, the Receipt and Acknowledgment form, or the Agreement to Arbitrate, suggests that the Company intended to retain its authority to modify the arbitration clause. By way of contrast, in *In re Tenet Healthcare, Ltd.*, 84 S.W.3d 760 (Tex. App. 2002), cited by the Company, the relevant agreement provided that "the company may change, rescind or add to any of the policies, benefits or practices described in the Employee Handbook, *except the employment-at-will policy and the Mutual Agreement to Arbitrate referred to below*, in its sole and absolute discretion, with or without prior notice." *Id.* at 763.

{13} In urging us to reverse the District Court, the Company relies primarily on *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997). In that case the U.S. Court of Appeals for the Eighth Circuit, construing Missouri law, enforced an arbitration agreement that was part of the acknowledgment form of an employee handbook. Immediately following a provision that reserved the company's right to amend any of the provisions of the handbook at any time, the acknowledgment form provided:

> I understand [Tenet] makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the **final decision** of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

Id. at 834–35. The Eighth Circuit, without a discussion of illusory promises or ambiguity, found that this arbitration clause was separate from the other provisions of the employee handbook which the company had reserved the right to amend. The court gave two reasons: first, the arbitration clause is on a separate page of the handbook, to be removed once the employee signs it, and second, the court found "a marked transition in language and tone" from the paragraph before the arbitration agreement. *Id.* at 835. That difference, the court reasoned, "would sufficiently impart to an employee that the arbitration clause stands alone, separate and distinct from the rest of the handbook." *Id.*

{14} *Patterson*, which addressed Missouri law, stands in sharp contrast to our Court of Appeals' decision in *Heye*. In *Heye*, the employee handbook mentioned the agreement to arbitrate twice: once in the body of the handbook, and a second time in the acknowledgment form. The employee's signature on the acknowledgment form attested that the employee had read the handbook, understood that the company could modify it at any time, understood that he or she was, and would remain, an at-will employee, and acknowledged "that I have read and agree to be bound by the arbitration policy set forth [in] . . . this handbook." *Heye*, 2003-NMCA-138, ¶ 6. Rather than rely on a "marked transition in language and tone" to find the arbitration provision separate, the Court of Appeals found that the arbitration agreement and acknowledgment form, seemingly absolute in their commitment to arbitration, conflicted with the reservation of the right to modify any provision of the handbook. This conflict created an ambiguity which the Court of Appeals construed against the company to find the promise to arbitrate illusory and unenforceable. *See also Dumais v. Am. Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002) (interpreting the same arbitration agreement as *Heye* and reaching the same result).

{15} Assuming that the Eighth Circuit adequately described Missouri law in *Patterson*, we conclude that there are sharp contrasts between the substantive contract law of that state and New Mexico. Instead, we find *Heye* to be an accurate statement of New Mexico law which we apply to this case. To the extent that Missouri law differs in regard to illusory promises or the rule, oft-repeated in this state, that we construe ambiguous adhesion contracts against the drafter, we do not find it persuasive.

III. CONCLUSION

{16} We conclude that the Agreement to Arbitrate was made part of the Employee Handbook by the plain meaning of the language in that Handbook. Because the Company has reserved the right to modify any provision of the Handbook at any time, we conclude that the Agreement to Arbitrate is an unenforceable illusory promise. We affirm the District Court.

{17} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-020

Filing Date: May 20, 2004

Docket No. 27,966

JOHN MONTANO,

Plaintiff-Petitioner,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Jay G. Harris, District Judge.

Rehearing denied, June 23, 2004.

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OPINION

CHÁVEZ, Justice.

{1} In this case we are required, once again, to determine whether an insurance company effectively precluded its insured from stacking the policy limits of all of his vehicles insured under the policy for his uninsured motorist ("UM") claim. Although we have reviewed several such attempts by the insurance industry in the past, each case has presented a new wrinkle. Yet, this Court has never upheld an anti-stacking clause in UM policies because in each case we found either an ambiguity in the policy or the payment of multiple premiums. We have done so in order to protect the reasonable expectations of the insured and because the insured should only get what he or she pays for. In this case we decline Plaintiff's invitation to declare all anti-stacking provisions void as against public policy. However, to further the important principles previously described, and influenced by NMSA 1978, § 66-5-301(A) and (C) (1983), we modify *Rodriguez v. Windsor Insurance Co.*, 118 N.M. 127, 879 P.2d 759 (1994) and *Lopez v. Foundation Reserve Insurance Co.*, 98 N.M. 166, 646 P.2d 1230 (1982), and hold that insurance companies must obtain written rejections of stacking in order to limit their liability. Such a modification to our judicially-created stacking doctrine will ensure that the insured's reasonable expectations are met and that an insured gets what he or she pays for and no more. Such a change should also, we hope, end the seemingly constant litigation in this area of law. Because, however, we recognize that this represents a new direction in our stacking jurisprudence, we will resolve the stacking question in this case under *Rodriguez*, which we read to require a plain and affirmative declaration that the amount charged represents a single premium for a single amount of coverage. This policy lacks such a declaration, and in the absence of such a declaration, Plaintiff is entitled to stack all four coverages.

I. FACTS

{2} Plaintiff was injured in a single-car accident allegedly caused by an unidentified truck who negligently sprayed rocks onto the road. As a result, Plaintiff filed suit against his insurer, Defendant Allstate Indemnity Company ("Allstate"), alleging that he was contractually entitled to compensation under his UM policy, as well as other independent causes of action. Plaintiff further claimed that he was entitled to "stack," or aggregate the UM coverage limits of his four insured automobiles. Allstate, on the other hand, contends that under the contract Plaintiff is only entitled to stack the coverage limits of two policies, and that the contract is enforceable under New Mexico law. After resolving all other claims, the parties submitted the resolution of the stacking question to the District Court on cross-motions for summary judgment, agreeing that the matter be submitted on the basis of "stipulated facts by the parties, affidavits and sworn deposition testimony." The District Court granted Allstate's motion and denied Plaintiff's. Plaintiff appealed, and the Court of Appeals, with Judge Bustamante specially concurring, affirmed the District Court. *Montano v. Allstate Indemnity Co.*, 2003-NMCA-066, 133 N.M. 696, 68 P.3d 936. In a lengthy but lucid opinion, a majority of the Court of Appeals concluded that: (1) it would not advance this state's public policy to require stacking in every instance, *id.* ¶ 77; (2) courts should not look at the actuarial data behind a policy's premium structure, *id.* ¶¶ 58-59; and (3) the relevant provisions of Montano's insurance contract were not ambiguous, *id.* ¶ 47.

{3} The parties stipulate that the relevant contractual provisions are the declarations page, the policy itself, an amendatory endorsement, and an explanatory insert. The first page of Plaintiff's declarations lists separate premiums for each of Plaintiff's four covered automobiles, including a separate charge for UM property damage coverage, but one single charge for "additional coverages." That "additional coverage" is explained on a separate sheet to be UM coverage for bodily injury, and the limits of the coverage ($25,000 per person / $50,000 per accident) are indicated next to a single premium figure of $114.30.

{4} The relevant "Limits of Liability" policy provision, as amended by a later endorsement, provides in part:

> The Uninsured Motorists Insurance for Bodily Injury limit stated on the declarations page is the maximum amount payable for this coverage by this policy for any one accident, except when two or more vehicles are insured under this policy, **we** will stack or aggregate up to two, but no more than two, uninsured motorist insurance for **bodily injury** coverages under this policy. This means the insuring of more than one auto for other coverages or under Section II of this coverage will not increase **our** limit of liability beyond the amount shown in the declarations, except when two or more vehicles are insured under this policy, we will stack or aggregate up to two, but no more than two, Uninsured Motorist Insurance for Bodily Injury coverages under this policy.

Along with the amendatory endorsement came an explanatory insert, which provided:

> We have revised the "Limits of Liability" provision under "Bodily Injury Caused by Uninsured Motorists" . . . :
>
> If you insure two or more vehicles under this policy, you can now "stack" the limits of Uninsured Motorists Insurance for Bodily Injury for two of the vehicles. For example, if you have two or more vehicles, which are each insured under this policy at $100,000 per accident for this coverage, we will pay up to $200,000 (subject to the "per person" limit) for injuries sustained as the result of an accident with a legally-liable uninsured motorist.

{5} After the amendment, therefore, Allstate's policy no longer contained an absolute anti-stacking clause, but rather a limitation-of-stacking clause. Allstate changed its former

absolute anti-stacking policy as a result of court decisions in Kentucky and Oklahoma. *See Kramer v. Allstate Ins. Co.*, 909 P.2d 128 (Okla. Ct. App. 1994); *Wilson v. Allstate Ins. Co.*, 912 P.2d 345 (Okla. 1996); *Swartz v. Metropolitan Prop. & Cas. Co.*, 949 S.W.2d 72 (Ky. Ct. App. 1997). In *Wilson*, one of the two Oklahoma cases, Allstate issued a single insurance policy covering the plaintiff's two vehicles. The policy provided for $25,000.00 per person and $50,000.00 per accident in UM coverage and contained language purporting to limit Allstate's liability to pay only one UM amount per accident, regardless of the number of automobiles covered under the policy. However, Allstate charged nearly twice the premium to multiple-car policyholders than it charged to single-car policyholders for identical UM coverage limits. Allstate had argued that, even with a higher premium for multi-vehicle policies, it charged a single premium and unambiguously precluded stacking; thus, stacking should not be required. *Wilson*, 912 P.2d at 346; *see also Kramer*, 909 P.2d at 129. The Oklahoma Supreme Court disagreed and concluded that, because the premium for a multi-vehicle policy was nearly twice as large as for a single-vehicle policy, Allstate should be required to stack two coverage limits for UM claims. *Wilson*, 912 P.2d at 347; *see also Kramer*, 909 P.2d at 129; *Swartz*, 949 S.W.2d at 76-77. The original policy issued to Plaintiff by Allstate contained the same provisions rejected by the *Wilson* court.

{6} The parties in this case also stipulate that Allstate charges a "single uninsured motorist bodily injury cover premium," for a multiple-car policy, although they also stipulate that Plaintiff paid $114.30 "in premiums" for his coverage. The parties further stipulate that Allstate also charged, at the same time, a single premium of $61.80 for a single-vehicle policy. The parties now dispute the legal significance of Allstate's "single" premium and the relevance of actuarial justifications for this premium structure, but both agree that the dispute should not prevent the determination of this case on summary judgment.

{7} On appeal, Plaintiff argues: (1) that all anti-stacking clauses should be declared void as against New Mexico's public policy; and alternatively, (2) that under the circumstances of this case, he should be permitted to stack four coverage limits, Allstate's limitation-of-stacking clause notwithstanding. For the following reasons, we reverse the Court of Appeals and hold that Allstate's limitation-of-stacking clause is unenforceable.

II. PLAINTIFF'S PUBLIC POLICY ARGUMENT

{8} Plaintiff first argues that we should follow *United States Fidelity & Guaranty Co. v. Ferguson*, 698 So. 2d 77 (Miss. 1997), and declare that all anti-stacking clauses are void as against New Mexico's stated policy in favor of stacking. In *Ferguson*, the Mississippi Supreme Court held that its public policy required stacking of UM coverage for every vehicle insured under every policy regardless of the number or amount of premiums paid for the coverage. *Id.* at 79. The Mississippi Supreme Court had previously determined that the intent of Mississippi's UM statute was "to provide the insured with *adequate protection* against injury caused by an uninsured motorist," *id.* (emphasis added), and that stacking had become a "positive gloss" on the UM statute. *Id.* (quoted authority omitted). The court was skeptical of traditional notions of freedom of contract because insurance contracts are contracts of adhesion: "When the entire insurance industry writes its policies to preclude stacking of UM coverage, attempting to circumvent case law and defeat public policy, the insured is denied any choice whatsoever." *Id.* at 80. For these reasons the Court determined that, no matter the premiums paid, stacking would be required.

{9} Although our cases have expressed a public policy in favor of stacking as broadly as did the cases in Mississippi prior to *Ferguson*, we are not willing to expand this public policy at this time to require stacking in all cases. We have always understood stacking to be the remedy for an ambiguous contract or the charging of multiple premiums. This Court's intra-policy stacking jurisprudence begins with *Lopez*, 98 N.M. at 166, 646 P.2d at 1230. In *Lopez* the insured

had purchased an insurance policy covering two automobiles and had paid separate premiums for UM coverage on each vehicle. Despite the clarity of the limitation-of-liability clause in that case, we found the policy ambiguous because it did not explain the effects of multiple premiums paid for UM coverage under the multi-vehicle policy. Having found an ambiguity, we determined that judicial construction of the policy was required. In deciding to allow the insured to stack his coverage limits, we relied primarily on two rationales which we found to be closely related: (1) intra-policy stacking fulfills the reasonable expectation of the insured, and (2) paying two premiums entitles an insured to two recoveries. We noted that "[w]here an insurance company charges a separate full uninsured motorist premium for each vehicle under a single or several policies, it is only fair that the insured be permitted to stack the coverages for which he has paid," even when the second premium is reduced. *Id.* at 171, 646 P.2d at 1235. Our rationale was guided by the simple fact that UM personal injury coverage does not follow the automobile. Instead we recognized that general UM coverage also insures one against bodily injury while a pedestrian or a passenger in someone else's vehicle. *Id.* at 169, 646 P.2d at 1233.

{10} One option available to the insurance industry following our holding in *Lopez* was simply to accept that charging multiple premiums would result in stacking. The industry could then have adjusted its premiums accordingly while giving the insured the right to accept or reject stacked coverages. Instead, insurance companies have sought only to avoid stacking coverages. These efforts continued to meet with the disapprobation of the courts, due primarily to the ambiguities that persisted with anti-stacking provisions. *See Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 757 P.2d 792 (1988); *Rodriguez*, 118 N.M. at 127, 879 P.2d at 759.

{11} In *Jimenez* we held that, although the policy at issue unambiguously precluded stacking, that exclusion violated public policy because multiple premiums had been charged. In so doing, we emphasized the second rationale in *Lopez* over the first:

> [T]he law in New Mexico . . . has been clear that when an injured insured is the beneficiary of a policy and either the insured or another has paid premiums for the benefit of the injured insured, then all policy coverages under which he or she is a beneficiary may be stacked.

Jimenez, 107 N.M. at 325, 757 P.2d at 795.

{12} In *Rodriguez* we had the opportunity to determine exactly the question presented in this case, specifically, whether we would preclude stacking when the insurance policy purports to preclude it and it appears that only one premium was charged. We initially noted that:

> [P]remium structures for uninsured motorist benefits in multi-car policies that purport to avoid a separate charge for the coverage with respect to each car . . . lay[] heavy stress on the rationale in many of our cases predicating stacking, in significant part, on the insured's payment of multiple premiums for multiple coverages—i.e., a separate premium for the uninsured motorist coverage "on" each car insured under the policy.

118 N.M. at 127, 879 P.2d at 759. Because of a different ambiguity in the policy, however, we did not have to determine whether we would require stacking when a true single premium had been paid.

{13} The policy at issue in *Rodriguez* included a declarations page that stated that "insurance is provided where a premium is shown for the coverage," and included a chart with types of insurance on one axis and cars on the other. *Id.* at 128, 879 P.2d at 760. In the row labeled uninsured motorist, the policy listed the full price of the coverage in the first car's column, and listed "INCL" in each other column. The parties disputed whether the insurer charged separate premiums for each automobile. We determined that,

when deciding whether more than one premium has been paid, "the essential factor . . . is whether a reasonable insured . . . would think that she was paying more than one premium for more than one coverage." *Id.* at 130, 879 P.2d at 762. We concluded that the policy was ambiguous as to whether more than one premium was paid because: (1) it was unclear what "INCL" meant in the policy declarations page; (2) because, although UM insurance follows the insured, not the car, the UM coverage was listed on a car-to-car basis; and (3) because the figures used in the limitation of liability section contradicted those on the declaration page. Because of these ambiguities, we construed the policy against the insurer and concluded that stacking was permitted. *Id.*at 133, 879 P.2d at 765; *see also Allstate Ins. Co. v. Stone*, 116 N.M.464, 863 P.2d 1085 (1993) (declining to determine whether stacking would be required when the policy purports to charge only one premium, because other aspects of the contract remained ambiguous).

{14} Importantly, however, we further stated that "it is [not] impossible for an insurance company to issue uninsured motorist coverage that is immune to stacking." *Rodriguez*, 118 N.M. at 133, 879 P.2d at 765. Noting that we had given effect to an unambiguous clause providing that medical payments coverages could not be stacked in *Sanchez v. Herrera*, 109 N.M 155, 783 P.2d 465 (1989), we indicated that

> it may be possible to give effect to a *truly* unambiguous antistacking clause, provided it plainly notifies the insured that only one premium has been charged for one insurance coverage, that the coverage provides personal accident insurance that cannot be stacked regardless of the number of vehicles covered by the policy, and that the insured should bear this feature in mind when purchasing insurance.

Rodriguez, 118 N.M. at 133, 879 P.2d at 765.

{15} We have never held that anti-stacking clauses violate public policy when unambiguous and when only one premium has been charged for the coverage. In fact, the above dicta in *Rodriguez* strongly suggested that we would give effect to anti-stacking clauses in UM policies—as we had in *Sanchez* for a med-pay provision—when they are truly unambiguous and plainly only charge one premium for one coverage limit. Plaintiff asks us to modify our case law and declare that *all* anti-stacking clauses are void as against public policy. We think that such a determination would expand the public policy in favor of stacking beyond what these earlier cases have declared it to be. Our public policy in support of stacking, rather, has always been tied to the notion that it is unfair not to allow stacking *when multiple premiums are paid* or when the policy is otherwise ambiguous. It would thus be an expansion of that policy to also require stacking when the policy clearly only charges a single premium and unambiguously precludes stacking. We decline to modify our case law in order to expand our expression of the public policy underlying stacking.

{16} Further, requiring stacking in all cases on a take-it-or-leave-it basis would reduce the freedom of the parties to contract for less coverage and thus their freedom to decide how much coverage they can afford. This could frustrate, rather than advance, the legislative intent behind the UM statute. By requiring insurers to offer UM coverage, *see* NMSA 1978, § 66-5-301 (1983), the legislature wanted to encourage insureds to purchase such coverage. Requiring stacking for all vehicles would put the insured who owns multiple vehicles in the position of paying for all of the coverages or rejecting UM coverage altogether, rather than deciding how much coverage they can afford. This could result in some lower-income insureds who own multiple vehicles being effectively "priced out" of UM coverage.

{17} Stacking is a judicially-created doctrine, which thus far has not met the disapproval of the Legislature. *Rodriguez*, 118 N.M. at 127, 879 P.2d at 759 (noting that our past cases have "evolved a strong judicial policy" favoring stacking). Although we have declined to adopt *Ferguson* and declare anti-stacking provisions

void as against public policy, the facts of this case convince us that our traditional case-by-case ambiguity analysis has proved unworkable. For that reason, we take this opportunity to chart a new course. Bearing in mind that it is a judicial doctrine, we conclude that the protracted litigation over the validity of anti-stacking clauses in this State demands our continued efforts to clarify when and under what circumstances those provisions might be enforced. In doing so, we must re-evaluate the dicta in *Rodriguez* that suggested that it was possible for an insurer to draft standard contract language that would preclude stacking. In the face of increasingly complex insurance contracts and pricing strategies, we have become convinced that our case law, which includes the suggestion in *Rodriguez* of 'a safe harbor,' is no longer sufficient to protect the reasonable expectations of insureds and to ensure that they get what they pay for. The history of this litigation and the facts of this case convince us that a new approach is needed to satisfy these twin goals of our stacking jurisprudence.

{18} For this new approach, we find Chief Justice Dan Lee's special concurrence in *Ferguson* persuasive. The Chief Justice was uncomfortable with the approach of the majority, which, in his words, "steps across the fine line dividing interpretation of the law [and] promulgation of the law." *Ferguson*, 698 So. 2d at 82 (Dan Lee, C.J., specially concurring). Instead, he looked to the language of Mississippi's UM statute, which, like that in this State, allowed the insured to opt out of UM coverage in writing. In order to clarify and make explicit the intention of the parties,

> the solution is to treat stacked coverage as extra coverage for which the parties have contracted, and to which the insured is entitled by default, unless the insurance company undertakes the burden of obtaining a separate, comprehensible, and written disclaimer of stacking. Under this rationale those who want stacked coverage pay for it, and those who don't want it don't pay for it.

Id. at 84. Such a rule, reasoned the Chief Justice, "best balances the interests in permitting private contractual relations between the parties, and honoring the broad intent of the [UM] statute." *Id.* We agree.

{19} In following the special concurrence in *Ferguson*, we also take guidance from Sections 66-5-301(A) and (C), which together suggest that insurance companies obtain the written rejection of each stacked coverage from its insureds in order to limit that coverage. Section 66-5-301(A) provides that no vehicle liability policy shall be delivered with respect to *any* vehicle registered or principally garaged in New Mexico unless UM coverage is provided therein. Although this Court interpreted this provision in *Lopez* as requiring "only that each of several vehicles insured under a single policy be covered by one minimum coverage," the court also acknowledged that such an interpretation did not preclude an insured from purchasing additional coverage. *Lopez*, 98 N.M. at 170, 646 P.2d at 1234. Before this case we have not been called upon to decide the implications of Section 66-5-301(C) on stacking. That provision has been interpreted as requiring an insured to reject UM coverage in writing. *Romero v. Dairyland*, 111 N.M. 154, 803 P.2d 243 (1990). When these two provisions are read together, we discern a solution to the seemingly inherent ambiguities in anti-stacking clauses: an insurance company should obtain written rejections of stacking in order to limit its liability based on an anti-stacking provision.

{20} As an illustration of our holding, in a multiple-vehicle policy insuring three cars, the insurer shall declare the premium charge for each of the three UM coverages and allow the insured to reject, in writing, all or some of the offered coverages. Thus, hypothetically, in the case of a $25,000 policy, if the premium for one UM coverage is $65, two coverages is an additional $60, and three coverages $57 more, the insured who paid all three (for a total premium of $182) would be covered up to $75,000 in UM bodily injury coverage. However, the insured may reject, in writing, the third available coverage and pay $125 for $50,000 of UM coverage; or the insured may reject, in writing, the second and

third coverages and pay $65 for $25,000 of UM coverage; or the insured may reject all three UM coverages. In any event, the coverage would not depend on which vehicle, if any, was occupied at the time of the injury. Thus, the insured's expectations will be clear, and an insured will only receive what he or she has paid for.

{21} Although we recognize this holding expands the holding in *Lopez*, or perhaps even calls it into doubt, we deem it necessary in order to effectuate the two functions of our stacking jurisprudence: fulfilling the reasonable expectations of the insured and ensuring that the insured receive what he or she pays for. In all future cases, an insurance policy that complies with this requirement will avoid the conclusion we now draw from the history of stacking litigation in this State, namely, that anti-stacking clauses are almost inherently ambiguous and are no longer effective at precluding stacking. With written waivers, insureds will know exactly what coverage they are receiving and for what cost; if an insurer is charging a higher premium based on the risk created by multiple vehicles, we will leave that to the market to resolve.

III. PLAINTIFF'S AMBIGUITY ARGUMENT

{22} Although we have set forth the policy language requirements for future stacking cases, we must now determine whether the particular contract at issue in this case effectively limits Plaintiff's right to stack to "two, but no more than two" coverage limits. We recognize that our holding described above is a new, and not easily foreshadowed, aspect to our jurisprudence on stacking and that it would be inequitable to apply it against Allstate before it has had an opportunity to alter its policy language; for those reasons, we choose to give it a purely prospective application. *See Beavers v. Johnson Controls World Servs.*, 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) (listing as factors we consider when deciding to exercise our inherent authority to give our decisions prospective effect whether the rule is new, whether retroactive application would advance or retard the new rule, and whether it would be inequitable to apply the new rule against the parties). To resolve this case, we will instead rely on our traditional ambiguity analysis, as described in *Rodriguez*. Plaintiff argues: (1) we should, on the basis of Allstate's premium structure, find the limitation-of-stacking clause unenforceable; and (2) the limitation-of-liability clause is ambiguous and therefore unenforceable under our case law. Because of Allstate's premium structure, it is no simple matter for a reviewing court, much less an insured, to determine whether Allstate charges a single premium or multiple premiums. We therefore hold that Allstate's insurance contract fails to meet the requirements set forth in *Rodriguez*.

{23} As the District Court in this case concluded, Allstate charged a multiple-vehicle rate that is less than twice the single vehicle rate. On this basis, Allstate argues that Plaintiff should not be permitted to stack more than two coverages, precisely as the insurance policy now indicates. Plaintiff argues, however, that we should look behind the text and consider Allstate's methods in establishing its premium rates. As noted, when multiple premiums are charged for UM coverage on multiple cars, even in the face of a truly unambiguous limitation-of-liability clause, stacking will be required. In *Lopez* we suggest that the reasons for such a rule are: (1) it is only fair to give the insured what was paid for, and (2) it would give effect to the reasonable expectation of the insured to allow stacking. For most cases, these two closely related rationales are cumulative; when, however, the policy appears to charge one premium but it is alleged that the one premium contemplates multiple vehicles, then the rationales diverge. If the primary goal is to fulfill the reasonable expectations of the insured, then there is no need to look at anything beyond the language of the policy itself. If, on the other hand, the primary goal is to give insureds what they pay for, then we should, at the very least, be concerned with the actuarial methods used to arrive at the premium and should look behind the policy language itself. Indeed, the parties dispute much regarding how the premiums were

calculated in this case and what the primary policy behind our stacking jurisprudence is. For the following reasons, we conclude that we need not resolve which rationale to give primary effect.

{24} We are convinced, however, that to resolve this case we should not ignore everything behind the policy language itself. To do otherwise might encourage actuarial ruses, such as has been alleged by Plaintiff, in order to defeat our stated public policy in favor of stacking when multiple premiums are charged. Indeed, if courts followed the suggestion of the Court of Appeals and refused to review the insurer's actuarial methods, Allstate would likely never have amended its policy in response to case law and permitted its customers to stack at least two coverages. Because Allstate did not increase the premium for UM coverage, but rather amended the policy to allow the stacking of up to two coverages, a reasonable inference is that prior to the mandates of the courts in Oklahoma, Allstate insureds may not have been receiving what they paid for.

{25} Allstate argues that we have determined that the reasonable expectation of the insured is the guiding policy behind our stacking jurisprudence, and as such any actuarial evidence suggesting that multiple premiums have been paid under the guise of a single premium is irrelevant. In support, Allstate relies on *Shope v. State Farm Insurance Co.*, 1996-NMSC-052, 122 N.M. 398, 925 P.2d 515, where we had to determine whether to apply Virginia law to an UM policy when the insured purchased the contract in Virginia, but the accident occurred in New Mexico. Ordinarily, Virginia law, as the lex loci contractus, would apply unless the application of that law would violate a fundamental public policy of New Mexico. Under Virginia law the insurance contract, which clearly prohibited stacking, would be enforced. In deciding to apply Virginia law, we noted that, although New Mexico public policy favors stacking, "our rationale in establishing this policy did not concern fundamental principles of justice, but focused on the expectations of the insured." *Id.* ¶ 7. Furthermore, "[w]hile we interpret New Mexico insurance contracts to avoid repugnancy in clauses that prohibit stacking of coverages for which separate premiums have been paid, this rule is one of contract interpretation that does not rise to the level of a fundamental principle of justice." *Id.* ¶ 9.

{26} We find *Shope* distinguishable, in that it does not appear that in that case there was any allegation that the premium structure used by the insurer charged multiple premiums under the guise of a single-premium charge. Further, that our policy in favor of stacking is not "fundamental" for purposes of a choice-of-law analysis does not mean that it is unimportant.

{27} Under *Rodriguez* we suggested that to be truly unambiguous, an insurance contract should, among other things, "plainly notif[y] the insured that only one premium has been charged for one insurance coverage." 118 N.M. at 133, 879 P.2d at 765. The contract at issue failed this requirement. A reasonable insured simply cannot determine whether or not "one premium has been charged for one insurance coverage." Although the contract purports to charge a single premium for a single coverage, the amendatory endorsement allows the insured to aggregate two coverages. Compounding the ambiguity is the fact that Allstate, in setting its premium, admits that it has factored into its premium calculation the average number of vehicles on all multi-vehicle policies, including those policies insuring three or more vehicles. We read *Rodriguez* to require a plain and affirmative declaration that the amount charged represents a single premium for a single amount of coverage; unquestionably, this contract has not done so. As such, we hold that it fails to meet the requirements set forth in *Rodriguez*for a truly unambiguous policy, and that Plaintiff is entitled to stack his four coverages.

IV. CONCLUSION

{28} We conclude that the insurance contract at issue fails to satisfy the requirements of *Rodriguez*, and Plaintiff is entitled to stack his four coverages. Further, taking the lead from the special concurrence in *Ferguson* and Section 66-5-301(C), we require insurance companies in

future cases to obtain written rejections of stacking in accordance with this opinion in order to eliminate ambiguity and to effectively limit their liability. We reverse the Court of Appeals and remand this case for further action consistent with this opinion.

{29} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-021

Filing Date: June 3, 2004

Docket No. 27,845

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

RUBEN FLORES,

Defendant-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
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OPINION

CHÁVEZ, Justice.

{1} The United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that execution of persons with mental retardation violates the Eighth Amendment prohibition against cruel and unusual punishment. Eleven years before *Atkins* was decided, our Legislature prohibited the execution of defendants with mental retardation and established a procedure for ascertaining those capital defendants who are ineligible for the death penalty on that basis. *See* NMSA 1978, § 31-20A-2.1 (1991). The statutory provision outlining the procedure, Section 31-20A-2.1(C), states that, for purposes of precluding the death penalty in a capital case, the trial court "shall hold a hearing, prior to conducting the sentencing proceeding," and the penalty of death shall be precluded "[i]f the court finds, by a preponderance of the evidence," that the defendant has mental retardation. This appeal presents three issues: (1) whether, after *Atkins*, the absence of mental retardation is an element of a capital crime which the State must prove to a jury beyond a reasonable doubt; (2) whether our statute requires the determination of mental retardation to be delayed until the guilt-innocence phase of the trial is complete; and (3) whether the defendant is entitled to present evidence of mental retardation to the jury at sentencing and how to give effect to such a finding.

{2} Defendant in this case has alleged that he has mental retardation and that he is therefore ineligible for the death penalty under *Atkins* and under Section 31-20A-2.1(B). The State, which seeks the death penalty against Defendant, appeals from a district court order declaring the statutory procedure unconstitutional on the following grounds: (1) the statutory procedure does not require a jury to find beyond a reasonable doubt that the defendant does not have mental retardation, as required by the Sixth Amendment under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and *Ring v. Arizona*, 536 U.S. 584, 609 (2002); and (2) the statutory procedure does not allow for a pretrial judicial

determination of the defendant's alleged mental retardation, as required by language in *Atkins* suggesting that if the determination is not made pretrial, the reliability and fairness of the ensuing capital trial may be jeopardized where the defendant has mental retardation. *See Atkins*, 536 U.S. at 306-07.

{3} We hold, first, because mental retardation is a factual issue that operates to reduce rather than to increase the maximum punishment permitted by a verdict of guilt, the Sixth Amendment does not require the question of mental retardation to be decided by a jury beyond a reasonable doubt. Therefore, the procedure prescribed in Section 31-20A-2.1(C) does not violate the Sixth Amendment right to trial by jury as articulated in *Ring*. Second, we hold that, while a pretrial determination is not constitutionally required by *Atkins*, a permissible reading of Section 31-20A-2.1(C) does not preclude a pretrial determination of a defendant's alleged mental retardation. In order to ameliorate the concerns addressed in *Atkins* relating to the reliability and fairness of capital trials where mental retardation is at issue and to address legitimate concerns of judicial economy, we conclude that a hearing to determine mental retardation under Section 31-20A-2.1(C) must be held pretrial if that issue is raised by the defendant at that time. Finally, reading Section 31-20A-2.1(C) both in light of *Atkins* and in light of the constitutional requirement under *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), that a jury be permitted to give mitigating effect to a finding of mental retardation, we conclude the defendant is entitled to present the issue of mental retardation to the sentencing jury as a conclusive mitigating factor.

PROCEDURAL HISTORY

{4} Defendant was charged with first-degree murder with aggravating circumstances, and the State filed notice to seek the death penalty. Defendant raised an issue regarding his competency to stand trial, and, following two psychiatric evaluations and in accordance with a stipulation by the parties, the trial court found Defendant both incompetent to stand trial and dangerous, pursuant to NMSA 1978, Section 31-9-1.2 (1999). The trial court also indicated that "defendant may have mental retardation." The court then committed Defendant to Las Vegas Medical Center for treatment. After three months of treatment, the Medical Center determined he was competent to stand trial. Following another competency hearing the trial court agreed and found that Defendant was competent to stand trial.

{5} Defendant filed a pretrial motion to dismiss the death penalty on the basis of Defendant's alleged mental retardation. The trial court ruled Defendant's motion was premature, concluding that Section 31-20A-2.1(C) requires the determination of mental retardation to occur only after the guilt-innocence phase of the trial is complete. Defendant then filed another motion requesting a jury determination of his mental retardation, in addition to a pretrial judicial determination of that issue. In that motion, Defendant argued that the hearing provided in Section 31-20A-2.1(C) must be conducted before trial, analogizing it to the Due Process requirement that the legal issue of the voluntariness of a confession be resolved prior to its admission at trial. *See Jackson v. Denno*, 378 U.S. 368, 395 (1964). Defendant also argued that a jury determination of the issue beyond a reasonable doubt was required by *Ring*, 536 U.S. at 609, which held that any factual finding that serves to increase the punishment from a prison term to capital punishment must be found by a jury beyond a reasonable doubt. After a hearing on the issue, the trial court agreed and issued a written order concluding that "the timing of the determination of mental retardation" under Section 31-20A-2.1(C), as well as "the procedure by which mental retardation is determined"—providing for the trial court, not the jury, to make the determination—are unconstitutional. The trial court then certified the issue for interlocutory appeal. The Court of Appeals accepted interlocutory appeal and certified the matter to this Court.

DISCUSSION

I. Mental Retardation as an Element under *Ring*

{6} Defendant first argues the trial court correctly concluded that a jury determination of the issue of mental retardation, based on the beyond-a-reasonable-doubt standard of proof, is required by the intersection of *Atkins* and *Ring*. *Ring* involved a Sixth Amendment challenge to Arizona's capital-punishment scheme, in which the judge, not the jury, was permitted to impose the death penalty if the judge found at least one aggravating circumstance and no mitigating circumstances sufficient to warrant leniency. *Ring*, 536 U.S. at 592-93. Applying its earlier decision in *Apprendi*, 530 U.S. at 490—holding that the Sixth Amendment requires any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the statutory maximum to be proved to a jury beyond a reasonable doubt—the Supreme Court in *Ring* held that each aggravating factor in a capital prosecution serves as the functional equivalent of an element of a greater offense under *Apprendi* and therefore must be proved to a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609. Defendant argues that, after *Atkins*, mental retardation is a factual issue upon which a defendant's eligibility for death depends, and that, applying *Ring*, the absence of mental retardation is the functional equivalent of an element of a greater offense and therefore must be proved to a jury beyond a reasonable doubt.

{7} We do not believe the absence of mental retardation is an element of a capital offense for purposes of analysis under *Ring*. *Apprendi* and *Ring* do not apply to cases where the factual finding at issue operates to lower the maximum allowable punishment rather than to raise the punishment above the statutory maximum. *Apprendi* carefully distinguished "between facts in aggravation of punishment and facts in mitigation":

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

530 U.S. at 490 n.16 (citation omitted). Here, a finding of mental retardation operates to reduce the maximum possible sentence from capital punishment to life in prison, and therefore the absence of mental retardation is not an element that must be proved by the State beyond a reasonable doubt.

{8} We note this conclusion is consistent with opinions from other state and federal courts that have examined this issue. The Georgia Supreme Court has concluded that "the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*." *Head v. Hill*, 587 S.E.2d 613, 620 (Ga. 2003). The Texas Court of Criminal Appeals has similarly concluded that under *Ring*, "[a] lack of mental retardation is not an implied element of the crime of capital murder which the State is required to prove before it may impose a sentence above the maximum statutory punishment for that crime." *Ex parte Briseno*, No. 29819-03, 2004 WL 244826, at *5 (Tex. Crim. App. Feb. 11, 2004). Finally, the United States Court of Appeals for the Fifth Circuit has concluded that "neither *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt." *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003). We agree with these authorities and conclude that the Sixth Amendment does not require the issue of a defendant's mental retardation in

a capital prosecution to be proved to a jury beyond a reasonable doubt. We therefore conclude the statutory procedure is not unconstitutional on this basis.[1]

II. Pretrial Determination of Mental Retardation

{9} Defendant next argues the trial court correctly concluded Section 31-20A-2.1(C) is unconstitutional under *Atkins* because it does not permit a pretrial determination of the issue of mental retardation. Section 31-20A-2.1(C), which outlines the procedure for a determination of mental retardation in a capital prosecution, states in relevant part:

> Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding. . . . If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment.

The State argues that this statutory language requires that the hearing take place only after the guilt-innocence phase of the trial is complete. While we agree that the language, "it shall sentence the defendant to life imprisonment," tends to suggest that the hearing must be held after the guilt-innocence phase is complete, we do not agree that this language expressly precludes an earlier hearing. Section 31-20A-2.1(C) does not by its own terms preclude a pretrial motion by the defendant, nor does it restrict the timing of the hearing itself, except that it shall be held "prior to conducting the sentencing proceeding." As a result, ambiguity exists regarding whether a pretrial hearing is contemplated by the statute.

{10} We believe that a more flexible reading of Section 31-20A-2.1(C) is appropriate in light of the flexibility of the related procedure for determining whether the defendant has mental retardation for purposes of competency to stand trial. *See* NMSA 1978, § 31-9-1.6(A) (1999); Rule 5-602(B)(1) NMRA 2004 (providing for a determination "at any stage of the proceedings"). "[S]tatutes which relate to the same class of things are considered to be in pari materia, and, if possible by reasonable construction, both are to be so construed that effect is to be given to every provision of each." *State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth.*, 76 N.M. 1, 18, 411 P.2d 984, 996 (1966) (citation omitted). Section 31-9-1.6 articulates the procedure for determining whether a defendant is incompetent to stand trial as a result of mental retardation, the statutory definition of which is identical to the definition of mental retardation under Section 31-20A-2.1(A): "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." *See* § 31-9-1.6(E). Under both Section 31-9-1.6 and Section 31-20A-2.1, the hearing to determine mental retardation is triggered by a motion of the defendant, *compare* § 31-9-1.6(A) *with* § 31-20A-2.1(C); the burden of persuasion is on the defendant by a preponderance of the evidence, *compare* § 31-9-1.6 (B) *with* § 31-20A-2.1(C); and an intelligence quotient of seventy or below establishes a presumption of mental retardation, *compare* § 31-9-1.6(E) *with* § 31-20A-2.1(A).

{11} A hearing to determine competency to stand trial may be invoked at any stage of the proceedings, "[w]henever it appears that there is a question as to the defendant's competency to proceed in a criminal case." NMSA 1978, § 31-9-1 (1993). By contrast, Section 31-20A-2.1(C) is silent on when the defense motion should be raised. Because both hearings are triggered by motion of the defendant, involve similar issues

[1] Not argued or briefed to this Court is whether placing the burden on the defendant and applying the preponderance-of-the-evidence standard articulated in Section 31-20A-2.1(C) comports with the requirements of the Due Process Clause of the Fourteenth Amendment or of the Due Process Clause of Article II, Section 18 of the New Mexico Constitution; accordingly, we do not address these issues at this time. *See generally Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (outlining general rule that courts will not address constitutional issues unless necessary to the disposition of the case).

of fact, and are governed by identical burdens of persuasion, it would be incongruous to require two separate hearings—one to determine mental retardation for purposes of competency and the other for purposes of eligibility for the death penalty. Indeed, both hearings would require substantially similar presentations of evidence, typically from expert witnesses, the expense of which in terms of both time and money tends to militate against an inflexible reading of Section 31-20A-2.1(C). "Statutes should be construed in the most beneficial way of which their language is susceptible to prevent absurdity, hardships, or injustice. . . ." *Cox v. City of Albuquerque*, 53 N.M. 334, 340, 207 P.2d 1017, 1021 (1949). Accordingly, we construe Section 31-20A-2.1(C) so as to permit a pretrial hearing "[u]pon motion of the defense requesting a ruling that the penalty of death be precluded," *id.*, when the defendant makes such motion pretrial.

{12} In addition, we recognize that a capital trial consumes significantly more resources than a noncapital trial and that it would be beneficial to all parties to resolve the question whether the defendant is ineligible for the death penalty as early in the proceedings as possible. In *State v. Ogden*, 118 N.M. 234, 238, 880 P.2d 845, 849 (1994), we acknowledged that trials involving the death penalty "are qualitatively and quantitatively distinct from other criminal proceedings." There, we based our holding—that a defendant is entitled to a pretrial determination whether there is probable cause to support an aggravating circumstance—on our conclusion that allegations of aggravating circumstances pervade every stage of a capital prosecution; that capital prosecutions involve tremendous hardships in terms of time, emotion, energy, and expense; that the State's entitlement to a death-qualified jury may give the State a strategic advantage in both the guilt-innocence and the sentencing phases of the trial; and that capital prosecutions are uniquely complex and consume significantly more judicial resources than noncapital prosecutions. *Id.* at 238-39, 880 P.2d at 849-50. Because of the extraordinary nature of capital prosecutions, every effort must be made to avoid a death-penalty trial, as early in the proceedings as possible, where capital punishment is precluded as a matter of law.

{13} This principle acquires acute significance where mental retardation is at issue. In *Atkins*, the Court stressed that defendants with mental retardation "face a special risk of wrongful execution" because they "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." 536 U.S. at 320-21. The Court gave these characteristics a constitutional dimension when it stated that "their impairments can jeopardize the reliability and fairness of capital proceedings." *Id.* at 306-07. To minimize these risks, which are inherent in the prosecution of a capital trial where the defendant has mental retardation, we conclude that a Section 31-20A-2.1(C) hearing must be held pretrial when the defendant, as in this case, has moved pretrial to preclude the death penalty on the basis of mental retardation.

III. Mental Retardation as a Conclusive Mitigating Factor at Sentencing

{14} Thirteen years before *Atkins* was decided, the Supreme Court had considered and rejected a claim that the execution of a criminal defendant with mental retardation violated the Eighth Amendment. *See Penry*, 492 U.S. at 340. While *Atkins* overruled *Penry* on this point, *Atkins* did not call into question *Penry*'s reaffirmation of the principle, grounded in the Eighth Amendment, that the sentencing jury in a capital trial "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Penry*, 492 U.S. at 328; *accord Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

less than death.") (Burger, Ch. J., plurality) (emphasis omitted); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.") (emphasis omitted). *Penry* held that this principle applies to any mitigating evidence, including evidence of mental retardation:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Penry, 492 U.S. at 328.

{15} In New Mexico, although the procedure outlined in Section 31-20A-2.1(C) calls for the trial court to decide the issue of mental retardation in the first instance, the Legislature intended for a sentencing jury also to consider the issue of "diminished intelligence" as a mitigating factor in the event the trial judge did not find mental retardation: "A ruling by the court that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty . . . shall not restrict the defendant's opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance." *Id.* Thus, Section 31-20A-2.1(C) comports with the *Penry* rule to the extent it provides an opportunity for the jury to consider and give mitigating effect to evidence of "diminished intelligence," one factor probative of mental retardation. *See* § 31-20A-2.1(A) (defining mental retardation as "significantly subaverage general intellectual functioning *existing concurrently with* deficits in adaptive behavior") (emphasis added).

{16} However, to the extent Section 31-20A-2.1(C) may be construed to restrict the jury's opportunity to consider and give mitigating effect to other evidence probative of mental retardation, such restriction would fail to comply with the rule of *Lockett*, *Eddings*, and *Penry*. "When construing a statute we are to construe it, if possible, so that it will be constitutional." *State v. Wade*, 100 N.M. 152, 154, 667 P.2d 459, 461 (1983); *accord Huey v. Lente*, 85 N.M. 597, 598, 514 P.2d 1093, 1094 (1973) ("[I]f a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality."). Because construing Section 31-20A-2.1(C) as restricting the defendant's right to present other evidence of mental retardation would render that restriction unconstitutional, we instead construe Section 31-20A-2.1(C) so as to permit the defendant to introduce any admissible evidence of mental retardation.

{17} Although we have held mental retardation is not an element of a capital offense that must be proved to a jury beyond a reasonable doubt, a determination of mental retardation by the jury at sentencing nevertheless must stand as an absolute bar to imposition of the death penalty. *See Atkins*, 536 U.S. at 321 ("[T]he Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.") (quoted authority omitted). After *Atkins*, therefore, the "mitigating significance," § 31-20A-2.1(C), of a jury's determination of mental retardation must be conclusive: if the jury finds that the defendant has mental retardation, notwithstanding the trial court's previous determination, the defendant is not eligible for the death penalty. In accordance with our reading of Section 31-20A-2.1(C), the defendant is entitled to introduce evidence of mental retardation at the sentencing stage, and a finding of mental retardation at sentencing must be given conclusive mitigating effect.[2]

[2] Because this case is before us in the course of a pretrial interlocutory appeal, the question of the precise procedure and instructions by which the jury at sentencing must consider the issue of mental retardation is not directly before us. However, New Mexico's Capital Felony Sentencing Act requires that "the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial

{18} To enable the jury during the capital sentencing phase to give conclusive mitigating effect to a finding of mental retardation, several general conditions must logically be met: (1) the defendant must have an opportunity at the sentencing proceeding both to introduce evidence of "general intellectual functioning" and "deficits in adaptive behavior," *see* § 31-20A-2.1(A) & (C), and to argue that such evidence is probative of mental retardation; (2) the jury must be instructed on the statutory definition of mental retardation, *see* § 31-20A-2.1(A); and (3) the jury must resolve the issue of mental retardation before it may proceed to its consideration of aggravating and other mitigating factors.[3]

{19} Further, because the jury's consideration of mental retardation must be considered independent of its consideration of aggravating and other mitigating factors, a special verdict is required. We note that we do not require the jury to apply a specific standard to the manner in which it balances aggravating and mitigating circumstances. *See State v. Cheadle*, 101 N.M. 282, 288, 681 P.2d 708, 714 (1983). Here, however, because a finding of mental retardation must not be weighed as a factor, but rather must be determined conclusively, the jury must be instructed to apply a specific standard of proof. In the absence of legislative guidance on this point, and in the absence of a proper constitutional challenge to the existing statutory burden, we apply the standard of proof articulated in Section 31-20A-2.1(C). If the jury finds by a preponderance of the evidence that the defendant has mental retardation, it must sentence the defendant to life imprisonment.

{20} Finally, we address what portion of the sentencing jury must find mental retardation for such finding to be given conclusive mitigating effect. On this issue we must construe our holding in *Clark v. Tansy*, 118 N.M. 486, 494, 882 P.2d 527, 535 (1994), that the jury "need not unanimously agree on the presence of a mitigating circumstance before considering it," *see also* UJI 14-7029 NMRA 2004, together with the Capital Felony Sentencing Act, NMSA 1978, Section 31-20A-3 (1979), which requires that in order to impose a sentence of death, the sentencing jury must unanimously specify the sentence of death. Because we hold that a jury finding that the defendant has mental retardation conclusively bars the death penalty, Section 31–20A-3 controls: the sentencing jury must be unanimous in its determination that the defendant is eligible for the death penalty. Therefore, the sentencing jury must unanimously specify that it does not find mental retardation before proceeding to its consideration of aggravating and other mitigating factors. "Where . . . the jury does not make the required finding, or the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment." *Id.*

CONCLUSION

{21} We reverse and remand to the trial court for proceedings consistent with this opinion.

{22} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

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jury." NMSA 1978, § 31-20A-1(B) (1979). Thus, we address these issues now in the interest of judicial economy by resolving them, at least in a preliminary fashion, before the trial jury is impaneled. Because we are not in a position to predict all the possible permutations of issues that might arise at that stage, we here provide only general guidelines for the assistance of the trial court should it be required to rule on issues relating to the jury determination at sentencing.

[3] Consistent with Section 31-20A-2.1(C), at no stage of the trial may the jury "be informed of any ruling" by the trial court denying the defendant's claim of mental retardation.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-028

Filing Date: July 14, 2004

Docket No. 28,480

RAPHAEL MASO,

Plaintiff-Petitioner,

v.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Neil Candelaria, District Judge

Anthony James Ayala
Albuquerque, NM

for Petitioner

Julia Belles
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} Petitioner Raphael Maso appeals from an opinion of the Court of Appeals which held that an English-language notice of a license-revocation proceeding that had been personally served on a Spanish-only speaker when he was arrested for driving under the influence of alcohol satisfies due process. On appeal to this Court, Petitioner argues for the first time in the course of these proceedings that we should grant greater protection under the due process clause of Article II, Section 18 of the New Mexico Constitution than is recognized under the due process clause found in the Fourteenth Amendment to the United States Constitution. We hold that Petitioner failed to preserve his state constitutional argument for an appellate determination. Because we also hold that the Court of Appeals correctly analyzed the notice requirement under the federal constitution, we affirm.

I. FACTS AND PROCEEDINGS

{2} On December 8, 2001, Albuquerque Police stopped Petitioner at a sobriety checkpoint and arrested him for driving under the influence of alcohol, contrary to NMSA 1978, § 66-8-102 (1999, prior to 2002 and 2003 amendments). Petitioner took a breath test which resulted in a .17 reading, more than twice the legal limit. He speaks and reads little to no English. Upon his arrest, as required by NMSA 1978, § 66-8-111.1 (1993, prior to 2003 amendments), the arresting officer served Petitioner with a notice of revocation which informs him, in English, that his driving privileges will be revoked in twenty days unless he requests a hearing in writing within ten days of service of the notice. Petitioner did not file his request for a hearing until well after the ten days had expired. His attorney sent a letter dated January 5, 2002, but postmarked January 7, 2002, requesting a hearing and explaining that his client "is a Spanish speaker and did not understand the Notice of Revocation or the fact that he had to submit his request within ten days." On January 9, 2002, the Motor Vehicle Division of the Taxation and Revenue Department issued a standard form letter rejecting Petitioner's request for a hearing on the grounds that the request was not made within ten days.

{3} Petitioner appealed the decision to the district court, which concluded that the denial of the

hearing did not violate due process. Petitioner then appealed to the Court of Appeals, which affirmed the district court's decision. The Court of Appeals held that "English-language notice regarding administrative revocation is compatible with due process when it is personally delivered to a driver during the course of his arrest for driving under the influence." *Maso v. State of New Mexico Taxation and Revenue Dep't*, 2004-NMCA-025, ¶ 21, 135 N.M. 152, 85 P.3d 276. The Court of Appeals also affirmed the district court's determination that the personal delivery of an English-language notice "satisfies due process, regardless of whether [Petitioner] understood English, because under the circumstances a reasonable driver who did not understand the contents of the notice would inquire further." *Id.* ¶ 20.

{4} Petitioner filed a petition for writ of certiorari to this Court, raising only one issue: "whether, given the distinctive characteristics of New Mexico's population, the Court of Appeals properly found that English language notice regarding administrative revocation is compatible with due process when it is personally delivered to a Spanish-only speaking individual." Despite this general reference to "due process," Petitioner's only argument to this Court is that we should grant greater protections under the state constitution's due process clause, N.M. Const. art. II, § 18, than under its federal counterpart. Indeed, Petitioner agrees that the federal constitution does not protect the right that he is seeking in this appeal: the right to have notice of a license-revocation proceeding which has been personally served on him printed in both Spanish and English.

II. STATE DUE PROCESS CLAIM

{5} Under Rule 12-216(A) NMRA 2004, in order to preserve a claim for appellate review, "it must appear that a ruling or decision by the district court was fairly invoked." In *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1, we clarified how, under our interstitial approach to interpreting the State Constitution, a party must fairly invoke a ruling that our constitution provides greater protection than its federal counterpart. If the relevant state constitutional provision has previously been interpreted to provide greater rights, the litigant need only: "(1) assert[] the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) show[] the factual basis needed for the trial court to rule on the issue." *Id.* ¶ 22. Where, however, there is no established precedent for interpreting the relevant state constitutional provision differently from its federal counterpart, "a party also must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision." *Id.* ¶ 23. Although *Gomez* was a criminal case, its preservation requirement is an interpretation of Rule 12-216 of the Rules of Appellate Procedure, and we can see no reason why it should not apply to a constitutional argument concerning a license-revocation proceeding. For the following reasons, we hold that Petitioner has not satisfied the *Gomez* requirements for preserving his argument under the state due process clause.

{6} In both his initial pleading to the district court, styled a "petition for writ of certiorari," and his subsequent statement of appellate issues, Petitioner did not mention the state constitution, but instead argued that the denial of a hearing violated his "right to procedural due process" because he cannot be said to have knowingly and intelligently waived his right to the hearing when he did not understand the notice. The district court rejected this argument, concluding that Petitioner was on "inquiry notice" when he received the English notice, which required him to take steps to have the notice translated. Having failed to do so, he cannot complain that he did not knowingly and intelligently waive his right to the hearing.

{7} In his brief-in-chief to the Court of Appeals, Petitioner made assertions relating to New Mexico's unique characteristics, but did not refer to the state constitution or argue that it should

provide greater protections than the federal constitution. Instead, Petitioner simply argued that, because the notice requirement of due process requires that efforts at notice be appropriate to the circumstances, New Mexico's unique characteristics are relevant to that inquiry. Significantly, in his reply brief to the Court of Appeals, Petitioner for the first time describes the demographic composition of New Mexico's population, citing to the United States Census.

{8} Thus, Petitioner's argument that the New Mexico Constitution should offer greater protections than the federal constitution is made for the first time to this Court. Under Rule 12-216(A) and *Gomez*, this argument was not preserved for appellate review, and we decline to address it. Indeed, this case perfectly illustrates the purposes behind the *Gomez* preservation requirement. As part of the argument that New Mexico has "distinctive state characteristics" that should result in a different interpretation of the State Constitution, *Gomez*, 1997-NMSC-006, ¶ 19, Petitioner cites demographic data from the 2000 Census to argue that New Mexico is a predominately Spanish-speaking state. The State, however, disputes both Petitioner's figures and his interpretation of them. Because Petitioner did not pursue this argument in the district court, the Census numbers are not a part of the record on appeal, nor are findings of fact resolving the disputed significance of those figures. We thus have no way of resolving this factual dispute, which, under *Gomez*, should have been brought first to the district court.

III. FEDERAL DUE PROCESS CLAIM

{9} Because we decline to address Petitioner's new state constitutional argument, we next decide whether the Court of Appeals correctly determined that the federal due process clause does not require a hand-delivered notice of license revocation be printed in both English and Spanish.[1] As noted, Petitioner, in the course of arguing for greater protections under the state constitution essentially conceded that the federal constitution would not require the notice be printed in Spanish. We agree.

{10} Due process requires notice and an opportunity for a hearing before the State can suspend or revoke a person's driver's license. *State v. Herrera*, 111 N.M. 560, 562, 807 P.2d 744, 746 (Ct. App. 1991); *see also Bell v. Burson*, 402 U.S. 535, 539 (1971). Due process does not require the same form of notice in all contexts; instead, the notice should be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950). Actual notice is not required, so long as the notice given is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314; *see also City of Albuquerque v. Juarez*, 93 N.M. 188, 190, 598 P.2d 650, 652 (Ct. App. 1979) (requiring notice that is reasonably calculated to be effective "without imposing unrealistically heavy burdens on the party charged with the duty of notification") (quotation marks and quoted authority omitted), *overruled on other grounds by Herrera*, 111 N.M. at 565, 807 P.2d at 749.

{11} As is required by the Implied Consent Act, *see* § 66-8-111.1, Petitioner was personally served at the time of his arrest with the notice of revocation which informed him, in English, that his license would be revoked in twenty days unless he requested a hearing within ten days. He does not complain that the notice was untimely or that the content of the notice would be insufficient to apprise an English-speaker of the right to a pre-deprivation revocation hearing upon request.[2] Thus, unlike those cases

[1] We recognize that, under our interstitial approach to state constitutional interpretation, we ordinarily first address whether the federal constitution protects the right asserted. *See Gomez*, 1997-NMSC-006, ¶ 19. Because, however, Petitioner bases his entire appeal to this Court on the new and unpreserved argument that the state constitution should be interpreted more broadly, we chose to address that argument first.

[2] Nor did Petitioner raise any constitutional issue regarding the requirement that the request for a hearing be made in ten days or the lack of a provision for an extension of time. We therefore do not address those questions.

where the notice was achieved by publication or a mailed letter which never arrived, Petitioner received actual notice of the revocation proceeding. The very narrow question we face in this case is whether the hand-delivered notice whose contents would sufficiently apprise an English-speaker of the revocation hearing violates the federal due process clause because it is not also printed in Spanish. Because of the nature of the hearing at issue, and because we agree with the Court of Appeals that a reasonable person in Petitioner's situation would have the notice translated, we conclude that the hand-delivered English-only notice is "appropriate to the nature of the case," and "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 313-14.

{12} A license-revocation proceeding is distinct from a criminal trial for driving under the influence. Under the Implied Consent Act, the purpose of the revocation proceeding is "to protect the public by promptly removing from the highways those who drive while intoxicated." *Bierner v. Taxation & Revenue Dep't*, 113 N.M. 696, 699, 831 P.2d 995, 998 (Ct. App. 1992). Thus, findings made in revocation hearings are not given preclusive effect in a subsequent criminal trial because doing so would "slow down what should be a summary administrative proceeding designed to handle license revocation matters quickly." *State v. Bishop*, 113 N.M. 732, 735, 832 P.2d 793, 796 (Ct. App. 1992). A license-revocation hearing must be held no later than ninety days after the notice of revocation, NMSA 1978 § 66-8-112(C) (1993, prior to 2003 amendments), and that time limit has been interpreted as mandatory and not waivable, *Taxation & Revenue Dep't v. Bargas*, 2000-NMCA-103, ¶ 15, 129 N.M. 800, 14 P.3d 538 (Ct. App. 2000). The hearing itself was limited by Section 66-8-112(E) to the following issues:

(1) whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor;
(2) whether the person was arrested;
(3) whether this hearing is held no later than ninety days after notice of revocation; and either
(4)
    (a) whether the person refused to submit to a test upon request of the law enforcement officer; and
    (b) whether the law enforcement officer advised that the failure to submit to a test could result in revocation of the person's privilege to drive; or
(5)
    (a) whether the chemical test was administered pursuant to the provisions of the Implied Consent Act; and
    (b) whether the test results indicated an alcohol concentration of eight one-hundredths or more in the person's blood or breath if the person is twenty-one years of age or older, or an alcohol concentration of two one-hundredths or more in the person's blood or breath if the person is less than twenty-one years of age.

Although a party may raise constitutional issues to the district court which the hearing officer could not address, review of the statutory issues is typically limited to whether "reasonable grounds exist for revocation or denial of the person's license or privilege to drive based on the record of the administrative proceeding." § 66-8-112(H).

{13} Given the summary nature of a license-revocation hearing, and its limited effect, we agree with the Court of Appeals that an English-language notice of the proceeding which was personally served satisfies due process, even if that person does not read English. Specifically, such notice satisfies due process because a reasonable person who has received the notice during an arrest for driving while intoxicated would inquire further and have the notice translated. In a different administrative context, the Court of Appeals has rejected a claim of inadequate notice

of a planned billboard where the claim was based on the fact that the landowners objecting to the billboard could not understand the description of its location in the notice provided them. *See Bogan v. Sandoval County Planning & Zoning Comm'n*, 119 N.M. 334, 890 P.2d 395 (Ct. App. 1994). In so doing, the Court of Appeals held that "where circumstances are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonable inquiry would have revealed." *Id.* at 341, 890 P.2d at 402. Likewise, we hold that where a person has been arrested for driving while intoxicated and has been personally served with papers, a reasonable person who did not understand those papers would seek to have them translated or explained.

{14} We therefore agree with those cases from other jurisdictions that have held that an English-language notice puts the non-English-speaker on inquiry notice to have the notice translated and, for that reason, satisfies due process. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 43-44 (2d Cir. 1983); *Guerrero v. Carleson*, 512 P.2d 833, 835-37 (Cal. 1973); *People v. Villa-Villa*, 983 P.2d 181, 182-83 (Colo. Ct. App. 1999); *Alonso v. Arabel, Inc.*, 622 So. 2d 187, 188 (Fla. Dist. Ct. App. 1993); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981); *Vasquez v. State*, 700 N.E.2d 1157, 1159 (Ind. Ct. App. 1998). Like the Court of Appeals, however, we do not accept all the reasoning advanced in some of those cases, particularly the argument that English is always adequate because this is an English-speaking country. *See, e.g., Guerrero*, 512 P.2d at 835. Indeed, our state constitution and statutes recognize the need for Spanish in some circumstances and the use of Spanish in other contexts. *See* N.M. Const. art. XII, § 8 (providing that the legislature shall provide for the training of teachers in public schools in English and Spanish to qualify them to teach English to Spanish-speaking students); N.M. Const. art. XX, § 12 ("For the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide."); NMSA 1978, § 14-11-11 (1923) (requiring publication of certain local proceedings and providing that when the local population is "not less than seventy-five percent Spanish speaking" publication in Spanish is sufficient). None of those provisions require Spanish-language notice in this context, and for that reason they do not alter the federal constitutional analysis.

IV. CONCLUSION

{15} Because Petitioner first asserts his state constitutional claim to this Court, we hold that the argument is not properly preserved, and we do not reach it. Further, we affirm the Court of Appeals, which held that the federal due process clause does not require that the notice of an administrative license-revocation hearing which has been personally served upon a person arrested for driving while intoxicated be provided in both English and Spanish.

{16} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-031

Filing Date: September 9, 2004

Docket No. 28,353

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

HECTOR VILLA III,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Grace B. Duran, District Judge

Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, P.A.
John D. Cline
Zachary A. Ives
Albuquerque, NM

for Petitioner

Patricia A. Madrid, Attorney General
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Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} A jury acquitted Defendant of forty-four out of fifty-two charges of violating the Water Quality Act ("WQA"). Defendant appealed his convictions of the remaining eight felony counts: five counts of knowingly discharging or knowingly causing or allowing another person to discharge a water contaminant in violation of a permit, contrary to NMSA 1978, § 74-6-10.2(A)(1) & (B) (1993); and three counts of knowingly failing or knowingly causing or allowing another person to fail to monitor, sample or report as required by a permit, contrary to Section 74-6-10.2(A)(4) & (B). The Court of Appeals found insufficient evidence to sustain the eight convictions because the permit at issue—the existence of which was an element of each offense—had expired. *State v. Villa*, 2003-NMCA-142, ¶ 10, 134 N.M. 679, 82 P.3d 46. We affirm the Court of Appeals' holding on this issue. The Court of Appeals, however, remanded to the district court to enter judgment and resentencing for eight counts of attempt to commit the offenses of which Defendant was convicted, even though he was not charged with attempt and the jury was not instructed regarding the crime of attempt. *Id.* ¶ 20. We reverse the Court of Appeals on this issue, because a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error.

I. FACTUAL AND PROCEDURAL HISTORY

{2} The New Mexico Environment Department ("NMED") is the state executive agency charged with the administration and enforcement of the WQA. In November 1992, NMED issued a discharge permit ("DP-854") to Henry Medina, operator of a landfill southwest of Las Cruces. The approval letter, directed to Medina, stated NMED had approved DP-854 for a period of five years, pursuant to the governing statute. *See* NMSA 1978, § 74-6-5(H) (1999) (providing that "[p]ermits shall be issued for fixed terms not to exceed five years," with an exception not relevant to this case). At the time of the events at issue, Defendant was a consultant for Valley By-Products, Inc. ("VBP"), an animal-rendering plant located near El Paso, Texas, which had an arrangement with Medina

allowing VBP to discharge its waste at Medina's landfill site.

{3} The Attorney General brought a grand jury indictment against Defendant, charging him with fifty-two counts of violating Section 74-6-10.2(A) on separate occasions between 1998 and 2000. Section 74-6-10.2(A) reads in relevant part:

> A. No person shall:
>
> (1) discharge any water contaminant . . . *in violation of any condition of a permit* for the discharge from the federal environmental protection agency, the [water quality control] commission or a constituent agency designated by the commission;[1]
>
> . . . .
>
> (4) fail to monitor, sample or report *as required by a permit* issued pursuant to a state or federal law or regulation;
>
> . . . .

(Emphasis added.) Section 74-6-10.2(B) articulates a mens rea element and states the penalty for conviction: "Any person who knowingly violates or knowingly causes or allows another person to violate Subsection A of this section is guilty of a fourth degree felony. . . ." The indictment did not charge Defendant with, and at trial the State did not prosecute Defendant for, *attempt* to violate Section 74-6-10.2(A)(1) or (A)(4).[2]

{4} With respect to the eight charges relevant to this appeal, the State's two theories were as follows: (1) on five separate occasions in August 1998, Defendant knowingly caused or allowed another person to discharge water contaminants at the landfill site operated by Medina in violation of DP-854, contrary to Section 74-6-10.2(A)(1); and (2) on three separate occasions between February 1999 and February 2000, Defendant knowingly caused or allowed Medina to fail to monitor, sample, or report water contaminants in violation of DP-854, contrary to Section 74-6-10.2(A)(4).

{5} At the close of the prosecution's case, Defendant moved for directed verdict of acquittal, arguing that DP-854 had expired in November 1997 and therefore the State lacked sufficient evidence as a matter of law on an essential element of each charge. The State argued in response that evidence had been admitted that the permit was in effect, including a letter addressed to Medina from NMED—a copy of which had been received by Defendant—erroneously stating that DP-854 was in effect until October 2000. Although NMED had corrected this error in numerous subsequent letters to Medina, there was no evidence at trial that Defendant was aware of these subsequent letters.

{6} Despite the permit technically having expired at the time of the conduct charged, the State argued that because Defendant subjectively believed the permit was valid, the State's charges under Section 74-6-10.2(A)(1) and (A)(4) remained viable. The trial court denied Defendant's motion for directed verdict on the basis that whether DP-854 was in effect at the time of the conduct charged was a question of fact for the jury. Accordingly, the district court instructed the jury that for each charge it must find that Defendant knowingly acted or failed to act "in violation of any condition of a permit issued by the New Mexico Environment Department, or the Environmental Protection Agency."

{7} The jury acquitted Defendant of forty-four of the fifty-two original charges. On appeal, the Court of Appeals reversed the eight remaining

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[1] By statute, NMED is a "constituent agency" authorized to grant discharge permits under the WQA. *See* NMSA 1978, § 74-6-2(K)(1) (2003).

[2] It is far from clear what conduct might constitute attempt to knowingly fail to monitor, sample, or report or attempt to knowingly allow another to fail to monitor, sample, or report. On its face, such conduct seems akin to civil negligence rather than criminal misconduct. However, because Defendant was not charged with attempt and the jury was not instructed on attempt, we decline to address (1) whether the crime of attempt is applicable to Section 74-6-10.2(A)(1) or (A)(4); (2) whether attempt is a lesser-included offense under Section 74-6-10.2(A)(1) or (A)(4); or (3) whether Defendant's charged conduct in this case would have constituted attempt to violate either Section 74-6-10.2(A)(1) or (A)(4), had Defendant been charged with attempt.

convictions, holding that insufficient evidence supported the verdicts because DP-854 was not in effect as a matter of law at the time of the conduct of which Defendant was convicted. *Villa*, 2003-NMCA-142, & 10. The Court further held, however, that attempt to commit a violation of the WQA is a lesser-included offense and that the jury necessarily found Defendant guilty of attempt. *Id.* & 18. Therefore, the Court of Appeals remanded to the trial court for entry of judgment of conviction and resentencing for attempt to commit each of the eight violations. *Id.* & 20. Defendant appeals, arguing that remand for resentencing for a lesser-included offense should not be permitted where the jury was not instructed on that offense.

II. DISCUSSION

{8} The question presented is whether, following reversal of a conviction due to insufficient evidence, an appellate court may remand for entry of judgment of conviction and resentencing for a lesser-included offense, where the jury had not been instructed on that lesser offense at trial.[3] The Court of Appeals below answered in the affirmative and remanded for resentencing on the lesser-included offense of attempt to commit the eight violations of the WQA. *Villa*, 2003-NMCA-142, & 45. The Court of Appeals held that an appellate court may remand for resentencing for a lesser offense on which the jury was not instructed, provided the following conditions are met: (1) there is a failure of proof of one element of the greater offense; (2) the evidence is sufficient to sustain all the elements of the lesser offense; (3) the lesser offense is included in the greater; and (4) no undue prejudice to the defendant would result. *Id.* ¶ 25; *see Allison v. United States*, 409 F.2d 445, 451 (D.C. Cir. 1969).

{9} We have previously considered when it would be appropriate for an appellate court to remand a case for entry of judgment of conviction and resentencing for a lesser-included offense without a new trial. In *State v. Haynie*, 116 N.M. 746, 748, 867 P.2d 416, 418 (1994), this Court reversed the defendant's conviction of first-degree murder due to insufficient evidence and remanded for entry of judgment and resentencing for the lesser-included offense of second-degree murder. *Id.* In deciding whether direct remand is appropriate in these circumstances, we stated the inquiry is whether the interests of justice would be served by ordering a new trial. *Compare Haynie*, 116 N.M. at 748 (holding the interests of justice would not be served by remanding for new trial on the offense of second-degree murder), *with State v. Garcia*, 114 N.M. 269, 276, 837 P.2d 862, 869 (1992) (holding on rehearing that the interests of justice would be better served by remanding for new trial on the offenses of second-degree murder and voluntary manslaughter). Significantly, the trial courts in both *Haynie* and *Garcia* had instructed the jury on the lesser-included offenses at issue, and the defendant in *Haynie* had argued to the jury for conviction of the lesser offense rather than the greater. *See Haynie*, 116 N.M. at 748, 867 P.2d at 418; *Garcia*, 114 N.M. at 271, 837 P.2d at 864. Here, the parties did not request and the jury was not tendered an instruction on any lesser-included offenses. Because neither *Haynie* nor *Garcia* address the specific situation in which the jury was not instructed on the lesser-included offense, this is a case of first impression.

{10} In expanding the scope of the *Haynie* direct-remand rule in New Mexico, the Court of Appeals relied primarily on *Shields v. State*, 722 So. 2d 584 (Miss. 1998). In a series of earlier cases, the Mississippi Supreme Court had held that when a conviction of a greater offense is invalidated on appeal for insufficient evidence, no new trial is required, and the defendant may be remanded for sentencing upon the lesser-included offense. *Id.* at 585. In each of those previous cases, however, the jury had been instructed on the lesser-included offense at issue. The question *Shields* addressed was whether Mississippi's direct-remand rule required the jury to have been instructed on the lesser-included offense. *Id.* at

[3] Because we decide this case on the narrow basis of the inapplicability of the direct-remand rule, we assume without deciding that attempt to violate Section 74-6-10.2(A)(1) and (A)(4) are lesser-included offenses.

586. The court held it did not and adopted the same test adopted by the Court of Appeals to determine whether direct remand is appropriate. *Id.* at 587; *see Villa*, 2003-NMCA-142, ¶ 25; *Allison*, 409 F.2d at 451.

{11} Defendant first argues that expanding the scope of the *Haynie* direct-remand rule would violate his Sixth Amendment right "to be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI; *see also* N.M. Const. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation. . . ."). In response, the State cites *State v. Gallegos*, 109 N.M. 55, 66, 781 P.2d 783, 794 (Ct. App. 1989), for the proposition that "[a] defendant is placed on notice of the potential for being charged with lesser included offenses of an offense charged in the indictment." In *Gallegos*, the Court of Appeals held the trial court properly allowed the State to amend the indictment to include a lesser-included offense and that the amended indictment did not prejudice the defendant. *Id.* There, however, the State moved to amend the indictment *pretrial*, a fact which sharply distinguishes that case from this one.

{12} Here, giving Defendant notice of the lesser-included offenses *after conviction* hardly provides Defendant with adequate notice of those charges. As we stated in *State v. Meadors*, 121 N.M. 38, 45, 908 P.2d 731, 738 (1995), in the context of our cognate approach to determining whether an offense is lesser included, "the defendant should be fully aware of the possible offenses for which he or she may face prosecution and should have ample opportunity to prepare a defense." We further emphasized that, when ruling on a motion by the State to instruct the jury on a lesser-included offense, the trial court should conduct an independent inquiry to determine whether the defendant has received constitutionally adequate notice of the lesser offense. *Id.* It would be inconsonant with *Meadors*' requirement of adequate pretrial notice to hold now that a defendant may be convicted *post-trial* of a lesser-included offense where the defendant was not advised of the State's intention to seek that conviction.

{13} Even if we were to conclude that Defendant had adequate notice of lesser-included offenses, we would still face the problem of convicting Defendant on appeal of a charge he did not in fact defend at trial. Had the State at trial requested instructions on the lesser-included offenses and the trial court properly granted that request, the parties would have had a full and fair opportunity to marshal evidence and craft their argument to persuade the jury for or against the elements of those offenses.

{14} In this case the State and Defendant pursued an "all-or-nothing" trial strategy, in which neither party requested instructions on any lesser-included offenses. On appeal, we do not second-guess the tactical decisions of the litigants. *See State v. Boeglin*,105 N.M. 247, 251, 731 P.2d 943, 947 (1987) ("[C]onsistent with the constitutional guarantees of a fair trial, the defendant in a first degree murder prosecution may take his chances with the jury by waiving instructions on lesser included offenses and cannot be heard to complain on appeal if he has gambled and lost."). Were we to adopt the State's position, "the [S]tate would have all the benefits and none of the risks of its trial strategy, while the accused would have all the risks and none of the protections." *State v. Myers*, 461 N.W.2d 777, 782 (Wis. 1990). We believe that both parties are entitled to the benefits and should be liable for the risks of their respective trial strategies.

{15} We also conclude that adopting the expanded direct-remand rule is inconsistent with New Mexico law regarding jury instructions and preservation of error. Rule 5-608(D) NMRA 2004, governing the preservation of error in jury instructions, states: "[F]or the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, *a correct written instruction must be tendered before the jury is instructed*." (Emphasis added.) The purpose of this language is "to allow the court an opportunity to

decide a question whose dimensions are not open to conjecture or after-the-fact interpretation." *Gallegos v. State*, 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992). Except in cases of fundamental error, *see State v. Garcia*, 19 N.M. 414, 421, 143 P. 1012, 1014-15 (1914), "[t]imely objections to improper instructions must be made or error, if any, will be regarded as waived in every case." *State v. Garcia*, 46 N.M. 302, 307, 128 P.2d 459, 462 (1942).

{16} Here, the State is in effect asking us to review for fundamental error its failure to request jury instructions that correctly conform to the evidence adduced at trial. Even if we were to review the State's claims for fundamental error, in order to establish such error the State would have the burden of showing that "some fundamental right has been invaded." *Garcia*, 19 N.M. at 421, 143 P. at 1015. The State has not shown that a fundamental right was invaded; rather, the State has demonstrated only that its trial strategy of forgoing any lesser-included instructions did not prevail.

{17} If the situation were reversed, and Defendant had made the strategic decision not to request jury instructions on lesser-included offenses, Defendant would not be entitled to request on appeal modification of the conviction of a greater offense to reflect a lesser-included offense. *See Boeglin*,105 N.M. at 251, 731 P.2d at 947. The State, having made the strategic decision not to request jury instructions on the crimes of attempt to violate Section 74-6-10.2(A)(1) and (A)(4), may not complain on appeal that it was denied a fair opportunity to pursue those convictions.

{18} Indeed, counsel for NMED informed the Court of Appeals at oral argument that NMED had made known to the Attorney General before the prosecution began that DP-854 was not in effect during the relevant period. At that point, the State was free to amend its indictment under Rule 5-204(A) NMRA 2004 to charge Defendant with attempt, but elected not to do so. Even at the close of the State's case at trial, when Defendant moved for directed verdict of acquittal, the State could have requested a jury instruction on attempt under Rule 5-611(D) NMRA 2004, but chose not to. As Judge Kennedy stated, "[t]he State caused its problem at trial by consciously, purposefully failing to preserve their right to have a lesser included offense considered." *Villa*, 2003-NMCA-142, ¶ 79 (Kennedy, J., concurring in part and dissenting in part) (emphasis omitted). Having decided to bring an indictment based on a permit the State knew had expired, and forgoing an opportunity to pursue the theory of attempt at trial, the State may not complain on appeal about the consequences of those decisions.

III. CONCLUSION

{19} We affirm in part and reverse in part the opinion of the Court of Appeals and remand to the trial court for proceedings consistent with this opinion.

{20} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-004

Filing Date: March 1, 2005

Docket No. 28,286

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ANTONIO GRAHAM,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Frank K. Wilson, District Judge

Patricia A. Madrid, Attorney General
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for Petitioner

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for Respondent

OPINION

SERNA, Justice.

{1} Following a jury trial, Defendant Antonio Graham was convicted of, among other charges, child abuse, contrary to NMSA 1978, § 30-6-1 (2001). On appeal, the Court of Appeals affirmed Defendant's other convictions but reversed his conviction of child abuse on the basis of insufficient evidence. *State v. Graham*, 2003-NMCA-127, & 3, 134 N.M. 613, 81 P.3d 556. This Court granted the State's petition for writ of certiorari to the Court of Appeals, and we now reverse.

I. FACTS

{2} Defendant lived at the residence of his girlfriend, Amanda Kelly, with their two children, ages one and three. On September 1, 2000, police sought to execute an arrest warrant for Defendant at Kelly's house. Police officers apprehended Defendant outside the house in a truck. With the consent of the owner of the truck, the officers found crack cocaine in a search of the truck. At that point, Kelly stepped out of the house and asked what was happening. The officers smelled a strong odor of burnt marijuana emanating from the house. They obtained a search warrant for the house. Inside, the officers found additional crack cocaine, several plastic bags with marijuana, a marijuana pipe, and a hanging scale in a dresser drawer in the master bedroom. The officers also noticed rolling papers and marijuana residue, including seeds and stems, on top of a different dresser. Additionally, the officers found a marijuana roach on the living-room floor in front of the sofa and a marijuana bud in a crib in the master bedroom. The officers also recovered a plastic sandwich bag with a small amount of marijuana just inside the front door on a table next to a fish tank. The officers saw two infants in the house and noticed that they were in diapers. The house was dirty and untidy, with soiled clothes on the floor throughout the house and unwashed dishes with old food on them. Along with various drug charges, the State charged Defendant with child abuse.

{3} At trial, Officer Lee Wilder testified that the bud is the most desirable part of the marijuana plant that people generally smoke. It is the part of the plant containing a high concentration of tetrahydrocannabinols. Officer Dusty Collins explained that marijuana dries in buds that are broken up and put in bowls or cigarettes to smoke.

The bud found in the crib was in one solid piece with the stem.

{4} Kelly testified that she was unaware of the marijuana on the floor of the living room and in the crib. She stated that if the children had ingested the marijuana she believed that they would have become sick. Kelly testified that Defendant told her that the presence of the marijuana on the living room floor and in the baby's crib was his fault and that he was sorry. In response to a question about whether drugs were more important to Defendant than his children, Kelly recited Defendant's statement that his only thoughts were about drinking, smoking dope, selling drugs, and running the streets.

{5} Two witnesses testified that they were inside Kelly's house immediately before Defendant's arrest on September 1, 2000. These witnesses testified that while they were in the living room they saw Kelly's two children running around the house and playing. Officer Collins testified that the marijuana in the living room was accessible to the children. In addition, a photograph of the bud inside the crib was admitted as an exhibit.

II. STANDARD OF REVIEW

{6} "[T]he test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We have explained that this test involves two separate parts. *State v. Coffin*, 1999-NMSC-038, ¶ 73, 128 N.M. 192, 991 P.2d 477; *State v. Sanders*, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). First, "[a] reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319. Second, an appellate court "determines whether the evidence, *viewed in this manner*, could justify a finding by *any* rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Sanders*, 117 N.M. at 456, 872 P.2d at 874 (emphases added).

{7} In setting out the standard for reviewing sufficiency of the evidence, the Court of Appeals stated that "the evidence and inferences drawn from that evidence must be sufficiently compelling so that a hypothetical reasonable factfinder could have reached 'a subjective state of near certitude of the guilt of the accused.'" *Graham*, 2003-NMCA-127, ¶ 12 (quoted authority omitted). It is indeed true that the standard of beyond a reasonable doubt has been described as "a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). This standard has also been described as being beyond "a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life." UJI 14-5060 NMRA 2005. However, in articulating the reasonable doubt standard referenced by the Court of Appeals, the United States Supreme Court emphasized that an appellate court reviewing for sufficiency does not

> ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

Id. at 318-19 (citation, quotation marks, and quoted authority omitted). We have used similar cautionary language: "A reviewing court may neither reweigh the evidence nor substitute its judgment for that of the jury." *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319. Thus, the question is not whether this Court is convinced of Defendant's guilt beyond "a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life." UJI 14-5060. Rather, the question is whether, viewing all of the evidence in a light most favorable to upholding the jury's verdict, there is substantial evidence in the record to support *any* rational trier of fact being so convinced. "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . ." *State v. Lujan*, 103 N.M. 667, 669, 712 P.2d 13, 15 (Ct. App. 1985), *quoted in State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661.

III. SUFFICIENCY OF THE EVIDENCE

{8} We begin our review of the sufficiency of evidence to support Defendant's conviction with the elements of child abuse. For the form of the crime with which Defendant was charged, the State had the burden of proving beyond a reasonable doubt that Defendant caused a child or children under the age of eighteen to be placed in a situation that may have endangered their life or health and did so with a reckless disregard. Section 30-6-1(A)(3), (D)(1). A reckless disregard requires that Defendant "knew or should have known [his] conduct created a substantial and foreseeable risk, [he] disregarded that risk and . . . was wholly indifferent to the consequences of the conduct and to the welfare and safety" of the child or children. UJI 14-604 NMRA 2005.

{9} By including endangerment in Section 30-6-1, the Legislature expressed its intent to extend the crime of child abuse to certain conduct even if the child has not suffered physical harm. *State v. Ungarten*, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993). "The [L]egislature's decision to criminalize the conduct described by the statute reflects a compelling public interest in protecting defenseless children." *Lujan*, 103 N.M. at 671, 712 P.2d at 17; *accord Santillanes v. State*, 115 N.M. 215, 219, 849 P.2d 358, 362 (1993). "[C]hildren, who are often times defenseless, are in need of greater protection than adults." *State v. Lucero*, 87 N.M. 242, 245, 531 P.2d 1215, 1218 (Ct. App. 1975). However, in designating the crime as, at a minimum, a third degree felony, Section 30-6-1(E), the Legislature did not intend to criminalize conduct creating "a mere possibility, however remote, that harm may result" to a child. *Ungarten*, 115 N.M. at 609, 856 P.2d at 571; *accord State v. Coe*, 92 N.M. 320, 321, 587 P.2d 973, 974 (Ct. App. 1978) (rejecting the argument "that because of its negligence requirement the statute covers any and all harm that might befall the child"), *overruled on other grounds by Santillanes*, 115 N.M. at 225 ¶ n.7, 849 P.2d at 368 ¶ n.7. "There must be 'a reasonable probability or possibility that the child will be endangered.'" *State v. McGruder*, 1997-NMSC-023, ¶ 37, 123 N.M. 302, 940 P.2d 150 (quoting *Ungarten*, 115 N.M. at 609, 856 P.2d at 571) (quotation marks omitted).

{10} In reviewing the evidence relevant to the charge of child abuse, the Court of Appeals stated that there was "no direct evidence that the two children were ever close to the drugs that were found and no direct or circumstantial evidence that the presence of the drugs posed a direct and imminent threat of danger to them." *Graham*, 2003-NMCA-127, ¶ 26. We first note that direct evidence is not required. *State v. Bell*, 90 N.M. 134, 137, 560 P.2d 925, 928 (1977). We also disagree with this assessment of the evidence. With respect to proximity, two witnesses testified that, while in the living room, they observed the children running around the house immediately before the arrest and search. Officer Collins testified that the marijuana on the floor in front of the sofa was accessible to the children. In addition, a whole marijuana bud was found in a crib, a piece of furniture that functions as a sleeping area for an infant. We believe that this evidence supports a reasonable inference that the children

were in the immediate vicinity of the marijuana, that it was accessible to them, and that there was a reasonable possibility that they would come in contact with the controlled substance. *See State v. Romero*, 79 N.M. 522, 524, 445 P.2d 587, 589 (Ct. App. 1968) ("An inference is merely a logical deduction from facts and evidence.") (quoting *State v. Jones*, 39 N.M. 395, 401, 48 P.2d 403, 406 (1935)). The Court of Appeals indicated that there was no evidence that the crib was used for either child. *Graham*, 2003-NMCA-127, ¶ 21. However, the State introduced a photograph depicting the contents and state of the crib at the time of the incident. Two police officers testified that the crib was in the master bedroom and that the bud in the crib was found underneath a teddy bear. This evidence, as well as the inherent purpose of this piece of furniture and the ages of the children, supports a reasonable inference that the crib was being used as a sleeping area for at least one of the children. From the testimony that the officers did not see the bud until they picked up the teddy bear, and from the absence of any evidence suggesting that the marijuana had just been put in the crib, a reasonable inference could also be drawn that the bud had been in the crib while the child slept.

{11} With respect to the danger to the children, the Court of Appeals discounted the testimony of Kelly. Noting that no objection had been made to Kelly's testimony, the Court nonetheless determined that Kelly's testimony was inadmissible and "that inadmissible testimony to which no objection is made has only such probative value as its rational persuasive power." *Graham*, 2003-NMCA-127, ¶ 21. Irrespective of its admissibility, we believe that the Court of Appeals applied an incorrect standard in reviewing Kelly's testimony. For the proposition that it could weigh Kelly's testimony, the Court of Appeals relied on *State v. Vigil*, 97 N.M. 749, 752, 643 P.2d 618, 621 (Ct. App. 1982). We believe the Court of Appeals' reliance on *Vigil* is misplaced. In *Vigil*, the testimony at issue was hearsay, and it was admissible, despite the existence of an objection by the defendant, because, as a probation revocation, the proceeding was not governed by the Rules of Evidence. *Id.* at 750-51, 643 P.2d at 619-20. The question on appeal was whether hearsay alone could establish a probation violation. *Id.* at 751, 643 P.2d at 620. Under these circumstances, the Court assessed the rational persuasive power of the testimony. *Id.* at 752, 643 P.2d at 621. This evaluation of the weight of testimony has similarly been restricted to hearsay serving as the sole evidence supporting a verdict in other cases. *See State v. Romero*, 67 N.M. 82, 86, 352 P.2d 781, 783 (1960) (noting that "hearsay, admitted without objection, is to be considered along with other evidence in determining whether there is substantial evidence to sustain a verdict on appeal"). Outside this limited context, and for non-hearsay such as Kelly's testimony, we follow the rule that

> [w]e do not . . . substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony. Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions.

Sanders, 117 N.M. at 457, 872 P.2d at 875 (citation omitted).

{12} In addition to Kelly's testimony, Officer Wilder testified that the bud is the part of the marijuana plant containing the highest concentration of tetrahydrocannabinols. We also note that the Legislature has designated marijuana as a Schedule I controlled substance under NMSA 1978, § 30-31-6(C)(10) (1978), together with LSD, heroin, and numerous other drugs. Moreover, the Legislature has increased the penalties available for distributing controlled substances, specifically including marijuana, to minors as opposed to adults, NMSA 1978, § 30-31-21 (1987), and has increased penalties for distributing controlled substances in the vicinity of minors by creating drug-free school zones, NMSA 1978, § 30-31-22(C) (1990). From these statutes, the Legislature has indicated its determination that marijuana is a dangerous substance,

particularly for minors. It is also common knowledge that the same amount of an intoxicant can have a more profound impact on infants and toddlers than on adults or even older children. The Court of Appeals, as an example of the inadequacy of the record in the present case, cited to a case in which an expert testified about the extremely large quantity of marijuana necessary for a lethal dose. *Graham*, 2003-NMCA-127, ¶ 24. However, Section 30-6-1(D)(1) proscribes conduct that may endanger the health, as well as the life, of a child. It was thus unnecessary for the State to show that the amount of marijuana accessible to the children could have been fatal. Given the illegality of the substance and the Legislature's determination that the substance is particularly dangerous to minors, we believe it was within the jurors' experience to decide whether the amount of accessible marijuana endangered the health of a three-year-old child and a one-year-old child.

{13} Contrary to the applicable standard of review, it appears that the Court of Appeals parsed the testimony and viewed the verdict only in light of the probative value of individual pieces of evidence. The Court of Appeals stated that "Kelly's testimony takes on significance far beyond what it should," *Graham*, 2003-NMCA-127, ¶ 26, that "[t]he rational persuasive power of . . . Kelly's testimony is minimal," *id.* ¶ 21, that "[w]e do not know if the children had access to the marijuana or their proximity to the drugs or drug users," *id.* ¶ 25, and that "[w]e do not know where the children were in relation to the others in the house, or whether the 'roach' that was found resulted from this or earlier smoking." *Id.* This divide-and-conquer approach is not contemplated in appellate review for sufficiency of the evidence. *Cf. United States v. Arvizu*, 534 U.S. 266, 274 (2002) (noting that a totality of the circumstances review for reasonable suspicion supporting an investigative stop is inconsistent with a "divide-and-conquer analysis" that looks at individual facts in isolation). We view the evidence as a whole and indulge all reasonable inferences in favor of the jury's verdict. "An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *Sutphin*, 107 N.M. at 130-31, 753 P.2d at 1318-19. Appellate courts "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. We do not search for inferences supporting a contrary verdict or reweigh the evidence because this type of analysis would substitute an appellate court's judgment for that of the jury.

{14} From the evidence in the record, a rational jury could draw reasonable inferences that the marijuana was accessible to the children, that there was a reasonable possibility that the children would come in contact with the marijuana, and that there was a reasonable possibility of danger to the very young children from ingesting the marijuana. In conjunction with this evidence, the jury heard testimony that Defendant trafficked in crack cocaine in close proximity to the children and that Defendant kept a substantial quantity of crack cocaine and marijuana in various places around the house. Defendant also admitted to being responsible for leaving the marijuana in places that the jury could infer were easily accessible to the children. Viewing all of the evidence in the record in a light most favorable to the verdict, we determine that a rational jury could find each element of child abuse, including a reasonable possibility of danger to the health of the children, beyond a reasonable doubt.

IV. CONCLUSION

{15} We conclude that Defendant's conviction of child abuse is supported by sufficient evidence in the record. We reverse the Court of Appeals and affirm the conviction.

{16} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice (specially concurring)

RICHARD C. BOSSON,
Chief Justice (dissenting)

PAMELA B. MINZNER,
Justice (dissenting)

SPECIAL CONCURRENCE

CHÁVEZ, Justice (specially concurring).

{17} I concur with the opinion authored by Justice Serna. I write separately to address some of the concerns raised in the dissenting opinion.

{18} In order to prove the offense of child abuse under Section 30-6-1(C)(1), the State must prove beyond a reasonable doubt that Defendant knowingly, intentionally or negligently, and without justifiable cause, permitted a child to be placed in a situation that may endanger the child's life or health. NMSA 1978, § 30-6-1(D) (2001). In child abuse cases, we have held that the Legislature intended the phrase "may endanger" to constitute "a reasonable probability or possibility" that the child will be endangered. *State v. Ungarten*, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993). In this case the jury was instructed that the State had the burden of proving beyond a reasonable doubt that Defendant caused a child or children to be placed in a situation which endangered their life or health. UJI 14-604 NMRA 2005.

{19} In my opinion, although this is a close case, the evidence was sufficient to support the conviction. I do not agree with the dissent that by sustaining this conviction we make bad parenting a crime. This is not simply a case of bad parenting or a "mistake" as characterized by the dissent. In this case two children, ages one and three, were running around the house while adults smoked marijuana rolled in cigar paper. A marijuana cigarette bud was left on the floor where the children were playing. An open bag with marijuana residue was left sitting on a table. Marijuana seeds and stems were left on a dresser in the room where the baby crib was located. In the baby crib was a marijuana bud, which, according to expert testimony, is the most potent part of the marijuana plant. The case would have been much stronger had a witness testified that the children were chewing the marijuana left within their reach and had a toxicologist testified regarding the toxicity of marijuana. However, in this case the law does not require such direct evidence. *See State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150. Given the jury's reasonable inference in this case that the marijuana bud , a particularly potent and illegal substance, could harm a child if ingested, I believe the evidence of marijuana left in the baby's crib and the areas where the children were playing is sufficient to support a finding of a reasonable probability or possibility that the children would be endangered.

{20} I am also not persuaded by the concern expressed in the dissent that the Court's holding criminalizes leaving household products accessible to children. Each of the products to which the dissent refers is legal. I do not read Justice Serna's opinion as prohibiting legitimate acts. Additionally, toxic household products have child resistant caps. The Defendant in this case left the marijuana accessible to children without taking any steps whatsoever to eliminate or minimize the risk that the children would ingest the marijuana. A reasonable fact finder could find that such an act constitutes child abuse as defined by the Legislature.

{21} Finally, the dissent relies on *State v. Trujillo* as support for the proposition that a child must be directly in harm's way to support a conviction of child abuse. Much like the dissent in this case, *Trujillo* seems to require proof of actual injury beyond all doubt. In *Trujillo* the Court of Appeals reversed a jury finding of child abuse, holding there was insufficient evidence that a child who witnessed the beating of her mother faced a "substantial risk" to her emotional or

physical health. 2002-NMCA-100, ¶¶ 20–21, 132 N.M. 649, 53 P.3d 909. In that case, the drunken father came home late one night, and, as the children slept, he began to beat his wife. The beating was loud enough to awaken the couple's eight-year-old child, who went to the room to see what was happening. The child testified that she saw her dad beating her mother as the mother asked him to stop. When the child appeared at the door the father stopped beating the child's mother and said to the child, "Get your little f—ing ass back to bed because I don't want to have you see me kill your mother." *Id.* ¶ 5. The Court of Appeals held there was insufficient evidence for a jury to find a "reasonable probability or possibility" that the daughter's emotional health was endangered, *id.* ¶ 20, despite testimony from the child and the mother that the child was scared and saddened by what she witnessed, and that for some time the child lived in fear that she would be "taken away," or that her father would injure her or kill her mother, to the extent that she missed many days of school. *Id.* ¶¶ 11–12. The dissent in this case underscores the lack of evidence of direct, physical harm to the child in *Trujillo*, emphasizing that "the father ordered his child to leave the room just so she would *not* be in the direct line of his anger." ¶ 31. In my opinion, requiring this type of evidence to sustain a jury finding of child abuse goes well beyond requiring the prosecution to prove each element of a crime beyond a reasonable doubt.

{22} Justice is a community project in which individuals participate directly when serving on a jury. While it is certainly appropriate in some cases to reverse a jury conviction based on insufficient evidence, this is not the case. The jury was instructed in such a way that what may be a vague and overbroad statute—requiring only a showing that a child was negligently placed in a situation that may have endangered the child—in fact required a showing that the child was placed in a situation which endangered the child's life. For the reasons previously stated, I believe a reasonable jury could find the defendant guilty based on the direct and circumstantial evidence presented to the jury and the reasonable inferences that could be drawn from such evidence.

{23} If our interpretation of legislative intent is incorrect as it relates to child abuse, let us err on the side of the safety of children. If the Legislature did not intend for the child abuse definition to reach the circumstance in which illegal drugs are placed within reach of children, the Legislature should revise the definition and tighten up what may be a vague and overbroad statute.

{24} For the foregoing reasons, I concur in affirming Defendant's conviction for child abuse.

EDWARD L. CHÁVEZ,
Justice

DISSENTING OPINION

BOSSON, Chief Justice (dissenting).

{25} I do not believe the State provided sufficient evidence at trial that the children were actually in danger of ingesting marijuana, and therefore I respectfully dissent. To establish a claim of child abuse, the State must demonstrate that the defendant caused the children "to be placed in a situation which endangered [their] life or health." UJI 14-604 NMRA 2005. The State must first show that marijuana is a potentially dangerous substance, and then that the children were actually in danger from it.

{26} Because most of the trial focused on the other charges arising from Defendant's drug dealing, the one count dealing with child abuse received little attention at trial from either side. The State presented only one theory for the charge in its opening statement: that Defendant committed child abuse by leaving the marijuana in areas accessible to children. *State v. Graham*, 2003-NMCA-127, ¶ 19, 134 N.M. 613, 81 P.3d 556. But it has never been a crime, before now, to leave a potentially toxic chemical in an area where there is only a mere possibility, however remote, that a child might come in contact with it. This cannot be what the legislature had in mind when it made criminal child abuse a third degree felony. Otherwise, we risk criminalizing huge territories of benign, though perhaps

careless, conduct which up to now has been the province of the abuse and neglect statutes or the law of civil negligence. *See* NMSA 1978, § 30-6-1 (2004). We risk making a criminal act out of merely being a bad parent.

{27} I agree with our Court of Appeals that the State presented an anemic case in support of the child abuse charge. Despite the testimony of a police officer formally trained in the identification and handling of marijuana, and a forensic chemist from the state crime lab, the State failed to elicit any expert testimony describing the toxicity of the two small pieces of marijuana or directly linking such a small amount to its potential effects upon small children. Presumably, the State could have done so without undue inconvenience, and the jury would have had the kind of evidence it deserved to make an informed decision.

{28} However, this satisfies only half the State's burden. Beyond proving the degree of risk to the child's health from marijuana generally, the State had to prove proximity: that a child was actually placed in a direct, physical line to that danger.[1] The danger to this particular child must be more than merely theoretical. Although the law does not require that a child suffer actual injury, it does require that the hazard be greater than a "mere possibility." *State v. Ungarten*, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993). The risk of harm has to be substantial; the legislature did not intend to criminalize every harm that might possibly come a child's way. *State v. Massengill*, 2003-NMCA-024, && 43–47, 133 N.M. 263, 62 P.3d 354. Our courts have previously lent such a reasonable interpretation to the child abuse statute, and I believe we should do so here. "In making this offense a third degree felony, the legislature intended to address conduct with potentially serious consequences to the life or health of a child. The coupling in the statute of the word 'health' with the word 'life' suggests to us that the legislature intended to address situations in which children are exposed to a substantial risk to their health." *State v. Trujillo*, 2002-NMCA-100, ¶ 21, 132 N.M. 649, 53 P.3d 909.

{29} With this caution in mind, I would point out what is self-evident about modern households. They contain a wide assortment of commonly used agents, potentially toxic to children, such as detergents, paint products, cleansers and bleaches, insecticides, herbicides, and even alcoholic beverages and cigarettes. Most of the time, these toxic agents are not under lock and key. Sensibly, as a society we place a considerable degree of trust and discretion in parents; we trust them to undertake reasonable precautions to keep these toxic agents away from children. We do not make a criminal act out of merely making a mistake; after all, none of us is a perfect parent.

{30} In interpreting the child abuse statute, our courts have recognized the distinction between imminent danger and danger which is more remote. For example, we have upheld child abuse convictions when the violent behavior of adults places children physically proximate to that violence and directly in harm's way. *See State v. McGruder*, 1997-NMSC-023, ¶ 38, 123 N.M. 302, 940 P.2d 150 (upholding child abuse conviction despite the lack of any physical harm when defendant aimed a gun at a woman and threatened to kill her while her daughter was standing behind her); *Ungarten*, 115 N.M. at 609–10, 856 P.2d at 571–72 (upholding child abuse conviction when defendant's knife thrusts at a child's parent came close to the child). In these cases, the evidence demonstrated that children were physically close to an inherently dangerous situation.

{31} On the other hand, our courts have reversed child abuse convictions when a child may be in the general area of a potentially dangerous situation, but the child is not placed directly in harm's way. For example, in *State v. Roybal*, 115 N.M. 27, 29, 846 P.2d 333, 335 (Ct. App. 1992), a father sold illegal drugs, itself a dangerous proposition, while his daughter waited in the car about ten to fifteen feet away. On appeal from

[1] Even with the presumed toxicity of marijuana, and fully recognizing its illegality, the State nonetheless had the burden of producing evidence of proximity.

a conviction for child abuse, the court reversed, finding insufficient evidence that the child's mere presence in the car put her sufficiently at risk to constitute criminal child abuse. *Id.* at 34, 846 P.2d at 340. Similarly, in *Trujillo*, 2002-NMCA-100, ¶ 7, a father was convicted of child abuse after his daughter witnessed the father's attack upon her mother from the bedroom doorway out of the direct line of danger. Oddly, the father ordered his child to leave the room just so she would *not* be in the direct line of his anger. *Id.* ¶ 5. Again, the court reversed, finding that any risk of danger was physically remote. *Id.* ¶ 19.[2]

{32} Defendant's case is similar to both *Trujillo* and *Roybal*. Even though Defendant introduced a potentially dangerous, illegal substance into the house, Defendant has already been convicted of possession and trafficking. With respect to the separate offense of child abuse, the State failed to demonstrate that either child was ever close enough to the marijuana to be seriously at risk.[3] At trial, the State presented no evidence that these children were ever in the crib with the marijuana bud or even in the same bedroom. In fact, there was very little evidence linking either piece of marijuana to the physical location of the children. The only indication from the record regarding the children's whereabouts is that they were running around the house, not in the bedroom with the crib, at approximately 5:30 p.m., shortly before Defendant's arrest. When the house was secured and officers awaited a search warrant, the children were most likely outside the house with their mother. For all we know, Defendant placed the marijuana bud in the crib earlier in the day, and we have no idea if the children were ever actually in the crib at the same time as the contraband.

{33} Importantly, there was no evidence that the children were ever left unsupervised by their mother. In fact, to make one of these children physically proximate to the marijuana in the crib, an adult would have to pick up the child, place the child in the crib, and then leave the child unsupervised in the crib with the marijuana bud. But the mother, not Defendant, was the parent in the house with her children, and there is no evidence that she would likely have been so careless. This does not absolve Defendant of blame or otherwise excuse his reprehensible behavior toward these children. But it does absolve Defendant of guilt under this particular child abuse statute, because the evidence does not prove the elements of the crime established by our legislature.

{34} More significantly, I fear the implications of this opinion with respect to what the legislature has defined as criminal child abuse. If we are going to convict based on nothing more than speculation as to what might have happened if certain events had occurred in the future, then there are almost no limits to what a jury might conclude is child abuse. But juries do not define crimes; the legislature does. And our legislature required evidence of "endangerment," which, under our existing case law, means something more than "what might have been."

{35} Under its broad reading of the statute, the majority is effectively allowing the jury to usurp the role of the legislature in determining what constitutes child abuse. I cannot agree to such a standard-less, open-ended reading, especially of a criminal statute. I especially fear the due process implications to which we give rise with such an unprecedented reading of our child abuse law. Accordingly, with respect, I am compelled to dissent.

RICHARD C. BOSSON,
Chief Justice

I CONCUR.

PAMELA B. MINZNER,
Justice

[2] The special concurrence implies a certain dissatisfaction with the Court of Appeals opinion in *Trujillo*. Yet *Trujillo* was and is the law of this State. This Court had the opportunity to review it on certiorari, yet declined, to do so. The present majority opinion makes no change in *Trujillo*.

[3] As the majority opinion correctly states, Defendant took full responsibility for the presence of the marijuana in the house and its location. However, Defendant never conceded its proximity to the children, nor was there any other direct evidence of its actual proximity to the children in terms of place and time.

Justice Edward L. Chávez

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-010

Filing Date: March 28, 2005

Docket No. 28,626

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

RUSSELL FENNEMA,

Defendant-Appellant.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
William F. Lang, District Judge

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OPINION

CHÁVEZ, Justice.

{1} Appellant Russell Fennema appeals a district court summary judgment in favor of State Farm Mutual Automobile Insurance Company[1]. The district court held that State Farm was not liable for underinsured motorist benefits to Fennema because Fennema breached a contract provision requiring Fennema to obtain the written consent of State Farm before settling his claim with the tortfeasor and her insurance carrier (consent-to-settle provision). Fennema argues that despite his breach of contract, recent developments in New Mexico insurance law require State Farm to show that it was substantially prejudiced by the breach before it can escape liability.

{2} For the first time we consider whether an insurance company must demonstrate substantial prejudice from the breach of a consent-to-settle provision before it can be relieved from paying underinsured motorist benefits. We answer this question in the affirmative. Consistent with the approach outlined in *Roberts Oil Co. v. Transamerica Ins. Co.*, 113 N.M. 745, 833 P.2d 222 (1992), we hold that for an insurer to justify foreclosing an insured's right to underinsured motorist benefits, the insurer must demonstrate it was substantially prejudiced by the insured's breach of the consent-to-settle provision. Although the insurer has the ultimate burden of persuasion, proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. *See id.* at 755, 833 P.2d at 232. In this case no genuine issues of material fact exist and State Farm is still entitled to summary judgment because Fennema did not offer evidence that could meet or rebut the presumption of substantial prejudice.

FACTS

{3} Defendant Moses (tortfeasor) negligently struck the rear of the vehicle driven by Fennema, causing serious injuries to Fennema. The

[1] We accepted certification from the Court of Appeals pursuant to NMSA 1978, § 34-5-14(C) (1972) because we believe the issue before us is one of substantial public interest.

tortfeasor had a $25,000 liability policy. Fennema paid premiums for three $25,000 uninsured/underinsured motorist policies issued by State Farm. The parties seem to agree that these policies could be stacked, affording Fennema $75,000 in uninsured/underinsured motorist coverage. Assuming tortfeasor's negligence proximately caused at least $75,000 in damages to Fennema, Fennema would be entitled to $50,000 from State Farm for underinsured motorist benefits having already collected $25,000 directly from the tortfeasor's insurer.

{4} However, the consent-to-settle provision in the State Farm policy denies uninsured/underinsured motorist coverage "for any insured who, without [State Farm's] written consent, settles with any person or organization who may be liable for the bodily injury or property damage." (Emphasis added.) Fennema settled with the tortfeasor, accepting $25,000 from the tortfeasor's insurer and as consideration gave a complete release of liability to the tortfeasor and her insurer. Fennema admits he breached the consent-to-settle provision of the policy because he did not obtain the written consent of State Farm to settle his claim against the tortfeasor.

INSURER MUST DEMONSTRATE SUBSTANTIAL PREJUDICE FROM BREACH OF CONSENT-TO-SETTLE PROVISION

{5} In 1965 this Court held it was "well established" that if an insured, without the knowledge of his insurer, effectively releases a wrongdoer from liability, the insured destroys any right of subrogation the insurer may have against the wrongdoer and is, thereafter, precluded from recovering from his insurer. *Armijo v. Foundation Reserve Ins. Co.*, 75 N.M. 592, 596, 408 P.2d 750, 752 (1965). This principle of law was applied to underinsured motorist claims in *March v. Mountain States Mutual Casualty Co.*, 101 N.M. 689, 687 P.2d 1040 (1984) (upholding a consent-to-settle provision in an underinsured motorist policy, and holding an insured's breach of such a provision precluded the insured from collecting underinsured motorist benefits). However, we subsequently held in *Roberts Oil* that when the insured breached a "voluntary payment" provision in the policy, the insurer was required to show "substantial prejudice" before voiding the policy. 113 N.M. 745, 833 P.2d 222 (clarifying for the first time that the substantial evidence rule could apply to claims involving injury to an insured rather than simply innocent third parties). The court of appeals, in *Eldin v. Farmers Alliance Mut. Co.*, 119 N.M. 370, 890 P.2d 823 (Ct. App. 1994), extended the substantial prejudice rule in *Roberts Oil* to cover an insured's breach of misrepresentation and concealment provisions.

{6} Fennema argues that the court of appeals' adoption of the substantial prejudice rule in *Eldin* requires that *March* be modified or overruled. While we disagree that *March* must be overruled, we do agree it must be modified. In *March*, we considered the limited question of whether a consent-to-settle provision in an underinsurance policy was valid and enforceable. *See March*, 101 N.M. at 690, 687 P.2d at 1041. Although both *Roberts Oil* and *Eldin* contained broad discussions of contract law and public policy that are certainly relevant to the consent-to-settle provisions at issue here and in *March*, neither case mentioned *March* or questioned its holding. Thus, we believe the basic holding of *March* is still good law, although we modify its holding in light of the adoption of the substantial prejudice rule in both *Roberts Oil* and *Eldin*.

{7} The substantial prejudice rule provides that an insurer "must demonstrate substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy." *Foundation Reserve Ins. Co. v. Esquibel*, 94 N.M. 132, 134, 607 P.2d 1150, 1152 (1980). The rationale for the rule is that failure by an insurer to show substantial prejudice by an insured's breach will frustrate the insured's reasonable expectation that coverage will not be denied arbitrarily. *Roberts Oil*, 113 N.M. at 751–52, 833 P.2d at 228–29. "[T]he rule implements a fundamental characteristic of all, or nearly all, insurance contracts

B namely, the essential nature of the contract as a promise by the insurer to indemnify and defend the insured against certain risks, in exchange for the insured's payment of the premium." *Id.* at 751, 833 P.2d at 228. Although an insurer must demonstrate substantial prejudice, a presumption of substantial prejudice arises upon proof of a breach of a policy provision. *Id.* at 755, 833 P.2d at 232. The ultimate issue of substantial prejudice is, in most cases, a question for a jury. *Eldin*, 119 N.M. at 375, 890 P.2d at 828.

{8} We believe it is consistent with the purpose of our uninsured motorist statute to require a showing of substantial prejudice before allowing an insurer to void an underinsured motorist policy when an insured breaches a consent-to-settle provision. The uninsured motorist statute was intended to expand insurance coverage to protect an insured against financially irresponsible motorists, thereby indemnifying the insured when the tortfeasor fails to do so. *Romero v. Dairyland*, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990); *see Sorensen v. Farmers Ins. Exch.*, 927 P.2d 1002, 1005 (Mont. 1996). This is accomplished by assuring that, in the event of an accident with an underinsured motorist, an insured motorist will receive at least the sum certain in underinsurance coverage purchased for his or her benefit. *See Fasulo v. State Farm Mut. Auto. Ins.*, 108 N.M. 807, 811, 780 P.2d 633, 637 (1989).

{9} On the other hand, the purpose of a consent-to-settle provision is to allow the insurer an opportunity to protect its subrogation interest. *March*, 101 N.M. at 692, 687 P.2d at 1043. Consent-to-settle provisions also protect insurers from collusion between an insured and a tortfeasor. *Roberts Oil*, 113 N.M. at 752, 833 P.2d at 229 (internal citation omitted). The insurer determines how to best protect this interest by investigating the merits of the liability case against the tortfeasor, the extent of damages suffered by its insured, the estimated expense of litigating against the tortfeasor and whether the tortfeasor has sufficient assets to give the insurer a realistic possibility of collecting a judgment against the tortfeasor. If the insurer elects to withhold consent to settle, it may tender the amount of the tortfeasor's liability coverage that was offered to its insured. *See* 18 A.L.R. 4th 249, § 11 (supp. 2004) (citing *Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So. 2d 160 (Ala. 1991). This allows the insurer to preserve its subrogated interest while placing its insured in the same position he or she would have been in, had the insured been authorized to settle with the tortfeasor.

{10} In reconciling these two policy concerns, it would be inconsistent with the purpose of the underinsured motorist statute to deny an insured indemnification when the insured's breach of a consent-to-settle provision has no real effect on the insurer's ability to recover from an insolvent tortfeasor through subrogation. *See Sorensen v. Farmers Ins. Exch.*, 927 P.2d at 1005. Rather, requiring an insurer to demonstrate substantial prejudice strikes a proper balance between protecting the insurer's subrogation interest and avoiding forfeiture of an insured's coverage when an insurer has not been injured. *See State Farm Mut. Auto. Ins. Co. v. Green*, 89 P.3d 97, 104 (Utah 2003). To hold otherwise would frustrate a consumer's reasonable expectation that coverage will not be denied arbitrarily. *See Roberts Oil*, 113 N.M. at 752, 833 P.2d at 229.

{11} Our holding today is consistent with the approach increasingly used in New Mexico as well as nationally. Our courts have applied the substantial prejudice rule to cooperation provisions, voluntary payment provisions, and misrepresentation and concealment provisions. *See Foundation Reserve Ins. Co. v. Esquibel*, 94 N.M. 132, 607 P.2d 1150; *Roberts Oil*, 113 N.M. 745, 833 P.2d 222; *Eldin*, 119 N.M. 370, 890 P.2d 823. We see no reason not to apply the rule to consent-to-settle provisions as well, which embody similar policy concerns of avoiding prejudice to the insured's right to protect its contractual interests. *See Roberts Oil*, 113 N.M. at 752, 833 P.2d at 229 (analogizing the policy concerns of cooperation provisions and voluntary payment provisions). In addition, growing numbers of jurisdictions apply the substantial prejudice rule to consent-to-settle provisions. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Green*, 89 P.3d at 103–04; *Ferrando v.*

Auto-Owners Mut. Ins. Co., 781 N.E.2d 927, 945–47 (Ohio 2002); *Taylor v. Gov't Employees Ins. Co.*, 978 P.2d 740, 748–49 (Haw.1999); *Greenvall v. Maine Mut. Fire Ins. Co.*, 715 A.2d 949, 954 (Me. 1998); *Sorensen v. Farmers Ins. Exch.*, 927 P.2d at 1005; *see also* 3 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 43.5 (2d ed. 1998) ("There is now a significant body of judicial precedents for the proposition that in order to justify foreclosing an insured's right to indemnification from an otherwise applicable underinsured motorist insurance coverage, an insurer must show that it was prejudiced by the settlement of the tort claim."). Requiring an insurer to establish substantial prejudice protects the "fundamental characteristic" of insurance contracts, the indemnification of the insured in exchange for the payment of premiums. *Roberts Oil*, 113 N.M. at 751, 833 P.2d at 228.

{12} We do not believe that requiring an insurer to prove substantial prejudice in this context is an unreasonable burden. An insurer is subject to a common law and statutory duty of good faith. *See* NMSA 1978, § 59A-16-20(E) (1997); *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56. The insurer must act reasonably under the circumstances to investigate a claim and to evaluate whether to consent to a settlement between its insured and the tortfeasor. *See Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶¶ 3, 19, 135 N.M. 106, 85 P.3d 230. In light of its duty to make a timely and fair investigation, the insurer's decision of whether to pursue subrogation is made relatively quickly, despite the fact that a judgment in New Mexico is valid and enforceable for fourteen years. NMSA 1978, § 37-1-2 (1983). By requiring an insurer to show it will be substantially prejudiced by an insured's breach of a consent-to-settle provision, i.e., by demonstrating the tortfeasor was unlikely to be judgment-proof, we are not requiring an insurer to provide any more evidence than it would already have obtained through its ordinary investigation.

{13} Moreover, although the insurer shall have the ultimate burden of persuasion to demonstrate substantial prejudice, a presumption of substantial prejudice arises from proof that an insured has breached a consent-to-settle provision. *See Eldin*, 119 N.M. at 375, 890 P.2d at 828. That presumption permits the fact finder to infer that the insurer was in fact substantially prejudiced, although the presumption is rebuttable. *See Roberts Oil*, 113 N.M. at 756, 833 P.2d at 233. The presumption may be met or rebutted by the insured by presenting evidence that the insurer was not substantially prejudiced. *See, e.g.*, *Rafferty v. Progressive American Insur. Co.*, 558 So.2d 432 (Fla. Dist. Ct. App. 1990); *Roberts Oil*, 113 N.M. at 756, 833 P.2d at 234. The insurer can attempt to meet its ultimate burden of persuasion by presenting evidence that the tortfeasor did have resources with which to pay a tort judgment.

{14} In this case, it is undisputed that Fennema breached the consent-to-settle provision of the policy. Therefore a presumption of substantial prejudice was created. Fennema attempted to meet or rebut the presumption by attaching answers to interrogatories that he obtained from the tortfeasor to his Brief in Opposition to the Motion for Summary Judgment. Viewed in a light most favorable to Fennema, *see Rummel v. St. Paul Surplus Lines Ins. Co.*, 1997-NMSC-042, ¶ 9, 123 N.M. 767, 945 P.2d 985, the tortfeasor's answers establish that at the time of answering the interrogatories, the tortfeasor was a graduate assistant at the University of New Mexico Psychology Department.

{15} Without more, this evidence does not, as a matter of law, meet or rebut the presumption of substantial prejudice. State Farm may have had a realistic possibility of recovering from the tortfeasor, who, as a graduate student in psychology, was likely to be gainfully employed in the near future. Judgments in New Mexico may be enforced in the state for fourteen years by, among other things, attaching real estate or garnishing wages. *See* NMSA 1978, §§ 39-4-1 through -3 (1953); § 37-1-2. Fennema failed to present any evidence to demonstrate that State Farm would be unlikely to collect from tortfeasor within this period as a matter of law.

{16} Although underinsured motorist benefits are designed to protect the insured against financially irresponsible motorists, enforcement of an insurer's subrogation right has the equally important policy objective of holding wrongdoers accountable for irresponsible conduct that results in injury. Underinsured motorist benefits are not for the benefit of the tortfeasor, and when there exists a realistic potential for the insurer to recover from the tortfeasor, courts must carefully preserve the right of subrogation and enforce consent-to-settle provisions.

CONCLUSION

{17} We modify *March* to conform to the concerns in *Roberts Oil* and *Eldin*. An insurer must demonstrate it was substantially prejudiced by an insured's breach of a consent-to-settle provision before avoiding liability for paying underinsured motorist benefits. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. Here, Fennema failed to meet or rebut this presumption. Consequently we affirm the summary judgment in State Farm's favor.

{18} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-016

Filing Date: May 24, 2005

Docket No. 28,348

DAVID WAGNER,

Worker-Appellee/Cross-Appellant,

v.

AGW CONSULTANTS, d/b/a TURNER ENVIRONMENTAL CONSULTANTS, and WILLIAM M. TURNER, individually and as trustee,

Employer-Insurer-Appellants/ Cross-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Gregory D. Griego, Workers' Compensation Judge

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Robert M. Aurbach, Special Assistant Attorney General
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for Amicus Curiae Worker's Compensation Administration

OPINION

CHÁVEZ, Justice.

{1} Worker prevailed in a heavily litigated worker's compensation claim and was awarded $58,599 in medical expenses, plus $26,761 in past and future weekly benefits. At the hearing on attorney fees, the worker's attorney sought $61,125 in attorney fees, of which the worker would have been liable for $30,562. *See* NMSA § 52-1-54(J) (2003) (providing worker and employer shall share payment of attorney fees equally except as otherwise provided by the statute). Worker argued the $12,500 limitation on attorney fees in NMSA 1978, Section 52-1-54(I) (1993, prior to 2003 amendment) should not apply because such a limitation violated constitutional guarantees of equal protection and due process.[1] The Workers' Compensation Judge took judicial notice of the chilling effect of miserly fees on representation but found the $12,500 award for attorney fees to be reasonable.

{2} The employer appealed the worker's award to the Court of Appeals and the worker cross-appealed the attorney fee award. The Court of Appeals certified the issue of the constitutionality

[1] At the time of this case, Section 52-1-54(I) of the WCA limited attorney fees to $12,500. Section 52-1-54(I) was amended in 2003 to raise the attorney fee limitation to $16,500. NMSA 1978, § 52-1-54(I) (2003). Because this case was already pending at the time the statute was amended, this Opinion considers only the constitutionality of the pre-2003 fee limitation.

of the limitation on attorney fees and otherwise proposed affirming the compensation award. We accepted certification to decide whether the limitation on attorney fees in Section 52-1-54(I) of the Workers' Compensation Act violates Worker's state constitutional rights to equal protection and due process.

{3} We review the attorney fee limitation provision under rational basis scrutiny, as the record in this case fails to demonstrate that the limitation has a sufficient impact on important rights to trigger a higher level of scrutiny. We hold that the fee limitation is rationally related to legitimate government purposes, particularly those of maximizing the limited benefits workers may currently obtain through the workers' compensation system. On these facts, were we to declare the fee limitation unconstitutional, the worker's benefits of $26,761 would be insufficient to pay his share of the $61,125 in requested attorney fees. The $12,500 attorney fee limitation, which in this case limits the worker's share of attorney fees to $6,250, still allows the worker to take home $20,511 in benefits. Therefore, while we do not decide whether other provisions of Section 52-1-54 would pass constitutional muster, we uphold the fee limitation itself. We adopt and append the Court of Appeals' analysis to all other issues raised in this appeal and cross-appeal. *See Wagner v. AGW Consultants*, No. 22,370 (N.M. Ct. App. Oct. 24, 2003) (certification order).

BACKGROUND

{4} David Wagner (Worker) filed a claim for workers' compensation benefits against AGW Consultants, d/b/a Turner Environmental Consultants (AGW), a ground-water hydrology consulting firm where he was injured while employed as a geologist. After realizing that AGW was a business trust, Worker amended his complaint to add as a defendant William Turner, AGW's sole trustee, in the event that Turner was the real party in interest. Turner appeared pro se to challenge Worker's claim, while separate counsel represented AGW.

{5} Several issues were heavily litigated at trial, including the applicability of the Workers' Compensation Act (WCA) to AGW, whether Turner was a real party in interest, the extent of Worker's injury, and the constitutionality of the attorney fee limitation. Turner himself filed a significant number of the roughly 2,500 pages of pleadings, independent of post-judgment motions and this appeal. The Workers' Compensation Judge ("WCJ") noted that although the issues were of average complexity, the case had the most extensive pleading record he had ever seen. At one point the WCJ stated on the record that had Turner been an attorney, the WCJ would have issued sanctions against him for repeatedly filing motions without merit. The WCJ did not initially enter findings of fact or conclusions of law regarding whether the parties engaged in bad faith, and therefore whether either party was entitled to additional attorney fees up to $2,500 under Section 52-1-54(I). On appeal the Court of Appeals retained jurisdiction but ordered the WCJ to enter findings and conclusions regarding the issue of bad faith. The WCJ found that some of Turner's pleadings were frivolous and without sound basis in law, but concluded that Turner's bad faith was irrelevant to awarding additional attorney fees under Section 51-2-54(I) because Turner was not Worker's employer. The WCJ ultimately found that Worker was an employee of AGW and that AGW was subject to the WCA, ordering AGW to pay Worker $58,599 in medical expenses and $26,671 in past and future weekly benefits.

{6} At the subsequent hearing on attorney fees, Worker's attorney claimed to have worked more than 400 hours, at $150 per hour, on the pre-trial and trial work. Worker's attorney argued the $12,500 statutory limitation on attorney fees was unreasonable in this case given the extraordinary amount of time involved, and that the limitation was unconstitutional due to its chilling effect on workers' ability to obtain adequate representation. Worker presented expert testimony that the fee limitation can be unfair and can make it uneconomical for attorneys to pursue certain time-consuming cases**.** AGW and Turner challenged the jurisdiction of the WCJ to declare

Section 52-1-54 unconstitutional and did not present evidence in support of the fee limitation.

{7} The WCJ awarded Worker $12,500 in attorney fees and made the following findings: (1) Worker's attorney reasonably expended over 200 hours at an hourly rate of $175 per hour,[2] (2) the miserly fee limitation has a chilling effect on representation, and (3) $12,500 was a reasonable fee in this case. On certification, Worker argues the attorney fee limitation violates state equal protection and substantive due process, claiming that as applied, the limitation unconstitutionally infringes on the right to access the courts and the right to an appeal guaranteed in the New Mexico Constitution. AGW contends Worker does not have standing to challenge the fee limitation and that in any event the fee limitation is constitutional.

I. WORKER HAS STANDING TO CHALLENGE FEE LIMITATION

{8} AGW claims Worker lacks standing to challenge the constitutionality of the fee limitation under *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 22, 122 N.M. 401, 925 P.2d 518, because the WCJ specifically found the $12,500 attorney fee to be reasonable and declined to find that Worker's attorney would have been entitled to a higher attorney fee but-for the limitation. We disagree.

{9} To have standing, Worker must either show, or the WCJ must explicitly find, that but for the fee limitation, reasonable attorney fees would have exceeded the awarded amount. *See Meyers v. Western Auto & CNA Ins. Cos.*, 2002-NMCA-089, ¶ 29, 132 N.M. 675, 54 P.3d 79; *cf. Mieras*, 1996-NMCA-095, ¶ 22 (holding the claimant had standing where the WCJ specifically found the value of the attorney's services to exceed the limitation). Although the WCJ found $12,500 to be a reasonable fee, the WCJ also found that Worker's attorney reasonably expended over 200 hours representing Worker at a fee of $175 per hour. While these findings appear inconsistent, the latter indicates at a minimum that but for the limitation, Worker's attorney would have been reasonably entitled to at least $35,000 in attorney fees even before this appeal. Unlike in *Meyers*, where the claimant lacked standing because he neither reached the fee limitation nor showed that he would have secured a higher attorney fee in the absence of the limitation, 2002-NMCA-089, ¶ 29, here Worker not only reached the limitation, but the WCJ found that his attorney reasonably expended over 200 hours at $175 an hour, bringing him well over the limitation of $12,500.

{10} We note that the fact Worker is represented by counsel, who continues to honor her ethical duty to represent him, does not preclude standing in this case. *See* Rule 16-116(B)(5) NMRA 2005 (declining or terminating representation). In *Corn v. New Mexico Educators Fed. Credit Union*, the Court of Appeals held the claimant had standing to challenge the constitutionality of the unilateral limitation on workers' attorney fees although claimant continued to be represented by counsel. 119 N.M. 199, 202, 889 P.2d 234, 237 (Ct. App. 1994), *overruled on other grounds in Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (*Trujillo III*) (overruling *Corn* to the extent it adopted a fourth tier of scrutiny, while affirming *Corn*'s holding and subsuming its "heightened rational basis" analysis under a "modern rational basis" standard). The WCJ in *Corn* found that but for the limitation, the claimant's attorney would have been entitled to nearly $20,000, and noted that although attorneys exceeded the limitation in only one of five hundred cases, the limitation caused workers to be at an unfair disadvantage compared to employers and significantly reduced the number of competent attorneys willing to take workers' compensation cases. *Id.* at 201, 208, 889 P.2d at 236, 243. Although the claimant in *Corn* was represented, the court found a significant risk of future injury because his attorney could withdraw during the appeals process if the lack of payment posed an unreasonable financial burden, which would have required claimant to "pursue matters of impairment and permanent

[2] Apparently the judge mistook Worker's attorney's fees for $175 an hour instead of the $150 hourly rate she requested.

disability without the aid of counsel." *Id.* at 202, 889 P.2d at 237.

{11} Thus, despite the fact that Worker is represented by counsel, he has shown that he is at risk of significant injury because of his inability to compensate a lawyer on appeal. Section 52-1-54 prohibits Worker from paying his counsel more than $12,500, either before the WCA or on appeal. *See* § 52-1-54(A), (I), (N) (making it unlawful to accept fees except as provided in the Act, punishable as a misdemeanor offense). The ethical rules allow Worker's lawyer to withdraw if the case poses an "unreasonable financial burden," and Worker would be unable to offer a new attorney any compensation on appeal. *See id.*; Rule 16-116(B)(5). This evidence certainly does not detract from Worker's having standing; if anything, it strengthens his argument. We hold Worker has standing to challenge the constitutionality of the fee limitation.

II. RATIONAL BASIS IS THE APPROPRIATE LEVEL OF SCRUTINY

{12} Before turning to the merits of the equal protection and due process challenges, we must identify the appropriate level of scrutiny for reviewing the challenged law. What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute. *See Mieras*, 1996-NMCA-095, ¶ 24. Ordinarily we defer to the Legislature's judgment in enacting social and economic legislation such as the WCA. *See Corn*, 119 N.M. at 204, 889 P.2d at 239. So long as such legislation does not impact important rights or protected classes, it is upheld unless the challenger can show the provision at issue is not rationally related to a legitimate government purpose. *See Trujillo III*, 1998-NMSC-031, ¶¶ 14, 26; *Mieras*, 1996-NMCA-095, ¶ 30. If legislation impacts important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted and we require the State to demonstrate that the law is substantially related to an important government purpose.[3] *Mieras*, 1996-NMCA-095, ¶ 26. If a law draws suspect classifications or impacts fundamental rights, we apply strict scrutiny and require the State to demonstrate that the provision at issue is closely tailored to a compelling government purpose. *See id.* ¶ 25.

{13} Worker and amicus New Mexico Trial Lawyers Association (NMTLA) urge us to review the attorney fee limitation under intermediate or strict scrutiny, arguing that the fee limitation impacts important or fundamental rights. They contend that certain claimants cannot obtain adequate representation because the fee limitation discourages lawyers from taking their cases, and that this lack of adequate representation threatens the meaningful exercise of two separate rights: (1) meaningful access to the courts as implied in the due process clause of the state constitution, *see* N.M. Const. art. II, § 18; *Richardson*, 107 N.M. at 696, 763 P.2d at 1161; and (2) the explicit constitutional right to an appeal in New Mexico. N.M. Const. art. VI., § 2. To warrant intermediate or strict scrutiny, Worker must first persuade us that at least one of these rights is "important" or "fundamental," and secondly that such a right is sufficiently impacted to warrant more than minimal scrutiny.

Worker Fails to Demonstrate the Impact on Important Constitutional Rights Is Sufficient to Trigger Intermediate Scrutiny

{14} New Mexico appellate courts have previously recognized that the right to access the

[3] We emphasize that this standard requires *either* an important right *or* a sensitive class, contrary to what we may have suggested in dicta in *Trujillo III*, 1998-NMSC-031, ¶ 15, and *Richardson v. Carnegie Library Rest., Inc.*, 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988), *overruled on other grounds by Trujillo III*, 1998-NMSC-031, ¶¶ 18–21, 32 (adopting rational basis test as appropriate standard for reviewing equal protection challenge to damage cap, rather than the intermediate scrutiny standard used in Richardson, but upholding the result in Richardson under modern rational basis test). Both cases indicated that intermediate scrutiny is used when a statute impacts important rights and sensitive classes. See Alvarez v. Chavez,118 N.M. 732, 736, 886 P.2d 461, 465 (Ct. App. 1994); Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

courts and the right to an appeal are important, although not fundamental, rights for purposes of constitutional analysis. *See Trujillo III*, 1998-NMSC-031, ¶¶ 18–19; *Herndon v. Albuquerque Pub. Schools*, 92 N.M. 287, 288, 587 P.2d 434, 435 (1978); *Mieras*, 1996-NMCA-095, ¶¶ 48, 51 (Hartz, J., specially concurring). Because the right to access the courts and the right to an appeal are synonymous in the context of the workers' compensation system, as both are implicated when a litigant seeks to appeal an administrative decision to the judicial branch, we consider them collectively. *See Herndon*, 92 N.M. at 288, 587 P.2d at 435; *Trujillo III*, 1998-NMSC-031, ¶ 21; *Mieras*, 1996-NMCA-095, ¶¶ 48, 51 (Hartz, J., specially concurring). Any legislation shown to truly impact these appellate rights should be subjected to more than rational basis review. *See, e.g.*, *Carson v. Maurer*, 424 A.2d 825, 830–32 (N.H. 1980) (applying intermediate scrutiny to invalidate a statute that limited medical malpractice recovery, after holding the right to recover for personal injuries was an important right under the state constitution).

{15} Worker argues that the fee cap impacts workers' appellate rights because it discourages lawyers from taking complex or time-consuming cases, depriving those claimants of meaningfully exercising their appellate rights. Meaningful access to our appellate courts depends in part on an individual's ability to obtain adequate representation. *See Herndon*, 92 N.M. at 288, 587 P.2d at 435; *Mieras*, 1996-NMCA-095, ¶ 48 (Hartz, J., specially concurring) ("A statute that deprives someone of the ability to obtain adequate representation in litigation could, in a very real sense, deprive the person of a right of access to the courts."); *Corn*, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., concurring). Whether representation is "adequate," however, depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 733–34 (1990) (Marshall, J., concurring) (distinguishing the complexities and adversarial nature of the regulatory system for obtaining benefits under the Black Lung Benefits Act from the more informal Veterans Administration system at issue in *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), such that the due process challenge in *Triplett* would have been successful had claimants shown the fee limitation deprived claimants of legal representation in proceedings under the Act); *Corn*, 119 N.M. at 207–08, 889 P.2d at 242–43.[4]

{16} In arguing that intermediate scrutiny applies, it is not enough to simply point to an important constitutional right; the challenger must show that the legislation in fact impacts the exercise of this right. *See Mieras*,1996-NMCA-095, ¶¶ 48–52 (Hartz, J., concurring). To support their argument that the fee limitation makes it difficult for those with complex or highly contested cases to obtain representation, and that such a "chilling effect" effectively deprives these workers of their appellate rights, Worker and amicus NMTLA rely on testimony presented at trial about the impact of the fee limitation on representation. Worker's expert, a workers compensation attorney, opined that the number of New Mexico attorneys who exclusively represent claimants in workers' compensation proceedings have decreased to about two or three since the benefits scheme was restructured in 1991,[5] and that in light of this reduction in available benefits, the fee limitation can be unfair to workers' attorneys in some circumstances, may discourage

[4] The dissent maintains that representation is particularly important at the appellate level, Dissent, ¶¶ 48–49, and cautions that we "should not encourage parties to attempt the rigors of the appellate process unaided by counsel." Dissent, ¶ 62. In doing so, the dissent seems to minimize the significance of administrative hearings in workers compensation cases. In fact, it is at the workers compensation level that skilled counsel is most crucial to ultimately preserving benefits awarded to an injured worker. The better the quality of the record below, the greater the likelihood of prevailing on the merits on appeal, particularly given the Court of Appeals' efficient summary calendar process, supported by a skilled and dedicated Prehearing Division.

[5] Amicus Workers' Compensation Administration alleges that in fact there was an increase in attorneys who represented workers before the WCA. Again, because this information is not in the record and was not subject to cross-examination to test its accuracy, we cannot rely on it. *See State v. Martin*, 101 N.M. 595, 603, 686 P.2d 937, 945 (1984) (appellate court cannot consider facts that are not of record).

claimants' attorneys from pursuing complex or time-consuming cases, and should be relaxed in particularly time-consuming cases.

{17} The record in this case is not meaningfully different from that in *Mieras*, where the Court of Appeals was unpersuaded that the fee limitation infringed on the right to access the courts by preventing a class of workers from obtaining adequate representation. *See Mieras*, 1996-NMCA-095, ¶¶ 27, 34; *see also id.* ¶¶ 49–52 (Hartz, J., specially concurring) (noting that claimant failed to show the cap actually prevented workers with complex cases from obtaining adequate representation). In *Mieras*, the claimant demonstrated that the limitation on attorney fees prevented her attorney from being compensated for the time he reasonably expended on behalf of his client. *Id.* ¶¶ 17–19. The claimant failed, however, to illustrate how the fee limitation resulted in workers being denied adequate representation, either in theory or fact. *Id.* ¶¶ 49–52 (Hartz, J., specially concurring). The court therefore applied rational basis review. *Id.* ¶ 27.

{18} As in *Mieras*, the record here fails to demonstrate that some claimants are unable to obtain representation in workers' compensation proceedings, either initially or on appeal, or that a decrease in available attorneys renders access to our appellate courts any less meaningful. Worker's expert did not directly attribute a decline in available lawyers to the attorney fee limitation, nor did Worker offer any direct evidence in support of this testimony. Rather, Worker's expert seemed to emphasize that the decline in lawyers representing workers was due to the overall reduction in benefits to injured workers. While the WCJ found a "chilling effect of miserly attorney fees on representation," the record fails to show that this chilling effect has impacted claimants' ability to access the courts sufficiently to trigger intermediate scrutiny of Section 52-1-54(I). *See Triplett*, 494 U.S. at 724 (holding the affidavits of three lawyers, which stated anecdotally that there were fewer qualified lawyers available to take black lung cases due to the attorney fee limitation, were "blatantly insufficient" to demonstrate that claimants could not obtain representation due to the fee limitation, even if assertions were left unrebutted); *see also Trujillo III*, 1998-NMSC-031, ¶¶ 19–23.

{19} Before finding that the fee limitation meaningfully impacts claimants' appellate rights, therefore, we would require more evidence in the record, such as testimony or data showing that workers with complex cases are unable to obtain representation due to the fee limitation. *See Triplett*, 494 U.S. at 723–24. Our conclusion might also be different in a case in which, because of the fee limitation, a worker's lawyer were unable to continue representing the worker on appeal because of the unreasonable financial burden, thus relieving the lawyer of the ethical duty to continue representation, or a worker were dissatisfied with his attorney but could not afford to hire a new attorney on appeal. *See, e.g.*, *Crosby v. State of New York, Workers' Compensation Bd.*, 442 N.E.2D 1191, 1194–95 (N.Y. 1982); *cf. Mieras*, 1996-NMCA-095, ¶ 34 (recognizing that the fee limitation "may under certain circumstances preclude any additional award of attorney fees for appellate legal services when the maximum limit has been attained for legal services rendered at the trial level," although those circumstances did not exist in that case).

{20} In seeking to elevate our review to intermediate scrutiny under the facts of this case, the dissent suggests a more "charitable" approach, even to the extent of selectively considering anecdotal information not of record. Dissent, ¶¶ 51–52. However, the facts and record of this case simply do not demonstrate how the fee limitation impacts the right to access the courts and the right to an appeal. Worker was free to appeal her case from the workers' compensation proceedings and did so. She continues to be represented by her counsel, whom we commend for her skilled and committed advocacy on behalf of her client, particularly in light of the volume of "frivolous and excessive" pleadings filed by the pro se litigant at the administrative level. Because this case fails to demonstrate that the fee limitation impacts important rights or sensitive classes, rational basis is the proper standard

of review for reviewing the equal protection and due process challenges.

III. EQUAL PROTECTION CHALLENGE TO FEE LIMITATION

{21} The New Mexico Constitution provides that no person shall be denied equal protection of the laws. N.M. Const. art. II, § 18**.** Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995).

{22} In *Corn*, we evaluated an equal protection challenge to the WCA fee limitation and declared the fee limitation unconstitutional because it applied only to the worker's attorney. *Corn*,119 N.M. at 209, 889 P.2d at 244. While *Corn* was pending, the Legislature partially corrected the inequality by amending the fee limitation provision to apply to both employers and workers. § 52-1-54(A) (1990). Nonetheless, the Legislature continues to treat workers and employers differently in a manner which may disparately affect workers' rights to access our appellate courts by requiring workers to obtain judicial approval for attorney fees without imposing the same requirement on employers under Section 52-1-54(C). Employers, through their insurance companies, are free to contract to pay their attorneys up to $12,500 for each workers compensation case, regardless of the work expended or any of the factors relevant to assessing reasonable fees for workers' attorneys. *Compare* Tex. Lab. Code Ann. §§ 408.221, 408.222 (Vernon 2005) (requiring agency or judicial approval of attorney fees for both claimants and employers). Further, employers' attorneys are compensated whether they win or lose, while workers' attorneys are only paid if they secure benefits for the worker. *See* § 52-1-54(G). The statutory scheme may allow employers to absorb the cost of time-consuming cases by compensating their attorneys over the long run in a way that workers may not, and, as a result, may disparately impact the appellate rights of workers. However, because this issue was not raised and briefed by the parties below, we will not consider it for the first time on appeal. *See Richardson*, 107 N.M. at 692, 763 P.2d at 1157. Therefore, our inquiry is confined to whether the fee limitation in Section 52-1-54(I) distinguishes between similarly situated individuals, and if so whether Worker has demonstrated that the limitation is not rationally related to a legitimate government purpose.

{23} As applied, Section 52-1-54(I) creates two classes of workers compensation litigants: those who do and do not reach the limitation at the administrative stage, and consequently those who can and cannot lawfully pay an attorney a reasonable fee on appeal.[6] *See Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding law violated equal protection as applied, although neutral on its face). Although Worker also urges us to recognize a class of workers with complex cases who are unable to obtain adequate representation because of the fee limitation, Worker fails to demonstrate both that this class exists and how he would be a member of such a class. Worker's case was not found to be unusually complex; rather, the record suggests the case was time-consuming because of the pro se litigant's frivolous and excessive pleadings.[7] Nonetheless, having determined that Section 52-1-54(I) does differentiate between two classes of workers compensation litigants, we must now decide whether such disparate treatment is rationally related to a legitimate government purpose. *See Trujillo III*, 1998-NMSC-031, ¶ 14.

[6] In addition, as discussed above, by subjecting workers, but not employers, to judicial approval of reasonable attorney fees, Section 52-1-54 creates an additional classification of those who can and cannot lawfully contract to pay an attorney of their choice reasonable fees on appeal. Again, however, the facts and record of this case do not squarely present such an issue, nor was this particular classification discussed by the parties below. See Richardson, 107 N.M. at 692, 763 P.2d at 1157.

[7] In this case, the WCJ may have been able to minimize the time expended by the attorneys by using appropriate sanctions to control the courtroom. *See* NMSA 1978, § 52-5-6(B) (2001). However, whether the WCJ was correct in his use of sanctions is not before us.

{24} While our rational basis test is neither "toothless" nor a "rubber stamp" for challenged legislation, it nonetheless requires us to defer to the validity of the statute, with the challenger carrying the burden of persuasion. *See id.* ¶¶ 14, 30. To successfully challenge the statute under this standard of review, Worker must demonstrate that the classification created by the legislation is not supported by a "firm legal rationale" or evidence in the record. *See Corn*, 119 N.M. at 203–04, 889 P.2d at 238–39. This Worker fails to do.

Section 52-1-54(I) is Rationally Related to a Legitimate Government Purpose

{25} The WCA was enacted as an exclusive remedy for employees to subject employers to liability without fault for work-related injuries. *Mieras*, 1996-NMCA-095, ¶ 30. We have consistently stated our approval of the Legislature's principal objectives in enacting the WCA: (1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system. NMSA 1978, § 52-5-1 (1990); *see Archer v. Roadrunner Trucking Inc.*, 1997-NMSC-003, ¶ 7, 122 N.M. 703, 930 P.2d 1155; *Sanchez v. M.M. Sundt Constr. Co.*, 103 N.M. 294, 296–97, 706 P.2d 158, 160–61 (Ct. App. 1985). We believe the first goal, maximizing a worker's recovery, is particularly important in the workers' compensation arena, where workers' ability to recover needed benefits is circumscribed by the legislation itself. *See Walters*, 473 U.S. at 321–22, 334 (recognizing the rational government policy of maximizing claimants' awards in rejecting a procedural due process challenge to the ten dollar limitation on attorney fees for those seeking benefits for service-connected deaths or disabilities in Veterans Administration proceedings); *cf. Mieras*, 1996-NMCA-095, ¶ 39 (Hartz, J., specially concurring) (describing the severe restrictions on recovery in workers' compensation actions).

{26} Worker does not challenge these government purposes for the attorney fee limitation, but rather argues that the fee limitation is not rationally related to these purposes. Contrary to Worker's argument, we find there to be a firm legal rationale, supported by the record of this case, to justify the $12,500 attorney fee limitation as a rational means to achieving the Legislature's goals. As we recognized in *Corn*, it is certainly rational for the State to minimize the role of attorneys in seeking to maximize claimants' awards quickly and efficiently. 119 N.M. at 208, 889 P.2d at 243. In addition, as we have already noted, the fee limitation is important to maximizing the limited benefits available to workers, particularly when workers must generally pay half of their attorneys' fees. *See* § 52-1-54(J); *Mieras*, 1996-NMCA-095, ¶ 38 (Hartz, J., specially concurring); *see also Corn*, 199 N.M. at 207, 889 P.2d at 242.

{27} In this case, Worker's $12,500 attorney fee award represented just under fifteen percent of Worker's total award, not including future medical benefits. This is well within the parameters that this Court has identified as generally appropriate for attorney fees in workers' compensation cases. *Woodson v. Phillips Petroleum*, 102 N.M. 333, 338, 695 P.2d 483, 488 (1985) (noting, *inter alia*, that in states that set attorney fees at some percentage of the worker's recovery, ten to twenty percent is generally considered to be an appropriate range). On the other hand, the fee proposed by Worker's attorney was $61,125, or 407.5 hours at $150 an hour. In contrast to the generally accepted ratio of attorney fees to total recovery, this proposed fee would have amounted to roughly seventy-two percent of the Worker's total award, not including time spent on appeal. Further, of the $85,360 that the WCJ awarded to Worker, only $26,761 was for actual compensation, while the bulk of the award was to cover Worker's medical expenses. Because Worker would have been liable for half of his attorney's proposed fee of $61,125, Worker's attorney fees would have exceeded his actual compensation. Were we to strike the fee limitation, Worker would be required to deplete his entire compensation award and dig into his own pocket to pay his attorney fees. While we do not pass on whether such attorney fees were reasonable in this case, these figures certainly suggest that the attorney fee limitation of

$12,500 is a rational means to maximize a worker's take-home award.

{28} Worker points to no legal authority or evidence in the record to show the $12,500 fee cap is an arbitrary and irrational means to achieve the State's objectives. For instance, there is no evidence in the record to suggest either what percentage of claimants approach or reach the fee limitation at the administrative level, or the typical amount of time expended by attorneys either at the administrative level or on appeal in such cases, to somehow demonstrate that $12,500 is an irrational figure.[8] *Cf. Corn*, 119 N.M. at 208, 889 P.2d at 243 (finding that the WCA's data that less than one fifth of one percent exceeded the limitation undermined the State's rationale by showing a de minimus effect from the unilateral limitation). There is simply no evidence in the record to demonstrate that, other than in this particular case, $12,500 has been insufficient to cover workers' attorney fees at the administrative and appellate levels. The dissent proposes, as an alternative to the current scheme it describes as inflexible, that the Legislature maintain an attorney fee limitation but create a separate category of fees on appeal. Dissent, ¶ 60. The dissent does not necessarily quarrel with a fee limitation but disagrees on where to draw the line. It remains unclear what the dissent believes would be an appropriate limitation for appellate fees, presumably because of the lack of any evidence in the record to suggest what such a limit should be, or how this alternative would make the fee limitation more flexible. If the legislation provided for a limit of $10,000 in attorney fees at the administrative level and $2,500 on appeal, how would that make the scheme more flexible or less burdensome on the worker? The dissent also fails to address the fact that such fees would still reduce the worker's take-home award.

[8] According to amicus WCA, reasonable attorney fees would have exceeded the $12,500 limitation in only 1.5% of workers' compensation cases prior to 2003. Again, this information was not in the record, so it is of little use to us here.

{29} We find nothing in Worker's argument to undermine the rationale that by limiting attorney fees at $12,500, Section 52-1-54(I) helps to maximize workers' take-home awards, minimize costs to employers and increase the efficiency of the system for the reasons discussed above.[9] Further, the fact that the Legislature increased the fee limitation to $16,500 in 2003 suggests to us that rather than setting the fee limitation arbitrarily, the Legislature continues to consider the role of attorney fees in order to maximize workers' awards while minimizing litigation costs. Because Worker fails to show the $12,500 fee limitation is not rationally related to a legitimate government purpose, his equal protection challenge must fail.[10]

IV. DUE PROCESS CHALLENGE TO FEE LIMITATION

{30} The due process clause in the New Mexico Constitution reads: "No person shall be deprived of life, liberty or property without due process of law . . .". N.M. Const. art. II, § 18. Substantive due process cases inquire whether a statute or government action "'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *See State v. Rotherham*, 1996-NMSC-048, 122 N.M. 246, 259, 923 P.2d 1131, 1144 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoted authorities omitted)). Worker and amicus NMTLA argue the fee limitation unconstitutionally interferes with workers' substantive due process rights to access the courts and to an appeal by chilling qualified lawyers from taking their cases. Using the rational basis standard discussed in Section II, we uphold

[9] The WCA also argues that the fee limitation minimizes insurance costs, which keeps down insurance premiums, increases economic development and employment, and encourages employers to continue to support and follow the mandatory system. However, there is no evidence to support this in the record and we decline to find this to be a firm legal rationale.

[10] This limited holding in no way suggests our belief that by requiring judicial approval for workers', but not employers', attorney fees, Section 52-1-54(C) rationally furthers the goals of minimizing costs to employers or maximizing workers' take-home awards.

Section 52-1-54(I) under substantive due process unless Worker shows it is not rationally related to a legitimate governmental purpose. *Id*. ¶¶ 101-02.

{31} For the reasons stated above, Worker and amicus NMTLA fail to show that Section 52-1-54(I) is not rationally related to the legitimate government purposes. *See Triplett*, 494 U.S. at 723–24 (holding that anecdotal evidence, in the form of attorneys' conclusions that a fee limitation would negatively impact the quality of representation or cause attorneys to leave the field of practice, was insufficient to prove due process violation); *Rhodes v. Indus. Comm'n*, 868 P.2d 467, 470–71 (Idaho 1993). Under the facts and record of the present challenge, the fee limitation satisfies substantive due process as well as equal protection.

CONCLUSION

{32} We hold that under the record in this case, the WCA attorney fee limitation satisfies state guarantees of equal protection and due process. Section 52-1-54(I) is rationally related to legitimate government purposes, particularly the important goal of maximizing workers' recovery. Assuming the Legislature limits workers' recovery in a constitutional manner, the fee limitation is a rational means to advance this goal. We adopt the Court of Appeals' analysis and conclusions regarding the remaining issues that were raised on appeal. We affirm.

{33} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Chief Justice (concurring in part and dissenting in part)

BOSSON,
Chief Justice (concurring in part and dissenting in part).

{34} I concur in part and dissent in part. Under the facts of this case, I reluctantly agree that the attorney fee limitation in NMSA 1978, Section 52-1-54(I) (1993) of the Workers' Compensation Act (the Act) passes the rational basis test, and is therefore constitutional, for proceedings before the Workers' Compensation Administration (the Administration). I write separately to express my concerns regarding the effect of the attorney fee limitation on a worker's right to appeal.

{35} In my mind, the absence of any provision for attorney fees at the appellate level impermissibly burdens the constitutional rights of those workers with complex or time-consuming cases. I believe the Legislature's failure to allow additional fees in the limited number of cases that reach our courts after exhausting the cap is contributing to an intolerable decline in adequate representation in the field of workers' compensation law. While I am not yet convinced that this decline impacts workers' access to the courts to the point of violating due process and equal protection rights in administrative proceedings, I would reach a different result when analyzing the impact of the fee limitation on the right to appeal.

{36} In part, I disagree with the majority because I would apply intermediate scrutiny to the important right to have access to the judiciary for the purpose of an appeal. Under intermediate scrutiny analysis, I would find the cap unconstitutional. I also dissent because I am troubled with the way the majority presents the rational basis test. I think our courts, attorneys, and litigants in New Mexico would benefit from further elaboration.

Rational Basis Test

{37} To begin, I respectfully disagree with the rational basis test presented by the majority.

Ever since we overruled the fourth tier of judicial scrutiny defined as heightened rational basis in *Trujillo v. City of Albuquerque*, we have avoided explaining what we meant by our so-called "modern articulation" of the rational basis test. 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (*Trujillo III*)(overruling, but "subsuming" the fourth tier of rational basis analysis applied in *Alvarez v. Chavez*, 118 N.M. 732, 738–39, 886 P.2d 461, 467–68 (Ct. App. 1994) and *Corn v. New Mexico Educators Fed. Credit Union*, 119 N.M. 199, 202–04, 889 P.2d 234, 237–39 (Ct. App. 1994)). I am afraid we continue to avoid explaining that test today in a way that will only perpetuate confusion.

{38} The majority professes that our rational basis test is one test, simultaneously deferential to the validity of the statute but not a "rubber stamp" or "toothless." Maj. Op. ¶ 24. The majority then explains the requirements of our rational basis test by using language from *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) that was referred to in *Corn*, 119 N.M. at 204, 889 P.2d at 239 (requiring legislative classifications to be supported by either a factual foundation or a firm legal rationale). The majority accepts that although *Corn* and *Alvarez* were overruled in *Trujillo*, *Trujillo* subsumed the "heightened rational basis" analysis from those cases in the modern rational basis test. Thus, in the majority's words: "To successfully challenge the statute under this standard of review, Worker must demonstrate that the classification created by the legislation is not supported by a 'firm legal rationale' or evidence in the record." Maj. Op. ¶ 24.

{39} I believe the language from *Cleburne* in fact creates a different test than the type of minimal scrutiny we usually associate with the rational basis test. *See City of Cleburne*, 473 U.S. at 455–60 (Marshall, J., concurring) (noting that the Court's analysis was at odds with traditional rational basis by seeming to require that the legislature has the burden to prove an act was constitutional, that the Court could sift through the record to find a firm factual foundation for an act's policy, and that legislation could not proceed incrementally). The traditional rational basis test is simply that the party challenging the legislation has the burden to prove "that the statute's classification is not rationally related to the legislative goal." *Trujillo*, 1998-NMSC-031, ¶ 14. "In rational basis scrutiny, 'a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *State v. Druktenis*, 2004-NMCA-032, ¶ 112, 135 N.M. 223, 86 P.3d 1050 (quoting *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993)).

{40} I do not object to giving our rational basis test more teeth in some situations, if we clearly identify what triggers heightened scrutiny, just as the Court of Appeals did in *Alvarez*, 118 N.M. at 740, 886 P.2d at 469 (applying heightened rational basis when legislation implicated a significant interest). But I do not believe it is desirable or appropriate to do so at the expense of the traditional deferential test. If the majority really intends to read *Trujillo* as adopting a single, but broader rational basis test, I think the Court should provide a detailed explanation.

{41} On the other hand, if this Court feels constrained by the traditional rational basis test, I would prefer not to follow the lead of the United States Supreme Court. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne*, 473 U.S. 432; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). In a confusing array of cases, the Court professes to have only one rational basis test, but sometimes appears to apply heightened scrutiny. *See* Laurence H. Tribe, *American Constitutional Law* § 16–33, at 1614 (2d ed. 1988) (concluding there is no coherent explanation for when heightened scrutiny is triggered). It seems to me that a better approach would be to give more flexibility to our intermediate scrutiny standard, and to forthrightly acknowledge that we are doing so.

Level of Scrutiny

{42} Equal protection challenges to legislative classifications that infringe on important, but not

fundamental rights, or involve sensitive, but not suspect classes, must be analyzed under intermediate scrutiny. *See Alvarez*, 118 N.M. at 736, 886 P.2d at 465.

{43} This Court has recognized that the right of access to the courts is an implicit fundamental right. *See Richardson v. Carnegie Library Rest., Inc.*, 107 N.M. 688, 696, 763 P.2d, 1153, 1161 (1988), *overruled on other grounds by Trujillo*, 1998-NMSC-031, ¶ 32; *Otero v. Zouhar*, 102 N.M. 482, 486, 697 P.2d 482, 486 (1985), *overruled on other grounds by Grantland v. Lea Reg'l Hosp., Inc.*, 110 N.M. 378, 380, 796 P.2d 599, 601 (1990); *Jiron v. Mahlab*, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983). In addition, and of utmost importance in this challenge to the attorney fee limitation, the right of one appeal is explicitly guaranteed by the New Mexico Constitution. N.M. Const. art. VI, § 2 ("an aggrieved party shall have an absolute right to one appeal").

{44} Of course, an individual's ability to have access to the judiciary to resolve legal claims is not endless. *See Jiron*, 99 N.M. at 427, 659 P.2d at 313. As the majority observes, our "courts have previously recognized that the right to access the courts and the right to an appeal are important, although not fundamental, rights for purposes of constitutional analysis." Maj. Op. ¶ 14.

{45} I believe that a worker's right to retain an attorney is one aspect of the right of access to the courts. *See Corn*, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., specially concurring). A statute that deprives a class of persons "of the ability to obtain adequate representation in litigation could" deprive that class of a right of access to the courts. *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 48, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring). "To the extent that the assistance of an attorney is necessary for the worker to obtain access to the courts, such assistance is entitled to special constitutional protection." *Id.* ¶ 42.

{46} As Worker argues, the fee cap discourages attorneys from taking complex or time-consuming workers' compensation cases. It also creates a risk that attorneys will have to abandon a case when they have exceeded the cap due to economic hardship. As a result of this chilling effect on representation, Amicus New Mexico Trial Lawyers Association claims Section 52-1-54(I) unfairly burdens claimants with complex or time-consuming cases and deprives them from meaningfully exercising the right to an appeal. Because I believe that adequate representation by an attorney is necessary to obtain meaningful access to the courts for an appeal from a workers' compensation proceeding, I would hold that this part of the equal protection challenge is entitled to intermediate scrutiny.

{47} The majority acknowledges that "[m]eaningful access to our appellate courts depends in part on an individual's ability to obtain adequate representation." Maj. Op. ¶ 15 (citing *Herndon v. Albuq. Pub. Sch.*, 92 N.M. 287, 288, 587 P.2d 434, 435 (1978)); *Mieras*, 1996-NMCA-095, ¶ 48 (Hartz, J., specially concurring); *Corn*, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., specially concurring)). The majority holds, however, that the attorney fee cap does not require intermediate scrutiny because Worker has not shown that any workers are prevented from obtaining adequate representation. *See* Maj. Op. ¶¶ 17–20.

{48} Unlike the majority, I would make a distinction between the administrative proceedings and appeals before our courts. In administrative proceedings before a workers' compensation judge, I am willing to agree that the attorney fee cap survives rational basis scrutiny. As the majority observes, whether representation is "adequate," "depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation." Maj. Op. ¶ 15. Given the nature of the workers' compensation system, which the Legislature designed as an administrative alternative for dispute resolution, it may be a rational legislative choice to limit attorney fees in order to discourage litigation, reduce costs, and ensure the quick delivery of benefits. *See Corn*, 119 N.M. at 204, 889 P.2d at 239 (stating that due process is a flexible concept when it comes to devising alternative

processes for dispute resolution). Thus, vesting adjudicative power in administrative law judges does not, by itself, deny workers the right of access to the courts. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985) (holding that an attorney fee limitation, even if it resulted in discouraging attorneys from representing claimants altogether, did not violate due process in a veterans' administrative proceeding which Congress wanted to keep as simple and informal as possible).

{49} In my opinion, however, this analysis changes for appeals before our courts. Unlike the United States Constitution, our State Constitution guarantees the absolute right to an appeal. *See* N.M. Const. art. VI, § 2. Thus, once a worker's case moves from the administrative setting to our courts, "the nature of the proceedings and the ability of the other side to secure representation" requires a more searching inquiry into whether representation is adequate. Maj. Op. ¶ 15. The cap prohibits workers, who have already received the statutory maximum for attorney fees, but are compelled to defend their benefit awards on appeal, from paying for necessary legal services, even out of their own pocket.[11] Thus, the cap forces a class of workers into a position of intolerable risk. They must rely on the good graces of their attorneys to continue representing them in litigation without hope of additional compensation. If these attorneys withdraw, or even worse cut corners, because they cannot afford to continue the representation due to economic hardship, this vulnerable class of workers may lose the very benefits they won during administrative proceedings.

{50} The majority declines to address the impact of the attorney fee limitation on appeals because it contends there is simply not enough evidence in the record to indicate that Worker was deprived from exercising his right to appeal. The majority relies on *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 723–24 (1990). In *Triplett*, the United States Supreme Court rejected a claim that an attorney fee restriction violated access to the courts, concluding the challengers only presented anecdotal evidence that the fee limitation deprived them of legal representation. *Id.* at 724. The Court ruled that the affidavits of three lawyers, which stated that there were fewer qualified lawyers available to take black lung cases, were "blatantly insufficient." *Id.* at 724–25. Similar to *Triplett*, the majority would require more evidence in the record that workers with complex or time-consuming cases are unable to obtain representation because of the fee limitation. *See* Maj. Op. ¶ 19.

{51} The majority seems to require an enormous evidentiary burden before it is willing to apply intermediate scrutiny—either that a class of workers are completely unable to obtain representation or that an attorney actually withdraw from representation because of an unreasonable financial burden. I would be more charitable and recognize a class of workers exists whose right to appeal is burdened by the attorney fee cap.

{52} I believe the record and decisions of our courts have sufficiently indicated that the attorney fee limitation deters legal counsel from taking cases like this one. In *Triplett*, the Supreme Court applied a "heavy presumption of constitutionality" to an attorney fee regime enacted by Congress. 494 U.S. at 721. The Court thus required those challenging the law to make "an extraordinarily strong showing" that the fee limitation violated due process. *Id.* at 722. Unlike our case, *Triplett* did not involve the absolute right to an appeal guaranteed by our State Constitution.[12] Because

[11] Section 52-1-54(I) "applies as a cumulative limitation on compensation for all legal services rendered in all proceedings," including representation before the courts on appeal. The Act makes it unlawful to accept fees except as provided; any person violating the attorney fee cap may be convicted of a misdemeanor, fined up to $500, and imprisoned for up to 90 days. Section § 52-1-54(A) & (N) (2003). As one state court noted in invalidating an attorney fee cap, most states with statutory limits on workers' compensation attorney fees allow fees to be increased when necessary, or do not make acceptance of additional compensation a crime. *See Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 142 n.3 (Minn. 1999).

[12] Worker raises his claim under the New Mexico Constitution. Federal cases do not control when interpreting our State Constitution, but are used only to the extent they are persuasive. *See Alvarez*, 118 N.M. at 735, 886 P.2d at 464. Because the right to one appeal is a state constitutional right, I do not

of that difference, the Supreme Court could apply the rational basis test. In contrast, considering the importance of the rights involved, I believe Worker presented enough evidence to challenge the attorney fee cap. Worker presented an expert witness who testified that, since the implementation of the attorney fee cap, very few attorneys are practicing, and only a couple are specializing, in the field of workers' compensation law. The expert testified that attorneys are not representing workers in those cases in which the injury will not result in a large benefit award and the employer is uninsured. This testimony was not contested by the opposing parties. Anecdotally, we all know it to be true. In addition, the workers' compensation judge made a specific finding that the cap causes a chilling effect on legal representation. Our courts have previously acknowledged this chilling effect. *See Corn*, 119 N.M. at 207, 889 P.2d at 242 ("In fact, the cap appears to discourage representation of workers by counsel.").

{53} While it is true that Worker appears to have been fortunate enough to obtain legal representation before the Administration and our courts, he still represents a class of workers who face a burden not shared by other claimants or employers who seek to exercise their right to an appeal. For that reason, intermediate scrutiny is appropriate.

Intermediate Scrutiny Applied

{54} Under intermediate scrutiny, the burden is on the party maintaining the statute's validity "to prove that the classification is substantially related to an important government interest." *Marrujo v. N.M. State Highway Transp. Dep't*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) (quoted authority omitted). Thus, this Court must examine the governmental interests served by the attorney fee cap, and whether the statutory classifications bear a substantial relationship to any such important interests. *Corn*, 119 N.M. at 211, 889 P.2d at 246 (Apodaca, J., specially concurring).

{55} I have no problem accepting that the attorney fee cap is aimed at advancing important government interests. However, upon examining the impact of the cap on those workers who must participate in an appeal to preserve their hard-won benefits, I do not believe that the employer and the Administration have carried their burden of proving that the attorney fee cap is substantially related to the interests it was designed to address.

{56} Under intermediate scrutiny, a less restrictive means analysis is appropriate. *See Corn*, 119 N.M. at 211, 889 P.2d at 246 (Apodaca, J., specially concurring). Intermediate scrutiny requires a court to balance the importance of the government interests against the burdens imposed on the individual and society. *Id.* One way to assess this balance is for the court "to determine whether alternatives exist that would not burden protected interests as heavily as the classification scheme chosen." *Id.* (quoted authority omitted). Applying this analysis, it is clear to me that the Legislature could have advanced its goals in ways that would have burdened the right to an appeal less.

{57} The majority argues that by discouraging litigation, the attorney fee cap advances one of the purposes of the Act, which is to assure quick and efficient delivery of benefits to workers at a reasonable cost to employers. *See* Maj. Op. ¶ 26. In this case, I fail to see how the cap has prevented the employer from prolonging litigation through its own appeal. Worker was brought involuntarily to the judiciary, and had no choice but to defend his benefits. While I do not mean to suggest that an employer should not have a constitutional right to appeal a decision of a workers' compensation judge, I do think that in some situations the employer has nothing to lose by appealing a decision. If the worker's counsel is already bled dry by the attorney fee cap, then even if the employer loses on appeal, the employer will not have to pay any more of the worker's attorney fees.

think federal cases are persuasive on this issue. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

{58} Meanwhile, the fee cap might not have the same effect on employers' attorneys. Paid if they win or lose, and not subject to judicial approval of fees, employers' counsel may be in a better position to prolong litigation through an appeal. If retained by an insurance company, employers' counsel may be able to offset losses incurred in one case due to the fee cap with gains from future cases. Usually, workers' attorneys are not similarly situated. In its practical effect, the fee cap provides employers with an unfair tactical advantage on appeal.

{59} In addition, the cap puts workers in a vulnerable position. Workers who can no longer pay their attorney on appeal might lose benefits won at the administrative level. Thus, at the appellate level, the attorney fee cap is not substantially related to legislative goals of reducing litigation and providing quick and efficient delivery of benefits.

{60} Reducing costs is another important purpose behind the attorney fee limitation. However, in my view, the evidence that only a few cases will exceed the cap, coupled with the fact that not all of those cases will go through an appeal, argues against the necessity of the cap in its present inflexible form.[13] There is no evidence in the record that making allowances for the few cases that deserve attorney fees in excess of the cap for the purposes of an appeal will harm the system. I acknowledge that actuarial uncertainty and insurance costs might rise if the cap were eliminated altogether. But under a less restrictive means analysis, there are other ways to address this potential problem. Instead of precluding a reasonable award altogether for appellate attorney fees, the Legislature could provide for some additional fees for appellate services. The Legislature could cap those fees. I find it persuasive that many state legislatures allow workers an additional award of attorney fees on appeal, usually with restrictions.[14] Thus, an absolute prohibition on appellate fees is not substantially related to the important interest in reducing costs. The Legislature could advance this goal in less burdensome ways.

{61} The majority also finds that the statutory cap promotes the Legislature's interest in protecting workers' limited benefits. *See* Maj. Op. ¶ 27. In its present form, the Act holds the worker responsible for paying half of any fee awarded to his attorney. If the fee cap is overturned, then fewer net benefits will be available to the worker. I acknowledge the force of this argument. Protecting workers' benefits is an important government interest. However, I do not believe a prohibition on paying appellate attorney fees is substantially related to protecting workers in this situation. Rather, it threatens them with severe harm. Forced to defend their benefits on appeal, workers need adequate representation. Unlike any other appellate party I know of, those workers who have exceeded the cap must either rely on an attorney who is working for free, or proceed alone.

{62} We should not encourage parties to attempt the rigors of the appellate process unaided by counsel. As is evident from the conclusion of the workers' compensation judge that miserly attorney fees cause a chilling effect on representation, the cap discourages counsel from representing workers when there is no money available on appeal. In the extreme, attorneys may withdraw when continued representation will result in unreasonable financial burden. *See* Rule 16-116(B)(5) NMRA 2005; *Corn*, 119 N.M. at 202, 889 P.2d at 237. While any change to the fee cap may cost workers some money, an even greater threat awaits if workers respond inadequately on appeal. Without adequate representation, Worker could lose everything. As one treatise admonishes:

> Some legislatures, in their zeal to save claimants from diminution of their net

[13] The Administration states in its amicus brief that "less than 1.5 percent of all attorney fees for workers even potentially penetrated the cap" in 2001 and 2002.

[14] *See, e.g.*, Alaska Stat. § 23.30.145(c) (Michie 2000); Ark. Code Ann. § 11-9-715(b)(1) (Michie Repl. 2002); Colo. Rev. Stat. § 8-43-403(1) (2003); Or. Rev. Stat. § 656.382(2) (2001); S.D. Codified Laws Ann. § 62-7-36 (Michie 1993 rev.); Vt. Stat. Ann. tit. 21 § 678 (2003); Wash. Rev. Code Ann. § 51.52.130 (West 2002).

> benefits th[r]ough legal fees, carry restrictions on fees to the point where they may well injure claimants as a class both by hindering the growth of an able compensation bar and by making it economically impossible for claimants' lawyers to give the necessary time to the preparation of each case.

8 Arthur Larson & Lex K. Larson, *Workers' Compensation Law* § 133.07, at 133–44 (2003). As we have previously said,

> [w]e must avoid a policy or a practice which would discourage representation or the taking of appeals where counsel feels that an injured work[er] has been aggrieved at the trial court level. We must also preserve the right of an injured work[er] to have representation where the employer has appealed.

Herndon, 92 N.M. at 288, 587 P.2d at 435.

{63} While I recognize the legislative power to draw lines, there are better ways to accomplish the important government goals at stake than drawing the line at zero. The Legislature is free to set a reasonable limit on fees as long as it makes a reasonable provision for the possibility of fees incurred during appellate review. I also am confident that workers' compensation judges can determine reasonable supplemental awards that would compensate attorneys without unduly impairing workers' benefits.

RICHARD C. BOSSON,
Chief Justice

APPELLATE CASE

DAVID WAGNER,

Worker/Appellee/Cross-Appellant,

v.

AGW CONSULTANTS, d/b/a TURNER ENVIRONMENTAL CONSULTANTS, and WILLIAM M. TURNER, Individually, and as Trustee,

Employer/Insurer/Appellants/ Cross-Appellees.

Docket No. 22,370

COURT OF APPEALS OF NEW MEXICO

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Gregory D. Griego, Workers' Compensation Judge

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CERTIFICATION TO THE SUPREME COURT

FRY, Judge.

{64} AGW Consultants, d/b/a Turner Environmental Consultants, (AGW) appeals and David Wagner (Worker) cross-appeals from the compensation order and order concerning attorney fees from the Workers' Compensation Judge (WCJ). AGW raises six issues on appeal and Worker raises three issues in his cross-appeal. The issues raised in both appeals fall into two broad categories: those concerning Worker's entitlement to benefits, and those concerning the award of attorney fees to Worker.

{65} As to Worker's entitlement to benefits, AGW argues: (1) that AGW does not have the requisite three employees contemplated by NMSA 1978, § 52-1-6(A) (1990) of the Workers' Compensation Act (the Act) and therefore is not subject to the Act; (2) that the WCJ erred in determining that the accident arose out of and in the course of Worker's employment; (3) that the WCJ erred in determining that Worker's second fall was not an independent, intervening cause; (4) that the WCJ's finding that Dr. Gehlert was an authorized health care provider is not supported by substantial evidence; and (5) that the WCJ's finding that AGW

is responsible for Worker's medical bills is not supported by substantial evidence. Worker argues in his cross-appeal (6) that the WCJ's determination of twenty percent loss of use for Worker's scheduled injury is not supported by substantial evidence.

{66} With respect to the issues concerning attorney fees, AGW argues that (1) the WCJ erred in the determination of the fee amount to be paid fifty-fifty. Worker argues that (2) the WCJ erred in rejecting Worker's request to find that AGW and Turner acted in bad faith, a finding that would have permitted an additional award of attorney fees pursuant to NMSA 1978, § 52-1-54(I) (2003). In addition, Worker argues (3) the $12,500 limit (cap) on attorney fees violates equal protection or due process or Worker's right of access to the courts.

{67} We certify the issue concerning the constitutionality of the attorney fee cap to the New Mexico Supreme Court. However, because the certification statute, NMSA 1978, § 34-5-14(C) (1972), and Rule 12-606 NMRA 2003 refer to the certification of "a matter" to the Supreme Court, we conclude that we must certify the entire case even if we wish only to certify one issue. *See Collins v. Tabet*, 111 N.M. 391, 404, 806 P.2d 40, 53 n.10 (1991) (construing "matter" to mean the entire case). In an effort to assist the Supreme Court, we submit our analysis of the other issues, which we would affirm for the reasons that follow. *See State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (attaching Court of Appeals' proposed opinion to Supreme Court's opinion on certification).

BACKGROUND

The Accident and Subsequent Medical Care

{68} AGW, a ground-water hydrology consulting firm, is a common-law business trust. William Turner is AGW's sole trustee. It is undisputed that at the time of the accident, AGW had two part-time employees, Worker and Todd McCabe. Whether Turner was a worker or employee of AGW is a disputed issue.

{69} On April 7, 1999, Worker and McCabe were sent to a particular water well, the S-10, to set up the equipment necessary for temperature readings to be taken of the well. Worker was climbing a ladder on the side of a water tank located near S-10, in order to fill a plastic tube with water so that the tube could be inserted in the S-10. The ladder came loose and Worker fell, breaking his left leg just above the ankle. His first treating physician, Dr. Felter, testified that Worker had "what we considered a compound fracture. That means part of the bone was sticking through the skin, and it was a highly comminuted fracture, which means in many pieces, and it involved the ankle joint itself."

{70} McCabe took Worker to Lovelace Medical Center, where Dr. Felter performed surgery. Worker was released two days later. His leg was in a cast at the time and he was instructed to use crutches, to avoid putting weight on the injured leg, and to keep his leg elevated.

{71} Three days after his release from the hospital, Worker was at home, on crutches. He was reaching for a checkbook that was on top of a bookcase when he raised his arm, lost his crutch, swung on the remaining crutch, kicked out with his injured foot for balance, struck his unprotected toes on the bookcase, pivoted 180 degrees, and fell. He was taken to Lovelace and Dr. Felter performed additional surgery.

{72} Worker subsequently told Turner that he was dissatisfied with his care from Lovelace. Turner suggested another doctor, Dr. White, who suggested Dr. Legant. Turner drove Worker to meet with Dr. Legant. After the meeting, Worker had a second surgery in April and continued to receive medical care from Lovelace until August 1999. At that point Worker again called Dr. Legant, who referred Worker to Dr. Gehlert. At that time, there was concern that the fracture was not healing. Dr. Gehlert provided additional medical treatment, including a bone graft. Ultimately, the WCJ found that

Worker incurred over $58,000 in medical bills and was unable to work for roughly a year. The WCJ also found that Worker reached maximum medical improvement (MMI) for the injury on June 5, 2000.

{73} Worker filed his claim on October 12, 1999. At that time he had not yet been released to return to work. He sought Temporary Total Disability (TTD) benefits, Permanent Partial Disability (PPD) benefits, attorney fees, disfigurement compensation, and payment of his medical bills. The complaint indicated the employer/respondent was AGW.

Pretrial Proceedings

{74} Two things happened during pretrial proceedings that bear on the issues raised on appeal. First, once it became clear that AGW was a business trust, Worker moved to amend his complaint by adding Turner as an Employer/Insurer, on the ground that Turner was the real party in interest**.** The WCJ granted the motion to amend.

{75} Second, AGW filed a motion to dismiss, based on the contention that Turner, as sole trustee of the business trust, was not within the definition of a "worker" and therefore could not be counted as an employee. Thus, AGW argued, AGW had only two employees, Worker and McCabe, and the Act did not apply. The WCJ denied the motion, finding that Turner was "in the same shoes" as a corporate executive and therefore would be treated as an employee. In support of this decision, the WCJ cited NMSA 1978, § 52-1-7(E) (2003).

Formal Hearing

{76} After the formal hearing, the WCJ filed a notice of proposed decision, and all parties filed proposed findings and conclusions. The WCJ then entered a compensation order, which, in pertinent part, found as follows. Worker was employed by AGW, a business trust, and not by Turner individually. Turner was an employee of the business. Worker's first injury arose out of and in the course of his employment. The second injury, the fall at home, was incidental to the normal activities of daily living and did not constitute an independent intervening cause. Dr. Gehlert was an authorized health care provider because Worker initially directed medical care, Turner suggested Dr. Legant, and Dr. Legant referred Worker to Dr. Gehlert. Worker was entitled to TTD benefits for roughly one year. Worker reached MMI June 5, 2000, and thereafter had a scheduled injury with a twenty percent loss of use. In addition, the WCJ ordered AGW to pay Worker's reasonable and necessary medical expenses.

{77} We discuss the factual and procedural background relevant to the award of attorney fees when we address the issues concerning that award.

DISCUSSION

Worker's Entitlement to Benefits

The WCJ Did Not Err In Determining That AGW Had Three Employees

{78} AGW contends that Turner, as the sole trustee of the business trust, was not an employee of AGW, relying on two arguments. First, AGW relies on authorities from other jurisdictions concerning the nature of a business trust. Second, AGW maintains that whether a person is an employee depends on whether that person is subject to the control of another. Consequently, AGW argues, because there is no evidence that Turner's decisions were supervised or controlled in any way by anyone but himself, the WCJ's finding that Turner was an employee of AGW is not supported by substantial evidence.

{79} We review de novo the application of the law to the facts. *Hise v. City of Albuquerque*, 2003-NMCA-015, ¶ 8, 133 N.M. 133, 61 P.3d 842. We apply whole record review to the factual determination of the WCJ. *Herman v. Miners' Hosp.*, 111 N.M. 550, 552, 807 P.2d 734, 736 (1991). In applying whole record review, this Court reviews both favorable and unfavorable evidence

to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder. *Levario v. Ysidro Villareal Labor Agency*, 120 N.M. 734, 737, 906 P.2d 266, 269 (Ct. App. 1995).

{80} AGW relies on *In re Hayes' Case*, 204 N.E.2d 277, 278–79 (Mass. 1965), where the managing trustee of a business trust filed a claim for workers' compensation benefits after he was injured on the job. The Massachusetts Supreme Judicial Court held that a trustee of a business trust was not an employee of the trust and therefore was not entitled to bring compensation proceedings before the Industrial Accident Board. *Id.* at 280. However, under Massachusetts law, a business trust is not a legally separate entity from its trustees. *Id.* In this case, the parties have assumed that AGW is a separate and distinct entity.

{81} AGW also relies on federal cases holding that the trustees of a business trust are not employees within the meaning of that term as used in the Social Security Act. *United States v. Griswold*, 124 F.2d 599 (1st Cir. 1941); *Loring v. United States*, 80 F. Supp. 781 (D. Mass. 1948). Under federal law "the most important factor has been the existence of a right in some one [sic] else, either an individual or a collective entity, to control the employee in the performance of his work." *Loring*, 80 F. Supp. at 784; *see also Griswold*, 124 F.2d at 601 (explaining that employees are subject to supervision and control pursuant to the Social Security Act). However, New Mexico uses a different standard to determine whether an individual is a "worker" within the meaning of the Act.

{82} By statute, the provisions of the Act apply to employers of three or more workers. Section 52-1-6(A). The parties do not dispute that AGW is a separate legal entity and that it was an employer within the meaning of the Act. The Act defines a "worker" as "any person who has entered into the employment of or works under contract of service or apprenticeship with an employer. . . . The term 'worker' shall include 'employee' and shall include the singular and plural of both sexes." NMSA 1978, § 52-1-16(A) (1989).

{83} In determining whether a given individual is a worker, the label that the parties have attached to their relationship is not controlling. *Yerbich v. Heald*, 89 N.M. 67, 69, 547 P.2d 72, 74 (Ct. App. 1976). Instead, the critical question is whether the individual has a contract of hire with the employer for wages or something of value that is like wages. *See Trembath v. Riggs*, 100 N.M. 615, 619, 673 P.2d 1348, 1352 (Ct. App. 1983), *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 105 N.M. 503, 734 P.2d 743 (1987). *Cf. Joyce v. Pecos Benedictine Monastery*, 119 N.M. 764, 766, 895 P.2d 286, 288 (Ct. App. 1995) (stating that a religious novice is not an employee, largely because the novice does not exchange her service for wages); *Jelso v. World Balloon Corp.*, 97 N.M. 164, 168, 637 P.2d 846, 850 (Ct. App. 1981) (explaining that an unpaid volunteer is not a worker or employee). In addition, the phrase "contract for hire" has been construed to require a mutuality of assent as well as an exchange of labor for wages or something similar. *Joyce*, 119 N.M. at 767, 895 P.2d at 289.

{84} In this case, the WCJ found that the business trust was created by a contract between Turner and his wife, Regina. Under the contract and supporting documents, Turner is the sole trustee. Trustees are paid reasonable compensation for their services. The contract specifically provides that "Trustee(s) . . . are like employees and not personally liable when dealing with the Trust properties or matters." Turner signed a document accepting his appointment as trustee. In short, there is substantial evidence in the record supporting the WCJ's finding that Turner is an employee of AGW under the statutory definition of "worker" as interpreted by cases of this Court. The fact that Turner is not subject to the control of another in making decisions concerning AGW is irrelevant.

Worker's Accident Arose out of and Was in the Course of Employment

{85} All the remaining issues concerning Worker's entitlement to benefits are challenges to the sufficiency of the evidence. In reviewing a claim for sufficiency of the evidence, we review the

record as a whole. *Lucero v. City of Albuquerque*, 2002-NMCA-034, ¶ 14, 132 N.M. 1, 43 P.3d 352. "In applying whole record review, this Court reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder." *Levario*, 120 N.M. at 737, 906 P.2d at 269.

{86} AGW challenges the WCJ's finding that the first accident arose out of and was in the course of Worker's employment. An injury is in the course of employment if it is incurred when the employee is at a place where he may reasonably be and is engaged in doing something incidental to fulfilling the duties of his employment. *Edens v. N.M. Health & Social Servs. Dep't*, 89 N.M. 60, 63, 547 P.2d 65, 68 (1976). Similarly, an injury arises out of employment if it is a risk "to which the worker is subjected in the employment." *Losinski v. Corcoran, Barkoff & Stagnone, P.A.*, 97 N.M. 79, 80, 636 P.2d 898, 899 (Ct. App. 1981).

{87} In support of its argument that Worker was not in the course and scope of his employment, AGW points to Turner's testimony that he had given Worker specific directions concerning how and where to fill the tube with water and that Worker did not follow those specific directions**.** We note, however, that the WCJ was not required to believe Turner's testimony on this issue. *See Powers v. Miller*, 1999-NMCA-080, ¶ 16, 127 N.M. 496, 984 P.2d 177 (explaining that the trier of fact is not required to believe any particular witness). More to the point, even if Worker did not follow Turner's instructions, that does not, by itself, establish that he was no longer in the course and scope of his employment at the time of the injury. Instead, the question is whether the deviation was so great that Worker was no longer doing anything to further his employer's business. *Frederick v. Younger Van Lines*, 74 N.M. 320, 325–27, 393 P.2d 438, 441–43 (1964); *see also* 1 Arthur Larson *The Law of Workmen's Compensation* § 19.50 (2003). It is undisputed that Worker was injured during work hours at a place that Worker was expected to be while attempting to set up the equipment necessary to take the well temperature measurements. Thus, substantial evidence supports the WCJ's finding that Worker's injury arose out of and was in the course of employment.

The Second Fall Was Not an Independent Intervening Cause

{88} AGW contends that Worker's fall at home while on crutches was an independent intervening cause and, therefore, AGW was not liable for any of the consequences of the second fall. AGW recognizes that this Court has previously held that "an injury resulting from the concurrence of a preexisting injury and the normal movements of everyday life is a 'direct and natural result' of the original injury." *Aragon v. State Corr. Dep't*, 113 N.M. 176, 181, 824 P.2d 316, 321 (Ct. App. 1991) (internal citation omitted). In essence, AGW contends that the second fall was not the result of the normal movements of everyday life. Common sense tells us that moving around one's home is a normal activity of daily life. Indeed, banging one's foot against a stationary object is woefully common. Consequently, substantial evidence supports the WCJ's finding that Worker's fall was compensable. Moreover, we doubt whether *Aragon*'s definition of independent intervening cause would apply at any time before the worker has reached MMI for the accidental injury.

Dr. Gehlert Was an Authorized Health Care Provider

{89} AGW also challenges the finding that Dr. Gehlert was an authorized health care provider. AGW acknowledges that Turner was aware that Worker was dissatisfied with his treatment at Lovelace and that Turner suggested to Worker that he consult Dr. White. Dr. White informed Worker that he did not treat ankle injuries and referred Worker to Dr. Legant. Turner drove Worker to Worker's appointment with Dr. Legant. Later, Dr. Legant declined to accept Worker as a patient and referred Worker to Dr. Gehlert. This is substantial evidence supporting the WCJ's finding.

{90} It may be that AGW is arguing that Dr. Gehlert was not authorized because Worker failed to provide AGW with a notice of change of health care provider as required by NMSA 1978, § 52-1-49(C) (1990). We question whether an employer who refuses to pay for medical treatment at the time of the injury is nevertheless entitled to formal written notice of a worker's decision to change his health care provider. AGW acknowledges that Worker made the initial selection of health care provider and that AGW never sought to change his selection. AGW paid $2000 to Lovelace for Worker's initial care and thereafter refused to pay for any of Worker's medical care. AGW was well aware of Worker's dissatisfaction with Lovelace and encouraged Worker to see Dr. Legant. AGW did not come forward with any medical evidence that would have supported a determination that Dr. Gehlert's treatment was either unreasonable or unnecessary. Under these circumstances, Worker's failure to notify AGW that he was changing his health care provider is so minor that it does not justify the potentially drastic consequences that AGW seeks. *See Fuentes v. Santa Fe Pub. Sch.*, 119 N.M. 814, 816–17, 896 P.2d 494, 496–97 (Ct. App. 1995) (discussing the legal doctrine of de minimis). Thus, we would hold that Worker's failure to notify AGW of his change of health care provider does not make Dr. Gehlert's treatment unauthorized.

Reasonableness and Necessity of Medical Bills

{91} AGW also argues that the WCJ erred in ordering it to pay Worker's medical bills. AGW contends that the finding of reasonableness and necessity is not supported by substantial evidence. However, AGW did not ask the WCJ to find that the medical bills or expenses were not reasonable and necessary. AGW's findings incorporated Turner's by reference. The only findings Turner asked for on this issue were, in essence, findings that Worker questioned the accuracy of the bills. Thus, AGW cannot challenge the sufficiency of the evidence to support the WCJ's finding. *Pennington v. Chino Mines*, 109 N.M. 676, 678, 789 P.2d 624, 626 (Ct. App. 1990) (stating that "[t]he failure of a party to file a timely request for findings of fact . . . precludes evidentiary review").

Twenty Percent Loss of Use

{92} Although Worker does not challenge the WCJ's determination that the scheduled injury section of the Act is applicable, he argues that the WCJ's finding of twenty percent loss of use of his left leg between the ankle and the knee is not supported by substantial evidence. Worker points out that Dr. Gehlert and Dr. Diskant both gave Worker a permanent partial impairment rating of forty-five percent for the left leg below the knee. However, the WCJ based his determination on loss of use rather than on the impairment rating.

{93} In *Lucero v. Smith's Food & Drug Centers, Inc.*, 118 N.M. 35, 37, 878 P.2d 353, 355 (Ct. App. 1994), this Court held that it is not necessary to prove an impairment, as defined by NMSA 1978, § 52-1-24(A) (1990), in order to obtain scheduled injury benefits under NMSA 1978, § 52-1-43 (2003). Worker recognizes our holding, but contends that the concept of impairment rating is essential to determining permanent partial disability. We disagree. Benefits for scheduled injuries are not governed by the rules that apply to benefits for permanent partial disability. *See Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 24, 131 N.M. 413, 38 P.3d 181. Thus, we would affirm on this issue as well.

Issues Concerning Attorney Fees

The WCJ Correctly Split the Liability for Worker's Attorney Fees

{94} During pretrial proceedings, the WCJ ordered AGW to pay $2000 to Worker's attorney as a sanction. The order found that AGW had initially stipulated on the record that it had three employees and the Act applied, and that AGW had later argued its stipulation was incorrect or in error. The order awarded "a sanction in the form of an attorney fee of $2000" payable to Worker's attorneys, representing "the number of hours of

work devoted to address this issue including time expended on this issue at two separate hearings before the Administration."

{95} Later, during the fee proceeding, the WCJ awarded Worker the maximum allowable attorney fee of $12,500, and Worker requested a finding that the $2000 previously awarded was a sanction that should not be credited against the attorney fee award. AGW countered that, pursuant to Section 52-1-54(J), it could only be required to pay half of $12,500 plus tax, or $6,613.28, and that the $2000 should be credited against the total amount it owed, leaving it owing $4,613.28. Instead, the WCJ credited the $2000 against the total fee of $12,500, and ordered AGW to pay half of $10,500.

{96} AGW contends the $2000 was simply a part of the total fee awarded to Worker, and pursuant to Section 52-1-54(J), "the payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer." Whether the award was a fee or a sanction is an issue of statutory construction, which is reviewed de novo on appeal. *Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. We conclude the $2000 awarded by the WCJ was not awarded as a fee under Section 52-1-54, but as a sanction.

{97} We first note that Worker did not argue below or on appeal that the $2000 was awarded pursuant to Section 52-1-54(I) for AGW's bad faith claims processing or litigation conduct. Therefore, we do not consider this potential argument on appeal. *Pinnell v. Bd. of County Comm'rs*, 1999-NMCA-074, ¶ 14, 127 N.M. 452, 982 P.2d 503 (explaining that appellate court will not affirm on grounds not presented to the trial court when to do so would be unfair to the appellant).

{98} We turn now to an analysis of whether the $2000 was a fee or a sanction. A WCJ is authorized by statute to "enter noncriminal sanctions for misconduct" pursuant to NMSA 1978, § 52-5-6(B) (2001). *Carrillo v. Compusys, Inc.*, 2002-NMCA-099, & 11, 132 N.M. 710, 54 P.3d 551. Section 52-5-6(B) specifically gives WCJs the power to

> preserve and enforce order during hearings; administer oaths; issue subpoenas to compel the attendance and testimony of witnesses, the production of books, papers, documents and other evidence or the taking of depositions before a designated individual competent to administer oaths; examine witnesses; enter noncriminal sanctions for misconduct; and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively.

The order awarding the $2000 refers to the award as a "sanction" and it may reasonably be read as imposing the sanction due to AGW's misconduct in waffling on the applicability of the Act.

{99} In addition, given the fact that the WCJ did not order this $2000 to be split, it appears that the WCJ deemed the award to be a sanction. If the $2000 was awarded as a noncriminal sanction under Section 52-5-6(B), then it was not awarded as an attorney fee under Section 52-1-54, and none of the provisions of that section apply to the $2000. We would therefore affirm on this issue.

Bad Faith

{100} Worker requested additional attorney fees in the amount of $2500 pursuant to Section 52-1-54(I), which provides:

> The workers' compensation judge may exceed the maximum amount [of attorney fees] stated in this subsection . . . if he finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed two thousand five hundred dollars

> ($2,500). As used in this subsection, "bad faith" means conduct . . . that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker or employer.

AGW also requested findings that Worker acted in bad faith. Because the WCJ made no findings at all regarding the bad faith of either party, we remanded the case and asked the WCJ to enter findings and conclusions on the issue.

{101} The WCJ found that, while some of Turner's filings were without a sound basis in law or fact, Turner was not Worker's employer and, therefore, Turner's bad faith was irrelevant. AGW was Worker's employer, and the WCJ found that AGW "did not file excessive, frivolous, or bad faith matters." Consequently, the WCJ concluded that AGW "did not engage in bad faith or unfair claims processing."

{102} This Court has treated bad faith in this context as a finding of fact subject to substantial evidence review. *Murphy v. Duke City Pizza, Inc.*, 118 N.M. 346, 349, 881 P.2d 706, 709 (Ct. App. 1994); *Trujillo v. City of Albuquerque*, 116 N.M. 640, 646, 866 P.2d 368, 374 (Ct. App. 1993). However, since those cases were decided, the law concerning mixed questions of law and fact has been extended to civil cases. *See, e.g., Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶¶ 6–7, 129 N.M. 698, 12 P.3d 960; *Souter v. Ancae Heating & Air Conditioning*, 2002-NMCA-078, ¶ 19, 132 N.M. 608, 52 P.3d 980. Therefore, "bad faith" is a mixed question of law and fact.

{103} Worker asserts a general argument that the "voluminous and repetitive filings of pleadings," the "repetitious and irrelevant examination" of witnesses, and the "unreasonable contestation of every claim set forth by Worker" establish AGW's bad faith. However, as Worker admits, most of this litigation excess was due to the conduct of Turner rather than AGW. Worker claims that AGW was equally guilty of Turner's bad faith conduct because it concurred in Turner's pleadings.

{104} We are not persuaded. The record shows that Turner filed fifty motions, and AGW did not file any pleadings indicating its concurrence in any of those motions. It is true that AGW adopted and incorporated by reference Turner's list of witnesses and exhibits and Turner's requested findings of fact and conclusions of law. However, we cannot say it was unreasonable for the WCJ to conclude that AGW's adoption of a small number of Turner's pleadings did not constitute "fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker." Section 52-1-54(I). The purpose of the bad faith statutory provision is to punish and to deter others from the commission of like offenses. *Sanchez v. Wohl Shoe Co.*, 108 N.M. 276, 278, 771 P.2d 984, 986 (Ct. App. 1989). The statute's purpose would be ill-served if AGW were punished for the pleadings it filed, which were appropriate and which raised colorable defenses, or for concurring in three of Turner's relatively innocuous pleadings.

{105} The WCJ made no findings regarding Worker's bad faith or lack of bad faith. Although AGW has not appealed the WCJ's determination that Worker did not act in bad faith, it filed a supplemental brief after remand arguing that the WCJ should have found that Worker acted in bad faith. AGW's argument comes too late; we do not consider contentions made for the first time in a reply brief or a supplemental brief. *Yount v. Millington*, 117 N.M. 95, 100, 869 P.2d 283, 288 (Ct. App. 1993).

Constitutionality of the Cap on Fees

{106} Worker argues that the limitation on attorney fees set forth in Section 52-1-54(I) violates his constitutional rights of equal protection, due process, and access to the courts. The question of whether Section 52-1-54(I) violates a worker's rights of equal protection and due process has not been addressed by a New Mexico appellate court since our Supreme Court established heightened rational basis analysis in *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305. The question

of whether Section 52-1-54(I) violates a worker's right of access to the courts is a matter of first impression. Because these are "significant question[s] of law under the constitution of New Mexico or the United States" and "issue[s] of substantial public interest," Section 34-5-14(C)(1), (2), we certify them to the Supreme Court.

CONCLUSION

{107} For the foregoing reasons, we would affirm the WCJ's compensation order on all issues except that involving the constitutionality of Section 52-1-54(I), which we certify to the Supreme Court.

{108} IT IS SO ORDERED.

CYNTHIA A. FRY,
Judge

WE CONCUR:

A. JOSEPH ALARID,
Judge

CELIA FOY CASTILLO,
Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-027

Filing Date: June 30, 2005

Docket No. 29,111

STATE OF NEW MEXICO,

Petitioner,

v.

HON. JAY W. FORBES, District Judge,

Respondent,

and

RALPH RODNEY EARNEST,

Real Party in Interest.

ORIGINAL PROCEEDING

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OPINION

CHÁVEZ, Justice.

{1} On March 8, 2004, the United States Supreme Court issued *Crawford v. Washington*, 541 U.S. 36 (2004), holding that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. We applied this principle in *State v. Johnson*, 2004-NMSC-029, ¶¶ 2, 7, 136 N.M. 348, 98 P.3d 998. Respondent, Ralph Rodney Earnest (Earnest), who in 1985 was convicted of murder, conspiracy to commit murder, kidnaping, conspiracy to distribute a controlled substance, and possession of a controlled substance, filed a Petition for Writ of Habeas Corpus seeking a new trial based on the holding in *Crawford*. The facts and posture of Earnest's case present a unique reason for granting him a new trial on his convictions now over two decades old. In 1985 this Court, relying on existing United States Supreme Court precedent, reversed his convictions for the very rationale stated by the United States Supreme Court in *Crawford*: that the admission of a prior statement by an alleged accomplice violated Defendant's rights under the Confrontation Clause[1] because it deprived Defendant of meaningful cross-examination. *State v. Earnest*, 103 N.M. 95, 99, 703 P.2d 872, 876 (1985) (*Earnest I*). However, our holding in *Earnest I* was vacated by the United States Supreme Court with instructions that we apply the reliability analysis in *Lee v. Illinois*, 476 U.S. 530 (1986), a case decided more than one year after we decided *Earnest I*. *New Mexico v. Earnest*, 477 U.S. 648 (1986) (*Earnest II*). We subsequently applied the reliability analysis and affirmed Earnest's convictions. *State v. Earnest*, 106 N.M. 411, 411, 744 P.2d 539, 539 (1987) (*Earnest III*).

{2} After a hearing on Earnest's habeas corpus petition, following *Crawford*, the district court concluded that *Crawford* did not announce a new rule of constitutional criminal procedure and that Earnest was entitled to its application. Accordingly, the district court granted Earnest's petition and issued a Writ of Habeas Corpus for

[1] The Confrontation Clause in the New Mexico Constitution, Article II, Section 14, mirrors the Confrontation Clause of the United States Constitution, Amendment VI, for purposes of our analysis in this case.

the release of Earnest unless the State elected to retry him. The State filed a Verified Petition for Stay of Order Granting Petition for Writ of Habeas Corpus with this Court. We treated the Petition as one for superintending control, entered an order staying the district court action pending further order of this Court, and set the matter for oral argument. We also recognize our jurisdiction under Rule 5-802 NMRA 2005. Because of the unique circumstances of Earnest's case, and our belief that the United States Supreme Court legal precedent at the time we decided *Earnest I* required the exclusion of the alleged accomplice statement, as *Crawford* suggests that it always has, we affirm the district court and remand for proceedings consistent with this opinion.

PROCEDURAL HISTORY

{3} The events leading to Earnest's convictions were alleged to have occurred on February 11 and 12, 1982. During Earnest's trial, information from two eyewitnesses, Conner and Boeglin, was provided to the jury. Conner took an oath and testified that while he and Boeglin committed the crimes, Earnest was not involved. The prosecution was given a full and fair opportunity to cross-examine Conner and challenge the reliability of his testimony. Boeglin, however, refused to take an oath and testify, despite having been granted use immunity, and was held in contempt of court. Over objection of defense counsel, the trial court declared Boeglin unavailable and admitted a tape recording and transcript of a statement Boeglin gave officers the day of his arrest. In his statement, Boeglin admitted that it was he who attempted to cut the victim's throat but he went on to implicate both Conner and Earnest, stating Earnest shot the victim in the head. *Earnest III*, 106 N.M. at 412, 794 P.2d at 540. Unlike the prosecution, which had a full and fair opportunity to cross-examine Conner, Earnest was deprived of the opportunity to cross-examine Boeglin to challenge the reliability of his statement. Boeglin's unsworn statement was admitted to the jury as substantive evidence of Earnest's guilt. A jury found Earnest guilty of all charges.[2]

{4} On March 4, 1985, we reversed Earnest's convictions and remanded for a new trial, holding that Earnest's confrontation rights had been violated. *Earnest I*, 103 N.M. at 96, 703 P.2d at 873. We concluded that admission of this prior statement by the alleged accomplice "was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningful cross-examination," relying on *Douglas v. Alabama*, 380 U.S. 415 (1965) (holding that a confession of an alleged accomplice who implicated Douglas violated Douglas's right to confront and cross-examine the witness against him and was inadmissible because he did not have the opportunity to cross examine the alleged accomplice). *Earnest I*, 103 N.M. at 99, 703 P.2d at 876. We did not believe *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that hearsay statements are admissible if the statements bear adequate "indicia of reliability," applied since the statement at issue in *Roberts* was a statement at a preliminary hearing where Roberts had the opportunity to cross-examine the declarant. *Earnest I*, 103 N.M. at 99, 703 P.2d at 876. The State appealed to the United States Supreme Court. On June 27, 1986, the United States Supreme Court entered a *per curiam* decision which vacated *Earnest I* and remanded for "further proceedings not inconsistent with" *Lee v. Illinois*, 476 U.S. 530 (1986), an opinion decided more than one year after the New Mexico Supreme Court decided *Earnest I*. *Earnest II*, 477 U.S. at 648.

{5} On remand we interpreted the United States Supreme Court order as requiring us to give the State "an opportunity to overcome the weighty presumption of unreliability attaching

[2] In its decision regarding the habeas corpus petition, the trial court concluded that admission of Boeglin's statement was not harmless beyond a reasonable doubt, citing *Earnest I*, in which we concluded that the statement was highly prejudicial. *See Earnest I*, 103 N.M. at 99, 703 P.2d at 876. We agree with the trial court's conclusion. *See Johnson*, 2004-NMSC-029, ¶ 33 (where custodial testimonial statement offers the only direct evidence, but is contradicted by other testimony, admission of the non-crossed statement is not harmless beyond a reasonable doubt).

to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns." *Earnest III*, 106 N.M. at 412, 744 P.2d at 540 (quoted authority omitted). We concluded that the accomplice statement at issue had sufficient indicia of reliability to satisfy the Confrontation Clause. *Id.* Thus, we held that the trial court had not erred in admitting the statement and affirmed Earnest's convictions. *Id.*

Earnest is Entitled to a New Trial

{6} From *Earnest II* up until *Johnson*, New Mexico courts continually applied the *Roberts* reliability test ("indicia of reliability") to accomplice statements, regardless of whether there had been an opportunity to cross-examine. *See, e.g.*, *State v. Desnoyers*, 2002-NMSC-031, 132 N.M. 756, 55 P.3d 968; *State v. Martinez-Rodriguez*, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267; *State v. Torres*, 1998-NMSC-052, 126 N.M. 477, 971 P.2d 1267. It is beyond dispute that since *Crawford*, the rest of the nation knows now what the New Mexico Supreme Court announced in 1985: under the Sixth Amendment, statements from an alleged accomplice to an officer are inadmissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. *See Crawford*, 541 U.S. at 68.

{7} Whether Earnest should now benefit from the holding in *Crawford* initially turns on whether *Crawford* announces a new constitutional procedural rule. *State v. Mascarenas*, 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221 ("An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a 'new rule.'"). In *Crawford*, the United States Supreme Court did not expressly state it was announcing a new rule. In *Johnson*, wherein we applied *Crawford*, we also did not state we were announcing a new rule. We analyze this issue by exercising our inherent power to decide whether rulings announce a new rule, and if so, whether the new rule is to be given prospective or retroactive application. *See State v. Ulibarri*, 1999-NMCA-142, ¶ 22, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818. In *Mascarenas*, we recognized the difficulty of determining when a case announces a new rule but looked to *Teague v. Lane*, 489 U.S. 288 (1989), for guidance:

> [W]e do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Mascarenas, 2000-NMSC-017, ¶ 24 (quoting *Teague*, 489 U.S. at 301).

{8} Applying the *Teague* analysis to this case, we conclude that as to the unique facts and procedural posture of Earnest's case, *Crawford* does not announce a new rule because the result was "dictated by precedent existing at the time" we decided *Earnest I*. *Teague*, 489 U.S. at 301. To aid our analysis, it is significant that Earnest preserved his argument that admission of the accomplice statement to police officers without him having the benefit of cross-examination violated his constitutional right to confront his accusers. Relying on *Douglas*, we agreed with Earnest in 1985 and reversed his conviction; the United States Supreme Court then reversed our opinion, asking us to reexamine the admissibility of the accomplice statement based on a case it decided over fourteen months after we decided *Earnest I*. The three Justices who separately concurred in *Earnest II* wrote that in their judgment, *Douglas* was no longer good law in view of *Lee*, stating "[a]s *Lee v. Illinois* makes clear, to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law." *Earnest II*, 477 U.S. at 649 (Rehnquist, J., concurring). The fact that the remaining six Justices did not

join the concurrence by then-Justice Rehnquist suggests to us that *Douglas* remained good law. We believe *Crawford* reaffirmed this conclusion. *See Crawford*, 541 U.S. at 57 (citing *Douglas*, the Court stated "[w]e similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine."). In any event, it cannot be disputed that *Douglas*, which held that an accomplice statement was inadmissible unless the defendant had a right to cross-examine, was good law at the time we decided *Earnest I*.

{9} The New Mexico Supreme Court was correct to follow *Douglas*, which we believe the analysis in *Crawford* now confirms. To support its reasoning, the Court in *Crawford* detailed the history of a defendant's right to confront his accusers, underscoring the essential requirement in the common law of the opportunity to cross-examine one's accuser. *Crawford*, 541 U.S. at 42–50. The Court believed the historical review of the common law supported two fundamental principles underlying the Sixth Amendment's Confrontation Clause: 1) the prohibition of the use of *ex parte* statements as evidence against the accused; and 2) that the Framers of the Sixth Amendment would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable and the accused had a prior opportunity to cross examine the witness. *Id.* at 49, 53–54.

{10} The *Crawford* Court analyzed its previous decisions and concluded "[o]ur cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. Of paramount significance is the United States Supreme Court's observation that it had historically excluded accomplice confessions where the defendant had no opportunity to cross-examine, citing to *Douglas*, the very case we relied on when we initially reversed Earnest's convictions in 1985. *Id.* at 57. Furthermore, the Court did not find *Lee* contrary to its holding that testimonial statements are admitted only when the declarant is unavailable and the accused had an opportunity to cross-examine, thus drawing into question the conclusion of the concurring Justices in *Earnest II*. *See id.*

{11} *Crawford* did note, however, that while the results of its decisions had generally been faithful to the above-stated principle, the same could not be said for its rationales. *Id.* at 60. The Court found this was particularly true of the rationale used in *Ohio v. Roberts*, stating that *Roberts* conditioned "the admissibility of all hearsay evidence on whether [the evidence fell] under a 'firmly rooted hearsay exception' or [bore] 'particularized guarantees of trustworthiness.'" *Id.* at 60 (quoting *Roberts*, 44 U.S. at 66). *Crawford* disavowed this rationale, criticizing *Roberts* for failing to distinguish hearsay that was *ex parte* testimony, and for allowing the admission of *ex parte* testimony upon a mere finding of reliability:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. at 61.

{12} *Crawford* also discussed the various hazards associated with the *Roberts* reliability test. Not only is the reliability test unpredictable, *Crawford* noted, but it allows the very statements the Confrontation Clause was intended

to exclude, and courts find reliability in the very factors that make the statements testimonial. *Id.* at 63, 65. To highlight the latter hazard, the United States Supreme Court noted that one court held that the fact that the declarant's statement was made to police while in custody made the statement more clearly against penal interest and therefore reliable. *Id.* at 63 (citing *Nowlin v. Commonwealth*, 579 S.E.2d 367, 371–72 (Va. App. 2003)). The same may very well be said about our reliability approach in *Earnest III*. *See Earnest III*, 106 N.M. at 412, 744 P.2d at 540 (holding that the accomplice's statement was reliable because it was given without a promise of leniency, was against his penal interest, was not blame-shifting, and there was independent evidence corroborating his description of certain events). The reliability of testimonials must be assessed "in the crucible of cross-examination" to avoid these hazards and remain faithful to the history of the Confrontation Clause. *Crawford*, 477 U.S. at 61.

{13} In *Crawford*, therefore, the United States Supreme Court confirmed what the New Mexico Supreme Court announced in *Earnest I*—that a custodial statement by an alleged accomplice to a police officer is not admissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. Because Earnest did not have the opportunity to cross-examine Boeglin, the tape recording and transcript of his statement were inadmissible under our reading of United States Supreme Court precedent that existed at the time of *Earnest I*, which *Crawford* clarifies has always been a correct interpretation of the law. Granting Earnest a new trial is consistent with our responsibility "to do justice to each litigant on the merits of his own case." *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting). Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then. Accordingly, we affirm the district court, lift the stay, and remand for execution of the Writ of Habeas Corpus, affording the State the opportunity to retry Earnest.

CONCLUSION

{14} Under the unique facts and procedural circumstances of this case, the district court is affirmed and this matter is remanded for execution of the Writ of Habeas Corpus, with the State having the right to decide whether to retry Earnest, in which case the district court shall consider conditions of release pending trial.

{15} IT IS SO ORDERED.

EDWARD L. CHÀVEZ,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

PATRICIO M. SERNA,
Justice (dissenting)

SERNA,
Justice (dissenting).

{16} I respectfully dissent. This case involves a petition for writ of habeas corpus and whether Earnest's incarceration violates his federal constitutional rights, specifically his right of confrontation under the Sixth and Fourteenth Amendments. The United States Supreme Court has explained that "it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.'" *Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., dissenting in part)) (alteration in original).

> "Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."

Id. (quoting *Mackey*, 401 U.S. at 682–83 (Harlan, J., dissenting in part)). The writ is not designed "simply to review the record for errors of the trial court; rather, habeas corpus inquiry is directed to the fairness of the entire proceeding, and a writ will lie when violations of the petitioner's constitutional rights rendered the judgment void by depriving the court of its jurisdiction." *Manlove v. Sullivan*, 108 N.M. 471, 476 n.3, 775 P.2d 237, 242 n.3 (1989) (citation omitted).

{17} The majority, relying on *State v. Ulibarri*, 1999-NMCA-142, ¶ 22, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, appears to treat the question in this case as whether, in the exercise of this Court's "inherent power," we should give retroactive effect to *Crawford v. Washington*, 124 S. Ct. 1354 (2004). I respectfully disagree. This case involves an analysis of federal constitutional law, not, as in *Ulibarri*, state constitutional law. While it is within this Court's discretion to make our own rulings prospective or retroactive, it is within the discretion of the Supreme Court, and not the courts of New Mexico, to make the Court's interpretation of the Sixth Amendment in *Crawford* retroactive. I recognize that the majority limits its retroactive application of *Crawford* to the specific facts of this case and to this one habeas petitioner. Nevertheless, even for this one petitioner's claim of a violation of his federal constitutional rights, I believe we must defer to the Supreme Court's retroactivity analysis. This Court has not adopted the analysis in *Crawford* as a matter of independent state constitutional law. In resolving a federal constitutional claim, we are bound by *Crawford* as a matter of federal supremacy; the fact that we have done what is required of us and applied *Crawford* in our own cases does not transform the matter into an issue of state law or invest this Court with discretion over *Crawford*'s retroactivity.

{18} The Supreme Court has stated that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309.

> New rules of procedure . . . generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004) (quoted authority omitted).

{19} Under this analysis, federal and state courts have overwhelmingly concluded that *Crawford* is not retroactive because, under *Teague*, it creates a new rule of law and does not fall within the limited exceptions to prospectivity. *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004), *cert. denied sub nom. Brown v. Lampert*, 125 S. Ct. 940 (2005); *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004),

cert. denied sub nom. Mungo v. Greene, 125 S. Ct. 1936 (2005); *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004) (en banc) ("[T]he *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to *Teague v. Lane*'s nonretroactivity doctrine."), *cert. denied sub nom. Evans v. Roper*, 125 S. Ct. 902 (2005); *People v. Edwards*, 101 P.3d 1118, 1123 (Colo. Ct. App.), *cert. granted*, No. 04SC565, 2004 WL 2784662 (Colo. 2004); *State v. Tarver*, 2005-Ohio-3119, 2004 WL 1463240, at *3 (Ohio Ct. App. June 20, 2005); *In re Markel*, 111 P.3d 249, 254 (Wash. 2005) (en banc).

> It is obvious to us . . . that *Crawford* establishes a new rule. It discards the framework that *Roberts* had adopted. True enough, . . . *Crawford* did not say that it was overruling *Roberts*; it emphasized that the declarant in *Roberts* had been subject to cross-examination. But it assuredly (and explicitly) jettisoned the *Roberts* standard. All of the Supreme Court's decisions between *Roberts* and *Crawford* had applied that understanding, though some of the Justices had questioned whether it should be maintained. . . . A rule is "new" for retroactivity analysis unless it was dictated by earlier decisions. *Crawford* was not "dictated" by *Roberts* or *Lilly*; it broke from them. That the break takes the form of a return to an older, less flexible but historically better grounded approach does not make it less a break. All constitutional decisions find their ultimate basis in texts adopted long ago—here in the Bill of Rights (1791) and their application to the states via the fourteenth amendment (1868). Judicial rhetoric routinely invokes older norms. This does not mean that there has been no "new rule" of constitutional criminal procedure since 1868.

Murillo, 402 F.3d at 790 (citations omitted).

{20} For purposes of Earnest's habeas petition, we apply the law prevailing at the time his conviction became final. Despite the majority's inclination to apply our analysis from *Earnest I*, Earnest's conviction was not final at that time; his case was still on direct review when we decided *Earnest III*. As a result, it is the law applied in *Earnest III* that is relevant. Because this Court was under a Supreme Court mandate to apply the analysis from *Lee v. Illinois*, 476 U.S. 530 (1986), rather than *Douglas v. Alabama*, 380 U.S. 415 (1965), I believe that our application of the law existing at the time could not be said to be unreasonable or in violation of Earnest's federal constitutional rights. Based on my conclusion that *Crawford* creates a new rule, which does not apply to Earnest's collateral attack on his conviction, his current incarceration also does not violate the federal Constitution. As a result, despite *Crawford*'s change in the law, Earnest's incarceration is not illegal or unconstitutional within the meaning of Rule 5-802 NMRA 2005, and I believe there are no grounds for issuing the writ of habeas corpus.

PATRICIO M. SERNA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-032

Filing Date: August 18, 2005

Docket No. 29,133

ALBUQUERQUE RAPE CRISIS CENTER, SHAYLA MYERS, and ROSE SANCHEZ,

Petitioners,

v.

HON. JAMES F. BLACKMER, Second Judicial District Court Judge,

Respondent,

and

STATE OF NEW MEXICO AND MARCO ANTONIO BRIZUELA,

Real Parties in Interest.

ORIGINAL PROCEEDING FOR WRIT OF SUPERINTENDING CONTROL

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OPINION

CHÁVEZ, Justice.

{1} In this case, we give effect to the Victim Counselor Confidentiality Act (Confidentiality Act), NMSA 1978, Sections 31-25-1 to -6 (1987), a statute which we construe to be consistent with this Court's psychotherapist-patient privilege, Rule 11-504 NMRA 2005. Both our psychotherapist-patient privilege and the legislatively enacted privilege at NMSA 1978, Section 31-25-3 (1987), protect confidential communications made during the course of treatment for an emotional or psychological condition from disclosure during court proceedings. Because the record in this case does not reflect whether the communications at issue were disclosed in the course of the counselor's treatment of the alleged victim for any emotional or psychological condition resulting from a sexual assault, we reverse the district court and remand this matter for proceedings consistent with this opinion.

Procedural History

{2} This case arises from a discovery dispute in a criminal prosecution of Brizuela ("Defendant"), a defendant accused of criminal sexual penetration. The alleged victim had presented herself to the Albuquerque Rape Crisis Center (ARCC) several hours after allegedly being raped by Defendant. Defendant filed a motion to compel the ARCC counselors "to participate in pretrial interviews with defense counsel and to provide statements concerning their contact with the alleged victim." The counselors entered

a special appearance so they could respond to the motion to compel, asserting that the communications they had with the alleged victim were confidential and protected by the Confidentiality Act. After hearing argument of counsel, the district court entered an order granting Defendant's motion, reasoning that because a victim-counselor privilege is not recognized in the Supreme Court Rules of Evidence, the statements were not protected.

{3} ARCC filed a motion asking the court to reconsider its order contending that Article II, Section 24 of the New Mexico Constitution creates a constitutional privilege by affording certain crime victims "the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process." The district court reaffirmed its previous order in a comprehensive and thoughtfully worded order acknowledging its strong agreement with the victim's right to privacy and urging this Court to adopt a victim-counselor privilege. The district court ordered the two counselors to give statements concerning their contact with the alleged victim and to reveal any assertions, in whatever form, the alleged victim may have made to the counselors regarding: the events of the alleged criminal sexual penetration; relevant events six months before and after the date of the alleged criminal sexual penetration; the alleged victim's relationship with Defendant before, during and after the alleged criminal sexual penetration; and any statements the alleged victim may have made regarding her bias, prejudice or anger toward Defendant.

{4} ARCC filed a Petition for Emergency Writ of Prohibition or Alternatively for Writ of Superintending Control and Request for Stay of Order. On March 18, 2005, this Court entered an order staying the district court order, pending further order of this Court, and set the matter for oral argument.

The Victim Counselor Confidentiality Act Is Given Effect Because It Is Consistent with the Supreme Court Psychotherapist-Patient Privilege

{5} At the heart of the controversy is the authority of the Legislature to enact legislation that regulates practice and procedure in the courts. Defendant cites *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), for the legal proposition that the power to prescribe rules of evidence and procedure is vested exclusively in the Supreme Court and that the Legislature generally lacks power to prescribe judicial rules by statute. While this Court has ultimate rule-making authority, the analysis in *Ammerman* and subsequent cases which interpret legislative enactments concerning practice and procedure do not support the broad statement that our rule-making authority is exclusive. *See* Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. Rev. 407, 437 (1985) ("A careful reading of the cases and subsequent decisions applying them suggests, however, that the supreme court intended not to exclude the legislature from the rule-making process but only intended to assure judicial supremacy in any clash between legislative and judicial rules of procedure."). Instead, we have exercised our superintending control under Article VI, Section 3, to revoke or amend a statutory provision when the statutory provision conflicts with an existing court rule, *see Southwest Community Health Services v. Smith*, 107 N.M. 196, 198, 755 P.2d 40, 42 (1988) ("[w]hile, historically, the judiciary has shared procedural rule-making with the legislature, any conflict between court rules and statutes that relate to procedure are today resolved by this Court in favor of the rules"), or constitutional provision, *see State ex rel. Anaya v. McBride*, 88 N.M. 244, 247, 539 P.2d 1006, 1009 (1975) ("any legislative measure which affects pleading, practice or procedure in relation to a power expressly vested by the Constitution in the judiciary, such as quo warranto, cannot be deemed binding"), or if the provision impairs the essential functions of the Court. *See State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957) ("The statutory regulation must preserve to the court sufficient power to protect itself from indignities and to enable it effectively to administer its judicial functions.").

{6} The facts and analysis of *Ammerman* illustrate that its holding was in fact narrow. In that case, the plaintiffs sued the defendants for alleged slanderous radio broadcasts, news reports and newscasts. *Id.* at 308, 551 P.2d at 1355. The defendants appealed an order of the district court requiring them to disclose their confidential informants, arguing that the information was privileged under the provisions of NMSA 1953, Section 20-1-12.1 (Supp. 1975) (now codified at NMSA 1978, § 38-6-7 (1973)). *Id.* After concluding that the legislation at issue created a procedural evidentiary privilege, this Court focused on whether the Legislature had authority to enact such a procedural rule. We began our analysis in *Ammerman* by revisiting one of our earliest opinions on the subject, *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936):

> It is true that this court in [*Roy*] declined to hold that its power and right to promulgate rules of pleading, practice and procedure is an exclusive one over which the Legislature has no control. It was observed that at the time there was no conflict between any rule promulgated by the court and any law enacted by the Legislature, and that when such a conflict arose it would then be time to decide which is paramount in the rule-making field, the court or the Legislature.

Ammerman, 89 N.M. at 311, 551 P.2d at 1358.

{7} We next looked to the discussion in *McBride* regarding this Court's exclusive power to enact procedural rules. In *McBride*, we held that statutes purporting to regulate practice and procedure are not binding because the courts have the exclusive constitutional power to regulate practice and procedure:

> Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in this court.

Ammerman, 89 N.M. at 311, 551 P.2d at 1358 (quoting *McBride*, 88 N.M. at 246, 539 P.2d at 1008). As in *McBride*, we were once again confronted in *Ammerman* with a conflict between a statute and a rule of the New Mexico Supreme Court. In *Ammerman*, the conflict was between Section 20-1-12.1 (confidential source privilege) and Rule 11-501 NMRA 2005, which provides:

> Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:
>
> A. refuse to be a witness; or
>
> B. refuse to disclose any matter; or
>
> C. refuse to produce any object or writing; or
>
> D. prevent another from being a witness or disclosing any matter or producing any object or writing.

The conflict existed because this Court had not adopted a confidential source privilege.[1] Because Rule 11-501 only recognized constitutional privileges or privileges adopted by court rule, we concluded that the statutory confidential source privilege should not be given effect. *Ammerman*, 89 N.M. at 312, 551 P.2d at 1359.

{8} Following *Ammerman*, we continued to adhere to the general principle embodied in Rule 11-501 that a privilege must be required or recognized by a court rule or the New Mexico Constitution. *See State ex. Rel. Attorney General v. First Judicial District Court*, 96 N.M. 254, 629 P.2d 330 (1981). In *First Judicial District*, we rejected the "public interest" privilege asserted by the Attorney General after concluding that the privilege was neither expressly or implicitly recognized by our Constitution nor adopted by court rule, as required by Rule 11-501. 96 N.M. at 259–260, 629 P.2d at 335–36. Unlike in *Ammerman*, we were not required to analyze the Legislature's authority to enact a procedural rule

[1] In 1982, the New Mexico Supreme Court adopted Rule 11-514 NMRA, the "News media-confidential source or information privilege."

because there was no statutory privilege at issue. Rather, we simply applied the framework provided in Rule 11-501 to determine whether such a privilege already existed. *Id.* at 259–260, 629 P.2d at 335–336.

{9} Neither *Ammerman* nor *First Judicial District* categorically prohibited the Legislature from enacting legislation affecting practice or procedure.[2] *See Ammerman*, 89 N.M. at 312, 551 P.2d at 1359. In fact, as *First Judicial District* recognized, some of our rules acknowledge that the Legislature may enact statutes granting a privilege. *See First Judicial District*, 96 N.M. at 259, 629 P.2d at 335 (discussing Rule 11-502 NMRA of the Rules of Evidence entitled "Required reports privileged by statute"). The same is true of other rules adopted by this Court regarding practice and procedure. *See* Rule 11-402 NMRA 2005 ("All relevant evidence is admissible, except as otherwise provided by constitution, *by statute*, by these rules. . . .") (emphasis added); Rule 5-102 NMRA 2005 ("Local rules and forms shall not conflict with, duplicate or paraphrase statewide rules *or statutes*.") (emphasis added).

{10} In *Ammerman*, we did not discuss what the result would have been had there been a court rule recognizing or requiring a confidential source privilege. Would the legislatively enacted confidential source privilege have been void altogether, or would it have been appropriate to first determine whether the legislatively enacted privilege conflicted with the purpose of this Court's rule recognizing a confidential source privilege? *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978), provides a useful analysis in answering this question. In *Herrera*, the defendant appealed, among other things, his conviction of criminal sexual penetration, arguing in relevant part that the statutory limitation on discovery and cross-examination concerning the victim's past sexual conduct was unconstitutional because the Legislature did not have authority to regulate practice and procedure. *Id.* at 10, 582 P.2d at 387. The Court of Appeals, relying on *Ammerman*, concluded that the legislation at issue did in fact regulate procedural matters within the control of the Supreme Court. *Id.* at 12, 582 P.2d at 389. However, the Court of Appeals noted this conclusion did not end the inquiry:

> The fact that the Legislature has attempted to regulate practice and procedure in regard to the victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. See N.M. Const., Art. III, § 1. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973) *states: "This court has no quarrel with the statutory arrangements which seem reasonable and workable and has not seen fit to change it by rule." While a statute regulating practice and procedure is not binding on the Supreme Court, it nevertheless is given effect until there is a conflict between the statute and a rule adopted by the Supreme Court. See Ammerman v. Hubbard Broadcasting, Inc.*, [89 N.M. 307, 551 P.2d 1354]; *State ex rel. Anaya v. McBride* [88 N.M. 244, 539 P.2d 1006].

Id.

{11} Reading *Ammerman*, *Herrera* and *First Judicial District* together provides the framework for analyzing when we might give effect to legislation affecting practice and procedure, and specifically in this case to an evidentiary privilege. First, if a privilege is not recognized or required by the New Mexico Constitution or court rule, then the Legislature may not enact such a privilege because to do so would conflict with Rule 11-501. Second, if a privilege is recognized or required by the Constitution or court rule, and the Legislature enacts a privilege affecting arguably the same subject matter, we analyze the statutory privilege to determine whether it is consistent with the purpose of the constitutional or court rule privilege. If the statutory privilege is consistent, both are given

[2] Although here we refer broadly to legislation affecting practice or procedure, in *Ammerman* we explained that rules of privilege are to be considered rules of evidence, and rules of evidence are procedural. 89 N.M. at 309–310, 551 P.2d at 1356–1357.

effect because the court rule recognizing a privilege is more specific than Rule 11-501 and the court rule is expanded only within the boundaries of its purpose. If the statutory privilege is not consistent, the statutory privilege is not given effect and the constitutional or court rule privilege prevails.[3]

{12} The legislation at issue in *Herrera* is illustrative of this approach. NMSA 1953, Section 40A-9-26 (2d Repl. Vol. 6, Supp. 1975), enacted in 1975, permitted evidence of the victim's past sexual conduct only to the extent the court found that such evidence was material to the case and its prejudicial nature did not outweigh its probative value. The Court in *Herrera* noted that Rule 11-403 NMRA, adopted by the Supreme Court in 1973, provided that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Herrera*, 92 N.M. at 12, 582 P.2d at 389 (quoting Rule 11-403). Analyzing the two provisions, the court rightfully concluded that the balancing approach for admitting evidence concerning past sexual conduct under Section 40A-9-26 did not conflict with, but rather was consistent with, Rule 11-403. *Id.* Accordingly, Section 40A-9-26 was given effect.

{13} The question in this case is whether the Confidentiality Act conflicts with, or rather is consistent with, rules promulgated by this Court. We conclude that the Confidentiality Act is consistent with the psychotherapist-patient privilege in Rule 11-504 and it is to be given effect. The purpose of the psychotherapist-patient privilege is to protect confidential communications made during treatment of a patient's mental or emotional condition from disclosure during court proceedings. Rule 11-504(B) provides:

> General Rule of Privilege. *A patient has a privilege to refuse to disclose* and to prevent any other person from disclosing *confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition*, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(Emphasis added.)

{14} A review of the Confidentiality Act reveals a similar purpose of protecting confidential communications made during the treatment of an emotional condition from disclosure. NMSA 1978, Section 31-25-3(A) (1987) provides:

> A victim, *a victim counselor* without the consent of the victim or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party *shall not be compelled to provide testimony or to produce records concerning confidential communications* for any purpose in any criminal action or other judicial, legislative or administrative proceeding.

(Emphasis added.) A "confidential communication" is defined in NMSA 1978, Section 31-25-2(A) (1987), as a communication "disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence." The parallels between the purposes for the judicial and statutory privileges is clear.

{15} The judicial psychotherapist-patient privilege and the statutory victim-counselor privilege are also justified by similar private and public concerns. *See Jaffee v. Redmond*, 518 U.S. 1, 10-12 (1996). The psychotherapist-patient privilege serves private interests by protecting confidential communications between a psychotherapist and her patient from involuntary disclosure,

[3] We believe the Legislature recognizes this coordinate approach to rule-making, while acknowledging the ultimate authority of the judicial branch to determine whether to give effect to a statutory privilege. Here, for instance, the Legislature provided that "[t]he supreme court may adopt rules of procedure and evidence to govern and implement the provisions of the Victim Counselor Confidentiality Act." NMSA 1978, § 31-25-6 (1987).

and serves the public interest by facilitating the administration of appropriate treatment for individuals suffering the effects of a mental or emotional problem and individuals suffering as a result of sexual assault or abuse. *Id.* at 11. Like the husband-wife privilege, Rule 11-505 NMRA 2005, and the attorney-client privilege, Rule 11-503 NMRA 2005, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Id.* at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1990)). Effective psychotherapy depends upon the existence of uninhibited communications. *Id.* The patient or individual must be "willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* Thus, when the psychotherapist-patient privilege was first recognized by the United States Supreme Court in *Jaffee*, the Court noted the Judicial Conference Advisory Committee's following observations:

> [A] psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment."

Id. (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (internal authority omitted)).

{16} New Mexico courts have recognized the private and public importance of a psychotherapist-patient privilege and acknowledged the rationale set forth in *Jaffee*. *See Lara v. City of Albuquerque*, 1999-NMCA-012, ¶ 12, 126 N.M. 455, 971 P.2d 846 (acknowledging the public and private interests furthered by the psychotherapist-patient privilege); *Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 22, 127 N.M. 446, 982 P.2d 497 ("keeping [Defendant's] communications with his psychotherapist confidential not only furthers the privilege's policy of patient autonomy and privacy but Defendant's own privacy interests"); *In re Doe*, 98 N.M. 442, 447, 649 P.2d 510, 515 (Ct. App. 1982), *overruled on other grounds by State v. Roper*, 1996-NMCA-073, ¶ 12, 122 N.M. 126, 921 P.2d 322. The New Mexico Court of Appeals has commented on the "fear of betrayal" that exists when an individual is contemplating whether to consult a psychotherapist. *In re Doe*, 98 N.M. at 447, 649 P.2d at 515. In addition, the sensitive nature of the problems for which individuals consult psychotherapists can lead to stigma if disclosed. *Jaffee*, 518 U.S. at 10. Without the psychotherapist-patient privilege, many individuals would likely be reluctant to seek treatment.

{17} The rationales underlying the statutory victim-counselor privilege echo those underlying the psychotherapist-patient privilege. Rape crisis centers provide specialized services within the realm of psychotherapy. As stated by the Legislature in the Confidentiality Act, these centers have "as one of [their] primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence." NMSA 1978, § 31-25-2(D) (1987). The ARCC serves as a unique and essential place of refuge for a rape victim. In order to preserve ARCC's existence as a place of refuge, confidential communications during the treatment of emotional conditions are as important as confidential communications made to licensed psychologists or their staff. It would make little sense for victims of rape to be deprived of the privilege because they seek help from victim counselors at a rape crisis center, while victims with the resources to seek help from a licensed psychologist would benefit from the privilege. The goals of protecting and treating survivors of sexual assault and abuse depend upon rape crisis center counselors being able to provide adequate and reliable assurances regarding confidentiality. In order to ensure their private interests are served, victims of alleged sexual assault and abuse must have complete confidence that their intensely personal communications will not be revealed. It is unlikely that they will continue to turn to ARCC if they are not assured that their disclosures will remain confidential.

Confidential support services also significantly advance the public interest by encouraging survivors to report crimes and aid police in preventing future crimes. In large part because of the similarities between these rationales and those that justify the psychotherapist-patient privilege, we conclude that the Confidentiality Act is consistent with our psychotherapist-patient privilege.

{18} We are mindful that adopting evidentiary privileges may increase the risk of interfering with the truth-seeking process of litigation. After noting "the ancient proposition of law" that "the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege" (citing to *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (quoted authority omitted)), Chief Justice Burger stated for a unanimous court in *United States v. Nixon*, 408 U.S. 665 (1974):

> The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

Nixon, 418 U.S. at 709-10.

{19} We must always be vigilant in our concern for the constitutional rights of all litigants. The constitutional protections which may be impacted by exclusionary rules of evidence include the right of an accused to be confronted with witnesses against him and to have compulsory process for obtaining witnesses in his favor, U.S. Const. amend. VI; N.M. Const. art. 2, Section 14; and the guarantee that no person shall be deprived of liberty without due process of law, U.S. Const. amends. V, XIV; N.M. Const. art. 2, Section 18. These important constitutional provisions serve as some of the reasons we have established an elaborate committee process for recommending rules changes to this Court. We believe the extent of the privilege discussed in this opinion was not lightly created nor expansively construed. Nevertheless, we refer this matter to our Rules of Evidence Committee for review and recommendation to assure comprehensive discussion and public input regarding the breadth of the victim-counselor privilege in this opinion.

{20} Finally, we hold that applying the Confidentiality Act to this case does not conflict with Article IV, Section 34 of our state constitution, which provides "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." While a plain reading of this provision prohibits the retroactive application of procedural or evidentiary statutes, by court order in 1942 we applied Article IV, Section 34 to court rules as well. *See Marquez v. Wylie*, 78 N.M. 544, 546, 434 P.2d 69, 71 (1967) (quoting the order, which stated "[i]t is the sense of the court and accordingly hereby ordered that article IV, § 34, of the New Mexico Constitution shall govern in determining the effective date of the operation of all rules adopted by this court *as though the said rules had been enacted by the legislature*") (emphasis in original). The Confidentiality Act became effective in 1987. Because we are construing a statute that pre-existed the filing of the case at bar, this is not a case in which the rules of the game were changed without the parties being notified. *See Smith*, 107 N.M. at 201, 755 P.2d at 45 (holding that because NMSA 1978, Section 41-9-5 (Repl. Pamp. 1986), pre-existed the litigation in that case, the confidentiality provisions of the statute did not violate Article IV, Section 34).

CONCLUSION

{21} The non-disclosure provisions of the Confidentiality Act are consistent with Rule 11-504

and are to be given effect. We therefore reverse the district court and remand for a determination of whether the communications from the alleged victim to the counselors were made "in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault." This issue may be uncontested or the trial court may very well have to conduct an *in camera* interview or review of documents to make this determination. We leave this matter to the sound discretion of the trial judge.

{22} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Chief Justice (dissenting)

BOSSON,
Chief Justice (dissenting).

{23} With reluctance, I respectfully dissent. In my mind, the majority opinion is wrong on the law, wrong on policy, and grossly unfair to this criminal Defendant.

{24} For thirty years now, since *State ex rel. Anaya v. McBride*, 88 N.M. 244, 539 P.2d 1006 (1975), and *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied*, 436 U.S. 906 (1978), it has been settled law that this Court, and only this Court, may create a testimonial privilege. Unless authorized by the Constitution, the Legislature may not decide who may give testimony in a court of law. The decision to create a testimonial privilege remains a core function of the judiciary as a separate and equal branch of government. *See Ammerman*, 89 N.M. at 312, 551 P.2d at 1359.

{25} In no uncertain terms, this Court adopted a controlling rule, Rule 11-501 NMRA 2005, which provides: "Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to . . . refuse to be a witness." The language is straightforward. It does not say, "Except as the legislature may otherwise provide. . . ." And it does not say, "Except as the legislature may provide, assuming we agree with what the legislature has done. . . ." It says, "no person" can refuse to give testimony unless excused by the Constitution or this Court.

{26} For thirty years, we have said the same thing in our case law. In *Ammerman*, 89 N.M. at 312, 551 P.2d at 1359, we found a legislatively created privilege to be an unconstitutional incursion upon the doctrine of separation of powers. Our holding was unequivocal:

> In view of our clear and unambiguous assertion in Rule 501 that no person has a privilege, except as provided by constitution or rule of this court—and no rule of this court grants a privilege to a journalist or newscaster—and in view of our equally plain and unambiguous assertion in our opinion in *State ex rel. Anaya v. McBride*, supra, that under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested *exclusively* in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding, we are able to reach no conclusion other than that the privilege purportedly created by [the Legislature] is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings.

Id. (emphasis added).

{27} I note the use of the word "exclusively." The constitutional power to prescribe a

testimonial privilege is vested "exclusively" in the courts. That means the power cannot simultaneously lie here and somewhere else, like the Legislature. When the majority states that *Ammerman* does not "categorically prohibit[] the Legislature from enacting legislation affecting practice or procedure," *see* Maj. Op. ¶ 9, I do not understand the reasoning. To the contrary, we said exactly that in *Ammerman*, 89 N.M. at 312, 551 P.2d at 1359, we categorically prohibited the creation of testimonial privileges in our courts by legislation. We overturned the Legislature's privilege, not because we disagreed with it or found it inconsistent, but because the legislature was overstepping its constitutional boundaries and intruding into an area in which power was vested "exclusively" in this Court. *Id.* In fact, we later adopted a news media-confidential source privilege similar to what we declared unconstitutional in *Ammerman*. *See* Rule 11-514 NMRA 2005. Our dispute with the Legislature in *Ammerman* was not about substance, it was very much about procedure and constitutional prerogative. With respect, I am compelled to conclude that the majority's statement about *Ammerman* is mistaken.

{28} We said much the same thing in *State ex rel. Attorney General v. First Judicial District Court*, 96 N.M. 254, 260, 629 P.2d 330, 336 (1981), in which we noted how different New Mexico's Rule 12-501 is from the more permissive federal rule. We concluded that, unlike practice elsewhere, New Mexico does not recognize those privileges rooted in the common law, unless required by the Constitution or provided in rules adopted by this Court. *Id.* This Court has never retracted either the language or the holdings of these two opinions, *Ammerman* and *First Judicial District*. We have been consistent in our solicitude regarding testimonial privilege.

{29} In other areas, we have not been so consistent. Accurately, the majority points out that at certain prescribed junctures our rules do permit a legislative voice in what might be called practice and procedure. In Rule 11-402 NMRA 2005, for example, we declared all relevant evidence is admissible, except as otherwise provided by constitution, by rule, or "by statute." In Rule 11-502 NMRA 2005, we recognized that when the Legislature requires a person to file a return or report, it may condition that requirement with a guarantee of confidentiality, even to the point of creating a limited testimonial privilege with respect to the contents of that report. Rule 11-502 is a good example of what we meant in *Ammerman*, and what we said in Rule 11-501, that no person has a privilege to refuse testimony "except as provided in these rules or in other rules adopted by the supreme court." We so "provided" in Rule 11-502.

{30} Unlike the privilege for statutory reports, however, this Court has never "provided" for a rape counselor privilege, nor has it ever "provided" for a statutory role in the creation of such a privilege. The case before us is not based on Rule 11-402; it is not based on Rule 11-502. It is not based on any other rule in which we have permitted the Legislature to act. It is based, instead, upon Rule 11-501, in which we have said unequivocally that the Legislature does *not* have authority to act.

{31} The majority relies heavily upon the Court of Appeals' opinion in *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978), but for reasons I cannot fathom. As is stated, the majority reads *Ammerman*, *Herrera*, and *First Judicial District* together to provide a new framework of analysis. Maj. Op. ¶ 11. Yet unlike *Ammerman* and *First Judicial District*, *Herrera* was not a testimonial privilege case. It involved nothing more than a statutorily created definition of relevant evidence, declaring a rape victim's sexual history inadmissible under certain circumstances. *Herrera*, 92 N.M. at 7, 582P.2d at 384. All the Legislature did with the statute at issue in *Herrera* was what we expressly allow it to do in Rule 11-402, and the statute was crafted so as to balance prejudice and probative value exactly as we direct in Rule 11-403 NMRA 2005. As an opinion of the Court of Appeals, *Herrera* made no pretense of modifying or limiting *Ammerman* and *First Judicial District*, opinions of this Court. In my mind, *Herrera* simply will not bear the weight the majority places upon it.

{32} As a matter of judicial policy it is, I suppose, a fair question whether we should change our precedent, overrule *Ammerman*, and enable the Legislature to create testimonial privileges by statute. Perhaps the better policy is that we should take a wait-and-see approach to legislation, as the majority suggests, leaving room for the Legislature to act unless we say it cannot. It may be, as some have suggested, that our policy has been too rigid, too confrontational. *See* Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. Rev. 407, 462–67 (1985).

{33} If we did decide to enable the Legislature to create testimonial privileges, there are several legitimate approaches we could take to do so. We could begin by amending Rule 11-501. A simple stroke of the pen would add "except as provided by statute" to the exceptions to the general rule prohibiting a person from refusing to be a witness. Or, we could codify a rape counselor privilege in our rules, much as this Court did in the aftermath of *Ammerman* with respect to the news media-confidential source privilege. The majority does neither, however, and concludes instead that its reasoning is somehow consistent with Rule 11-501 without the need for a new rule. I do not follow. If we do not amend Rule 11-501, or come up with a new rule, then we must change how we have interpreted Rule 11-501, and that means we must overrule *Ammerman*. Again, the majority declines, reasoning that its opinion is somehow consistent with *Ammerman*. Again, I do not follow.

{34} I believe there is something important in *Ammerman* that we should not disturb so easily. The decision to allow someone not to give testimony, and the balancing of policy considerations implicit in such a decision, goes to the heart of judicial authority. Courts are all about seeking the truth, and towards that end everyone, rich and poor, the most powerful and the most humble, can be compelled to give testimony. If we do not have exclusive control over our own courts and that truth-seeking process, then by what right can we claim to be an equal and independent branch of government?

{35} In my experience bright line rules can sometimes be helpful. Litigants know well in advance that privileges are the exclusive province of this Court. Judge Blackmer below knew it, as did the attorneys from both sides, none of whom argued for the position taken by this opinion. Bright line rules can also be helpful to the Legislature. A bright line rule can explain why legislative action is inappropriate. Sometimes it helps for a co-equal branch of government to clearly understand its limitations. The permissive rule presently envisioned by the majority provides no such protection for the judiciary. It simply provides an invitation to act; the Legislature loses nothing by enacting a privilege because we may eventually agree. And the Legislature will certainly advise us that it acts as always with a presumption of constitutionality.

{36} My troubles with the majority opinion do not end with its treatment of *Ammerman* and Rule 11-501. Even if *Ammerman* is no longer good law and our prior views about Rule 11-501 are inoperative, that does not end the inquiry. Assuming we adopt the majority's new reasoning about a shared role between the Legislature and this Court, that does not explain how the rape counselor privilege, never recognized by this Court before today, can apply to this particular Defendant in this particular prosecution. *See* N.M. Const. art. IV, § 34 ("No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.").

{37} Ironically, I might well favor the rape counselor privilege on its merits. But Judge Blackmer had it quite right when he said that such a decision would create a new rule with respect to this criminal prosecution, which neither this Court nor the Legislature can do consistent with our state Constitution. This particular Defendant has a right to be tried under the rules as they existed at the time of his arrest and prosecution. At that time there was no constitutional rule of privilege applicable to rape counselors

because we had not provided for one in our rules, and until today we had not provided for one in our case law. To now suggest, as the majority does, that the statutory privilege was valid and effective when enacted, despite the clear injunction of *Ammerman*, because we now say it is not inconsistent with a totally different judicially created privilege for psychotherapists, seems all too concerned about result and not sufficiently concerned about how we get there.

{38} The correct answer to the Article IV, Section 34, dilemma should be to give effect to the new rape counselor privilege when this Court recognizes it as such, and decides that the statutory privilege is consistent with our own rules of privilege. That is how I understand the majority to argue that the judiciary retains its constitutional authority and control over rules of privilege: that we decide what is consistent or inconsistent with our own rules. But if the statutory privilege is not valid until we recognize it to be so, then it cannot apply retroactively to this Defendant's criminal case. If, on the other hand, we are saying that the privilege was actually in effect and valid when enacted years ago by the Legislature, without any imprimatur from this Court, then we will have surrendered any pretense of control over testimonial privileges and the rules of practice and procedure that govern judicial proceedings.

{39} With great reluctance, the foregoing concerns impel me to register my dissent from the opinion of the majority.

RICHARD C. BOSSON,
Chief Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMSC-003

Filing Date: December 16, 2005

Docket No. 28,525

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

TREMAINE JERNIGAN,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
James W. Counts, District Judge

John Bigelow, Chief Public Defender
William A. O'Connell, Assistant Appellate Defender
Santa Fe, NM

for Petitioner

Patricia A. Madrid, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, NM

for Respondent

Freedman Boyd Daniels Hollander & Goldberg P.A.
Zachary A. Ives
Albuquerque, NM

Amicus Curiae, New Mexico Criminal Defense Lawyers Association

OPINION

CHÁVEZ, Justice.

{1} Defendant was convicted of second-degree murder for the killing of Jerome Scott, attempted second-degree murder for the shooting of Chris Washington, and tampering with evidence. For these convictions, Defendant was sentenced to twenty-eight years in prison. His basic sentence of nineteen years and six months was enhanced by six years and six months based on the trial court's finding of aggravating circumstances.[1] Defendant contends that his convictions for both second-degree murder and attempted second-degree murder should be reversed because the trial court erred in refusing to instruct the jury on defense of another. As an additional ground for reversing his conviction for attempted second-degree murder, Defendant contends the trial court erred in refusing to instruct the jury on attempted voluntary manslaughter. Finally, Defendant contends that it was unconstitutional for the trial judge to enhance his sentence by finding aggravating circumstances based on facts not found by the jury. The Court of Appeals affirmed Defendant's convictions and sentencing. We granted Defendant's Petition for Certiorari.

{2} We hold that the evidence presented did not support Defendant's theories of defense of another for the shooting of Washington or the killing of Scott. As a matter of first impression, we hold that under limited circumstances attempted voluntary manslaughter is a crime in New Mexico. Because Defendant presented evidence of sufficient provocation for the shooting of Washington, and the jury was instructed on attempted second-degree murder with lack of sufficient provocation as an element, the district court should have instructed the jury on attempted voluntary manslaughter. Having refused the tendered attempted voluntary manslaughter instruction, we reverse Defendant's conviction

[1] The jury also found, beyond a reasonable doubt, that Defendant used a firearm in committing the second-degree murder against Scott and the attempted second-degree murder against Washington. *See* UJI 14-6013 NMRA. Each firearm enhancement carries a sentence increase of one year. NMSA 1978, § 31-18-16 (A) (1993).

for attempted second-degree murder and remand for a new trial. Finally, we hold that it was constitutional for the trial court to enhance Defendant's sentence based on aggravating circumstances found by the court and not a jury based on this Court's recent opinion in *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754.

I. DEFENSE OF ANOTHER JURY INSTRUCTION

{3} Defendant argues the trial court erred in refusing to instruct the jury on defense of another for the shooting of Washington and killing of Scott. An instruction on defense of another should be given if "the evidence is sufficient to allow reasonable minds to differ as to all elements of the defense." *State v. Lopez*, 2000-NMSC-003, ¶ 23, 128 N.M. 410, 993 P.2d 727 (internal citation omitted); *see also State v. Coffin*, 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477 (stating that the possible existence of such a reasonable belief is why we recognize self-defense as a complete justification to homicide). Failure to instruct a jury on a defendant's theory of the case is reversible error. *State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69.

{4} To receive the defense of another instructions for the shooting of Washington and killing of Scott, Defendant would have had to present sufficient evidence there was an appearance that Jessica Runningwater ("Jessica") was in immediate danger of death or great bodily harm from Washington or Scott, and that Defendant's actions would have prevented such harm. *See* UJI 14-5184 NMRA. Defendant failed to present such evidence as to either the shooting of Washington or the killing of Scott.

{5} Defendant testified that on the night of the shooting, Washington came looking for Washington's girlfriend, Jessica, at the trailer where Defendant was partying with Jessica and others. Defendant testified that he was outside the trailer urinating when Washington and his friends arrived and entered the trailer. After hearing screams coming from inside the trailer, Defendant testified he reentered the trailer and saw "Washington . . . standing over [Jessica] hitting her in the head." Defendant testified he grabbed Washington by the arm and told him to stop beating Jessica, and that Washington ordered Jessica outside. Once outside, Defendant testified he saw Washington grab Jessica by the hair, hit her in the head again and then chase Jessica around the vehicles parked in front of the trailer. According to Defendant, because Jessica was screaming for his help, he told Washington, "you want to hit on the woman, hit on me." Defendant testified he then pushed Washington, who fell back away from him. After falling back, Defendant testified Washington came toward him "coming out of his waistline area" as though he were pulling a pistol. Defendant testified, "At first when we were all out there arguing, I thought it was just going to be a little scrap or scuffle . . . and that was it. But when I seen him go for the gun, I was scared." Defendant also testified, "In my mind, when I seen his hand go for his crotch area, I thought he had a pistol. That's the only reason I shot at him." Although the evidence shows Jessica was clearly at risk of some injury, it does not support the view that Defendant believed Jessica was in imminent danger of death or great bodily harm so as to warrant a defense of another instruction for the shooting of Washington.

{6} Even less testimony was offered by Defendant to support an instruction for defense of another for the killing of Scott. Defendant testified that "[Scott] wasn't the violent one. . . . Only reason I shot [Scott] is because he went to the car and he was coming back and . . . he looked like he had . . . a gun in his hand." This evidence does not support an instruction for defense of another for the killing of Scott, as it does not support any appearance of imminent death or great bodily harm to Jessica.[2]

{7} Viewing the evidence in the light most favorable to giving the requested instruction, *see State v. Hill*, 2001-NMCA-094, ¶ 5, 131 N.M. 195, 34 P.3d 139, we hold Defendant did not

[2] On the other hand, both this evidence and that relating to the shooting of Washington do support a self-defense instruction, which the court gave at the request of Defendant.

present sufficient evidence to allow reasonable minds to differ as to all elements of the defense of another. We affirm the trial court's decision not to instruct the jury on defense of another.

II. ATTEMPTED VOLUNTARY MANSLAUGHTER JURY INSTRUCTION

{8} Defendant was charged with attempt to commit murder against Washington. While the parties and the court were settling jury instructions, Defendant's attorney tendered an instruction entitled "attempt to commit the crime of manslaughter." However, the tendered instruction included only the elements for an "attempt to commit a felony" instruction. *See* UJI 14-2801 NMRA (requiring the State to prove beyond a reasonable doubt that: (1) the defendant intended to commit the crime; (2) the defendant began to do an act which constituted a substantial part of the crime but failed to commit the crime; and (3) the attempt took place on a certain date). Defendant argued below, and now argues on appeal, that because the court was going to instruct the jury on attempted second-degree murder, there was evidence of sufficient provocation to entitle him to an instruction on "attempted manslaughter."

A. DEFENDANT ADEQUATELY PRESERVED THE ISSUE FOR REVIEW

{9} The State's primary argument is that Defendant failed to properly preserve this issue for review because his tendered instruction was an incorrect statement of the law. The instruction tendered by the Defendant was for "attempt to commit the crime of manslaughter." Thus, the State contends that since "attempted manslaughter" is not a crime in New Mexico, the tendered instruction was an incorrect statement of the law. Defendant claims that it was clear from the discussions that the attorneys and the judge knew he was asking for an "attempted voluntary manslaughter" instruction. The State points out that Defendant also did not tender an instruction defining the elements of attempted voluntary manslaughter. The trial court indicated that aggravated battery was the appropriate instruction and refused the tendered instruction.

{10} Generally, to preserve error on a trial court's refusal to give a tendered instruction, the Appellant must tender a legally correct statement of the law. *State v. Foster*, 1999-NMSC-007, ¶ 54, 126 N.M. 646, 974 P.2d 140. However, if the record reflects that the judge clearly understood the type of instruction the Defendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review. *Hill*, 2001-NMCA-094, ¶ 7. The rationale for allowing such flexibility regarding preservation is reinforced by the actual purpose of Rule 5-608 (D) NMRA,[3] which is to alert the trial court to the defendant's argument. *See Hill*, 2001-NMCA-094, ¶ 7.

{11} The record in this case demonstrates that the judge understood Defendant was asking for an "attempted voluntary manslaughter" instruction. *See id*. The following discussion took place with respect to Defendant's requested instruction number 10, "attempt to commit the crime of manslaughter":

> Ms. Stevens (State's Attorney): I would strongly object to that. Manslaughter is simply – it's second-degree murder reduced because of provocation. There wouldn't be an attempted manslaughter. Would be an aggravated battery. Which is that he knew his acts created a strong probability of great bodily harm. That's aggravated battery.
>
> Mr. Mitchell (Defendant's Attorney): And I think in that instance manslaughter applies. And besides this is a case regarding provocation.
>
> Ms. Stevens: If you read the elements of manslaughter, though, there's no way to

[3] Rule 5-608 (D) reads "[F]or the preservation of error in the charge . . . a correct written instruction must be tendered before the jury is instructed."

> commit attempted manslaughter. Without it simply being aggravated battery.
>
> The Court: [A]ggravated battery . . . most accurately covers that situation. Rather than attempt to commit manslaughter a more appropriate (inaudible) would be aggravated battery. Defense requested instruction number 10 will be refused.

Because voluntary manslaughter is second-degree murder committed with sufficient provocation, UJI 14-220 NMRA; *see also State v. Gaitan*, 2002-NMSC-007, ¶ 11, 131 N.M. 758, 42 P.3d 1207, Ms. Stevens' comment that "[m]anslaughter is simply – it's second-degree murder reduced because of provocation" demonstrates that the State understood the discussion was about voluntary manslaughter. Additionally, Defendant's attorney stated this was a case about provocation. Because the parties were discussing the tendered instruction in the context of the issue of provocation, it is clear the judge understood Defendant was asking for an instruction on "attempted voluntary manslaughter."

{12} The fact that Defendant tendered a separate instruction for "attempt to commit the crime of involuntary manslaughter" is further evidence that the court understood Defendant was also asking for an instruction on attempted voluntary manslaughter. New Mexico recognizes two types of manslaughter: voluntary and involuntary. NMSA 1978, § 30-2-3 (1994); *State v. Alvarado*, 1997-NMCA-027, ¶ 3, 123 N.M. 187, 936 P.2d 869. Because New Mexico only recognizes two types of manslaughter, and in light of the additional instruction for attempted involuntary manslaughter requested by the Defendant, it is only logical that the court and the parties understood that Defendant's requested instruction number 10, "attempt to commit the crime of manslaughter," was an instruction for attempted voluntary manslaughter. Defendant's tendered instruction was not refused because Defendant failed to include the word "voluntary," but rather because the trial court was persuaded that the appropriate step-down instruction from attempted second-degree murder was aggravated battery.

{13} The present case is analogous to *Hill*, in which the Court of Appeals held the defendant had preserved his argument for a self-defense instruction for appellate review. 2001-NMCA-094, ¶ 7. The defendant in *Hill*, who was convicted of battery on a police officer, requested a self-defense instruction that was refused by the trial court. *Id.* ¶ 1. On appeal, the State argued the defendant failed to preserve the issue for review because the instruction he tendered did not accurately state the law with respect to self-defense against a peace officer. *Id.* ¶ 6. The Court of Appeals acknowledged that the self-defense instruction was flawed on its face. *Id.* ¶ 7. However, the court was persuaded that the trial court understood the type of instruction the defendant wanted. Because the trial court understood what instruction the defendant sought, the Court of Appeals explained that the trial court should have modified the instruction to correctly state the law. *Id.*; *see Gallegos v. State*, 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992) (concluding that the purpose of the Rule 5-608 (D) language "is to allow the court an opportunity to decide a question whose dimensions are not open to conjecture or after-the-fact interpretation"). The Court of Appeals held that despite the fact the tendered self-defense instruction was flawed on its face, the defendant made a sufficient record to preserve review because the trial court understood what instruction the defendant sought and had the opportunity to modify the instruction to correctly state the law. *Hill*, 2001-NMCA-094, ¶ 7.

{14} We also reject the State's argument that Defendant did not preserve the issue when he failed to tender an instruction defining the elements of attempted voluntary manslaughter. It does not seem to us that the trial court was troubled by Defendant's failure to submit such an instruction. During discussions regarding Defendant's requested instruction number 9, "attempt to commit second-degree murder," in addition to objecting to the propriety of giving the instruction, the State pointed out that, as written, the instruction did not provide the elements of the crime. Once the trial court agreed to instruct the jury on attempted second-degree murder, the

court modified Defendant's instruction to include the elements for attempted second-degree murder. Had the trial court believed it was appropriate to instruct the jury on attempted voluntary manslaughter, we are convinced the trial court would have modified the instruction to correctly state the law, by including all of the essential elements for the crime.[4] *See* UJI 14-2801 NMRA.

{15} The record reflects the judge understood Defendant wanted an attempted voluntary manslaughter instruction and had an opportunity to modify the instruction to correctly state the law, but did not give the tendered instruction because he believed aggravated battery to be the correct step-down instruction. Therefore, we hold that Defendant properly preserved the issue for appeal.

B. ATTEMPTED VOLUNTARY MANSLAUGHTER MAY BE A CRIME IN NEW MEXICO

{16} Jurisdictions that have considered whether attempted voluntary manslaughter exists are split. 40 Am. Jur. 2d *Homicide*, § 48 (2004). Jurisdictions that recognize attempted voluntary manslaughter as a crime do so because if circumstances can mitigate an intentional killing, and reduce it from an intentional murder to voluntary manslaughter, it is logical to reduce an attempted intentional murder to attempted voluntary manslaughter when similar circumstances are present but the defendant fails to carry out his intent. *See People v. Van Ronk*, 217 Cal. Rptr. 581, 585 (Cal. Ct. App. 1985) ("There is nothing illogical or absurd in a finding that a person who unsuccessfully attempted to kill another did so with the intent to kill which was formed in the heat of passion or which arose out of an honest but unreasonable belief in the necessity of self-defense."); *see also State v. Norman*, 580 P.2d 237, 240 (Utah 1978) *overruled on other grounds by State v. Standiford*, 769 P.2d 254 (Utah 1988); *State v. Barnes*, 781 P.2d 69, 70 (Ariz. Ct. App. 1989); *State v. Rainey*, 574 S.E.2d 25, 30 (N.C. Ct. App. 2002); *Kauffman v. State*, 729 So. 2d 424, 425 (Fla. Dist. Ct. App. 1999); *Ex parte Buggs*, 644 S.W.2d 748, 750 (Tex. Crim. App. 1983) (en banc).

{17} Jurisdictions that refuse to recognize attempted voluntary manslaughter as a crime do so because they conclude it would be illogical to apply the crime of attempt, a specific intent crime, to the general intent crime of voluntary manslaughter. *See State v. Howard*, 405 A.2d 206, 212 (Me. 1979) ("The crime of manslaughter . . . is predicated upon a different mental state from that found in the attempt statute. . . . Because of the discrepancy in culpable mental states between criminal attempt on the one hand and manslaughter on the other, the proffered crime of 'attempted manslaughter' is a logical impossibility."); *see also People v. Brown*, 21 A.D.2d 738, 739 (N.Y. App. Div. 1964); *Westbrook v. State*, 722 So. 2d 788, 792 (Ala. Crim. App. 1998); *State v. Loa*, 926 P.2d 1258, 1273 (Haw. 1996); *People v. Martinez*, 611 N.E.2d 277, 278 (N.Y. 1993); *Curry v. State*, 792 P.2d 396, 397 (Nev. 1990); *People v. Stevenson*, 555 N.E.2d 1074, 1078 (Ill. App. Ct. 1990).

{18} Although we have implicitly recognized attempted voluntary manslaughter as a crime, we have never squarely held it exists in New Mexico. *See State v. Stampley*, 1999-NMSC-027, ¶ 48, 127 N.M. 426, 982 P.2d 477 (remanding for a new trial on the charge of attempted first-degree murder by deliberate killing, to include instructions on attempted second-degree murder by intentional killing and attempted voluntary manslaughter); *State v. Durante*, 104 N.M. 639, 643, 725 P.2d 839, 843 (Ct. App. 1986) (finding defendant was not entitled to attempted voluntary manslaughter instruction when defendant created the provocation that would reduce the crime from murder to manslaughter). As in other jurisdictions that have specifically considered whether attempted voluntary manslaughter is a crime, our holding today turns on whether voluntary manslaughter is a

[4] The use notes for the uniform jury instructions on attempt require a separate attempt instruction for each applicable felony. UJI 14-2801, use note 1. Each attempt instruction must be immediately followed by the essential elements of the felony, unless the elements are already listed in a separate instruction relating to the completed offense. *Id.*

specific intent or a general intent crime. We agree that it is illogical to apply attempt, a specific intent crime, to a general intent crime. *State v. Johnson*, 103 N.M. 364, 367–68, 707 P.2d 1174, 1177–78 (Ct. App. 1985). Generally speaking, voluntary manslaughter is a general intent crime. *See State v. Beach*, 102 N.M. 642, 645, 699 P.2d 115, 118 (1985) (holding, as a matter of statutory definition, that voluntary manslaughter does not contain an element of intent to do a further act or achieve a further consequence). However, voluntary manslaughter is second-degree murder committed with sufficient provocation. *See State v. Aragon*, 35 N.M. 198, 292 P. 225 (1930). While second-degree murder is commonly held to be a general intent crime in New Mexico, *see State v. Campos*, 1996-NMSC-043, ¶ 38, 122 N.M. 148, 921 P.2d 1266, second-degree murder has been held to be a specific intent crime under limited circumstances. *Johnson*, 103 N.M. at 370, 707 P.2d at 1180 (holding that where a defendant fire bombed a mobile home intending to kill someone inside, but knowing that his act created the requisite probability of death or great bodily harm with respect to unknown persons inside, defendant's act could constitute sufficient evidence to convict him of attempted second-degree murder as to the unknown persons). Thus, for the same reasons that in some limited circumstances second-degree murder can be a specific intent crime, *see id.*, under similar limited circumstances voluntary manslaughter may also be a specific intent crime if provocation is at issue. Under such limited circumstances, it is logical to offer an attempted voluntary manslaughter instruction where the court finds it appropriate to offer an attempted second-degree murder instruction and sufficient provocation is an issue.

{19} The trial court in this case, over the State's objection, instructed the jury on attempted second-degree murder. An appropriate instruction for attempted second-degree murder would consist of an instruction on attempt, UJI 14-2801 NMRA, immediately followed by the elements for second-degree murder, UJI 14-210 NMRA. *See* UJI 14-2801 NMRA note 1; *Johnson*, 103 N.M. at 370–71, 707 P.2d at 1180–81. This sequence for instructing the jury on attempted second-degree murder adequately instructs the jury on attempted second-degree murder as a specific intent crime. *Id.* at 371, 707 P.2d at 1181. Here, we are persuaded the trial court instructed the jury on attempted second-degree murder as a specific intent crime. Otherwise, it would have been error for the court to instruct the jury on attempted second-degree murder, *see id.*, and the appropriate step-down instruction from attempted first-degree murder would have been aggravated battery. *State v. Meadors*, 121 N.M. 38, 44, 908 P.2d 731, 737 (1995).

{20} We hold that under limited circumstances, where attempted second-degree murder is offered as a greater-included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter is a crime in New Mexico. Among the elements of the jury instruction for attempted second-degree murder was the requirement that the jury find "[t]he defendant did not act as a result of sufficient provocation." This language is included in a second-degree murder instruction *only* when provocation is an issue. UJI 14-210 NMRA, use note 1. When provocation is at issue, an instruction on voluntary manslaughter must be given. UJI 14-210 NMRA, use note 4. Therefore, the trial court should have instructed the jury on attempted voluntary manslaughter if it found evidence of sufficient provocation.

C. EVIDENCE OF SUFFICIENT PROVOCATION EXISTED TO SUPPORT AN ATTEMPTED VOLUNTARY MANSLAUGHTER INSTRUCTION

{21} We next determine whether there was evidence of sufficient provocation to support an attempted voluntary manslaughter instruction. Failure to instruct the jury on a lesser included offense of a charged offense is reversible error if: (1) the lesser offense is included in the greater, charged offense; (2) there is evidence tending to establish the lesser included offense and that evidence establishes that the lesser offense is the highest degree of crime committed; and (3) the defendant has tendered appropriate instructions

preserving the issue. *Hill*, 2001-NMCA-094, ¶ 16 (internal citation omitted).

{22} Just as voluntary manslaughter is a lesser included offense of second-degree murder, *see State v. Duarte*, 1996-NMCA-038, ¶ 1, 121 N.M. 553, 915 P.2d 309 (noting that while defendant was charged with second-degree murder, he was convicted of the lesser included offense of voluntary manslaughter), we recognize that attempted voluntary manslaughter is a lesser included offense of attempted second-degree murder where sufficient provocation is at issue in the trial. As to the third requirement, we stated above that the Defendant has preserved the issue for appeal. The second requirement is the only remaining issue, so our analysis is limited to whether evidence of sufficient provocation was presented at trial to support the attempted voluntary manslaughter instruction.

{23} With regard to the second requirement, we consider whether "there is a rational view of the evidence that would lead the jury to conclude beyond a reasonable doubt that Defendant committed the lesser included offense while still harboring a reasonable doubt that Defendant committed the charged offense." *See Hill*, 2004-NMCA-094, ¶ 17 (internal citation omitted). That Defendant here was convicted of attempted second-degree murder with regard to Washington is evidence that the jury rejected the State's argument that Defendant exhibited the requisite degree of intent necessary to convict him of attempted-first degree murder. Therefore, we need only consider whether there is evidence of sufficient provocation so that the jury could have concluded beyond a reasonable doubt that Defendant committed attempted voluntary manslaughter while still harboring a reasonable doubt that Defendant committed attempted second-degree murder.

{24} Sufficient provocation is defined as "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions." UJI 14-222 NMRA. "The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." *Id.* Evidence of provocation exists to support a voluntary manslaughter instruction where the defendant feared the victim was attempting to get a gun with which to shoot the defendant, and the defendant acted to prevent the victim from getting the gun. *See State v. Wright*, 38 N.M. 427, 429, 34 P.2d 870, 871 (1934). Similarly, such evidence should also support an attempted voluntary manslaughter instruction.

{25} In this case, Defendant's testimony that he was scared when he believed Washington was reaching for a gun provides evidence of sufficient provocation to support an attempted voluntary manslaughter instruction. *See State v. Abeyta*, 120 N.M. 233, 240, 901 P.2d 164, 171 (1995) ("It is not unreasonable that the accused should be found guilty of voluntary manslaughter where the plea of self-defense fails.") (internal citations omitted). Defendant's testimony could not have been clearer when he stated "[W]hen I seen him go for the gun, I was scared," and "[i]n my mind, when I seen his hand go for his crotch area, I thought he had a pistol. That's the only reason I shot at him." Defendant further stated, "Where I'm from, somebody coming out of that area [the waistline] . . . it's more than likely . . . that they are going to shoot you." We note also that the judge instructed the jury on voluntary manslaughter regarding the killing of Scott, presumably based on Defendant's testimony that he thought Scott had a gun. Viewing the evidence in the light most favorable to giving the requested instruction, *Hill*, 2001-NMCA-094, ¶ 5, we hold Defendant presented evidence of sufficient provocation to support an attempted voluntary manslaughter jury instruction. Accordingly, we reverse Defendant's conviction for attempted second-degree murder with regard to Count II, and remand to the trial court for a new trial on this count.

III. SECTION 31-18-15.1 IS CONSTITUTIONAL

{26} The jury convicted Defendant of three crimes: (1) second-degree murder, a second-degree felony, which carries a basic sentence of fifteen years imprisonment; (2) attempted

second-degree murder, a third-degree felony, which carries a basic sentence of three years imprisonment; and (3) tampering with evidence, a fourth-degree felony, which carries a basic sentence of eighteen months. NMSA 1978, § 31-18-15 (2003). After the trial, the State gave notice that it intended to seek enhanced sentences for each of the three counts against Defendant under NMSA 1978, § 31-18-15.1 (2003), based on several aggravating circumstances: (1) level of anger and ill will displayed toward the victims; (2) gang affiliation and criminal history from the age of 14; (3) avoiding prosecution by fleeing the jurisdiction, and using false aliases, birth dates and social security numbers; (4) inciting disorder and turmoil while incarcerated; and (5) showing no remorse. At the sentencing hearing, the State introduced testimony from Washington and two members of Scott's family, all of whom spoke of how the shooting impacted their lives, two Otero County Detention Center employees, who spoke of Defendant's noncompliant behavior while in detention, a detective from Las Vegas, Nevada who testified about Defendant's use of aliases, and a Los Angeles County detective, who testified about Defendant's criminal history from 1993 to 1998. Of these witnesses, only Washington had testified at trial.

{27} The judge enhanced Defendant's sentences beyond the basic sentences authorized in Section 31-18-15 after finding seven aggravating factors: (1) Defendant hunted the victims; (2) Defendant fired multiple gun shots toward the victims; (3) Defendant was acting as an enforcer for a drug dealer; (4) Defendant was the aggressor and had violence on his mind all day; (5) Defendant's actions showed extreme anger and ill will toward the victims; (6) Defendant avoided prosecution by using aliases and by fleeing the jurisdiction; and (7) Defendant has failed to accept responsibility for his own actions or show remorse. Defendant's sentence was increased by six and one-half years due to the finding of aggravating circumstances.

{28} At issue here is whether the sentence enhancements authorized by Section 31-18-15.1 are constitutional in light of the United States Supreme Court's recent holdings in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005). This Court recently held in *State v. Lopez*, 2005-NMSC-036, that Section 31-18-15.1 is constitutional. In doing so, we affirmed the Court of Appeals opinion in *State v. Wilson*, 2001-NMCA-032, 130 N.M. 319, 24 P.3d 351, which was relied on by the Court of Appeals in this case. Accordingly, we affirm the Court of Appeals on this issue.

CONCLUSION

{29} We hold Defendant did not present sufficient evidence to support a defense of another jury instruction for either the killing of Scott or the shooting of Washington. Therefore, we affirm Defendant's conviction for the second-degree murder of Scott. Defendant properly preserved the issue of whether he should have been given an attempted voluntary manslaughter instruction because the judge understood Defendant was asking for such an instruction, and the judge had an opportunity to modify the instruction to correctly state the law. Additionally, we hold that under limited circumstances, where attempted second-degree murder is offered as a greater-included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter may be a crime in New Mexico. Defendant presented evidence of sufficient provocation to support an attempted voluntary manslaughter jury instruction. Therefore, we reverse Defendant's conviction for attempted second-degree murder with regard to Count II, and remand to the trial court for a new trial on this count. Finally, Section 31-18-15.1 is constitutional.

{30} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PATRICIO M. SERNA,
Justice

PAMELA B. MINZNER,
Justice (concurring in part and dissenting in part)

PETRA JIMENEZ MAES,
Justice (concurring in part and dissenting in part)

MINZNER,
Justice (concurring in part and dissenting in part)

{31} I concur in part and dissent in part. I concur in affirming Defendant's conviction for second-degree murder. I respectfully dissent from the decision to reverse Defendant's conviction for attempted second-degree murder. I also concur in affirming the enhancement of Defendant's sentence pursuant to NMSA 1978, § 31-18-15.1 (1993). I would affirm both convictions from which Defendant has appealed, as well as the judgment and sentence. Because I concur in the analysis within Sections I and III of the Opinion, I will discuss only Section II.

{32} Although I agree with most of the analysis in Section II, I am not persuaded that Defendant was entitled to an instruction on attempted voluntary manslaughter. I would hold there was insufficient evidence of the extreme emotion, sufficient to cause a loss of self-control, on which UJI 14-222 NMRA 2006, defining provocation, instructs the jury. The Majority Opinion relies on the concept of imperfect self-defense, *see State v. Abeyta*, 120 N.M. 233, 901 P.2d 164 (1995), but the Opinion seems to overlook the uniform jury instruction requirement that the action to which a defendant was responding aroused an extreme emotion. The Opinion describes Defendant's testimony as very clear, *see* ¶ 25, but there is no hint within that testimony that Defendant's ability to reason was affected. Unlike the testimony in *State v. Wright*, 38 N.M. 427, 34 P.2d 870 (1934), to which the Majority Opinion refers in ¶ 24, there was no testimony that Defendant was afraid of the victim, that he was afraid of being shot, or that he was unable to reason as a result of his fear.

{33} The Majority Opinion suggests and perhaps actually holds that the same facts that give rise to an instruction on self-defense will give rise to an instruction on provocation. Yet the concepts are different. *See generally State v. Parish*, 118 N.M. 39, 46, 878 P.2d 988, 995 (1994) ("Either the Defendant is guilty of having been provoked into voluntary manslaughter or he is innocent because he killed in self-defense."). In *Parish*, this Court noted the potential for confusion, but we suggested that if juries are instructed that they must acquit if they are satisfied a defendant acted in self-defense, then jury confusion on the difference between the effect of finding provocation and the effect of finding self-defense can be avoided. *Id.* at 47, 878 P.2d at 996.

{34} The Majority Opinion leads me to the conclusion that, in addition to the kind of instruction *Parish* recommends, recognition of attempted voluntary manslaughter requires us to approve new jury instructions. If facts that support imperfect self-defense always justify an instruction on provocation, we at least need an instruction on provocation that fits the circumstances in which, based on evidence supporting an imperfect self-defense claim, the jury should receive a step-down instruction from attempted second-degree murder to attempted voluntary manslaughter. *See generally* Leo M. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M. L. Rev. 747, 756 (1982) (arguing that our uniform jury instructions permit us to distinguish proof of sufficient provocation "when it serves as a mitigating defense to murder").

{35} Professor Romero notes, as he begins the discussion of our cases, that "[t]he evidence of provocation and heat of passion sufficient to require or merit an instruction on voluntary manslaughter in New Mexico is not clear." *Id.* at 752. He argues that we ought to distinguish the standard for determining whether there is enough evidence to support a voluntary manslaughter conviction when charged or tried separately from

the standard for determining whether there is enough evidence to support giving an instruction on voluntary manslaughter as a lesser included instruction. *See id.* at 754–55. He also argues that constitutional due process actually requires recognizing the dual role of voluntary manslaughter, *id.* at 760, which is both a lesser included offense and a separate crime, "with additional and different elements from murder." *Id.* He concludes his article, however, with the following:

> Voluntary manslaughter could then operate as both a mitigating defense and a crime at the same time. The drafters of the Uniform Jury Instructions attempted such a compromise in the instructions on murder and voluntary manslaughter. Instructions, however, cannot change the statutory definition of voluntary manslaughter. The responsibility rests with the legislature. The homicide law in New Mexico should be revised to resolve the contradiction in the murder-manslaughter scheme.

Id. at 789.

{36} I am persuaded that we ought to recognize, as Professor Romero argues, the right to an instruction on voluntary manslaughter as a lesser included offense of second-degree murder in circumstances other than those in which the statutory definition of voluntary manslaughter has been satisfied. *See generally* NMSA 1978, § 30-2-3(A) (1994) (defining voluntary manslaughter as "manslaughter committed upon a sudden quarrel or in the heat of passion"). I also agree that we ought to recognize the existence of the crime of attempted voluntary manslaughter and concur in the analysis within Section II(B).

{37} I appreciate the careful way in which the Majority Opinion discusses the issue of preservation within Section II(A). Nevertheless, I am not persuaded that the issue on which the Majority Opinion reverses Defendant's conviction for attempted second-degree murder was preserved. In *Abeyta*, this Court indicated that when both self-defense and imperfect self-defense are argued, an instruction clarifying the role of each should be given. 120 N.M. at 241, 901 P.2d at 172 (indicating the jury must be told that it must acquit if it finds a defendant acted in self-defense in order to avoid conflicting instructions). Such an instruction was not tendered in this case. In addition, as the Majority Opinion notes, one of the reasons we can conclude, on these facts, that attempted voluntary manslaughter is a lesser included offense is the fact that we believe second-degree murder of the intentional kind was the type on which the jury was instructed. *See* Maj. Op. ¶ 19. That fact is not something Defendant argued. In addition, Defendant's argument on appeal, and thus perhaps at trial, seems to rely not only on the evidence that he thought the victim had a gun, but also that he was provoked by the victim's treatment of Jessica Runningwater. Finally, the Majority Opinion reaches a conclusion about the availability of an instruction on provocation that seems to have required a different instruction than the instruction Defendant tendered. *See* Maj. Op. ¶ 8. Defendant tendered an instruction that would ask the jury a question I am not persuaded the evidence actually supports. He did not tender an instruction that would have asked the question the Majority Opinion concludes he was entitled to have answered.

{38} For these reasons, I concur in Sections I, II(B), and III. I respectfully dissent from Sections II(A) and II(C). I would affirm the convictions Defendant has challenged on appeal and the judgment and sentence entered on the jury's verdict. The majority being of a different view, I concur in part and dissent in part.

PAMELA B. MINZNER,
Justice

I CONCUR:

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMSC-010

Filing Date: February 22, 2006

Docket No. 28,983

CONNIE CALLAHAN, SALLY FISH, and ANNE WATERS,

Plaintiffs-Respondents,

v.

NEW MEXICO FEDERATION OF TEACHERS-TVI, ALBUQUERQUE TVI FACULTY FEDERATION LOCAL NO. 4974 AFT, NMFT, and AMERICAN FEDERATION OF TEACHERS,

Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Susan M. Conway, District Judge

Law Offices of Justin Lesky
Justin Lesky
Albuquerque, NM

for Petitioners

Steven K. Sanders & Associates, L.L.C.
Steven K. Sanders
Albuquerque, NM

for Respondents

OPINION

CHÁVEZ, Justice.

{1} This case examines the scope of a public employee union's liability to its members for alleged inadequate representation during a grievance proceeding. Plaintiffs, who were members of the New Mexico Federation of Teachers-TVI, Albuquerque TVI Faculty Federation Local No. 4974 AFT, NMFT, and the American Federation of Teachers ("Union Defendants"), were fired from their jobs as full-time teachers at Albuquerque Technical Vocational Institute ("TVI"). Plaintiffs requested Union Defendants to represent them in a grievance against TVI seeking reinstatement and back pay through the procedures established in the Collective Bargaining Agreement between Union Defendants and TVI. However, after obtaining a favorable arbitration decision concluding that Plaintiffs could file a grievance challenging their terminations, Union Defendants allegedly negotiated a settlement with TVI without consulting Plaintiffs, effectively waiving Plaintiffs' grievance. Plaintiffs then filed a lawsuit in the district court against Union Defendants, asserting: 1) breach of the duty of fair representation, based on a negligence standard; 2) breach of the collective bargaining agreement of which Plaintiffs were third-party beneficiaries; 3) breach of the covenant of good faith and fair dealing implied in the collective bargaining agreement; and 4) breach of a fiduciary duty. The district court dismissed Plaintiffs' complaint under Rule 1-012(B)(6) NMRA 2006, concluding that Plaintiffs did not state a cause of action against Union Defendants.

{2} On appeal the Court of Appeals reversed the district court, reinstating Plaintiffs' complaint in its entirety. *Callahan v. Albuquerque TVI Faculty Fed'n Local No. 4974*, 2005-NMCA-011, 136 N.M. 731, 104 P.3d 1122. The Court of Appeals held that Plaintiffs could sue Union Defendants for breach of the duty of fair representation, breach of the collective bargaining agreement because Plaintiffs were third-party beneficiaries, breach of the covenant of good faith, and breach of a fiduciary duty. *Id.* ¶ 30. The Court of Appeals opinion also suggests that mere negligence would suffice to prove a breach of the duty of fair

representation. *Id.* ¶ 28. In addition, the Court of Appeals decided two issues not specifically addressed by the district court. The Court of Appeals held that Plaintiffs were not required to file their complaint against Union Defendants with the TVI Labor Relations Board as a means of exhausting administrative remedies under the Public Employees Bargaining Act, *see* NMSA 1978, §§ 10-7D-1 to 10-7D-26 (1992, amended 1997 and 1998, repealed 1999) ("PEBA I")[1], and that the international union, American Federation of Teachers ("AFT"), was a proper party defendant under the facts as pled. *Id.* ¶ 30.

{3} We granted certiorari to consider three issues. One, what is the scope of a public employee union's liability to a member for alleged failure or refusal to adequately represent the employee in a grievance proceeding? Two, whether public employees who seek compensatory damages from their union for inadequate representation during a grievance proceeding must file their complaint against the union with a Labor Relations Board as a prohibited practice in order to exhaust administrative remedies. Three, whether under the facts as pled the international union may be joined as a party defendant. We hold that under the facts pled by Plaintiffs, the only cause of action that may survive a 12(B)(6) motion is the cause of action for breach of the duty of fair representation based only on a showing that the union acted arbitrarily, fraudulently or in bad faith. Plaintiffs were not required to file their complaint with the TVI Labor Relations Board in order to exhaust administrative remedies since their cause of action against Union Defendants is not a prohibited practice under PEBA I. Finally, because Plaintiffs pled that AFT does business in New Mexico as an exclusive bargaining agent for Plaintiffs under the Collective Bargaining Agreement, Plaintiffs' complaint survives a 12(B)(6) motion. Accordingly, the Court of Appeals is reversed in part, affirmed in part, and this matter is remanded to the district court for proceedings consistent with this opinion.

[1] Plaintiffs based their lawsuit largely on the provisions for public employee bargaining in PEBA I. The current provisions for public employee bargaining are found in a new Public Employee Bargaining Act. *See* NMSA 1978, § 10-7E-1 (2005). Although the two acts appear to be identical in relevant part, *see §§* 10-7E-2 to 10-7E-26 (2003, amended 2005), we rely on the provisions of PEBA I because the relevant events occurred prior to the repeal of PEBA I.

BACKGROUND

{4} In its order dismissing Plaintiffs' complaint, the district court was clear that it was deciding this case under Rule 12(B)(6) and was not considering matters outside the pleadings. Dismissal on 12(B)(6) grounds is appropriate only if Plaintiffs are not entitled to recover under any theory of the facts alleged in their complaint. *Kirkpatrick v. Introspect Healthcare Corp.*, 114 N.M. 706, 709, 845 P.2d 800, 803 (1992). Therefore, we assume the veracity of all of the well-pled facts in Plaintiffs' complaint to determine whether Plaintiffs may prevail under any state of the facts alleged. *Swinney v. Deming Bd. of Educ.*, 117 N.M. 492, 493, 873 P.2d 238, 239 (1994). The material facts pled by Plaintiffs, which we accept as true, are provided as background for our analysis.

{5} Plaintiffs were fired from their jobs as full-time teachers at TVI without notice or explanation. As employees of a public institution, Plaintiffs were covered by PEBA I. PEBA I gives public employees the right to join a labor organization for the purpose of collective bargaining. Union Defendants are the exclusive representatives of TVI employees under a Collective Bargaining Agreement between Union Defendants and TVI. Part of the responsibilities of Union Defendants under the Collective Bargaining Agreement are to represent public employees during a grievance proceeding.

{6} Plaintiffs sought representation from Union Defendants to challenge their terminations and obtain reinstatement and back pay. Union Defendants undertook representation of Plaintiffs and filed grievances on Plaintiffs' behalf. As a preliminary matter, Union Defendants

represented Plaintiffs in an arbitration to determine whether Plaintiffs had a right to challenge their terminations. On this issue, Union Defendants prevailed—it was determined that Plaintiffs were entitled to challenge their terminations under the Collective Bargaining Agreement. Although Union Defendants continued to represent Plaintiffs, rather than seek reinstatement and back pay for them, Union Defendants settled the matter without notifying or consulting with Plaintiffs. The settlement required Plaintiffs to dismiss a pending federal lawsuit against TVI and to waive any right to future employment with TVI.[2] In the event Plaintiffs refused to abide by the settlement, Union Defendants had an agreement with TVI to testify against Plaintiffs in an attempt to have Plaintiffs' federal lawsuit against TVI dismissed.

{7} Dissatisfied with the settlement, Plaintiffs sued Union Defendants in the district court. In their complaint, Plaintiffs allege that Union Defendants ignored Plaintiffs' legitimate defense to their terminations, failed to investigate Plaintiffs' claims, processed their grievances in a perfunctory manner, and settled Plaintiffs' claims with TVI without notifying or consulting Plaintiffs. The first issue we decide is what cause or causes of action these facts will support against Union Defendants.

I. CAUSES OF ACTION SUPPORTED BY THE FACTS STATED IN PLAINTIFFS' COMPLAINT AGAINST UNION DEFENDANTS

A. Labor Organizations owe Public Employees a Duty of Fair Representation but Cannot be Sued for Negligent Representation

{8} Plaintiffs argue that the above facts state a cause of action against Union Defendants for breach of the duty of fair representation and urge us to adopt a negligence standard to support such a cause of action. Union Defendants concede that they have a duty to fairly represent their union members. Union Defendants also concede in their reply brief that Plaintiffs have alleged sufficient facts in their complaint to support a cause of action for breach of the duty of fair representation. However, relying on *Jones v. Int'l Union of Operating Engineers*, 72 N.M. 322, 383 P.2d 571 (1963), Union Defendants contend that the duty of fair representation may only be breached if a union acts arbitrarily, fraudulently, or in bad faith.

{9} In *Jones*, the employer, Continental Oil Company, fired Jones for refusing to sign a statement acknowledging he had a preexisting eye injury that limited his ability to work. *Id.* at 324, 383 P.2d at 572. Jones sued Continental for wrongful termination. He also sued his union for arbitrarily, fraudulently, and in bad faith breaching its trust obligations as his exclusive bargaining agent by refusing to demand that his termination be submitted to arbitration. *Id*. The district court dismissed his lawsuit under Rule 12(B)(6) for failure to state a cause of action. *Id*. On appeal, we reversed the district court and held that Jones stated a cause of action against his union because labor organizations owe their members a duty of fair representation. *Id*. at 330, 332, 383 P.2d at 576, 578. We explained that the duty of fair representation extends beyond the bargaining table to the "day-to-day adjustment of working rules and the protection of employee's rights secured by the contract." *Id.* at 330, 383 P.2d at 576. Despite explaining that a union's responsibilities extend to the protection of employees' rights, we cautioned against unrestrained interference with a union's decision whether to pursue the arbitration of an employee's grievance:

> The union has great discretion in handling the claims of its members, and in determining whether there is merit to such claim

[2] Plaintiffs' federal lawsuit against TVI was dismissed with prejudice on April 2, 2002, pursuant to a settlement between the parties. We note that in the federal scheme, suits involving wrongful termination and inadequate union representation are normally brought as hybrid actions, where the aggrieved employee sues the employer for breach of the collective bargaining agreement under Labor Management Relations Act § 301, 29 U.S.C. § 185 (2000), and sues the union for breach of the duty of fair representation implied from the National Labor Relations Act. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983).

> which warrants the union's pressing the claim through all of the grievance procedures, including arbitration, and the courts will interfere with the union's decision not to present an employee's grievance only in extreme cases.

Id. at 331, 383 P.2d at 577.

{10} In *Jones,* we also cited cases and legal scholars for the legal premise that a union is liable to a member for its arbitrary or bad faith action in representing or failing to represent a member against his or her employer. *Id*. Persuaded by the authority we cited, we held Jones had stated a cause of action when he pled that the union had arbitrarily, in bad faith, and in violation of its trust refused to press Jones's grievance to arbitration. *Id.* at 331–32, 383 P.2d at 577. In this case, Plaintiffs suggest that our holding in *Jones* was limited to the pleadings in that case and invite us to recognize that a cause of action for breach of the duty of fair representation may be sustained on facts which demonstrate negligent representation. We decline Plaintiffs' invitation.

{11} We continue to believe that a court should only interfere with a union's decision not to present an employee's grievance in extreme cases. Expanding a cause of action for breach of fair representation to include negligent representation would exceed the bounds of caution we expressed in *Jones*. Moreover, requiring arbitrary, fraudulent or bad faith conduct to prove a breach of the duty of fair representation is consistent with United States Supreme Court precedent. *See Vaca v. Sipes*, 386 U.S. 171 (1967).

{12} In *Vaca*, the employee was terminated from his employment because of high blood pressure and poor health. *Id.* at 174–75. He sued his employer for wrongful termination and the union for refusing to submit his grievance to arbitration. *Id.* at 173. In examining whether the employee had a viable cause of action against the union, the United States Supreme Court recognized that a union's duty of fair representation was a well established duty stemming from federal laws like the Railway Labor Act and the National Labor Relations Act. *Id.* at 177. The Supreme Court went on to define the duty as "a statutory obligation to serve the interests of all members [of a union] without hostility or discrimination toward any, to exercise . . . discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* The duty of fair representation was considered by the Supreme Court to be "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id*. at 182.

{13} Nevertheless, the Supreme Court recognized that the federal collective bargaining system "of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Id*. Therefore, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. With respect to the employee's specific claims that the union was obligated to take his grievance to arbitration, the Supreme Court held that a union member does not have "an absolute right to have his [or her] grievance taken to arbitration." *Id.* at 191. Rather, a union does not breach its duty of fair representation merely by settling an employee's grievance short of arbitration; the union's refusal or failure to take the grievance to arbitration has to be arbitrary, discriminatory or in bad faith. *Id.* at 190, 192.

{14} Since *Vaca,* the United States Supreme Court has reiterated its holding that a union breaches its duty of fair representation only when its conduct is arbitrary, discriminatory, or in bad faith. *United Steelworkers of Am.*, 495 U.S. 362, 372 (1990); *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976) (indicating that it would be injustice of the grossest sort to let erroneous arbitration decisions stand even though the union's representation had been dishonest, in bad faith, or discriminatory).

{15} Because we hold that the breach of duty of fair representation requires a showing of arbitrary, fraudulent, or bad faith conduct, Plaintiffs' cause of action based on simple negligence is dismissed. The factual allegations in the complaint are sufficient to state a cause of action for arbitrary, fraudulent, or bad faith breach of the duty of fair representation.

B. Plaintiffs do not State a Claim for Breach of Fiduciary Duty

{16} The Court of Appeals held that "unions such as Defendants owe a fiduciary duty to their union members such as Plaintiffs to represent those members fairly. Plaintiffs have adequately stated a cause of action and should be able to proceed with it." *Callahan*, 2005-NMCA-011, ¶ 23. The Court of Appeals also wrote in its conclusion that "Plaintiffs adequately stated a cause of action in that unions owe a fiduciary duty to their members to represent them fairly." *Id.* ¶ 30. Plaintiffs have interpreted this language as permitting a cause of action for breach of fiduciary duty. Union Defendants argue that the factual allegations in the complaint cannot support a cause of action for breach of fiduciary duty since Plaintiffs do not allege a breach of fiduciary duty as defined in 29 U.S.C. § 501 (2000).

{17} We do not interpret the Court of Appeals opinion to create a cause of action for breach of fiduciary duty. Rather, we interpret the opinion as relying on our language in *Jones* to explain why Plaintiffs state a cause of action for breach of the duty of fair representation. In *Jones*, we stated that collective bargaining agreements "generally provide that grievance procedures are union controlled and that the individual employee is to be represented by the union under its *fiduciary* capacity as the bargaining agent." *Jones*, 72 N.M. at 329, 383 P.2d at 576 (emphasis added). We also quoted the following passage from a law review article:

> Unless a contrary intention is manifest, the employer's obligations under a collective bargaining agreement which contains a grievance procedure controlled by the union shall be deemed to run solely to the union as the bargaining representative, to be administered by the union in accordance with its *fiduciary duties* to employees in the bargaining unit. The representative can enforce the claim. It can make reasonable, binding compromises. It is liable for breaches of trust in a suit by the employee beneficiaries.

Id. at 329, 383 P.2d at 576 (emphasis added) (*quoting* Archibald Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 619 (1956)). Although we employed the phrases "fiduciary capacity" and "fiduciary duties" in the above quotations, we were referring to a union's duty to represent union members under a collective bargaining agreement. The intent in using such language was and remains an explanation as to why we recognize a cause of action by a union member against the union for breach of the duty of fair representation. We have explained the proof necessary to establish a breach of the duty but do not label the cause of action as one for breach of fiduciary duty. When the complaint arises from the union's representation of the employee in a grievance proceeding, the cause of action is for breach of the duty of fair representation.[3]

{18} Plaintiffs rely on an American Law Reports annotation and two Pennsylvania cases in support of their argument that Union Defendants owed them a fiduciary duty relating to their employment grievance. However, our review of these authorities reveals that the authorities deal only with a union's duty of fair representation. *See* Jerald J. Director, Annotation, *Union's Liability in Damages for Refusal or Failure to Process Employee Grievance*, 34 A.L.R.3d 884, 896 (1970) (stating that a number of "courts have

[3] We agree the complaint does not state a cause of action for breach of fiduciary duty as fiduciary duty is defined in 29 U.S.C. § 501. However, a review of 29 U.S.C. § 501 is not necessary since this section is not applicable to government, or public, employee unions. *Local 1498 v. Am. Fed'n of Gov't Employees*, 522 F.2d 486, 490 (3rd Cir. 1975).

recognized or applied a duty often arising out of the fact that the union is the employee's statutory agent, or out of a general fiduciary obligation, *to fairly represent* its members and other employees in the bargaining unit" (Emphasis added and footnotes omitted)); *Falsetti v. Local Union No. 2026*, 161 A.2d 882, 895 (Pa. 1960) ("In entering into this [collective bargaining] Agreement, the Union has assumed the role of trustee for the rights of its members and other employees in the bargaining unit. The employees, on the other hand, have become beneficiaries of fiduciary obligations owed by the Union. As a result, the Union bears a heavy *duty of fair representation* to all those within the shelter of its protection." (Emphasis added.)); *Rutledge v. Se. Pa. Transp. Auth.*, 415 A.2d 982, 984 (Pa. Commw. Ct. 1980) (describing a union's failure to pursue the final stages of grievance procedures under a collective bargaining agreement as a breach of the "fiduciary duty of fair representation"), *overruled on other grounds by Fouts v. Allegheny County*, 440 A.2d 698 (Pa. Commw. Ct. 1982). Since Plaintiffs do not allege any financial impropriety on the part of Union Defendants, and since Plaintiffs' claims are encompassed by their claim for breach of the duty of fair representation, we hold that Plaintiffs did not state a claim for breach of a fiduciary duty in this case.

C. Plaintiffs did not State a Claim for Breach of Collective Bargaining Agreement as Third-Party Beneficiaries

{19} The Court of Appeals held that Plaintiffs stated a claim for breach of a collective bargaining agreement as third-party beneficiaries. *Callahan*, 2005-NMCA-011, ¶ 25. As the Court of Appeals stated, "[a] collective bargaining agreement is a contract between a labor organization and the employer." *Id.* In this case, TVI and Union Defendants entered into a collective bargaining agreement. Plaintiffs were not signatories to that contract. However, Plaintiffs allege that they may state a cause of action against Union Defendants for breach of the collective bargaining agreement as third-party beneficiaries.

{20} A third-party may have an enforceable right against an actual party to a contract if the third-party is a beneficiary of the contract. *Fleet Mortgage Corp. v. Schuster*, 112 N.M. 48, 49, 811 P.2d 81, 82 (1991). A third-party is a beneficiary if the actual parties to the contract intended to benefit the third-party. *Id.* at 49–50, 811 P.2d at 82–83; *Leyba v. Whitley*, 120 N.M. 768, 773, 907 P.2d 172, 177 (1995). The intent to benefit the third-party "'must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary.'" *Fleet Mortgage*, 112 N.M. at 50, 811 P.2d at 83 (*quoting Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987)). As TVI and Union Defendants entered into a collective bargaining agreement in accordance with PEBA I, TVI and Union Defendants clearly intended to benefit Plaintiffs, as public employees.

{21} However, for Plaintiffs "to have an enforceable right as third-party beneficiaries against the Union, at the very least the employer must have an enforceable right as promisee." *Rawson*, 495 U.S. at 375. Plaintiffs argue that they should be allowed to seek damages for breach of the collective bargaining agreement because "TVI promised that it would not terminate their employment unfairly or unjustly and Unions indirectly through the CBA . . . promised that they would safeguard Members' rights by challenging their unfair or unjust terminations through arbitration." In order to state a claim, instead of relying on the general notion that TVI and Union Defendants entered into a collective bargaining agreement that pertains to Plaintiffs' employment, Plaintiffs would need to assert a promise that Union Defendants made to TVI and subsequently broke. Plaintiffs have not directed this Court to any such promise or to duties that Union Defendants owed to TVI, and thus also owed to Plaintiffs as third-party beneficiaries of the Collective Bargaining Agreement. Therefore, we find that Plaintiffs did not state a claim for breach of the Collective Bargaining Agreement as third-party beneficiaries.

D. Plaintiffs did not State a Claim for Breach of Implied Covenant of Good Faith and Fair Dealing as Third-Party Beneficiaries

{22} While we do not recognize breach of an implied covenant of good faith and fair dealing as a cause of action in New Mexico in at-will employment relationships, *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988), we have recognized breach of an implied covenant of good faith and fair dealing in employment arrangements that are not at-will. *Bourgeous v. Horizon Healthcare Corp.*, 117 N.M. 434, 439, 872 P.2d 852, 857 (1994). *Bourgeous* dealt with a lawsuit brought by the *non-union* director of nursing at a nursing home against her *employer* for breach of contract and breach of implied covenant of good faith and fair dealing stemming from wrongful termination. *Id.* at 435, 872 P.2d at 853. In this case, we are faced with a situation where Plaintiffs are attempting to sue Union Defendants for breach of the implied covenant of good faith and fair dealing as third-party beneficiaries to a collective bargaining agreement. We conclude Plaintiffs' claims for breach of implied covenant are subsumed within their claims for breach of the duty of fair representation.

II. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES IN THIS CASE BECAUSE BREACH OF THE DUTY OF FAIR REPRESENTATION IS NOT A "PROHIBITED PRACTICE" UNDER PEBA

{23} Union Defendants argue that Plaintiffs' claims are barred because Plaintiffs did not file a prohibited practices complaint with either the Public Employee Labor Relations Board ("PELRB") or the TVI Labor Relations Board ("TVI-LRB") alleging a breach of the duty of fair representation. According to Union Defendants, PEBA I "required Plaintiffs to file a 'prohibited practices complaint' if they believed the Union failed or refused to comply with the collective bargaining agreement or otherwise violated or interfered with their rights." Plaintiffs counter that requiring exhaustion in the present case would be inappropriate or futile because the duty of fair representation is not a clearly defined "prohibited practice" under New Mexico law and because neither PEBA I nor TVI's Collective Bargaining Agreement "provide any direct rights for union Members against their union."

{24} The general rule is that a party must exhaust administrative remedies unless those administrative remedies are inadequate. *McDowell v. Napolitano*, 119 N.M. 696, 700, 895 P.2d 218, 222 (1995). Of course, where there is no applicable statutory remedy, there is no need to exhaust administrative procedures. *Id.* Although the PELRB and the TVI-LRB schemes for filing a prohibited practice complaint are comprehensive and subject to judicial review, a claim against a union for breach of the duty of fair representation does not fall within the "prohibited practices" of PEBA I. Section 10-7D-20.

{25} Even if we were to interpret PEBA I broadly enough to define a prohibited practice to include a claim for breach of the duty of fair representation, the PELRB and the TVI-LRB cannot provide Plaintiffs with an appropriate remedy. Neither the PELRB nor the TVI-LRB are authorized to award monetary damages to an aggrieved union member for a union's breach of its duty of fair representation. PEBA I endows the PELRB with "the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies." Section 10-7D-9(F); *see also* Section 10-7D-11(E) (endowing local boards like TVI-LRB with "the power to enforce provisions of the Public Employee Bargaining Act or a local collective bargaining ordinance, resolution or charter amendment through the imposition of appropriate administrative remedies"). However, PEBA I does not define the scope of PELRB's power to impose appropriate administrative remedies to include the award of compensatory damages. TVI's Governing Board Resolution 1994-57 (August 29, 1994), which was adopted pursuant to PEBA I, Section 10-7D-26(C), states the collective bargaining policy and creates the TVI-LRB. While Section 6(F) of Resolution 1994-57

attempts to define the scope of the administrative remedies, the resolution does not state that the TVI-LRB is authorized to award Plaintiffs' monetary damages against Union Defendants. Section 6(F) of Resolution 1994-57 states:

> If upon the preponderance of the evidence introduced at a hearing the board shall be of the opinion that it has been established that a person or organization has engaged in or has committed a prohibited practice under Section 14 or 15 of this policy, it shall issue and cause to be served on such person an order requiring such person to cease and desist from such prohibited practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate this policy. . . .

It is clear that those who wrote Resolution 1994-57 envisioned suits against an employer, who would be in a position to reinstate an employee and provide that employee with back pay. However, the TVI-LRB, armed with the Legislature's grant of power to impose "appropriate administrative remedies," could not order Union Defendants to reinstate Plaintiffs. It is also doubtful that the Legislature's grant empowers the TVI-LRB to award monetary damages other than back pay, such as the actual and exemplary damages sought by Plaintiffs here against Union Defendants. Therefore Plaintiffs were not required to exhaust administrative remedies by first bringing their claim against Union Defendants before the PELRB or the TVI-LRB.

III. PLAINTIFFS HAVE PLED FACTS SUFFICIENT TO DEFEAT A MOTION TO DISMISS AFT AS A DEFENDANT UNDER RULE 12(B)(6)

{26} Plaintiffs' lawsuit included AFT as a named defendant along with the New Mexico Federation of Teachers-TVI, Albuquerque TVI Faculty Federation Local No. 4974 AFT, NMFT. AFT contends that it should be dismissed from the lawsuit because it is neither a party to the Collective Bargaining Agreement nor a bargaining agent for the public employees. Although this issue was not specifically decided by the district court, the Court of Appeals addressed the issue and concluded that because AFT was included in the definition of "Federation" under the Collective Bargaining Agreement, it could not conclude that AFT was not a party to the agreement or that AFT was not the bargaining agent for Plaintiffs. *Callahan*, 2005-NMCA-011, ¶ 29. Accordingly, the Court of Appeals held that the AFT was a proper party to the litigation. *Id.* ¶ 29, 30.

{27} A general rule is that an international union cannot be sued for breach of the duty of fair representation where the international union is not designated as an exclusive representative in a collective bargaining agreement. *Kuhn v. Nat'l Ass'n of Letter Carriers, Branch 5*, 528 F.2d 767, 770 (8th Cir. 1976) (stating that "exclusive representation is a necessary prerequisite to a statutory duty to represent fairly"); *Teamsters Local Union No. 30 v. Helms Exp. Inc.*, 591 F.2d 211, 217 (3rd Cir. 1979) (indicating that only an "exclusive collective bargaining representative of the individual plaintiffs" owes a duty of fair representation). In addition, an international union cannot be sued for breach of the duty of fair representation if the international union has not played a role in consulting with or advising either the employee or the local union. *See Kuhn*, 528 F.2d at 770 (finding as support for dismissing suit against an international union the fact that the international union has "played no part whatsoever in advising or consulting with [the discharged employee] with respect to the grievance and was in no way responsible for the failure, if any, of [the local union] to properly present [the discharged employee's] case at the informal appearance before the postal authorities or in failing to file a notice of appeal within the appropriate time limits").

{28} Although these authorities are persuasive, because the district court decided the issues under Rule 12(B)(6), we must determine whether Plaintiffs pled sufficient facts in their Complaint which, if true, would make AFT a party to the Collective Bargaining Agreement or

an exclusive bargaining agent for Plaintiffs. In paragraph 2 of their Complaint, Plaintiffs alleged that AFT does business in New Mexico and by contract is an exclusive representative for Plaintiffs. In paragraph 4, Plaintiffs alleged that AFT is a party to the Collective Bargaining Agreement. We conclude that Plaintiffs have pled facts sufficient to defeat a 12(B)(6) motion seeking to dismiss AFT as a party defendant.

CONCLUSION

{29} We hold that public employee unions in New Mexico owe union members a duty of fair representation and that Plaintiffs stated a cause of action against Union Defendants for breach of the duty of fair representation since the complaint can be interpreted to include a breach based on arbitrary, fraudulent, or bad faith conduct. Plaintiffs did not state a claim for breach of a fiduciary duty, breach of a collective bargaining agreement as third-party beneficiaries, or breach of the implied covenant of good faith and fair dealing as third-party beneficiaries. Because breach of the duty of fair representation is not listed as a prohibited practice under PEBA I, Plaintiffs were not required to bring their claim before the PELRB or the TVI-LRB to exhaust their administrative remedies. Finally, Plaintiffs have pled sufficient facts against AFT, which if true, make AFT a proper party defendant. We remand to the district court for proceedings consistent with this opinion.

{30} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMSC-033

Filing Date: June 20, 2006

Docket No. 29,506

HARTFORD INSURANCE COMPANY OF THE MIDWEST and INTERSTATE INDEMNITY INSURANCE COMPANY,

Plaintiffs-Counter-Defendants-Appellees,

v.

CHARLES D. CLINE and JUDITH E. DAVIS,

Defendants-Counter-Claimants-Appellants.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
Harris L. Hartz, United States Court of Appeals Judge

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OPINION

CHÁVEZ, Justice.

{1} Charles Cline and Judith Davis have lived together since 1997. Although they are not married, they have held themselves out to the public as husband and wife. After Davis was involved in an automobile accident, she made a claim for underinsured motorist benefits as a Class I insured under insurance contracts issued only to Cline as the named insured. *See Morro v. Farmers Ins. Group*, 106 N.M. 669, 670–71, 748 P.2d 512, 513–14 (1998) (defining Class I insureds as named insureds under a policy, their spouse, and relatives living in the household; defining Class II insureds as those covered only because they occupy an insured vehicle). These contracts were issued by Hartford Insurance Company of the Midwest and Interstate Indemnity Insurance Company. Each contract extended Class I coverage to Cline as the named insured and his family members, as defined by each policy. With slight differences in language, "family member" is defined in each policy to mean "a person related to the named insured by blood, marriage or adoption who is a resident of the named insured's household, including a ward or foster child." Both Hartford and Interstate denied the claim for underinsured motorist benefits, asserting that Davis was neither a named insured nor a family member under their respective policies. She was, however, listed as a driver, along with Cline, on the declaration page of the Hartford policy.[1]

[1] The declaration page also has the designation "MS" and both Davis and Cline are listed with an "M." The record does not contain an explanation as to what is meant by MS, i.e. whether this refers to the marital status of Davis and Cline. For this reason we do not believe it appropriate for this court to consider the designation in answering the question certified to us by the federal Court.

{2} Following a declaratory judgment action filed by the insurance companies, a federal judge held that Davis was not entitled to underinsured motorist benefits under either policy because "New Mexico does not recognize the doctrine of common law marriage" and therefore Class I insurance coverage does not extend to domestic partners. Cline and Davis appealed to the Tenth Circuit, which certified the following question to this Court pursuant to the provisions of NMSA 1978, Section 39-7-4 (1997)[2]:

> Is excluding domestic partners from the definition of *family member* in an automobile-insurance policy invalid as contrary to the public policy of the state of New Mexico?

Because there is no express statutory language or indication of legislative intent in New Mexico that domestic partners must be included in the definition of family member for purposes of automobile insurance coverage, we answer the question certified to us in the negative.

DISCUSSION

{3} Cline and Davis urge this Court to answer the certified question in the affirmative. Their argument is based on the public policy in New Mexico against family member exclusions in automobile policies, coupled with recently declared judicial, executive, and legislative policies providing legal protections to domestic partners. According to Cline and Davis, these policies preclude automobile insurance contracts from excluding domestic partners from coverage as family members.

{4} We agree that family member exclusions in automobile insurance policies are void as against the public policy of New Mexico. *See Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 111, 703 P.2d 882, 888 (1985) (holding that household exclusions in automobile liability insurance policies violate the public policy of New Mexico); *GEICO v. Welch*, 2004-NMSC-014, ¶ 3, 135 N.M. 452, 90 P.3d 471 (holding that "household exclusions in umbrella policies related to liability and uninsured or underinsured automobile coverage are void as against public policy"). Although these cases involved contract language that excluded coverage for the entire class of household members as defined in the insurance contracts, we have also invalidated exclusions that purported to limit uninsured motorist coverage to a Class I insured. *See Loya v. State Farm Mut. Auto. Ins. Co.*, 119 N.M. 1, 8, 888 P.2d 447, 454 (1994) (invalidating a limitation of uninsured motorist coverage for a dependent minor child who was not living with the insured at the time of the accident, based on a policy definition of "relative" which required the child to be living with the insured unless the child was unmarried, unemancipated and away at school).

{5} In this case the insurance contracts at issue do not exclude the entire class of household members from underinsured motorist coverage. Cline and Davis contend that by not including domestic partners in the definition of family members, by implication domestic partners are excluded from coverage. If family member exclusions are invalid in New Mexico as against public policy, Cline and Davis argue, *a fortiori*, limiting the definition of family member by excluding domestic partners must also violate public policy. Their argument depends on whether the public policy of New Mexico requires that domestic partners be considered family members for purposes of automobile insurance contracts.

{6} Cline and Davis argue that recently declared judicial, executive, and legislative policies providing legal protections to domestic partners demonstrate that New Mexico's public policy recognizes domestic partners as "family members." As evidence of a judicial policy extending legal protections to domestic partners, Cline and Davis cite to *Lozoya v. Sanchez*,

[2] Section 39-7-4 provides that "[t]he supreme court of this state may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision or statute of this state."

2003-NMSC-009, 133 N.M. 579, 66 P.3d 948. In *Lozoya,* we permitted Sara Lozoya to pursue a claim for loss of consortium when her domestic partner, Osbaldo Lozoya, was seriously injured. We held that a common law cause of action for loss of consortium was not limited to married partners because loss of consortium is a claim to recover compensation for damage to a *relational* interest with a person, not a legal interest. *Id.* at ¶ 20; *see also Fitzjerrell v. City of Gallup*, 2003-NMCA-125, ¶ 11, 134 N.M. 492, 79 P.3d 836. In so holding we were careful to note that "the State has a continuing interest in protecting the legal interest of marriage as well. Allowing an unmarried partner to recover for loss of consortium neither advances nor retracts from that interest." *Lozoya*, 2003-NMSC-009, ¶ 20. We agree with Cline and Davis that our ruling in *Lozoya* recognizes an important relational interest. However, our ruling in *Lozoy*a was not intended to confer general contractual rights to domestic partners similar to those contractual rights enjoyed by married couples.

{7} Cline and Davis next cite to Executive Order No. 2003-010, signed April 9, 2003, as additional proof that the public policy of New Mexico forbids the exclusion of domestic partners from the definition of family member in automobile insurance contracts. This Order, entitled "Establishing Benefits for Domestic Partners of State Employees," provides in relevant part:

> I, Bill Richardson, Governor of the State of New Mexico, by virtue of the authority vested in me by the Constitution and the Laws of New Mexico, do hereby order the General Services Department and the State Personnel Office to engage in negotiations with benefits providers to ensure that domestic partners of state employees are afforded the same benefits as spouses by July 1, 2003. Such benefits shall extend to domestic partners who are in a mutually exclusive, committed relationship, who share a primary residence for twelve or more consecutive months, who are jointly responsible for the common welfare of each other and who share financial obligations. Each state employee and domestic partner must execute an affidavit of domestic partnership. . . .

As important as this executive order is to domestic partners of state employees, our interpretation of the Order is not as broad as Cline and Davis' interpretation. The Order simply instructs the General Services Department to negotiate with benefits providers to extend to domestic partners of state employees those benefits that are available to spouses of state employees. The Order does not define spouse to include domestic partners nor does it interpret existing contracts to apply equally to spouses and domestic partners. A fair interpretation of the Order, however, does support a statement that the executive believes employment benefits that are available to a spouse of a state employee should also be available to a domestic partner of a state employee. Undoubtedly, the Governor was aware of the need for contracts to be modified to make sure that domestic partners receive the same benefits as dependents of state employees. *See* NMSA 1978, § 10-7B-6(A) (1989) ("Any such group benefits self-insurance plan shall afford coverage for employees' dependents at each employee's option."). Indeed, a reasonable inference is that since the executive order requires domestic partners to be jointly responsible for the common welfare of each other, they are dependents. *See Brokenbaugh v. N.J. Mfrs. Ins. Co.*, 386 A.2d 433, 436 (N.J. Super. Ct. App. Div.1978) (stating "the Commissioner indicates that family shall include those who live within the domestic circle of, and are economically dependent on, the named insured").

{8} Although Executive Order No. 2003-010 may be viewed as some evidence of the public policy in New Mexico, the Order alone, without parallel action by the legislature, is not sufficient proof of the public policy of New Mexico. The predominant voice behind the declaration of public policy of the state must come from the legislature, with an additional supporting role played by the courts and the executive department:

> [I]t is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature. The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government. Courts should make policy . . . only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature.

Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). In addition, "[w]e also have recognized the unique position of the Legislature in creating and developing public policy." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768.

{9} As evidence of legislative intent to extend benefits to domestic partners, Cline and Davis cite to the Uniform Health-Care Decisions Act, NMSA 1978, Sections 24-7A-1 to -18 (1995, as amended through 2000). This Act sets forth in priority order the persons lawfully entitled to make health-care decisions for a patient if the patient has been determined to lack capacity and no agent or guardian has been appointed or is not reasonably available. Section 24-7A-5. The priorities begin with (1) the spouse, followed by (2) "an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being." Section 24-7A-5(B)(2). Other persons authorized through the Act to make health-care decisions in descending priority order include: (3) an adult child, (4) a parent, (5) an adult brother or sister, or (6) a grandparent. *See* § 24-7A-5(B)(3) - (6). We agree with Cline and Davis that this statute evinces the willingness of the legislature to permit domestic partners to make health care decisions for one another. However, we do not believe this Act demonstrates that the legislature intended to confer general contractual rights to domestic partners similar to those rights enjoyed by married couples, such as automatic inclusion as Class I insureds in automobile policies.

{10} While there have been indications, as cited by Defendants Cline and Davis and noted above, that the executive department and the judiciary might be willing to recognize domestic partners as "family members," the legislature has not given a clear indication that it is ready to define "family members" as including domestic partners for the purposes of automobile insurance policies. In fact, there have been several failed attempts in recent legislative sessions to pass legislation intended to extend the rights, protections and benefits enjoyed by spouses in a marriage to domestic partners, such as the "Domestic Partner Rights and Responsibility Act" and the "Domestic Partner Benefits" bills, which were both introduced in the 2005 legislative session. *See* S.B. 576, 47th Legislature, 1st Sess. (N.M. 2005); H.B. 86, 47th Legislature, 1st Sess. (N.M. 2005). These bills enjoyed some level of success in the legislature, with H.B. 86 passing the state House and the Senate Judiciary Committee, but both bills died when the legislature adjourned.

{11} We find it particularly significant to our discussion of whether New Mexico's public policy requires recognition of domestic partners as "family members" to note that the "Domestic Partner Rights and Responsibility Act" would have created a legal relationship between domestic partners that would have been equal to the legal relationship between spouses. Thus, domestic partners would have been liable for each other's debts and legal obligations to the same extent as a married spouse. Had the legislators believed the public policy of New Mexico required contracts to include domestic partners in the definition of "family member," the proposed legislation would not have been necessary.

{12} We believe this is the significant difference between spouses and domestic partners as "family members" in the automobile insurance

policy at issue here. When an insured purchases automobile insurance, the coverage required by our mandatory financial responsibility statute must be extended to that liability imposed by law. *See* NMSA 1978, § 66-5-205.3(A)(2) (2003) (stating that "[a] motor vehicle insurance policy shall . . . insure the person named in the policy . . . against loss from the liability imposed by law"). Our cases regarding family or household exclusions in automobile insurance policies illustrate that we struck down those exclusions because they denied benefits even where liability was imposed by law. For example, in *Estep*, 103 N.M. at 108, 703 P.2d at 885, we recognized that a conflict existed between a family member exclusion in an automobile insurance policy and the liability imposed by law, because "a wife in this jurisdiction has a cause of action for injuries suffered because of her husband's negligence. . . ." We found the exclusion invalid because "the family exclusion clause in the policy specifically carves out from coverage . . . [persons] who are entitled by law to recover for the owner's or driver's negligence." *Id.* Thus, we determined in *Estep* that "the coverage required by the financial responsibility statutes must be extended to that liability imposed by law." *Id.* at 110, 703 P.2d at 887. Similarly, when we said in *Loya*, 119 N.M. at 3, 888 P.2d at 449, "[w]hen a married couple contracts for insurance coverage for the family, there is a presumption that the coverage applies with equal effect to both parties unless one of them is expressly excluded from coverage," we were describing the presumption that arises out of the legal relationship between the spouses in addition to the fact that they are members of the same household. In the case consolidated with *Loya*, we reasoned that a dependent child of the named insured father was entitled to recover under the father's uninsured motorist insurance because the father was "legally obligated and liable for his son's medical bills whether [the son] lives with his mother or with him. . . ." *Id.*, 119 N.M. at 8, 888 P.2d at 454. We emphasized in each of these cases that the legal responsibility within the relationship between the named insured and the relative informed our decision that denying coverage was against public policy, stating:

> [g]iven the fact that most individuals are not legally responsible financially for relatives other than their children or spouses and therefore do not normally intend to provide uninsured motorist coverage for those relatives, it is not necessarily against public policy for an insurance policy to preclude coverage to those other kinds of relatives not living with a named insured.

Id. at 9, 888 P.2d at 455. Therefore, with no similar legal relationship between domestic partners as between spouses or other family members, and with no clear statement to date by the legislature expressing a public policy that recognizes domestic partners as family members in the context of automobile insurance policies, we are not convinced that the insurance policy's definition of "family members" violates New Mexico's public policy.

{13} Furthermore, New Mexico does not recognize common law marriage. *Hazelwood v. Hazelwood*, 89 N.M. 659, 556 P.2d 345 (1976). The absence of the legal state of marriage here means that the presumptions, rights and responsibilities enjoyed by legal spouses do not automatically extend to domestic partners. "If we were to say that the same rights that cannot be gained by common-law marriage may be gained by the implications that flow from cohabitation, then we have circumvented the prohibition of common-law marriage." *Merrill v. Davis*, 100 N.M. 552, 554, 673 P.2d 1285, 1287 (1983). Legal rights and responsibilities, such as insuring a domestic partner as a named insured under an automobile insurance policy, must be created by contract when domestic partners cohabit outside the marital relationship. Indeed, Hartford and Interstate concede as much when they state, "if Cline had intended Davis to be covered as a Class I insured under his policies, he could have easily achieved that result by simply listing her as a second named insured," indicating that an informed consumer could easily modify his or her insurance contract to provide the coverage expected for a domestic partner.

{14} We note that until domestic partners are recognized as "family members" by the public policy of New Mexico, they should require

complete explanations of automobile insurance policies by their agents, and make sure that their contracts accurately reflect their expectations. Most purchasers of insurance will not know the difference in effect, particularly for stacking of coverages, between having status as a named insured and simply being listed as a driver. Insureds should expect their insurance agents to explain exactly which coverages will be applicable to each driver. Without such explanation, the insured may in fact have the reasonable expectation that listing a domestic partner as an additional driver will provide the same coverage as asking for her to be a named insured, even though the insurance policy definitions, as here, will indicate otherwise.

CONCLUSION

{15} If domestic partners are to enjoy automatic protections in insurance coverage equal to those enjoyed by married couples, it will be up to the legislature to make that policy, rather than the courts. "'[I]t is the duty of the Legislature to make laws and of the court to expound them, . . . the subjects in which the court undertakes to make the law by mere declaration (of public policy) should not be increased in number without the clearest reasons and the most pressing necessity.'" *State v. Lavender*, 69 N.M. 220, 231–32, 365 P.2d 652, 660 (1961) (quoting *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175, 181 (1957)). Until then, excluding domestic partners from the definition of family member in an automobile insurance policy is not invalid as contrary to public policy in New Mexico.

{16} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

PATRICIO M. SERNA,
Justice (dissenting)

SERNA,
Justice (dissenting)

{17} I respectfully dissent because I conclude that Charles Cline and Judy Davis are family members within the automobile insurance policy definition and that New Mexico public policy supports recognizing them as such. At the time of the automobile accident that gives rise to this lawsuit, Mr. Cline was approximately 80 years old and Ms. Davis was approximately 50 years of age. Mr. Cline and Ms. Davis have lived together continuously since 1997. He testified that the reason they chose not to formally marry was due to a promise to his deceased wife, Virginia, to whom he was married for 41 years. "I told Virginia I won't never get married again," Mr. Cline stated. Ms. Davis declared, "he knew I loved him and I knew he loved me. And I just didn't feel that I had to have a piece of paper or that anyone else should have the right to tell us that we could or couldn't or should or should not. . . ." Ms. Davis testified that even though she never officially changed her name to Cline, most people know her as Judy Cline, and that she has credit cards issued to her as Judy Cline.

{18} Prior to the accident, both Mr. Cline and Ms. Davis took measures to make sure they were insured against such bad luck. In a sworn affidavit, Mr. Cline stated that he advised his insurance agents that Ms. Davis was his wife and that she could renew the policies and act on his behalf. Ms. Davis said that she was personally introduced to one insurance agent, and when speaking to Hartford on a recorded phone call, Mr. Cline introduced her as his wife. On the endorsement page of the Hartford policy, there is a line listing the named insured. Insured is stated in the singular and nothing about the form indicates that more than one name could or should be printed on the line. On the declarations page, by contrast, there is ample space for multiple drivers

to be listed and both Mr. Cline and Ms. Davis are listed as drivers. Under the heading "MS," presumably for marital status, both drivers are listed as "M," presumably for married.

{19} Ms. Davis visited Mr. Cline's brother in the hospital and, upon returning from the hospital, another vehicle struck her car. The other driver died as a result of the accident. Due to the car crash, Ms. Davis is disabled. She testified that according to her doctor, "I will never be able to use my hand and leg or do the things that I used to do." Mr. Cline takes care of her daily needs, such as food and shelter. "I can't hold a frying pan. He helps me do the cooking. I can't get in the tub or get out by myself unless he puts me in there. Because I can't get up and I can't get out."

{20} After the accident, Mr. Cline and Ms. Davis claimed coverage for Ms. Davis' substantial injuries. Both Hartford and Interstate insurance companies denied coverage and sought a declaration that Ms. Davis was not a family member within their policy definitions. We are now asked, "Is excluding domestic partners from the definition of family member in an automobile insurance policy invalid as contrary to public policy of the State of New Mexico?" I answer yes. In my mind, allowing Hartford and Interstate to deny coverage on these facts to a couple like Mr. Cline and Ms. Davis does violate New Mexico public policy. I concede that because we do not have a definitive statement from our Legislature, this case is close. However, in close cases in which this Court must employ its judgment until the Legislature definitively speaks, I am more comfortable upholding the insureds' contract expectations, *see Loya v. State Farm Mut. Ins. Co.*, 119 N.M. 1, 5, 888 P.2d 447, 451 (1994) (resolving language ambiguities affecting coverage in favor of the reasonable expectations of the insured), and deciding that Mr. Cline and Ms. Davis are family members, rather than announcing that an octogenarian caring for his disabled domestic partner is outside New Mexico's understanding of family. I am also troubled that Hartford and Interstate waited to clarify their position on coverage for Ms. Davis and the insurance companies' definition of family member until they were asked to pay a claim. It seems that it was within the insurance companies' power to assist Mr. Cline and Ms. Davis to fill out the forms to conform with the consumers' coverage expectations. In addition to these fairness concerns, I come to my public policy conclusion based on action from all three branches of state government.

{21} The Legislature in the 2005 session considered House Bill 86, otherwise known as the Domestic Partner Benefits Bill. The Bill specifically addressed insurance coverage and stated, a domestic partner "is jointly responsible for the common welfare of and shares financial obligations with another person." H.B. 86, 47th Leg., 1st Sess. (N.M. 2005). The House Consumer and Public Affairs Committee voted 4-3 in favor of the bill and recommended that it do pass, the House Business and Industry Committee voted 10-2 in favor of the bill and recommended that it do pass, and the bill did pass the House on the 25th day of the 2005 legislative session. The Senate Public Affairs Committee voted 4-2 in favor of the bill and recommended that it do pass and the Senate Judiciary Committee postponed action indefinitely on the 37th day of the legislative session. The Senate also considered the Domestic Partner Rights and Responsibilities Act, Senate Bill 576. That proposed act declared that "[d]omestic partners have the same rights, protections and benefits under law, whether derived from statute, rule, common law or other provisions or sources of law, as spouses in a marriage." S.B. 576, 47th Leg., 1st Sess. (N.M. 2005). The Senate Public Affairs Committee recommended a do pass, but action was postponed indefinitely in the Senate Judiciary Committee. I think the most we can discern with certainty from the legislative history is that the committees that did review and vote on these bills were overwhelmingly supportive of domestic partner benefits but that these bills were not a high enough priority in the 2005 session to receive a vote from the full Legislature. This history supports answering the certified question in the affirmative and concluding that Mr. Cline and Ms. Davis are family members more than this history supports answering the question in the negative and declaring that these domestic partners are not family members.

{22} The Legislature did pass the Uniform Health-Care Decisions Act, NMSA 1978, § 24-7A-1 to -18 (1995, as amended through 2000). In terms of who can make health care decisions for a patient, the Act grants a spouse first priority and then second priority to "an individual in a long-term relationship" to act as a surrogate. Section 24-7A-5(B). The Act does not grant greater rights and benefits to a spouse with marriage paperwork than to an individual in a long-term relationship, so I read this to be an indirect statement of legislative intent to treat domestic partners the same as spouses. This also more likely supports answering the certified question in the affirmative rather than the negative.

{23} The executive branch has also addressed domestic partners in a way that favors answering the certified question in the affirmative. Governor Bill Richardson signed an executive order establishing benefits for domestic partners of state employees. The order provides for state government to "engage in negotiations with benefits providers to ensure that domestic partners of state employees are afforded the same benefits as spouses." Exec. Order No. 2003-010 (Apr. 9, 2003). While this order has limited applicability to answering the certified question, it does tend to support the idea that state public policy is to treat domestic partners like spouses rather than to treat domestic partners as not having any recognizable relationship.

{24} Our judicial branch decisions are consistent with the direction of both the legislative and the executive branches. We have permitted domestic partners to pursue loss of consortium claims regardless of legal status. *Lozoya v. Sanchez*, 2003-NMSC-009, 133 N.M. 579, 66 P.3d 948. Since 1985, it has been against public policy in New Mexico to exclude household members from automobile insurance policies. *Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 703 P.2d 882 (1985). In 2002, we reaffirmed "that a restriction . . . limiting coverage for household members violates New Mexico law and is a repudiation of our public policy." *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶ 13, 132 N.M. 696, 54 P.3d 537. As recently as 2004, we reiterated this point when answering a certified question from the federal courts. This Court stated, "we conclude that family exclusions in liability and uninsured or underinsured motorist coverage offered through umbrella policies implicate a fundamental principle of justice and are contrary to New Mexico public policy." *Gov't Employees Ins. Co. v. Welch*, 2004-NMSC-014, ¶ 8, 135 N.M. 452, 90 P.3d 471. The Majority has not convinced me that its opinion is within the precedent of our earlier decisions.

{25} For the reasons stated above, I am compelled to dissent.

PATRICIO M. SERNA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMSC-046

Filing Date: September 6, 2006

Docket No. 29,246

RODDIE CHAVARRIA and NORMA CASTANEDA,

Plaintiffs-Petitioners,

v.

FLEETWOOD RETAIL CORPORATION OF NEW MEXICO,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Robert E. Robles, District Judge

Kyle W. Gesswein
Las Cruces, NM

Janet K. Santillanes
Olivia Neidhardt
Albuquerque, NM

Feferman & Warren
Richard N. Feferman
Albuquerque, NM

for Petitioners

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Edward Ricco
Jeffrey M. Croasdell
Albuquerque, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} In this case, it is undisputed that employees of Fleetwood Mobile Homes committed fraud during the sale of a mobile home to Roddie Chavarria and Norma Castaneda (Plaintiffs). It is also undisputed on appeal that Fleetwood failed to deliver the customized mobile home it promised and set up the home it did deliver in an unworkmanlike manner. The district court judge, sitting without a jury, found in favor of Plaintiffs and awarded compensatory and punitive damages plus attorney fees. On appeal, the Court of Appeals reversed a portion of the compensatory damages award, concluding that certain elements of damages were duplicated, and reversed the punitive damages award, concluding that Fleetwood was not liable for the fraudulent conduct of its employees. *Chavarria v. Fleetwood Retail Corp.*, 2005-NMCA-082, 137 N.M. 783, 115 P.3d 799. We granted certiorari and reverse the Court of Appeals regarding the compensatory and punitive damages claims. We affirm that portion of the Court of Appeals' opinion reinstating Defendant's counterclaim.

I. FACTS

{2} Plaintiffs lived in a 1,120-square-foot trailer with their four children in Las Cruces. Mr. Chavarria, who attended school up to the 9th grade, worked as a custodian at New Mexico State University, and Ms. Castaneda worked as a presser at Alameda Laundry and Cleaners. Plaintiffs noticed a marquee at Fleetwood advertising no payments for ninety days. Plaintiffs found the ninety-day grace period attractive because it would allow them to pay off other debts, which in turn would enable them to purchase a new mobile home with a higher monthly mortgage payment. When Plaintiffs went to Fleetwood to investigate the purchase of a mobile home, sales agent Devon Pike assured Plaintiffs that the ninety-day grace period would apply to them. Bob Lancaster, the general manager of the Fleetwood office in Las

Cruces assisted Pike in selling a mobile home to Plaintiffs.

{3} Plaintiffs selected a 1,568-square-foot, four-bedroom home so that their two teenage sons would not have to share a room. Fleetwood submitted Plaintiffs' credit application to GreenPoint Credit, and GreenPoint approved the financing for the four-bedroom home. Pike called Plaintiffs and informed them that they had been approved to purchase the four-bedroom home. A few days later, however, Pike called Plaintiffs to tell them "that the bank had gone back on the four-bedroom deal" and urged them to try and qualify for a less expensive, three-bedroom home. After Plaintiffs had settled on a three-bedroom home, Pike told Plaintiffs that GreenPoint had changed its mind and was once again willing to approve them for the four-bedroom home. Plaintiffs selected a four-bedroom home and thought it was set for delivery. Yet, about one week later, Pike made a fourth call to Plaintiffs, informing them that GreenPoint had once again changed its mind and decided to reject Plaintiffs' financing application for the four-bedroom home. In truth, GreenPoint never denied Plaintiffs' loan application for a four-bedroom home.

{4} Plaintiffs ultimately agreed to purchase a 1,232-square-foot, three-bedroom home, paying virtually the same amount for it that they would have paid for the four-bedroom home they previously selected. Plaintiffs ordered the home without double sinks or a garden tub in the master bathroom and without a new dishwasher or refrigerator, features Plaintiffs did not deem necessary. In addition, Plaintiffs requested three custom features: bigger closets in the kids' rooms, commercial-grade carpet throughout the trailer, and a window in the master bathroom. Pike assured Plaintiffs they would receive a "custom ordered trailer."

{5} Unbeknownst to Plaintiffs, Pike and Lancaster falsified Plaintiffs' income to GreenPoint, altering their credit applications to show that Ms. Castaneda earned an additional eight hundred dollars a month from a side job at another dry cleaning business. Pike and Lancaster set up a fake, or "dummy," telephone number so that GreenPoint could call and "verify" the false income, and fabricated a pay stub from Ms. Castaneda's fictitious employer. In addition, Pike and Lancaster forged Plaintiffs' signatures on credit and loan application documents.

{6} Pike and Lancaster agreed to let Plaintiffs use their old trailer as a trade-in to satisfy GreenPoint's ten percent down payment requirement on the deal, and assigned it a retail NADA value of $11,349. GreenPoint relied on this value "as an accurate evaluation of collateral." After deducting what Plaintiffs still owed on the trailer, Fleetwood gave Plaintiffs a cash value of $8,409.20 to use as a down payment on their new home. Pike and Lancaster also certified to GreenPoint that they were building a garage and decks on Plaintiffs' property costing $7,500 and $2,000, respectively. Plaintiffs were assured they would not be charged extra for the garage and decks. Yet, Pike and Lancaster submitted fictitious invoices to GreenPoint showing that the garage and decks had been installed, and GreenPoint released $9,500 of Plaintiffs' money to Fleetwood. Once GreenPoint became aware that the garage and decks had not been installed, they directed Fleetwood to rectify the situation, and also requested that Fleetwood repurchase the loan. No garage or decks were ever installed, and in fact "it was physically impossible to put a garage on the property." Instead, without Plaintiffs' permission, Fleetwood erected a fence on Plaintiffs' property worth approximately $1,000.

{7} Fleetwood also failed to deliver a custom home. The home it delivered did not have the custom features Plaintiffs' ordered, although Fleetwood removed the "fancier" items as Plaintiffs requested. In addition, the setup of the home was substandard. A general contractor and certified home inspector testified that the setup would not pass a Housing and Urban Development inspection for numerous reasons. Fleetwood installed the home on a temporary foundation instead of on a required permanent foundation. The home was not aligned properly, leaving a one-to-three-inch gap between the two halves of Plaintiffs' mobile home. The resulting crack in the roof near Plaintiffs'

kitchen and hall bathroom allowed light, dirt, and insects into the home. The misalignment also resulted in increased utility bills and an onslaught of dust, mosquitos, moths, and roaches. In addition, duct work on the roof was covered with tape instead of a lid and screws, a torn rubber grommet allowed moisture to enter the house, and many shingles were missing. Numerous interior and exterior walls were uneven and loose, and quarter-inch screws were sticking out of some walls. Windows and doors throughout the home were difficult to open and close. Inside, the floors were uneven in several places, and ceiling panels, trim, and molding throughout the home were loose and uneven. The walls were covered with soot, and the carpet was filthy. Plaintiffs could hear leaks in the walls and saw water on the floors.

{8} Plaintiffs called Pike and Lancaster several times regarding the problems with their home. Because "Lancaster was not adequately taking care of their service issues," Fleetwood's zone district manager William Kasprzyk visited the site and made a list of the problems. He also "made a comment like he didn't believe how that mobile home made it out of the lot in the condition it was in." Fleetwood made some repairs to the home, such as covering the soot on the walls with wallpaper, touching up the paint, fixing a leak in the master bathroom and replacing the bathtub. However, Fleetwood left a hole in the wall after fixing the leak and cracked the wall when installing the new tub. Kasprzyk never conducted a follow-up visit, and the major repairs, such as removing the gap between the two halves of the home, have not been completed.

II. PROCEDURAL BACKGROUND

{9} Plaintiffs sued Fleetwood in district court alleging fraud, conversion, violation of the Unfair Practices Act (UPA), breach of warranty, and other claims. Fleetwood filed a counterclaim to collect on the promissory note executed by Plaintiffs. The trial court entered judgment in favor of Plaintiffs and awarded them damages for fraud, conversion, and violations of the UPA. In addition, the trial court awarded punitive damages for Fleetwood's fraud and conversion, trebled the damages for the willful UPA violations, and dismissed Fleetwood's counterclaim for payment on the mortgage note without prejudice. The trial court also awarded Plaintiffs costs and attorney fees. After Fleetwood filed a motion to amend the judgment, the trial court reduced the punitive damages award.

{10} On appeal, the Court of Appeals found that some of the damages for fraud and conversion were duplicated and reduced both awards, and the Court of Appeals reversed all but one of the trial court's findings pertaining to the additional UPA violations. *Chavarria*, 2005-NMCA-082, ¶¶ 17, 24–26. The Court of Appeals also reversed the entire punitive damages award because, in its view, the evidence did not support corporate ratification. *Id.* ¶¶ 29–33. The Court of Appeals refused to consider Plaintiffs' argument based on a managerial capacity theory after concluding that Plaintiffs did not raise the theory until after trial. *Id.* ¶ 34. Finally, the Court of Appeals reinstated Fleetwood's counterclaim for payment on the note and remanded to the trial court for a recalculation of attorney fees in light of its opinion. *Id.* ¶¶ 38, 46.

III. COMPENSATORY DAMAGES

A. Fraud

{11} The trial court awarded Plaintiffs $17,900 for fraud based on Fleetwood's failure to deliver a garage and decks worth $9,500 and based on Fleetwood depriving Plaintiffs of $8,400 in value related to the trade-in. The Court of Appeals reversed $8,400 of the compensatory award because, in its view, allowing Plaintiffs to recover damages for loss of value on the trade-in, in addition to damages for the nonexistent garage and decks, would amount to a double recovery. *Chavarria*, 2005-NMCA-082, ¶ 22. The lynchpin of the Court of Appeals' analysis was that there was no evidence that Fleetwood inflated the sales price of Plaintiff's home by approximately $18,000. Instead, according to the Court of Appeals, there was only evidence of a $9,500 inflation. *Id.*

¶¶ 19–22. Plaintiffs argue that they are entitled to the trial court's full award of $17,900 because Fleetwood inflated the price of the three-bedroom home by *both* the amount charged for the garage and decks that Fleetwood never intended to construct *and* the amount given Plaintiffs for their trade-in. We agree with Plaintiffs and reverse the Court of Appeals on this issue.

{12} We will uphold a trial court's findings if they are supported by substantial evidence. *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 552, 494 P.2d 962, 965 (1972). Substantial evidence is "that which a reasonable mind accepts as adequate to support a conclusion." *Bill McCarty Constr. Co. v. Seegee Eng'g Co.*, 106 N.M. 781, 783, 750 P.2d 1107, 1109 (1988). Because the trial court appears to have adopted virtually all of Plaintiffs' requested findings of fact and conclusions of law verbatim, we examine this case "'with a more critical eye to insure that the trial court has adequately performed its judicial function.'" *United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155, 204, 629 P.2d 231, 280 (1980) (quoting *Ramey Constr. Co. v. Apache Tribe*, 616 F.2d 464, 467 (10th Cir. 1980)).

{13} Fleetwood concedes that it charged $9,500 for nonexistent garage and decks and that Plaintiffs are entitled to $9,500 in damages. This amount is not at issue, and the only question we must address is whether there is evidence of an additional inflation of roughly $8,400. Regarding this additional $8,400, there is some evidence that Fleetwood gave Plaintiffs a credit of $8,409.20 for the trade-in of their mobile home. Therefore, in order for Plaintiffs to recover the trial court's full award, there must be evidence in the record to support their contention that this credit is illusory and that Defendant inflated the price of their mobile home by an amount that would consume both the charge for the garage and decks and the down payment. Plaintiffs persuasively argue that the evidence demonstrates a pattern of Fleetwood "manipulating the numbers so it is difficult to figure out exactly where all the overcharges are hidden." However, when we look at the evidence and the reasonable inferences that may be drawn from it, we conclude that there is sufficient evidence to support the trial court's finding that Fleetwood inflated the price of the mobile home so as to deprive Plaintiffs of the value of their trade-in, as well as the amount charged for the garage and decks.

{14} Both parties direct us to examine the advanced calculation sheets for the four-bedroom mobile home that Plaintiffs initially qualified for and the three-bedroom mobile home they ultimately received. To assist us in interpreting the advance calculation sheets, we have referred to Exhibit 13, the Retailer Advance financing guidelines from GreenPoint, which indicate that the sales price of a mobile home is not to exceed 130% of the net manufacturer's invoice for purposes of GreenPoint financing. This percentage calculation is referred to as an adjusted invoice.

{15} Exhibit 33, the advance calculation sheet for the three-bedroom home relied on by the parties, shows a net manufacturer's invoice of $18,511. Multiplied by 130%, the adjusted invoice equals $24,064. The sales price for the three-bedroom home is listed as $39,100. This $39,100 sales price includes a $2,000 charge for a patio or decks, but does not include the $7,500 charged for a garage. Adding the $7,500 fee for the garage to the sales price of the home, the actual sales price was $46,600. Subtracting the adjusted invoice price of $24,064 from the $46,600 sales price leaves $22,536.

{16} A similar calculation with the four-bedroom home price demonstrates one way the trial court may have found that Defendant inflated the price of Plaintiffs' mobile home. Exhibit 19, the advance calculation sheet for the four-bedroom home relied on by the parties, shows a net manufacturer's invoice of $32,377. Multiplied by 130%, the adjusted invoice for the four-bedroom home is $42,090. Subtracting the adjusted invoice price of $42,090 from the sales price of $46,000 for the four-bedroom home equals $3,910. Comparing the difference in value between the adjusted invoice price and sales price for both the three- and four-bedroom homes, a reasonable inference may be drawn that Fleetwood inflated the sales price of the

three-bedroom home by $18,626 more than the amount by which it inflated the sales price of the four-bedroom home ($22,536 minus $3,910). This $18,626 inflation of the price of the three-bedroom home supports the trial court's finding that Fleetwood defrauded Plaintiffs out of $9,500 related to the nonexistent garage and decks *and* $8,400 of value on the trade-in.

{17} Another reasonable inference that can be drawn from the evidence is that Fleetwood was willing to sell Plaintiffs the four-bedroom home for an adjusted invoice price of $42,090 and a sales price of $46,000. Fleetwood instead persuaded Plaintiffs to buy a three-bedroom home with an adjusted invoice price of $24,064 and a sales price of $46,600. The invoice prices indicate that the three-bedroom home should have cost Plaintiffs $18,026 less than the four-bedroom home, not $600 more than the four-bedroom home. We conclude that there is substantial evidence supporting the trial court's compensatory damages award for fraud, and we reinstate the full award of $17,900.

B. Conversion

{18} The trial court awarded Plaintiffs $17,000 for conversion related to the garage, decks, and trade-in. Specifically, the trial court found that Fleetwood converted $7,500 in value from Plaintiffs' trade-in and $9,500 in loan proceeds to pay for the nonexistent garage and decks. The Court of Appeals reversed all but $9,500 of Plaintiffs' conversion award on the same theory that it used to reverse a portion of Plaintiffs' fraud award. *Chavarria*, 2005-NMCA-082, ¶ 23. Because there is sufficient evidence that Plaintiffs did not receive value for their trade-in, we conclude that the Court of Appeals erred in reversing a portion of Plaintiffs' conversion damages. We reinstate the trial court's full award of $17,000 for conversion.

C. UPA Violations

{19} For Fleetwood's UPA violations, the trial court awarded Plaintiffs $9,500 in actual damages for misrepresentations regarding the garage and decks, and "an additional $6,220 in actual damages for Defendant's misrepresentations pertaining to the failure to deliver a custom home, additional utility charges, inconvenience and aggravation, and the sale of insurance." The Court of Appeals reversed all of the additional award except for $1,700 for Fleetwood's failure to deliver a custom home. *Chavarria*, 2005-NMCA-082, ¶¶ 24–26. Plaintiffs do not challenge the reversed awards on appeal. Therefore, Plaintiffs are entitled to the two surviving UPA awards: $9,500 for the garage and decks and $1,700 for Fleetwood's failure to deliver a custom home. Plaintiffs do not have to elect damages on the $1,700 UPA award for failure to deliver a custom home. This award is separate from the fraud and conversion awards and thus survives independent of the awards given for those causes of action.

IV. CORPORATE LIABILITY FOR PUNITIVE DAMAGES

{20} The trial court awarded Plaintiffs punitive damages against Fleetwood based on the fraudulent conduct of Fleetwood's employees. Fleetwood does not dispute the trial court's finding that Pike and Lancaster committed fraud in this case but argues it should not be held liable for the punitive damages award. The Court of Appeals agreed with Fleetwood, concluding that the evidence did not support a finding of corporate ratification. *Chavarria*, 2005-NMCA-082, ¶¶ 29–33. The Court of Appeals also declined to consider Plaintiff's managerial capacity theory because it "was not clearly raised by Plaintiffs until their response to Defendant's motion to amend judgment." *Id.* ¶ 34. We disagree, and we reverse the Court of Appeals on this issue.

{21} A corporation may be held liable for punitive damages for the misconduct of its employees if: (1) corporate employees possessing managerial capacity engage in conduct warranting punitive damages, *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc*., 118 N.M. 140, 144–45, 879 P.2d 772, 776–77 (1994); (2) the

corporation authorizes, ratifies, or participates in conduct that warrants punitive damages, *id.* at 143–44, 879 P.2d at 775–76; or (3) under certain circumstances, the cumulative effects of the conduct of corporate employees demonstrate a culpable mental state warranting punitive damages, *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994).

{22} In both their complaint and amended complaint, Plaintiffs pled facts that would give rise to an award of punitive damages against Fleetwood and requested punitive damages as a form of relief. This pleading complied with the notice requirements of Rule 1-008(A) NMRA, which only requires a short and plain statement of a party's claim and a demand for relief. A specific pleading of the theory that supports an award of punitive damages against the corporation is not required by the rules.

{23} In addition, Plaintiffs expressly relied on the managerial capacity theory in closing argument. We fail to see how it would be unfair to Defendant to rely on a managerial capacity theory here, and we examine the record to determine whether the evidence supports the judgment. In doing so, we resolve all disputed facts and indulge all reasonable inferences in favor of the judgment. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 46, 127 N.M. 47, 976 P.2d 999. Although Plaintiffs need only prove one theory of punitive damages in order to succeed, we conclude that the evidence supports an award under the theories of managerial capacity and corporate ratification. We do not address the theory of corporate indifference.

A. Managerial Capacity

{24} A corporation may be liable for punitive damages for the wrongful acts of employees who are acting within the scope of employment and who are employed in a managerial capacity. *Albuquerque Concrete Coring Co.*, 118 N.M. at 144–45, 879 P.2d at 776–77. This theory of liability derives from the Restatement (Second) of Torts Section 909(c) (1979) and the Restatement (Second) of Agency Section 217(C)(c) (1958), which we adopted in *Albuquerque Concrete Coring Co.*, 118 N.M. at 145, 879 P.2d at 777. The trial court concluded that Pike, Lancaster, Gifford, and Kasprzyk were acting within the course and scope of their employment at all times material to the transaction with Plaintiffs. Fleetwood does not challenge these findings, and there is ample evidence in the record that these employees' acts were fairly and naturally incidental to the business Fleetwood assigned them and were done while engaged in Fleetwood's business with the view of furthering Fleetwood's interest. *See* UJI 13-407 NMRA; *Narney v. Daniels*, 115 N.M. 41, 48, 846 P.2d 347, 354 (Ct. App. 1992) ("Generally, whether an employee is acting in the course and scope of employment is a question of fact."). The question remains whether any of these participants possessed managerial capacity.

{25} An employee has managerial capacity if he or she has the discretion or authority to "speak and act independently of higher corporate authority." *Brashear v. Baker Packers*, 118 N.M. 581, 583, 883 P.2d 1278, 1280 (1994). In *Albuquerque Concrete Coring Co.*, we noted how "[i]n the modern world of multinational corporations, corporate control must be delegated to managing agents who may not possess the requisite upper-level executive authority traditionally considered necessary to trigger imposition of corporate liability for punitive damages," and we rejected the traditional standard requiring wrongful acts committed by an employee with the "whole executive power" of the corporation. 118 N.M. at 146, 879 P.2d at 778. Instead, we noted that "[c]orporate liability for punitive damages should depend upon corporate responsibility for wrongdoing, not corporate ability to insulate top executives from daily, hands-on management." *Id.* Therefore, we concluded that "[j]ob titles, in and of themselves, are not necessarily dispositive." *Id.* at 145, 879 P.2d at 777. The "key in determining whether an agent acts in a managerial capacity is to look at the nature of what the agent is authorized to do by the principal and whether the individual has discretion regarding both what is done and how it is done." *Id.*

{26} Fleetwood argues that it is not liable for punitive damages because Lancaster was not employed in a managerial capacity. We disagree. Lancaster was employed by Fleetwood as the general manager of its Las Cruces office at the time that he and Pike sold the mobile home to Plaintiffs. Fleetwood general managers were responsible for the financing of mobile homes, and the evidence indicates that Lancaster dealt directly with GreenPoint regarding Plaintiffs' financing without oversight from upper-management. General managers were also responsible for advertising and for determining the value of trade-ins. When asked in his deposition how Lancaster was able to get away with his misconduct without it being detected sooner, Jim Gifford replied: "Any paperwork coming through would look simply normal as far as if a garage was going to be put on. I mean, you can't oversee, on a daily basis, every deal. That's why you have a general manager in a store. That is his responsibility, to put business together." Gifford also discussed how Fleetwood depends on general managers providing the company with correct information, and Kasprzyk testified that he confronted Lancaster instead of Pike regarding the nonexistent garage and decks "because the whole deal was Bob Lancaster's responsibility as general manager of that store." Finally, Kasprzyk indicated that he did not fire Lancaster immediately upon learning of his fraudulent activity because of Lancaster's elevated status as a general manager. We conclude that Lancaster had sufficient discretionary authority "regarding both what is done and how it is done" to bind Fleetwood for punitive damages. *Id.*

{27} The evidence also indicates that Kasprzyk and Gifford were employed in a managerial capacity. Vice-president Gifford was responsible for Fleetwood's operations and expansion in Arizona, Colorado, Nevada, and New Mexico, and he described himself as the "chief cook and bottlewasher" for the region. Gifford had the authority to repurchase Plaintiffs' $82,688.75 loan from GreenPoint without seeking corporate approval or authorization. Gifford's zone district manager, Kasprzyk, was the "day-to-day" supervisor for "approximately 13 stores between New Mexico, Arizona and Colorado." Kasprzyk, who had trained Pike and Lancaster, was the direct supervisor of the general managers of each store in his region and was also "physically responsible for all the actions of each individual store that [he] was supervising."

{28} Fleetwood concedes that Kasprzyk and Gifford were employed in a managerial capacity but argues that they were not involved in defrauding Plaintiffs. The evidence indicates otherwise. After GreenPoint discovered that a garage and decks had not been installed on Plaintiffs' land, GreenPoint notified Gifford that Fleetwood had falsely certified the construction of the garage and decks and requested that Fleetwood repurchase the loan. With this knowledge of fraud, Gifford placed Kasprzyk in charge of rectifying the situation. Kasprzyk confronted Lancaster in Las Cruces and asked, "Bob, do you understand what you've just done here? You've closed on a loan . . . and defrauded our lender." Instead of firing Lancaster in accordance with Fleetwood's "Call to Integrity" policy, which required "immediate dismissal" for falsification of information, Kasprzyk continued to leave Lancaster in charge.

{29} In addition, because a garage could not be placed on the property, GreenPoint authorized a substitution of "a fence of similar value" in place of the garage and decks. Without Plaintiffs' permission, Fleetwood erected a fence worth $1,000 as a substitute for the promised $9,500 in garage and decks. In their depositions, Kasprzyk and Gifford blamed each other for the substitution of the fence. Gifford said he left Kasprzyk in charge of remedying the situation and denied his involvement with the fence. However, Kasprzyk testified in his deposition that "Mr. Gifford and Vangie out of the zone office were also involved in that transaction, in regards to the fence issue" and that "they had just told me that they were going to take and move forward and put a fence in for the value." At trial, Kasprzyk testified again that the "fence issue" "was being handled through the zone office directly with GreenPoint Credit and the store itself." Kasprzyk denied any personal involvement with the fence substitution

and testified that he left Lancaster in charge of remedying the consequences of the fraud. Gifford disputed Kasprzyk's claims when he testifed that "Mr. Kasprzyk told me we were putting a fence on the property. Problem solved, as far as I was concerned." The trial court was at liberty to accept or reject their testimony, and we believe the evidence is sufficient to find that Pike, Lancaster, Kasprzyk, and Gifford each participated to some extent in defrauding Plaintiffs and GreenPoint. Therefore, Fleetwood is liable for punitive damages under a managerial capacity theory.

B. Corporate Authorization, Ratification, and Participation

{30} A corporation may be liable for punitive damages for the fraudulent acts of an employee where the corporation in some way authorizes, ratifies, or participates in that fraudulent conduct. *Albuquerque Concrete Coring Co.*, 118 N.M. at 143–44, 879 P.2d at 775–76. This theory of liability is consistent with the Restatement (Second) of Torts Section 909(d) and the Restatement (Second) of Agency Section 217(C)(d), which indicate that a corporation is liable for punitive damages where the corporation or a managerial agent of the corporation ratifies or approves of the act. In *Brashear*, 118 N.M. at 583, 883 P.2d at 583, we implicitly recognized Sections 909 and 217C, in their entirety, as being consistent with New Mexico law. While our adoption of these Restatement provisions has only been implicit, we take this opportunity to explicitly adopt Sections 909 of the Restatement (Second) of Torts and 217C of the Restatement (Second) of Agency. Therefore, proof of corporate ratification may include evidence that a managerial agent ratified, accepted, or acquiesced to the fraudulent conduct of corporate employees. *See Albuquerque Concrete Coring Co.*, 118 N.M. at 144, 879 P.2d at 776 ("A corporation can ratify the acts of its agents by acquiescence in or acceptance of the unauthorized acts.").

{31} In this case, Kasprzyk and Gifford, whom Fleetwood concedes were managerial agents, knew of the fraud committed by both Pike and Lancaster. The evidence is sufficient to support a finding that Kasprzyk and Gifford, with knowledge of the fraud related to the garage and decks, authorized the substitution of a fence worth $1,000 for the garage and decks. Knowing that Fleetwood had defrauded Plaintiffs and substituted a fence without their permission, Fleetwood proceeded to pay Pike a full commission for his fraudulent sale, failed to discipline Lancaster, and did not fire Pike or Lancaster until another customer complained that the two had attempted to falsify income.

{32} Fleetwood also kept the $9,500 Plaintiffs had been wrongfully charged for the garage and decks. Although Gifford repurchased Plaintiffs' loan from GreenPoint on behalf of Fleetwood, he did not reduce the principal balance by the amount wrongfully charged for the garage and decks. Subtracting $9,500 from the principal would have reduced the interest points Plaintiffs had to pay by roughly $800, reduced Plaintiffs' monthly payments by $79, and reduced the total finance charges on the loan by roughly $28,000.

{33} Fleetwood's "policing system" offers further evidence of corporate ratification. According to Evangeline Bustamonte, Gifford's office manager, Fleetwood did not want Gifford's zone office to police the files of local offices for falsification. Policing the files would have alerted Fleetwood to Pike and Lancaster's falsification of Plaintiffs' income, and to the improper construction income related to the garage and decks. Furthermore, there is evidence that Fleetwood's centralized finance office received a "tool-belt" sheet showing construction income "that doesn't make any sense" and should have alerted Fleetwood to the fraudulent activity. However, despite the fraud that occurred in this case, Fleetwood did not change its financing procedure or how its zone offices were to supervise local offices. We conclude that the conduct attributable to Fleetwood constitutes the substantial evidence needed to uphold the trial court's award of punitive damages for ratification, authorization, or participation. *See Brashear*, 118 N.M. at 583–84, 883 P.2d at 1280–81; *see also Ulibarri Landscaping Material, Inc.*

v. Colony Materials, Inc., 97 N.M. 266, 270, 639 P.2d 75, 79 (Ct. App. 1981) ("A principal who expressly or impliedly elects to ratify unauthorized acts of an agent will not be permitted to accept the benefits and reject the burdens of the acts.").

{34} Fleetwood argues that punitive damages are inappropriate in this case because, under Fleetwood's view of the evidence, Gifford and Kasprzyk merely left Lancaster in charge of rectifying the situation and Lancaster compounded the fraudulent scheme. Even if we were to accept Fleetwood's view of the evidence, placing a wrongdoer like Lancaster in charge of rectifying his own fraudulent activity under such circumstances would alone demonstrate an "acquiescence in or acceptance of" Pike and Lancaster's fraudulent activity. *Albuquerque Concrete Coring Co.*, 118 N.M. at 144, 879 P.2d at 776. There is sufficient evidence to support the trial court's findings that Fleetwood is liable for punitive damages under the theory of corporate ratification.

V. CONSTITUTIONALITY OF PUNITIVE DAMAGES AWARD

{35} The trial court awarded Plaintiffs punitive damages in the amount of $250,000 for Fleetwood's fraud and conversion. Fleetwood filed a motion to amend the judgment, arguing in one section of its motion that the trial court's award of punitive damages was unconstitutionally large because the ratio of punitive damages to compensatory damages exceeded ten-to-one. In response to Fleetwood's motion, the trial court reduced the punitive damages award "to a ratio not to exceed 10:1," or $150,000. The Court of Appeals did not address the constitutionality issue because it reversed the entire punitive damages award. Plaintiffs now ask us to reinstate the trial court's initial award of $250,000, or in the alternative, the trial court's reduced award of $150,000.

{36} In reducing its original punitive damages award, the trial court appears to have focused on the ratio of punitive damages to compensatory damages. However, the relationship between punitive and compensatory damages is but one of the factors we consider in assessing the constitutionality of a punitive damages award. Our de novo review of the amount of Plaintiffs' punitive damages award is essentially a review for reasonableness. *See Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 19, 132 N.M. 401, 49 P.3d 662; *see also* UJI 13-1827 ("The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances."). In ascertaining the reasonableness of a punitive damages award, we are guided by three criteria derived from *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) and adapted to New Mexico jurisprudence in *Aken*, 2002-NMSC-021, ¶¶ 20–21, 23, 25. Those three criteria are as follows: (1) the reprehensibility of the defendant's conduct, or the enormity and nature of the wrong; (2) the relationship between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases. *Aken*, 2002-NMSC-021, ¶ 20.

{37} The United States Supreme Court has indicated that the degree of reprehensibility of a defendant's conduct is "'[t]he most important indicium of the reasonableness of a punitive damages award.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW*, 517 U.S. at 575). In *BMW*, the United States Supreme Court concluded that the defendant's "conduct evinced no indifference to or reckless disregard for the health and safety of others" and that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. Unlike the conduct in *BMW*, this case involved a series of misrepresentations, forgeries, and fraudulent conduct that ultimately deprived a low-income couple of the four-bedroom home they wanted for their family and instead saddled them with a defective home of like size to their old home and at an increased financial obligation. While

we will not revisit the entire spectrum of misconduct here, it is "eminently clear" to us that Fleetwood's "behavior exhibited consciousness of wrongdoing, such that [Fleetwood] should have expected, or had notice, that legal punishment was likely." *Aken*, 2002-NMSC-021, ¶ 21; *see also BMW*, 517 U.S. at 576 (noting that deceitful conduct is more reprehensible than mere negligence). Fleetwood's repeated and deceitful acts, which subjected Plaintiffs' to an increased financial burden and substandard living conditions, demonstrate a reckless disregard for the welfare of a financially vulnerable family. *See Campbell*, 538 U.S. at 419 (discussing factors for courts to consider in assessing reprehensibility). "[W]e conclude that a substantial award was necessary to meet the goal of punishing [Fleetwood] for its conduct and deterring it, and others similarly situated in the future, from engaging in such conduct." *Aken*, 2002-NMSC-021, ¶ 21.

{38} The second *BMW* guidepost asks us to compare the punitive damages award to the actual or potential harm suffered by Plaintiffs. *BMW*, 517 U.S. at 575. Or, as *Aken* stated, "The test under the second guidepost in New Mexico is that '[t]he amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice.'" 2002-NMSC-021, ¶ 23. Although *Campbell* indicated that punitive damage awards reflecting "a single-digit ratio between punitive and compensatory damages" are most likely to comport with due process, 538 U.S. at 410, the United States Supreme Court has repeatedly declined "to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell*, 538 U.S. at 425; *see also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."). Instead, the United States Supreme Court has discussed the need for a flexible approach, especially in situations involving egregious behavior, low compensatory damage awards, injuries that are difficult to detect, or non-economic harm that is not easily converted into a dollar value. *Campbell*, 538 U.S. at 425; *BMW*, 517 U.S. at 582. Given the truly reprehensible behavior in this case, the relatively low compensatory damage award, and the intangible nature of the harm that Plaintiffs suffered, we believe that a substantial punitive damages award was appropriate.

{39} The third *BMW* guidepost, described as the least important of the *BMW* indicia, involves a comparison between Plaintiffs' punitive damages award and potential civil and criminal sanctions. *Aken*, 2002-NMSC-021, ¶ 25. "The possibility of a jail sentence justifies a substantial punitive damages award." *Id.* ¶ 27. Aside from the surviving UPA violations, we note that several criminal statutes would potentially apply to fraudulent and deceitful conduct. Forgery and fraud and embezzlement involving property valued between $2,500 to $20,000 are third degree felonies. NMSA 1978, §§ 30-16-10(C), -6(E), -8(E) (2006). Third degree felonies in New Mexico are punishable by a basic sentence of three years in prison and a $5,000 fine. NMSA 1978, § 31-18-15(A)(8), (E)(8) (2005). We conclude that the potential civil and criminal penalties for conduct similar to that seen in this case weigh in favor of the reasonableness of a substantial punitive damages award, and that all three *BMW* guideposts weigh in favor of the reasonableness of the trial court's initial punitive damages award. While it appears that the trial court reduced the initial punitive damages award under the mistaken belief that it reflected an unconstitutionally large ratio between compensatory and punitive damages, only the trial court knows the precise reasons for the reduction. Therefore, we remand this issue to the trial court to assess the punitive damages in this case consistent with this opinion.

VI. FLEETWOOD'S COUNTERCLAIM

{40} The trial court dismissed, without prejudice, Fleetwood's counterclaim to collect on the promissory note signed by Plaintiffs to secure financing for their mobile home. Fleetwood appealed, and the Court of Appeals reinstated the counterclaim, remanding it to the trial court for further proceedings. *Chavarria*, 2005-NMCA-082, ¶¶ 36–38. We

uphold the Court of Appeals' decision to reinstate Fleetwood's counterclaim.

{41} Plaintiffs argued at the trial level, and continue to argue on appeal, that Fleetwood failed to establish the essential element of its claim that it was the current holder of the promissory note, as required by NMSA 1978, § 55-3-308 (1992). Plaintiffs rely on the Arkansas case of *McKay v. Capital Resources Co.*, 940 S.W.2d 869, 871 (Ark. 1997), in which the Arkansas Supreme Court held that a party could not enforce a promissory note when it had failed to produce the original note or explain its absence. We agree with Plaintiffs that a party seeking to enforce a promissory note must generally produce the note or demonstrate a right to enforce it. *See* § 55-3-308; NMSA 1978, § 55-3-301 (1992). However, in their answer to Fleetwood's counterclaim, Plaintiffs admitted that the note was "owned in all respects whatsoever" by Fleetwood. Before the start of the trial, the trial court also admitted into evidence a "set of original exhibits" offered by Plaintiffs. Plaintiffs' set of exhibits contained a copy of the promissory note. The Court of Appeals was correct in concluding that Plaintiffs waived their objection to Fleetwood's failure to produce the original note. *See Tassock v. Hogan*, 538 P.2d 910, 912 (Or. 1975) (holding that a defendant who had admitted that the plaintiff was the owner and holder of a note could not later challenge the plaintiff's failure to produce the note at trial). We affirm the ruling of the Court of Appeals on this issue, and we remand to the trial court for further proceedings on Fleetwood's counterclaim.

VII. ATTORNEY FEES

{42} The trial court awarded Plaintiffs $79,943.73 in attorney fees under NMSA 1978, Section 57-12-10(C) (2005) of the UPA. The Court of Appeals affirmed the trial court's decision to award attorney fees. *Chavarria*, 2005-NMCA-082, ¶ 45. Because it reversed the trial court's award of UPA damages for additional utility expenses, inconvenience and aggravation, and the unauthorized sale of insurance, the Court of Appeals remanded the issue of attorney fees to the trial court for a redetermination of the appropriate amount. *Id.* ¶ 46. We uphold the decision of the Court of Appeals to remand this issue to the trial court.

{43} The Court of Appeals also denied Plaintiffs' request for attorney fees on appeal. *Id.* Because two of Plaintiffs' UPA awards survive appeal, the trial court may consider awarding Plaintiffs appellate attorney fees. *See Hale v. Basin Motor Co.*, 110 N.M. 314, 321–22, 795 P.2d 1006, 1013–14 (1990) (noting that UPA does not limit attorney fee and cost awards to trial level and that awarding appellate fees and costs "is entirely consistent with the statutory purpose of creating a private remedy to redress wrongs resulting from unfair or deceptive trade practices"). We remand to the trial court to determine the appropriate amount of attorney fees.

VIII. CONCLUSION

{44} Plaintiffs are entitled to the trial court's full award of compensatory damages for fraud or conversion. In addition, Fleetwood's conduct supports the trial court's decision to award punitive damages. We remand this case to the trial court to set the appropriate amount of punitive damages and to determine the appropriate amount of attorney fees. We also remand for further proceedings on Defendant's counterclaim.

{45} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

LYNN PICKARD,
Judge (sitting by designation)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-009

Filing Date: February 27, 2007

Docket No. 29,557

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

RAUL PACHECO,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Don Maddox, District Judge

Gary K. King, Attorney General
Martha Anne Kelly, Assistant Attorney General
Santa Fe, NM

for Petitioner

John Bigelow, Chief Public Defender
Nancy M. Hewitt, Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Chief Justice.

{1} In this case, an interpreter was sworn to interpret for two non-English speaking jurors throughout the court proceedings. Defendant appealed his convictions asserting that the interpreter should not have been present during jury deliberations without being given an additional instruction not to participate in the deliberations. The New Mexico Court of Appeals agreed in a majority opinion, holding that the trial court should have given a pre-deliberation instruction to the interpreter as suggested by the Non-English Speaking Juror Guidelines (NES Guidelines). *State v. Pacheco*, 2006-NMCA-002, ¶¶ 10, 18, 138 N.M. 737, 126 P.3d 553; *see* NES Guidelines, § III(C)(5) (attached as Appendix C to this opinion). Because the trial court did not give a pre-deliberation instruction to the interpreter, the Court of Appeals concluded the interpreter was not authorized to be in the jury room during deliberations, and thus, Defendant was presumptively prejudiced. *Pacheco*, 2006-NMCA-002, ¶¶ 18, 21. Finding that the State made no attempt to overcome the presumption of prejudice, the Court of Appeals reversed Defendant's convictions and remanded for a new trial. *Id*. ¶¶ 21–22.

{2} This case requires us to address whether an interpreter's presence during jury deliberations is unauthorized, thus giving rise to a presumption of prejudice, and to clarify the application of the NES Guidelines. We hold under existing case law, once an interpreter has been given the mandatory interpreters' oath to interpret testimony correctly, an interpreter is authorized to be in the room during deliberations to assist non-English speaking jurors.

Furthermore, because the interpreter is authorized to be present during deliberations, no presumption of prejudice arises. To obtain a new trial, a party must present evidence of prejudice by showing that the interpreter behaved improperly during deliberations. Because Defendant did not demonstrate that the interpreter acted improperly by, for example, participating in the deliberations, Defendant failed to prove he was prejudiced by the interpreter's presence in the jury deliberation room. We therefore reverse the Court of Appeals. However, we take this opportunity to make certain suggested procedures in the NES Guidelines mandatory in future cases involving an interpreter for a non-English speaking juror.

I. BACKGROUND

{3} Defendant was charged with three counts of criminal sexual penetration of a minor and one count of criminal sexual contact of a minor after his girlfriend's twelve-year old daughter alleged that Defendant forced her to engage in sexual acts with him. During the trial, two jurors required assistance from an interpreter who was present to interpret English into Spanish. Additionally, one witness who testified during the trial also required the assistance of an interpreter.

{4} Prior to the commencement of the trial, the judge administered the following oath to the interpreter: "Do you solemnly swear that you will faithfully and impartially interpret English into Spanish and Spanish into English the testimony about to be given in the cause now on trial so help you God?" The interpreter agreed to faithfully and impartially translate testimony. Nothing in the record indicates that the trial judge administered an additional oath or instruction to the interpreter regarding the interpreter's role during jury deliberations, nor was such an instruction requested by either party.

{5} After the jury convicted Defendant of three counts of criminal sexual penetration of a minor, Defendant made a motion for a new trial, arguing among other things that "the Court neglected to give an oath to the interpreter that she would not participate directly or indirectly in the deliberations." Defendant further alleged that a new trial was necessary because following deliberations the trial court did not require the interpreter to swear, on the record, that the deliberations were free from undue influence. However, Defendant did not point to any allegations of improper behavior by the interpreter. The record is silent as to whether the trial judge ruled on Defendant's motion for a new trial. Thus, the motion was automatically denied thirty days after Defendant filed the motion. *See* Rule 5-614(C) NMRA ("If a motion for new trial is not granted within thirty (30) days from the date it is filed, the motion is automatically denied.").

{6} The Court of Appeals reversed Defendant's convictions and remanded for a new trial. First, the court concluded that the interpreter's presence in the jury room was unauthorized without an additional oath or instruction from the trial court to ensure that she neither participate nor interfere with the jury's deliberations. *Pacheco*, 2006-NMCA-002, ¶ 15. Second, although the record did not indicate any improper behavior by the interpreter that might have prejudiced Defendant, the court held that a presumption of prejudice arose when the interpreter was not given an additional oath or instruction, and that the State did not overcome this presumption. *Id.* ¶ 21. The Court of Appeals found support for its holding in the NES Guidelines, which encourage the use of such an instruction. *See id.* ¶ 10.

II. DISCUSSION

A. Defendant Did Not Preserve His Claim of Error, But We Review the Claim as a Matter of General Public Interest.

{7} As noted previously, Defendant did not request the trial court to give a pre-deliberation oath to the interpreter, nor did Defendant object when the trial court did not give such an oath. Defendant raised the issue in his motion for new trial. To preserve an issue for appellate review under Rule 12-216(A), "it must appear that a ruling or decision by the district court was fairly invoked." "We require a party to object at trial and invoke a ruling from the trial court in order to 'alert the trial court to a claim of error so that it has an opportunity to correct any mistake.'" *State v. Reyes*, 2002-NMSC-024, ¶ 41, 132 N.M. 576, 52 P.3d 948 (quoting *State v. Gomez*, 1997-NMSC-006, ¶ 29, 122 N.M. 777, 932 P.2d 1).

{8} Because the interpreter assisted non-English speaking jurors throughout the trial it is reasonable to assume Defendant understood the interpreter would be present during jury deliberations. Therefore, Defendant should have either requested the court to administer a pre-deliberation oath to the interpreter or objected when such an oath was not given before deliberations. Doing so would have allowed the trial court to address the issue. Because Defendant did neither, he did not

preserve the issue for appellate review. However, we may review the claim of error if it is a question involving fundamental error, fundamental rights of a party, or an issue of general public interest. *See* Rule 12-216(B)(1)-(2) NMRA (stating the exceptions to the preservation rule).

{9} Defendant argues this case involves fundamental error because the interpreter was not authorized to be present during jury deliberations without a pre-deliberation oath or instruction. However, as the Court of Appeals noted, *Pacheco*, 2006-NMCA-002, ¶ 14, New Mexico case law holds that an unauthorized presence in the jury room gives rise to a presumption of prejudice which the State may rebut. *See State v. Coulter*, 98 N.M. 768, 769–70, 652 P.2d 1219, 1220–21 (Ct. App. 1982).

{10} Although this case implicates Defendant's fundamental right to a trial by a fair and impartial jury, we are not persuaded that we may review the claimed error on that basis. *See* U.S. Const. amend. VI (guaranteeing a defendant the "right to a speedy and public trial, by an impartial jury"); N.M. Const. art. II, § 12 ("The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."). Fundamental rights, such as the right to trial by a fair and impartial jury, may be waived or lost. *State v. Sanchez*, 2000-NMSC-021, ¶ 26, 129 N.M. 284, 6 P.3d 486. Defendant waived his right by failing to timely invoke the ruling of the trial court. *See Vigil v. Atchison, T. & S.F. Ry.*, 28 N.M. 581, 590, 215 P. 971, 974 (1923) (holding that counsel waived any alleged error as to an interpreter's presence during deliberations by waiting to object until after the interpreter entered the jury room), *overruled on other grounds by Dunleavy v. Miller*, 116 N.M. 353, 356 n.1, 862 P.2d 1212, 1215 n.1 (1993); *cf. State v. Escamilla*, 107 N.M. 510, 515, 760 P.2d 1276, 1281 (1988) (finding that a defendant waives his right to trial by a fair and impartial jury by waiting to object to jury qualifications until after the verdict is rendered).

{11} What remains is our discretion under Rule 12-216(B) to consider an issue not preserved below under the general public interest exception. *See* Rule 12-216(B)(1) NMRA. Although this exception should be used sparingly, we choose to do so in this case because of the important competing constitutional interests. *See* U.S. Const. amend. VI; N.M. Const. art. VII, § 3. We believe the large population of non-English speaking citizens in New Mexico who may require the assistance of an interpreter to effectively exercise their constitutional right to serve as jurors, and the impact of this case on a defendant's right to a fair and impartial trial by jury, justifies our review of the claimed error.

B. Because of the Constitutional Provisions Involved, the Proper Standard of Review is De Novo.

{12} In determining whether the claimed error occurred in this case, we must balance a "citizen's right to serve as a juror regardless of his or her ability to speak, read or write the English or Spanish languages," N.M. Const. art. VII, § 3, with a defendant's right to trial by a fair and impartial jury. U.S. Const. amend. VI; N.M. Const. art. II, § 12. In light of the constitutional provisions involved, we apply a de novo standard of review. *See State v. Brown*, 2006-NMSC-023, ¶ 8, 139 N.M. 466, 134 P.3d 753 ("Because this case implicates two important constitutional rights, . . . our review is *de novo*.").

{13} At the outset, we note that the record in this case does not reflect whether the interpreter was actually present during the jury deliberations. However, failure to provide an interpreter for jurors who require such assistance would be contrary to *State v. Rico*, in which we held that "Article VII, Section 3 [of the New Mexico Constitution] requires that a trial court make every reasonable effort to accommodate a potential juror for whom language difficulties present a barrier to participation in court proceedings." 2002-NMSC-022, ¶ 11, 132 N.M. 570, 52 P.3d 942. Because the record in this case is deficient with respect to whether the interpreter was present, we indulge every presumption "'in favor of the correctness and regularity of the [trial] court's judgment.'" *State v. Rojo*, 1999-NMSC-001,

¶ 53, 126 N.M. 438, 971 P.2d 829 (quoting *In re Ernesto M.*, 1996-NMCA-039, ¶ 19, 121 N.M. 562, 915 P.2d 318) (alteration in original). Therefore, we presume that an interpreter was present in the jury room to assist the non-English speaking jurors in accordance with our holding in *Rico*. Additionally, we note that the State does not dispute that the interpreter was present in the jury room during deliberations.

C. A Sworn Interpreter Is an Authorized Presence in the Jury Room.

{14} The use of an interpreter for a non-English speaking juror during deliberations raises a concern regarding the presence of a thirteenth person in the jury room and the potential impact that the interpreter's presence has on a defendant's right to a fair and impartial trial by jury. We agree with the Court of Appeals that "[t]he heart of a jury's function lies in its deliberations," and that the jury's deliberative process is sacrosanct. *Pacheco*, 2006-NMCA-002, ¶ 7. Outside influences or intrusions on the jury's deliberative process cannot be tolerated. Accordingly, the presence of an unauthorized person during jury deliberations creates a presumption of prejudice which may be rebutted by the State. *See Coulter*, 98 N.M. at 770, 652 P.2d at 1221 (holding that defendant was entitled to a new trial since "the State made no showing to overcome the presumption of prejudice created by the presence of 'the thirteenth juror'").

{15} Yet, as the Court of Appeals's majority opinion recognized, "[t]he presence of an interpreter during jury deliberations does not constitute, per se, the presence of an unauthorized person giving rise to a presumption of prejudice." *Pacheco*, 2006-NMCA-002, ¶ 8. In fact, depending on the circumstances, the presence of an interpreter in the jury room may be constitutionally required to ensure that jurors with language difficulties may fully participate in court proceedings, such as jury deliberations. We held in *Rico* that if an interpreter is needed for a non-English speaking juror, then Article VII, Section 3 of the New Mexico Constitution requires the trial court to provide the juror with an interpreter. 2002-NMSC-022, ¶ 16. Thus, the presence of an interpreter during deliberations who has been given an oath to correctly interpret testimony in the case is consistent with our interpretation of Article VII, Section 3 in *Rico*. Accordingly, we are persuaded that a sworn interpreter is authorized to be present during jury deliberations to assist non-English speaking jurors.

{16} Our holding is consistent with a long line of New Mexico cases recognizing sworn jury interpreters as authorized in the jury room. Our case law dating back to the territorial court of New Mexico in the 1800s has treated sworn jury interpreters as officers of the court. In *Territory v. Romine*, the Supreme Court of the Territory of New Mexico noted New Mexico's unique history of once having been a part of the Republic of Mexico, and acknowledged the impracticability and unjustness of having an all English-speaking jury. 2 N.M. 114, 123 (1881). In several counties at that time "a sufficient number of English speaking jurors could not have been obtained to try any important case." *Id*. Accordingly, in any county where juries included Spanish-speaking jurors, "all the proceedings [were] translated by a sworn interpreter, *who is a court officer*." *Id.* at 124 (emphasis added).

{17} In *Territory v. Thomason*, the Supreme Court of the Territory of New Mexico confronted a situation very similar to the one before us today: a challenge to the use of an interpreter during jury deliberations. 4 N.M. 154, 13 P. 223 (1887). In *Thomason*, the trial court had directed the interpreter to attend the jury deliberations at the request of the jury because they were unable to communicate with each other. *Id*. at 167, 13 P. at 228. The Supreme Court of the Territory of New Mexico held that

> [u]nder such circumstances, the statute provides for an interpreter, who acts under oath, and who is an *officer of the court*, and through him the business is conducted in both languages. While it is not in terms, provided that such an interpreter may attend the jury in its deliberations, yet the necessity therefor is frequently imperative.

Id. at 166, 13 P. at 228 (emphasis added). The court found that this was unlike a situation in which "a stranger goes into the jury room as a spy upon the deliberations, or as an unwelcome intruder," and, thus, upheld the use of the interpreter during deliberations. *Id*. at 167, 13 P. at 228.

{18} Most recently, in *State ex rel. Martinez v. Third Judicial District Court*, attached as an appendix to *Rico*, we denied a petition for a writ of prohibition which alleged that provisions adopted by the Third Judicial District Court, allowing for the use of an interpreter for non-English speaking jurors, amounted to an unauthorized presence in the jury room. *Rico*, 2002-NMSC-022 app. at 575. In our denial of the writ, we rejected this contention and stated that "the use of court interpreters during jury deliberations *does not constitute an unauthorized presence in the jury room*." *Id*. (emphasis added). These cases demonstrate that since New Mexico's territorial days we have consistently treated sworn jury interpreters as officers of the court and as an authorized presence in the jury room.

{19} Based on our prior interpretation of Article VII, Section 3 requiring trial courts to make every reasonable effort to accommodate non-English speaking jurors, and our precedent describing interpreters as officers of the court, we conclude that an interpreter is authorized to be present in the jury room during deliberations so long as the interpreter has taken the initial oath to interpret testimony. The mandatory interpreters' oath instructs the interpreter to "solemnly swear or affirm that [the interpreter] will correctly interpret from English to Spanish [or other applicable language] and from Spanish to English all questions and answers and matters pertaining to this cause under penalty of law." UJI 13-212 NMRA; *see* NMSA 1978, § 38-10-8 (1985) (providing that "[e]very interpreter appointed pursuant to the provisions of the Court Interpreters Act . . . , before entering upon his duties, shall take an oath"). Having taken the oath to correctly interpret testimony, the interpreter becomes an officer of the court, and the "interpreter's role is bound by ethical constraints, court rules and orders, and court instructions." *Rico*, 2002-NMSC-022 app. at 575. Because a sworn interpreter acts as an officer of the court and is bound by the interpreter's oath, we hold that a sworn interpreter is authorized to be in the jury room during deliberations when a juror requires such assistance in order to fully participate in the court proceedings.

D. Evidence of Prejudice Is Necessary in Cases Involving a Sworn Interpreter.

{20} Having determined that a sworn interpreter is an authorized presence in the jury deliberation room, we next address the issue of prejudice. When an unauthorized person is present during jury deliberations, a presumption of prejudice attaches that may be rebutted by the State. *Coulter*, 98 N.M. at 769, 652 P.2d at 1220. However, in circumstances involving a sworn interpreter who is authorized to be present during jury deliberations, we hold that prejudice must be established by evidence showing that an interpreter acted outside the bounds of the interpreter's oath. Furthermore, because a sworn interpreter is an officer of the court, our case law supports a presumption that the interpreter acted properly, absent any evidence to the contrary.

{21} In *Thomason*, the Supreme Court of the Territory of New Mexico determined that once the interpreter was sworn and sent to the jury room, the presumption was that the interpreter, as an officer of the court, would "act as *the medium of communication,* and take no part in the deliberation." 4 N.M. at 167, 13 P. at 228. The court also noted that there was no evidence of any improper behavior by the interpreter, nor any indication that the interpreter's presence influenced the jurors or impacted the jurors' ability to fulfill their duties. *Id*. As such, the court held that it was not willing to presume that the interpreter acted improperly or to the prejudice of the defendant. Instead, the court held that "[a]cting under oath and the order of the court, the presumption should be in favor of proper action by [the interpreter], rather than against it." *Id*.

{22} Our recent decision in *State v. Rodriguez* also demonstrates that a presumption of prejudice is not necessary when the facts involve an officer of the court. 2006-NMSC-018, ¶ 7, 139 N.M. 450, 134 P.3d 737. *Rodriguez* did not involve a jury interpreter. *Rodriguez* addressed whether we should presume prejudice in a situation in which a trial court reassembled the jury to correct the jury's verdict after the foreman mistakenly signed the wrong verdict form. *Id*. ¶¶ 1–2. We declined to presume prejudice because the trial judge was able to show that the jury did not leave the court's presence or control. *Id*. ¶ 7. Additionally, we held that "because they are *officers of the court*, we decline to presume that court officials have contaminated a juror or the jury." *Id*. (emphasis added).

{23} Absent any evidence that an interpreter acted improperly during deliberations, other jurisdictions have also declined to find prejudice when a sworn interpreter is present in the jury room. In *State v. Marcham*, the Arizona Court of Appeals addressed a claim from a defendant that an interpreter for a deaf juror resulted in the presence of an unauthorized person during jury deliberations. 770 P.2d 356, 357 (Ariz. Ct. App. 1988). The court pointed out that there was "a presumption that court interpreters [would] do their duty and that an oath [would] be properly administered." *Id*. Ultimately, the court concluded that "in the absence of any evidence to the contrary, a presumption of regularity exists with respect to the oath of the interpretor [sic] and her proper interpretation of the proceedings in the trial court." *Id*. at 359.

{24} The New Mexico Court of Appeals appeared to rely on *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987), to support its holding that a presumption of prejudice arose when the trial court failed to give a pre-deliberation instruction to the interpreter. *Pacheco*, 2006-NMCA-002, ¶¶ 9, 18. In *Dempsey*, the trial judge administered an oath requiring the interpreter to interpret correctly, but the trial judge also specifically instructed the interpreter that she could not participate in jury deliberations. 830 F.2d at 1086–87. In discussing *Dempsey*, the New Mexico Court of Appeals drew the conclusion that "[b]ecause the interpreter's 'oath to act strictly as an interpreter and not to participate in the deliberations' sufficiently protected the jury's deliberations, the [Tenth Circuit] held that the interpreter's presence did not warrant a new trial of the defendant." *Pacheco*, 2006-NMCA-002, ¶ 9 (quoting *Dempsey*, 830 F.2d at 1092).

{25} However, *Dempsey*does not hold that a presumption of prejudice arises when a pre-deliberation instruction is not given. Rather, the Tenth Circuit in *Dempsey* relied on the fact that a pre-deliberation instruction was given, and the fact that the interpreter took an oath to interpret correctly, as support for its presumption that the interpreter complied with that instruction absent any evidence of impropriety. *Id*. at 1091–92. The court made clear that the absence of evidence of misconduct was key in its decision not to order a new trial, finding that "[a] different situation would arise if there were evidence that the interpreter behaved improperly." *Dempsey*, 830 F.2d at 1092. The court also stated that "any evidence from jurors that the interpreter acted other than strictly as an interpreter would warrant a new trial," but found that without any such evidence, ordering a new trial would be based on speculation rather than fact. *Id*. at 1091–92. Thus, *Dempsey* stands for the proposition that an interpreter is presumed to comply with the oaths and instructions given by the trial court, and there is no prejudice unless the defendant presents evidence of interpreter misconduct.

{26} Because a sworn interpreter is an officer of the court, there is a presumption that the interpreter acted only as a "medium of communication," and not as a participant in jury deliberations absent any evidence to the contrary. *See Thomason*, 4 N.M. at 167, 13 P. at 228; *see also Rodriguez*, 2006-NMSC-018, ¶ 7 ("[B]ecause they are officers of the court, we decline to presume that court officials have contaminated a juror or the jury, although counsel are at liberty to raise the issue."). Without any evidence that an interpreter exceeded his or her role by improperly participating in jury deliberations, a presumption of regularity exists with respect to an interpreter's

compliance with the oath to correctly translate testimony. *See Marcham*, 770 P.2d at 359; *see also Lujan ex rel. Lujan v. Casados-Lujan*, 2004-NMCA-036, ¶ 20, 135 N.M. 285, 87 P.3d 1067 ("Bedrock principles of appellate law dictate that matters not of record present no issue for review, that there is a *presumption of regularity in the proceedings below*, and that error must be clearly demonstrated.") (emphasis added). Accordingly, we decline to find prejudice unless there is a showing that an interpreter acted improperly.

{27} In this case, Defendant failed to present any evidence that the interpreter acted improperly. The record does not contain any allegation or indication that the interpreter acted outside her role as interpreter during deliberations. No jurors came forward alleging improper behavior by the interpreter. Defendant acknowledged this fact in his Answer Brief, stating that "no jurors made allegations that [the interpreter] improperly participated in the jury's deliberations." Yet, Defendant would have us reverse his convictions on the basis that "the record is not clear that she did not [participate in deliberations]." Defendant urges us to read the record's silence as supporting an assertion that the interpreter behaved improperly during deliberations. If we were to do so and order a new trial for Defendant, we would be basing our decision not on fact, but solely on speculation. We decline to speculate that improper behavior occurred, and instead presume the interpreter acted properly within the bounds of her oath.

{28} While administering a pre-deliberation instruction to the interpreter regarding the interpreter's role during deliberations would have been appropriate and would have eliminated the due process concerns implicated in this case, it was not mandatory to do so when Defendant stood trial. Because there was no evidence demonstrating misconduct by the sworn interpreter, the Court of Appeals erred in holding that the interpreter's presence in the jury deliberations room resulted in an automatic presumption of prejudice simply because the trial court did not give the additional instruction. All that was required at the time Defendant's trial took place was that the trial court administer an oath to the interpreter that she correctly interpret the testimony in the case. *See* § 38-10-8 (mandating that "[e]very interpreter appointed pursuant to the provisions of the Court Interpreters Act . . . shall take an oath that he will make a true and impartial interpretation"); UJI 13-212 NMRA (providing the oath that should be given to interpreters in district court). Because the trial court administered the initial oath to the interpreter, no presumption of prejudice arose, and Defendant was required to demonstrate prejudice with evidence that the interpreter acted improperly.

E. Trial Courts Are Required to Give Additional Instructions to Interpreters and Jurors in Future Cases.

{29} The State argues that the Court of Appeals erred by giving the NES Guidelines the force of law when it held that a pre-deliberation oath was required. We do not read the Court of Appeals's opinion as giving the NES Guidelines the force of law. However, in light of the importance of preserving the sanctity of the jury deliberation room, we take this opportunity to make certain NES Guidelines mandatory, as detailed below, and to require an additional instruction to the jury in future cases involving interpreters.

{30} The NES Guidelines were developed in response to our order in *Martinez*, in which we held that the "broad language of [Article VII, Section 3] explicitly prohibits the automatic dismissal of an otherwise qualified person based solely on their inability to speak, read or write the English or Spanish languages." *Rico*, 2002-NMSC-022 app. at 575. The Committee of the Chief Justice for Improvement of Jury Service in New Mexico considered the impact of the *Martinez* order on jury service and recommended that the Administrative Office of the Courts provide guidelines to our courts in assisting non-English speaking jurors. Comm. of the Chief Justice for Improvement of Jury Serv. in N.M., *Interim Report*, N.M.B. Bull., Oct. 26, 2000, at 12, 16. The Administrative Office of the Courts issued the Guidelines in 2000 pursuant to this Court's

order. Order No. 00-8500, Sept. 11, 2000, *in* N.M.B. Bull., Oct. 26, 2000, at 21–22.

{31} In part, the NES Guidelines suggest that prior to jury deliberations, the trial judge should, on the record and in the presence of the jury, instruct the interpreter not to interfere or participate in any way with jury deliberations. NES Guidelines, § III(C)(5). Additionally, the NES Guidelines recommend that after jury deliberations, but before the verdict is announced, the trial judge should question the interpreter on the record whether the interpreter abided by the oath given not to participate in deliberations. *Id.* § III(C)(6). The guidelines also allow for a party to request that the jurors be questioned regarding whether the interpreter improperly participated in the deliberations. *Id*.

{32} Although the trial court in this case did not err by not complying with the NES Guidelines because they were not mandatory when Defendant stood trial, we believe that additional safeguards will help maximize a defendant's due process rights when an interpreter is present during jury deliberations. As a result, we take this opportunity to exercise our power of superintending control and adopt as mandatory the NES Guidelines regarding pre-deliberation and post-deliberation instructions for interpreters, as well as additional requirements for our courts when interpreters are used to assist non-English speaking jurors. *See* N.M. Const. art. VI, § 3 ("The supreme court shall have . . . a superintending control over all inferior courts. . . ."); *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975) ("Our constitutional power under N.M. Const. art. III, § 1 and art. VI, § 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government.").

{33} Accordingly, we hold that in addition to the initial oath that must be given regarding correct interpretation, a trial court must comply with the following mandatory requirements. First, prior to excusing the jury for deliberations, the trial court must administer an oath, on the record in the presence of the jury, instructing the interpreter not to participate in the jury's deliberations. *See* NES Guidelines, § III(C)(5). We also require that the interpreter be identified on the record by name, that the interpreter state whether he or she is certified, and that the interpreter indicate whether he or she understands the instructions. In addition to instructing the interpreter, the trial court must also give an instruction to the jury about the interpreter's role during deliberations. Until we approve modified instructions, Appendix A to this opinion contains the pre-deliberation oath for the interpreter and Appendix B contains the jury instructions that trial courts should use effective immediately.

{34} After deliberations, but before the verdict is announced, the trial court is required to ask the interpreter on the record whether he or she abided by the oath not to participate in deliberations. The interpreter's response must be made part of the record. Furthermore, at the request of any party, the trial court must allow jurors to be questioned to the same effect. Finally, the trial judge must also instruct the interpreter not to reveal any part of the jury deliberations until after the case is closed. *See id.* § III(C)(6).

{35} In borrowing some of these requirements from the NES Guidelines, we recognize the considerations that were taken into account by the Administrative Office of the Courts when it recommended that this Court not make the Guidelines mandatory. These considerations included the "unique needs and limitations" of local courts, and the fact that some guidelines "may not be applicable in all courts." *Id.* § I. While some of the NES Guidelines may not be appropriate for all courts, the suggestions that we adopt today as mandatory are universally applicable in a case involving an interpreter for a non-English speaking juror. All trial courts are charged with the duty of protecting a defendant's right to a fair and impartial trial, as well as protecting the right of a non-English speaking juror to fully participate in judicial proceedings. We believe the requirements we have adopted strike a balance between the competing constitutional rights at stake in this case. The requirements take into

account the need for interpreters during jury deliberations as required by Article VII, Section 3, while also emphasizing the strictly limited role of the interpreter to ensure a defendant's due process rights are adequately protected.[1]

III. CONCLUSION

{36} The Court of Appeals is reversed. In accordance with our decision today, we refer this matter to our Uniform Jury Instructions committees for immediate action consistent with this opinion. Until final instructions are developed and adopted by this Court for use in cases involving interpreters for non-English speaking jurors, a provisional oath for interpreters and instructions to the jury are attached to this opinion as appendices for immediate use by trial courts. Defendant raised four other issues in his original appeal which were not addressed by the Court of Appeals. We remand to the Court of Appeals for consideration of those remaining issues.

{37} **IT IS SO ORDERED.**

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

[1] The procedures for balancing due process requirements with the constitutional mandate that non-English speaking citizens not be systematically excluded from participating in our jury system has been dynamic and evolving. One example of this is the adoption of the Court Interpreters Code of Professional Responsibility. *See* Rule 23-111(C) NMRA. The Code was not in place at the time of Defendant's trial. However, since this Court's adoption of the Code in 2004, all certified court interpreters are required to sign a statement indicating that "as officers of the court, court interpreters are bound to [the] professional code of ethics to ensure due process of law." Rule 23-111(C)(A). One requirement under the Code that is particularly relevant to future cases involving an interpreter for a non-English speaking juror is that "[t]he interpreter shall confine himself or herself to the role of interpreting." Rule 23-111 (C)(C)(4).

APPENDIX A

Pre-Deliberation Oath to Interpreter

"Do you solemnly swear or affirm that you will not interfere with the jury's deliberations in any way by expressing any ideas, opinions, or observations that you may have during deliberations, and that you will strictly limit your role during deliberations to interpreting?"

APPENDIX B

Pre-Deliberation Instruction to Jury

Ladies and gentlemen, we have at least one non-English speaking juror who is participating in this case. The New Mexico Constitution permits all citizens to serve on a jury whether or not English is their first language. You should include this [these] juror(s) in all deliberations and discussions on the case. To help you communicate, the juror(s) will be using the services of the official court interpreter. The following rules govern the conduct of the interpreter and the jury:

1) The interpreter's only function in the jury room is to interpret between English and [the non-English speaking juror(s) native language].

2) The interpreter is not allowed to answer questions, express opinions, have direct conversations with other jurors or participate in your deliberations.

3) The interpreter is only allowed to speak directly to a member of the jury to ensure that the interpreter's equipment is functioning properly or to advise the jury foreperson if a specific interpreting problem arises that is not related to the factual or legal issues in the case.

4) No gesture, expression, sound or movement made by the interpreter in the jury room should influence your opinion or indicate how you should vote.

5) If you can speak both English and [the language of the non-English speaker], we ask that you speak only in English in the jury room so the rest of the jury is not excluded from any conversation.

6) Leave all interpretations to the official court interpreter [who is trained and certified by the court]. The interpreter should be the only one to interpret conversations inside the jury room and testimony in the courtroom.

7) Any deviation from these rules should be immediately reported by submitting a note identifying the problem to the judge or court personnel.

DIRECTIONS FOR USE

This instruction should be read before deliberations whenever a non-English speaking juror is serving on the jury.

APPENDIX C

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Administrative Office of the Courts

Non-English Speaking Juror Guidelines

I. INTRODUCTION

These guidelines are intended to assist in the efforts of the New Mexico Judiciary to incorporate non-English speaking (NES) citizens into New Mexico's jury system. Because each local court has unique needs and limitations, these guidelines may not be applicable in all courts. Accordingly, these guidelines should not be considered mandatory directives that must be followed in all cases. However, all courts are encouraged to implement the standards set forth below to the fullest extent possible.

II. NON-ENGLISH SPEAKING JUROR ASSISTANCE SERVICES

A. Scope

Article VII, Section 3, of the New Mexico Constitution provides that "[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages." To comply with this constitutional mandate, all courts should strive to incorporate all New Mexico citizens into our jury system regardless of the language spoken by a prospective NES juror. Because most potential NES jurors speak Spanish as their primary language, these guidelines seek to implement statewide standards for accommodating prospective jurors who speak Spanish. However, where financially and logistically possible, all courts are encouraged to implement these guidelines for other languages.

B. Court Interpreters

Upon request by an NES citizen called for jury duty, all courts should appoint a court interpreter to assist the NES juror or prospective juror. In the absence of a specific request for a court interpreter, all courts should independently determine whether a juror or prospective juror is in need of a court interpreter. To make this determination, a court may consider conducting a limited interview of the juror or prospective juror to assess whether the juror or prospective juror is capable of understanding the proceedings in English.

C. Jury Summons

The New Mexico jury summons form should include a statement in Spanish notifying citizens called for jury duty that assistance is available for those who cannot understand English. The Spanish notice should also provide a telephone number that prospective NES jurors may call for further assistance. The Administrative Office of the Courts (AOC) is responsible for producing jury summonses for local courts that will include an appropriate Spanish notice. The AOC will coordinate with local courts to ensure that an adequate number of trained court personnel are available to respond to calls for assistance from prospective NES jurors.

D. Juror Questionnaire

The AOC is responsible for preparing a Spanish version of the juror questionnaire used by local

courts. The AOC is also responsible for distributing copies of the Spanish version of the juror questionnaire to all local courts. All local courts should provide a Spanish version of the juror questionnaire upon request from any prospective juror. All local courts should also make arrangements to have court personnel available to provide an oral, Spanish translation of the juror questionnaire and to otherwise assist prospective NES jurors who cannot read Spanish.

E. Juror Orientation Materials

The AOC is responsible for distributing to all local courts copies of the Spanish version of jury orientation materials approved by the Supreme Court. To the extent that local courts may provide English language jury orientation materials to prospective jurors, those courts should also make arrangements to provide oral, Spanish translations when needed. Alternatively, courts are encouraged to produce written translations of juror orientation materials.

F. Jury Selection

All courts should make arrangements to have a court interpreter available for prospective NES jurors during the jury selection process. Upon arriving for jury selection, the court should introduce the court interpreter appointed to assist prospective NES jurors and advise prospective NES jurors that they should alert the interpreter if they have any questions during the process. The transcript of proceedings need not include the foreign language statements of the court interpreter or prospective NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for a prospective NES juror.

Although a court interpreter may provide interpretation services for more than one prospective NES juror at a time, a court interpreter ordinarily should not be used to interpret for both a litigant and a prospective NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for both the litigant and the prospective NES juror. Subject to availability, courts are encouraged to avoid using the same court interpreter for jury selection and trial in the same case.

Prospective NES jurors are subject to peremptory challenges and challenges for cause the same as any other prospective juror. However, a prospective NES juror may not be challenged or excused simply because that juror is unable to read, write, or speak the English language. Moreover, the trial court should not excuse a prospective NES juror who asks to be excused simply because he or she cannot read, write, or speak the English language. Exercising its discretion in ruling on an objection to the service of any NES citizen, the court should consider all facts and circumstances pertaining to service by this juror, as the court would do in ruling on an objection to service by any citizen. In the event that a court interpreter will not be available to provide interpretation services for a prospective NES juror who would otherwise be selected to serve on the jury, the presiding judge may either postpone the proceedings until a court interpreter is available or excuse the juror from service for that proceeding only, provided that the prospective NES juror is recalled for jury selection for the next scheduled proceeding. If an interpreter cannot be obtained after reasonable effort, the prospective NES juror may be excused permanently.

G. Trial Proceedings

All courts should make arrangements to have a court interpreter available for all NES jurors during all trial proceedings. The transcript of proceedings need not include the foreign language statements of the court interpreter or the NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for an NES juror. Although a court interpreter may provide interpretation services for more than one NES juror, a court interpreter ordinarily may not provide

interpretation services for both a litigant and an NES juror or for a witness and an NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for the litigants, witnesses, other court participants, and NES jurors. Subject to availability, courts are encouraged to avoid using the same court interpreter for the trial and for jury deliberations.

H. Jury Deliberations

All courts should make arrangements to have a court interpreter available for all NES jurors during all jury deliberations. One court interpreter may provide interpretation services for more than one NES juror at a time during deliberations. To the extent that documentary exhibits are submitted to the jury for consideration during deliberations, the court interpreter assigned to assist NES jurors may provide an oral translation of the written material. With respect to jury instructions submitted to the jury, courts are encouraged to draft written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors during deliberations may provide an oral translation of the jury instructions.

III. COURT INTERPRETATION STANDARDS FOR NES JURORS

When providing the court interpretation services to NES jurors and prospective jurors as outlined above, all courts should strive to meet the following standards:

A. Certification and Availability Standards

1. Certified

All courts should use certified court interpreters to assist NES jurors during all jury selection, trial, and deliberation proceedings. Certification is governed by the provisions of the Court Interpreters Act, NMSA 1978, §§ 38-10-1 to -8 (1985), as administered by the AOC. Except as otherwise provided below, an uncertified court interpreter should only be used if the requirements of NMSA 1978, Section 38-10-3(B) (1985), are met. In the event that a court must use an uncertified court interpreter, the court should consider briefly examining the uncertified court interpreter to establish the qualifications of the interpreter.

2. Uncertified

All courts may use uncertified court interpreters to assist NES jurors and prospective jurors in completing the juror questionnaire. Uncertified court interpreters may also be used during the jury orientation process.

3. Availability

All courts should maintain a list of locally available certified and uncertified court interpreters and submit an updated copy of that list to the AOC by May 1st of each year. For those courts that do not have an adequate number of locally available certified or uncertified court interpreters available to assist NES jurors and prospective jurors, the local court administrator or chief judge should coordinate with the AOC to compile a list of certified and uncertified court interpreters who are available from other areas. The AOC should also assist local courts in the training of local court personnel to assist NES jurors and prospective jurors with the juror questionnaire, jury orientation, and with questions arising outside the context of formal court proceedings.

B. Written Translation Standards

1. Qualification Materials

The AOC will provide all courts with a written, Spanish translation of the juror qualification form and questionnaire translated by a certified court interpreter.

2. Trial Materials

Written materials that are submitted to the jury for consideration during trial or jury deliberations should be orally translated by a certified court interpreter or translated in writing by a certified court interpreter. If a certified court interpreter is not available, the court may use an uncertified court interpreter to orally translate written materials if the requirements of Section 38-10-3(B) are met.

3. Machine Translation

A number of services are available on the Internet and elsewhere that provide free or low-cost translation of written materials from English into a number of other languages. Because machine translation may not be accurate, courts should not use machine translation for written materials that are to be used in formal court proceedings, such as jury instructions or documentary exhibits. Although courts may consider using machine translation for other informational and local orientation materials submitted to jurors and prospective jurors, all courts are cautioned against relying exclusively on machine translation without human verification of the accuracy of a machine translation.

C. Use and Performance Standards

Because of the demanding and sensitive nature of the services provided by court interpreters appointed to assist NES jurors and prospective jurors, all courts are encouraged to use and instruct court interpreters in accordance with the following standards.

1. Hours of Service

All courts should strive to limit the amount of time that a court interpreter interprets for an NES juror or prospective juror to avoid court interpreter fatigue. Ideally, two court interpreters should be used as a team to provide interpretation services, and each interpreter should avoid interpreting for more than 30–45 minutes without a rest period. Because this may not be logistically feasible in all circumstances, every court should remain sensitive to the risk of court interpreter fatigue. Whenever a court interpreter suspects that the quality of interpretation may become compromised because of fatigue, the interpreter should advise the trial court judge of the need for a period of rest.

2. Oath of Interpreter

Before a court interpreter begins to provide interpretation services for an NES juror or prospective juror during jury selection or trial, the trial judge should administer an oath to the court interpreter in accordance with NMSA 1978, Section 38-10-8 (1985).

3. Pre-Interpretation Interview

Prior to providing interpretation services for an NES juror or prospective juror, with the knowledge and permission of the court, the court interpreter should briefly interview the NES juror or prospective juror to enhance the effectiveness of the interpretation by becoming familiar with the speech patterns and linguistic traits of the NES juror or prospective juror.

4. Courtroom Explanation of the Role of the Interpreter

Prior to the commencement of proceedings, the trial court judge should explain the role of the court interpreter to those present in the courtroom by explaining that the interpreter was appointed by the court to assist jurors or prospective jurors who do not understand English. The judge should also explain to the jury that the interpreter is only allowed to interpret and that the jurors may not ask the interpreter for advice or other assistance. The judge should also explain that, for those English speaking jurors who may understand the non-English language spoken by the court interpreter, the jurors should disregard what they hear the interpreter

say and rely solely on the evidence presented in English.

5. Pre-Deliberation Instructions

Prior to excusing the jury for deliberations, the trial judge should, on the record in the presence of the jury, instruct the court interpreter who will be providing interpretation services for an NES juror that the interpreter should not interfere with deliberations in any way by expressing any ideas, opinions, or observations that the interpreter may have during deliberations but should be strictly limited to interpreting the jury deliberations. The trial judge should also ask the court interpreter to affirmatively state on the record that the interpreter understands the trial judge's instructions.

6. Post-Deliberation Instructions

Following jury deliberations but before the jury's verdict is announced, the trial judge should ask the court interpreter on the record whether the interpreter abided by his or her oath to act strictly as an interpreter and not to participate in the deliberations. The interpreter's identity and answers should be made a part of the record. At the request of a party to the litigation, the jurors may also be questioned to the same effect. The trial judge should also instruct the court interpreter not to reveal any aspect of the jury deliberations after the case is closed.

7. Equipment

With the assistance of the AOC, all courts should make arrangements to provide equipment for use by a court interpreter who will be providing interpretation services for NES jurors. The AOC will develop standards and seek funding to acquire adequate equipment for use by court interpreters throughout the state who will be providing interpretation services for NES jurors and prospective jurors. The equipment should allow interpreters to provide interpretation services for multiple persons with minimum disruption of the court proceedings.

To the extent that the AOC and local courts are unable to provide court interpreters with interpretation equipment, all court [personnel] should assist court interpreters with the logistical arrangements for providing interpretation services whenever possible. Accordingly, prior to jury selection or trial proceedings, court personnel should identify the number of NES jurors or prospective jurors scheduled to appear in court. This information should be provided to the appointed court interpreter so that the interpreter can make arrangements for the appropriate equipment and seating arrangements. The interpreter should obtain the prior approval of the trial court if special equipment and seating arrangements are needed. The bailiff should inform counsel if any seating changes have been made to accommodate NES jurors or prospective jurors.

IV. COURT INTERPRETATION COSTS

A. Jury and Witness Fee Fund

All costs associated with administering these guidelines and providing services for NES jurors and prospective jurors should be paid from the Jury and Witness Fee Fund. To the extent that such costs are initially incurred at the local court level, local courts may seek reimbursement from the Jury and Witness Fee Fund.

B. Interpreters in Civil Cases

The costs for a court interpreter to provide interpretation services to an NES juror or prospective juror in civil cases should be paid by the court through the Jury and Witness Fee Fund.

C. Interpreter Compensation

Court interpreters appointed to provide interpretation services for NES jurors or prospective

jurors should be paid at a fixed rate in accordance with the approved fee schedule established by the AOC. However, all courts are free to employ a certified interpreter on a full-time basis or under contract at a mutually agreed upon compensation rate.

V. COURT INTERPRETER RECRUITMENT AND TRAINING

A. Administration

The AOC is be responsible for the recruitment and training of court interpreters to provide interpretation services for NES jurors and prospective jurors. Consistent with the New Mexico Judicial Branch Personnel Rules, local court personnel are encouraged to train for and become certified as court interpreters.

B. Special Training

The AOC, in consultation with the Court Interpreters Advisory Committee, *see* NMSA 1978, § 38-10-4 (1985), will develop supplemental training standards for court interpreters who will provide interpretation services for NES jurors and prospective jurors. These standards should be incorporated into the general certification process for all new court interpreters.

EFFECTIVE DATE:

Guidelines are effective November 15, 2000

_____ _____

John M. Greacen Date

Director, Administrative
Office of the Courts

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-025

Filing Date: May 18, 2007

Docket No. S-1-SC-30122

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

DAVID S. MARTINEZ,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Joseph Michael Kavanaugh, District Judge

Gary K. King, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, NM

for Petitioner

John Bigelow, Chief Public Defender
Josephine H. Ford, Assistant Appellate Defender
Albuquerque, NM

for Respondent

OPINION

CHÁVEZ, Chief Justice.

{1} Defendant David Martinez challenges his conviction of driving while intoxicated. First, Martinez claims that the metropolitan court judge abused her discretion by admitting a breath-alcohol-test (BAT) card containing the test results of a breathalyser into evidence. Martinez argues that the arresting officer's testimony that he saw a certification sticker on the breathalyser indicating that the machine's certification was current was insufficient foundation for the BAT card's admissibility. Martinez also asserts that his constitutional right to confront his accusers was violated by this testimony. We reject both of his claims.

I. BACKGROUND

{2} Early in the morning of November 25, 2004, Officer Matt Sandoval of the Albuquerque Police Department was dispatched to the scene of a one-car accident at the intersection of I-25 and I-40. Martinez was standing near the car when Officer Sandoval arrived. Officer Sandoval noticed that Martinez smelled of alcohol and was unsteady on his feet. Officer Sandoval also noticed two full miniature whiskey bottles underneath the driver's side of the car. Based on these observations, along with a conversation he had with Martinez, Officer Sandoval believed that Martinez had been driving the crashed car. After performing poorly on a set of field sobriety tests, Martinez was arrested and transported to the North Valley Substation. There, he was read the Implied Consent Act and given a BAT. Martinez was charged by criminal complaint in Bernalillo County Metropolitan Court with aggravated driving under the influence of intoxicating liquor (DUI), *see* NMSA 1978, § 66-8-102(D) (2004, prior to 2005 amendment), reckless driving, *see* NMSA 1978, § 66-8-113 (1987), and driving with a suspended license, *see* NMSA 1978, § 66-5-39(A) (1993).

{3} At trial, Officer Sandoval testified that the machine he used to conduct the BAT was certified by the Scientific Laboratory Division of the Department of Health (SLD). Officer Sandoval's knowledge that the machine was certified and that its certification was current at the time of the test was gained by viewing a SLD certification sticker on the machine. When the State moved to admit the BAT card, the metropolitan court judge reserved ruling until argument could be held out of the presence of the jury. While the jury was in

recess, defense counsel argued that Officer Sandoval's testimony regarding the machine's certification was insufficient to lay a proper foundation for admission of the BAT card. The main thrust of defense counsel's argument was that the BAT card could not be admitted because Officer Sandoval had no first-hand knowledge of the machine's certification. Defense counsel suggested that the person actually responsible for certification was required to testify. The State responded by claiming that Officer Sandoval's testimony that he saw a sticker on the machine showing that the machine's certification was current was sufficient for foundational purposes under Rule 11-104(A) NMRA and *State v. Onsurez*, 2002-NMCA-082, 132 N.M. 485, 51 P.3d 528. Defense counsel responded that this was "a matter of due process." The judge noted that *State v. Smith*, 1999-NMCA-154, ¶ 11, 128 N.M. 467, 994 P.2d 47, held that an officer could testify as to the contents of calibration logs without having first-hand knowledge of the actual calibrations. Finding Officer Sandoval's testimony concerning certification to be analogous, the judge allowed the BAT card to be admitted.

Martinez was convicted of non-aggravated DUI[1] and reckless driving.

{4} Among other issues, Martinez appealed the admission of the BAT card to the Second Judicial District Court. *See* NMSA 1978, § 34-8A-6(C) (1993). After the district court affirmed the metropolitan court, Martinez appealed to the Court of Appeals. Prior to deciding Martinez's case, the Court of Appeals filed its opinion in *State v. Lizzol*, No. 25,794, 2006-NMCA-130, 2006 WL 3001105 (Aug. 28, 2006), where this issue was addressed. In *Lizzol*, the trial court concluded that an officer's testimony that he or she saw a certification sticker on the machine was *not* sufficient foundation for the admission of a BAT card. *See id.* ¶¶ 4–9. The Court of Appeals in *Lizzol* agreed, holding: "Upon proper challenge to certification, the State will be required to provide a reasonable quantum of direct admissible evidence going to the issue. Testimony that 'a certificate was attached' and the 'machine seemed to work properly' is not enough." *Id.* ¶ 39. We granted certiorari in *Lizzol* on October 12, 2006.[2] 2006-NMCERT-010, 140 N.M. 675, 146 P.3d 810. Shortly thereafter, a different panel of the Court of Appeals filed a memorandum opinion in this case. *State v. Martinez*, No. 26,137, slip op. (Ct. App. Oct. 30, 2006).

{5} In its memorandum opinion, the Court of Appeals held that *Lizzol* required it to reverse Martinez's DUI conviction. *Id.* at 8. However, two members of the three-judge panel discussed their disagreement with *Lizzol*. *See id.* at 12–15 (Pickard, J., joined by Wechsler, J., specially concurring). They believed that New Mexico's precedent, particularly *Smith*, allows foundational requirements to be met through an officer's testimony of what he or she saw in a document. *Id.* at 13–14. We granted certiorari in the instant case on December 13, 2006, but held the case in abeyance pending our opinion in *Lizzol*. 2006-NMCERT-012, 141 N.M. 105, 151 P.3d 66.

{6} Today, we file our opinion in *Lizzol* but do not reach the certification issue there because we hold that double jeopardy principles barred the State from appealing that case in the first place. *State v. Lizzol*, No. 30,019, (N.M. filed May 18, 2007). Thus, in this case we address the question of whether, for foundational purposes in admitting a BAT card into evidence, it is sufficient for an officer to testify that he or she saw a SLD certification sticker attached to the breathalyser and that the sticker revealed the certification to be current. We hold that it does. We also hold that Martinez did not preserve his argument that he was denied his Sixth Amendment right to confront his accusers and that no fundamental error occurred.

[1] The jury verdict did not reveal whether the jury relied on the "per se" provision of the DUI statute, *see* § 66-8-102(C), or on its "impaired to the slightest degree" provision, *see* § 66-8-102(A). On appeal to the Court of Appeals, the State acknowledged that it was relying on the "per se" theory.

[2] Subsequently, on December 8, 2006, we entered an order withdrawing publication and holding the case in abeyance until our final resolution of the matter. Order No. 30,019, N.M. B. Bull., Jan. 1, 2007, at 13.

II. DISCUSSION

{7} We review an alleged error in the admission of evidence for an abuse of discretion. *State v. Armendariz*, 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526. The lower "court's ruling will be disturbed on appeal only when the facts and circumstances of the case do not support [its] logic and effect." *State v. Harrison*, 2000-NMSC-022, ¶ 40, 129 N.M. 328, 7 P.3d 478 (quoted authority omitted).

A. Certification of a Breathalyser Is a Foundational Requirement That Must Be Satisfied Before a BAT Card Is Admitted Into Evidence

{8} New Mexico's "per se" DUI statute provides that it is illegal for a person to drive a vehicle with "an alcohol concentration of eight one hundredths or more in his [or her] blood or breath." § 66-8-102(C)(1). The minimum breath-alcohol concentration level required for a violation of Section 66-8-102(C) is .08 grams of alcohol per 210 liters of breath. *See* NMSA 1978, § 66-8-111(D) (2005). In order to prove that a person was driving at or above this minimum threshold, the State will necessarily need to admit a BAT card.

{9} In New Mexico, "upon proper objection, there must be a threshold showing of the machine's validity as foundation for admission of the [test result]." *Plummer v. Devore*, 114 N.M. 243, 245, 836 P.2d 1264, 1266 (Ct. App. 1992). *Plummer* initially established that before a court admits the result of a breath test into evidence, the State must make a threshold showing that, at the time of the test, the machine was properly calibrated and that it was functioning properly. *See id.* at 246, 836 P.2d at 1267. However, the list of foundational requirements that must be met by the State before a BAT card is admitted into evidence has grown over the years.

{10} In the year after *Plummer*, the Legislature amended the DUI statutes to provide that breath tests taken pursuant to the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2003), be approved by SLD. *See* NMSA 1978, § 66-8-107 (1993). The SLD regulations are codified at 7.33.2.1-.18 NMAC. In *State v. Gardner*, the Court of Appeals held that compliance with SLD regulations is "a condition precedent to admissibility" of the result of a breath test. 1998-NMCA-160, ¶ 11, 126 N.M. 125, 967 P.2d 465. Later, the Court of Appeals held in *Onsurez* that "in cases where the defendant properly preserves the objection, the State must show that the machine used for administering a breath test has been certified by SLD." 2002-NMCA-082, ¶ 13. However, because it had not been properly preserved in *Onsurez*, the court did not reach the issue of what the State is required to show to meet this foundational requirement. *See id.* ¶ 14. This case squarely presents that question.

{11} We recently clarified in *State v. Dedman* that, to meet foundational requirements, the State does not need to show compliance with all regulations, but only with those that are "accuracy-ensuring." 2004-NMSC-037, ¶ 13, 136 N.M. 561, 102 P.3d 628. Pursuant to *Dedman*, our first question is whether the regulations governing certification are accuracy-ensuring regulations. SLD regulations require that breath-alcohol testing equipment be certified by SLD for a period of up to one year. 7.33.2.11(A)-(B) NMAC. Prior to and twice annually after initial certification, a machine must undergo calibration tests and an inspection conducted by SLD. 7.33.2.11(C) NMAC. Should the machine fail to meet SLD standards, the machine shall not be certified, or if already certified, certification shall be revoked or suspended. *Id.* Further, the machine must annually be sent to SLD for inspection. 7.33.2.11(E) NMAC. The location of the machine must be approved by SLD. 7.33.2.11(D) NMAC. If the machine is moved to a non-approved SLD site, the machine must be recertified before being put back into service. *Id.* Certification is also contingent upon: (1) monthly submission of records pertaining to all tests conducted on the machine, (2) satisfactory performance of six yearly proficiency samples, and (3) a calibration check at least every seven days and/or a .08 calibration

check conducted on each subject. 7.33.2.11(G) NMAC.

{12} These regulations clearly exist to ensure that the result of a test conducted on a breathalyser is accurate. Moreover, as noted in *Onsurez*, because calibration is but a part of certification, the State cannot substitute proof of calibration for proof of certification. 2002-NMCA-082, ¶ 13. Thus, we agree that before a BAT card is admitted into evidence, the State must make a threshold showing that the machine has been certified. At the same time, we note that because certification may be revoked under certain circumstances and must be annually renewed, showing that the machine "has been certified" is not enough. Instead, before the result of a breath test is admissible, the State must also make a threshold showing that SLD certification was current at the time the test was taken.

B. Whether the State Has Sufficiently Established That a Breathalyser Was Currently Certified Is Governed by Rule 11–104(A)

{13} We now address the question left unanswered in *Onsurez*—how may the State satisfy this requirement? Or, as presented in this case, is this foundational requirement satisfied by the officer conducting the test giving in-court testimony that there was a certification sticker on the machine and that the sticker indicated that the machine's certification was current? In answering this question, we keep in mind the distinction between the piece of evidence the State is ultimately attempting to have admitted and the evidence the State must initially present to have that evidence admitted. *See* 21A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5052, at 47 (2d ed. 2005) ("[O]ne must distinguish between the evidence the party is trying to get admitted . . . and the evidence to be used to prove its admissibility."). The distinction is critical. On one side of the line is the evidence that is to be admitted—the test result—on the other is evidence used to determine whether the test result is admitted in the first place—the foundational requirements. *See State v. Delgado*, 112 N.M. 335, 339, 815 P.2d 631, 635 (Ct. App. 1991).

{14} For a violation of the "per se" DUI statute based on breath-alcohol content, the State is required to prove beyond a reasonable doubt to the jury that the defendant had a breath-alcohol level of .08 grams of alcohol per 210 liters of breath at the time he or she was driving. *See* §§ 66-8-102(C), -111(D). Since they are not elements, the State is not required to have admitted into evidence and proven beyond a reasonable doubt that the testing machine was certified, calibrated and functioning properly at the time the test was taken, or that the officer conducting the test was certified by SLD. *See* UJI 14-4503 NMRA; *see also* 7.33.2.13 NMAC. Instead, these are merely foundational requirements that the State must meet before the critical piece of evidence—the test result—is admitted into evidence.

{15} Whether a piece of evidence should be admitted based on a sufficient foundation is governed by Rule 11-104 NMRA. The pertinent provisions of that rule provide:

> A. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Paragraph B. In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> B. Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

An initial question we must decide is whether Paragraph A or Paragraph B applies. That is, is the jury's consideration of the breath-test result dependent upon it being relevant once the jury

finds another fact (Paragraph B), or is the admission of the test result into evidence determined solely by the trial court (Paragraph A)? *See, e.g.*, *State v. Gano*, 988 P.2d 1153, 1163–64 (Haw. 1999) (discussing distinction between Hawaii's analog to Rule 11-104(A) and Rule 11-104(B)); *see also* Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §104.30[1] (Joseph M. McLaughlin ed., 2d ed. 2006) (discussing Federal Rule of Evidence 104(b)).

{16} Some of New Mexico's case law suggests that Paragraph B applies. For example, quoting Rule 11-104(B) the Court of Appeals in *Plummer* established the requirement that before a breath-test result is admitted as evidence, "there must be 'evidence sufficient to support a finding' that the particular test was capable of producing valid results." 114 N.M. at 245–46, 836 P.2d at 1266–67. An implication also arises in *State v. Ruiz*, 120 N.M. 534, 903 P.2d 845 (Ct. App. 1995), that Rule 11-104(B) is the proper framework from which to view the admissibility of a breath-test result. In that case, the defendant argued that the trial court had erred in admitting the calibration logs into evidence because the logs were hearsay. The State responded that the calibration logs fell within the business-records exception to the hearsay rule. *Id.* at 536, 903 P.2d at 847. Relying on *State v. Christian*, 119 N.M. 776, 780–81, 895 P.2d 676, 680–81 (Ct. App. 1995), which held that blood-alcohol test results are admissible as business records, the court in *Ruiz* held that calibration logs of breathalysers are admissible as business records as well. 120 N.M. at 536–38, 903 P.2d at 847–49. Thus, one might assume after reading *Ruiz* that Paragraph B of Rule 11-104 applies since the foundational evidence was actually submitted to the jury in that case.

{17} We have never fully explored the distinction between Paragraphs A and B of Rule 11-104. After considering relevant treatises discussing the Federal Rules of Evidence, *see Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 8, 139 N.M. 671, 137 P.3d 611 ("The New Mexico Rules of Evidence generally follow the federal rules of evidence. . . ."), as well as other states' counterparts and cases from other jurisdictions, we hold, contrary to the implication arising from *Plummer* and *Ruiz*, that Rule 11-104(A)—not 11-104(B)—governs the admissibility of a BAT card. Whether a BAT card may be admitted into evidence is a matter decided solely by the trial court and is not contingent upon its relevancy being established by other facts submitted to the jury.

{18} Wright and Graham explain the two parts of the rule governing foundational evidence as "an allocation of responsibility between judge and jury for the proper selection of evidence to be used in deciding the case." Wright & Graham, *supra*, § 5052.1, at 54–55 (quoted authority omitted). Paragraphs A and B have been described as creating a distinction between "competency" and "relevancy." *See United States v. James*, 590 F.2d 575, 579 (5th Cir. 1979), *overruled on other grounds by United States v. Chestang*, 849 F.2d 528, 531 (11th Cir. 1988); *Gano*, 988 P.2d at 1164. That is, the trial court is to determine whether evidence is competent and, thus, admissible, whereas jurors are to determine "preliminary questions as to the conditional relevancy of the evidence." *James*, 590 F.2d at 579; *see Gano*, 988 P.2d at 1164. "Competence, in this context, means 'whether evidence is admissible under one of the policy-based exclusionary rules, such as the rule against hearsay.'" *Gano*, 988 P.2d at 1164 (quoting *State v. Carlson*, 808 P.2d 1002, 1008 (Or. 1991)).

{19} In other words, under Rule 11-104(A) "[e]ven though evidence is clearly relevant, it may still be subject to attacks on its admissibility based on fundamental policy decisions that demand exclusion of privileged information, testimony by unqualified or incompetent witnesses, and *inherently unreliable evidence*, and it is the responsibility of the judge to make these determinations." Weinstein & Berger, *supra*, § 104.10, at 104–12 (emphasis added). When using Rule 11-104(A) to determine whether evidence is admissible, the trial court need only be satisfied by a preponderance of the evidence that the foundational requirement has been met. *See State v. Roybal*, 107 N.M. 309, 311, 756 P.2d 1204, 1206

(Ct. App. 1988) (discussing *Bourjaily v. United States*, 483 U.S. 171, 175–79 (1987)). Moreover, in making its determination, the rules of evidence, except those concerning privileges, do not apply. Rule 11-1101(D)(1) NMRA.

{20} On the other hand, Rule 11-104(B)'s concern is with ensuring that "a given piece of evidence be what its proponent claims." *United States v. Sliker*, 751 F.2d 477, 499 (2d Cir. 1984). Thus, under this rule the jury is charged with determining such issues as whether evidence presented is within the realm of the testifier's personal knowledge and whether a document is authentic. If the jury answers either of these questions in the negative, then the evidence is irrelevant and the jury will not consider it even though it may have already been admitted into evidence contingent on these facts later being established. *See* Wright & Graham, *supra*, § 5054.1, at 137–41. If the trial court were to determine for itself the issues of personal knowledge and authenticity, it would usurp the important function of the jury and infringe upon a party's right to a jury trial. *See id.* § 5052.1, at 57. Rule 11-104(B) provides that the trial court is to admit evidence depending on the fulfillment of a condition of fact when there is "evidence sufficient to support a finding of the fulfillment of the condition." Under this standard, the trial court does not determine whether the conditional fact has been proven by a preponderance of the evidence. Instead, "[t]he court simply examines all the evidence in the case and decides *whether the jury could reasonably find* the conditional fact . . . by a preponderance of the evidence." *Huddleston v. United States*, 485 U.S. 681, 690 (1988) (emphasis added).

{21} When considering whether the result of a BAT is reliable enough to be entered into evidence, Rule 11-104(A) governs and Rule 11-104(B) does not. The admission of evidence based on its reliability or lack thereof is a policy-based decision the judge, and the judge alone, makes. To the extent *Plummer*'s quotation of Rule 11-104(B) suggests otherwise, it is overruled. Furthermore, *Ruiz* should not be read to imply that it is necessary to submit foundational evidence to the jury. Thus, in considering whether a foundational requirement has been met—in this case whether a breathalyser was certified by SLD at the time a given test was taken—the trial court must satisfy itself by a preponderance of the evidence. Furthermore, when making its decision the trial court is not bound by the rules of evidence, except those concerning privileges. Thus, the trial court may consider hearsay. *See Smith*, 1999-NMCA-154, ¶ 11 (holding that the foundational requirement of calibration was satisfied when the officer conducting the test testified as to his experience and "that the log attached to the machine indicated that it had been calibrated within the previous seven days").

{22} Martinez argues that Rule 11-104(B) should apply because, according to him, Officer Sandoval must have had personal knowledge of the *certification process*. The Court of Appeals attempted to distinguish *Smith* on similar grounds:

> As we noted in *Lizzol*, the challenge in *Smith* was to the officer's testimony about the breath machine's calibration, not about its certification, and the officer in *Smith* demonstrated sufficient personal knowledge about calibration to justify admission of the breath card. *Lizzol*, 2006-NMCA-130, ¶ 37. By contrast, Sandoval did not testify to any personal knowledge about certification.

Martinez, No. 26,137, slip op. at 8. Yet, under Rule 11-104(B) the issue is whether the person giving the testimony has personal knowledge of *what is being admitted into evidence*. In this case, that is the BAT card, not evidence of certification. Even though the officer in *Smith* had "personal knowledge" of the calibration process because he "explained how the machine performed its self-calibration upon startup," 1999-NMCA-154, ¶ 11, that was immaterial. In both *Smith* and this case, the officers conducting the breath test testified as to what they saw in a document without actually having participated in the process that generated the information. Whether the officer understands the underlying process

that led to the document's content does not matter for foundational purposes—what matters is simply the content of the document.

{23} Apparently, Martinez's argument rests upon his assertion that certification is a "core" fact instead of a preliminary fact. Although Martinez does not expound on what constitutes a "core" fact, it appears that he believes certification is an element that must be proven to the fact-finder. There is nothing "core" about a breathalyser's certification. The essential elements of a "per se" DUI charge are: (1) operating a motor vehicle, (2) in New Mexico, (3) with a .08 alcohol concentration in the blood or breath. UJI 14-4503 NMRA. Certification is but a foundational requirement for the admission of evidence tending to prove the third element. As discussed above, Rule 11-104(A) governs in this situation and the rules of evidence, except those concerning privileges, do not apply. Here, Officer Sandoval presented hearsay evidence—he saw an SLD sticker on the machine indicating that it was certified by SLD when he conducted the test. Given that foundational requirements need only be met by a preponderance of the evidence, we cannot say that admitting the BAT card in this case was "clearly contrary to logic and the facts and circumstances of the case." *See Armendariz*, 2006-NMSC-036, ¶ 6.

{24} Finally, we think it worth remembering that once the trial court determines that the State has met the foundational requirements for the admission of a BAT card, a defendant may successfully challenge the reliability of the breath test. *See Dedman*, 2004-NMSC-037, ¶ 44 ("[T]he opponent of admissibility of a report has the burden to show that the report should be excluded for lack of trustworthiness."). As far as certification goes, a defendant is entitled to obtain records pertaining to a machine's certification in discovery if he or she chooses. Also, on its website, http://www.sld.state.nm.us/alc/agency.asp, SLD maintains a list of all currently certified machines. Based on this discovery information, a defendant may be able to critically challenge an officer's foundational testimony concerning certification. Since Martinez made no such attempt here, Officer Sandoval's testimony went unchallenged and the judge did not abuse her discretion in admitting the BAT card.

C. Martinez Did Not Preserve His Confrontation Clause Claim

{25} Martinez claims that his Sixth Amendment right of confrontation was violated when he was not given the opportunity to cross-examine anyone who had "actual knowledge" of the machine's certification. We conclude that this issue is not preserved for our review. At trial, defense counsel simply argued that it was a "matter of due process." Martinez argues that this was sufficient for preservation since the Fourteenth Amendment makes the Confrontation Clause of the Sixth Amendment applicable to our state. *See State v. Lopez*, 2000-NMSC-003, ¶ 14, 128 N.M. 410, 993 P.2d 727 (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). We disagree. Although the right to confrontation is an element of due process guaranteed by the Fourteenth Amendment, merely mentioning "due process" was not sufficient to alert the judge to a Confrontation Clause claim and did not fairly invoke a ruling. *See* Rule 12-216 NMRA; *State v. Alingog*, 117 N.M. 756, 759–60, 877 P.2d 562, 565–66 (1994). Moreover, in reviewing for fundamental error, Martinez's claim fails. *See Campos v. Bravo*, 2007-NMSC-021, ¶ 18 (discussing fundamental error). The protections afforded by the Confrontation Clause do not extend to preliminary questions of fact. *Roybal*, 107 N.M. at 311–12, 756 P.2d at 1206–07; *see also Dedman*, 2004-NMSC-037, ¶¶ 25–45 (performing an in-depth analysis of the Confrontation Clause and concluding that the defendant's right to confront his accusers was not violated by the admission of a blood-alcohol report).

III. CONCLUSION

{26} The metropolitan court judge did not abuse her discretion in admitting the BAT card

after determining that the State had laid sufficient foundation. Martinez did not preserve his argument that he was denied his Sixth Amendment right to confront his accusers and no fundamental error occurred. The Court of Appeals is reversed and the case is remanded to the Bernalillo County Metropolitan Court.

{27} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-005

Filing Date: December 10, 2007

Docket No. 29,941

CHRISTOPHER LEE BALDONADO, et al.,

Plaintiffs-Respondents,

v.

EL PASO NATURAL GAS COMPANY, a foreign corporation,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
William P. Lynch, District Judge

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Sarah M. Singleton
Santa Fe, NM

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for Respondents

OPINION

CHÁVEZ, Chief Justice.

{1} On motion for rehearing, the opinion filed December 4, 2007, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} The issue in this case is whether firefighters may recover damages for intentional infliction of emotional distress sustained in the course of responding to a fire. The answer to this question initially turns on whether the firefighter's rule, as adopted in *Moreno v. Marrs*, 102 N.M. 373, 695 P.2d 1322 (Ct. App. 1984), should continue as a part of New Mexico jurisprudence. The rule, which prohibits firefighters from suing for damages sustained while responding to a fire except where the owner or occupier of the land fails to warn of a known danger or misrepresents the nature of the hazards being confronted, was overruled by the Court of Appeals. In that opinion, one judge would abolish the rule entirely and two judges would prohibit firefighter litigation involving negligence claims. *See Baldonado v. El Paso Natural Gas Co.*, No. 24,821 (N.M. Ct. App. June 29, 2006). We adopt a policy-based approach to the firefighter's rule and hold that a firefighter may recover damages if such damages were proximately caused by (1) intentional conduct; or (2) reckless conduct, provided the harm to the firefighters exceeded the scope of risks inherent in the firefighters' professional duties. Applying this rule to the case before us, we

conclude that the firefighters have properly pled a claim for intentional infliction of emotional distress.

I. BACKGROUND

{3} On August 19, 2000, in the early morning hours, a high-pressure natural gas pipeline[1] operated by El Paso Natural Gas Company ruptured near the Pecos River south of Carlsbad, New Mexico. *Baldonado*, No. 24,821, slip op. ¶ 2. At that time, twelve members of an extended family were camped in the area of the pipeline. The escaping gas ignited, creating a fireball that engulfed the campsite. All twelve family members, including young children, either were killed during the fire or died later from severe burns. The survivors were conscious but in obvious physical pain and mental anguish. The record and the Court of Appeals opinion depict the horror of the scene, which we do not duplicate here. *See id.*

{4} Plaintiffs are paid or volunteer members of the local fire departments who responded to the explosion. Plaintiffs did not assist in putting out the fire, nor do they claim to have suffered any physical injuries from the fire or explosion. Rather, Plaintiffs assert that they suffered extreme emotional distress in witnessing the severe injuries suffered by the victims when Plaintiffs assisted them after the explosion.

{5} Plaintiffs brought suit against Defendant for negligent infliction of emotional distress, intentional infliction of emotional distress, and other counts. Defendant filed a motion to dismiss pursuant to Rule 1-012(B)(6) NMRA, claiming that Plaintiffs' claims were barred by the firefighter's rule. The district court granted Defendant's motion and dismissed Plaintiffs' complaint. Plaintiffs appealed to the Court of Appeals, which affirmed the district court with respect to the negligent infliction of emotional distress claim, but reversed with respect to the intentional infliction of emotional distress claim. *Baldonado*, No. 24,821, slip op. ¶ 35. Defendant filed a petition for writ of certiorari with this Court, contending that the firefighter's rule bars a claim in this case, and that Plaintiffs failed to properly plead a claim for reckless or intentional infliction of emotional distress. *Baldonado v. El Paso Natural Gas Co.*, 2006-NMCERT-009. We granted certiorari on the question of intentional infliction of emotional distress.[2]

II. DISCUSSION

{6} "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true." *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 650, 905 P.2d 185, 190 (1995), *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. "[T]he motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim." *Runyan v. Jaramillo*, 90 N.M. 629, 632, 567 P.2d 478, 481 (1977).

{7} Defendant asserts two reasons why the Court of Appeals erred in holding that Plaintiffs' complaint for intentional infliction of emotional distress is legally sufficient. First, Defendant argues that the firefighter's rule in New Mexico has no exception for reckless or intentional conduct, thereby barring Plaintiffs' lawsuit. Second, Defendant argues that New Mexico has adopted the definition of intentional infliction of emotional distress from *Restatement (Second) of Torts* § 46 (1965), and Plaintiffs cannot prove that Defendant's conduct was "directed at" Plaintiffs as required by the *Restatement*. *Id.* § 46(2).

{8} Plaintiffs urge this Court to abolish the firefighter's rule, contending that the rule is outdated, as evidenced by the several jurisdictions that have abolished the rule or created exceptions

[1] The pipeline measured thirty inches in diameter and was approximately fifty years old.

[2] Initially we also granted certiorari on the question of negligent infliction of emotional distress, but later quashed certiorari on that issue.

for intentional torts that would otherwise be excluded by the rule. Plaintiffs also argue that they have stated a cause of action for intentional infliction of emotional distress as defined in *Trujillo v. Northern Rio Arriba Electric Cooperative, Inc.*, 2002-NMSC-004, ¶ 25, 131 N.M. 607, 41 P.3d 333.

A. The Firefighter's Rule

{9} A firefighter's rule bars a firefighter, and possibly other professional rescuers, from suing the party whose actions caused the event to which the firefighter responded. Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 Ind. L.J. 745, 745 (Summer 2007). Although most states have adopted a firefighter's rule, they "disagree considerably about the exceptions to and the scope of" the rule, and in many states the exceptions threaten to swallow the rule. *Id.* at 753. Thus, when deciding to adopt a firefighter's rule, it is necessary to choose among formulations. *Moreno*, 102 N.M. at 377, 695 P.2d at 1326.

{10} States that have adopted a firefighter's rule generally base it on one of three legal theories: (1) duties of landowner to invitees; (2) assumption of risk; or (3) public policy. The original firefighter's rule was based on the duties of a landowner or occupier of the land to invitees or licensees. *Gibson v. Leonard*, 32 N.E. 182, 189 (Ill. 1892), *overruled in part by Dini v. Naiditch,* 170 N.E.2d 881, 886 (Ill. 1960). Some courts have since rejected this theory of the firefighter's rule. *See, e.g.*, *Hass v. Chicago & Nw. Ry. Co.*, 179 N.W.2d 885, 887 (Wis. 1970). The rule can also be based on assumption of risk, although this theory is also falling out of favor. *See, e.g.*, *Fordham v. Oldroyd*, 171 P.3d 411, 2007 WL 2683704, at *3 (Utah Sept. 14, 2007).

{11} Most modern decisions base the firefighter's rule on a public policy rationale. *Id.* at *7 (Wilkins, Assoc. C.J., concurring and dissenting). Utah, the most recent state to adopt the firefighter's rule, chose this approach. *Id.* at *5. Public policy provides a number of rationales for the firefighter's rule. The rule encourages the public to summon assistance when they need help and recognizes that firefighters "have a relationship with the public that calls on them to confront certain hazards as part of their professional responsibilities." *Id.* at *2. The rule also spreads the costs of injury among taxpayers and avoids charging taxpayers twice—once when they pay their taxes for public services, and again when they are sued by those same service providers. Heidt, *supra*, at 760–61. Some courts, however, reject the public policy rationale, arguing that the sounder policy is to allow firefighters to sue for injuries the same as any other injured party. *Fordham*, 171 P.3d 417, 2007 WL 2683704, at *7 (Wilkins, Assoc. C.J., concurring and dissenting).

{12} In *Moreno*, the Court of Appeals adopted a firefighter's rule for New Mexico based on the California case of *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977), *superseded by statute* Cal. Civ. § 1714.9 (West 2001) (codifying California's firefighter's rule). *Moreno*, 102 N.M. at 376, 695 P.2d at 1325. The California Supreme Court based its rule on both assumption of risk theories and public policy rationales. *Walters*, 571 P.2d at 612–13.

{13} We agree with the Court of Appeals in *Moreno* that "there should be a fireman's rule." 102 N.M. at 376, 695 P.2d at 1325. We take this opportunity, however, to clarify the rule's definition and scope. In doing so, we hope to avoid the necessity for myriad exceptions that other states have faced.

{14} We begin by recognizing that a policy-based firefighter's rule follows naturally from our version of the rescue doctrine. Traditionally, the rescue doctrine "prevent[ed] a rescuer from being barred from recovery because of a finding that the rescuer was contributorily negligent" for the injuries he or she received in rescuing a victim. *Restatement (Third) of Torts* § 32 cmt. d (Proposed Final Draft No. 1, 2005). In *Govich v. North American Systems, Inc.*, 112 N.M. 226, 231, 814 P.2d 94, 99 (1991), we examined the

impact of our system of comparative negligence on the rescue doctrine. We concluded that the rescue doctrine is "shorthand for a public policy" that imposes a duty of care owed to rescuers. *Id.* at 232, 814 P.2d at 100.

{15} The rescue doctrine creates the need for a firefighter's rule. Because there is no general duty to rescue, the rescue doctrine imposes a duty of care owed to rescuers. However, when the rescuer has a duty to rescue—as is the case with firefighters—the underlying rationale for imposing a duty on the public changes, and the doctrine must change along with the policy.[3] The firefighter's rule accomplishes that change by limiting the scope of the rescue doctrine. In other words, the rescue doctrine creates an exception to traditional tort duties, and the firefighter's rule limits that exception.

{16} We seek a formulation of the firefighter's rule that will avoid piling exception upon exception. Utah, for example, recently adopted a simple firefighter's rule based on culpability: the person creating a peril owes a professional rescuer no duty if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; and (2) was within the scope of risks inherent in the rescuer's professional duties. *Fordham*, 171 P.3d 411, 2007 WL 2683704, at *2.

{17} The Utah test provides a good starting point, but we believe it is too broad because it allows recovery for injuries arising from negligent actions, so long as those injuries are outside the normal scope of a firefighter's duties. Joining the two prongs in the disjunctive would narrow the test, excluding all injuries arising out of negligent actions. It would, however, also exclude injuries arising out of intentional actions—such as arson—if the injuries are within the normal scope of a firefighter's duties.

{18} We choose to adopt a two-prong test based on culpability that holds the public liable for intentional acts and some reckless acts. Under our test, the person creating a peril owes a professional rescuer no duty if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; or (2) was derived from the reckless conduct that occasioned the rescuer's response and was within the scope of risks inherent in the rescuer's professional duties. This test ignores different "degrees" of negligence, a distinction we rejected in *Govich*, 112 N.M. at 233, 814 P.2d at 101. As in *Moreno*, the test does not depend on the firefighter's categorization as an entrant to land, on which the injury occurred, or on whether the firefighter is a paid professional or a volunteer. *See Moreno*, 102 N.M. at 376–77, 695 P.2d at 1325–26. Furthermore, the specific duties noted in *Moreno*—to warn of hidden hazards and to accurately represent the nature of a hazard—are distinct from the conduct that brings firefighters to the scene, and thus fall outside the scope of today's rule. *See id.* at 378, 695 P.2d at 1327.

{19} In contrast to *Moreno*, this rule does allow recovery for actions that derive from reckless or intentional behavior. *See id.* at 377, 695 P.2d at 1326. The potential injuries to the firefighter are the same, whether they arise from negligence, recklessness, or intentional conduct. From a public policy viewpoint, we do not want to reward reckless or intentional acts by insulating defendants from liability.

{20} Plaintiffs base their second claim for relief on the theory that gas transport is an inherently dangerous activity. *Moreno* applied the firefighter's rule to ultrahazardous activities, declining to impose strict liability for injuries to firefighters resulting from such activities. *Id.* We note that the underlying public policy rationales for imposing a duty are the same, whether the fire resulted from an ordinary, an inherently dangerous, or an ultrahazardous activity. Therefore, we hold that the duty to firefighters should be

[3] We recognize that special relationships, such as the doctor-patient or employer-employee relationship, can create a duty to rescue. *See Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 14, 140 N.M. 596, 145 P.3d 76; *Restatement (Second) of Torts* § 314A (1965). The rescuers in these situations are not professional rescuers, so our ruling today does not affect this category of duties.

evaluated under the culpability test announced today, rather than strict liability, when firefighters respond to an emergency arising out of an inherently dangerous or ultrahazardous activity.

{21} This is the first opportunity we have had to address the firefighter's rule since *Moreno* was decided over twenty years ago. Tort law, especially with respect to the duties owed to rescuers, has changed significantly during that time. A policy-based approach to the firefighter's rule will encourage the public to ask for rescue while allowing professional rescuers to seek redress in limited but appropriate circumstances.

{22} Because Plaintiffs are firefighters, a legally sufficient complaint must allege that Defendant acted recklessly or intentionally. Plaintiffs have claimed damages based on intentional infliction of emotional distress, which requires a showing of reckless or intentional conduct on Defendant's part. *Trujillo*, 2002-NMSC-004, ¶ 25; *see also* UJI 13-1628 NMRA. A claim of intentional infliction of emotional distress is therefore legally sufficient under the firefighter's rule, so long as Defendant's actions were intentional or, if reckless, Plaintiffs' injuries exceeded the normal scope of injuries inherent to their profession.

{23} Firefighters will always be subject to some emotional distress when responding to an emergency call. We must determine whether Plaintiffs have alleged facts sufficient to show that their distress could have exceeded the normal scope of distress inherent to their profession; ultimately, however, it will be up to the jury to determine whether Plaintiffs' stress did in fact exceed that scope. *See Dominguez v. Stone*, 97 N.M. 211, 215, 638 P.2d 423, 427 (Ct. App. 1981). Plaintiffs allege that they suffer from continuing, severe emotional distress that "has been manifested by physical symptomotology [sic], has impacted their personal lives, has resulted in recurrent nightmares and flashbacks, has been debilitating, and has been traumatizing." We find that the particular injuries described by Plaintiffs in their complaint could be found to exceed the normal scope of injuries inherent to the profession. Therefore, even if Defendant's actions were reckless, Plaintiffs have alleged sufficient facts to state a claim under the firefighter's rule. We must now determine whether Plaintiffs have alleged sufficient facts to support a cause of action for intentional infliction of emotional distress.

B. Intentional Infliction of Emotional Distress

{24} The tort of intentional infliction of emotional distress was developed primarily by legal scholars rather than the courts. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 42 (1982). It "provides recovery to victims of socially reprehensible conduct, and leaves it to the judicial process to determine, on a case-by-case basis, what conduct should be so characterized." *Id.* Perhaps because of its indeterminacy, its main purpose seems to be to "provide the basis for achieving situational justice." *Id.* at 74–75.

{25} New Mexico first confronted intentional infliction of emotional distress in *Mantz v. Follingstad*, 84 N.M. 473, 479–80, 505 P.2d 68, 74–75 (Ct. App. 1972), but the plaintiffs failed to present sufficient facts to submit the claim to the jury. In the next case to address the tort, the Court of Appeals followed the elements as defined in the *Restatement (Second) of Torts* § 46, when it found that the plaintiffs had established sufficient facts to survive summary judgment on the cause of action. *Dominguez*, 97 N.M. at 214–15, 638 P.2d at 426–27.

{26} This Court has "adopted the approach used in the *Restatement (Second) of Torts* § 46." *Trujillo*, 2002-NMSC-004, ¶ 25. The *Restatement* sets out a two-prong approach, providing for both first-party and third-party claims:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is

> subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

Restatement (Second) of Torts § 46.

{27} In *Trujillo*, we also stated that the following elements must be proven: "(1) the conduct in question was extreme and outrageous; (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff; (3) the plaintiff's mental distress was extreme and severe; and (4) there is a causal connection between the defendant's conduct and the claimant's mental distress." *Trujillo*, 2002-NMSC-004, ¶ 25 (quoting *Hakkila v. Hakkila*, 112 N.M. 172, 182, 812 P.2d 1320, 1330 (Ct. App. 1991)) (Donnelly, J., specially concurring) (internal quotation marks omitted). We note that these elements merely restate the first prong of the *Restatement* test. The second prong of the *Restatement* test was not at issue in *Trujillo*, so we had no reason to address it.[4] Because of the special relationship between Plaintiffs and Defendant, as detailed below, we do not address Plaintiffs' third-party claim under the second prong in this case.

1. First-Party Claim

{28} Intentional infliction of emotional distress claims most frequently arise from a preexisting relationship between the plaintiff and the defendant. Givelber, *supra*, at 63. The relationship may have a formal legal basis, such as employer-employee, *id.* at 63–64, or it may be more informal, such as a situation where one party has an obligation to the other that is regulated by the State. *Id.* at 70. One of the first academic articles on intentional infliction of emotional distress noted that the early version of the tort had most frequently been applied to innkeepers and common carriers, and raised the question of "how far this liability for insulting conduct will be extended to other relationships." Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1051–53 (1936). The *Restatement*also recognizes the importance of relationships: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." *Restatement (Second) of Torts* § 46 cmt. e; *see also Restatement (Third) of Torts* § 45 cmt. c ("[W]hether an actor's conduct is extreme and outrageous" depends on the facts of each case, including the relationship of the parties).

{29} Most of the intentional infliction of emotional distress cases in New Mexico have involved such relationships. *See, e.g., Trujillo*, 2002-NMSC-004, ¶¶ 1–2 (employer-employee and Human Rights Act); *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 1, 127 N.M. 47, 976 P.2d 999 (employer-employee and Workers' Compensation Act); *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 13, 124 N.M. 613, 954 P.2d 45 (contract for burial); *Sanders v. Lutz*, 109 N.M. 193, 194, 784 P.2d 12, 13 (1989) (agreement granting easement); *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 425, 773 P.2d 1231, 1232 (1989) (employer-employee); *Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, ¶ 1, 125 N.M. 500, 964 P.2d 61 (employer-employee and federal Civil Rights Act); *Stock v. Grantham*, 1998-NMCA-081, ¶¶ 1, 22, 125 N.M. 564, 964 P.2d 125 (employer-employee and Human Rights Act); *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 271, 901 P.2d 201, 202 (Ct. App. 1995) (employer-employee); *Hakkila*, 112 N.M. at

[4] Although the Court of Appeals quoted the *Restatement* test in its entirety in *Dominguez*, our research has turned up no New Mexico cases that have based a claim on the second prong of the test. *See Dominguez*, 97 N.M. at 214, 638 P.2d at 426.

173, 812 P.2d at 1321 (husband-wife); *Dominguez*, 97 N.M. at 212, 638 P.2d at 424 (employer-employee and Human Rights Act).

{30} Oregon has formally recognized the significance of the relationship between the parties in cases alleging intentional infliction of emotional distress. For example, *Rockhill v. Pollard*, 485 P.2d 28 (Or. 1971) (en banc), involved a claim of intentional infliction of emotional distress that arose when a physician turned away accident victims who sought his help. The Oregon Supreme Court noted that "the particular relationship between the parties" was an "important factor" in the case. *Id.* at 31. The Oregon court later clarified this statement, noting that the special relationship between the parties is a factor in determining whether the defendant's conduct is outrageous. *McGanty v. Staudenraus*, 901 P.2d 841, 850 (Or. 1995) (en banc) (analyzing claim of intentional infliction of emotional distress in the context of an employer-employee relationship). In fact, almost all successfully pleaded claims in Oregon involved a special relationship. *Delaney v. Clifton*, 41 P.3d 1099, 1107 n.7 (Or. Ct. App. 2002).

{31} Other courts have followed Oregon's lead. The Arizona Court of Appeals concluded that *Rockhill* and similar cases from other jurisdictions "emphasize the relationship between the parties as being a factor to consider" in determining whether conduct is outrageous. *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 716 P.2d 1022, 1027 (Ariz. Ct. App. 1985). A federal court, applying Washington state law, noted that the extreme and outrageous nature of a defendant's conduct must be determined on a case-by-case basis, and that "whether a special relationship exists between the parties" is a factor in that determination. *Masood v. Saleemi*, 2007 WL 2069853, at *6 (W.D. Wash. July 13, 2007); *see also Garretson v. City of Madison Heights*, 407 F.3d 789, 799 (6th Cir. 2005) ("[I]n Michigan, a special relationship between the parties may lower the level of conduct needed to be actionable."); *Robinson v. Intercorp*, 512 F. Supp. 2d 1307, 1315 (N.D. Ga. 2007) ("[T]he existence of a special relationship between the actor and victim, such as that of employer to employee, may make otherwise non-egregious conduct outrageous.") (citing *Trimble v. Circuit City Stores, Inc.*, 469 S.E.2d 776 (Ga. Ct. App. 1996)); *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 688 (Ark. 1980) ("[T]here are cases in which the extreme and outrageous nature of the conduct arises not so much from what is done as from the abuse by the defendant of a relationship with the plaintiff which gives him power to damage the plaintiff's interests.") (citing William L. Prosser, *Insult and Outrage*, 44 Cal. L. Rev. 40, 47 (1956)); *Taylor v. Metzger*, 706 A.2d 685, 695 (N.J. 1998) (surveying cases in several states that found "[T]he employer-employee relationship has been regarded as a special relationship which is a factor to be considered in determining whether liability should be imposed.") (quoting J.D. Lee & Barry A. Lindahl, 3 *Modern Tort Law: Liability and Litigation* § 32.03, at 133–34 (rev. ed. 1990)) (internal quotation marks omitted).

{32} In this case Plaintiff's allegations that Defendant is subject to various statutes and regulations could support a finding that Defendant has a special relationship with Plaintiffs. As Defendant points out, federal law seemingly requires Defendant to establish procedures for "[n]otifying appropriate fire . . . officials of gas pipeline emergencies and coordinating with them both planned responses and actual responses during an emergency." 49 C.F.R. § 192.615(a)(8) (2006). This regulation requires more than just establishing procedures: Defendant is also required to "establish and maintain liaison with appropriate fire . . . officials." *Id.* § 192.615(c). The purpose of this liaison is for Defendant to

> (1) Learn the responsibility and resources of each government organization that may respond to a gas pipeline emergency;
>
> (2) Acquaint the officials with the operator's ability in responding to a gas pipeline emergency;
>
> (3) Identify the types of gas pipeline emergencies of which the operator notifies the officials; and

> (4) *Plan how the operator and officials can engage in mutual assistance to minimize hazards to life or property*.

Id. (emphasis added).

{33} This regulation requires more of both parties than the typical relationship of a member of the general public with the local fire department. It requires more than even a business owner or landlord who must abide by a fire code and pass inspections. This regulation requires active cooperation between Defendant and Plaintiffs. In particular, Section 192.615(c)(4) requires Defendant and Plaintiffs to work together to minimize the exact risk that Plaintiffs allege led to their injuries in this case.

{34} We now must evaluate Defendant's conduct in the context of this potential relationship. We first note that it is highly unlikely that calling firefighters in response to an emergency will ever be considered extreme and outrageous conduct. *See Restatement (Second) of Torts* § 46 cmt. g ("[C]onduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances."). It is always appropriate for firefighters to respond to an emergency, even one caused by an intentional act such as arson, and we do not want to discourage any member of the public from calling for assistance. Thus, we look not to Defendant's response to the emergency, but to Defendant's alleged acts leading up to the emergency.

{35} According to Plaintiffs' complaint, Defendant is required to properly design and maintain its pipelines, and Defendant failed to take the steps necessary to insure the safety of the pipeline at issue. Defendant knew the consequences of such failure: Defendant had been cited for past safety violations, and had experienced at least two previous pipeline explosions, one of which involved severe burns. With respect to the pipeline at issue in this case, Defendant knew that the area around it was used for camping. Defendant also knew, or should have known, that this area of pipeline suffered from the same problems that resulted in the explosions in other pipelines nearby. Despite this knowledge, and its obligation to coordinate with firefighters, Defendant did not share any of this information with Plaintiffs.

{36} Given the nature of Defendant's relationship to Plaintiffs, we find that these facts show Defendant's conduct could be considered extreme and outrageous. We are aware of no cases where a firefighter's claim for intentional infliction of emotional distress has been decided on the merits, and thus find little guidance in the precedent of either New Mexico or other jurisdictions. Instead, we look for circumstances that indicate an "abuse by the defendant of a relationship with the plaintiff," *M. B. M. Co.*, 596 S.W.2d at 688, or a "disregard for the plaintiff[] . . . under particularly trying circumstances." *Rockhill*, 485 P.2d at 32. The allegations that Defendant knew about the specific risks inherent in failing to maintain its pipelines, and that Plaintiffs would be exposed to those risks, if proven could support a finding of such abuse or disregard.

{37} Plaintiffs must also show that Defendant's conduct was intentional or in reckless disregard of Plaintiffs.[5] Recklessness is "'the intentional doing of an act with utter indifference to the consequences.'" *Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.,* 2001-NMCA-082, ¶ 59, 131 N.M. 100, 33 P.3d 651 (quoting UJI 13-1827 NMRA); *see also Restatement (Second) of Torts* § 46 cmt. i (defining recklessness as "deliberate disregard of a high degree of probability that the emotional distress will follow"). The prior explosions with injuries, and Defendant's failure to remedy the problems with its pipelines,

[5] We are aware that firefighters are necessarily subjected to emotional distress every time they respond to an emergency. Supervisors therefore necessarily and knowingly send firefighters into a situation where they will suffer injuries. These actions, however, do not expose supervisors to liability for intentional infliction of emotional distress. In *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 26, 131 N.M. 272, 34 P.3d 1148, we noted that when an "employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker[,]" then the employer could be liable for the worker's injury. We specifically recognized, however, that firefighters and police fall under the "just cause or excuse" exception. *Id.* ¶ 27.

could show recklessness. *See Gonzales v. Surgidev Corp.*, 120 N.M. 133, 147, 899 P.2d 576, 590 (1995) (finding that prior acts are relevant to recklessness, and failure to remove defective products from the market "demonstrate[s] a reckless disregard for the safety" of others).

{38} Finally, Plaintiffs must show that their mental distress is extreme and severe, and that there is a causal connection between Defendant's conduct and Plaintiffs' mental distress. As we discussed under our analysis of the firefighter's rule, *supra*, Plaintiffs have alleged sufficient facts to show that their distress is severe. That stress arose from witnessing the physical injuries to the victims, injuries caused by Defendant's failure to maintain the pipeline at issue.

{39} Plaintiffs have thus alleged sufficient facts to support each element of a claim of intentional infliction of emotional distress. These facts allow Plaintiffs' claim to survive Defendant's Rule 1-012(B)(6) motion, but Plaintiffs must still prove their case. In evaluating the outrageousness of Defendant's conduct and the severity of Plaintiffs' distress, we must remember that emotional distress is part of a firefighter's job; what might be outrageous conduct or severe distress to a typical member of the public may just be part of an ordinary day to a firefighter.

2. Third-Party Claim

{40} It is tempting to analyze this case under the second prong of the *Restatement* test, as Defendant would have us do. The second prong covers situations where the defendant's conduct is directed at a third person, and observation of the third person's injuries causes the plaintiff's emotional distress. *Restatement (Second) of Torts* § 46, cmt. l. In this case, Plaintiffs allege that their mental distress arose from observing the injuries to the victims caused by Defendant's failure to properly maintain the pipeline at issue. However, as we discussed in our analysis of Plaintiffs' first-party claim, the extreme and outrageous nature of Defendant's conduct arises if there is a special relationship between Defendant and Plaintiffs. It is the possibility of a special relationship that permits Plaintiffs' claim under the elements defined in *Trujillo*. Therefore, we do not need to reach Defendant's argument that Plaintiffs' claim is legally insufficient as a third-party claim.

III. CONCLUSION

{41} The firefighter's rule has a place in New Mexico law, but as a matter of public policy it does not cover injuries arising out of intentional acts and certain reckless acts. Under our reformulation of the firefighter's rule, Plaintiffs' complaint alleges legally sufficient facts to support a first-party claim of intentional infliction of emotional distress. We remand this case to the district court for further proceedings consistent with this opinion.

{42} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

PAUL J. KENNEDY
(Pro Tem)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-024

Filing Date: April 15, 2008

Docket No. 29,786

CARL CASE,

Petitioner,

v.

TIMOTHY HATCH,
Warden of the Guadalupe County Correctional Facility

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Gary L. Clingman, District Judge

Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, L.L.P.
Peter Shoenburg
Marc M. Lowry
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for Petitioner

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for Respondent

OPINION

CHÁVEZ, Chief Justice.

{1} On January 30, 1982, the moderately to severely decomposed body of a teenage girl, Nancy Mitchell, was discovered in Eddy County near an area known locally as Six Mile Dam. Petitioner Carl Case was convicted by a jury on October 26, 1982 of first-degree murder and first-degree criminal sexual penetration of Mitchell. The evidence in support of his conviction included the eyewitness testimony of three teenaged witnesses, Audrey Knight, Paul Dunlap, and Bobby Autry, which, while not entirely consistent, incriminated Case. Case also testified at his trial and (1) admitted he was present during the events that led to the victim's death; (2) corroborated the presence of Knight and Dunlap at the scene, but testified that Mitchell accidentally fell. This Court affirmed his conviction in *State v. Case*, 100 N.M. 714, 676 P.2d 241 (1984).

{2} On December 4, 2003, over twenty years after Case's conviction, Knight and Dunlap signed affidavits recanting their trial testimony that had incriminated Case, asserting that they did not know anything about the events leading to Mitchell's death. Knight and Dunlap originally made these assertions to the police, and they were the subject of extensive cross-examination during the trial. Each of the three witnesses testified at trial under oath that their original statements to the police, denying any knowledge of the crime, were false and were made because of threats of violence from Case and others. Knight now asserts that she perjured herself at trial because of the intense pressure she felt from law enforcement. Dunlap now asserts that he perjured himself at trial because of the intense pressure he felt while incarcerated pending charges for Mitchell's rape and murder.

{3} In 2004, Case filed a verified petition for a writ of habeas corpus in state district court. In his petition Case asserted that the newly-discovered recantations by two of the three eyewitnesses violated his fundamental right to a fair trial under the due process clauses of the federal and state constitutions, and more specifically, that "the prosecution purposefully withheld knowledge that the witnesses were fabricating their testimony from the defense." The State responded to the petition, arguing that (1) the recantations were not credible; (2) the witnesses' original

statements were the subject of extensive cross-examination by defense counsel; and (3) Case failed to prove that the testimony at trial was knowingly and intentionally used by the prosecution. In reply, Case asserted that he was not contending that the prosecution deliberately falsified the testimony, just that the witnesses "were young, inexperienced, and impressionable . . . who chose to accommodate the prosecution's view of events rather than challenging" the aggressive techniques of the prosecution team.

{4} During the pendency of the habeas corpus proceedings, counsel for Case discovered four taped statements made by Autry to law enforcement of Autry's version of the events that occurred on New Year's Day. Autry is the only witness who has not recanted his testimony. Case's counsel asserted that one of the four statements was not produced by the prosecution, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Following evidentiary hearings in November 2005 and February 2006, the district court denied the petition, finding that:

> 1) The State did not illegally suppress evidence that was materially favorable to [Case].
>
> 2) The State did not knowingly or recklessly use false testimony at [Case's] trial.
>
> 3) The recantations of Paul Dunlap and Audrey Knight do not constitute newly discovered evidence in that assuming arguendo, that their original testimony was false, [Case] knew it was false when given. [Case's] counsel could not find evidence to prove [Case's] claimed alibi and did not rebut the "false" testimony. [Case] in fact conformed his testimony to match the "false" testimony, took the stand and corroborated much of the "false" testimony with his own testimony.
>
> 4) Law Enforcement's interrogation of Paul Dunlap and Audrey Knight do not shock the conscience of the Court and do not constitute impermissible police conduct.
>
> 5) The Court does not find a new trial warranted by "cumulative error."

Because we conclude that the trial court did not abuse its discretion **in concluding that the recantations did not constitute newly-discovered evidence, and that the prosecution did not suppress material evidence, we affirm the denial of the petition for writ of habeas corpus.**

I. APPROPRIATE ANALYSIS FOR HABEAS RELIEF BASED ON RECANTED TESTIMONY

{5} When a witness recants his or her trial testimony, the recantation may constitute newly-discovered evidence warranting a new trial under Rule 5-614 NMRA. In evaluating the recantation testimony, the court must consider whether:

> (1) the original verdict was based upon uncorroborated testimony; (2) the recantation occurred under circumstances free from suspicion of undue influence or pressure from any source; (3) the record fails to disclose any possibility of collusion between the defendant and the witness between the time of the trial and the retraction; and (4) the witness admitted [the] perjury on the witness stand and thereby subjected [himself or] herself to prosecution.

Montoya v. Ulibarri, 2007-NMSC-035, ¶ 31, 142 N.M. 89, 163 P.3d 476 (quoted authority omitted) (alterations in original). The grant of a new trial is not automatic; rather, the defendant must prove that the newly-discovered evidence meets each of the following requirements:

> "1) it will probably change the result if a new trial is granted; 2) it must have been discovered since the trial; 3) it could not have been discovered before the trial by the exercise of due diligence; 4) it must be material; 5) it must not be merely cumulative; and 6) it must not be merely impeaching or contradictory."

State v. Garcia, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 125 P.3d 638 (quoting *State v. Volpato*, 102 N.M. 383, 384–85, 696 P.2d 471, 472–73 (1985)). However, a motion for a new trial based on newly-discovered evidence must be brought within two years of the date of final judgment. Rule 5-614(C).

{6} When a witness recants testimony more than two years after final judgment, a defendant may still be entitled to relief. It has been held that the only relief available is executive clemency under NMSA 1953, Section 31-21-17 (1955) and Article V, Section 6 of the New Mexico Constitution. *See State v. Minns*, 81 N.M. 428, 429, 467 P.2d 1000, 1001 (Ct. App. 1970). However, executive clemency as an exclusive remedy has been called into question by at least two of this Court's opinions where recanted testimony was at issue. This Court recently recognized that a free-standing claim of actual innocence entitled a defendant to habeas corpus relief under Rule 5-802 NMRA, if the petitioner proved "by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." *Montoya*, 2007-NMSC-035, ¶ 30. We also held in 1963 that a defendant could seek relief under Rule 5-802 when a "deprivation of constitutional rights amounts to a denial of due process." *Johnson v. Cox*, 72 N.M. 55, 57, 380 P.2d 199, 201 (1963). The latter relief is available because the "right to substantive due process embodies principles of fundamental fairness and entitles every individual to be free from arbitrary or oppressive government conduct." *State v. Vallejos*, 1997-NMSC-040, ¶ 31, 123 N.M. 739, 945 P.2d 957. In determining whether that right has been violated, "the inquiry on habeas corpus is directed to a review of the entire proceedings, and if the total result was the granting to [the] accused of a fair and deliberate trial, then no constitutional right has been invaded, and the proceedings will not be disturbed." *Johnson*, 72 N.M. at 57, 380 P.2d at 201.

{7} In reviewing a writ of habeas corpus based on recanted testimony, we must distinguish between a "knowing prosecutorial use of perjured testimony," *Sanders v. Sullivan*, 863 F.2d 218, 221 (2nd Cir. 1988), and a "mere repudiation of former testimony or admission of perjury." *Johnson*, 72 N.M. at 58, 380 P.2d at 201 (being convinced after reviewing all of the proceedings that the recanting witness did not commit perjury at trial *or*, in any event, that perjured testimony was wilfully and intentionally used by the prosecution).

{8} The knowing prosecutorial use of perjured testimony clearly implicates the necessary state action for a violation of due process. *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) ("[T]he action of prosecuting officers on behalf of the state . . . may constitute state action within the purview of the Fourteenth Amendment."); *see also Duran v. N.M. Monitored Treatment Program*, 2000-NMCA-023, ¶ 21, 128 N.M. 659, 996 P.2d 922 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)) (recognizing the requirement for state action in due process claims). When the petitioner alleges that the prosecution deliberately participated in the falsification, we require the petitioner to show: (1) that the original testimony was, in fact, false; and (2) "that it was knowingly, wilfully and intentionally used by the prosecution to procure the conviction." *Johnson*, 72 N.M. at 58, 380 P.2d at 201. The same test applies when the prosecution does not actually solicit false testimony, but instead learns it is false during the course of the trial and "'allows it to go uncorrected when it appears.'" *State v. Hogervorst*, 87 N.M. 458, 459, 535 P.2d 1084, 1085 (Ct. App. 1975) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

{9} Case is not making a free-standing claim of actual innocence. We also do not interpret his petition as contending that the prosecution deliberately participated in the presentation of false testimony. Case initially contended in his petition that "the prosecution purposefully withheld knowledge that the witnesses were fabricating their testimony from the defense." However, in his reply he specifically cited *Johnson* indicating he was not contending that the prosecution deliberately falsified the testimony. In any event, we agree with the trial court finding that the State did not knowingly or recklessly use false testimony at Case's trial.

{10} The issue of whether a petitioner is entitled to habeas corpus relief when the petitioner raises due process implications from the alleged unknowing use of perjured testimony by the prosecution is unsettled. The United States Supreme Court has not addressed the issue. *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006). In *Durley v. Mayo*, however, four Justices would have held that "[d]eprivation of a [habeas corpus] hearing under these circumstances amounts . . . to a denial of due process of law." 351 U.S. 277, 291 (1956) (Douglas, J., dissenting). The majority never reached the question, instead dismissing for lack of jurisdiction. *Id.* at 285 (majority opinion). More recently, Justices Stevens and Ginsburg made the same argument in their opposition to a denial of certiorari. *Jacobs v. Scott*, 513 U.S. 1067, 1067 (1995) (Stevens & Ginsburg, JJ., dissenting).

{11} A majority of the federal circuit courts require a knowing use of perjured testimony by the prosecution to find a violation of due process. *Sanders*, 863 F.2d at 222 (citing cases from the Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeals). The Second Circuit in *Sanders* found that due process rights may be implicated "when a credible recantation of the testimony in question would most likely change the outcome of the trial and a state leaves the conviction in place." *Id.* (footnote omitted). In New Mexico, we have expressed a "particular interest in ensuring accuracy in criminal convictions in order to maintain credibility within the judiciary." *Montoya*, 2007-NMSC-035, ¶ 21. As such, we are loath to deny a petitioner any chance at relief when it is proven that he or she remains incarcerated solely on the basis of lies. To do so would make truth subordinate to process and undermine the "[f]undamental fairness [that] is intrinsic within the concept of due process that is provided by the New Mexico Constitution." *Montoya*, 2007-NMSC-035, ¶ 23; *see also Sanders*, 863 F.2d at 224.

{12} That leaves us with the question of the appropriate analysis required to grant or deny habeas corpus relief. Aside from the passage of time, we see little difference between a motion for new trial and a petition for writ of habeas corpus based on the newly-discovered evidence of a recantation. *Cf. United States v. Duke*, 50 F.3d 571, 576 (8th Cir. 1995) ("We apply the same standards of review in a § 2255 proceeding as in a habeas corpus proceeding.") (citation omitted). In a motion for a new trial, we evaluate the credibility of the recantation under the four factors described in *Montoya* and the significance of the new evidence to the verdict under the six factors described in *Garcia.* Both the credibility of the recantation and the significance of the evidence are also important in a habeas corpus proceeding.

{13} We cannot, however, ignore the dimension of time. A motion for new trial must necessarily be brought within a relatively short time after the original trial. This minimizes the risk that witnesses will disappear, evidence will be lost, and memories will fade. *See Barker v. Wingo*, 407 U.S. 514, 521 (1972) ("As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade."). The new trial following a timely motion for new trial should proceed very similarly to the original trial, with the exception of the new evidence. As a result, the trial court can look ahead to the probable outcome of a new trial in order to gauge the significance of the new evidence.

{14} In contrast, a habeas corpus petition can be brought many years—or even decades—after the original trial. This remoteness practically guarantees missing witnesses, lost evidence, or faded memories. A new trial at this late date would most likely take a very different course than the original trial, even without the new evidence. The probable outcome of a new trial therefore says little, if anything, about the significance of the new evidence: We cannot "look into the seeds of time /And say which grain will grow and which will not." William Shakespeare, *Macbeth*, Act 1, scene 3.

{15} To insure that the analysis is made with the freshest possible evidence, we replace the first factor of *Garcia* with a rearward look at the original trial. Looking at the record as a whole,

including both the original and the new evidence, the reviewing court must determine whether it is left "with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *See Sanders*, 863 F.2d at 226 (footnote omitted). We recognize that most circuits in this situation, and our own Rule 5-614, would grant a new trial if the petitioner can show that "the jury would have 'probably' or 'likely' reached a different verdict had the perjury not occurred." *Evenstad*, 470 F.3d at 783 n.6. We believe, however, that the "firm belief" standard requires more and will avoid new trials when the perjured testimony is of an extraordinary nature. *See Sanders*, 863 F.2d at 226.

{16} In *Montoya*, we listed four factors that must be considered when evaluating whether the recantation is credible, that is, whether the trial testimony was perjured. *Id.*, 2007-NMSC-035, ¶ 31. One additional factor that must be considered is whether the new testimony is corroborated by additional new evidence. This is not a new factor, but one that we have considered in the past. In *State v. Chavez*, 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974), the Court of Appeals granted a new trial after a key prosecution witness recanted and another person confessed to the crime. We noted later, in *State v. Stephens*, 99 N.M. 32, 37, 653 P.2d 863, 868 (1982), that the confession in *Chavez* was persuasive in part because it was corroborated by other eyewitnesses.

{17} In summary, a petitioner seeking a new trial through a writ of habeas corpus because of recanted testimony must prove, based upon the entire record, including the original trial proceedings at issue, that the recantation is credible and was significant to the original verdict. In assessing the recantation's credibility, the trial court, in addition to weighing the credibility of the witnesses, must consider the following factors, none of which is dispositive by itself:

> (1) the original verdict was based upon uncorroborated testimony; (2) the recantation is corroborated by additional new evidence; (3) the recantation occurred under circumstances free from suspicion of undue influence or pressure from any source; (4) the record fails to disclose any possibility of collusion between the defendant and the witness between the time of the trial and the retraction; and (5) the witness admitted the perjury on the witness stand and thereby subjected himself or herself to prosecution.

To show that a credible recantation was significant, the petitioner must prove that the evidence meets each of the following requirements:

> (1) it must have been discovered since the trial; (2) it could not have been discovered before the trial by the exercise of due diligence; (3) it must be material; (4) it must not be merely cumulative; (5) it must not be merely impeaching or contradictory; and (6) the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.

With the exception of the "firm belief" standard which we announce today, the remaining factors are already a part of New Mexico habeas corpus jurisprudence. On appeal we will review the district court's determination for an abuse of discretion. *State v. Sena*, 105 N.M. 686, 687, 736 P.2d 491, 492 (1987).

II. SUMMARY OF HABEAS TESTIMONY AND TRIAL EVIDENCE

{18} We begin the analysis with a summary of the testimony at the habeas hearing and a summary of the trial testimony we consider important to a determination of whether the trial court abused its discretion in denying the petition.

A. Knight's Testimony

{19} During the habeas hearing, Knight testified in response to questions by the judge that she had lied at trial, she was never at the scene, and she did not know anything about the events

leading to Mitchell's death. She explained that during her initial visits with the police, she told them that she did not know anything about the events leading to Mitchell's death. However, she claims she felt pressured because the police interviewed her a number of times and told her they had information that her truck was at the scene. Finally, when Case changed his story and admitted that he was at the scene, she changed her story and gave the police details of what happened, with one lie leading to another.

{20} During the trial, over twenty years before the habeas evidentiary hearing, Knight testified to the following. She was seventeen years old at the time and considered Mitchell a friend. She saw Mitchell at a party on the island near Six Mile Dam. Mitchell was with Case, Curtis Worley, Mike Tweedy, Joe Brown, and Dunlap in a car driven by Worley. The boys were talking about what a nice body Mitchell had and how they wanted to have sex with her. Knight did not believe that Mitchell heard the discussion, but the boys talked about gang-banging Mitchell and something about the dam. Knight then saw Mitchell get in a car with the boys and leave the party. About fifteen minutes later, Knight drove in her truck to the dam, where she saw Worley's car parked. She stopped her truck and started to get out, when Case and then Dunlap approached her and told her she should not be there. Knight did not leave immediately because she saw Mitchell in the car with her shirt off and Worley on top of her. Mitchell saw Knight and hollered "Help, Audrey." Knight started toward the car, but Case and Dunlap got in front of her and pushed her. She then saw Worley hit Mitchell and saw Tweedy hold Mitchell's hands and then cover her mouth. At that point, Knight left.

{21} When asked why she had not told the police what she saw, Knight testified that Case and Dunlap had told her not to say anything or they would hurt her family and a specific friend. She said she was afraid of them. She also described a conversation the next day where the boys, including Case, expressed concern about Mitchell's body being found.

{22} During an extensive cross-examination, Knight acknowledged that when she first spoke with the police, she lied and was trying not to tell the police anything about the boys. Having admitted that she lied to the police, she claimed that she lied because she was scared. She also acknowledged under cross-examination that she felt pressure from the police and was a little afraid of them. She indicated that the police were the first ones to use the phrase "gang bang." She was not able to verify that Autry was there that night, although she had previously told the police that he might have been.

B. Dunlap's Testimony

{23} During the habeas hearing, Dunlap testified that while he was in custody, he initially told the police that he did not have any knowledge about the events leading to Mitchell's death. He was then given a polygraph test and was told by the police that he failed the test. He was jailed for six months with charges pending against him for Mitchell's rape and murder. Despite having told the police that he did not know anything about the events, he decided he needed to make a deal because other witnesses were lying. He scripted his testimony from untruthful testimony he heard at his bail hearing and from the police questioning. Once he memorized the script, he destroyed it and notified the district attorney that he would take an offer of immunity in return for his testimony. Prior to the murder trial, he spoke with the prosecutor for a few minutes, and at trial told the story he had prepared in jail. During the habeas hearing, Dunlap conceded on cross-examination that he never told any of the police, the prosecutors, or his lawyer that he was lying at trial, nor was he ever told to lie. However, he testified that all of his testimony implicating Case was untruthful.

{24} During the murder trial, Dunlap testified that he had been granted immunity from prosecution for Mitchell's rape and murder after serving six months in a juvenile detention center. He said that he had initially given a false statement to the police on March 10, 1982.

When asked to tell the jury the truth about what happened on January 1, 1982, he stated that he had been at a party near Six Mile Dam and he had gotten a ride in a car driven by Worley. Others in the car included Brown, Autry, Case, Worley, and Mitchell. They drove for a while, then Worley stopped the car and all of the boys got out. When Dunlap started to get back in the car, Worley pulled Mitchell out of the car and hit her in the face, knocking her down. Brown and Case were then holding her on the ground trying to get her shirt off. At that time Dunlap said that lights started to come up the road, so he walked toward the lights. Knight got out of her truck and started to walk toward the people near the car. Dunlap told her to leave because she should not be there. While he was talking to Knight, Mitchell was screaming, but he did not hear her call out for Knight. Case then approached Knight, and after talking with her, Knight left. Dunlap returned to the car, and by then the boys had gotten Mitchell back in the car. When Case returned to the car, he told Dunlap that he had better keep his mouth shut. Brown and Worley then got Mitchell out of the car, put her on the ground, and took off the rest of her clothes. After Brown and Worley got her pants off, Worley pulled his pants off, and Worley, Case, and Brown took turns rolling around on the ground with her. They next put her clothes back on her, and Worley and Case carried her off by the arms, with Joe following them. They were gone for about fifteen minutes, and when they returned without Mitchell, the boys drove back into town with Dunlap. Dunlap was not sure where Autry went when all of this started, but he did not see Autry again. Dunlap also testified that he did not tell anyone what had happened because he was too scared and because Case had threatened him.

{25} During cross-examination at the habeas hearing, Dunlap recounted how he had first been questioned by the police for about twelve hours with them getting angry, getting right up in his face, calling him a liar, and threatening him with a murder charge. The officers did not, however, tell him what the other witnesses were saying. Throughout the statement, he told the police he was not at the party on January 1, 1982, but he admitted that he lied to the police. Dunlap also acknowledged that he had heard testimony from Autry and Knight at his transfer hearing on April 12, 1982, months before he decided to give the police the statement that gave him immunity. He also denied seeing Case or anyone other than Worley strike Mitchell, and he said that he did not see anyone strike her with an object.

C. Autry's Testimony[1]

{26} Autry was the third eyewitness at trial. Dunlap testified that Autry was present at the party on January 1, 1982, but Knight testified that Autry was not there. Autry testified that he was not at a party on January 1, 1982, but that Worley picked him up at a Dairy Queen. With Worley were Case, Brown, Tweedy, Dunlap, and Mitchell. They drove around for a while and then went to Six Mile Dam. While they were there, Worley reached out to pinch Mitchell on the breast and she slapped him, so he hit her and knocked her down to the ground. Autry testified that when she tried to get back up, Case pushed her down once. He thought that Brown appeared to have something like a stick or a piece of pipe, and he said that Brown hit her with it. While she was on the ground, Autry saw Worley grab Mitchell's pants and rip them open, and the other boys all jumped down on her like a bunch of vultures, holding her down and trying to tear her clothes off. He ran home once he saw what was happening.

{27} After that day, Autry testified that he received a number of threatening calls from Worley and Case. When the police first interviewed him he did not tell them what had happened, because he said that he and his family had been threatened. He told the police that he was not present when Mitchell was attacked, but he failed a lie detector test when he claimed he did not know what happened to her. After the test, Autry decided to tell the police what happened that night. Autry testified that he did not see either Knight or a truck during the events he witnessed. During

[1] Autry did not testify during the habeas hearing.

cross-examination, he stated that he did not see anyone have sexual intercourse with Mitchell. Autry also acknowledged that he had initially been charged with Mitchell's rape and murder, but he was told that if he testified to what he knew, he would go home.

D. Case's Testimony

{28} Case testified at the habeas hearing that he too had perjured himself at trial based on what he heard at trial. He said that he met with his attorney three days before his trial, and that his attorney told Case that he was unable to find any alibi witnesses for him. Case claimed that he had been to Six Mile Dam with these people in the past, but he had not been there on New Year's Day. During the trial, and not during the meeting three days before trial, Case told his attorney that he was in fact there on New Year's Day. It was not originally part of the trial strategy for him to testify during his trial. Case's attorney testified during the habeas hearing that a few days before trial, he met with his client and advised him that he did not have the witnesses to support his alibi defense. It was during this meeting that Case told his attorney to what he would ultimately testify at trial, and when they agreed that Case would in fact testify during trial.

{29} Turning next to the trial, immediately after the prosecution made their opening statement, Case's attorney told the jury that Case would indeed testify, describing in detail what information Case's testimony would include. Early in his testimony, Case testified about an event at the Sound Castle, a local teenage hangout, when Worley tried to pull Mitchell from Case's car. He said that as a result he had to slap Worley around. Worley left and then returned with a shotgun, threatening to kill Case.

{30} Regarding the events on New Year's Day, he testified that Brown and Worley picked him up at about 10:00 to 10:30. They drove to the Sound Castle, where they picked up Dunlap, and then drove to the Carlsbad Inn, where they picked up Tweedy and Mitchell. They drove for a while and then went to Six Mile Dam. Throughout this time, Worley was constantly pinching Mitchell on the breasts or butt, and she would slap him, but she was pretty much just laughing about it.

{31} When they arrived at Six Mile Dam, everyone except Mitchell got out of the car and went to a platform on the dam. Worley went back to the car, and he and Mitchell were joking when he back-handed Mitchell. Case testified that Mitchell told Worley that she needed to go to the bathroom, but Worley would not let her go. He kept wrestling with her on the hood of the car, trying to pull off her shirt. Worley and Mitchell ended up back in the car, so Case went back to the dam because he "didn't want any part of this." While this was happening, he saw headlights approaching, so he walked back up toward the car from the dam and told Worley to straighten up, it might be the law. Worley had taken Mitchell's top off. Case walked up to see who had arrived. He recognized Knight, and he told her, "Look, stay in your truck and go on back to town." He did not want Knight to see what Worley and Mitchell were doing. Mitchell and Worley stayed in the car for another five to ten minutes. Mitchell was drunk when she got out of the car, and said she still had to go to the bathroom. Halfway down the embankment, she tumbled and rolled the rest of the way to the bottom. Case did not think that the fall was enough to injure anybody. Worley called for her but she did not answer. The boys got back in the car and left her there because Worley did not want to give her a ride back to town. Case testified that he did not see anyone have sexual intercourse with Mitchell that night. Although he verified the presence of Dunlap and Knight, Case testified that Autry was not there. He also admitted during direct examination that he had lied to the police about the last time he had seen Mitchell and his claim that he hadn't been hanging around Worley and the other boys.

{32} During cross-examination, he acknowledged telling the police that both Worley and Brown were capable of rape and murder. When the police were investigating Mitchell's death, Case told them to look specifically to Worley, but he did not tell the police what he told the jury

about her accidental fall, because he did not want to get involved or have his reputation ruined. Case also admitted that when he saw Worley strike Mitchell, he believed Worley intended to have sexual intercourse with her.

E. Forensic Pathologist's Testimony

{33} Dr. Greggory Kaufman, a forensic pathologist who performed the autopsy on Mitchell, also testified at trial. He described receiving her body in a state of moderate to severe decomposition. She was wearing a pink t-shirt that was inside-out, a white bra, and red jean-style trousers with the zipper pulled apart. She had multiple contusions or abrasions that were scattered over her head and multiple contusions scattered over her neck and upper front chest. She also had a couple of contusions over the abdomen, and abrasions over her trunk, the backs of her hands, and the top of her feet. The abrasions appeared to have occurred in the period when the body was dying or post-mortem, and their vertical orientation suggested that the body had been dragged along the ground. The bruising he found on Mitchell's body occurred while the patient was alive and would have resulted from a beating, not from a fall. The internal examination revealed a fracture at the base of her skull on the right side, which could have resulted either in her death or just being knocked unconscious. The pathologist couldn't be sure about the injuries to her brain because it had decomposed. There was a small amount of alcohol in her system, probably due to the body's decomposition. He did not find any human semen during the autopsy and could not prove whether or not somebody had sexual intercourse with her because of the extensive decomposition. In the pathologist's opinion, the cause of death was blunt trauma to the head, and the death occurred approximately three weeks prior to the autopsy, which was performed on January 31, 1982, although that was a "very, very rough estimate" on his part. On cross-examination, he confirmed that he did not see blood in her vaginal wall, he did not test her undergarments for semen, and he did not find any puncture wounds.

III. WHETHER THE RECANTATIONS WERE NEWLY-DISCOVERED EVIDENCE

{34} In this case, the trial judge assumed that the recantations were credible when he assumed for the sake of argument that the original testimony was false. However, the trial court went on to find that the recantations were not newly-discovered evidence. In support of this finding, the trial court pointed out that (1) Case corroborated much of the false testimony of the witnesses at trial, and (2) Case's attorney was unable to produce evidence to support his alibi. Although we prefer to have the benefit of the trial court's findings regarding each factor relating to the credibility and significance prongs, our Court has not always been so disciplined. *See State v. Smith*, 104 N.M. 329, 333, 721 P.2d 397, 401 (1986), *overruled on other grounds*, *Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 731, 779 P.2d 99, 108 (1989) (the trial court made findings on each of the six criteria relating to a motion for a new trial, but the Supreme Court only reached the first criterion because it was dispositive). It is likely that the trial court chose not to analyze each factor relating to the credibility prong because a finding that the recantations were not newly-discovered evidence is dispositive. *See State v. Fero*, 107 N.M. 369, 372, 758 P.2d 783, 786 (1988). We agree that a negative finding of any of the six factors under the significance prong is dispositive. This has been the rule in New Mexico since at least 1903. *See Territory v. Claypool*, 11 N.M. 568, 585, 71 P. 463, 468 (1903). However, we believe it would inform our review if trial courts, rather than presuming the credibility of the recantations, would make findings with respect to each factor relating to the credibility prong before addressing the significance prong.

{35} We next analyze whether the recanted testimony was discovered after the original trial was completed. As is evident from the testimony from the original murder trial, in their initial statements to the police, Knight and Dunlap asserted that they did not know about the events leading to Mitchell's death. These statements

appear qualitatively similar to the recantations made during the habeas hearing in that both the initial statements to the police and the testimony at the habeas proceeding failed to incriminate Case in Mitchell's death. However, statements to the police by Knight and Dunlap subsequent to their initial interviews did incriminate Case and were consistent with their trial testimony. The inconsistency in the statements was both alluded to during direct examination and the subject of extensive cross-examination during trial. Thus, the question is whether under these circumstances the recanted testimony constitutes newly-discovered evidence. The burden is on Case to prove that the earlier statements were qualitatively different and thus constitute newly-discovered evidence. Because of the absence of case law in New Mexico on this subject, we have looked to other jurisdictions for guidance.

{36} In *United States v. Earles*, 983 F. Supp. 1236, 1241–43 (N.D. Iowa 1997), a key prosecution witness testified at a grand jury hearing, and then, after failing a polygraph examination, testified differently at a second grand jury hearing. The first testimony supported the defendant; the second supported the State's case. *See id.* The witness then refused to testify at trial, asserting his Fifth Amendment right against self-incrimination. *Id.* at 1243. As a result, both versions of the grand jury testimony were admitted at trial. *Id.* at 1253. The Court considered the second grand jury testimony to be a recantation, and the post-trial testimony that was consistent with the first grand jury testimony to be a "re-recantation." *Id.* at 1245. In his re-recantation, the witness said that his original recantation was "put together . . . from hints, suggestions, or coaching by [the prosecutor] and other law enforcement officials," and that he gave false testimony "in the hope of obtaining a reduction of sentence on other charges against him . . . and because he was told by [the prosecutor] that he was considered a suspect in the [crime] and so he felt he needed to protect himself." *Id.* at 1243–44. Because the defendant knew about both sets of testimony, a later recantation consistent with an earlier one could not be considered newly-discovered evidence. *Id.*

{37} In *Olson v. United States*, 989 F.2d 229, 230 (7th Cir. 1993), the petitioner filed a writ of habeas corpus seeking a new trial based on the newly-discovered evidence of two witness recantations. The petitioner had been convicted of murder based in part on the testimony of three witnesses. *Id.* The details revealed by the witnesses at trial were inconsistent, but all of their stories incriminated the petitioner. *Id.* Approximately four or five years after the trial, two of the witnesses recanted. The Court found that the recantations were not newly-discovered evidence because the witnesses had testified inconsistently during two grand jury hearings and one petit jury hearing, and the recantations were merely an attempt "to change their trial stories back to their original grand jury stories." *Id.* at 231. The Court also found the two recantations no more persuasive when considered together, in part because the witnesses did not provide an alibi for the petitioner or identify anyone else as the murderer. *Id.* at 232.

{38} In *United States v. Ramsey*, 761 F.2d 603, 604 (10th Cir. 1985), a witness testified that the defendant had hired him to burn down a store. Before the trial, the witness had told the defendant's son that the defendant was innocent. *Id.* Defense counsel cross-examined the witness on this inconsistency. *Id.* After the trial, the witness told two other people that the defendant was innocent and signed an affidavit to that effect. *Id.* The Court held that the recanted recantation was not newly-discovered evidence because "vacillation had been before the jury in the trial." *Id.* The Court also held that any new testimony by the witness was not credible because the "case is riddled with recantations and reassertions." *Id.*

{39} Similarly, in this case the recantations of Knight and Dunlap are efforts to revert to the original statements they gave to the police that they did not know anything about the events leading to Mitchell's death. Case was aware of these statements, as evidenced by cross-examination of each witness at trial. The defense strategy during the murder trial was that the witnesses were pressured by the police; they were scared of the police; and therefore they conformed their

testimony in such a way as to incriminate Case and others. With respect to Dunlap, the defense's additional theory was that Dunlap conformed his testimony to avoid prosecution. The jury heard the evidence and heard arguments of counsel regarding the motives of these witnesses to recant their original statements to the police and perjure themselves during trial. Because the inconsistent statements were the subject of the original trial, a jury has already been charged with the responsibility of weighing the inconsistent statements. As stated by the Court in *Ramsey*, the "vacillation had been before the jury in the trial." *Id.* The jury rejected the defense theory and found Case guilty.

{40} The recantations were also cumulative. *State v. Chavez* is the case in New Mexico most directly on point. 116 N.M. 807, 867 P.2d 1189 (1993). The defendant in that case was initially charged with second-degree murder, among other charges. *Id.* at 809, 867 P.2d at 1191. The defendant's wife, who was a key witness, changed her story twice before trial, and her third story led the State to raise the homicide charge to first-degree murder. *Id.* at 809–10, 867 P.2d at 1191–92. Ten months after he was convicted, the defendant moved for a new trial when his wife recanted her testimony, claiming that she had lied at trial and that "she was pressured to do so by the State." *Id.* at 813, 867 P.2d at 1195. A new trial was denied because the witness had already admitted that she had lied to the defendant, the police, and defense counsel, and thus her recantation was merely cumulative of that admission. *Id.* Similarly, in this case Knight and Dunlap admitted during trial that they had lied to the police and given inconsistent statements. The latest recantations of Knight and Dunlap are merely contradictory and impeaching.

{41} Finally, we agree with the trial court's assessment that Case corroborated the trial testimony and note from our review of the trial transcript that other evidence corroborated the testimony as well. Both Knight and Dunlap testified about their presence at the scene and provided details consistent with Mitchell being assaulted. Autry corroborated the presence of Dunlap and Case at the scene and provided details consistent with Mitchell having her clothes forcefully removed and having been beaten, including with a blunt instrument. Despite inconsistencies in the details, each witness incriminated Case. Case himself testified about his presence and that of Knight and Dunlap. Although he attempted to minimize what had happened to Mitchell, he did confirm that Worley had struck her and had removed her shirt.

{42} The forensic pathologist's findings corroborated the testimony of Dunlap and Autry that Mitchell's clothes were forcefully removed and that she had been beaten. According to the pathologist, when he received Mitchell's body, the zipper on her trousers had been pulled apart and her shirt was on inside-out. He also testified that her injuries were not consistent with a fall, but were consistent with a beating. Moreover, the pathologist testified that the vertical orientation of the abrasions on Mitchell's body were consistent with her body being dragged along the ground, which corroborates Dunlap's testimony.

{43} For the foregoing reasons, we conclude that the trial court did not abuse its discretion in denying the petition for writ of habeas corpus based on the recanted testimony. We conclude, consistent with the determination of the trial court, that the recanted testimony is not newly discovered. We next consider the *Brady* claim.

IV. *BRADY* ISSUE

{44} Case claims that his right to due process was violated because the prosecution failed to disclose one of Autry's four taped statements. This claim is based on *Brady*, in which the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In order to establish a *Brady* violation, the petitioner "must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material

to the defense." *Banks v. Reynolds*, 54 F.3d 1508, 1516 (10th Cir. 1995).

{45} While the first element requires proof that the prosecution suppressed or withheld the evidence in question, it "does not require a finding of bad faith or any other culpable state of mind on the part of the prosecutor." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995) (footnote omitted); *see also Brady*, 373 U.S. at 87 (noting that suppression of material exculpatory evidence violates due process "irrespective of the good faith or bad faith of the prosecution"). The focus of a due process analysis in *Brady* cases is on "'the fairness of the trial, not the culpability of the prosecutor.'" *Smith*, 50 F.3d at 823 (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). Thus, it is irrelevant whether the prosecutor failed to disclose evidence either intentionally or negligently. *Chacon v. State*, 88 N.M. 198, 199, 539 P.2d 218, 219 (Ct. App. 1975).

{46} In addition, "the 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects [of the case]." *Smith*, 50 F.3d at 824 (citation and footnote omitted); *accord State v. Wisniewski*, 103 N.M. 430, 435, 708 P.2d 1031, 1036 (1985).

{47} An alleged *Brady* violation is a charge of prosecutorial misconduct. *See State v. Trujillo*, 2002-NMSC-005, ¶ 48, 131 N.M. 709, 42 P.3d 814. The trial court's ruling on prosecutorial misconduct is reviewed for abuse of discretion because "the 'trial court is in the best position to evaluate the significance of any alleged prosecutorial errors.'" *Id.* ¶ 49 (quoting *State v. Duffy*, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807). The trial court should be upheld "'unless its ruling [was] arbitrary, capricious, or beyond reason.'" *Id.* (quoting *Duffy*, 1998-NMSC-014, ¶ 46).

{48} The taped statement at issue in this case is one of four statements Autry gave to the police during the initial investigation of this case. The taped statement was found in the district attorney's files during the pendency of the habeas corpus proceedings. While all of Autry's other taped statements were transcribed, the statement at issue was not. During the habeas corpus evidentiary hearing, Case's attorney testified that, having reviewed the statement at issue, he did not believe he received either the tape or a transcription of the statement. The attorney was adamant that had this particular statement been available to him, he would have used it to cross-examine Autry because it showed that (1) Autry had previously had a sexual relationship with Mitchell, and (2) he was angry because he was unable to complete the sexual encounter. The fact that the attorney did not cross-examine Autry about these issues is what convinces the attorney that he did not receive the statement. During cross-examination the attorney noted that he had never had any difficulty getting evidence from the prosecution, and the prosecution has an open file policy.

{49} The district attorney, on the other hand, testified that he had no recollection of the taped statement. However, as discussed earlier, it is irrelevant for *Brady* purposes whether evidence was suppressed intentionally or negligently. It is also irrelevant whether the district attorney or the police were ultimately responsible for the suppression. Law enforcement personnel involved in an investigation are considered part of the prosecution for *Brady* purposes. Ultimately, we are not left with a clear answer about whether the taped statement was suppressed by the prosecution.

{50} The second *Brady* element is whether the suppressed evidence was favorable to the accused, either as impeachment or exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Case argues that the suppressed statement was favorable to him because (1) it could be used to impeach Autry, and (2) the statement was exculpatory evidence because it implicates Autry as the real perpetrator.

{51} Case argues that the statement's significance is that Autry admitted he had lied to the police about having a prior sexual encounter with Mitchell because he "didn't know if she was raped at the time or what, and [he] didn't

want nobody to point the finger at [him] cause [he] didn't do it." Regarding the prior sexual encounter, Autry told the police that they were at the Flumes in his car. She took her bra and underwear off and

> we just laid there foolin' around, kissin' and stuff, and I was playing with her breasts, and then she just - I - I tried to - I got fixed up about half way in, and she said no, she pushed back, and I said alright. Then she said let's go on out to that party and I said well, let's go. Got dressed up and we both crawled back in the front seat of my car and we went out to the - we went by and got Mike and we went out to the party.

Later in the statement he reiterated that she had pushed him back, and added "[s]he got mad, said let's go to the party." The officer then asked him if he had gotten mad.

> Q: Did you get mad?
> A: No. I got - I got mad, yeah, but not, not that mad. I said well hell, ain't no great big loss to get turned down by a girl.
> Q: You didn't get mad because she wouldn't let you?
> A: Well - anybody'd get mad, but - I don't mean mad like in - like you're gonna do something like that to her. Just get kind of teed off or something.

Autry then agreed to provide samples of pubic hair, head hair, and blood. It is clear from the statement's context that this encounter occurred prior to January 1, 1982. In a subsequent statement, he describes the encounter as occurring on December 19, 1981.

{52} During the murder trial, the prosecution asked Autry if he ever had sexual intercourse with Mitchell. Autry replied, "No, sir." The next question was whether Autry had ever tried to have sexual intercourse with Mitchell, and Autry answered, "Yes, sir." During re-direct, the prosecution asked if Mitchell was a pretty good-looking girl, and Autry answered yes, admitting that he found her attractive. When asked if she slept around, Autry answered that he did not know, but again acknowledged that he had unsuccessfully tried to have sexual intercourse with her. Defense counsel did not cross-examine Autry on these points either during his cross-examination or re-cross-examination.

{53} Case claims that the statement was critical impeachment evidence that would have cast doubt on Autry's credibility as a witness. It seems reasonable that the statement has some impeachment value. Therefore, the next question we must address is whether the statement was material to the defense. "[E]vidence is material [under *Brady*] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682*; see also Trujillo*, 2002-NMSC-005, ¶ 50. Evaluating materiality under *Brady* requires us to look "'at the entire trial to determine whether the defendant's conviction was obtained by violating due process, whether his or her trial was tainted with fundamental unfairness because certain evidence was not disclosed to the defense.'" *State v. Baca*, 115 N.M. 536, 541, 854 P.2d 363, 368 (Ct. App. 1993) (quoting *Trujillo v. Sullivan*, 815 F.2d 597, 612–13 n.9 (10th Cir. 1987)).

{54} In viewing Autry's taped statement within the context of the entire trial, we conclude that even had the statement been disclosed to the defense, there is no reasonable probability of a different result. Autry's credibility was already put into question at the trial, not only through an aggressive cross-examination showing prior inconsistent statements, but through character witnesses who testified that Autry had a reputation for untruthfulness. Thus, the taped statement would have been cumulative of other evidence used to impeach Autry, and cumulative evidence is not considered material for *Brady* purposes. *Chavez*, 116 N.M. at 813, 867 P.2d at 1195. Materiality only exists if the suppressed evidence "creates a reasonable doubt that did not otherwise exist*." United States v. Agurs*, 427 U.S. 97, 112 (1976). "We do not, however, automatically require a new trial whenever 'a combing of the

prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoted authority omitted).

{55} Case also argues that the taped statement was exculpatory because it implicated Autry as the perpetrator. According to Case, the defense would have used the taped statement to show that Autry had a motive to kill the victim because he was angry that she withdrew her consent to a sexual act at a time when he had achieved partial penetration. A defendant is entitled to defend against criminal charges by showing that a third person, and not the defendant, committed the crime charged. The defendant need not prove the third party's guilt beyond a reasonable doubt. However, evidence that another person had a motive to commit the crime for which a defendant is on trial is generally inadmissible, absent direct or circumstantial evidence linking the third person to the crime. *See State v. Rosales*, 2004-NMSC-022, 136 N.M. 25, 94 P.3d 768. In *Rosales*, a first-degree murder case, we considered whether the trial court erred in excluding evidence that a third person had a motive to murder the victim. In analyzing the issue we noted that courts in other jurisdictions have held that a third person's motive is not admissible, unless there is at least some other evidence to connect the third person to the offense. We cited the Alaska Supreme Court's case, *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999), as an example. We declined to recognize a special rule of admissibility of a third person's motive to commit the offense for which the defendant has been charged. Instead, we pointed out that our general rules of relevancy are adequate because the "rule addresses the concerns for admitting third person motive evidence expressed by the Alaska Supreme Court in *Smithart*." 2004-NMSC-022, ¶ 12. We concluded in *Rosales* that the proffered evidence that a third person had a motive to murder the victim to eliminate a debt was highly probative on the issue of the defendant's guilt or innocence. We were persuaded because "The statements at issue appear to have occurred only a couple of weeks before the murder. At trial, other evidence showed that [the third person] had recently threatened the life of the victim, the victim was killed in [the third person's] vehicle, and the murder weapon might have been a pocket knife owned by [the third person]." *Id*. ¶ 13. In this case, other than the alleged motive–that days or weeks before the murder, Autry became angry because he was unable to conclude a sexual act with Mitchell–Case has not pointed to the existence of other evidence, direct or circumstantial, which links Autry to Mitchell's murder. Although Dunlap confirmed Autry's presence during the night in question, he testified that he was not sure where Autry went when the attack on Mitchell began, and he did not see Autry again after the attack began. The motive itself is speculative. For *Brady* purposes, exculpatory evidence cannot be purely speculative. *See State v. Huber*, 2006-NMCA-087, ¶¶ 30–32, 140 N.M. 147, 140 P.3d 1096. We therefore agree with the trial court that the State did not suppress material evidence from Case, and the trial court did not abuse its discretion.

V. CONCLUSION

{56} For the foregoing reasons, we affirm the district court and deny Case a writ of habeas corpus.

{57} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

JAMES A. HALL,
Judge
Sitting by Designation

RICHARD C. BOSSON,
Justice (concurring in part and dissenting in part).

BOSSON,
Justice (concurring in part and dissenting in part).

{58} I concur whole-heartedly with the author's analysis of the *Brady* issue, as well as the fundamental legal framework posited for evaluating newly-discovered evidence offered in a habeas petition many years after the original trial. This Opinion will well-serve the bench and bar for the clarity it brings to this important field. With great regret, however, I cannot join in the majority's decision to find that recantations in cases like this cannot be "newly-discovered" even if a trial court were to find them credible. For the following reasons, I would remand the case to the trial court for a determination of the credibility of the recantations.

{59} The credibility of a recantation is not so easily divorced from the significance of that recantation as newly-discovered evidence. A trial court's finding that a recantation is credible directly implicates our concern that a person should not be "incarcerated solely on the basis of lies," regardless of whether the recanting witness has previously wavered in his or her story. It seems contrary to our truth-seeking responsibilities to say that a credible recantation by a principal witness should be disregarded simply because the witness's credibility had previously been called into question at trial, and thus the *credible recantation* would add nothing new. Inherently, if a trial court finds that a recantation is believable, and by extension understands that a jury could have found it believable, it should not matter that there were inconsistent statements at trial. If a reviewing court believes the recanted testimony, and thus believes that the witness lied at trial, it follows that the incarceration is based upon lies, justifying judicial intervention. *See United States v. Earles*, 983 F. Supp. 1236, 1250 (N.D. Iowa 1997) (noting that "credibility of the recantation is the key to the impact of the recantation upon the probability that the recantation will lead to an acquittal"). A credible recantation would certainly constitute a new weapon that the defense did not previously have.

{60} Further, in evaluating credibility, trial courts should be allowed to consider both the circumstances surrounding the latest recantation that make it different from the inconsistencies presented at trial, as well as the fact that the recantation of sworn testimony under oath is itself something that a jury would not necessarily ignore. As noted by the Seventh Circuit in *United States v. Leibowitz*, "notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false." 919 F.2d 482, 485 (7th Cir. 1990) (quoted authority omitted).

{61} Using this case as an example, the witnesses testified that they felt guilty about lying at the trial and had been living with that guilt for many years. Audrey Knight had contacted Curtis Worley's father of her own accord, and arranged to meet with him so that she could "get it off her chest." Paul Dunlap had become religious and testified that when the law students asked him if he told the truth at trial, he was about to lie and say that he had, but he just could not go through with it, so he admitted that he had lied at Case's trial. He knew nothing of Knight's recantation at that time. At the habeas hearing, Dunlap insisted that he wanted to "do the right thing," even after being advised of his Fifth Amendment right against self-incrimination, and otherwise resisting pressure from the prosecution *not* to testify. These circumstances all add something beyond the original inconsistencies at trial, and they are not things that Petitioner could have uncovered pre-trial with due diligence.

{62} In my view, this case, as with most habeas cases involving recanted testimony, comes down to the trial court's essential function of testing the credibility of the recantations. The trial court should be instructed to perform that function, and if the trial court is persuaded that the recantations are credible, then relief should follow. I do not understand the cases cited by the majority in support of the notion that Knight's and Dunlap's recantations were not "newly-discovered" to say anything different. In none of those cases did the court find that a credible recantation was nonetheless insignificant. Further, each of those cases was either a review of a trial court's credibility determination or was a district court opinion, and each emphasized the critical role of the trial court in evaluating and deciding credibility. *See Olson*

v. United States, 989 F.2d 229, 232 (7th Cir. 1993) (court was persuaded in part "by the fact that the same district court judge who denied [the defendant's] most recent new trial motion presided over his trial and was able to view, weigh and analyze firsthand not only the witnesses' composure or lack thereof, but their testimony as well"); *United States v. Ramsey*, 761 F.2d 603, 604 (10th Cir. 1985) ("The district court judge, who took the evidence and personally observed the witness as he testified, was in a much better position than this court to determine whether, even after noting [the witness's] frequent about-faces, his testimony was nonetheless sufficiently credible to support a jury verdict."); *Earles*, 983 F. Supp. at 1249 (explaining that "[t]he level of insulation the law grants to a skeptical trial judge's assessment of recanting affidavits reflects the notion that trial judges are in the best position to compare a witness's earlier testimony with his new version of the facts" (quoted authority omitted)); *see also State v. Chavez*, 116 N.M. 807, 812, 867 P.2d 1189, 1194 (Ct. App. 1993) (noting that "[t]he trial court is in the best position to evaluate the evidence of prejudice" to the defense due to the State's failure to disclose the previous arrest of an important witness).

{63} It may be that in the case before us the trial judge would have no reason to believe Knight and Dunlap any more now than twenty-four years ago. Fair enough. But in a future case, let us suppose that every key witness were to recant and the lawyers were to come armed not only with recantations persuasive in themselves, but also with airtight alibi witnesses corroborating all of the recanting witnesses' testimony. In that event, would we flatly prohibit the trial judge from ordering a new trial simply because similar questions of credibility were hashed out twenty-four years earlier? I would leave the power in the trial judge to conclude in an appropriate case that a *credible*, persuasive recantation can itself be newly-discovered evidence, even though it suffers from all the weight that the majority attaches to it. In this instance, I would remand for the trial judge to determine the credibility of the recantations.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-049

Filing Date: July 22, 2008

Docket No. 30,490

JOSE PINCHEIRA and OLIVIA PINCHEIRA,

Plaintiffs-Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Michael Eugene Vigil, District Judge

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OPINION

CHÁVEZ, Chief Justice.

{1} On motion for rehearing, the opinion filed June 20, 2008 is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} Over seven years ago, Jose and Olivia Pincheira (Plaintiffs) filed a complaint against Allstate Insurance Co. (Defendant) alleging bad faith, fraud, unfair trade practices, and other claims. The merits of those claims are not at issue in this appeal. Rather, this appeal relates to Plaintiffs' attempt to compel discovery of a set of documents known as the "McKinsey slides" or "McKinsey documents." Defendant claimed that these documents contained trade secrets or other confidential or proprietary information and refused to turn them over without a protective order. *See* Rule 1-026(C)(7) NMRA. Following Defendant's refusal to turn over the documents, the trial court entered a default judgment on liability, with damages to be determined at trial. A Court of Appeals majority held that the trial court abused its discretion in ordering Defendant to turn over the documents without either a protective order or an evidentiary hearing, and vacated the default judgment and remanded for reevaluation of Defendant's assertion of a trade secret privilege. *Pincheira v. Allstate Ins. Co.* (*Pincheira II*), 2007-NMCA-094, ¶¶ 27, 72, 142 N.M. 283, 164 P.3d 982. The case reaches this Court on Plaintiffs' petition for writ of certiorari.

{3} Although Defendant's request for a protective order has been rendered moot by subsequent

events, Plaintiffs' request for sanctions remains. As a result, we take this opportunity to clarify the procedure to be used when seeking to protect an alleged trade secret and the factors that trial courts should consider when issuing protective orders covering trade secrets. We conclude that Defendant met its initial burden of requesting an evidentiary hearing on the trade secret status of its materials by following the procedure we describe. This procedure differs from that proposed by the Court of Appeals, but we affirm the Court of Appeals to the extent that we vacate the default judgment entered against Defendant. On remand, Plaintiffs may request a hearing on the trade secret status of Defendant's documents at the time Defendant refused to turn them over, as potential support for alternative sanctions.

I. PROCEDURAL BACKGROUND

{4} This case has followed a tortuous path to this Court. The Court of Appeals presented an excellent review of the history in *Pincheira II*. *See id.* ¶¶ 4-25. We provide a brief overview to clarify the issues on appeal.

{5} Plaintiffs served Defendant with a second request for production of documents on July 16, 2001. Defendant timely responded with numerous objections. With respect to the McKinsey documents, Defendant objected that they contained confidential or proprietary information. Although Defendant did not use the term "trade secret" in its objection, Plaintiffs filed a motion to compel and responded to the objection as if it were an assertion of a trade secret privilege. Defendant's response brief included an affidavit by Allstate corporate vice president Christine Sullivan that explained why Defendant believed the documents to be trade secrets.

{6} Defendant argued the trade secret status of the materials in question at the October 30, 2001,[1] hearing on Plaintiffs' motion, stating that "We said we objected to [discovery] to the extent it sought confidential or proprietary information. We believe that was sufficient to invoke the protection of trade secrets." The trial court accepted the objection as an assertion of trade secrets but ruled that Defendant's affidavit describing the McKinsey documents was "too general and conclusory to support [Defendant's] request" for a protective order.

{7} Before the court entered its order compelling production, Defendant requested an expedited hearing on a motion to reconsider the trial court's oral ruling. In support of that motion, Defendant asked the trial court to hold an evidentiary hearing, as the court had recommended in an earlier case involving the same documents and the same plaintiff's counsel. *See Blanks v. Allstate Ins. Co.*, No. D-101-CV-200000852 (1st Dist. N.M. Oct. 25, 2001). The *Blanks* case was submitted to an arbitrator before the *Blanks* court could hold a hearing. The arbitrator, however, heard testimony about the documents and concluded that they contained trade secrets. Defendant offered the arbitrator's letter in support of its motion and request for an evidentiary hearing in this case.

{8} The trial court denied the request for an evidentiary hearing and ordered Defendant to turn over the documents. Following another hearing, the trial court again ordered Defendant to turn over the documents but granted a temporary protective order pending an appeal for writ of error. The protective order prohibited Plaintiffs from using the documents outside the scope of this litigation and would "remain in effect until fourteen days following the completion of appellate review of the questions presented in [Defendant's] Petition for Writ of Error." At the hearing granting the protective order, the trial court noted that Defendant would "have 14 days to regroup if the Court of Appeals says no or 14 days to respond in some way." The court also noted that, if the Court of Appeals declined to enter a writ of error, the protective order would be lifted fourteen days later.

[1] The motion to compel was not originally scheduled for consideration at this hearing, but both parties agreed to argue the matter. Plaintiffs then presented documentary and live testimony, which was allowed over Defendant's objection. *Pincheira II*, 2007-NMCA-094, ¶¶ 14–15.

{9} Defendant produced the documents and filed its writ of error one day late. *Pincheira v. Allstate Ins. Co.* (*Pincheira I*), 2004-NMCA-030, ¶¶ 3–4, 6, 135 N.M. 220, 86 P.3d 645. The Court of Appeals quashed the writ as untimely. *Id.* ¶ 1. On the same day, the Court of Appeals filed *King v. Allstate Insurance Co.*, which held that an order granting or denying a motion for a protective order cannot be reviewed by writ of error. 2004-NMCA-031, ¶ 1, 135 N.M. 206, 86 P.3d 631. Instead, the Court held that such orders can be appealed only if they are certified by the trial court for an interlocutory appeal or as of right from a contempt citation for failure to comply. *Id.* ¶ 19. We denied Defendant's petition for writ of certiorari from *Pincheira I*, and returned the case to the trial court. *Pincheira v. Allstate Ins. Co.*, 2004-NMCERT-003, 135 N.M. 319, 88 P.3d 261.

{10} Before the fourteen-day protective order expired, Defendant asked the trial court to clarify or extend the protective order, and respectfully asked the court to hold it in contempt so that it could appeal as it did in *King*. Plaintiffs returned the documents to Defendant and asked the trial court to enter a default judgment against Defendant for its "contumacious defiance" of the trial court's authority. The trial court ordered Defendant to turn over the documents without a protective order, or it would enter a default judgment. Defendant refused, again asking to be held in contempt. The trial court entered default judgment, with a trial to be held on the issue of damages.

{11} Defendant appealed the default judgment. The Court of Appeals dismissed the appeal, holding that the default judgment was a non-final order because damages had not been decided. *Pincheira II*, 2007-NMCA-094, ¶ 25. We granted Defendant's petition for writ of certiorari and remanded to the trial court to determine whether the default judgment was intended as a contempt order within the meaning of *King*. The trial court stated that it was.

{12} Defendant timely appealed the contempt order to the Court of Appeals. A Court of Appeals majority remanded to the trial court so that it could vacate the default judgment, reevaluate the documents' trade secret status and, if they were found to be trade secrets, issue an appropriate protective order. 2007-NMCA-094, ¶ 72. We granted Plaintiffs' petition for writ of certiorari.

II. MOOTNESS

{13} Plaintiffs argue that publication of the McKinsey documents on its web site makes this appeal moot and that Defendant should be sanctioned for opposing discovery. *See* Petitioners' Special Motion for Immediate Summary Affirmance . . . and for an Award of Attorney Fees and Sanctions, at 6–9, *Pincheira v. Allstate Ins. Co.*, No. 30,490 (N.M. Apr. 7, 2008). We agree that Defendant's public disclosure of the McKinsey documents has rendered the request for a protective order moot. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984). "As a general rule, this Court does not decide moot cases." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. Plaintiffs, however, continue to ask for sanctions. We cannot determine whether sanctions are warranted unless we first determine whether Defendant was justified in seeking a protective order and then followed the proper procedure for appealing the trial court's denial of a protective order. Therefore, we hold that the appeal is not moot, and we will address the issue of sanctions following our discussion of the merits of this appeal.

III. TRADE SECRET PRIVILEGE AND PROTECTION

{14} In addition to its complicated and lengthy procedural background, this case requires resolution of the intricate interplay among discovery and privilege rules related to trade secrets. Aside from the two earlier *Pincheira* opinions, we are aware of only two other opinions that dealt with the merits of a trade secret claim, and neither involved the rules of discovery or privilege as they relate to trade secrets. *See Excelsior Laundry Co. v. Diehl*, 32 N.M. 169, 252 P. 991 (1927) (holding that a list of customers on a laundry route

is not a trade secret); *Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, 128 N.M. 611, 995 P.2d 1053 (analyzing the definition of trade secrets and the inevitable discovery doctrine under the Uniform Trade Secrets Act, NMSA 1978, §§ 57-3A-1 to -7 (1989)). As such, these are issues of first impression in New Mexico. We review discovery orders for abuse of discretion. *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 6, 139 N.M. 671, 137 P.3d 611. Construction of a privilege, however, is a question of law, which we review de novo. *Id.* We begin our analysis with a brief summary of the relevant statutes and rules.

A. Relevant Statutes and Rules

{15} New Mexico adopted the Uniform Trade Secrets Act (TSA) in 1989. NMSA 1978, §§ 57-3A-1 to -7 (1989). In doing so, the legislature implicitly recognized the commercial importance of trade secrets and the corresponding need to protect them. *Cf.* Unif. Trade Secrets Act, Prefatory Note (amended 1985), 14 U.L.A. at 531 (2005) (noting "the commercial importance of state trade secret law to interstate business"). The TSA defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique or process, that:

> (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 57-3A-2(D). The TSA provides remedies for misappropriation of a trade secret, which means acquiring a trade secret by improper means. *See* § 57-3A-2(A), (B). When an action alleging the misappropriation of a trade secret is brought under the TSA, the TSA requires the court hearing the case to "preserve the secrecy of [the] alleged trade secret by reasonable means," including protective orders, in camera hearings, and sealing the record. Section 57-3A-6.

{16} We have also adopted rules to protect trade secrets outside of misappropriation complaints. *See* Rules 1-026(C) & 11-508 NMRA. During discovery, the trial court may issue a protective order for trade secrets:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
>
> . . . .
>
> (7) that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a designated way. . . .

Rule 1-026(C).

{17} A party may also assert a trade secret privilege:

> A person has a privilege . . . to refuse to disclose and to prevent others from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take such protective measure [sic] as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Rule 11-508.

{18} These rules do not define a trade secret. Although we are not bound by the TSA's definition when construing our own rules, we see no legal or policy reason to adopt an alternative definition. Like the TSA, the discovery and privilege rules are designed to protect the commercial value of trade secrets. Furthermore, following a definition for the TSA and that is different

for the rules would create confusion in cases where both the TSA and discovery or privilege are at issue. *Cf. Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 10, 138 N.M. 398, 120 P.3d 820 ("'While a statute regulating practice and procedure is not binding on the Supreme Court, it nevertheless is given effect until there is a conflict between the statute and a rule adopted by the Supreme Court.'" (quoting *State v. Herrera*, 92 N.M. 7, 12, 582 P.2d 384, 389 (Ct. App. 1978))).

{19} Before promulgation of the Uniform Trade Secrets Act, most jurisdictions followed Section 757 of the *Restatement (First) of Torts*. *See* Unif. Trade Secrets Act, Prefatory Note, 14 U.L.A. at 531. The *Restatement* defined a trade secret as

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Restatement (First) of Torts § 757 cmt. b (1939). The *Restatement* also lists six factors "to be considered in determining whether given information is [a] trade secret":

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. While the TSA's definition of a trade secret is broader than the *Restatement*'s, these factors "'still provide helpful guidance to determine whether the information in a given case constitutes "trade secrets" within the definition of the [TSA].'" *Basic Am., Inc. v. Shatila*, 992 P.2d 175, 184 (Idaho 1999) (quoting *Optic Graphics, Inc. v. Agee*, 591 A.2d 578, 585 (Md. Ct. App. 1991)).

B. Discovery Vs. Privilege

{20} Much of the dispute in this case revolves around possible conflicts between Rule 11-508, which creates a trade secret privilege, and Rule 1-026(C)(7), which offers protection for trade secrets. Both the majority and the dissent in *Pincheira II* refer to the rules as "compatible and complementary," but they disagree about how the standards of proof in the two rules should be applied and whether those standards conflict. *See* 2007-NMCA-094, ¶ 71; *id.* ¶ 74 (Vigil, J., dissenting). Plaintiffs would settle this dispute by having us harmonize the two rules. In contrast, Defendant would have us use the flexibility inherent in Rule 1-026(C) as a means to incorporate provisions of Rule 11-508 into Rule 1-026.

{21} We take a different approach, beginning with the recognition that Rule 11-508 is a rule of evidence, whereas Rule 1-026 is a rule of discovery. The purpose of the rules of evidence is to ascertain the truth by determining what evidence is admissible during the trial. *See State v. Stanley*, 2001-NMSC-037, ¶ 23, 131 N.M. 368, 37 P.3d 85. In contrast, the purpose of our discovery rules is to allow liberal *pretrial* discovery, such that the trial itself is "a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *In re Estrada*, 2006-NMSC-047, ¶¶ 31–32, 140 N.M. 492, 143 P.3d 731 (quoted authority omitted); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.").

{22} The "broad and flexible" right to discovery allows discovery of information that may not be admissible under the rules of evidence.

United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 170, 629 P.2d 231, 246 (1980) (quoted authority omitted); Rule 1-026(B)(1). Allowing discovery of privileged information, however, would destroy the privacy right inherent in every privilege, thereby making the evidentiary privilege useless. As a result, privileged material is not discoverable. Rule 1-026(B)(1) ("Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action" (emphasis added)).

{23} By referring to privileged material, Rule 1-026(B)(1) incorporates the rules of privilege into the rules of discovery. It is here, under Rule 1-026(B), where the evidentiary rules of privilege and the rules of discovery intersect. When a party follows the procedure in Rule 1-026(B)(8) and the trial court finds that information is privileged, the information is not discoverable under the plain language of Rule 1-026(B)(1). *Cf. Wallis v. Smith*, 2001-NMCA-017, ¶ 20, 130 N.M. 214, 22 P.3d 682 ("[O]nce a privilege is asserted in response to interrogatories, counsel cannot unilaterally disregard the privilege and then issue subpoenas to sidestep the procedure outlined in Rule 1-033 [NMRA] for resolving the dispute."). A protective order should not be necessary unless the party seeking discovery continues to request the information despite the trial court's finding of a privilege. To avoid delays and multiple proceedings, however, the party opposing discovery may seek a protective order at the same time an objection is raised on the basis of privilege.

{24} To counterbalance the liberality of discovery, Rule 1-026(C) provides additional protection to non-privileged materials, which otherwise are not protected by Rule 1-026(B). *See Seattle Times*, 467 U.S. at 34. The purpose of Rule 1-026(C) is not to duplicate the protections offered by Rule 1-026(B), but to give the court an additional mechanism to prevent abuse of discovery. *See Seattle Times*, 467 U.S. at 34–35. Thus, Rule 1-026(C) gives the trial court an important supervisory role over the discovery process, allowing the court "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." *Id.*; *Bowlen v. Dist. Court, County of Adams*, 733 P.2d 1179, 1182 (Colo. 1987) ("Courts therefore have a substantial role in supervising discovery. . . .").

{25} Public release is an important consideration under Rule 1-026(C). The federal courts have interpreted the liberal discovery rules as allowing a party to "generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal." *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683–84 (5th Cir. 1985). In particular, parties may disseminate materials to litigants in other cases or to the public. *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994); *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988). The right to disseminate, however, may be limited by a protective order issued under Rule 26(c) of the Federal Rules of Civil Procedure. *Seattle Times*, 467 U.S. at 31–36.

{26} Like the federal courts, New Mexico recognizes the right of parties to disseminate discovered materials, subject to the limits of Rule 26(c). *John Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 14, 122 N.M. 307, 924 P.2d 273. While this right receives "*some* [First Amendment] protection," *id.* ¶ 33 (emphasis added), "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party *to a far lesser extent* than would restraints on dissemination of information in a different context." *Seattle Times*, 467 U.S. at 34 (emphasis added). This authority extends to irrelevant information and information that "if publicly released could be damaging to reputation and privacy," even though it might otherwise be discoverable under Rule 1-026(B). *See Seattle Times*, 467 U.S. at 35.

{27} In summary, we have a hierarchy of rules governing the disclosure and use of information. The rules of evidence place limitations on the admissibility of certain information during trial. The rules of discovery place limitations on the

disclosure and dissemination of a broader range of information that may be obtained during pretrial proceedings. Pretrial limitations may arise out of the evidentiary rules of privilege, or they may arise independently out of the courts' need to prevent abuse of the discovery process.

{28} The Court of Appeals implicitly recognized this hierarchy in *Piña v. Espinoza*, 2001-NMCA-055, 130 N.M. 661, 29 P.3d 1062. In that case, the plaintiff sought to protect communications with her doctor under the physician-patient privilege. *Id.* ¶ 4 (citing Rule 11-504 NMRA). The court held that some of the plaintiff's communications were related to her claim and thus were not privileged under an exception to the physician-patient privilege. *Id.* ¶ 23 (citing Rule 11-504(D)(3)). The court, however, recognized that classifying the communications as non-privileged did "not affect their status as confidential communications." *Id.* ¶ 27. The trial court could therefore issue a protective order under Rule 1-026(C), limiting disclosure only to a party-opponent and preventing disclosure "to the world at large." 2001-NMCA-055, ¶ 27. This solution protected both the court's truth-seeking process and the privilege's purpose of encouraging people in need to seek assistance and to communicate freely with those who can help. *See Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶¶ 16–18.

{29} Like physician-patient communications, trade secrets also receive dual protection from discovery under Rule 1-026(B) and (C). Unlike physician-patient communications, however, trade secrets are mentioned explicitly both in the rules of privilege and the rules of discovery. We now describe how a litigant may seek protection for a trade secret under those rules.

C. Procedure for Protecting Trade Secrets

{30} As this case has shown, collateral litigation over the protection of trade secrets can drag on for many years, at a high cost to both the courts and the parties, without advancing the ultimate outcome of the case based on its merits. The burden created by this delay should be avoidable because the rules of evidence and discovery, properly applied, create a streamlined process for seeking protection of alleged trade secrets. That is especially true when the case involves only non-competitors and the disputed information has not been offered for admission at trial.

1. *Initial Assertion of A Trade Secret*

{31} Two avenues are available to a party seeking to protect a trade secret: establishing a privilege or obtaining a protective order. Establishing a privilege requires a showing that the information comprises a trade secret and that the privilege "will not tend to conceal fraud or otherwise work injustice." Rule 11-508. Obtaining a protective order requires a showing that the information comprises a trade secret and that there is "good cause" to issue the order. Rule 1-026(C). Common to both rules is the requirement to show that the information comprises a trade secret.

{32} Given this common first step, we see no reason to distinguish between assertion of a privilege or a request for a protective order during the early stages of litigation. In either situation, the party opposing discovery or production must first make a good faith claim that the materials it seeks to protect comprise trade secrets. Plaintiffs argue that this claim should be made following the exact procedure set out in *Piña*, which requires submission of a privilege log and supplemental affidavits that "fully set out the basis for the claim." *Piña*, 2001-NMCA-055, ¶¶ 24–25. That argument, however, ignores the difference between trade secrets and other types of information or communications.

{33} *Piña* involved questions of physician-patient privileges that, like other communication privileges, are destroyed by any revelation of the actual communications. The purpose for requiring detailed privilege logs and affidavits is to give the demanding party "a fair opportunity

to argue against the privilege claim" without destroying the privilege in the process. 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 11:6, at 63–64 (2d ed. 1999) (footnote omitted). A court may alternatively require a less-detailed description and determine privilege through an in camera examination, but this deprives the opponent of the opportunity to test the claim in an adversarial proceeding. *Id.* at 68; *Piña*, 2001-NMCA-055, ¶ 20.

{34} Adversarial proceedings are particularly important when a trade secret is asserted. "The existence of a trade secret ordinarily is a question of fact." *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 723 (7th Cir. 2003) (footnote omitted). It is also "one of the most elusive and difficult concepts in the law to define." *Id.* (quoted authority omitted). Evaluating trade secret status therefore "requires an ad hoc evaluation of all the surrounding circumstances. For this reason, the question of whether certain information constitutes a trade secret ordinarily is best resolved by a fact finder after full presentation of evidence from each side." *Id.* (quoted authority omitted). When the trade secret is claimed in the context of a privilege or discovery order, it is evaluated as a preliminary question of fact by the trial court under Rule 11-104(A) NMRA. *See* 26 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5652, at 396 (1992).

{35} Detailed privilege logs or in camera hearings are unnecessary for these proceedings when, as here, the claim involves trade secrets and the opposing party is not a competitor. When those conditions exist, and the party opposing discovery or production makes a good faith claim of a trade secret, the trial court should readily order production of the information on the conditions that it be used solely for the purpose of determining trade secret status and that it not be disseminated to anyone other than the parties.[2] If the parties cannot agree on the trade secret status of the information, the trial court should then hold a closed, adversarial hearing in which it determines the trade secret status of the materials. This initial procedure should be the same, whether the opposing party asserts a privilege under Rules 11-508 and 1-026(B)(8), or seeks a protective order under Rule 1-026(C)(7).

{36} This process minimizes the burden for both the parties and the courts. It avoids collateral disputes over whether the privilege log is sufficiently detailed, and it allows the opposing party to test the claim with the actual information rather than a description of the information. It also postpones the need to show no injustice, which will be unnecessary if the court finds that the information is not a trade secret.

{37} If the hearing is held in the context of a Rule 1-026(C)(7) protective order, this process may also eliminate the need for the court to review thousands of pages or documents. A collection of pages or documents may comprise a trade secret, even though the individual pages or documents, by themselves, are not trade secrets. *Imperial Chem. Indus. Ltd. v. Nat'l Distillers & Chem. Corp.*, 342 F.2d 737, 742 (2d Cir. 1965); *State ex rel. The Plain Dealer v. Ohio Dep't of Ins.*, 687 N.E.2d 661, 674–75 (Ohio 1997). A relatively cursory review may be sufficient to show that the collection as a whole comprises a trade secret. Reviewing each page individually, or even compiling a privilege log listing every page, would therefore be a waste of time. If the party compelling discovery later seeks to admit individual pages into evidence, the court can review only those pages when the request is made. *See Tavoulareas v. Piro*, 93 F.R.D. 24, 29–30 (D.C.D.C. 1981) (granting protective order based on a "relatively cursory review of the contents or source of the documents" and allowing challenges to specific documents in order to expedite discovery and minimize involvement of

[2] We recognize that this process may not work when the litigation involves competitors, because disclosure under a protective order will not preserve the trade secret. In those cases, the trial court may need to modify the process by allowing disclosure to counsel only, holding an in camera hearing, appointing an expert or special discovery master, following a process more strictly aligned with *Pia*, or other similar measures. *See* Rule 11-706 NMRA (court-appointed experts); Rule 1-053 NMRA (special masters).

the court (footnote omitted)). The trial court may want to establish, as part of its protective order, a procedure to challenge the trade secret status of individual portions of the collection. *See Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990).

{38} Favoring production upon a good faith showing does not limit the trial court's discretion. If the party opposing production gives nothing more than "an initial conclusory assertion" of a trade secret's existence, the trial court may decline further review and order production without a protective order. *See Piña*, 2001-NMCA-055, ¶ 25. But given the elusive nature of trade secrets, it may not be possible to "fully set out the basis for the claim" without actually producing the documents under a protective order for review by both the opposing party and the court. *See id.* In deciding whether the initial assertion of a trade secret is sufficient, the trial court should consider both the nature of the information and how easily it can be made available under a protective order.

{39} If the trial court determines, or the parties agree, that the contested information does not comprise a trade secret, the initial protective order should be lifted and full disclosure ordered. The holder of the information may then seek to protect the information as "'other confidential research, development or commercial information.'" *Pincheira II*, 2007-NMCA-094,¶ 57 (quoting Rule 1-026(C)(7)) However, if the conclusion is that the information does comprise a trade secret, the court should craft an appropriate protective order covering use and dissemination of the information (including, possibly, post-trial dissemination). We agree that the requirement to show "good cause" under Rule 1-026(C) is met by the establishment of a trade secret, which by definition implies that unprotected disclosure results in economic harm.[3] *See Pincheira II*, 2007-NMCA-094, ¶¶ 46–47; *accord Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991) ("A showing that a discovery request seeks trade secrets constitutes an adequate demonstration of good cause for a protective order under Rule 26(c)."). Once this protective order is entered, the trial court should not have to concern itself with the material again unless and until the compelling party seeks to admit it at trial.

2. *Establishing A Trade Secret Privilege*

{40} Once the trial court determines that information comprises a trade secret, the information is privileged. A trade secret, however, can survive limited disclosure, unlike other privileged information such as physician-patient communications. Thus, the trade secret privilege is qualified[4] rather than absolute, permitting admission at trial "if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." Rule 11-508. Even if the information is admitted, "the court shall take such protective measure [sic] as the interests of the holder of the privilege and of the parties and the furtherance of justice may require." *Id.*

{41} Because the trade secret privilege survives disclosure as a qualified privilege, the Rule 1-026(B)(1) blanket prohibition against discovery of privileged material would appear

[3] This does not change the standard for showing good cause when the party claims protection for "other confidential research, development or commercial information" under Rule 1-026(C)(7), as established in *Krahling v. Executive Life Ins. Co.*, 1998-NMCA-071, 125 N.M. 228, 959 P.2d 562. In *Krahling*, the Court of Appeals held that good cause requires a specific showing that "disclosure will work a clearly defined and serious injury to the party seeking closure." *Id.* ¶ 15 (quoted authority omitted). This holding did not apply to trade secrets, because the court specifically noted that the materials under dispute did not contain trade secrets. *Id.* ¶¶ 10 n.2, 17. While the Court of Appeals' opinion in *Pincheira II* agreed with this analysis of *Krahling*, the opinion mistakenly put the burden to show an injury on the party seeking disclosure, rather than on the party seeking closure. *Compare Pincheira II*, 2007-NMCA-094, ¶ 46 *with Krahling*, 1998-NMCA-071, ¶ 15.

[4] A "qualified" privilege allows disclosure under limited conditions, whereas a "conditional" or "contingent" privilege is an absolute privilege that is destroyed when certain conditions are met. *Cf. Pincheira II*, 2007-NMCA-094, ¶ 67 (referring to the trade secret privilege as "conditional"); *id.* ¶ 74 (Vigil, J., dissenting) (referring to the trade secret privilege as "contingent").

to prohibit any discovery of trade secrets. This runs contrary to Rule 11-508's purpose in allowing the admission of such materials. Because Rule 1-026(B) incorporates the rules of privilege, it must be read *in pari materia* with Rule 11-508, *see State v. Stephen F.*, 2006-NMSC-030, ¶ 17, 140 N.M. 24, 139 P.3d 184, and we construe the rules "in a way that facilitates their operation and the achievement of their goals." *Miller v. N.M. Dep't of Transp.*, 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987), *superseded by statute on other grounds as recognized in Gallegos v. Sch. Dist. of W. Las Vegas*, 115 N.M. 779, 782, 858 P.2d 867, 870 (Ct. App. 1993) (Hartz, J., concurring). We avoid any conflict by incorporating the evidentiary definition of privilege into Rule 1-026, thereby prohibiting discovery only to the extent that the privileged material is not admissible.

{42} The party seeking admission of a trade secret has the burden of showing fraud or injustice. To put the burden on the party opposing admission would require proof of a negative, which is a difficult burden and one that could be unrealistic in some situations. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) ("[P]roving a negative is a challenge in any context."); *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 75, 136 N.M. 454, 99 P.3d 1166. *But see Dawley v. La Puerta Architectural Antiques, Inc.*, 2003-NMCA-029, ¶ 23, 133 N.M. 389, 62 P.3d 1271 ("We are mindful that it is the plaintiff's burden to demonstrate lack of probable cause notwithstanding the obstacles inherent in proving a negative proposition."). This is similar to the burden we place on the discovery of work product, where the party seeking to compel production must prove that denial of production will result in unfair prejudice or cause undue hardship or injustice. *Knight v. Presbyterian Hosp. Ctr.*, 98 N.M. 523, 525, 650 P.2d 45, 47 (Ct. App. 1982); *Carter v. Burn Constr. Co.*, 85 N.M. 27, 31, 508 P.2d 1324, 1328 (Ct. App. 1973)

{43} As with the initial proof of a trade secret, proof of fraud or injustice requires a review of the particular facts and circumstances of the case.[5] When, as here, the case does not involve competitors, the party seeking admission should have full access to the contested information when making its argument. If, however, access is limited based on the competitive stance of the parties, the trial court should consider the added difficulty created by the limited access in establishing fraud or injustice.

{44} An assertion of a trade secret privilege may be made contemporaneously with or at any time after the initial claim that certain information comprises a trade secret. When the quantity of information is small, and it is anticipated that it will be used at trial, it may be most efficient to assert the privilege at the same time the initial protective order is sought. When the information is voluminous, and it is not clear which portions, if any, will be used at trial, it may be most efficient to postpone the privilege claim until the parties have limited the scope of the material they will use at trial. To maintain flexibility in timing, the privilege is not waived if a party initially seeks a protective order only on the basis of Rule 1-026(C)(7), so long as the request specifically claims trade secret status.

3. *Summary and Application to this Case*

{45} The procedure we have described today should streamline the process for protecting trade secrets, minimizing the burdens on all parties and the court, and protecting economic interests, without compromising the court's interest in ascertaining the truth. While this procedure may appear to depart from earlier decisions related to privilege, such a conclusion ignores the unique nature of trade secrets and the fact that we have never addressed trade secrets in the context of protective orders or privilege.

[5] Because the burden to prove fraud or injustice does not arise until evidence is sought to be admitted, we are not faced with circumstances that require us to define that burden. Nevertheless, we agree with the Court of Appeals that analysis of the trade secret privilege in other jurisdictions provides guidance for defining this burden. *See Pincheira II*, 2007-NMCA-094, ¶¶ 39–41.

{46} The process for protecting a trade secret is initiated when one party makes a discovery request or seeks to admit evidence, and the opposing party responds with a good faith assertion that the information is a trade secret. Unless the compelling party seeks admission at this time, the opposing party need not assert a privilege.

{47} If the parties are not competitors, the trial court should issue an appropriate protective order and hold an evidentiary, adversarial hearing on the trade secret status of the information. If the court finds that the information is not a trade secret, it cannot be protected unless it is confidential information. If the information is a trade secret, the trial court should issue an appropriate protective order covering both pretrial proceedings and post-trial dissemination.

{48} It is only when the compelling party seeks to admit the information that the opposing party must assert a trade secret privilege. At that time, the compelling party must identify what subset of the information it seeks to admit. If the trial court determines that the information standing on its own is a trade secret, the compelling party must then show why preventing admission would conceal a fraud or work injustice. If this burden is met, the trial court should allow the material to be admitted, but it should also craft an appropriate protective order covering use and dissemination of the information during and after the trial proceedings.

{49} In this case, the record shows that Defendant made a good faith claim that the information it sought could be a trade secret, justifying an evidentiary hearing on the trade secret status of the McKinsey documents. *See Pincheira II*, 2007-NMCA-094, ¶ 52. The affidavit describes the type of information contained in the document, how Defendant uses that information in its business, how the information would be useful to competitors, and how Defendant kept the information secret.

{50} More significantly, the arbitration letter submitted by Defendant states that the McKinsey documents "contain[] trade secret information subject to protection." Although the arbitrator heard testimony about the documents, he acknowledged that "the [p]laintiff's witnesses did not actually know the contents of the documents" and recognized that he might need to reconsider his findings if the plaintiffs later acquired new information. This situation illustrates the difficulty inherent in defending against a privilege claim without access to the allegedly privileged materials.

{51} Because Defendant met its initial burden of making a good faith claim of a trade secret, the trial court's denial of Defendant's request for a protective order and evidentiary hearing was an abuse of discretion. In asking to be held in contempt, Defendant followed the procedure approved by the Court of Appeals in *King*. *See* 2004-NMCA-031, ¶ 19. Although the threat of a contempt sanction serves the useful purpose of discouraging the appeal of unimportant issues, sanctions are inappropriate when the appellant prevails. *See id.* ¶ 18. The default judgment entered against Defendant is therefore reversed and the case remanded.

D. Trade Secret Analysis and Alternative Sanctions

{52} Although Defendant met its initial burden justifying an evidentiary hearing, the trial court may have determined, after a hearing on the trade secret status of the materials, that Defendant lacked a good faith basis for asserting trade secret protection. Such a finding may have been warranted if the Sullivan affidavit turned out to be false or misleading, or if Defendant knew that the McKinsey documents had lost their trade secret status since the arbitrator's finding. Plaintiffs may therefore move for sanctions on remand, which will require a hearing on the trade secret status of the materials at the time Defendant made its original request for a protective order. The trial court may consider the following nonexclusive factors in its analysis.

1. *Value of Information*

{53} Economic value is one of the defining characteristics of a trade secret. *See* § 57-3A-2(D)

(1). Placing a value on trade secrets is a difficult task, even after the information has been misappropriated and used by a competitor. *See* Douglas G. Smith, *Application of Patent Law Damages Analysis to Trade Secret Misappropriation Claims*, 25 Seattle U. L. Rev. 821, 823 (2003) ("Trade secrets often relate to some small part of a process or machine and, by their very existence as 'secrets,' may not be as readily subject to valuation in the marketplace."). Uncertainty about the *computation* of value, however, does not mean there must be uncertainty as to the *fact* of value. *Cf. Nosker v. W. Farm Bureau Mut. Ins. Co.*, 81 N.M. 300, 302, 466 P.2d 866, 868 (1970) ("Our law is to the effect that lack of certainty of proof of damage, which will prevent a recovery, is uncertainty as to the fact of the damage, and not as to its amount.").

{54} In determining whether a trade secret exists, we are concerned only with the fact of the information's value, not the computation of that value. The value does not need to be large, only "more than trivial," and it can be shown by circumstantial evidence such as the amount of resources invested in development of the information, efforts to protect its secrecy, and its use in the business. *Restatement (Third) of Unfair Competition* § 39 cmt. e (1995).

{55} Plaintiffs claim that the Sullivan affidavit is too general to meet Defendant's initial burden, in part because Defendant "has the burden to show that disclosure . . . would cause a *specific*, significant harm to its competitive and financial position" through the production of concrete examples. If this were a misappropriation case where Defendant sought damages, we would agree with Plaintiffs. However, Defendant is only trying to establish the existence of a trade secret. Under those circumstances, the Sullivan affidavit adequately describes the efforts Defendant took to develop the information, the efforts it took to keep the information secret, how the information is used in its business, and how competitors might use the information. The Sullivan affidavit and the arbitrator's letter are what justified an evidentiary hearing on the trade secret status of the McKinsey documents. On remand, any analysis of value should focus on whether the documents retained more than a trivial value when Plaintiffs sought to compel production.

2. *Age of Information*

{56} The Court of Appeals noted that the age of information is a factor in determining its status as a trade secret. *Pincheira II*, 2007-NMCA-094, ¶ 52. There appeared to be some confusion over the proper application of this factor during oral argument and in the proceedings before the trial court. While age is a relevant factor, its significance is limited.

{57} First, we note that the three-year statute of limitations in the TSA has nothing to do with whether information has lost its trade secret status because of its age. *See* § 57-3A-7. Information can remain a trade secret for much longer than three years. *See, e.g.*, *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 294 (D. Del. 1985) (describing how the formula for Coca-Cola has been kept as a trade secret since 1886). The purpose of the statute of limitations is not to set a maximum age on a trade secret, but to "compel the exercise of a right of action within a reasonable time so that the party against whom the action is brought will have a fair opportunity to defend." *Moncor Trust Co. ex rel. Flynn v. Feil*, 105 N.M. 444, 446, 733 P.2d 1327, 1329 (Ct. App. 1987).

{58} Second, age alone can never destroy a trade secret. Information remains a trade secret so long as it is kept secret and retains value to both the holder and its competitors. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 415 (M.D.N.C. 1991). When the information "encompasses strategies, techniques, goals and plans" that may change over time, the information remains valuable to the extent that it "still reflects current thinking." *See id.* at 415-16. Even if the information no longer reflects current thinking, a competitor could, for example, use old business data to extrapolate a business's current strategy. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891–92 (E.D. Pa. 1981). Age

therefore indicates a need for greater scrutiny, but otherwise does not limit information's status as a trade secret. *See Brittain*, 136 F.R.D. at 415.

{59} The events in this case illustrate the relationship between age and value. Despite its public release of the McKinsey documents, Defendant claims that they were still valuable as trade secrets. *See* Notice of Intention to Produce, at 1. Defendant concluded, however, that the information's value had been outweighed by the cost of keeping the documents secret in the form of negative publicity. *See id.* at 2. Therefore, Defendant does not contend that the passage of time reduced the documents' value, but rather the loss in value resulted from other events that happened during that time. On remand, any analysis of age should consider only the events that transpired between the creation of the McKinsey documents and Plaintiffs' motion to compel production.

3. *Public Information*

{60} Information that is publicly available cannot, by definition, be a trade secret. As we have already noted, however, a collection of pages or documents may comprise a trade secret, even though the individual pages or documents, by themselves, are not trade secrets. This may be true even if the individual pages are publicly available. *Imperial Chem. Indus.*, 342 F.2d at 742 ("[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret."); *Plain Dealer*, 687 N.E.2d at 674–75 ("Where documents already in the public domain are combined to form a larger document, a trade secret may exist if the unified result would afford a party a competitive advantage.").

{61} Plaintiffs claim that the McKinsey documents could not have been trade secrets because they contain information that was publicly available in Defendant's Claims Core Process Redesign (CCPR) manuals. As *Imperial Chemical Industries* and *Plain Dealer* show, however, the *collection* of McKinsey slides can be a trade secret, even though the information on individual slides may be in the public domain. Whether the publicly-available portions of the documents were sufficient to destroy the trade secret is a factual question for the trial court.

{62} Plaintiffs also claim that the McKinsey documents could not have been trade secrets after the protective order expired because they were under no obligation to keep the materials secret, and Plaintiffs' counsel, Mr. Berardinelli, published an article about the documents, attached his summary notes of the slides into the record proper, and may have planned to publish a book about the documents, as alleged by Defendants. Whether these public revelations actually contained trade secrets or disclosed enough of the trade secrets so as to diminish their value is a factual question.

4. *Negative Information*

{63} Defendant has argued that the McKinsey documents were trade secrets in part because they show business methods that Defendant considered and rejected, and that competitors could use that information in developing their own processes. Other jurisdictions have recognized this type of "negative knowledge" as a trade secret. *See On-Line Techs., Inc. v. Perkin-Elmer Corp.*, 253 F. Supp. 2d 313, 323 (D. Conn. 2003) (applying Connecticut Uniform Trade Secrets Act); *Novell Inc. v. Timpanogos Research Group Inc.*, 46 U.S.P.Q.2d 1197, 1217 (Utah Dist. Ct. 1998) ("[N]egative knowledge gives [former employees] a considerable head start or competitive advantage as they develop competing products for the market.").

{64} In response, Plaintiffs argue that, because the public CCPR manuals describe what processes work, a "reasonably competent competitor . . . would automatically know what . . . didn't work." This argument is based on three false assumptions. First, it assumes that the competitor will independently think of every

alternative that Defendant considered, and thus not gain any new information from Defendant's documents. Second, it assumes that the competitor has already thought of those alternatives, and thus will not save any time by seeing them in Defendant's documents. Third, it assumes that Defendant was correct in rejecting each of the alternatives, and that the competitor would not identify any flaws in Defendant's methodology as revealed in the documents. On remand, any analysis of value should include the value of the McKinsey documents as negative information.

E. Protective Orders

{65} The procedure we have described today relies in part on the fact that the value of a trade secret can be preserved, even if the secret is disclosed, as long as disclosure is limited by an appropriate protective order. Although the need for a protective order has been rendered moot in this case, the trial court's ability to fashion an appropriate order is necessary to our holding. We therefore provide guidance for future protective orders. The specific terms of the actual orders remain within the trial court's discretion and will depend on the circumstances of each case.

1. *General Guidelines*

{66} The purpose of a protective order is to maintain a trade secret's value, while giving the opposing party access to the information it needs to fairly prepare for and present its case. The trial court may consider a number of factors in crafting a protective order. The list we present here is not exclusive.

{67} The wider the dissemination of the information at issue, the more likely it is that the trade secret will be compromised. The protective order should therefore limit dissemination of the material to the parties and their counsel for use in the case before the court, subject to the discovery-sharing guidelines discussed below. *See, e.g.*, *In re Remington Arms Co.*, 952 F.2d 1029, 1033 (8th Cir. 1991). The trial court may consider whether reproduction of the materials should be limited or prohibited, whether the materials should be marked as confidential or trade secrets, whether the materials and all copies should be returned to the originating party upon completion of the litigation, and whether the compelling party should post a bond. *See, e.g.*, *id.*; *Wauchop*, 138 F.R.D. at 553; *Baker*, 132 F.R.D. at 129.

{68} The trial court may also consider whether a protective order will be effective, even if the party compelling discovery can show that disclosure is otherwise warranted. In *Remington Arms*, for example, the appellate court noted that the counsel who sought to compel discovery of alleged trade secrets may have made unauthorized disclosures of other trade secrets in cases involving the same defendant, even though such actions would have subjected him to sanctions. 952 F.2d at 1033. Under these circumstances, the trial court has the discretion to decline to order production of the material, even with a protective order. *See id.*

{69} These guidelines apply to all of the protective orders discussed in this opinion, including the initial protective order issued to hold a hearing on trade secret status, and any subsequent orders issued covering discovery, trial, and post-trial phases of the litigation. Given the potential value of trade secrets, protective orders should expire only upon an affirmative order of the trial court. *See, e.g.*, *Baker*, 132 F.R.D. at 129. This precaution will avoid the confusion that was caused by the automatic expiration provision of the protective order in this case.

2. *Discovery Sharing*

{70} The parties and amici recognize that this case is really about discovery sharing, both with other litigants and with the public at large. *See Pincheira II*, 2007-NMCA-094, ¶ 59.

{71} Plaintiffs claim that protective orders increase the cost of litigation by allowing Defendant to relitigate the same issue with other

plaintiffs. A protective order prohibiting discovery sharing can "make other litigation more difficult, costly and less efficient." *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986). Costs are increased for the courts, the other litigants, and even the party opposing discovery. *See Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982). As a result, courts favor the "[c]ollaborative use of discovery material" to "further the goals of Rule 1 [of the Federal Rules of Civil Procedure; Rule 11-102 NMRA] by eliminating the time and expense involved in 're-discovery'." *Wauchop*, 138 F.R.D. at 546.

{72} Despite these benefits, insistence upon unlimited dissemination would take away the trial court's discretion to consider the potential abuses of discovery sharing when crafting its protective order. *See Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1981). If a litigant wishes to share discovery, the parties should first try to reach an agreement on their own, consistent with the protective order. Ordinarily a protective order should permit discovery sharing among other litigants and witnesses, who are not competitors of the defendant, and who sign an agreement subjecting themselves to the terms of the protective order. If they cannot agree, then the parties may move the court to resolve their dispute. *See Cipollone*, 113 F.R.D. at 91 (requiring parties or collateral litigants who wish to share discovery to "seek leave of the court before whom the matter is pending."); *see also, e.g.*, *Wauchop*, 138 F.R.D. at 554; *Baker*, 132 F.R.D. at 126; *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482, 485 (E.D. Mich. 1979). This action will allow the trial court to determine, on the particulars of each discovery-sharing request, whether the other litigants can be covered by the existing protective order or a modified protective order, or whether sharing with a particular litigant should be prohibited. *See Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir. 2003) ("Courts could not function effectively in cases involving sensitive information . . . if they lacked the power to limit the use parties could make of sensitive information obtained from the opposing party by invoking the court's authority.").

{73} The procedure we describe today, coupled with the guidelines for protective orders, gives trial courts the discretion they need to efficiently move cases along and to allow discovery sharing, where appropriate. By making it easier for parties to obtain an adversarial, evidentiary hearing on information's trade secret status, we also hope to preclude at least some relitigation of discovery matters.

IV. CONCLUSION

{74} Defendant met its initial burden of asserting a trade secret, justifying an evidentiary hearing on the trade secret status of the McKinsey documents. The trial court therefore abused its discretion in denying Defendant's request for a hearing. That request, however, has been rendered moot. We remand to the trial court to reverse its entry of default judgment and to continue this case on its merits. Plaintiffs may request an evidentiary hearing to establish the trade secret status of the disputed materials at the time Defendant first opposed discovery, to determine whether sanctions are warranted consistent with this opinion.

{75} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

ETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

RODERICK T. KENNEDY,
Judge Sitting by Designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-001

Filing Date: December 1, 2008

Docket No. 30,210

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JESUS ROBERTO ZAMARRIPA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Mark A. Macaron, District Judge

Law Offices of Nancy L. Simmons, P.C.
Nancy L. Simmons
Albuquerque, NM

for Appellant

Gary K. King, Attorney General
Max Shepherd, Assistant Attorney General
Santa Fe, NM

for Appellee

OPINION

SERNA, Justice.

{1} This case comes to us on direct appeal from a life sentence pursuant to Rule 12-102(A)(1) NMRA. A jury convicted Jesus Zamarripa (Defendant) of first degree murder (depraved mind), contrary to NMSA 1978, Section 30-2-1(A)(3) (1994); shooting at or from a motor vehicle resulting in great bodily harm, contrary to NMSA 1978, Section 30-3-8(B) (1993); conspiracy to commit shooting at a motor vehicle resulting in great bodily harm, contrary to NMSA 1978, Sections 30-28-2(A) (1979) and 30-3-8(B); and two counts of aggravated assault with a deadly weapon, contrary to NMSA 1978, Sections 30-3-2(A) (1963) and 31-18-16(A) (1993).[1] Although Defendant raises several issues on appeal, we reach only one: that he was denied the right to confront a critical witness against him at trial. On this ground, we vacate his convictions and remand for a new trial.

I. BACKGROUND

A. Facts

{2} In the early evening hours of April 15, 2004, a skirmish arose between six men riding in two separate cars near Central Avenue in Albuquerque. Defendant was riding in a silver or gold Saturn with Johnny Baca and his son, Ray Baca. Christopher Arena (Victim), Arellano Navarro, and Anthony Rubio were in a black Explorer. Shots were fired at two different intersections: 55th and Churchill and Central and Atrisco. Victim was struck in the head. After the second encounter, the Explorer went to a car wash where it was met by an ambulance to treat Victim. Defendant and the Bacas were stopped by law enforcement within minutes; Ray Baca had a gunshot wound to the hand. Victim subsequently died of his gunshot wound.

{3} The State's theory of the case was that Defendant and the Bacas had pursued the Explorer and shot at its occupants because of a gang rivalry. It alleged that, though Defendant was not a gang-member, the Bacas were members of the Los Padillas gang and the occupants of the Explorer had ties to the TCK gang. The State presented evidence that the hat victim had been wearing identified him as a member of TCK.

[1] The jury also convicted Defendant of second degree murder, contrary to NMSA 1978, Section 30-2-1(B), but that conviction and sentence merged with the first degree murder conviction and sentence.

{4} To support this theory, the State introduced an out-of-court statement by Ray Baca that he gave to investigators on the night of the shooting. In the statement, Baca said that, while Defendant was not a gang member, both Baca and Defendant recognized that the occupants of the Explorer were part of the TCK gang, a gang that they had "had trouble with." Baca stated that gang signs were thrown between the two cars and then the Explorer began shooting at them. He did not admit to shooting at the Explorer; he maintained that the only shots fired had come from the Explorer. Baca also said that, just prior to the shots being fired, he saw the occupants of the Explorer hanging out of the windows and yelling, though he did not see a gun.

{5} The State used Baca's statement in two ways. First, it used Baca's recognition that he did not see the gun allegedly wielded by the occupants of the Explorer to argue that they did not have a gun and that Defendant was not acting in self-defense, as he claimed. Second, the State used Baca's admission that the shooting was gang related to show motive and as foundation for a gang expert who testified about the rivalry between Los Padillas and TCK and how the altercation may have escalated.

{6} The defense theory was that Victim's injury was "friendly fire" inflicted by one of the other occupants of the Explorer, and that Victim's car fired upon Defendant's car first and that Defendant had only returned fire in self-defense. While neither Defendant nor Johnny Baca testified, Baca's statement supports this claim in that he stated that the Explorer was the first to shoot. Nevertheless, in an apparent attempt to keep the gang evidence away from the jury, defense counsel opposed the admission of Baca's statement.

{7} As for the surviving occupants of the Explorer, they denied that there was "maddogging" (staring), yelling, or gang-sign flashing just prior to the shooting. One of them denied that the shooting was gang-related. They both denied ever firing a gun at the Saturn or having one in their possession.

{8} Although there was evidence that at least two guns were fired—casings from two separate guns were found at the intersections where shots were fired [], there was a bullet hole in the Saturn, and witnesses reported that the cars were shooting at each other—only one gun was recovered by the police, and it was found in Defendant's car. Police did not find a gun in the Explorer. It is unclear whether investigators searched for a gun along the path that the Explorer traveled before making contact with the police.

B. Proceedings Below

{9} At Defendant's trial, Baca, who was awaiting the outcome of his own appeal for the incident, invoked his Fifth Amendment privilege against self-incrimination to avoid testifying. *See* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself."). The State moved for an order to compel Baca's testimony based on his statement and grant him use immunity. *See* Rule 5-116 NMRA (giving district courts the authority to compel witnesses to testify and immunize them from further prosecution). The use immunity was intended to protect Baca from use of his compelled testimony in any future proceeding against him, *see* Rule 11-412 NMRA (precluding the use of evidence obtained under an immunity order), and was offered by the State in an apparent attempt to avoid defeating his confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). However, the scope of the immunity only covered Baca's verification of the accuracy of the transcript of his statement; he was not immune from future prosecution based on his answers to substantive questioning on the events described in the statement.

{10} Defense counsel argued numerous times that admitting the transcript of the Baca statement while he had no opportunity to cross-examine Baca would circumscribe Defendant's rights under *Crawford*. However, over Defendant's objection, the court granted the State leave to give limited use immunity to Baca so that it could compel him to take the stand and verify

that the transcript of his statement accurately reflected what he had told the investigator the night of the shooting.

{11} At this point in the trial, there was a lengthy colloquy between the prosecutor, defense counsel, Baca's attorney, and the court about how to proceed with Baca's statement while remaining cautious about Baca's Fifth Amendment privilege, the *Crawford* issue, and the potential prejudice to Defendant if Baca invoked the privilege on the stand. During the exchange, Baca's attorney tried to clarify the scope of the use immunity. The State proposed several options for the form that its questions to Baca could take so as to avoid inadvertently coaxing him beyond the immunity granted. Baca's attorney expressed concern about the nature of the questioning; specifically, he thought that the State's proposed questions went to the substance of Baca's statement while the order granting use immunity only covered questions about the statement itself.

{12} The court asked whether defense counsel had any input; defense counsel asked whether the written transcript of Baca's statement would be going to the jury. When asked by the court whether he wanted the written transcript to go to the jury, defense counsel answered, "I think I do want it. If we are going to get into it, I think the whole thing has to go in. . . . We wouldn't have to walk [Baca] through 'Did you say this, did you say that.'" Defense counsel said that Baca's concerns would be addressed by putting the written statement itself in "so then we are not going through [the] wording of questions." He continued that "it may . . . be less prejudicial considering the rulings made, to the defense."

{13} The court suggested that both sides stipulate to the statement in an effort to "avoid the risks of expanding the field and questions about what's protected and what's not." The State said that it would stipulate to the statement but then asked whether Defendant, by stipulating to the statement, was waiving his right to cross-examine Baca. Defense counsel replied: "I am not waiving *Crawford*. . . . I haven't waived *Crawford* and I don't intend to. . . ."

{14} The court then responded to defense counsel:

> I recognize you made arguments on the record regarding *Crawford*, I am not asking you to waive what you have argued, but the fact is that at this point, if the statement goes in, you would be foregoing any further questions regarding that now. Is that—would that work for you?

Defense counsel asked, "Is the Court saying the only way the statement can go in in a written form is if I forego any further cross-examination?" The court replied, "No . . . I didn't say that. I am wondering if that might be a substitute for having Mr. Baca basically sit on the stand and affirm the statement and sit on the stand and answer to you that he is going to assert the fifth."

{15} Defense counsel then suggested that Baca could affirm the validity of the transcript and then assert his Fifth Amendment privilege to any other questions. He added that "I don't see where . . . that itself is error or following that manner of proceeding at this point is not going to cause any error." The prosecutor stated that without Defendant waiving *Crawford*, they could not merely stipulate to the statement. The court agreed. The prosecutor continued that she could have Baca testify to the statement and then let Defendant cross-examine him, and Baca would still be able to assert the privilege if defense counsel got outside of the original testimony.

{16} Defense counsel then interjected with:

> Is what the Court—maybe I missed the Court's—wants me to consider at this point waiving cross-examination at this point so the statement comes in, in lieu of verifying the statement and then possible cross-examination? The Court is saying by waiving any cross-examination at this point in the proceedings we could put the statement in and both sides would waive cross?

When the court answered in the affirmative, defense counsel replied that he would be willing to do that. However, when asked if it was willing, the State responded that it would like to stipulate to the statement and still put Baca on the stand to verify the transcript.

{17} Baca's attorney again expressed concern that the State would ask Baca questions about the substance of the statement. The State assured Baca's attorney and the court that it would only ask about what Baca had told the investigator: "the question . . . would be, 'Is that what you told [the] [d]etective?' . . . I am not asking, 'Is that what happened?' But I am asking, 'Is this a fair representation of what you told her that night?'"

{18} After ensuring that Baca's attorney and the State were in agreement as to the form of the State's questions to Baca, the court asked defense counsel, "[i]s that going to work for you?" Defense counsel responded "in light of where we are in the legal rulings, that is adequate. That's a fair way to address it." The court then told defense counsel that it needed to offer him the opportunity to cross for the record. Defense counsel said that he might ask Baca a question about his hand injury. The court asked Baca's attorney if there was a problem with Defendant asking about the hand injury. Baca's attorney responded no, but he would be concerned about too many more questions cumulatively implicating Baca's privilege against self-incrimination. The court said that it "need[ed] a commitment" in order to reach an agreement. It asked defense counsel: "[d]o you agree that would satisfy your need to cross?" Defense counsel answered that it would. The court stated again that it wanted to be sure for the record that defense counsel was comfortable asking only one question of Baca and that he agreed to waive further cross. Defense counsel said that he was, at that point. He then stated that the defense opposition to the order compelling testimony and granting use immunity was not noted on the order, but that he signed it "as to form."

{19} The State then put Baca on the stand to verify the accuracy of the transcript. The prosecutor asked him whether he had had a chance to review the transcript and whether it "accurately reflect[ed]" and was "a fair representation" of what he remembered telling the investigator. Baca answered affirmatively. As stipulated, Baca's statement was admitted to evidence. Defense counsel did not conduct any cross-examination of Baca.

{20} The jury returned a verdict against Defendant on six of eight charges and he was sentenced to life plus two years imprisonment.

II. DISCUSSION

{21} Defendant claims that Baca's statement was admitted in violation of the Confrontation Clause of the Sixth Amendment to the U.S. Constitution as interpreted by *Crawford*. *See* U.S. Const. amend. VI; *Crawford*, 541 U.S. at 53-54. He argues that admission of Baca's statement when Defendant did not have the opportunity to cross-examine Baca on its contents defeated his constitutional right to confront the witness against him. *See Crawford*, 541 U.S. at 53-54. We agree.

{22} We review admission of statements alleged to be in violation of *Crawford* de novo. *State v. Dedman*, 2004-NMSC-037, ¶ 23, 136 N.M. 561, 102 P.3d 628. Defendant did not argue that the New Mexico Confrontation Clause, N.M. Const. art. II, sec. 14, afforded more rights than the United States Confrontation Clause, U.S. Const. amend. VI, so we address only the federal Constitutional provision. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1.

A. Defendant's Constitutional Right to Cross-Examine the Witness Against Him Was Violated

{23} "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. Out-of-court testimonial statements are barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior

opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the court. *Crawford*, 541 U.S. at 68; *State v. Johnson*, 2004-NMSC-029, ¶ 7, 136 N.M. 348, 98 P.3d 998. Specifically, "an accomplice's testimonial statement [is] inadmissible under the Confrontation Clause unless the accomplice [is] unavailable and the defendant had a prior opportunity to cross-examine the accomplice *concerning the statement*." *State v. Henderson*, 2006-NMCA-059, ¶ 15, 139 N.M. 595, 136 P.3d 1005 (internal quotation marks and citation omitted).

{24} The nature and circumstances of Baca's statement reveal that its admission was a paradigmatic *Crawford* violation. First, the statement falls under the purview of *Crawford* because it was testimonial. "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52; *State v. Romero*, 2006-NMCA-045, ¶¶ 49-50, 52, 139 N.M. 386, 133 P.3d 842. Statements are testimonial when there is no ongoing emergency and the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

{25} Here, Baca gave his statement in response to formal police interrogation. He had been mirandized. He was at a police station answering the questions of an investigator and his statement was tape recorded. *See Romero*, 2006-NMCA-045, ¶ 52 (holding that a statement made at a police station in response to police questioning that was tape recorded bore the indicia of formal police interrogation and was thus testimonial). Further, Baca made the statement at a time when the urgency of the shooting had ceased and the efforts of the police had shifted from ensuring safety in an ongoing emergency to "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *See Davis*, 547 U.S. at 822. For these reasons, Baca's statement was testimonial and thus within the scope of *Crawford*.

{26} Having determined that the statement was testimonial, the propriety of its admission depends upon whether the two *Crawford* requirements were met. First, Baca must have been unavailable to testify to the contents of the statement at the time of Defendant's trial, and second, Defendant must have had a prior opportunity to cross-examine Baca on the contents of the statement.

{27} "'Unavailability as a witness' includes situations in which the declarant . . . is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement. . . ." Rule 11-804(A)-(A)(1) NMRA; *McGuinness v. State*, 92 N.M. 441, 444, 589 P.2d 1032, 1035 (1979). Baca invoked his Fifth Amendment privilege against self-incrimination and was therefore unavailable to be cross-examined. Thus, the "unavailability" requirement of *Crawford* is met. We turn to the next requirement.

{28} It is undisputed that Defendant had no opportunity to cross-examine Baca on the contents of the statement prior to Defendant's trial. However, the State claims that Defendant had an opportunity to cross-examine Baca *during* Defendant's trial. This argument is belied by the facts as they are presented in the record. As discussed above, Baca invoked his Fifth Amendment privilege to avoid testifying at Defendant's trial; his attorney plainly stated that he was invoking his Fifth Amendment privilege and was "not willing to testify" on at least two occasions. The State stipulated that Baca had invoked his Fifth Amendment privilege.

{29} If the State means to argue that Defendant had an opportunity to cross-examine Baca by virtue of the use immunity, that claim is similarly without merit. The order granting use immunity stated that the immunity extended only to Baca's testimony "regarding the statement he made to [the police]." In attempting to clarify the nature of the immunity granted, Baca's attorney illuminated the situation thus:

> If the question is, 'Is that what happened,' do we still have immunity from that? . . . Because to me that's not asking him about the statement he made to [the police]. It's

> asking him about the events . . . and as I read the proposed form of Order, we are talking only about immunity with regard to evidence he made, the testimony he may give, with regard to the statement he made to [the police].

The prosecutor confirmed the impression of Baca's attorney regarding the restricted nature of the immunity: "[t]he question . . . would be, 'Is that what you told [the police] what happened on that night?' . . . I am not asking, 'Is that what happened?' But I am asking, 'Is this a fair representation of what you told her that night?' "

{30} Defense counsel contested the limited scope of the use immunity and its effect on his client's *Crawford* rights:

> [w]e reiterate our arguments . . . made prior to the trial beginning regarding the *Crawford* problems. We still feel there's some restriction if the testimony is permitted without the opportunity to fully cross-examine him. We realize the State is attempting to obviate that by seeking the motion . . . [b]ut we do not concur in the motion. We still want to be able to fully cross-examine the gentlemen if he testifies at all . . . we are in opposition because we feel it's too restrictive in cross-examination."

If Baca was available to be questioned on the substance of the statement or the events described therein, surely the State would have asked more of him than whether the transcript "accurately reflect[ed]" and was a "fair representation" of what he told the police on that evening. When Baca was on the stand, he was compelled there for the narrow purpose of verifying the accuracy of the transcript of his statement, not for answering any substantive questions on the statement itself or the events described therein.

{31} While Defendant may have been able to cross-examine Baca regarding the accuracy of the transcript of his statement, that limited questioning does not satisfy the demands of the Confrontation Clause. We have held on numerous occasions that, when confronted with an accomplice's statement, a defendant's rights to confront are only satisfied where he or she is allowed the opportunity to cross-examine the accomplice *on the statement*. *See, e.g.*, *State v. Forbes*, 2005-NMSC-027, ¶ 3, 138 N.M. 264, 119 P.3d 144 (holding that an accomplice's statement was inadmissible where the defendant "was deprived of the opportunity to cross-examine [the accomplice] to challenge the reliability of his statement"); *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 24, 136 N.M. 309, 98 P.3d 699 (holding that, where the defendant had no opportunity to cross-examine the accomplice on the accomplice's testimonial statements, admission of the statements violated the Sixth Amendment); *Johnson*, 2004-NMSC-029, ¶ 6 (holding that an accomplice's statement was inadmissible where the defendant did not "at any time have an opportunity to cross-examine [the accomplice] on his statement"); *Henderson*, 2006-NMCA-059, ¶ 16 (holding that a "prior *opportunity* to cross-examine *the statement*" was a prerequisite to the testimonial statement's subsequent admission at trial); *State v. Duarte*, 2004-NMCA-117, ¶ 10, 136 N.M. 404, 98 P.3d 1054 (holding that an accomplice's testimonial statement was inadmissible "unless the accomplice was unavailable and the defendant had a prior opportunity to cross-examine the accomplice concerning the statement").

{32} Admission of Baca's testimonial statement when Defendant did not have a prior opportunity to cross-examine him on its substance violated Defendant's right to confront. Baca's statement was admitted without regard to that "central concern of the Confrontation Clause[:] . . . to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999) (internal quotation marks and citation omitted).

B. Defendant Preserved His *Crawford* Argument

{33} Having determined that Defendant's rights under the Sixth Amendment were violated

by admission of Baca's statement, we turn to the question of whether he preserved the issue for appellate review. Even constitutional rights may be lost if not preserved below. *See State v. Silva*, 2008-NMSC-051, ¶ 15, 144 N.M. 815, 192 P.3d 1192 ("[T]he loss of the fundamental right to cross-examine is not necessarily fundamental error."). "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked. . . ." Rule 12-216(A) NMRA. A party must assert its objection and the basis thereof with "sufficient specificity to alert the mind of the trial court to the claimed error." *Silva*, 2008-NMSC-051, ¶ 9 (internal quotation marks and citation omitted).

{34} Defendant fairly invoked a ruling by the trial court with his numerous objections to the admission of Baca's statement without an opportunity for Defendant to cross-examine Baca on its contents. For example, defense counsel stated just before trial: "Mr. Baca . . . is not testifying. . . . If Mr. Baca is uncross-examinable . . . I think that's a violation. . . . [W]e are left with a situation where it's a violation of *Crawford* and a violation, I believe, of the proper cross-examination."

{35} When, at trial, Baca invoked his Fifth Amendment privilege, defense counsel repeated his arguments. He stated: "the *Crawford* problem that we have . . . we are unable to cross-examine [Baca]" and "[w]e reiterate our arguments . . . made prior to the trial beginning regarding the *Crawford* problems. We still feel there's some restriction if the testimony is permitted without the opportunity to fully cross-examine him." Defendant objected with "sufficient specificity to alert the mind of the trial court" to the *Crawford* problem. *See Silva*, 2008-NMSC-051, ¶ 9 (internal quotation marks and citation omitted).

{36} We note that, although the dissent does not directly contest our conclusion that Defendant preserved *Crawford*, it seems troubled by defense counsel's incorporation during trial of arguments made pretrial and reference to the court's previous ruling in making the *Crawford* argument. Dissenting Opinion, ¶¶ 70, 71, 74, 76. The lack of clarity was owing to the fact that the *Crawford* issue was initially due to the State's intended introduction of Baca's statement when Baca was going to invoke the Fifth and then persisted when the State's granted immunity was too narrow in scope to allow Baca to testify substantively. Nevertheless, we conclude that the Defendant sufficiently alerted the mind of the trial court to the error and that the issue was properly preserved.

C. Defendant Did Not Waive His Right to Cross-Examine Baca

{37} Next, the State argues—and the dissent concurs—that Defendant waived his right to cross-examine Baca. In support of this argument, the State points to the fact that defense counsel agreed that both sides would stipulate to admission of Baca's statement and then waive cross-examination. The dissent adds that Baca's statement was not admitted "in lieu of live testimony except at Defendant's prompting." Dissenting Opinion, ¶ 67. The State also contends that defense counsel waived the objection by not asking any questions of Baca when it actually came time to cross-examine him. Both the State and the dissent posit that Defendant waived his *Crawford* objection for tactical reasons, because Baca's statement corroborated Defendant's claim that the occupants of the Explorer fired first and that he was acting in self-defense. We will address each argument in turn.

{38} Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *State v. Padilla*, 2002-NMSC-016, ¶ 18, 132 N.M. 247, 46 P.3d 1247 (internal quotation marks and citation omitted). A waiver must be knowing and voluntary. *Id.* There is a presumption against the waiver of constitutional rights. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

{39} As an initial matter, the dissent contends that the "State intended to introduce the statement's substance through directly questioning Baca, without restricting Defendant from cross-examining him about the statement." Dissenting

Opinion, ¶ 68. We respectfully submit that our colleague misapprehends the nature of the order to compel and grant use immunity. The motion was drafted to extend only to statements verifying the transcript. The restrictions placed on Defendant inhered in the terms of that motion, which excluded any substantive questioning on the statement.

{40} Next, the State and the dissent make what initially appears to be a strong argument that, by stipulating to admission of Baca's statement and stating that he would waive cross-examination of Baca, defense counsel waived his *Crawford* objection. However, study of the transcript reveals that this occurred only *after* the court had granted the State's motion for limited use immunity and thereby rejected Defendant's *Crawford* argument. From the time the limited use immunity was conferred, Defendant was not in a position to waive his right to full cross-examination under *Crawford* because full cross-examination was no longer available to him, per the scope of the immunity granted.

{41} The possibility of stipulation to Baca's statement arose as a way to end the prolonged debate on the form the State's questions would take to elicit the information the State desired from Baca without inadvertently having him incriminate himself. The court suggested that both sides might stipulate to the transcript to "avoid the risks of expanding the field and questions about what's protected and what's not."

{42} The State said that it would stipulate to the statement but then asked whether Defendant, by stipulating to the statement, was waiving his right to cross-examine Baca. Critically, defense counsel replied:

> *I am not waiving Crawford*. I think the questions I asked are going to be answered with the Fifth Amendment. That was made prior to the Court's ruling. The Court considered [*Crawford*] and made its decision, and counsel and the client respect that decision, but I think I haven't waived *Crawford* and I don't intend to, but I think within this purview, ... If [Baca] takes the fifth amendment, I am stuck with that. That doesn't waive *Crawford*. . . . *the Crawford argument has been considered and rejected* as far as applicable to whether [Baca] can testify summarily in the Court's ruling. . . . *I would be willing to stipulate without waiving Crawford.* I am saying at this point my *Crawford* argument was much stronger, was asserted prior to the Court's ruling. At this point it really doesn't make much difference. The Court has said this statement is coming in, so I am saying if it's coming in, put it [sic] in the statement. I know I'm not going to get anything more out of [Baca] because that's the terms that inure . . . in the order. The terms are the statement comes in, [Baca] doesn't have to testify, can still assert his fifth. . . . The Court rejected [the *Crawford* argument] and we will proceed.

The court then responded to defense counsel: ". . . I recognize you made arguments on the record regarding *Crawford*, *I am not asking you to waive what you have argued*, but the fact is that at this point, if the statement goes in, you would be foregoing any further questions regarding that now. Is that—would that work for you?" Defense counsel asked, "[i]s the Court saying the only way the statement can go in in a written form is if I forego any further cross-examination?" The court replied, "[n]o . . . I didn't say that."

{43} However, when defense counsel asked whether the court was asking him to consider waiving cross-examination "so that the statement comes in, in lieu of verifying the statement and then possible cross-examination," the court answered in the affirmative. Defense counsel agreed to this procedure. The State then said that it would stipulate to the statement but still wanted to put Baca on the stand to verify the transcript. After a final clarification between Baca's attorney and the prosecutor on the form that the State's questions to Baca would take, the court asked defense counsel, "[i]s that going to work for you?" Defense counsel again responded "*in light of where we are in the legal rulings*, that is adequate. That's a fair way to address it."

{44} In response to the dissent's conclusion that Defendant waived his right to cross-examine Baca because "Baca's statement was not admitted in lieu of live testimony except at Defendant's prompting," Dissenting Opinion, ¶ 67, we respectfully submit that our colleague misconstrues the nature of the live testimony that was available to Defendant after the court granted the State's motion. Rather than alleviate the *Crawford* problem, as the State and the court may have intended, the order to compel Baca's testimony and immunize him from prosecution thereon actually perfected the *Crawford* problem because it ensured that Baca would testify only to the extent of verifying the accuracy of his statement.

{45} The narrow scope of the immunity granted was problematic in that it did not allow for substantive questioning or full cross-examination of Baca. Rather, any opportunity that Defendant may have had to cross-examine Baca was lost per the terms of the order, because the immunity granted did not extend as far as would have allowed Baca to be fully cross-examined on his statement. Thus, from the time the very limited immunity was conferred, full cross-examination of Baca—such that would have satisfied *Crawford*—was not on the table. Any subsequent negotiation or acquiescence on the part of defense counsel can only be understood in terms of what was still available to him after the immunity was granted; per the terms of the order, this was cross-examination only on the accuracy of the transcript of Baca's statement, not on its substance.

{46} The little that was at stake for Defendant during the back-and-forth about how to proceed with Baca's statement after the order was granted is evident from the court's statement to defense counsel that foregoing cross-examination "might be a substitute for having Mr. Baca basically sit on the stand and affirm the statement and sit on the stand and answer to you that he is going to assert the Fifth." If Defendant can be said to have waived anything in negotiating with the State, he may have waived the limited cross-examination still permitted to him after the order was granted, specifically cross-examination limited to the accuracy of the transcript. The constitutional error was made at the point that the State's motion was granted: any subsequent negotiation with respect to cross-examination of Baca on his verification of the statement did not waive the objection to the underlying, fundamental limitation on Defendant's rights to fully cross-examine Baca on the substance of the statement.

{47} Although defense counsel participated in the discussion about how best to handle Baca's statement and, in so doing, stipulated to admission of the statement and said that he waived cross-examination, his *Crawford* argument had been made and rejected by that point. Participating in the discussion "in light of the rulings made" did not constitute a "knowing and voluntary" waiver of the prior *Crawford* objection. *See Padilla*, 2002-NMSC-016, ¶ 18. We particularly decline to imply a waiver in light of defense counsel's clear statement: "I am not waiving *Crawford* . . . and I don't intend to."

{48} The State next contends that defense counsel waived his objection to the *Crawford* issue by failing to ask any questions of Baca after the State had put him on the stand to verify the transcript of his statement. We emphasize that, as discussed above, Baca was only on the stand for the limited purpose of verifying the accuracy of the transcript of his statement and was not available to answer substantive questions. All parties and the court were aware that outside the bounds of the immunity order, Baca had invoked the Fifth Amendment. Requiring defense counsel to attempt to question Baca on the substance of his statement to avoid waiving his *Crawford* objection would have resulted in Baca invoking the Fifth Amendment on the stand. However, to avoid prejudice, claims of privilege are to be invoked outside the presence of the jury. Rule 11-513(B) NMRA. Requiring defense counsel to attempt to cross-examine Baca when he was aware that Baca had invoked the Fifth Amendment would have been improper; Defendant did not waive *Crawford* by declining to do so.

{49} Finally, the State and the dissent maintain that Defendant waived his right to cross-examine

Baca and actually acquiesced in admission of the statement for strategic reasons, as demonstrated by his subsequent reliance on Baca's statement. While we agree that admission of the statement may have been beneficial to Defendant because of Baca's claim that the occupants of the Explorer were the only ones to fire a gun, we remain unpersuaded that the possible benefit to Defendant betrays a tactical or strategic plan on the part of defense counsel to "have it both ways," specifically to object to the statement to preserve an appellate claim and yet to acquiesce in its admission to buttress his client's defense in front of the jury. On the whole, defense counsel fought admission of Baca's statement because it provided strong evidence of a possible motive and was foundational evidence for the State to introduce a gang expert who testified to extensive detail on gangs and gang rivalries and may have diminished Defendant in the eyes of the jury. Defendant's subsequent reliance on the statement was not a waiver or evidence of a strategic plan to have it both ways, but was an attempt to mitigate the adverse ruling by arguing the evidence in his client's favor.

{50} Defense counsel's reliance on Baca's statement after his *Crawford* objections had been made and rejected did not constitute a waiver. An objection is not waived where, after it is overruled, the objecting party agrees to the introduction of statements similarly objectionable and relies on them to make its case. *Sayner v. Sholer*, 77 N.M. 579, 581, 425 P.2d 743, 744 (1967) ("The court having already overruled the proper objection . . . , counsel was placed in the rather unenviable position of having to make the best of a bad situation. This was not a waiver." (internal quotation marks and citation omitted)); *accord Romero*, 2006-NMCA-045, ¶ 16 (holding that, where "improper evidence is admitted over objection, resort may be had to like evidence without waiving the original error." (internal quotation marks and citation omitted)); 1 John W. Strong, *McCormick on Evidence* § 55, at 246-47 (5th ed. 1999) (same). Arguing evidence admitted over an attorney's objection in the client's favor is consonant with an attorney's professional responsibility to zealously advocate for the client and the attorney's duty to act diligently under Rule 16-103 NMRA. There is no waiver where a defense attorney, his or her original objection rejected by the court, determines to "make the best of a bad situation" and argues the improperly admitted evidence in the client's favor. *See Sayner*, 77 N.M. at 581, 425 P.2d at 744.

{51} For all the foregoing reasons, we conclude that Defendant did not waive his *Crawford* objection.

D. Admission of Baca's Statement Was Not Harmless Error

{52} When a statement is admitted in violation of the Confrontation Clause, we next inquire into whether the error was harmless. *Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986); *Johnson*, 2004-NMSC-029, ¶ 7. To preclude reversal, the error must be harmless beyond a reasonable doubt. *Johnson*, 2004-NMSC-029, ¶ 8. The ultimate inquiry is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (internal quotation marks and citation omitted). We do not "cobble together sufficient evidence" and proclaim that the jury might have convicted the defendant in the absence of the erroneously admitted statement, *see Johnson*, 2004-NMSC-029, ¶ 44, nor do we usurp the role of the jury and conduct our own inquiry into the defendant's guilt or innocence. *See id.* ¶ 43. Rather, we make "an objective reconstruction of the record of evidence the jury either heard or should have heard absent the error and a careful examination of the error's possible impact on that evidence." *Id.* ¶ 10.

{53} In conducting a harmless error analysis in the context of a *Crawford* violation, we are guided by the following "Johnson factors:" (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the

testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Id.* ¶ 11. "Once the constitutional error has been established, the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt." *Id.* ¶ 9.

{54} All of Defendant's convictions arose from his alleged shooting at the Explorer and all of them required the jury to discredit his claim of self-defense. Thus, while there are some cases where an error may not be harmless with respect to one conviction and harmless with respect to another conviction, *id.* ¶ 31, we are presented with a case where Defendant's convictions will either all stand together or all fall together. This will depend on whether there was a "reasonable possibility" that Baca's statement might have contributed to the jury's conclusion that Defendant had not acted in self-defense. *See Chapman*, 386 U.S. at 23.

{55} The first Johnson factor requires us to examine the importance of Baca's statement to the State's case. We begin by noting that the State mentioned Baca's statement eight times in its closing argument. The State argued that Baca's statement proved that Defendant had not acted in self-defense and was in fact the first shooter. In making this point, the State recounted to the jury that Baca saw the occupants of the Explorer hanging out of the car, did not see any weapons, and then heard shooting. The State claimed that this proved that the shots that Baca heard came not from the occupants of the Explorer, whom Baca did not see wielding a gun, but from Defendant.

{56} The State also relied on Baca's statement that he and Defendant recognized the occupants of the Explorer as members of TCK, a gang whom they had had trouble with, and that there was yelling and flashing of gang signs before the shooting broke out. The State represented multiple times to the jury that this tended to show Defendant's intent to confront the occupants of the Explorer and that he was not merely protecting himself when he shot at them.

{57} While we acknowledge that Baca's statement also supported Defendant's claim that the occupants of the Explorer were the first to fire, and that the portion of Baca's statement relied upon by the State does not seem to be particularly strong proof that Defendant was the initial shooter, we do not weigh evidence. What is paramount in the Johnson analysis is the State's heavy emphasis on Baca's statement and its continuous representations to the jury that the statement disproved Defendant's claim of self-defense. *See State v. Torres*, 1999- NMSC-010, ¶ 53, 127 N.M. 20, 976 P.2d 20 (holding that the State's emphasis on improperly admitted evidence demonstrated a reasonable possibility of it contributing to the conviction). Because of the State's heavy reliance on Baca's statement, the first Johnson factor weighs in favor of a "reasonable possibility" that its admission contributed to Defendant's conviction. *See Chapman*, 386 U.S. at 23.

{58} The second Johnson factor is whether the improperly admitted statement was merely cumulative. In addressing this factor, we treat Baca's statement as containing two strands of evidence. First, as discussed above, the State used portions of Baca's statement to argue that Defendant had not acted in self-defense but was the initial shooter. The State also utilized the statement for Baca's admission that the shooting arose because of a gang rivalry. On neither point was the statement cumulative.

{59} First, although the statement was not the only evidence that Defendant had not acted in self-defense when he allegedly shot at the Explorer, it was the only evidence of its kind on this point. Specifically, it was the only evidence originating directly from an occupant of the Saturn that incriminated Defendant. Given that Baca's self-inculpating admission would be much more powerful in the eyes of the jury than what could be perceived as the self-serving claims by the surviving occupants of the Explorer, Baca's statement was not cumulative. Rather, it corroborated and confirmed the victims' testimony that Defendant was the initial shooter. *See Johnson*, 2004-NMSC-029, ¶ 39 ("[C]orroborative

evidence tends to corroborate or to confirm, whereas cumulative evidence merely augments or tends to establish a point already proved. . . .").

{60} The State also used Baca's statement to show that the shooting arose because of a gang rivalry. The statement was not cumulative on this point, either. Both of the surviving occupants of the Explorer initially denied the possibility that the shooting was gang-related, although one of them subsequently admitted at trial that the shooting might have been gang-related. Thus, there was little direct evidence beyond Baca's statement that the shooting arose because of a gang rivalry.

{61} The introduction of the gang element was significant for two reasons. First, it provided evidence of a motive for the shooting. Second, it created the foundation for the State to introduce expert evidence on Los Padillas and TCK, the gangs' particular rivalry, and how the initial encounter may have escalated into a shooting match. We cannot conclude that introduction of Baca's statement, with its injection of gangs into the trial, was "so unimportant and insignificant" that it did not affect the verdict. *See Chapman*, 386 U.S. at 22.

{62} As to the third Johnson factor, although Baca's statement may not have been the only evidence tending to show that Defendant was the initial aggressor or that gangs were involved in the shooting, it was the strongest. As discussed above, it was particularly damaging to Defendant in that it came from his accomplice. Regarding the fourth Johnson factor, as analyzed in detail above, there was no cross-examination of Baca permitted outside of his verification of the statement. Cross-examination of other witnesses was unrestricted.

{63} The final Johnson factor requires inquiry into the overall strength of the State's case against Defendant. While the prosecution's case was quite strong that Defendant shot at the Explorer—there was substantial evidence that occupants of the two cars shot at one another—it was less strong that he did not act in self-defense because there was no conclusive evidence showing who fired the first shots. However, our role is not to ask "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* ¶ 9 (internal quotation marks and citation omitted). To this effect, we decline to "hypothesize a guilty verdict that was never in fact rendered." *See Johnson*, 2004-NMSC-029, ¶ 10 (internal quotation marks and citation omitted). We cannot conclude that the same verdict would have been returned for Defendant in the absence of Baca's statement.

{64} For all the forgoing reasons, Baca's statement was not "so unimportant and insignificant" that there was no "reasonable possibility" that it contributed to the verdict against Defendant. *See Chapman*, 386 U.S. at 22, 23. The admission of Baca's statement was not harmless error.

III. CONCLUSION

{65} Admission of Baca's statement in the absence of any opportunity for Defendant to cross-examine Baca on its substance violated Defendant's Sixth Amendment rights under *Crawford* and was not harmless error. Defendant's convictions are vacated and we remand for a new trial consistent with this Opinion.

{66} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

DISSENTING OPINION

CHÁVEZ, Chief Justice (dissenting).

{67} Defendant knowingly and voluntarily waived his right to cross-examine witness Ray

Baca (Baca). Baca's statement was not admitted in lieu of live testimony except at Defendant's prompting, and as such, I respectfully dissent.

{68} The State produced Baca to testify with the benefit of use immunity. The parameters of the use immunity were defined by the contents of a statement given by Baca to an investigating officer on the night of the shooting in question. The State intended to introduce the statement's substance through directly questioning Baca, without restricting Defendant from cross-examining him about the statement. Instead of exercising the right to cross-examine Baca concerning the statement, Defendant's attorney announced his preference for the entire transcript of the statement to go to the jury. Obviously, this strategic decision was prompted by the exculpatory evidence in the statement. As such, I agree with the State's unrebutted argument that Defendant waived any potential claim under *Crawford v. Washington*, 541 U.S. 365 (2004) relating to Baca's statement. I would affirm the trial court on this issue and I am not persuaded by Defendant's remaining arguments. Therefore, I would affirm his convictions.

{69} The dispute over Baca's statement originated before trial in Defendant's efforts to prevent the State from introducing evidence that the killing had been gang-related. Defendant argued that there was no foundation for such evidence, but the trial court agreed with the prosecutor that testimony from Baca, along with other foundational testimony, would justify its introduction. Defendant filed a motion to reconsider this judgment, and by the time a hearing was held on the motion, Defendant had been apprised that Baca would refuse to testify to avoid self-incrimination. Baca had previously been convicted of crimes relating to this shooting, and was currently appealing his conviction. Defendant argued that if Baca would not testify, the prosecutor could not introduce his statement at trial because this would violate Defendant's rights under *Crawford*. 541 U.S. at 59. The prosecutor answered that she planned to offer limited use immunity to Baca. Defendant raised no further concerns.

{70} Having concluded its discussion of Defendant's motion to reconsider, the trial court went on to discuss a separate defense motion in limine, the text of which is unavailable to us, in which Defendant apparently sought to disqualify the jury panel. Defendant argued that the jury had been unfairly prejudiced because its questionnaires included details about gangs. Defendant argued that since Baca would not be testifying, the jury would not actually hear evidence at trial about gangs, because introducing the statement without the opportunity to cross-examine would violate *Crawford*. The prosecutor again explained that

> [I]n terms of Crawford, [defense counsel] is correct. If Mr. Baca takes the stand, refuses to testify, although that makes him unavailable as a witness, his statement to [the police] was testimonial. I would not be able to walk up and admit it, and I had not intended to do that. Instead . . . [I am seeking] an order compelling testimony and granting use immunity. . . .

Once again, Defendant had no response; he never argued before trial that the grant of limited use immunity would not satisfy his need to cross-examine Baca.

{71} As the prosecutor indicated, Baca was present in court during trial, and the prosecution was prepared to call him as a witness. Based on discussions the prosecutor had with Baca's attorney, she confirmed that Baca intended to invoke his Fifth Amendment privilege. The trial court asked the prosecutor, "[w]hat are you going to be asking of Mr. Baca at this time?" The prosecutor responded that she would seek to compel his testimony, having granted him use immunity for testimony relating to his statement. The prosecutor elaborated:

> I would ask him if he recalled the interview, did he recall being mirandized or not, and asking very specific questions about what he told her. Where he was, who he was with. What car he was driving. They encountered a black truck. When the black

> truck turned on Churchill his interview states that they began firing at the Saturn with a weapon, and I believe his statement also says he yelled at them "f—you," I believe it was, and at that point he was shot in the hand.

While on the witness stand, Baca asked the trial court about the penalty for contempt of court. Apparently unsure, the trial court asked counsel to comment. The prosecutor indicated that the penalty could be up to a year. Defendant's attorney made a vague reference to a pretrial motion regarding *Crawford* and his inability to cross-examine Baca, which from his perspective led to the State's legal position, apparently referring to the grant of use immunity.

{72} After being satisfied that Baca would invoke his Fifth Amendment privilege, the trial court turned to the issue of use immunity. The prosecutor argued that it would be in the interest of justice if Baca were compelled to testify about his statement to the police, noting that it contained evidence favorable to Defendant. Defendant's attorney stated that he reiterated his arguments prior to trial "regarding the Crawford problems":

> We reiterate our arguments, Judge, made prior to the trial beginning regarding the Crawford problems. We still feel there's some restriction if the testimony is permitted without the opportunity to fully cross-examine him. We realize the State is attempting to obviate that by seeking the motion, the granting of the motion, which would then make it a fifth amendment problem. But we do not concur in the motion. We still want to be able to fully cross-examine the gentleman if he testifies at all, but we realize that there are certain limitations. The State may have successfully but we are in opposition because we feel it's too restrictive in cross- examination.

This was the only discussion to which Defendant cited in his brief in chief as evidence that he preserved the *Crawford* issue. Defendant did not point this Court to the discussion he was reiterating, and although I have scoured the record, I have been unable to find any prior discussion relevant to this topic. This explanation was nothing more than an unilluminating repetition of Defendant's pretrial assertion, to which the prosecutor had agreed, that he was entitled to cross-examine Baca about the statement he gave to the police. Importantly, no one contended that Defendant's attorney could not cross-examine Baca about the statement. This simply was not a situation where the statement itself was being tendered in lieu of live testimony. Baca was in the courtroom and the trial court was considering whether to compel him to answer the questions the prosecutor intended to ask.

{73} In any event, Baca opposed use immunity because he did not believe that his testimony was relevant. The prosecutor rebutted this argument by pointing out that Baca was one of the few witnesses who was directly involved in the incident. Significantly, Defendant's attorney agreed that the testimony would be relevant. After taking a recess to consult case law, the trial court announced that Baca's statement was relevant to the case and then granted Baca use immunity.

{74} After the trial court announced its decision, Baca's attorney asked if the prosecutor could simply inquire whether Baca made the statement. The prosecutor explained her preference for asking questions, not just admitting the statement:

> So what I would prefer to do is let him go over the statement, even keep a copy with him, and then basically just walk through it and say, "Did you talk to Mary Ann Wallace," in a semi-leading way, "on this date? Did she mirandize you, give you rights? Did you waive the rights?"
>
> "Yes, I did.["]
>
> "Did you tell her what happened that day?["]
>
> "Yes, I did."

> "And can you tell us who you were with," which is in the statement, and not go outside of asking him anything that is not in the statement, but basically allowing him to answer instead of me feeding him the answers.

Defendant's attorney then asked the trial court whether the transcript would go to the jury. The trial judge indicated that he did not know. While the prosecutor was explaining how she would question the witness, the court apparently asked Defendant's attorney, "[w]ell, you want the transcript?" Defendant's attorney explained that he did want the transcript to go to the jury:

> I think I do want it. If we are going to get into it, I think the whole thing has to go in. I think the transcript is an accurate transcription, but it seems consistent, and I certainly can't get anything better off my hearing of the actual tape, so I figure if we will be asking questions, it does capture the excitement, much of the 911 transcript does, of the young men that were, at one point or another, in both vehicles. So I think that would move matters along better. We wouldn't have to walk him through, "Did you say this, did you say that." If it goes in, what is exciting or meaningful is the manner in which it's said. I think as [the State] said, it does help us in the search for truth.

Baca's attorney then interjected that he was still concerned because the prosecution seemed to want to ask questions such as "[i]s this what happened that night," instead of questions about the statement. Defendant's attorney then interjected his perspective that it would be less prejudicial to the defense if the statement were introduced with Baca acknowledging its contents, given the trial court's rulings. What rulings were alluded to by Defendant's attorney are unclear, since the only ruling at this point was that use immunity would be granted to Baca, and that Baca would be compelled to testify about the contents of his statement to the police. The mechanics for getting the information before the jury remained at issue. The State wanted the standard question-and-answer format, but Baca's attorney and Defendant's attorney wanted the statement transcript admitted instead.

{75} The prosecutor explained that she did not object to stipulating to the transcript, but astutely inquired "[b]y merely stipulating to the transcript, my next question would be is he then waiving, essentially waiving, his right to cross-examine Mr. Baca by stipulating to the transcript being admitted?" The prosecutor clearly recognized that admitting the statement without cross-examination could raise doubts about whether the *Crawford* problem had truly been solved. If Defendant wanted the statement admitted, the prosecutor was demanding that he specify that he was voluntarily foregoing cross- examination.

{76} Unsure of what Defendant was thinking, the trial court turned to Defendant's attorney for clarification. Defendant's attorney said that Defendant was not waiving his argument based on *Crawford,* although yet again Defendant has not pointed this Court to the argument on which he relies, and none is evident from a review of the record. Because Defendant was not waiving his right to cross-examine Baca, the prosecution pointed out that it could not "merely stipulate to the statement." The trial court agreed. The prosecutor then went on to state, "[i]n those terms, I would have to have Mr. Baca testify as to what he said and allow Mr. Samore to cross-examine him on that testimony, whatever the questions may be. And obviously, if he got outside of what Mr. Baca testified, then he has a fifth amendment privilege."

{77} This exchange confirms that the State was not restricting Defendant's right to cross-examine Baca about the statement. This is simply not a *Crawford* violation.[2] "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . .

[2] If Defendant's concern was the limited scope of Baca's use immunity, he should have alerted the trial court to this concern with something more than a vague reference to a right to "fully cross-examine."

The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59. As the majority points out, *Crawford* protects the right to cross-examine on the statement. Majority Opinion, ¶ 28.

{78} Defendant's attorney, recognizing that the State would be unwilling to simply admit the statement as evidence without a waiver, quickly made an interjection to find out what the trial court was suggesting by "waiving any cross-examination at this point in the proceedings we could put the statement in and both sides would waive cross?" When the trial court verified that this was indeed what it was thinking, Defendant's attorney stated unequivocally, "[w]e would be willing to do that."

{79} Although I conclude that this was enough to show that Defendant waived his right to cross-examine Baca about the statement, the trial court exercised greater caution. After Defendant's attorney indicated that he might want to ask Baca to verify a picture of Baca's injured hand, the trial court asked, "Do you agree that would satisfy your need to cross?" Defendant's attorney flatly stated, "[y]es, judge." Leaving nothing to chance, the trial court went on to ask, "Mr. Samore, I want to be sure on the record that you are comfortable at this point asking that the sole question that you would ask, or that you will be asking of Mr. Baca about this and agreeing to waive further cross?" "At this point I am[,]" replied Defendant's attorney, although he cautioned that questions made by the prosecution might require him to ask more questions, in which case he would approach the bench before doing so.

{80} With this agreement on the record, the jury returned to open court and Baca testified. After Baca identified the statement he made to the investigating officer, the prosecutor announced, "Your Honor, the parties have stipulated to the admission of State's Exhibit 123 which is the transcript of Mr. Baca's statement, as given to Detective Mary Ann Wallace on April 16, 2004." Defendant's attorney noted his concurrence and Defendant's concurrence and chose not to ask Baca any questions.

{81} Because Baca's statement was not admitted in lieu of live testimony except with Defendant's prompting, I would find that Defendant waived his right to cross-examine Baca about the statement. Had Defendant not sought to have the transcript introduced, it is clear from the record that his attorney could have cross-examined Baca about the statement. The Confrontation Clause does not require more, and as such I must respectfully dissent.

EDWARD L. CHÁVEZ,
Chief Justice

I CONCUR:

PETRA JIMENEZ MAES, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-013

Filing Date: March 11, 2009

Docket No. 30,710

MARBOB ENERGY CORPORATION, a corporation,

Petitioner-Petitioner,

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Respondent-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Daniel A. Sanchez, District Judge

Holland & Hart, L.L.P.
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Larry J. Montaño
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OPINION

CHÁVEZ, Chief Justice.

{1} The Oil Conservation Commission (the Commission) promulgated New Mexico Administrative Code regulation 19.15.14.1227 NMAC (12/1/08) (Rule 1227),[1] giving itself and the Oil Conservation Division (the Division) the authority to assess civil penalties and impose other sanctions against any person who violates the Oil and Gas Act (the Act), NMSA 1978, Sections 70-2-1 to -38 (1935, as amended through 2004), or any rule, order, or regulation issued thereunder. Petitioner Marbob Energy Corporation (Marbob) appealed the Commission's order to the district court, arguing that the Commission exceeded its statutory authority when it implemented Rule 1227. The district court upheld the Commission's order, holding that the Legislature's broad grants of authority and jurisdiction to the Commission and the Division include the authority to assess the civil penalties authorized by the Act. We reverse and hold that the specific provisions of Section 70-2-28 require the Attorney General to bring an action in court to assess civil penalties for violations of the Act and rules, orders, and regulations issued thereunder.

I. BACKGROUND

{2} The Commission was created by Section 70-2-4 of the Act and has two primary duties regarding the conservation of oil and gas: prevention of waste and protection of correlative rights. Section 70-2-11(A); *Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.*, 114 N.M. 103, 112, 835 P.2d 819, 828 (1992). The Commission may also make rules and

[1] Rule 1227 was originally codified at 19.15.14.1227 NMAC. Apparently either the New Mexico Energy, Minerals and Natural Resources Department, the Commission, or the Division repealed that section of the Administrative Code and replaced it with 19.15.5.10 NMAC, although we could not find any record of the agency or the Commission making this change effective. Section 19.15.5.10 NMAC is identical in all material respects to former Rule 1227. For the sake of consistency on appeal, we refer to the disputed section of 19.15.5.10 as Rule 1227, recognizing that our holding affects the validity of 19.15.5.10(B)(2).

regulations to implement and enforce the Act. *See* § 70-2-11(A) (granting the Division the authority to make and enforce rules, regulations, and orders); § 70-2-11(B) (granting the Commission concurrent jurisdiction with the Division "to the extent necessary for the [C]ommission to perform its duties as required by law"). Marbob is an oil and gas producer subject to the authority of both the Commission and the Division.

{3} In September 2005, the Division filed an application for rule adoption and amendment with the Commission, requesting that the Commission adopt or amend certain provisions of the New Mexico Administrative Code pertaining to the regulation of oil and gas. Among the requested changes, the Division asked the Commission to adopt Rule 1227, thereby establishing administrative "compliance proceedings." "A compliance proceeding is an adjudicatory proceeding in which the [D]ivision seeks an order imposing sanctions for violation of a provision of the Oil and Gas Act, or a provision of a rule or order issued pursuant to the [A]ct." 19.15.5.10(B) NMAC (citation omitted). Among the several sanctions available in Rule 1227, the Division and the Commission may assess civil penalties pursuant to Section 70-2-31(A) of the Act.[2] 19.15.5.10(B)(2) NMAC. The Commission granted the Division's application with its Order No. R-12452 on November 10, 2005, implementing Rule 1227 upon its publication in the New Mexico Register.

{4} Marbob timely filed an application for rehearing with the Commission under the Act. The Commission took no action on Marbob's application, automatically making Order No. R-12452 final ten days after Marbob's filing. *See* § 70-2-25(A). Marbob appealed the Commission's decision to the district court on several grounds, and the district court upheld the Commission's decision. Marbob petitioned the Court of Appeals for a writ of certiorari to the district court, which was denied. Marbob then petitioned this Court for a writ of certiorari, which we granted to determine whether the Division or the Commission has the statutory authority to assess civil penalties. *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2007-NMCERT-011, 143 N.M. 156, 173 P.3d 763.

II. DISCUSSION

A. Standard of Review

{5} We are asked to determine whether Rule 1227 granted the Division and the Commission authority not provided by the Act. It is well settled that "[a]n agency may not create a regulation that exceeds its statutory authority." *Gonzales v. N.M. Educ. Ret. Bd.*, 109 N.M. 592, 595, 788 P.2d 348, 351 (1990) (citation omitted). To determine whether Rule 1227 complies with the Act, we must look to the Act to determine whether the Legislature granted the Division or the Commission the authority to impose civil penalties. As a result, our analysis is one of statutory construction, and we review the district court's decision upholding Rule 1227 de novo. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n,* 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105 ("Statutory interpretation is . . . review[ed] de novo.").

{6} In construing the Act, the Commission encourages us to defer to its interpretation of the Act's provisions that it contends authorize the Division to assess civil penalties. We decline to afford the Commission such deference. When an agency construes a statute that governs it, the court will accord some deference to the agency's interpretation. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). In addition, the court will confer a heightened degree of deference to the agency on legal questions that determine fundamental policies within the scope of the agency's statutory function. *Id.* These two principles suggest that we should defer to the Commission's construction of the Act because the Commission is construing its governing statute and the legal question before us is whether the Commission or

[2] The parties agree that Rule 1227 empowers both the Commission and the Division to assess civil penalties. Thus, our holding is applicable to both the Commission's and the Division's authority in this regard.

the Division may achieve its statutory function of conserving oil and gas by enforcing the Act through the assessment of civil penalties. However, these principles are not the only guideposts we observe in determining whether an agency's interpretation of its governing statute should be accorded deference.

{7} Statutory construction is a question of law. *State v. Romero*, 2006-NMSC-039, ¶ 6, 140 N.M. 299, 142 P.3d 887. As such, "the court is not bound by the agency's interpretation [of its own statute] and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law." *Morningstar*, 120 N.M. at 583, 904 P.2d at 32. Moreover, we are less likely to defer to an agency's interpretation of the relevant statute if the statute is clear and unambiguous, as it is in this case. *See Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 10, 140 N.M. 6, 139 P.3d 166. Also, if statutory construction is not within the agency's expertise, this Court should afford little, if any, deference to the agency on issues of statutory construction. *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. The Commission's specialized expertise pertains to the regulation and conservation of oil and gas. *See* § 70-2-4 (stating that the commissioners "shall be persons who have expertise in the regulation of petroleum production by virtue of education or training."). Nothing in the Act requires the Commissioners to be trained in matters of statutory interpretation. Thus, we conclude that statutory construction is not within the Commission's specialized expertise. *Cf. N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105 (holding that statutory construction is not a matter within the Public Regulation Commission's expertise). For these reasons, whether the Legislature intended to bestow upon the Commission or the Division the authority to assess civil penalties as part of the Act's overall compliance regime is a question of law, and we accord the Commission little deference on this matter.

B. Section 70-2-28 Requires That The Attorney General Bring An Action To Establish Liability And Assess Penalties For Violations Of The Act Or Related Rules Or Orders

{8} The parties' dispute essentially amounts to conflicting interpretations of Sections 70-2-28 and -31 of the Act. Marbob argues that Section 70-2-28 mandates that the Attorney General bring suit to assess the penalties authorized by Section 70-2-31 for violations of the Act or related rules or orders. The Commission argues that Sections 70-2-28 and -31 are silent about who may assess penalties and that the Division and the Commission may therefore assess penalties by virtue of the broad statutory authority granted to them in Sections 70-2-6 and -11 to enforce the Act. The Commission further specifically contends that regarding civil penalties, the Attorney General's role is limited in Section 70-2-31 to collecting the penalties previously assessed by the Division. We agree with Marbob that it is the role of the Attorney General to establish liability and assess the civil penalties authorized under the Act.

{9} In construing a statute, our charge is to determine and give effect to the Legislature's intent. *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and "[w]e look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* "When statutory language is clear and unambiguous, [this Court] must give effect to that language and refrain from further statutory interpretation." *Anadarko Petroleum Corp. v. Baca*, 117 N.M. 167, 169, 870 P.2d 129, 131 (1994) (internal quotation marks and citation omitted). Only if an ambiguity exists will we proceed further in our statutory construction analysis. *See State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933 (filed 2006) ("Unless ambiguity exists, this Court must adhere to the plain meaning of the language."). Therefore, we begin our analysis with the plain

language of the Act's relevant provisions to determine whether their ordinary meaning results in an ambiguity.

{10} The plain language of Section 70-2-28 requires the Attorney General to bring an action for penalties when those penalties are applicable. It states, in pertinent part:

> Whenever it shall appear that any person is violating, or threatening to violate, any statute of this state with respect to the conservation of oil or gas, or both, or any provision of this act, or any rule, regulation or order made thereunder, the division *through the [A]ttorney [G]eneral shall bring suit* against such person in the county of the residence of the defendant, or in the county of the residence of any defendant if there be more than one defendant, or in the county where the violation is alleged to have occurred, *for penalties, if any are applicable*, and to restrain such person from continuing such violation or from carrying out the threat of violation.

Id. (emphasis added). An ordinary reading of this section affirmatively requires that the Attorney General bring suit on the Division's behalf to impose penalties when those penalties are applicable. However, Section 70-2-28 does not state *when* penalties are applicable. We must look elsewhere in the Act to make that determination.

{11} Sections 70-2-22, -31, and -36 of the Act authorize penalties. Of these sections, the only penalty provision that directly concerns us in this case is Section 70-2-31(A), which provides that "[a]ny person who knowingly and willfully violates any provision of the Oil and Gas Act . . . or any provision of any rule or order issued pursuant to that act shall be subject to a civil penalty of not more than one thousand dollars ($1,000) for each violation." However, we must read all three of these penalty provisions together with Section 70-2-28 to determine how the Legislature envisioned that these penalties be assessed. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 ("[W]here several sections of a statute are involved, they must be read together so that all parts are given effect.").

{12} Reading these provisions together, we conclude that the "for penalties, if any are applicable" language in Section 70-2-28 refers to the various penalties authorized by the Act, which may be applicable as a tool to enforce the Act in response to a particular violation. For example, Section 70-2-22(B) states that "[p]enalties shall be imposed" for each transaction involving illegal gas or oil products when the person committing that transaction "knows that illegal oil or illegal oil product, or illegal gas or illegal gas product, is involved in such transaction." Similarly, Section 70-2-31 authorizes civil penalties for knowing and willful violations of the Act or related rules or orders. Finally, Section 70-2-36 makes it a misdemeanor to alter or remove any identification mark of any kind from any tool, construction item, or oil field equipment with the intent to deprive its lawful owner of positive identification. Reading these four sections together, we conclude that the Legislature intended to require the Attorney General to bring an action to impose the penalties authorized by the Act's various sections, including the civil penalties authorized by Section 70-2-31. Such an action would determine whether a person is liable for an alleged violation and, if so, the amount of penalties to be imposed.

{13} The Commission offers several arguments to support its position that the Legislature intended the Division or the Commission to assess civil penalties for violations of the Act, or related rules or orders, and the Attorney General to only collect them. The Commission first argues that Sections 70-2-6 and -11, when read together, expressly grant the Division and the Commission the authority to impose civil penalties. Section 70-2-6(A) grants the Division "jurisdiction and authority over all matters relating to the conservation of oil and gas." It further gives the Division "jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of

this act." *Id.* Section 70-2-11(A) empowers the Division to prevent waste and protect correlative rights and "to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." The Commission is granted "concurrent jurisdiction and authority with the [D]ivision to the extent necessary for the [C]ommission to perform its duties as required by law." Sections 70-2-6(B), -11(B). The Commission argues that the broad jurisdiction and authority given the Division in these sections to do whatever is reasonably necessary to enforce the Act "is a clear and explicit delegation of jurisdiction of penalty assessment cases." We disagree.

{14} The Commission's reading of Sections 70-2-6 and -11 ignores the specific requirement in Section 70-2-28 that the Attorney General bring suit "for penalties, if any are applicable." Indeed, without more, the Commission's construction of Sections 70-2-6 and -11 creates a contradiction in the statute. If the Commission's interpretation is correct, then the Legislature would have granted the Division jurisdiction to assess civil penalties in Section 70-2-11 while simultaneously requiring the Attorney General to bring suit in district court to accomplish the same thing. The Legislature cannot have intended both. We resolve this ambiguity by giving effect to Section 70-2-28, which is the more specific statutory provision.

{15} "As a general rule of statutory construction, . . . general language in a statute is limited by specific language." *Lubbock Steel & Supply, Inc. v. Gomez*, 105 N.M. 516, 518, 734 P.2d 756, 758 (1987). Section 70-2-28 specifically requires the Attorney General to "bring suit . . . for penalties, if any are applicable." In contrast, Section 70-2-11 empowers the Commission and the Division to do "whatever may be reasonably necessary" to enforce the Act. The Attorney General's specific obligation under Section 70-2-28 to bring suit in district court for penalties, when applicable, governs over the general grants of authority and jurisdiction to the Division and the Commission in Sections 70-2-6 and -11. Therefore, Sections 70-2-6 and -11 do not grant the Division and the Commission express authority to assess civil penalties.

{16} The Commission's next argument encourages us to construe a suit to "recover" penalties as a suit to "collect" them. In this way, the Commission argues, when the Legislature authorized civil penalties that "*shall be recoverable* by a civil suit filed by the [A]ttorney [G]eneral in the name and on behalf of the [C]ommission or the [D]ivision in the district court," Section 70-2-31(A) (emphasis added), it only intended the Attorney General to bring a suit to collect the penalties that the Division had already assessed pursuant to its broad enforcement authority in Sections 70-2-6 and -11. The Commission relies on a definition of "recover" to mean only "collect." In light of the Act's other, related provisions, we do not believe the Legislature intended that term to be given such a restrictive meaning.

{17} *Black's Law Dictionary* defines "recover" broadly, meaning "[t]o obtain by a judgment or other legal process." *Id.* at 1302 (8th ed. 2004). We recognize, however, that an action to recover could also be an action to collect what has previously been determined to be due, such as an action to recover a judgment previously entered. *See Black's Law Dictionary* 1440 (4th ed. 1968) (defining "recover" as "[t]o get or obtain again, to collect"). Thus, the meaning of the term is ambiguous, and we will look to the Act's related provisions to determine what the Legislature intended. *See Gen. Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985) ("[This Court] read[s] the act in its entirety and construe[s] each part in connection with every other part in order to produce a harmonious whole.") (citation omitted)).

{18} Giving the term "recoverable" in Section 70-2-31 the more limited meaning of an action solely to collect penalties already assessed would create an inconsistency between Sections 70-2-28 and -31. Section 70-2-28 requires the Attorney General to bring an action to impose liability and assess penalties when they may be

applicable. Following the Commission's definition of "recover," Section 70-2-31 would attempt to limit that authority to collections actions. We are disinclined to construe a statute to create conflicts between its provisions rather than resolve them. *See El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 584, 592 P.2d 181, 184 (1979) ("It is the duty of the court, so far as practicable, to reconcile different provisions so as to make them consistent, harmonious, and sensible.") Therefore, we reject the Commission's argument that Section 70-2-31 limits the Attorney General's authority with respect to civil penalties to actions to collect penalties previously assessed by the Division or the Commission.

{19} In support of its construction of the Act, the Commission next argues that Section 70-2-28, which requires the Attorney General to bring suit in district court, is solely an injunction provision and its "penalties" language applies only when the Commission or the Division has not previously assessed civil penalties for a violation of the Act, "as this [structure] would obviate the necessity for a separate proceeding before the Commission." The Commission argues that a provision authorizing the Attorney General to seek the judicial remedy of an injunction is necessary because the Commission does not have contempt powers. Thus, according to the Commission, the Attorney General could bring an action to impose liability and assess penalties when it was seeking an injunction and the Division had not already assessed penalties for the same violation; otherwise, penalty assessment authority is reserved exclusively to the Division and the Commission. We are not persuaded by this argument.

{20} In support of this contention, the Commission relies on language in the first sentence of Section 70-2-28 to claim that the Legislature intended to limit the Attorney General's authority to bring actions only for present or future violations. *See id.* ("Whenever it shall appear that any person *is violating, or threatening to violate*, any statute of this state with respect to the conservation of oil or gas, . . . the [D]ivision through the [A]ttorney [G]eneral shall bring suit against such person . . . for penalties, if any are applicable, and to restrain such person from continuing such violation or from carrying out the threat of violation.") (emphasis added)). Although the Commission contends that this language renders Section 70-2-28 solely an injunction provision, its construction of Section 70-2-28 gives the Attorney General authority to assess penalties in certain situations as well. In spite of its argument that Section 70-2-28 is an injunction provision, the Commission's construction would allow the Attorney General to seek assessment of penalties when two conditions are met: first, when the Attorney General is seeking an injunction; and second, when the Division or the Commission has not previously assessed penalties for the same violation. The Commission's interpretation of Section 70-2-28 would have us read into the statute language that is not there, which we will not do if the provision makes sense as written. *See High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. There is no indication anywhere in the Act that the Legislature intended this conditional, if-then approach to penalty assessment, and the plain language of Section 70-2-28 does not impose such a scheme. Accordingly, we will not read this language into the Act.

{21} Furthermore, the Commission's argument requires that we construe the language in Section 70-2-28 that "the [A]ttorney [G]eneral shall bring suit . . . for penalties, if any are applicable" to mean that civil penalties are only "applicable" (in the sense that the Attorney General may assess them) when the Division has not previously assessed them *and* when the Attorney General is simultaneously seeking injunctive relief for the same violation of the Act or related rules or orders. The Commission's construction of the Act would give itself the first chance to adjudicate civil liability and assess penalties. In light of the Act's other penalty provisions, *see, e.g.*, Sections 70-2-22, -36, and the language of Section 70-2-28 requiring the Attorney General to bring suit for penalties, when applicable, the Commission's interpretation cannot be what the Legislature intended. The Legislature's use of the word "applicable" in Section 70-2-28 is

a reference to the other statutory penalty provisions, which would be applicable depending on the type and nature of the alleged violation. Rather than construing the word "applicable" to mean "when the Division has not previously assessed civil penalties," we conclude that Section 70-2-28 makes sense as written and requires the Attorney General to bring suit in court to establish liability and to assess whatever penalties are authorized by the Act. Therefore, we reject this argument as well.

{22} Finally, the Commission argues that the Legislature's use of the phrase "the [A]ttorney [G]eneral shall bring suit" in Section 70-2-28 is only meant to emphasize the Commission's duty to enforce the Act and should be read in conjunction with the Act's next section, which grants private citizens the right to enforce the Act when the Commission and the Division do not. *See* § 70-2-29 ("Actions for damages; institution of actions for injunctions by private parties."). We disagree. It is widely accepted that when construing statutes, "shall" indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent an clear indication to the contrary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The plain reading of Section 70-2-28 requires, among other things, that the Attorney General bring suit for penalties when those penalties are applicable. To read the phrase "the [A]ttorney [G]eneral shall bring suit" in Section 70-2-28 to mean that the Commission or the Division have the responsibility and the authority to enforce the Act and related rules and orders violates the plain meaning rule. We believe that the Legislature's directive that the Attorney General shall bring suit should be read to require the Attorney General to bring an action, not as a reminder that the Commission should enforce the Act. *See Anadarko Petroleum Corp.*, 117 N.M. at 169, 870 P.2d at 131 ("Statutory language should be interpreted literally.") (internal quotation marks and citation omitted)). *Cf. Cerrillos Gravel Prods., Inc. v. Bd. of County Comm'rs of Santa Fe County*, 2005-NMSC-023, ¶ 21, 138 N.M. 126, 117 P.3d 932 (holding that county had implied statutory authority to suspend a mining permit because of zoning violations and was not limited to seeking statutory penalties through the district attorney in court). Therefore, we reject this final argument of the Commission as well.

III. CONCLUSION

{23} While not unsympathetic to the Commission's professed need for greater enforcement authority, we defer, as we must, to the Legislature for the grant of that authority, and so too must the Commission. The Commission's enabling statutes are undeniably dated, and perhaps inadequate to face the contemporary challenges the Commission appears to claim. However, any enhancements to the Commission's authority must come from the same legislative body that created the Commission in the first instance.

{24} For the reasons stated above, we hold that Section 70-2-28 requires the Attorney General to bring suit on behalf of the Division in court to impose civil penalties authorized by Section 70-2-31. We therefore reverse the district court and invalidate Section 19.15.5.10(B)(2) NMAC pertaining to the Commission's and the Division's authority to impose penalties.

{25} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-034

Filing Date: June 22, 2009

Docket No. 31,010

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

BRIGETTE TROSSMAN,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Stephen Bridgforth, District Judge

Hugh W. Dangler, Chief Public Defender
Nancy M. Hewitt, Appellate Defender
Santa Fe, NM

for Petitioner

Gary K. King, Attorney General
Max Shepherd, Assistant Attorney General
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Chief Justice.

{1} Defendant Brigette Trossman was convicted of negligently permitting child abuse by endangerment, contrary to NMSA 1978, Section 30-6-1(D) (2004, prior to amendments in 2005),[1] after she was arrested in a house in Chapparal, New Mexico, where chemicals and equipment involved with methamphetamine production were found and the evidence suggested that her child lived there with her. In addition to the normal instruction for negligently permitting child abuse, Jury Instruction No. 4 provided that:

> Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child.

Defendant appealed her conviction to the Court of Appeals, arguing (1) that this instruction undermined the jury's responsibility to find all of the essential elements of her charge, and (2) that there was insufficient evidence to support her conviction. *State v. Trossman*, No. 26,576, mem. op. at 2 (N.M. Ct. App. Feb. 28, 2008). The Court of Appeals rejected these arguments, *id*., and Defendant sought a writ of certiorari from this Court. The Court granted certiorari on both issues. *State v. Trossman*, 2008-NMCERT-004, 144 N.M. 48, 183 P.3d 933 (table).

{2} We reverse the Court of Appeals on both issues. First, we hold that Jury Instruction No. 4, which constituted an evidentiary presumption under our Rules of Evidence, was erroneous because a reasonable juror could have concluded that he or she was not required to find the essential element of endangerment beyond a reasonable doubt. Second, we conclude that there was insufficient evidence to support Defendant's conviction of child abuse. Defendant's conviction is therefore vacated.

[1] Throughout this opinion, our citations refer to Section 30-6-1 as it appeared prior to the amendments in 2005. As a result, we refer to current Section 30-6-1(I) as Section 30-6-1(F). We also note that Defendant's indictment and judgment incorrectly refer to the child abuse by endangerment provision as being found at Section 30-6-1(C) instead of Section 30- 6-1(D).

BACKGROUND

{3} The facts in this case are not in dispute. Responding to reports of suspicious purchases of pseudoephedrine, police followed Billy Glenn, later a co-defendant in this case, as he and several unidentified adults made additional purchases of ephedrine and matches, both possible methamphetamine precursors. Glenn was observed entering a house carrying several bags. Police watched the house that evening and then left for approximately thirty-six hours, during which time they obtained a search warrant. When the warrant was executed, police apprehended Defendant, Glenn, and one other female. Inside the house police found fifty-three items consistent with the presence of a methamphetamine lab.[2] One officer also observed what appeared to be a child's room, although he admitted during cross-examination that he had no personal knowledge about who lived there or whether a child had been present at any particular time. However, a social worker who took jurisdiction over Defendant's child after the raid later testified that Defendant had told her that Defendant's child lived at the house. The social worker also testified that the child had been absent on the night before the raid, and that she had not asked whether the child had been absent on any previous nights.

{4} Defendant was charged with violating Section 30-6-1, which at that time provided in relevant part that:

> D. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:
>
> (1) placed in a situation that may endanger the child's life or health. . . .
>
> F. Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.

{5} At the end of Defendant's trial, Defendant moved for a directed verdict on the grounds that there was no evidence "to show that the child was in the proximity or could have been exposed to [dangerous chemicals and equipment]." The motion was denied. The parties proceeded to discuss proposed jury instructions and agreed on an instruction on negligently permitting child abuse under Section 30-6-1(D) based on UJI 14-605 NMRA that read as follows:

> INSTRUCTION NO. 3[.]
>
> [Defendant] has been charged with negligently permitting child abuse which did not result in death or great bodily harm. For you to find [Defendant] guilty of child abuse which did not result in death or great bodily harm, as charged in the Grand Jury Indictment, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of [her child];
>
> 2. The defendant acted with reckless disregard. To find that [Defendant] acted with reckless disregard, you must find that [Defendant] knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of [her child][;]
>
> 3. [Defendant] was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child's welfare;

[2] As explicitly described in testimony, these included two metal cans of acetone; one gallon and a separate quart of denatured alcohol; baggies; scales; a mason jar with a bi- layered liquid; a heating mantle; a mason jar with a reddish white powdery substance; Red Devil lye; a plastic sports bottle; a Pyrex cooking dish; coffee filters; iodine; empty blister packs for pseudoephedrine or ephedrine (but apparently no pills); hydrogen peroxide; a cooler; and stained gloves.

> 4. [Defendant's child] was under the age of 18;
>
> 5. This happened in New Mexico on or about August 12, 2004.

In addition, the State proposed an instruction with the exact wording of Section 30-6-1(F).[3] The attorneys for Defendant and her co-defendant objected that such an instruction violated their clients' rights to due process because "innocent activity could be construed to meet the elements of this statute[;]" that the instruction was improper because it could not yet be found in the UJI; and that the instruction would prevent the jury from finding all of the required elements of child abuse. The judge suggested modifications to the language of Section 30-6-1(F), and notwithstanding renewed objections, the jury was eventually instructed on the judge's modified version of the statute:

> INSTRUCTION NO. 4.
>
> Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall [may] be deemed prima facie evidence of abuse of the child.

Defendant was convicted.

{6} Defendant appealed, continuing to claim that the instruction was flawed and the evidence was insufficient to convict her. *Trossman*, No. 26,576, mem. op. at 2. The Court of Appeals affirmed the conviction. *Id.* at 8. First, the Court held that Jury Instruction No. 4 was proper because it "simply gave an alternative definition of what can constitute placing a child in a dangerous situation. It did not mandate a conviction. . . ." *Id*. Second, the Court held that the evidence was sufficient to support Defendant's conviction because there was testimony that her child lived in the house and that being present around the chemicals was dangerous. *Id.* at 5-6. We reverse the Court of Appeals and vacate Defendant's conviction.

DISCUSSION

I. JURY INSTRUCTION NO. 4 COULD HAVE CONFUSED OR MISDIRECTED A REASONABLE JUROR

{7} Defendant argues that Jury Instruction No. 4 "mandated a conviction" of child abuse because it "took away an element from the jury's determination–the element of whether the defendant's actions of having a variety of lawful materials in her house amounted to child abuse." In support of this argument, Defendant cites to a series of cases including *State v. Parish*, 118 N.M. 39, 878 P.2d 988 (1994), which concern the failure of trial courts to instruct juries on all of the essential elements of the crime charged. The State responds that since the Legislature "has gone to the trouble of providing a specific definition of a type of child abuse by endangerment" under Section 30-6-1(F), it was not error for the trial court to instruct on that basis. The State contends that Jury Instruction No. 4 did nothing more than create "a permissive inference," which did not violate Defendant's rights because it was rational for the jury to "make . . . the inference set forth in the challenged instruction, i.e., that allowing a child to be in a methamphetamine house is inherently dangerous to the child's health and well being." The Court of Appeals agreed with the State, holding that Section 30- 6-1(F) created "an alternative definition" of child abuse and that nothing prevented the jury from being instructed on that basis, particularly given the alterations made by the trial court. *Trossman*, No. 26,576, mem. op. at 8.

{8} In *Parish*, 118 N.M. at 41-42, 878 P.2d at 990-91, we explained that jury instructions can be defective in three ways: (1) they can be facially erroneous, requiring reversal; (2) they can

[3] The record does not include this proposed instruction, but we are able to infer its contents from the discussion between the parties in the transcript.

be vague, in which case the court must "evaluate whether another part of the jury instructions satisfactorily cures the ambiguity[;]" and (3) they can be contradictory, requiring reversal because "there is no way to determine whether the jury followed the correct or the incorrect instruction." Whatever the case, the ultimate concern of the reviewing court must be whether "a reasonable juror would have been confused or misdirected." *Id*. at 42, 878 P.2d at 991. To determine whether Jury Instruction No. 4 was erroneous under the standards enunciated in *Parish*, we must first resolve the conflict between the parties regarding the import of Section 30-6-1(F).

{9} Rule 11-302(A) NMRA provides that "in criminal cases, presumptions against an accused, recognized at common law or created by statute, *including statutory provisions that certain facts are prima facie evidence of other facts or of guilt*, are governed by this rule." (Emphasis added.) A presumption may be instructed to the jury in a criminal trial, subject to certain restrictions considered later in this opinion. Rule 11-302(C). In the most general terms, "a presumption is a standardized practice, under which certain facts [the basic facts] are held to call for uniform treatment with respect to their effect as proof of other facts [the presumed facts]." 2 Kenneth S. Broun, *McCormick on Evidence* § 342, at 495 (6th ed. 2006). At first glance, the basic facts under Section 30-6-1(F) appear to be both (1) the act of allowing a child "to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance", and (2) the mens rea standard "knowingly, intentionally or negligently." These basic facts are given a certain uniform effect (they are "prima facie evidence") regarding the presumed fact of child abuse under Section 30-6-1(D).

{10} A careful reading of Sections 30-6-1(D) and (F) requires us to slightly modify this conclusion, however. First, we note that the acts described in Section 30-6-1(F) are consistent with only one theory of child abuse: endangerment under Section 30-6-1(D)(1). Sections 30-6-1(D)(2) and (3) create the other possible forms of child abuse when a child is "tortured, cruelly confined or cruelly punished" or "exposed to the inclemency of the weather[,]" respectively. Second, we observe that the mens rea standard of Section 30-6-1(F) ("knowingly, intentionally or negligently") is nothing more than a restatement of the mens rea standard under Section 30-6-1(D). Given these considerations, we hold that the presumption created by Section 30-6-1(F) can only be understood to allow the basic fact of allowing a child "to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance" to serve as evidence of the essential element of endangerment under Section 30-6-1(D)(1), when this theory of child abuse is at issue. *See* UJI 14-605.

{11} Rule 11-302 also specifies the effect that the basic facts under Section 30-6-1(F) should have regarding the presumed fact of endangerment. The jury may, but is not required to, infer the presumed fact upon evidence of the basic facts; in other words, "[t]he court is not authorized to direct the jury to find a presumed fact against the accused[,]" if the jury finds the basic facts. Rule 11-302(B); *see also* Rule 11-302(C). "This provision incorporates the constitutional requirement that presumptions not be conclusive in criminal cases even if unrebutted." *State v. Matamoros*, 89 N.M. 125, 127, 547 P.2d 1167, 1169 (Ct. App. 1976) (internal quotation marks and citation omitted); *see, e.g.*, *State v. Jones*, 88 N.M. 110, 112, 537 P.2d 1006, 1008 (Ct. App. 1975) (concluding that an instruction was impermissibly mandatory when it read that "the requisite knowledge or belief that the property has been stolen *is presumed* in the case of an individual who is found in possession or control of property stolen from two or more persons on separate occasions." (internal quotation marks omitted) (emphasis added)). As the United States Supreme Court has explained, to satisfy the mandates of due process, a presumption "must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *County Court of Ulster County v. Allen*, 442 U.S.

140, 156 (1979). What our criminal rules refer to as a presumption is more properly termed a permissive inference, the purpose of which "is to guide the jury by highlighting the propriety of drawing a factual inference they might otherwise be naturally less likely to draw." 1 Michael H. Graham, *Handbook of Federal Evidence* § 303:4, at 296 (6th ed. 2006); *see also Jones*, 88 N.M. at 113, 537 P.2d at 1009 ("The effect of [the predecessor of Rule 11-302] . . . is to abolish 'true' presumptions in criminal cases.").

{12} Rule 11-302(C) guides the trial court in assuring that a jury instruction is given effect only as a permissive inference:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the court shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

UJI 14-5061 NMRA puts the mandates of Rule 11-302 into a specific form that "shall be given when the state relies upon a statutory 'presumption' to prove an element of the crime or when an element is inferred ('implied') from certain facts." UJI 14-5061 Use Note. Pursuant to our reading of the statute, such an instruction based on UJI 14-5061 could have been given in addition to an instruction on the essential elements of child abuse by endangerment[4] and should have read as follows:

> Proof that [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of [her child] is an essential element of negligently permitting child abuse as defined elsewhere in these instructions. The burden is on the state to prove that [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of child beyond a reasonable doubt.
>
> In this case if you find that it has been proved that [Defendant] allowed [her child] to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance, you may but are not required to find that it has been proved that [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of [her child]. You must consider all of the evidence in making your determination. In order to find the defendant guilty of negligently permitting child abuse, you must be convinced beyond a reasonable doubt that the defendant permitted [her child] to be placed in a situation which endangered the life or health of [her child].

{13} Although the trial judge made several well-considered changes to the language of Section 30-6-1(F) before instructing the jury–for instance, changing "shall" to "may"–Jury Instruction No. 4 entirely lacked the marked emphasis placed by Rule 11-302 and UJI 14- 5061 on the necessity that the jury find the essential element of endangerment beyond a reasonable doubt. Thus, while we disagree with Defendant's characterization of Jury Instruction No. 4 as mandating a finding of guilt, we believe that the risk of confusion caused by this instruction is equally troubling. *See State v. Montano*, 1999-NMCA-023, ¶ 18, 126 N.M. 609, 973 P.2d 861 (reversing a conviction for aggravated battery when a jury instruction implied that the jury need not find that the alleged weapon could have caused death or serious injury and was therefore ambiguous). We perceive a twofold risk under Jury Instruction No. 4: (1) the jury might have understood it to supplant the reasonable doubt standard; and (2) the jury might not have understood that the presumption did not relieve the jury of the necessity of finding the essential element of

[4] For example, Jury Instruction No. 3 in Defendant's case, *supra*. *See also* UJI 14-605.

endangerment.[5] *See Ulster County*, 442 U.S. at 156.

{14} Neither can we conclude that other instructions cured the error. *See State v. Crosby*, 26 N.M. 318, 324, 191 P. 1079, 1081 (1920) ("If this instruction were ambiguous and incomplete, and also capable of another, different, and correct interpretation . . . it might then be cured by the subsequent instruction. . . ."). Although Jury Instruction No. 2 provided that "[t]he burden is always on the state to prove guilt beyond a reasonable doubt[,]" it did not explain what it was, exactly, that the jury must find beyond a reasonable doubt. If instructed correctly per UJI 14-5061, Jury Instruction No. 4 would have explained that "[i]n order to find the defendant guilty of negligently permitting child abuse, you must be convinced beyond a reasonable doubt *that the defendant permitted [her child] to be placed in a situation which endangered the life or health of [her child]*" (emphasis added). It is the ultimate fact of endangerment that must be proven beyond a reasonable doubt–not just the basic facts from which the inference may be drawn. We must vacate Defendant's conviction where there was a possibility that the jury could have convicted her without finding each of the elements of the crime charged beyond a reasonable doubt. *See Parish*, 118 N.M. at 44- 46, 878 P.2d at 993-95 (reversing a conviction when jury instructions failed to place on the State the burden of proving that the defendant did not act in self-defense).

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION

{15} Defendant claims that the evidence presented at trial was insufficient to support her conviction because it did not show that her child was endangered, since he "was not in the residence at the time that any manufacture of any controlled substance took place." Defendant argues that our review must employ the criterion of endangerment set forth by our child abuse precedents, that endangered children must be "exposed to a substantial risk to their health." *State v. Trujillo*, 2002-NMCA-100, ¶ 21, 132 N.M. 649, 53 P.3d 909. The State argues that Section 30-6-1(F) creates its own substantive standard that obviates the need to determine whether there was sufficient evidence of endangerment, as defined by our precedents. Moreover, the State argues that even under the endangerment standard, testimony established the child's presence in the house and the dangers that would have resulted from being in the presence of the seized chemicals. The Court of Appeals concluded the jury could infer that Defendant's child was endangered because dangerous chemicals were stored in the house where he lived. *Trossman*, No. 26,576, mem. op. at 5-6.

{16} To decide whether there was sufficient evidence, we conduct the following analysis: "[i]nitially, the evidence is viewed in the light most favorable to the verdict. Then the appellate court must make a legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Lopez*, 2008-NMCA-111, ¶ 14, 144 N.M. 705, 191 P.3d 563 (internal quotation marks and citation omitted). We "indulge all permissible inferences in favor of upholding the verdict." *State v. Apodaca*, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). Also, in reviewing such cases

[5] In fact, there was a third risk as well. As we noted above, the mens rea standard in Section 30-6-1(F) is merely a repetition of the mens rea standard in Section 30-6-1(D), and as such would create a needless redundancy if–as happened in the case at bar–it were instructed in the presumption as well as in the normal elements of child abuse. In addition, by including the "knowingly, intentionally or negligently" standard verbatim in Jury Instruction No. 4, the trial court may have violated our holdings requiring criminal negligence in child abuse cases. *See, e.g.*, *State v. Mascarenas*, 2000-NMSC-017, ¶¶ 12, 16, 129 N.M. 230, 4 P.3d 1221 (holding that because criminal negligence is required to prove child abuse, an instruction incorporating both the words "negligently" and "reckless disregard" resulted "in the distinct possibility of juror confusion as to the mens rea necessary for conviction" and mandated reversal (internal quotation marks and citation omitted)). However, this issue is not before us.

for sufficient evidence, we must not "parse[] the testimony and view[] the verdict only in light of the probative value of individual pieces of evidence," but rather "view the evidence as a whole." *State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285.

{17} As an initial matter, we must settle the debate between the parties over whether the sufficiency of the evidence in this case should be decided, as Defendant urges, under traditional endangerment standards or, as the State argues, solely with reference to Section 30-6-1(F). We concede that the State's position has, on its face, a certain appeal. Section 30-6-1(F) is framed in terms of "prima facie evidence." In general legal parlance, "prima facie evidence" is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary 598 (8th ed. 2004); *see also Matamoros*, 89 N.M. at 127, 547 P.2d at 1169. The Court of Appeals applied this definition to a provision similar to Section 30-6-1(F) in *In re Shaneace L.*, 2001-NMCA-005, ¶ 12, 130 N.M. 89, 18 P.3d 330. In *Shaneace L.*, the Court reviewed the defendant's conviction under NMSA 1978, Section 30-20-12 (1967) ("Use of telephone to terrify, intimidate, threaten, harass, annoy or offend") for sufficiency of the evidence in light of Section 30-20-12(B), which provided that "[t]he use of obscene, lewd or profane language or the making of a threat or statement . . . shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend." 2001-NMCA-005, ¶ 12. Unlike the case at bar, in *Shaneace L.*, no instruction was given on the basis of this provision. The Court of Appeals held that Section 30-20-12(B) was the Legislature's way of mitigating "the difficulty in proving the requisite statutory intent[.]" *Id*. As such, the Court of Appeals concluded that "testimony that Child threatened to kill [the victim] and her baby shortly after the placing of the telephone call is sufficient evidence from which the children's court could infer that Child had the intent to annoy or harass [the victim]." *Id*. In short, the Court viewed the "prima facie evidence" provision as creating an evidentiary standard for use in reviewing claims of insufficient evidence. If we were to apply this reasoning to the case at bar, we would hold that there was sufficient evidence of endangerment if a rational jury could have found the *basic facts* described in Section 30-6-1(F) beyond a reasonable doubt. This would permit a finding of endangerment when, for example, a child was allowed to enter and remain in a house containing iodine that the child's parent planned to use in methamphetamine production, even if the situation would not qualify as endangerment under our precedents.

{18} We cannot adopt this reasoning. To interpret Section 30-6-1(F) in accordance with *Shaneace L*. would bring us into conflict with our specific rule on presumptions. Rule 11-302(B) requires that:

> When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

When the Legislature has directed that one or more basic facts may be considered prima facie evidence of a presumed fact, the trial court must test the sufficiency of the evidence of the *presumed fact* before the jury may be instructed that the presumed fact may be inferred from the basic fact or facts. In Defendant's case, Rule 11-302(B) requires that the trial court be satisfied that sufficient evidence has been presented of the child's *endangerment* before giving an instruction in accordance with UJI 14-5061. As discussed above, this requirement assures that the presumption does not "undermine the fact-finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ulster County*, 442 U.S. at 156. An evidentiary presumption does not change the State's burden to establish the essential elements of the crime without reference to the presumption itself. Accordingly, for the purposes of our review, the evidence must have

been sufficient to prove endangerment under Section 30-6-1(D)(1).

{19} For this reason, to the extent that *Shaneace L.* suggests that a statutory provision like Section 30-6-1(F), making a basic fact prima facie evidence of a presumed fact, is a standard for deciding the sufficiency of the evidence, it is overruled. However, we have no quarrel with the ultimate outcome of *Shaneace L.*; there was certainly sufficient evidence of intent in that case, not because of the presumption, but because of the natural inference that flows from threatening behavior to the intent to annoy or harass. *See, e.g.*, *State v. Silva*, 2008-NMSC-051, ¶ 18, 144 N.M. 815, 192 P.3d 1192 (observing that "[i]ntent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence" (internal quotation marks and citation omitted)).

{20} Viewing the evidence as a whole under the endangerment standard, we are compelled to agree with Defendant that there was insufficient evidence to support her conviction. We have held that in creating the crime of child abuse by endangerment, "the Legislature did not intend to criminalize conduct creating a mere possibility, however remote, that harm may result to a child." *Graham*, 2005-NMSC-004, ¶ 9 (internal quotation marks and citations omitted).

> In making this offense a third degree felony, the legislature intended to address conduct with potentially serious consequences to the life or health of a child. The coupling in the statute of the word "health" with the word "life" suggests to us that the legislature intended to address situations in which children are exposed to a substantial risk to their health.

Trujillo, 2002-NMCA-100, ¶ 21; *see also* UJI 14-603 NMRA (requiring a "substantial and foreseeable risk" to the child). In *State v. Jensen*, 2006-NMSC-045, ¶ 10, 140 N.M. 416, 143 P.3d 178, we explained that "[p]roof of child endangerment is sufficient for a conviction if a defendant places a child within the zone of danger and physically close to an inherently dangerous situation."

{21} Applying the substantial and foreseeable risk standard, our courts have found sufficient evidence of endangerment when the defendant invited a minor to drink alcohol, view pornography, and eat possibly tainted food in a filthy house, *id.* ¶¶ 15-16; when marijuana, a controlled substance determined by the Legislature to be hazardous, had been left by the defendant in his house in locations where children had been playing just prior to its discovery and in a baby's crib, *Graham*, 2005-NMSC-004, ¶¶ 10-12; when the defendant drove drunk and in a dangerous manner with her children in the car, *State v. Castañeda*, 2001-NMCA-052, ¶ 22, 130 N.M. 679, 30 P.3d 368; and when the defendant pointed a gun at a woman and threatened to kill her while her daughter stood behind her, *State v. McGruder*, 1997-NMSC-023, ¶¶ 37-38, 123 N.M. 302, 940 P.2d 150. Our courts have found insufficient evidence of child abuse by endangerment when the defendant had allowed a stroller to roll in front of him beyond his reach and it tipped over, injuring the child, *State v. Massengill*, 2003-NMCA-024, ¶ 47, 133 N.M. 263, 62 P.3d 354; when the defendant assaulted the child's mother while the child was in a different part of the house, *Trujillo*, 2002-NMCA-100, ¶¶ 19-20, 132 N.M. 649, 53 P.3d 909; and when the defendant had left his child in a car with the child's mother, ten to fifteen feet from the defendant's drug transaction, *State v. Roybal*, 115 N.M. 27, 34, 846 P.2d 333, 340 (Ct. App. 1992). These cases clearly require the State to prove the child's presence in a situation where harm was both probable and sufficiently grave to justify a criminal sanction.

{22} In this case, we are concerned with the lack of evidence that establishes the presence of the child in the home on or about August 12, 2004 and under conditions that could have endangered his life or health. The evidence supporting the jury's verdict is as follows. A social worker testified that Defendant told her that the child "lived with [Defendant]" at the house in Chapparal, but could provide no specific dates

that the child was present at the house, and in fact stated that the child was not present the night before the raid. A police officer testified that he had seen what appeared to be a child's room in the house but conceded that he had no personal knowledge about who lived in the room or when he or she had been present. The mere fact that the child normally resided in the home is insufficient. The Legislature requires actual presence, as evidenced by the basic facts detailed in Section 30-6-1(F)–that the child be allowed to *enter or remain* in the building at the relevant time. Similarly, every New Mexico case cited above has as its premise that the child was actually present when the dangerous situation occurred.

{23} In addition, our cases require a greater showing of risk of harm. Here, there was testimony that on the day of the raid, the house contained numerous items that were most likely used for methamphetamine production in the house. However, there was no evidence regarding when any of the items had been taken into the house, with the possible exception of some matches, pseudoephedrine, and ephedrine, which testimony implied may have been taken into the house about thirty-six hours before the raid. Police testified that some methamphetamine labs can be moved quickly from place to place and that others cannot, but did not specify into which category the lab in the house fell. Witnesses testified that some of the materials found in the house could be dangerous: iodine could result in burns, lye is a carcinogen, and organic solvents like acetone could be dangerous. However, there was no evidence that any of these legal, household chemicals were actually stored in a manner that could endanger a child in the house. There was ample evidence that the process of creating methamphetamine is extremely hazardous, releasing toxic gases and creating the potential for fires. However, there was no evidence regarding when or how often methamphetamine production had occurred in the house. Indeed, testimony suggested that this process takes only six to eight hours. There was evidence that, because of the hazards inherent in methamphetamine production and the likelihood that an entire house used in processing methamphetamine could become contaminated, police typically use fully contained suits to enter houses containing methamphetamine labs. However, there was no evidence that the house in Chapparal was actually contaminated. Finally, we note that no methamphetamine was found in the house.

{24} Viewing the evidence as a whole, we conclude that there was not sufficient evidence to support a finding of child abuse by endangerment. We concede that if the State had produced evidence that Defendant had allowed her child to be present during the process of methamphetamine production, or had stored such dangerous chemicals in ways that could have harmed her child, we would be highly inclined, in light of the precedents cited above, to conclude that there was sufficient evidence that she placed her child's life or health at risk. *Cf. Graham*, 2005-NMSC-004, ¶¶ 10-12 (finding sufficient evidence of endangerment when the defendant had allowed children to play in the vicinity of marijuana and marijuana was found in a child's crib). In the case before us, however, the State failed to provide any evidence whatsoever that Defendant allowed her child to be present in the house under hazardous conditions. Although a jury is certainly entitled to draw reasonable conclusions from the circumstantial evidence produced at trial, *see id.* ¶ 10, it must not be left to speculate in the absence of proof. *See Silva*, 2008-NMSC-051, ¶ 19 (reversing a conviction of tampering with evidence when the State showed that the police had failed to find a weapon that was previously in the defendant's possession, and did not produce any evidence that defendant had acted in any way to hide or destroy the weapon). In *State v. Leal*, 104 N.M. 506, 510, 723 P.2d 977, 981 (Ct. App. 1986), the Court of Appeals overturned a conviction for negligently permitting child abuse when the child's injuries occurred at Defendant's residence within twelve to eighteen hours before the child was taken to the hospital, but no specific evidence placed Defendant at the scene when the violence was perpetrated by another. We believe that, just as "[t]he fact that an injury occurred is not sufficient to prove this defendant guilty[,]" *id*., in the case at bar, the likelihood that a hazardous activity probably took place in the house

at some time is not sufficient to prove Defendant guilty of allowing her child to be present while it took place. There was no testimony that placed Defendant's child at the house under any hazardous conditions or suggested that hazardous conditions must have been ongoing in such a way that the jury could have judged the probability that the child must have encountered them at some point. Similarly, there was no testimony that indicated the house was actually contaminated or chemicals were stored in such a way that the child's presence at any time would have been dangerous. Even if the jury could have concluded that at some point over the months prior to the arrest, Defendant's child was likely to have been endangered by Defendant's activities, it would not have been entitled to convict; the jury instructions only charged Defendant for conduct occurring "on or about August 12, 2004." The State simply did not present any evidence to allow the jury to draw the specific inferences required for it to find endangerment. For these reasons, we find that there was insufficient evidence to support Defendant's conviction of child abuse.

CONCLUSION

{25} The Court of Appeals' opinion is reversed. Because the jury was instructed improperly and because there was insufficient evidence to convict Defendant, her conviction is vacated.

{26} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

MAES,
Justice (specially concurring).

MAES,
Justice (specially concurring).

{27} I concur in the majority opinion. I write separately, however, because I disagree with the majority that "[t]he mere fact that the child normally resided in the home is insufficient" to prove that the child was permitted "to enter or remain" in the home pursuant to NMSA 1978, Section 30-6-1(F) (2004, prior to amendments in 2005). I believe that, absent evidence to the contrary, it is reasonable to infer that a ten-year-old child sleeps in his primary residence and, therefore, the evidence in the present case was sufficient to prove that Defendant permitted the child to enter or remain in the home on the night of August 10, 2004. Nonetheless, for the reasons explained in the majority opinion, the evidence was insufficient to prove that the chemicals or equipment subsequently found in the home on the morning of August 12 posed a risk of danger to the child's life or health approximately two days earlier, on the night of August 10. As aptly stated by the majority, "in the case at bar, the likelihood that a hazardous activity probably took place in the house at some time is not sufficient to prove Defendant guilty of allowing her child to be present while it took place." Accordingly, the evidence was insufficient to support Defendant's conviction of negligently permitting child abuse contrary to Section 30-6-1(D).

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-048

Filing Date: September 15, 2009

Docket Nos. 30,956, 30,957, 30,958

F. FERRELL DAVIS,

Plaintiff-Petitioner and Cross-Respondent,

v.

DEVON ENERGY CORPORATION, et al.,

Defendants-Respondents and Cross-Petitioners.

Consolidated with:

PHILLIS IDEAL and COLLINS PARTNERS, LTD., a Texas limited partnership,

Plaintiffs-Petitioners and Cross-Respondents,

v.

BP AMERICA PRODUCTION COMPANY,

Defendant-Respondent and Cross-Petitioner.

Consolidated with:

SMITH FAMILY, L.L.C., for itself and all others similarly situated,

Plaintiff-Petitioner and Cross-Respondent,

v.

CONOCOPHILLIPS COMPANY, a Delaware corporation,

Defendant-Respondent and Cross-Petitioner.

ORIGINAL PROCEEDINGS ON CERTIORARI
James A. Hall, District Judge

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Robert E. Hanson
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for Respondents and Cross-Petitioners

OPINION

CHÁVEZ, Chief Justice.

{1} In these consolidated class actions, Plaintiff royalty owners allege on behalf of themselves and those similarly situated that Defendant gas producers have improperly deducted from Plaintiffs' royalty payments the costs of making coalbed methane (CBM) gas "marketable." Plaintiffs claim that despite the differing language in the various royalty agreements, Defendants in every case have breached an implied covenant prohibiting Defendants from deducting the costs of gathering, treating, and otherwise making the CBM gas marketable once it has been produced.

{2} Presented with Plaintiffs' motions to certify these classes, the district court concluded that Defendants' consistent treatment of class members by uniformly deducting certain costs from their royalties was sufficient to certify each class for declaratory and injunctive relief under Rule 1-023(B)(2) NMRA. However, the district court denied certification for monetary damages under Rule 1-023(B)(3), concluding that individualized inquiries into the many and various royalty agreements, as required by *Continental Potash, Inc. v. Freeport-McMoran, Inc.,* 115 N.M. 690, 858 P.2d 66 (1993) and *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 845 P.2d 1232 (1993), predominated over the common issues of law and fact. We affirm the district court's certification of these three classes under Rule 1-023(B)(2). However, we conclude that the district court's reliance on *Continental Potash* and *Mark V* as necessary to its determination of whether the implied covenant to make CBM gas marketable may be implied in each agreement was misplaced. We therefore reverse the district court's denial of class certification under Rule 1-023(B)(3) and remand to the district court.

I. CLASS ACTION CONTEXT

{3} We granted this interlocutory appeal to review the district court's certification orders under Rule 1-023(B)(2) and (B)(3).[1] These rules provide, in pertinent part:

> B. **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied, and in addition:
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Our class action certification rules mirror the federal rules. *See Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, 7, 144 N.M. 405, 188 P.3d 1156 (noting that "we may seek guidance from federal law applying the rule"). As the rule's text makes clear, one significant difference between (B)(2) and (B)(3) actions is that (B)(2) classes, unlike those certified under (B)(3), "have no requirement that the common questions predominate over individual questions, or that the class action be superior to other available methods for the fair and efficient adjudication of the controversy." 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* 4:11, at 62 (4th ed. 2002). Instead, (B)(2) certification requires only that the defendant "has acted or refused to act on grounds generally applicable to the class," Rule 1-023(B)(2), such that "final relief of an injunctive nature or of a corresponding declaratory nature[] settl[es] the legality of the behavior with respect to the

[1] Defendants do not contend that the requirements of Rule 1-023(A) have not been met. Thus, we accept that they have been satisfied for the purposes of our review. *See* Rule 1-023(B) ("An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied. . . .").

class as a whole[.]" Fed. R. Civ. P. 23 advisory committee note to subdivision (b)(2). The predominancy and superiority requirements "are applicable only for Rule 23(b)(3) class actions." Conte & Newberg, *supra* 4:11 at 62.

{4} For the purpose of our review, we accept as true all well-pled factual allegations from Plaintiffs' complaints. *See Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, 23, 142 N.M. 557, 168 P.3d 129 (at the certification stage, "the court accept[s] Plaintiffs' factual allegations about the merits as true and decline[s] to examine evidence proffered by Defendants that dispute[s] such allegations"). Class certification is not the appropriate time to decide the merits of the case, *Ferrell*, 2008-NMSC-042, 2 n.1, because "'[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)); *see also Ferrell*, 2008-NMSC-042, 7 (noting that our "current class action rule mirrors the federal rule upon which it is based. Thus, we may seek guidance from federal law applying the rule." (citations omitted)). These principles do not mean that the courts should "blindly accept any conclusory allegations which parrot Rule [1-0]23 [NMRA] requirements." *Armijo*, 2007-NMCA-120, 23 (internal quotation marks and citation omitted). Rather, the court should "engage in a rigorous analysis to determine whether Plaintiffs satisfied the requirements of Rule 1-023." *Id.*

II. BACKGROUND

{5} Defendants are energy companies that either own or have owned working interests in various leases, units, and wells that produce CBM gas from the Fruitland coal formation of New Mexico's San Juan Basin. Plaintiffs seek to represent classes of hundreds of individuals and entities that own thousands of royalty interests and overriding royalty interests (collectively, "royalties") in Defendants' CBM gas production. Plaintiffs allege that the CBM gas produced from the Fruitland formation cannot be sold until it has been gathered, compressed, dehydrated, and otherwise treated to remove impurities such as carbon dioxide and water. Whether those costs may be deducted from Plaintiffs' royalties is the focus of the parties' dispute.

{6} Plaintiffs offer a number of theories purporting to grant them relief. Each claim, however, is founded upon the allegation that Defendants have breached the royalty agreements by deducting from their royalty payments the costs of making the CBM gas "marketable." They contend that under the implied covenant to market CBM gas, recognized by this Court in *Darr v. Eldridge*, 66 N.M. 260, 263, 346 P.2d 1041, 1044 (1959), Defendants have an implied duty to make CBM gas a "marketable product" such that the costs of gathering, compressing, dehydrating, and otherwise treating the CBM gas before it is sold in the interstate market may not be passed on to the royalty owners. This new covenant has been called the "first-marketable product rule," *see*, *e.g.*, *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 904 (Colo. 2001) (en banc), as well as the "marketable condition rule." *See*, *e.g., Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1036-37 (D.C. Cir. 2008). Plaintiffs' requested relief includes a declaratory judgment, a permanent injunction, and money damages. Defendants deny any wrongdoing.

{7} The district court consolidated these three cases for the purposes of discovery and class certification. In each case, Plaintiffs moved to certify a class of royalty owners under both Rule 1-023(B)(2) and (B)(3), and Defendants opposed certification. At the heart of the parties' dispute was whether the many royalty instruments are sufficiently similar in relevant respects to merit class certification. Defendants argued that even if the marketable condition rule applies in New Mexico, each owner's contract must be independently reviewed, along with extrinsic evidence relevant to each party's intention, to determine if that covenant appears in each agreement. Therefore, Defendants contended that because the royalty language in many contracts is different, litigating these claims on a class-wide basis would

be unmanageable under any provision of Rule 1-023. Plaintiffs argued that the agreements are sufficiently similar to warrant class certification because none expressly permitted the deductions of the costs necessary to make the CBM gas "marketable." Plaintiffs also argued that Defendants' uniform treatment of Plaintiffs in deducting those costs is sufficient to certify the class.

{8} In three similar memorandum opinions and corresponding orders, the district court found that in all three cases, there exist variations in the language of the royalty instruments that could affect whether the costs of removing the impurities could be deducted from Plaintiffs' royalties. However, the district court also found that despite these differences in the written words of each contract, Defendants take a "standardized approach" in calculating royalty payments. The district court concluded that all Defendants deduct certain costs uniformly, regardless of the various language in each royalty agreement.[2]

{9} Based on this "consistent treatment" in calculating royalties, the district court concluded that Defendants had acted or refused to act on grounds generally applicable to the class, such that if Defendants were found liable, the court would be in a position to craft declaratory and injunctive relief to require them to comply with their contractual obligations. Accordingly, the district court certified the following (B)(2) class in each case:

> All present owners of royalty and overriding royalty interests, which burden [Defendants'] working interests in the units, leases, and wells which are now or have been productive of coal bed [sic] methane gas from the Fruitland coal formation underlying New Mexico lands, whether now or formerly owned or operated by [Defendants].

[2] The district court noted an exception to this conclusion: those royalty instruments that require payment on a "same as fed" basis, which do not allow the allocation of certain post-production costs to the royalty interest owner. *See* 3 Howard R. Williams et al., *Oil and Gas Law* 645.2, at 612-612.1 (2008).

{10} While the district court certified the class under (B)(2), it denied certification under (B)(3), concluding that individualized issues predominated over common ones and that management of Plaintiffs' claims would be "extremely difficult." Unlike its conclusion that it would be in a position to grant declaratory and injunctive relief, the district court concluded that "determining whether a particular class member's contract has been breached and, if so, the appropriate damages, would involve significant individual issues." The district court reasoned that because the parties would have "the opportunity to present evidence to determine whether each contract is ambiguous, the evidentiary presentations on the variety of contract terms would overwhelm the case." Thus, the court concluded that "[w]hile common questions of law and fact do exist in [these cases], those common issues do not predominate over the individual issues in the claims for damages."

{11} After being denied interlocutory review in the Court of Appeals, Plaintiffs sought certiorari review in this Court of the denial of their (B)(3) class, and Defendants sought certiorari review of the certification of the (B)(2) class. We consolidated these three cases and granted Plaintiffs' and Defendants' petitions. *Davis v. Devon Energy Corp.*, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181; *Ideal v. BP Am. Prod. Co.*, 2008-NMCERT-003, 143 N.M. 683, 180 P.3d 1182; *Smith Family, L.L.C. v. ConocoPhillips Co.*, 2008-NMCERT-003, 143 N.M. 683, 180 P.3d 1182.

III. DISCUSSION

A. Standard of Review

{12} We review the district court's decision to certify or not certify a class action for an abuse of discretion. *See Armijo*, 2007-NMCA-120, 17 ("[T]he district court has broad discretion whether or not to certify a class." (internal quotation marks and citation omitted)); *Brooks v. Norwest Corp.*, 2004-NMCA-134, 7, 136 N.M. 599, 103 P.3d 39 (declining the plaintiffs' invitation

"to apply a 'less deferential standard' where the district court has denied [class] certification"). However, the district court's interpretation of Rule 1-023 is a question of law that is reviewed de novo, *Ferrell*, 2008-NMSC-042, 39, as are other questions of law. *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, 5, 141 N.M. 387, 156 P.3d 25.

{13} When making its certification decision, the district court will often make factual findings beyond the facts it accepts as true from the plaintiff's complaint. This is because the district court "must engage in a rigorous analysis of whether the Rule's requirements have actually been met[,]" *Ferrell*, 2008-NMSC-042, 8 (internal quotation marks and citation omitted), and may "probe behind the pleadings [to] forecast what kind of evidence may be required or allowed at trial." *Armijo*, 2007-NMCA-120, 22 (internal quotation marks and citation omitted). We review the district court's factual findings for substantial evidence. *See Brooks*, 2004-NMCA-134, 7 ("If the correct law has been applied to the facts, the district court's [class certification] decision must be affirmed when it is supported by substantial evidence." (citation omitted)). When there are no challenges to the district court's factual findings, we accept those findings as conclusive. *State v. Rotherham*, 1996-NMSC-048, 122 N.M. 246, 266, 923 P.2d 1131, 1151 (Minzner, J., specially concurring) (stating when reviewing the record for substantial evidence to support the district court's findings of fact, findings not challenged in the parties' briefs will be "deemed conclusive" (internal quotation marks and citation omitted)). We discern no such challenges here.

B. We do not Address the Marketable Condition Rule

{14} The district court ruled on summary judgment in *Ideal* and *Smith* that "under the implied duty to market, the marketable condition rule applies in New Mexico." Although the district court was not presented with a similar motion for summary judgment in *Davis*, its memorandum opinion in *Davis* is essentially identical to those in *Ideal* and *Smith* in that they each assume that the marketable condition rule applies in New Mexico. For the purposes of our review, we accept this interlocutory ruling of the district court as applicable in each case, and we do not address the existence of the marketable condition rule in New Mexico or its applicability in any of these cases. *Cf. Ferrell*, 2008-NMSC-042, 2 n.1 (declining to reach the substantive mootness issue "[b]ecause the validity of class certification [was] the only issue on appeal").

{15} The district court left open the following questions, among others, pertaining to the scope of the marketable condition rule and its application in these cases: (1) whether, under the marketable condition rule, Defendants are obligated to pay royalties on a marketable product and to bear the cost of placing the gas in a marketable condition; (2) whether CBM gas from the Fruitland formation is in a "marketable condition" when it emerges from the wellhead; (3) whether the costs deducted by Defendants were necessary to make the product marketable; and (4) whether those costs are actually and reasonably incurred. These issues are directly relevant to the existence and application of the marketable condition rule in New Mexico and will be the subject of the parties' continued litigation. Thus, the question of whether and under what circumstances the marketable product rule applies in New Mexico is not ripe for review at this time. *See Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, 24, 144 N.M. 636, 190 P.3d 1131 ("[T]he doctrine of ripeness is intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." (alteration in original, internal quotation marks and citation omitted)). Therefore, nothing in this opinion should be construed as either the recognition or disapproval of the marketable condition rule, its scope, or its applicability. We discuss only the propriety of the district court's certification orders.

C. Certification of the Classes Under Rule 1-023(B)(2) Was Proper

{16} Defendants first argue that the district court's (B)(2) certification was in error because the requested declaratory and injunctive relief will not be uniform for each class member. They contend that even though their accounting methodologies in deducting certain costs are uniform for each class, to determine if that methodology is improper, and, if so, what relief is appropriate, the district court must review the terms of each royalty agreement, as well as extrinsic evidence relevant to the parties' intentions. These inquiries, they assert, are "highly individualized" and may require that the district court fashion a variety of remedies, "each tailored to fit the varying circumstances of the individual Plaintiffs' royalty instruments." Thus, according to Defendants, this necessity for "individualized proof" of the terms of each agreement makes injunctive relief impossible "with respect to the class as a whole[.]" Rule 1-023(B)(2). We disagree.

{17} Defendants' reliance on "individualized proof" and "highly individualized inquiries" is an improper attempt to incorporate the predominance and superiority requirements of Rule 1-023(B)(3) into the (B)(2) certification analysis. They effectively argue that because individualized inquiries might be required to determine if each royalty agreement was breached, those inquiries make class certification imprudent. However, the district court need not be satisfied that common issues predominate or that a class action is a superior method for resolving class members' claims in a (B)(2) action. Rather, the district court must only conclude that "the party opposing the class . . . acted or refused to act or failed to perform a legal duty . . . on grounds generally applicable to all class members" and that the final injunctive or declaratory relief will "settl[e] the legality of the behavior with respect to the class as a whole[.]" 2 Conte & Newberg, *supra* 4:11 at 55, 56.

{18} Here, the district court found that Defendants acted on grounds generally applicable to all class members by deducting certain costs uniformly in all royalty agreements, regardless of the language of those instruments. In Devon's case, the district court found that:

> Devon calculates royalty based on sale of the gas at the wellhead. Devon uniformly calculates "at the well" valuation by computing a gross value based upon actual sales to third parties at the tailgate of the plant and then netting that value back to the wellhead or central delivery point by deducting costs for gathering, dehydrating and [carbon dioxide] removal incurred between the well or central delivery point and the sales point.

With respect to BP, the district court found that its "various methodologies all include deductions for one or more of the following services: fuel, transportation, gathering, compression, dehydration, and treatment, including the removal of [carbon dioxide] from CBM." Finally, regarding Conoco, the district court found that it pays class members "on a 'proceeds' basis (weighted average sales price less post-production costs incurred between the well and the sales point)." These findings are not challenged by Defendants on review.

{19} Given Defendants' standardized treatment of all class members in deducting certain costs, we agree with the district court that it would be in a position to declare the rights of the parties on a class-wide basis with respect to the propriety of those deductions. For those agreements in which the marketable condition rule may be implied, a matter we address later in this opinion, the court would be in a position to adjudicate on a class-wide basis whether the costs uniformly deducted by Defendants were necessary to put the CBM gas in a marketable condition. Thus, should Plaintiffs prevail, the district court would be in a position to grant class-wide injunctions to compel Defendants to stop deducting those costs from the royalty payments. Therefore, Defendants' reliance on individualized inquiries is misplaced.

{20} Finally, with respect to the district court's (B)(2) ruling, Defendants argue that certification

was inappropriate because monetary damages predominate Plaintiffs' claims. They rely on federal precedent for the proposition that injunctive and declaratory relief must be the predominant remedy in order to certify a class under (B)(2). *See, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998) (noting that the Fifth Circuit has "adopted the position taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory" (footnote omitted)). Defendants argue that because Plaintiffs' claims are dominated by requests for money damages, certification of the (B)(2) class was an abuse of discretion. Finally, they argue that the monetary relief is not a "group remedy" in that damages available to each class member depend on the "varying circumstances" of each class member's case. We are not persuaded.

{21} Although we have said that Rule 1-023(B)(3) "generally applies when class members seek monetary damages[,]" *Ferrell*, 2008-NMSC-042, 10 (citation omitted), our appellate courts have not yet considered the impact of requests for monetary relief on class certification under Rule 1-023(B)(2). Those jurisdictions that impose a requirement that requests for money damages must not predominate the plaintiff class's claims do so in reliance on the Advisory Committee Note to Federal Rule of Civil Procedure 23(b)(2), which explains that certification under that provision "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee note to subdivision (b)(2) (emphasis added); *see also Allison*, 151 F.3d at 411. The primary concern appears to be that the class members' rights in (B)(3) actions to receive notice of the class action and to opt out of that litigation are not required in (B)(2) cases. *See* Rule 1-023(C)(2); *Allison*, 151 F.3d at 412-13. These rights are protected in (B)(3) cases because "[m]onetary remedies are more often related directly to the disparate merits of individual claims." *Allison*, 151 F.3d at 413. In other words, "a class seeking substantial monetary remedies will more likely consist of members with divergent interests." *Id.*

{22} These divergent interests, it is said, are minimal when the plaintiff class seeks declaratory and injunctive relief because "its members suffer from a common injury properly addressed by class-wide relief[.]" *Id.* Classes certified under (B)(2) are "assumed to be a homogenous and cohesive group with few conflicting interests among its members." *Id.* Thus, the rights to notice and opt out are less critical in (B)(2) cases because the need to protect the individual rights of class members is said to be less critical than in cases where individualized issues relating to money damages are at the forefront of the litigation.

{23} However valid the concerns are about the need to protect an individual's right to litigate his or her money damages claim, they must be considered in light of the reality that "[m]onetary damages are almost always requested when injunctive relief is sought." 2 Conte & Newberg, *supra* 4:11 at 61. We agree that "[r]efusing to certify a Rule 23(b)(2) class action based on a request for monetary relief defeats the possibility of ever maintaining an injunctive class action." *Id.* at 61-62. What is more, disputes about which type of relief, injunctive or monetary, predominates the plaintiff class's claims are difficult to resolve because they require a court to determine which relief is more important to the plaintiff class. *See id*. § 4:14 at 93-94. We believe that rather than attempting to weigh which form of relief is the focus of the plaintiffs' case, "the court should conclude that when the Rule 23(a) prerequisites are satisfied and declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members." *Id.* at 94. When both the injunctive and monetary relief are of roughly equal importance, and the other requirements of certification have been met, (B)(2) certification is proper. *Id.* at 93.

{24} Although we recognize that our holding will allow actions for money damages and injunctive relief to proceed under (B)(2), we are nevertheless mindful of the importance of the notice and opt-out requirements of (B)(3) actions. *See Allison*, 151 F.3d at 412 n.4 (recognizing due process rights to notice and opt out in class actions seeking monetary relief). Therefore, to protect the rights of absent class members, courts should engage in a practical assessment of the plaintiffs' claims and, consistent with their broad discretion to manage class litigation, *see Salcido v. Farmers Ins. Exch.*, 2004-NMCA-006, 9, 134 N.M. 797, 82 P.3d 968, determine when and if notice and the right to opt out of the damages portion of the suit should be made available. *See* 2 Conte & Newberg, *supra* 4:14 at 94-95, 103, 104-06 (listing options for class certification when both money damages and injunctive relief are sought by the plaintiff class). For example, the court could require notice and opt out in a (B)(2) case under Rule 1-023(D)(2), pursue a hybrid certification where notice and opt out are provided only after a determination of liability has been made, or certify only particular issues under Rule 1-023(C)(4)(a). *See* Thomas R. Grande, *Innovative Class Action Techniques—The Use of Rule 23(B)(2) in Consumer Class Actions*, 14 Loy. Consumer L. Rev. 251, 264-67 (2002). We do not determine whether the district court must provide notice and the right to opt out to (B)(2) class members in this case, as that issue is not before us. We simply acknowledge that district courts and litigants should be aware that certification of a (B)(2) class requesting significant money damages might present additional management issues.

{25} Here, the district court concluded that while Plaintiffs seek to recover damages for the class, "[t]o say that the primary relief requested is monetary damages fails to recognize the likelihood of substantial royalty payments which will occur in the future. Given the reserves of CBM gas, the requested declaratory relief and injunctive relief could be of greater import than the claim for damages." We agree. Although we cannot tell from the record what a typical class member's damages award might be if Defendants are found liable, we are nonetheless convinced that Plaintiffs are equally concerned about correcting Defendants' allegedly improper past conduct, as well as their conduct in the future. For each of these reasons, therefore, we affirm the district court's certification of all three classes under Rule 1-023(B)(2).

D. We Reverse the District Court's Denial of Class Certification Under Rule 1-023(B)(3)

{26} In denying class certification under Rule 1-023(B)(3), the district court relied on two authorities, *Continental Potash* and *Mark V*. The court determined that under *Continental Potash*, it must examine the language from each royalty agreement to determine if its express terms addressed whether the costs of making CBM gas marketable could be deducted from the royalty calculations. It found that Defendants established that the express terms of the contracts vary: there are at least nineteen different variations in *Davis*, thirty-four variations in *Ideal*, and an undetermined number of variations in *Smith*. Thus, according to the district court, it would be "impossible to conclude that the contract analysis would be the same for the proposed class members," and therefore the individualized inquiries required under *Continental Potash* predominate over any common issues of law or fact.

{27} The district court also concluded that under *Mark V*

> the court would be required at a minimum to receive evidence on relevant usage of trade, course of dealing and course of performance to determine whether an ambiguity exists in the express terms of the contracts. Even for those contracts that have the same express terms, it may be necessary to receive evidence regarding the circumstances surrounding the making of the individual contracts.

In sum, the court concluded that because it must look to the express language of potentially thousands of contracts under *Continental Potash*, as

well as extrinsic evidence of the parties' intentions under *Mark V*, "[m]anagement of a [(B)(3)] class action under the various claims for damages would be extremely difficult." It stated that "[w]ith the opportunity to present evidence to determine whether each contract is ambiguous, the evidentiary presentations on the variety of contract terms would overwhelm the case." We review the district court's interpretation of *Continental Potash* and *Mark V* in light of the requirements of interpreting Rule 1-023 de novo as questions of law. *See Ferrell*, 2008-NMSC-042, 39.

{28} Plaintiffs argue that the district court's reliance on *Continental Potash* and *Mark V* was misplaced, as those cases are inapplicable to the facts before the court in these consolidated class actions. While we acknowledge that the district court's reading of *Continental Potash* and *Mark V* was reasonable, we conclude that its reliance on these two cases was in error. We therefore reverse the district court's denial of certification under Rule 1-023(B)(3) and take this opportunity to clarify the requirements of *Continental Potash* and *Mark V* as they apply to the implication of legal duties on one or more parties to a mining contract.

{29} In *Continental Potash*, this Court adopted Texas law to determine whether an implied covenant exists in the context of mining law.

> [W]hen parties reduce their agreements to writing, the written instrument is presumed to embody their entire contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole. An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole.

115 N.M. at 704, 858 P.2d at 80 (internal quotation marks and citations omitted). The Court concluded that "[t]he general rule is that an implied covenant cannot co-exist with express covenants that specifically cover the same subject matter." *Id.* (citation omitted).

{30} In addition to evaluating the express terms of an agreement to determine if they conflict with the provisions of a purported implied covenant, *Continental Potash* requires an examination of the agreement as a whole, as well as extrinsic evidence, to determine if implying those provisions would be consistent with the parties' intentions.

> When it is clear, however, from the relevant parts of the contract taken together and considered with the facts and circumstances surrounding the execution of the agreement, that the obligation in question was within the contemplation of the parties or was necessary to effect their intention, then such obligation may be implied and enforced.

Id. In implying a covenant, then, *Continental Potash* relies heavily on the parties' intentions, as evidenced by their written agreement.

{31} The district court apparently relied on our use of the term "implied covenant" to describe the duty to market in *Darr*, 66 N.M. at 263, 346 P.2d at 1044, in determining that the provisions of *Continental Potash* applied to a determination of whether the marketable condition rule may be implied as a covenant in each royalty agreement.

115 N.M. at 704, 858 P.2d at 80 (discussing when covenants may be implied in mining contracts). What *Continental Potash* failed to make clear, however, is that there are different types of "covenants" that may be implied in a given agreement, and depending on the nature of the promise to be implied, different rules of construction apply. In other words, *Continental Potash* is not applicable in all cases.

{32} In determining whether a covenant may be implied in a given contract, courts must first determine the legal theory supporting the implication of that promise. In implying a covenant, courts may either be effectuating the parties' intentions by interpreting the written terms of an agreement and analyzing the parties' conduct, or they may be stating that a duty imposed by law creates an obligation on one or more of the parties to the agreement. Depending on the nature of the implied promise, the court may or may not be required to interpret the parties' agreement and effectuate their intentions.

> When a court finds a promise by implication, its procedure may be nothing more than the ordinary interpretation of word symbols; it may be the interpretation of a person's acts and other conduct not including words; *it may be the judicial determination that a legal duty exists, stating the result in the language of promise without doing anything that can properly be called interpretation*; or it may be a combination of any two of these or of all three at once.

6 Arthur Linton Corbin, *Corbin on Contracts* 561, at 1-2 (1979) (emphasis added). Thus, in implying promises in contracts, courts must be clear if the "'implication' is true interpretation or is purely judicial construction." *Id.* at 4. The former requires an analysis of the parties' intentions. The latter is merely a judicial determination of the duties the law imposes on the parties.

{33} In this way, the basis supporting the implication of the promise or covenant determines the court's analysis. If the court is identifying an implied legal duty of a party to a contract, it may do so regardless of the parties' intentions. *See, e.g.*, *Sanders v. FedEx Ground Package Sys., Inc.*, 2008-NMSC-040, 7, 144 N.M. 449, 188 P.3d 1200 (stating that the implied covenant of good faith and fair dealing is implicit in every contract). However, if a covenant or promise does not operate to impose a duty as a matter of law, any implied obligation must arise from the parties' intentions. This latter "process of implication is treated instead as a process of interpretation, a process of logical and factual inference and not a pure construction or creation by the court." 6 Corbin, *supra* 562, at 10. We note that:

> It would probably be advantageous if when finding a promise by "implication" the court would ask itself whether it finds the promise by actual interpretation—that is, by searching for the meaning given to the words of the contract by one or both of the parties[—]or is putting into promissory language its finding that a party to the contract ought now to act as if he had made such a promise even though nobody actually thought of it or used words that express it.

Id. 561 at 4. It is this distinction that we did not make clear in *Continental Potash*.

{34} *Continental Potash* applies to the process of interpreting an agreement and its surrounding circumstances to effectuate the parties' intentions, not to the implication of a legal duty controlling the parties' conduct. *Continental Potash* held that the defendants did not have an implied duty to blend different grades of potash and refrain from "high-grading" the mined potash, because "express provisions in the contract according the defendants exclusive discretion and control in the mining operations left no room for the implied covenants that the trial court enforced against [them]." 115 N.M. at 703, 704-05, 858 P.2d at 79, 80-81. By looking to the express provisions of the parties' contract, this Court determined that the parties intended that the defendants would have exclusive control over certain mining operations. *Id.* at 705, 858 P.2d at

81. Thus, the Court held that these implied covenants could *not* be implied as legal duties as a matter of law. *Id.* at 705-06, 858 P.2d at 81-82. As a result, the analysis set forth in *Continental Potash* only applies to those promises that may be implied because the parties so intended them. Its analysis does not apply to covenants that impose legal duties upon contracting parties as a matter of law.

{35} In this way, *Continental Potash* is inapplicable to the implication of the marketable condition rule as announced by the district court in this case. The district court ruled that "*under the implied duty to market*, the marketable condition rule applies in New Mexico." (Emphasis added.) In *Darr*, this Court recognized the implied covenant "to make diligent efforts to market the production in order that the lessor may realize on his royalty interest." 66 N.M. at 263, 346 P.2d at 1044 (internal quotation marks and citation omitted); *see also Libby v. De Baca*, 51 N.M. 95, 99, 179 P.2d 263, 265 (1947) (recognizing the lessee's duty to "proceed with reasonable diligence, as viewed from the standpoint of a reasonably prudent operator, having in mind his own interest as well as that of the lessor, to market the product") (citation omitted). We implied this legal duty on oil and gas producers in equity, without looking to the language of the agreements or other evidence of the parties' intentions. *Darr*, 66 N.M. at 264, 346 P.2d at 1044. Therefore, given the district court's conclusion that the duty to market, which applies in equity irrespective of the parties' intentions, incorporates the duty to put CBM gas in a marketable condition (a conclusion we do not review in this opinion), the requirements of *Continental Potash* are likewise inapplicable to a determination of whether the marketable condition rule may be implied in each royalty agreement.

{36} For the same reasons that *Continental Potash* is inapplicable to this case, the extrinsic evidence analysis required by *Mark V* is also unnecessary. In *Mark V* we "discuss[ed] the appropriate methods for a trial court to use in determining whether a contract contains ambiguous terms and in resolving any ambiguities thus discovered." 114 N.M. at 779, 845 P.2d at 1233. As we have just explained, given the district court's summary judgment ruling, the provisions of each royalty agreement are irrelevant to the implication of the marketable condition rule in each contract because the district court is imposing a legal duty on Defendants. This is a matter of "purely judicial construction." 6 Corbin, *supra* 561, at 4. Thus, the determination and resolution of any ambiguities in the contract's terms are likewise unnecessary.

{37} In denying class certification under Rule 1-023(B)(3), the district court relied exclusively on *Continental Potash* and *Mark V* to determine that individualized issues predominated over common ones and that the class litigation would not be a superior method for resolving Plaintiffs' claims because managing the various claims for damages would be difficult. Although we make no decision in this opinion regarding the existence or the applicability of the marketable condition rule, we believe that in light of our holding that *Continental Potash* and *Mark V* are inapplicable to these class actions, the district court's conclusion that the marketable condition rule has been incorporated in the existing duty to market is sufficient to certify these classes under Rule 1-023(B)(3). The primary issue to be litigated on remand is whether the costs deducted by Defendants were necessary to make the CBM gas "marketable." This is an issue common among all class members and is appropriate for class certification. The district court retains broad discretion in managing these class actions on remand. For example, should it see fit, it may divide the class into subclasses under Rule 1-023(C)(4)(b) or otherwise alter, amend, or decertify the class prior to a decision on the merits. Rule 1-023(C)(1).

E. The District Court did not err by Failing to adopt formal Findings of Fact and Conclusions of Law

{38} Plaintiffs contend that the district court's failure to enumerate specific findings of fact and conclusions of law in its certification orders was in error. They admit that "Rule 1-023 does not

require that a class certification order contain findings of fact." *Salcido*, 2004-NMCA-006, 19. Instead, they contend that under *Salcido*, the district court is required to enter formal findings of fact and conclusions of law in a class certification order when requested to do so by the parties, as they did here. Plaintiffs are correct that *Salcido* did suggest that a district court must honor a party's request to enter findings of fact and conclusions of law when making a class certification decision. *See id.* ("[I]f Defendants wanted to have findings and conclusions accompanying the order, they could have submitted their own and requested they be entered."). *Salcido* relied on *DeTevis v. Aragon*, 104 N.M. 793, 800, 727 P.2d 558, 565 (Ct. App. 1986) for the proposition that "[t]he trial court must, if requested, adopt findings of fact resolving the material issues raised by the parties." *Id.* (internal quotation marks omitted). In support of that proposition, *DeTevis* relied on the predecessor to Rule 1-052 NMRA. *DeTevis*, 104 N.M. at 800, 727 P.2d at 565. Rule 1-052 charges the district court with entering findings of fact and conclusions of law in a case tried by a judge without a jury. *See* Rule 1-052(A). *Salcido* improperly equated the necessity of the court entering findings of facts and conclusions of law in non-jury trials with those "strongly encourage[d]" to be entered in class certification orders. *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, 45, 143 N.M. 158, 173 P.3d 765. Thus, to the extent that *Salcido* suggested that the district court must enter findings of fact and conclusions of law in a class certification order based on Rule 1-052, it is incorrect.

{39} The Court of Appeals has suggested in "class certification cases that district courts should provide findings of fact and conclusions of law." *Romero v. Philip Morris Inc.*, 2005-NMCA-035, 33, 137 N.M. 229, 109 P.3d 768; *see also Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, 19 n.1, 136 N.M. 454, 99 P.3d 1166 ("We take this opportunity to state a strong preference for district courts entering formal findings of fact and conclusions of law in support of their ruling in Rule 1-023 proceedings."), *abrogated on other grounds by Ferrell v. Allstate Ins. Co.*, 2007-NMCA-017, ¶ 40, 141 N.M. 72, 150 P.3d 1022, *rev'd by Ferrell*, 2008-NMSC-042. We agree that "[f]indings will make review on appeal more informed and will force the parties to explicitly address the Rule's requirements." *Berry*, 2004-NMCA-116, 19 n.1 (citation omitted). Like the Court of Appeals, we therefore strongly encourage the district court to enter findings of fact and conclusions of law in their class certification orders. However, entering findings of fact and conclusions of law is not a prerequisite to our review of the district court's certification order. The district court in Plaintiffs' cases actually made factual findings and entered conclusions of law in its memorandum opinions. Its findings and conclusions may not have been enumerated as such in a formal manner, but, as indicated throughout this opinion, they were nonetheless present.

IV. CONCLUSION

{40} For the reasons stated above, we affirm the district court's certification of the classes under Rule 1-023(B)(2). We reverse the district court's denial of certification under Rule 1-023(B)(3) and remand to the district court. While our ruling requires certification of these classes under both (B)(2) and (B)(3) at this stage, the district court retains its broad discretion to manage these class actions as this litigation progresses.

{41} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-054

Filing Date: November 6, 2009

Docket No. 31,244

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

MICHAEL SLAYTON,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Steven L. Bell, District Judge

Henninghausen & Olsen, L.L.P.
Kenneth B. Wilson
Roswell, NM

for Petitioner

Gary K. King, Attorney General
Martha Anne Kelly, Assistant Attorney General
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Chief Justice.

{1} After rear-ending a vehicle and leaving the scene of the accident, Defendant Michael Slayton was handcuffed in his driveway by a police service aide (PSA), pending the arrival of police officers to investigate Defendant's involvement in the accident. As a result of the investigation, Defendant was charged with aggravated DWI, second offense, contrary to NMSA 1978, Section 66-8-102 (1953, prior to 2007 amendments). At trial Defendant sought to suppress all evidence following his detention and arrest because the PSA who detained him was employed as a non-commissioned officer of the Roswell Police Department and did not have the statutory authority to detain or arrest an individual suspected of DWI. Defendant contends that the PSA's lack of statutory authority to detain or arrest him is an unreasonable seizure under the Fourth Amendment of the United States Constitution, entitling him to the remedy of suppression. While we agree that the PSA did not have the authority to detain or arrest an individual suspected of a crime, we disagree that a state actor's unauthorized seizure of a person suspected of committing a crime is per se a violation of the Fourth Amendment. Because Defendant has not argued either that the unauthorized seizure violated the New Mexico Constitution or that the Legislature has made suppression the remedy for an unauthorized arrest, we do not address those issues. Finally, we disagree with Defendant's final argument on appeal that his consent to a blood test was coerced. Therefore, we affirm Defendant's conviction.

I. BACKGROUND

{2} On the afternoon of January 7, 2007, PSA Ali Blake (Blake) responded to a traffic accident in Roswell, New Mexico. Blake observed that a red vehicle had been rear-ended by a vehicle with white paint, and witnesses at the scene informed her that the driver of a white truck rear-ended the vehicle and left the scene. Blake obtained the license plate of the white truck from a witness and was told in which direction the truck was traveling as it left the scene. Blake located the truck parked in Defendant's driveway with Defendant still inside, either unconscious or asleep.

{3} Blake knocked on the truck's window, awakening Defendant and ordering him to get out of the truck. When Defendant got out of his truck, Blake detected an odor of alcohol coming from him and noticed several boxes of ammunition on the truck's floorboard. Once he was out of the truck, she asked

Defendant to get on his knees. Instead of complying, Defendant tried to walk toward his house but tripped and fell, injuring his nose. Citing concerns for both her safety and that of Defendant, Blake handcuffed Defendant and called police officers and medical assistance personnel to the scene.

{4} Roswell Police Officer Scott Stevenson responded to Blake's request for assistance. Upon arriving at Defendant's house, Officer Stevenson approached Defendant, who was sitting on the ground. He noticed that Defendant appeared disoriented or confused, had bloodshot, watery eyes, and slurred speech. Officer Stevenson reported that Defendant admitted he had been drinking vodka "all day" and driving his truck, but he could not remember the crash or why his nose was bleeding. Defendant was taken to the hospital, where Officer Stevenson formally placed him under arrest for DWI. Approximately four hours after the accident, Defendant consented to have his blood drawn to test his blood alcohol content (BAC). His BAC was 0.36 grams of alcohol per 100 milliliters of blood.

{5} Defendant filed three motions to suppress evidence in district court, two of which are the subject of this appeal. He moved the court to suppress all evidence obtained by the police after his detention or arrest because "[t]he arrest and detention of Defendant [were] without proper police authority" and were therefore illegal. He also moved to suppress all evidence relating to the blood alcohol draw because it was taken without Defendant's voluntary consent. The district court denied these two motions. Defendant entered a conditional plea of no contest to aggravated DWI, second offense, a misdemeanor, preserving his right to appeal the "issues surrounding his motions to suppress/unlawful arrest/blood alcohol draw without consent[.]" He then appealed to the Court of Appeals.

{6} In a divided memorandum opinion, the Court of Appeals affirmed the trial court's order denying Defendant's motions to suppress. *State v. Slayton*, No. 27,892, slip op. at 2 (N.M. Ct. App. June 30, 2008). The majority held that Defendant failed to preserve the issue of Blake's authority to detain him because he had only argued to the district court that Blake was without the authority to arrest him. *Id.* at 6-7. The Court concluded that Blake's detention of Defendant did not amount to an arrest, and it therefore did not need to address whether Blake had the authority to arrest. *Id.* at 12. Regarding the issue of Defendant's consent to the blood draw, the Court held that Defendant was not forced to submit to the test, and therefore the blood draw evidence was not subject to suppression. *Id.* at 12-13.

{7} The dissent concluded that Defendant had preserved the issue of Blake's illegal detention of him. *Id.* at 17. In any case, the dissenting judge would have held that Defendant was arrested by the PSA, who was not a commissioned police officer. *Id.* at 22 (Vigil, J., dissenting). Judge Vigil explained that:

> The majority's reasoning, with which I disagree, allows it to not address the consequences of an illegal detention or arrest by a PSA officer. I would address the merits of whether Defendant's detention and arrest were legal, and if they were not, the consequence. One consequence might be that Defendant's consent to the blood test was not sufficiently attenuated from PSA Blake's unconstitutional conduct. Without such an analysis, I do not agree with the majority's conclusion concerning Defendant's consent to the blood test.

Id. at 22-23. This Court granted certiorari and now addresses the two suppression issues. *State v. Slayton*, 2008-NMCERT-008, 145 N.M. 255, 195 P.3d 1267.

II. DISCUSSION

A. Defendant Fairly Invoked a Ruling on the issue of his Detention

{8} The State asserts that Defendant argued only to the district court that Blake was without authority to *arrest* him, a question separate and distinct from a determination of whether Blake

was authorized to *detain* him. It contends that the district court's order embodied only two rulings: (1) that Blake did not arrest Defendant; and (2) that Defendant's detention was reasonable under the Fourth Amendment. According to the State, the absence of the district court's express ruling on Blake's *authority to detain* Defendant demonstrates Defendant's failure to adequately preserve that argument for consideration below.

{9} Defendant's argument in the district court was that Blake's actions, however characterized, were unreasonable within the context of the Fourth Amendment. He specifically argued that either "the arrest *or detention* of Defendant" was "illegal," and therefore all evidence obtained after his seizure should be suppressed. In addition to his broad argument that his detention was unreasonable, Defendant also specifically argued that "[t]he arrest *and detention* of Defendant [were] without proper *police authority*."

{10} While Defendant's argument could have been clearer, we believe that it was sufficient to invoke a ruling from the district court on the issue of Blake's authority to detain him. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"). Defendant focused the district court's attention on the fact that Blake was not a commissioned police officer, and therefore lacked authority to detain or arrest him, making his seizure unreasonable within the context of the Fourth Amendment. Indeed, the district court denied "Defendant's Motion to Suppress based upon an alleged unlawful arrest *and detention* by police officers[.]" Therefore, we conclude that Defendant did preserve the issue of whether Blake had the authority to detain him and, if not, whether exceeding that authority violated the Fourth Amendment's protections against unreasonable seizure.

B. Blake was without Statutory Authority to Either Detain or Arrest Defendant

{11} "A ruling on a motion to suppress evidence presents a mixed question of law and fact." *State v. Rivera*, 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213. This Court reviews factual findings under a substantial evidence standard, viewing the facts in the light most favorable to the prevailing party, and we review de novo whether the district court correctly applied the law to the facts. *Id.* In this case, the district court made formal findings of fact in its order denying Defendant's motions. Neither party asserts that these findings were made in error, and the pertinent factual findings are supported by the record. We therefore accept these findings as conclusive. *Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 13, 147 N.M. 157, 218 P.3d 75 ("When there are no challenges to the district court's factual findings, we accept those findings as conclusive.").

{12} Defendant's argument that his seizure by Blake was unreasonable within the context of the Fourth Amendment rests entirely on the assertion that Blake lacked the statutory authority to detain or arrest anyone suspected of committing a crime. We believe that Defendant would concede that if a commissioned police officer had seized him, his detention and arrest would have been reasonable under the Fourth Amendment. Thus, Defendant's argument presents two separate issues: (1) whether Blake had the authority to seize Defendant, because if she did, her actions were presumably reasonable under the Fourth Amendment; and (2) if she did not have such authority, whether her lack of authority is an unreasonable seizure under the Fourth Amendment, which would entitle Defendant to application of the exclusionary rule. We address these arguments in turn.

{13} The State argues that there is nothing in the record to show that Blake's actions were unauthorized because Blake had the authority to seize Defendant for two reasons: (1) she may be considered to have the authority to arrest by virtue of her status as a "peace officer" under this Court's decision in *State v. Ogden*, 118 N.M. 234, 245, 880 P.2d 845, 856 (1994); and (2) she was acting on the express authority of the Roswell Police Department. We disagree with both contentions.

{14} We are not persuaded by the State's first argument, which relies on *Ogden* as support for Blake's authority to arrest Defendant. In *Ogden* we determined that a City of Farmington Community Service Officer (CSO) was a "peace officer" within the context of the aggravating circumstances statute, NMSA 1978, Section 31-20A-5(A) (1981). 118 N.M. at 245, 880 P.2d at 856. We concluded that by enacting the aggravating circumstances statute, the Legislature intended "to protect a broader category of law enforcement officers than only police officers." *Id.* at 244, 880 P.2d at 855. Because "CSOs are charged with the duty to maintain public peace or order" and "all of their responsibilities are of a peace-keeping nature[,]" we held that the Legislature intended to include CSOs in the definition of "peace officer" for the purpose of Section 31-20A-5(A). *Ogden*, 118 N.M. at 245-46, 880 P.2d at 856-57.

{15} While we recognized in *Ogden* that CSOs and, by extension, PSAs may perform some police functions similar to those of commissioned officers, we did not endeavor to identify the scope of these non-commissioned officers' duties. In fact, in holding that the aggravated circumstances statute protects a broader category of "peace officer" than simply commissioned police officers, we implicitly recognized that CSOs, PSAs, and other auxiliary officers or service aides are sometimes treated differently by virtue of their lack of commission. In any case, the analysis of whether a PSA possesses the authority to seize a person suspected of violating the Motor Vehicle Code or other laws regarding motor vehicles presents a distinct issue of statutory construction that is only tangentially related to the aggravated circumstances statute we addressed in *Ogden*. Therefore, although Blake was likely a "peace officer" within the context of the aggravating circumstances statute, as a non-commissioned employee of the Roswell Police Department, her authority to arrest individuals suspected of violating the Motor Vehicle Code has been limited by the Legislature.

{16} We are also not persuaded by the State's second argument that Blake was acting with the express authority of the Roswell Police Department. Any authority granted to Blake by the City of Roswell to arrest individuals suspected of violating the Motor Vehicle Code would be nullified by statutory authority to the contrary. *See Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 21, 143 N.M. 320, 176 P.3d 309 ("[A] municipality may adopt ordinances or resolutions not inconsistent with state law. A municipal ordinance does not conflict with state law unless the ordinance permits an act the general law prohibits, or vice versa." (internal quotation marks and citations omitted)). The Legislature has expressly stated that "[n]o person shall be arrested for violating the Motor Vehicle Code [66-1-1 NMSA 1978] or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer's official status." NMSA 1978, § 66-8-124(A) (1961, prior to 2007 amendments). The Legislature intended that only commissioned officers may arrest a person who is suspected of violating the Motor Vehicle Code. Therefore, any municipal grant of authority to the contrary would "permit[] an act the general law prohibits" and would be impermissible. *Stennis*, 2008-NMSC-008, ¶ 21 (internal quotation marks and citations omitted).

{17} Here, it is undisputed that Blake was not a commissioned police officer. It is also undisputed that Defendant was charged with second offense aggravated DWI, contrary to Section 66-8-102, a misdemeanor. *See* 66-8-102(F) (stating that second offense aggravated DWI is punishable by up to 364 days in jail); NMSA 1978, § 30-1-6(B) (1963) ("A crime is a misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment in excess of six months but less than one year is authorized."). Therefore, according to Section 66-8-124(A), Blake was without statutory authority to arrest Defendant.

C. For Purposes Of Section 66-8-124(A), "Arrest" Includes a Temporary Detention

{18} What constitutes an arrest under the provisions of Section 66-8-124(A) is pivotal to our

determination in this case. In its opinion, the Court of Appeals devotes a significant amount of time distinguishing an arrest from a temporary detention and delineating when an arrest has occurred. *Slayton*, No. 27,892, slip op. at 9-12. The Court of Appeals directs its focus to *State v. Werner*, 117 N.M. 315, 871 P.2d 971 (1994), to determine at what point "'an investigatory seizure is invasive enough to constitute an arrest[.]'" *Slayton*, No. 27,892, slip op. at 9 (quoting *Werner*, 117 N.M. at 317, 871 P.2d at 973). Though the definition of arrest can be narrowly construed to include only custodial arrests, for the purpose of determining which actions are governed by the Motor Vehicle Code, we have interpreted "arrest" broadly to include not only custodial arrests but also temporary detentions.

{19} As used in Section 66-8-124(A), the term "arrest" does not refer solely to custodial arrest or incarceration; it also includes a "temporary detention." *See State v. Ochoa,* 2008-NMSC-023, 15, 143 N.M. 749, 182 P.3d 130 (construing the misdemeanor arrest rule and Section 66-8-123, "[w]e hold that the Court of Appeals improperly applied New Mexico's misdemeanor arrest rule to this case, because the 'arrest' at issue was an investigatory stop for a seatbelt violation"); *State v. Bricker*, 2006-NMCA-052, ¶ 9, 139 N.M. 513, 134 P.3d 800 ("While the statute [NMSA 1978, Section 66-8-123 (1978, as amended through 1989)] uses the words 'arrest' and 'custody,' we believe the Legislature intended those terms to refer to a temporary detention rather than a traditional custodial arrest in which a person is arrested and taken to the police station for booking."); *State v. Archuleta,* 118 N.M. 160, 163, 879 P.2d 792, 795 (Ct. App. 1994) (construing Section 66-8-124(A), the Court developed two tests to determine if the officer is in "uniform"; the second test evaluated "whether the person *stopped and cited* either personally knows the officer or has information that should cause him to believe the person making the stop is an officer with official status") (emphasis added); *see also United States v. Gonzalez,* 763 F.2d 1127, 1130 n.1 (10th Cir. 1985) (construing Section 66-8-123: "Despite the statute's use of the words 'arrest' and 'custody,' when a New Mexico police officer stops a car merely to issue a traffic summons for a minor speeding infraction, we think that for Fourth Amendment purposes that stop is more in the nature of an investigative detention than a traditional arrest.").

{20} We have never interpreted the Legislature's intent to restrict the term "arrest" in Section 66-8-124 only to custodial arrests, and we believe that under Chapter 66 of the New Mexico statutes, unless otherwise noted, "arrest" includes temporary detentions. *See State v. Marquez*, 2008-NMSC-055, ¶ 11, 145 N.M. 1, 193 P.3d 548 ("Nothing in the Fresh Pursuit Act indicates that the Legislature intended 'authority to arrest' to be limited to a custodial arrest. In fact, reference to other statutes indicates that the Legislature intended no such limit. Under NMSA 1978, Section 66-8-123(A) (1989), which provides for citations in lieu of custodial arrest for certain violations of the Motor Vehicle Code, 'a person is arrested' for the offense, 'the arresting officer' prepares the citation, 'the arrested person' signs the citation, and 'the arrested person' receives a copy of the citation before being released." (alterations omitted)); *Archuleta,* 118 N.M. at 162, 879 P.2d at 794 (construing Section 66-8-124(A), "[i]t seems clear enough that the intention of the legislature in requiring the officer to wear a uniform plainly indicating his official status was to enable the motorist to be certain that the officer who stops him is, in fact, a police officer"). Therefore, legislative intent and previous New Mexico case law leads us to conclude that temporary detentions are covered under the term "arrest" as used in Chapter 66 as well as custodial arrests, and Blake's actions in detaining Defendant constitute an arrest under Section 66-8-124(A). As a result, we need not address the de facto arrest analysis employed by the Court of Appeals in this case.

D. Blake's Seizure of Defendant was State Action

{21} Having determined that Blake did not have statutory authority to either detain or arrest Defendant, we now address Defendant's

contention that Blake's lack of authority resulted in an unreasonable seizure under the Fourth Amendment. The State argues that if Blake was acting without such statutory authority, she must have been acting as a private citizen, and she was therefore authorized to arrest Defendant for a breach of the peace. *See State v. Arroyos*, 2005-NMCA-086, ¶ 5, 137 N.M. 769, 115 P.3d 232 ("Any person . . . may arrest another upon good-faith, reasonable grounds that a felony had been or was being committed, or a breach of the peace was being committed in the person's presence."); *see also State v. Emmons*, 2007-NMCA-082, ¶ 15, 141 N.M. 875, 161 P.3d 920 (noting that this Court has "specifically declined to favor citizen's arrest for breaches of the peace, stemming from [our] concern that such an expansion of citizen power might likely lead to more breaches of the peace and encourage vigilantism"). We understand the State to be arguing that if Blake was acting in her capacity as a private citizen, then there was no state action for purposes of the Fourth Amendment. *See State v. Murillo*, 113 N.M. 186, 188-89, 824 P.2d 326, 328-29 (Ct. App. 1991) ("The courts of New Mexico, like other jurisdictions, have accepted the long-standing rule that the protections of the Fourth Amendment do not apply to private individuals acting for their own purposes." (footnote omitted)). We disagree.

{22} It is undisputed that Blake was acting in her capacity as an employee of the Roswell Police Department when she investigated the traffic accident. She was dispatched to the scene of the accident by the Roswell Police Department, and consistent with this directive, searched for and found Defendant sitting in his truck in his driveway. However, her authority to detain Defendant is less clear. Blake admitted that she did not have the authority to arrest Defendant, but the record does not clearly reveal whether she had the authority to detain him until a commissioned officer arrived to investigate the accident and make any necessary arrests. Nevertheless, Blake stated that the Roswell Police Department employed her to "do a lot of the same work that a certified officer would do," including investigating traffic accidents and crime scenes. In fact, PSAs such as Blake wear uniforms and drive marked patrol cars.

{23} While on this record we cannot definitively determine that Blake was acting within the express authority granted to her by the Roswell Police Department, we nonetheless conclude that Blake's actions were state actions because she was acting as an agent of the Roswell Police Department when she detained Defendant in his driveway. "Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). As we recently stated in *State v. Santiago*, to determine whether a person is acting as an agent of the government, we consider "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his [or her] own ends." 2009-NMSC-045, ¶ 18, 147 N.M. 76, 217 P.3d 89 (internal quotation marks and citation omitted). We apply this same test to determine whether a seizure was state action. *See United States v. Snowadzki*, 723 F.2d 1427, 1429 (9th Cir. 1984) (applying the same factors "[t]o determine whether a private person acted as a government agent in an illegal search and seizure").

{24} The sole reason Blake undertook to investigate and ultimately detain Defendant was due to her employment by the Roswell Police Department and her directive to investigate the accident. Although Blake exceeded the scope of her authority in detaining Defendant while waiting for commissioned officers to arrive, the government initiated her investigation and acquiesced in its results. Furthermore, acting in her capacity as an employee of the Roswell Police Department, Blake's intentions were to assist the government in arresting Defendant for DWI. Thus, although Blake was without statutory authority to detain and arrest Defendant, she nonetheless was acting as an agent of the government when she seized him. *Cf. People v. Rosario*, 585 N.E.2d 766, 768-69 (N.Y. 1991) (non-commissioned auxiliary officers are "fellow officers" for the purpose of providing information for commissioned officers

to make warrantless arrests that comport with the requirements of the Fourth Amendment). We now must determine whether her lack of statutory authority has Fourth Amendment implications.

{25} Before doing so, however, we are compelled to address a conflict in our case law that arises by virtue of our holding in this case that only commissioned peace officers may seize persons suspected of violating provisions of "the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor[.]" Section 66-8-124(A). In *Arroyos*, the Court of Appeals held that a deputy marshal acting outside of the territorial jurisdiction of his commission was authorized to detain a driver for suspected DWI, a misdemeanor breach of the peace. 2005-NMCA-086, ¶¶ 2-5, 9, 11. The Court reached its conclusion by construing NMSA 1978, Section 3-13-2 (1988), which limited the marshal's territorial jurisdiction as "not divesting the officers of their common law right as citizens to make arrests or detentions." *Id.* ¶ 8. *Arroyos* did not address any provisions of the Motor Vehicle Code that might affect a citizen's authority to arrest another person for suspected violations of that statute, a matter we addressed earlier in this opinion.

{26} As we explained above, the common law right to citizen's arrest for suspected violations of the Motor Vehicle Code and other misdemeanor motor vehicle laws has been abrogated by the Legislature. *See* NMSA 1978, 66-1-4.14(J) (1990, as amended through 1999) ("'police or peace officer' means every officer authorized to direct or regulate traffic or to make arrests for violations of the Motor Vehicle Code"); § 66-8-124(A) ("No person shall be arrested for violating the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer's official status."). DWI is a violation of the Motor Vehicle Code. Section 66-8-102. Therefore, citizens' arrests for DWI are not legal. To the extent that *Arroyos* suggests that a private citizen, including a commissioned peace officer acting outside the scope of his or her territorial jurisdiction, may make a citizen's arrest for suspected violations of motor vehicle laws, it and any other cases so holding are overruled.

{27} We recognize that NMSA 1978, Section 66-8-127 (1978) suggests that the Legislature may have intended to retain citizens' common law ability to arrest for misdemeanors committed in their presence by providing that "the procedure prescribed [in Sections 66-8-122 through -125] is not exclusive of any other method prescribed by law for the arrest and prosecution of a person violating these laws." However, construing Section 66-8-127 to allow citizens' arrests would render meaningless the mandate in Section 66-8-124(A) that a peace officer must make arrests for violations of the Motor Vehicle Code and other laws relating to motor vehicles that are punishable as misdemeanors. Because "[w]e will reject an interpretation of a statute that makes parts of it . . . meaningless[,]" *State v. Herbstman*, 1999-NMCA-014, ¶ 20, 126 N.M. 683, 974 P.2d 177, we believe that in setting forth the specific arrest procedures in Section 66-8-124, the Legislature intended to abrogate the common law right to citizens' arrests for suspected violations of motor vehicle laws. *See Bricker*, 2006-NMCA-052, ¶¶ 12, 14 (holding that Section 66-8-127 does not incorporate the common law misdemeanor arrest rule for offenses governed by Section 66-8-123(A), which requires the arresting officer to issue a citation and release the person from custody, because such an interpretation of Section 66-8-127 would render the mandate of Section 66-8-123(A) meaningless). Therefore, Section 66-8-127 does not operate to allow citizens' arrests for violations of the Motor Vehicle Code and other laws relating to motor vehicles.

E. Blake's Unauthorized Seizure of Defendant did not Violate the Fourth Amendment

{28} We next address whether Blake's seizure of Defendant was unreasonable under the Fourth Amendment of the United States Constitution

solely because she acted without statutory authority to either detain or arrest him. The Court of Appeals recently addressed a similar issue in *Bricker* where the defendant, who was driving with a suspended license, was placed under custodial arrest and taken to the police station instead of being issued a citation and then released from custody, as required by statute. 2006-NMCA-052, ¶¶ 1, 2, 8. The Court concluded that "[t]he custodial arrest of Defendant violated Section 66-8-123(A) and was therefore unlawful. However, this holding alone does not resolve the question of whether the evidence obtained from the search of Defendant's wallet should have been suppressed." *Id.* ¶ 14. To answer that question "requires an analysis of whether the unlawful custodial arrest violated the Fourth Amendment to the United States Constitution or Article II, Section 10 of our State Constitution." *Id.*

{29} In *Bricker*, the State argued that "an arrest in violation of a statute does not elevate the issue to a constitutional level." *Id.* ¶ 19 (citing *People v. Lyon*, 577 N.W.2d 124, 129 (Mich. Ct. App. 1998) for the proposition that the exclusionary rule is only compelled by the Fourth Amendment if the seizure was constitutionally invalid, based on a lack of probable cause, and not merely statutorily illegal). The Court agreed, stating that "[w]ere we to be guided solely by federal law interpreting the Fourth Amendment, the custodial arrest of Defendant would be reasonable. Under the Fourth Amendment, the constitutional reasonableness of a custodial arrest is measured by whether probable cause existed for the arrest." *Id.* ¶ 21. The *Bricker* Court quoted *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) to set forth the principles of reasonableness under the Fourth Amendment:

> [T]he United States Supreme Court [has] held fast with probable cause as the test of reasonableness, "without the need to balance the interests and circumstances involved in particular situations. . . . If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."

Bricker, 2006-NMCA-052, ¶ 21. Notwithstanding its Fourth Amendment analysis, the Court of Appeals ultimately concluded that the defendant's custodial arrest violated Article II, Section 10 of the New Mexico Constitution and suppressed the evidence as unlawfully seized. *Id.* ¶ 30.

{30} A few years after *Bricker* was filed, the United States Supreme Court ratified the Court of Appeals' decision. In a factual scenario essentially identical to the facts before the Court in *Bricker*, the United States Supreme Court relied in part on *Atwater* to hold that the defendant's custodial arrest, in violation of a Virginia statute that required him to have been issued a citation and then released, did not offend the Fourth Amendment because it was supported by probable cause. *Virginia v. Moore*, 553 U.S. 164, ___, 128 S. Ct. 1598, 1608 (2008). The United States Supreme Court stated that "[W]hether or not a search is reasonable within the meaning of the Fourth Amendment . . . has never depend[ed] on the law of the particular State in which the search occurs." *Id.* at ___, 128 S. Ct. at 1604 (internal quotation marks and citation omitted, alterations in original). This same principle is true in the context of seizures. *Id.* at ___, 128 S. Ct. at 1604-05. The Court concluded that "warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections." *Id.* at ___, 128 S. Ct. at 1607. "When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety." *Id.* at ___, 128 S. Ct. at 1608.

{31} The Supreme Court's decision in *Moore* rested on the premise that "[i]ncorporating state-law arrest limitations into the Constitution would produce a constitutional regime" that would "vary from place to place and from time to time[.]" *Id.* at ___, 128 S. Ct. at 1606, 1607 (internal quotation marks and citation omitted). This is because what would be permissible under

the Fourth Amendment in one state might not be permissible in another. "Fourth Amendment protections are not so variable and cannot be made to turn upon such trivialities[,]" such as "local law enforcement practices[.]" *Id.* at ___, 128 S. Ct. at 1605 (internal quotation marks and citation omitted). Rather, the Fourth Amendment places "great weight" on the "essential interest in readily administrable rules." *Id.* at ___, 128 S. Ct. at 1606 (internal quotation marks and citation omitted). Simply put, "it is not the province of the Fourth Amendment to enforce state law." *Id.* at ___, 128 S. Ct. at 1608.

{32} The glaring difference between the facts present in *Bricker* and *Moore* and those in Defendant's case is that here, Defendant was not detained by a commissioned officer. The issue before us is whether the Fourth Amendment would treat a violation of a state law restricting *who* may seize a person differently from a state law concerning *whether* a person may be taken into custodial arrest by an otherwise authorized officer. Given the broad language of the United States Supreme Court's recent decision in *Moore*, we do not believe that the Fourth Amendment would distinguish between state laws purporting to address a seizure's lawfulness. The only inquiry of consequence to the Fourth Amendment is whether the state actor has reasonable suspicion to detain or probable cause to arrest the defendant for a crime committed in his or her presence.

{33} Our conclusion that the Fourth Amendment is not concerned with a state actor's violation of a statute governing who may seize a person suspected of committing a crime is supported by analogous cases from other jurisdictions reaching the same conclusion. *See, e.g.*, *People v. Hamilton*, 666 P.2d 152, 156-57 (Colo. 1983) (en banc) (holding that an arrest supported by probable cause but made by officers acting in violation of a statute restricting their territorial jurisdiction did not violate the Fourth Amendment); *Moore v. State*, 798 S.W.2d 87, 89-90 (Ark. 1990) (finding that a citation issued by an officer who did not meet the statutory qualifications to serve as a police officer did not offend the Fourth Amendment), *overruled on other grounds by Grillot v. State*, 107 S.W.3d 136, 145 (Ark. 2003); *State v. Droste*, 697 N.E.2d 620, 622-23 (Ohio 1998) (holding that a DWI arrest made by liquor control investigators who did not have statutory authority to stop a driver for violating traffic laws was nonetheless constitutional under the Fourth Amendment because it was supported by probable cause). Therefore, we hold that an arrest made by a state actor in violation of a statute is not per se a violation of the Fourth Amendment. *See Droste*, 697 N.E.2d at 623 ("[A]bsent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule."). The pertinent question is whether the state actor who seized the defendant had "probable cause to believe that a person has committed a crime in their presence[.]" *Moore*, 553 U.S. at ___, 128 S. Ct. at 1608.

{34} Defendant does not present any additional arguments that his seizure was unconstitutional under the Fourth Amendment. His sole argument on appeal to this Court is that his seizure was unconstitutional because Blake was without statutory authority to either detain or arrest him. Therefore, we do not address any other arguments relating to the lawfulness of his detention and subsequent arrest, such as whether his arrest was supported by probable cause. We hold that Blake's lack of statutory authority to seize Defendant did not violate Defendant's Fourth Amendment protections against unreasonable seizures.

F. Defendant's Consent to the Blood Test was Valid

{35} Defendant argues that the results of his blood test should be suppressed because the test was taken without his voluntary consent. He admits that he ultimately consented to the blood draw. However, he argues that his consent was not valid because it was the product of duress and coercion. We disagree.

{36} The record shows that once Defendant was arrested at the hospital, he was asked "more than twice" if he would consent to a blood draw and that he refused these "numerous" requests. However, after Defendant had been evaluated

and scheduled for release from the emergency room, the arresting officer gave him a "last chance" to consent to the blood draw. The officer explained to him that if he did not consent to the blood draw, he would be charged with aggravated DWI and, if he were to be convicted, the consequences of that conviction. Defendant then consented to have his blood drawn.

{37} The Court of Appeals affirmed the district court's denial of Defendant's motion to suppress the results of his blood draw. *Slayton*, No. 27,892, slip op. at 12-13. The Court of Appeals concluded that "Defendant only had the right 'not to be forcibly tested after manifesting refusal.'" *Id.* at 12 (quoting *McKay v. Davis*, 99 N.M. 29, 30, 653 P.2d 860, 861 (1982). We agree.

> Any person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act [66-8-105 NMSA 1978], to chemical tests of his breath or blood or both . . . for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug.

NMSA 1978, 66-8-107(A) (1978, as amended through 2003). The Implied Consent Act also provides that if a person refuses to submit to a breath or blood test, "none shall be administered except when a municipal judge, magistrate or district judge issues a search warrant authorizing chemical tests as provided in Section 66-8-107 NMSA 1978[.]" NMSA 1978, 66-8-111(A) (1978, as amended through 2005). This right, however, is a only a right "not to be forcibly tested after manifesting refusal." *McKay,* 99 N.M. at 30, 653 P.2d at 861.

{38} Defendant does not argue that he was forcibly tested. Rather, he argues that his consent was coerced by the arresting officer's explanation that if he did not consent, he would be charged with aggravated DWI. As explained previously, Defendant's implied consent to the blood draw was given when he got behind the wheel and took to the road. As a result, any coercion affecting his consent would be to his willingness to drive the vehicle, not to submit to the blood test. Therefore, because Defendant was neither forcibly tested nor coerced to drive his vehicle, he consented pursuant to the Implied Consent Act, regardless of the officer's representations of the consequences of his failure to submit.

III. CONCLUSION

{39} Although Blake did not have statutory authority to detain or arrest Defendant for suspected DWI, her lack of authority did not by itself amount to a violation of the Fourth Amendment's protections against unreasonable seizure. Defendant's consent to have his blood drawn was valid. Therefore, we affirm his conviction.

{40} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-001

Filing Date: November 19, 2009

Docket No. 31,258

TIMOTHY MARCKSTADT,

Plaintiff-Petitioner,

v.

LOCKHEED MARTIN CORPORATION MISSILES & FIRE CONTROL, MID-CENTURY INSURANCE COMPANY, and PACIFIC EMPLOYERS COMPANY INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA,

Defendants-Respondents.

Consolidated with:

Docket No. S-1-SC-31447

FEDERATED SERVICE INSURANCE COMPANY, a Minnesota corporation,

Plaintiff-Appellee,

v.

DANNY MARTINEZ,

Defendant-Appellant.

ORIGINAL PROCEEDING ON CERTIORARI
Jerald A. Valentine, District Judge

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Mary Beck Briscoe, Timothy M. Tymkovich, and Neil M. Gorsuch, Circuit Judges.

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OPINION

CHÁVEZ, Chief Justice.

{1} In these consolidated cases, Appellants, employees who were injured on the job, sought

uninsured or underinsured (UM/UIM) motorist benefits under their employers' insurance policies, which were denied. They claim that because they were covered under their employers' automobile liability policies and because their employers and their employers' insurers failed to properly reject UM/UIM coverage, it should be read into their employers' policies. Specifically, Appellants argue that in order to reject UM/UIM coverage in New Mexico, the insured must provide the insurer with a written, signed rejection, which must be attached to the insurance policy. Appellees, the insurers in both cases and one of the employers, contend that because there is no dispute that the employers intended to reject such coverage, and because this rejection was evidenced by endorsements to their policies, UM/UIM coverage was successfully rejected.

{2} NMSA 1978, Section 66-5-301 (1983) provides, in relevant part:

> A. No motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person and for injury to or destruction of property of others arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in New Mexico with respect to any motor vehicle registered or principally garaged in New Mexico unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, and for injury to or destruction of property resulting therefrom, according to the rules and regulations promulgated by, and under provisions filed with and approved by, the superintendent of insurance.
>
> B. The uninsured motorist coverage described in Subsection A of this section shall include underinsured motorist coverage for persons protected by an insured's policy. . . .
>
> C. . . . The named insured shall have the right to reject uninsured motorist coverage as described in Subsections A and B of this section[.]

13.12.3.9 NMAC provides that:

> The rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required in writing by the provisions of Section 66-5-301 NMSA 1978 must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance.

{3} We consolidated these cases because they involve substantially similar issues. *Gov't Employees Ins. Co. v. Welch*, 2004-NMSC-014, ¶ 3, 135 N.M. 452, 90 P.3d 471. In *Marckstadt v. Lockheed Martin Corp*., the issue reaches us on appeal of the district court's grant of summary judgment in favor of Appellees. In *Federated Service Insurance Co. v. Martinez*, the question has been certified from the Tenth Circuit Court of Appeals.

{4} Answering the question certified in *Federated*, we hold that an insurer must obtain a written rejection of UM/UIM coverage from the insured in order to exclude it from an automobile liability insurance policy under Section 66-5-301 and 13.12.3.9 NMAC. However, we hold that neither the statute nor the regulation requires that the insured's written rejection be signed. Also, despite the clear requirement under 13.12.3.9 NMAC that the rejection of UM/UIM coverage be attached, endorsed, stamped, or otherwise made part of the policy, we hold that the written rejection itself need not be made part of the policy. Accordingly, with respect to *Marckstadt*, because we cannot determine on the basis of the record before us whether the insurer obtained a written rejection of UM/UIM coverage from the insured, we find the district court's grant of summary judgment improper and remand.

I. BACKGROUND

A. Marckstadt V. Lockheed Martin Corp.

{5} The facts of *Marckstadt* are not in dispute. Defendant-Appellee Lockheed Martin Corp. entered into an insurance policy with Defendant-Appellee Pacific Employers Insurance Co. that became effective on September 1, 1998. It appears undisputed that the policy included some liability coverage for Plaintiff-Appellant Timothy Marckstadt, a Lockheed employee. The policy also included an endorsement entitled "Limits of Liability - Uninsured Motorists" that featured a list of states and next to each, either an "X" indicating the rejection of UM/UIM coverage or a dollar figure reflecting the state's "minimum limits." Next to New Mexico, the endorsement contained an "X" indicating rejection. Lockheed maintains that it intended to reject UM/UIM coverage, and Marckstadt does not appear to dispute this.

{6} However, the record is not clear regarding the circumstances resulting in the inclusion of this endorsement in the policy. There is no evidence of any discussions or correspondence in which Lockheed directed Pacific to exclude UM/UIM coverage from its policy. The record shows that before the policy went into effect, documents were provided to Lockheed "for [its] execution" that were subsequently returned to its underwriter post-execution. The record does not contain all of the documents that were "executed," but it does include a copy of the relevant endorsement and several associated portions of the policy as they appeared when Lockheed returned them to its underwriter. From these documents alone, it is not clear exactly what Lockheed did to "execute" its policy: there is no signature on the endorsement, and from the record we cannot determine whether it was Lockheed, Pacific, or some other party who drafted or filled in the endorsement, for example, by indicating with an "X" that coverage in New Mexico was rejected. It was only after the accident giving rise to this case that Lockheed signed a rejection of UM/UIM coverage.[1]

{7} On November 25, 1998, after the policy was in effect, Plaintiff-Appellant Timothy Marckstadt was injured in an automobile accident through no fault of his own while acting within the scope and course of his employment by Lockheed. Marckstadt received workers' compensation benefits and was awarded $25,000 from Allstate, the insurer of the driver who hit him. He then brought this action, asking the district court to determine whether he was owed UIM benefits from his personal insurer, Farmers Insurance Group, or from his employer, Lockheed, or both. Marckstadt later amended his complaint to name Defendant Mid-Century Insurance Co. instead of Farmers and to include Pacific, Lockheed's insurance provider. Marckstadt's claims against Mid-Century were removed to arbitration and abated pending the determination of whether Lockheed was primarily responsible for UIM coverage. Lockheed and Pacific moved for summary judgment, claiming that because Lockheed's policy contained the endorsement reflecting Lockheed's intent to reject, UIM coverage had been rejected under Section 66-5-301 and 13.12.3.9 NMAC, and that, in any case, Marckstadt was precluded from seeking his claims under the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 408.001(a) (1993).

{8} After a hearing, the district court granted summary judgment to Lockheed and Pacific, apparently finding that Section 66-5-301 did not support Marckstadt, and explaining that 13.12.3.9 NMAC

> may not be the best written regulation I ever saw. But I think that "or otherwise made part of the policy," I think that this matter–that Lockheed has done that. Even though they call it an endorsement. Even though there may be a question as to whether that endorsement should be signed, I think it's clear that they intended to reject it, and it is otherwise made a part of the policy.

[1] It is not entirely clear that this rejection applied to the policy covering Marckstadt, but because the rejection postdated the accident at issue here, it is not directly relevant, even if it applied to that policy.

The district court did not reach the question regarding the Texas workers' compensation statute. The Court of Appeals affirmed, holding that the attached but unsigned endorsement satisfied the requirements of the insurance code and regulations, and that public policy did not mandate a contrary outcome. *Marckstadt v. Lockheed Martin Corp.*, 2008-NMCA-138, ¶¶ 12, 23, 145 N.M. 90, 194 P.3d 121. Like the trial court, the Court of Appeals did not find support for Marckstadt in either the statute or the regulation. *Id.* ¶ 23. The Court opined that the regulation's purpose is to provide affirmative evidence to the insured of the rejection of coverage. *Id*. ¶ 12. Since the regulation allowed many methods of providing such evidence, and since there was no signature requirement on its face, the Court could find no evidence that a signature was required. *Id*. ¶¶ 15-23. In addition, the Court could not discern any policy reason to require a signature where "the insured maintains that he or she never doubted whether UM coverage had been rejected." *Id.* ¶ 21.

{9} We granted certiorari to decide "[w]hether a rejection of uninsured motorist (UM) and/or underinsured motorist (UIM) coverage must be signed by the insured, in addition to being attached or otherwise made a part of the policy, before it constitutes a valid rejection under the provisions of [NMSA 1978,] §66-5-301 (1983)." Marckstadt asks us to reverse the district court's grant of summary judgment and remand.

B. Federated Service Insurance Co. V. Martinez

{10} The facts of *Federated* are also undisputed. Capitol Motor Co. first obtained an automobile insurance policy from Plaintiff-Appellee Federated Service Insurance Co. in 2001. Again, it appears undisputed that the policy provided some liability coverage for the injured employee in this case, Defendant-Appellant Danny Martinez. In the original policy, Capitol elected to receive UM/UIM coverage in the amount of $500,000 per accident for management employees and $60,000 per accident for non-management employees. In November of 2001, Denny Rommann, a Federated employee, executed a change to Capitol's policy that eliminated UM/UIM coverage for non-management employees effective March 1, 2002. There was no written or signed rejection from Capitol leading to this change, but like Lockheed, it is uncontested that Capitol intended to reject coverage. Strangely, on March 29, 2002, Capitol's general manager, Mark Brandt, signed and returned a document to Federated that selected UM/UIM coverage in the amount of $60,000 per accident for non-management employees. Nevertheless, as of March 1, 2002, Capitol's premium for UM/UIM coverage for its non-management employees was returned. Subsequent renewed policies included endorsements rejecting UM/UIM coverage, none of which were signed by Capitol. The renewed policy that was in effect on May 11, 2005, included such an endorsement.

{11} On May 11, 2005, Martinez was struck by a car while working at Capitol as a non-management employee. He requested UM benefits from Federated, leading Federated to bring an action in federal court under diversity jurisdiction seeking a declaratory judgment that Martinez was not entitled to any benefits under its policy with Capitol. Martinez answered, seeking a declaratory judgment that Capitol's rejection was "contrary to insurance policy and therefore . . . invalid" and seeking damages for personal injury, breach of contract, bad faith violations of New Mexico's Insurance Code and Unfair Practices Act, and negligence.

{12} Federated moved for summary judgment, claiming that the endorsement to Federated's policy constituted a sufficient rejection under New Mexico law. Martinez also moved for summary judgment, stating that because there was no written rejection attached to the policy, rejection could not have been effective. The district court granted Federated's motion and dismissed all of Martinez's claims except for negligence. The district court reasoned that

> there does not appear to be any requirement under New Mexico law that a rejection of UM/UIM coverage takes any particular

> form, *e.g.*, a document with a box that must be checked to decline coverage. . . . So long as some means of making the rejection a part of the policy is employed "to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived," the requirements of New Mexico law are satisfied.

Federated Serv. Ins. Co. v. Martinez, No. 06-638, slip op. at 8 (D.N.M. Aug. 31, 2007) (quoting *Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990)). The district court found this to be particularly the case in the context of a corporate policy when there was evidence that the insured party was fully aware of its right to have UM/UIM coverage. The district court's partial summary judgment was certified as a final judgment and appealed to the Tenth Circuit Court of Appeals, where Martinez asked the Court to hold as a matter of law that UM/UIM coverage had not been properly rejected because there was not a written rejection provided by the insured and attached to the policy. The Tenth Circuit requested certification to this Court of the question of whether, "[f]or a valid rejection of UM/UIM coverage under New Mexico law, must that rejection be written, signed by the insured, and attached to the policy?" We accepted certification.

II. DISCUSSION

{13} In these cases, the Court is asked to determine what is required under Section 66-5-301 and 13.12.3.9 NMAC to effectively reject UM/UIM coverage. There are no factual disputes. In both cases, Appellees argue that because the employers intended to reject UM/UIM coverage and endorsements to their policies evidenced this rejection, the statute and regulation were satisfied and summary judgment was justified. Neither of the Appellants disputes the existence of the endorsements or the parties' intent, but both suggest that some or all of the following additional steps were required under the statute and regulation: written rejection by the insured, signature of the rejection, and attachment of the rejection to the policy. In short, these cases present questions of law, which the Court reviews de novo. *See Pielhau v. RLI Ins. Co.*, 2008-NMCA-099, ¶ 6, 144 N.M. 554, 189 P.3d 687 ("We review de novo the granting of summary judgment[.]"); *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, ¶¶ 4-5, 141 N.M. 387, 156 P.3d 25 (applying de novo review to a certified question about the meaning of Section 66-5-301).

{14} When deciding a statute's meaning, "[o]ur goal . . . is to determine and give effect to legislative intent. We do not depart from the plain language of a statute unless we must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 947 (citation omitted). However, in light of the purpose of New Mexico's UM/UIM statute to expand coverage to protect members of the public against uninsured motorists, "[t]he statute is interpreted liberally to implement that remedial purpose, and any exception will be strictly construed." *Kaiser v. DeCarrera*, 1996-NMSC-050, ¶ 7, 122 N.M. 221, 923 P.2d 588 (citation omitted). Finally, although our task today also involves the interpretation of a regulation, the same principles apply. *Alliance Health of Santa Teresa, Inc. v. Nat'l Presto Indus., Inc.*, 2007-NMCA-157, ¶ 18, 143 N.M. 133, 173 P.3d 55 ("In interpreting sections of the Administrative Code, we apply the same rules as used in statutory interpretation." (citation omitted)).

A. 13.12.3.9 Nmac Requires an Insured to Reject Um/Uim Coverage in Writing

{15} Section 66-5-301 and 13.12.3.9 NMAC were designed to "expand insurance coverage to protect the public from damage or injury caused by other motorists who were not insured and could not make the impaired party whole." *Sandoval v. Valdez*, 91 N.M. 705, 707, 580 P.2d 131, 133 (Ct. App. 1978). The policy of expanding UM/UIM coverage is reflected in the plain language of Section 66-5-301(A) and (B), which

mandates that all automobile liability policies shall include UM/UIM coverage for the persons insured under the liability policy. This section, however, is qualified by Section 66-5-301(C), which provides that "[t]he named insured shall have the right to reject[.]" Read as a whole, Section 66-5-301 makes UM/UIM coverage the default when the insured has not exercised the right to reject. *See Vigil v. Rio Grande Ins. of Santa Fe*, 1997-NMCA-124, ¶ 7, 124 N.M. 324, 950 P.2d 297 ("[T]he statute also allows an insured to *choose not to purchase* UM coverage by specifically rejecting such coverage." (emphasis added)). From the statute's text, we can deduce that the insurer may not exclude UM/UIM coverage from an automobile liability policy unless it has offered it to the insured, *see Montano v. Allstate Indem. Co.*, 2004-NMSC-020, ¶ 16, 135 N.M. 681, 92 P.3d 1255, and the insured has exercised the right to reject the coverage through some positive act. Section 66-5-301(C).

{16} Section 66-5-301 does not explicitly address the *manner* in which the offer or rejection of UM/UIM coverage must take place. However, under the statute's plain language and the unambiguous policies embodied within it, we believe that certain implications can clearly be discerned. For example, in order for the offer and rejection requirements of Section 66-5-301 to effectuate the policy of expanding UM/UIM coverage, the insurer is required to *meaningfully offer* such coverage and the insured must *knowingly and intelligently act* to reject it before it can be excluded from a policy. *Romero*, 111 N.M. at 156, 803 P.2d at 245. Thus, an offer of UM/UIM coverage could, in principle, be so inadequate or misleading as to render a rejection ineffective under the statute. Conversely, even if an offer of UM/UIM coverage were completely adequate, we would not find that coverage had been rejected if the insured never acted to reject coverage, even if an endorsement were attached to the policy by the insurer. Further, because of the distinct risks of miscommunication and confusion in the context of complex insurance agreements, *see Montano*, 2004-NMSC-020, ¶ 17, and our statute's clear policy of expanding UM/UIM coverage, we do not believe it would be wholly implausible to interpret Section 66-5-301 alone to require the insured not just to affirmatively act to reject coverage, but specifically to make its rejection in writing. *See, e.g.*, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 669 N.E.2d 824, 827 (Ohio 1996) (holding, under a UM/UIM statute quite similar to New Mexico's, that "the spirit of [the statute] is best served by requiring the offer to be in writing. Such a requirement will prevent needless litigation about whether the insurance company offered UM coverage and will in the long run benefit insurance companies[,]" and that this reasoning "necessitates the same requirement for rejections. Such a requirement will lessen the difficulty of proving rejection in a case such as this. We are persuaded that requiring rejection of UM coverage to be in writing comports with the spirit of [the statute] and with public policy."), *superseded by statute as recognized in Shindollar v. Erie Ins. Co.*, 774 N.E.2d 316, 319 (Ohio Ct. App. 2002). However, we also recognize that such a writing requirement simply does not appear on the face of the statute. *See id*. at 827 (Cook, J., dissenting).

{17} In contrast, we believe that a written rejection requirement can unambiguously be found in 13.12.3.9 NMAC. Promulgated under Section 66-5-301's grant of authority to create rules and regulations concerning UM/UIM coverage, the words of 13.12.3.9 NMAC bear repeating:

> The rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required in writing by the provisions of Section 66-5-301 NMSA 1978 must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance.

{18} Unless the rejection requirements of 13.12.3.9 NMAC are strictly met, UM/UIM coverage will be read into an automobile liability policy. *Romero*, 111 N.M. at 155, 803 P.2d at 244 ("[U]nless the named insured rejects [UM/UIM] coverage in a manner consistent with the requirements imposed by the superintendent of insurance, uninsured motorist coverage will be

read into the insured's automobile liability insurance policy *regardless of the intent of the parties* or the fact that a premium has not been paid." (emphasis added)). For this reason, although we agree with Appellees' suggestion that public policy generally supports freedom of contract, *see Lynch v. Santa Fe Nat'l Bank*, 97 N.M. 554, 560, 627 P.2d 1247, 1253 (Ct. App. 1981), the necessity of meeting the statutory and regulatory requirements plainly conditions freedom of contract in this limited situation. *See id.* (recognizing that public policy supports the parties' freedom to contract "unless they clearly contravene some positive law" (internal quotation marks and citation omitted)). Therefore, although Appellees were free to reject UM/UIM coverage for their employees, they were obliged to do so in accordance with the law.

{19} Cases applying 13.12.3.9 NMAC have focused on its "endorsed, attached, stamped or otherwise made a part of" language. For example, in *Romero*, this Court considered the case of an insured who claimed uninsured motorist coverage under her liability policy despite the fact that she had knowingly signed a waiver of such coverage and had not paid premiums for it. 111 N.M. at 155-59, 803 P.2d at 244-48. We held in her favor because

> The rejection must be made a part of the policy by endorsement on the declarations sheet, by attachment of the written rejection to the policy, or by some other means that makes the rejection a part of the policy so as to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived.

Id. at 156, 803 P.2d at 245. We reasoned that strict compliance was required under the insurance regulations, and that, in any case, this outcome furthered the policy of giving the insured "affirmative evidence of the extent of coverage" to enable him or her to make informed choices about coverage. *Id*. A similar conclusion was reached in *Kaiser*, in which this Court held that UM/UIM coverage had not been effectively rejected, despite the insurance company's receipt of a signed waiver from the insured, because the policy contained no evidence of the rejection, even though the insurance company had made unsuccessful efforts to mail an updated declarations page to the insured. 1996-NMSC-050, ¶¶ 1-4, 17.

{20} We disagree with Appellees that placing evidence of the rejection in the policy is the *only* requirement to be found in the regulation. 13.12.3.9 NMAC states that the rejection, "*as required in writing* by the provisions of Section 66-5-301 NMSA 1978" (emphasis added), must be made part of the policy. Curiously, as we have noted, Section 66-5-301 does not explicitly require the rejection to be in writing; the only mention of a writing in the statute concerns requests to *reinstate* UM/UIM coverage when it has been previously rejected. Section 66-5-301(C). Despite its lack of clarity, we cannot simply ignore this portion of the regulation. *Benavidez v. Sierra Blanca Motors*, 1996-NMSC-045, 122 N.M. 209, 213, 922 P.2d 1205, 1209 ("We presume that the [agency] is well informed regarding existing statutory and common law and does not intend to enact a nullity."). Since the "in writing" language cannot restate a statutory requirement, we believe it must state an additional explicit requirement: that the rejection must be in writing.

{21} To create such a requirement was certainly within the authority delegated to the superintendent of insurance under Section 66-5-301(A). *Willey v. Farmers Ins. Group*, 86 N.M. 325, 327, 523 P.2d 1351, 1353 (1974) ("The authority granted to the superintendent of insurance is a lawful delegation of authority to an administrative agency."), *overruled on other grounds by Found. Reserve Ins. Co. v. Marin*, 109 N.M. 533, 535, 787 P.2d 452, 454 (1990). The written rejection requirement furthers the policy of expanding UM/UIM coverage by assuring that the insured is sufficiently informed before rejecting coverage, alerting the insured to the importance of the decision, and providing clear evidence of a decision to reject, reducing litigation after the fact. In cases where the insured and insurer dispute whether coverage was rejected, without a written rejection requirement, courts are forced to

decide whether the insured acted to reject based solely on extrinsic evidence of the parties' intentions. In cases where the insured and the insurer agree that coverage was rejected but a third party claims coverage, without a written rejection requirement, the third party is susceptible to fraud.

{22} Appellees suggest that "in writing" merely applies to the subsequent portion of the regulation such that only the endorsement, attachment, stamp, or other means of making the rejection part of the policy must be in writing, and not the insured's rejection of UM/UIM coverage itself. We disagree. First, Appellees' construction of the "in writing" provision would reduce that language to a redundancy. Obviously, whatever is attached, endorsed, stamped, or otherwise made part of the policy, providing evidence of the decision to reject, must be in writing, because policies are written instruments. We hesitate to read the regulation to render certain terms extraneous. *See T.W.I.W., Inc. v. Rhudy*, 96 N.M. 354, 357, 630 P.2d 753, 756 (1981) ("[Regulations] must be construed so that no part of the [regulation] is rendered surplusage, if possible."). Second, we believe Appellees' reading contradicts the regulation's plain language. The regulation states that the rejection of UM/UIM coverage as required by the statute must be in writing. However, the statute does not speak to the necessity of endorsing, attaching, or otherwise making the rejection part of the policy. This requirement is found only in the regulation. As a result, the rejection which the regulation requires to be in writing must be the *act* of rejection described in the statute and not the *evidence* of that act mandated by the regulation itself.

{23} We note that although no New Mexico case has directly decided the question of whether an insured must reject UM/UIM coverage in writing, other cases that have found occasion to comment on it have also concluded that the insured must provide a written rejection before UM/UIM coverage can be excluded from an automobile liability policy. *See, e.g.*, *Montano*, 2004-NMSC-020, ¶ 19 (basing its requirement of a written waiver of stacking in part on its observation that the New Mexico's UM/UIM statute and regulations "[have] been interpreted as requiring an insured to reject UM coverage in writing" (citation omitted)); *Kaiser*, 1996-NMSC-050, ¶ 8 ("Even though an insured may sign a rejection notice of UM/UIM coverage, *that alone is not enough*. The rejection notice *must also* be endorsed, attached, stamped or otherwise made a part of the policy to be effective." (internal quotation marks and citation omitted) (emphasis added)); *Romero*, 111 N.M. at 156, 803 P.2d at 245 ("The rejection must be made a part of the policy by endorsement on the declarations sheet, *by attachment of the written rejection* to the policy, or by some other means that makes the rejection a part of the policy so as to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived." (emphasis added)). Following this long-held understanding, we hold that 13.12.3.19 NMAC requires an insured to reject UM/UIM coverage in writing.

B. The Insured's Written Rejection Need not be Signed to be Effective

{24} We next consider whether, as Appellants suggest, the written rejection must be signed by the insured. We conclude that a signature is not required. First, unlike the writing requirement, neither the statute nor the regulation includes any explicit mention of signature. As Appellees point out, the Legislature has explicitly required signatures in related contexts where it desires them. *See, e.g.*, NMSA 1978, § 66-5-222 (1977, as amended through 1998) (requiring signatures on driver exclusion endorsement forms). Second, we are not prepared to hold that the words "in writing" necessarily imply that a signature is required in any context. *See* Black's Law Dictionary 1748 (9th ed. 2009) (defining "writing" as "[a]ny intentional recording of words that may be viewed or heard with or without mechanical aids" and distinguishing it from a "signed writing," which is defined as "[a] writing to which a person's signature has been affixed in some form"). Although as a matter of prudence, it might appeal to us to require the signature of the insured to effectively

reject coverage,[2] *see Lane v. Lane*, 1996-NMCA-023, ¶ 20, 121 N.M. 414, 912 P.2d 290 (explaining that a signature requirement can serve both an evidentiary purpose, assuring that the signatory actually gave consent, and a cautionary purpose, because "[o]ne who pauses to sign a document can be expected to give more thought to the consequences of consent than one who gives consent in a less formal setting"), we are asked in this case only to interpret Section 66-5-301 and 13.12.3.9 NMAC. Given the lack of an express signature requirement in these provisions, we cannot conclude that there is no situation in which a written but unsigned rejection of coverage would satisfy the letter of and policy behind the statute and regulation.

C. The Insured's Written Objection Does not need to be Attached to the Policy

{25} We also disagree with Appellants' contention that the written rejection itself must be attached to the policy in order for rejection to be effective. It is correct that the automobile liability policy must contain some evidence of the insured's rejection in order to satisfy 13.12.3.9 NMAC. *Romero*, 111 N.M. at 156, 803 P.2d at 245. However, we note that the command of the regulation is phrased in the form of a disjunctive: the rejection "must be endorsed, attached, stamped *or otherwise made a part* of the policy of bodily injury and property damage insurance." 13.12.3.9 NMAC (emphasis added). Thus, although the sufficiency of a particular form of endorsement or attachment might be subject to debate, we cannot hold that the regulation may only be satisfied by the attachment of the written rejection provided to the insurer by the insured. Certainly other forms of notification could function equally well "to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived." *Romero*, 111 N.M. at 156, 803 P.2d at 245.

{26} To summarize, we hold that in order to exclude UM/UIM coverage from an automobile liability policy pursuant to Section 66-5-301 and 13.12.3.9 NMAC, the insurer must obtain a written rejection from the insured, but that the written rejection need not be signed or attached to the policy. Obviously the insurer may attach the written rejection itself to the policy and be in compliance with the regulation. Alternatively, once the insurer obtains a written rejection from the insured, it may choose not to attach the written rejection itself to the policy. However, we reiterate our holding in *Romero* that 13.12.3.9 NMAC requires that some evidence of the insured's written rejection of UM/UIM coverage must be made part of the policy by endorsement, attachment, or some other means that calls the insured's attention to the fact that such coverage has been waived. *Id.*

D. Our Holding Applies to this Case

{27} Appellees suggest that even if this is our holding, the circumstances of the cases at bar should lead us to draw exceptions for three reasons. First, Appellees argue that because the insurers and the insureds agree that the insureds intended to reject UM/UIM coverage, the employees, as third-party beneficiaries, should not be permitted to seek to modify the terms of their agreement. Appellees point to *Jaramillo v. Providence Washington Insurance Co.*, in which we wrote that "[i]n cases in which the question is whether a third-party beneficiary is entitled to coverage, if the premium-paying insured and the insurer agree as to what they intended, that should be controlling." 117 N.M. 337, 341-42, 871 P.2d 1343, 1347-48 (1994). We do not believe this statement applies to the case at bar. In *Jaramillo*, two of the plaintiffs, employees of the insured, claimed that they should be able to

[2] It seems to have appealed to insurers as well. Although it is not a matter of record in this case, we observe that many UM/UIM cases suggest that the insurance industry already has adopted a practice of seeking signed rejections. *See, e.g.*, *Kaiser*, 1996-NMSC-050, ¶ 2 (explaining that the plaintiff signed a UM/UIM rejection notice from his insurer); *Romero*, 111 N.M. at 155, 803 P.2d at 244 (reproducing the rejection form, including space for a signature, used by the plaintiff's insurer); *Vigil*, 1997-NMCA-124, ¶ 9 (detailing the signed rejection form obtained from the plaintiff). Indeed, in *Marckstadt*, Pacific obtained a signed waiver from Lockheed after the accident at issue.

stack UM bodily injury coverages under their employer's policy. *Id*. at 339, 871 P.2d at 1345. The policy only allowed class-one insureds to stack coverage. *Id*. at 340-41, 871 P.2d at 1346-47. The district court granted summary judgment in these plaintiffs' favor, ruling that the policy's definition of who was a class-one insured was ambiguous as a matter of law and must be construed in favor of coverage. *Id*. at 339, 871 P.2d at 1345. We reversed, holding that ambiguities did not need to be construed in favor of coverage by "a third party who is not expressly named as the insured or who is not an acknowledged family member[.]" *Id*. at 341, 871 P.2d at 1347. To the contrary, if the premium-paying insured and insurer agree that the third party was not intended to be included under the provision allowing stacking, their understanding should control. *Id*. at 342, 871 P.2d at 1348.

{28} The case before us is distinguishable from *Jaramillo*. Here, there is no dispute that Appellants were the intended beneficiaries of liability coverage under their employers' policies. The only dispute is whether this coverage included UM/UIM coverage. Unlike the availability of policy stacking in *Jaramillo*, the question of the presence of UM/UIM coverage under an automobile liability policy is not a question of intent. Section 66-5-301 and 13.12.3.9 NMAC provide that automobile liability policies shall contain UM/UIM coverage in the absence of an appropriate rejection, irrespective of the parties' intent. *Romero*, 111 N.M. at 155, 803 P.2d at 244. Appellants recognize this principle and argue that rejection was ineffective, and therefore, as a matter of law, their coverage includes UM/UIM coverage. Unlike *Jaramillo*, in which the central question of the case had to be settled by referring to the parties' intent in signing the contract, here, the question of the intent to include or not to include the third-party beneficiaries in UM/UIM coverage is irrelevant because the issue is whether the rejection, if any, conformed with the requirements of the statute and the regulation. Even if the statutory or regulatory mechanisms are not perfectly adapted to their goals–risking the possibility that fully knowing rejections might be found technically inadequate–we cannot subvert the clear mandate of the regulation. Further, to hold as Appellees suggest would benefit them at the cost of potentially harming other employees such as Appellants who could be exposed to fraud. Moreover, it would undermine what we perceive to be the effort of both the Legislature and the superintendent of insurance to impose more uniformity on often-confusing insurance agreements.

{29} In a second argument for an exception from our holding, Appellees contend that Lockheed and Capitol, as sophisticated commercial parties, should not be held to the same standards as individual policyholders. We cannot draw such a distinction here. Appellees contend that *Rehders v. Allstate Insurance Co.*, 2006-NMCA-058, 139 N.M. 536, 135 P.3d 237 stands for the proposition that New Mexico courts apply a different, more stringent standard in cases involving commercial policies. We need not determine whether *Rehders* stands for such a broad proposition here because it is wholly inapplicable to the issue before us. In *Rehders*, the Court of Appeals construed a corporate policy to determine whether the son of the sole shareholders of the named insured corporation was a class-one insured. *Id.* ¶¶ 1, 15-18. Here, we are not at all concerned with interpreting language in the relevant policies. Rather, we are concerned with legislative intent and must construe Section 66-5-301 and 13.12.3.9 NMAC. Because neither of these provisions contains any hint of differing standards for commercial, as opposed to individual, policies, we decline Appellees' invitation to interpret their policies more strictly against the insureds. Moreover, the regulation applies to the insurer, not the insured. Therefore, we cannot concern ourselves with the sophistication of the insured when the regulation imposes burdens on the insurer and not the insured.

{30} Finally, Appellees argue that even if our holding does apply to situations such as the case at bar, it should be applied prospectively. Appellees contend that because various federal courts and the lower court in this case have drawn different conclusions on this question, *compare Marckstadt*, 2008-NMCA-138, *with Farm Bureau Mut. Ins. Co. v. Jameson*, 472 F. Supp. 2d

1272 (D.N.M. 2006), our holding is not easily foreshadowed such that it would be unfair to apply it to existing policies. Appellees point to *Montano*, in which we modified the judicially-created doctrine of stacking to require written rejection of stacked coverage where previously we had utilized a case-by-case ambiguity analysis. 2004-NMSC-020, ¶ 17. We observed that this "new, and not easily foreshadowed, aspect to our jurisprudence" could not equitably be applied to the insurer in that case "before it has had an opportunity to alter its policy language[.]" *Id*. ¶ 22.

{31} We do not believe that *Montano*'s reasoning applies here. Generally speaking, there is a presumption that the holding of a civil case will apply retroactively. *Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994). We are empowered to limit a holding to prospective application depending on the weight of the following factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> Second, it has been stressed that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.
>
> Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.

Id. (internal quotation marks, citations, and alterations in original omitted). We do not believe that these factors weigh in favor of prospectivity. First, the holding we announce today is not clearly a new rule: it does not supplant any prior rule, and although it is an issue of first impression, we believe that as a matter of statutory and regulatory interpretation drawing on explicit language in the relevant provisions, the parties could have foreseen this result. Indeed, although it is not a matter of record how common the practice already may be, we have observed that even in *Marckstadt*, Pacific did obtain a written, signed waiver from Lockheed–although it was too late to affect its coverage of Marckstadt. We also noted in footnote 2 that, at least since 1990, insurance companies have not only obtained written rejections, they have obtained signed, written rejections, which suggests either that the superintendent of insurance codified an existing practice or insurance companies understood perfectly that written rejections are required in New Mexico. Of course, even if the outcome of our decision was difficult to foresee, there could not have been any reliance on a different rule, since none had been announced by a New Mexico court in any other case. *See id.* at 399, 881 P.2d at 1384 (discussing reliance as a factor in determining the retroactive application of a new rule of law). Second, the purpose of the rule we recognize today is to promote the Legislature's remedial policy of expanding UM/UIM coverage by assuring that rejections are knowingly and intelligently made. *See Romero*, 111 N.M. at 156, 803 P.2d at 245. The Legislature and the superintendent of insurance intended their rules to take effect immediately, and we will not second-guess them. Third, we do not perceive any serious risk of inequity. There is no hardship in applying a foreseeable rule, and to the extent that our holding was difficult to anticipate, the hardship we cause to insurance companies seems equal to the hardship we would cause to many rightful beneficiaries of UM/UIM coverage should we apply our rule prospectively. *See Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 22, 140 N.M. 630, 145 P.3d 110 (acknowledging that in determining the retroactive application of a decision that changes the law, the Court should evaluate the potential unfairness to the defendants, the plaintiffs, and *potential future* plaintiffs). For these reasons, we decline to limit our holding to prospective application.

III. CONCLUSION

{32} Under Section 66-5-301 and 13.12.3.9 NMAC, insurance companies must obtain written rejections of UM/UIM coverage from the insured to exclude such coverage from automobile liability insurance policies. However, such waivers need not be signed or attached to the policy to be effective. We therefore answer the certified question in *Federated* partly in the affirmative and partly in the negative. We reverse the trial court's grant of summary judgment in *Marckstadt* and remand to the district court to determine whether the insured rejected UM/UIM coverage in writing.

{33} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

CHARLES W. DANIELS,
Justice

RICHARD C. BOSSON,
Justice, dissenting

BOSSON,
Justice (dissenting).

{34} The Tenth Circuit certified the following question to us: "For a valid rejection of UM/UIM coverage under New Mexico law, must that rejection be written, signed by the insured, and attached to the policy?" Plaintiffs have urged us to answer in the affirmative. In other words, the rejection would have to be in writing, signed by the insured, and physically attached to the policy. The majority opinion comes to a different conclusion with which I partially agree. Correctly, the rejection does not have to be signed by the insured or attached to the policy because nothing in the statute or the insurance regulation requires either. And no opinion from this Court has ever required a signature or an attachment. In fact, physical attachment is only one of several ways to make the rejection a part of the policy; the policy can just say "UM coverage rejected" without any attachment and that should take care of it.

{35} Our only dispute now reduces to whether the rejection must not only be made a part of the written policy (with which we all agree), but also whether that rejection must appear in a prior writing that precedes the policy. The majority opinion now requires, for the very first time, *two* writings–a kind of belt and suspenders approach. First, the insured must indicate in writing (but not necessarily sign it) his or her decision to reject UM coverage, and then, independently, the policy must also state the fact of rejection.

{36} In our two consolidated cases, of course, the decision to reject is quite clearly stated in the policy, and there is no dispute about this. This is not simply a case of the policy not *including* or not *mentioning* UM coverage or being otherwise vague; both policies affirmatively *reject* UM coverage for their employees just as the law allows. All agree on this record that such a choice represented a conscious decision by the employer—the insured party and the owner of the policy—to reject UM coverage for employees, however irresponsible that decision may have been.

{37} What is not clear, however, is whether the insurer also issued a separate, initial document preceding the policy in which the employer first indicated its desire to reject. I suspect not, given that these employers are both commercial entities, likely accustomed to conducting their insurance business through agents, with advice of counsel, and in a less structured manner. The salient point, however, is that in both cases, the employer as insured stands behind its decision to reject coverage. Both insureds acknowledge their choice to reject UM coverage for their employees, a decision which each insured asks this Court to respect.

{38} If freedom of contract means anything, it must be that—absent a statutory requirement of UM coverage—corporate employers like Lockheed and Capitol Motors are free to make a knowing, informed business decision about who *not* to insure and when *not* to insure them. They are free to choose. For as long as we have been a state, New Mexico has recognized the right of parties to contract as they see fit, especially in their business affairs. It is part of the common law we inherited, first from England, and then from 19th Century America before statehood. Freedom to contract remains firmly rooted in our jurisprudence. As a judiciary, exercising proper restraint, we do not interfere with such business decisions without clear guidance from either the legislature or an authorized executive agency.

{39} Without much hyperbole, the freedom to contract is part of fundamental personal liberty. It cuts against that notion of liberty to be told that, although the law allows a company to reject UM insurance coverage for its employees and the company does so openly and knowingly, the courts are now going to countermand that business decision. It seems all the more offensive to interfere simply because of a lack of a *second* writing—one the company did not need, did not ask for, and still does not ask for today. It is a writing that would not have made any difference in the context of these two cases. The majority does not dispute the futility of such an exercise in these two cases, a futility which Judge Parker acknowledges—and on which he appropriately relies—in the Capitol Motors case. If ever there was a hyper-technicality, this seems like one.

{40} The majority takes the position that the insured's intent is irrelevant; it boils down instead to the supposedly "clear" language of the statute and insurance regulation. The statute, of course, makes no mention of a writing; it only says the insured may reject UM coverage without any mention of the means of rejection—in writing, verbally, or I suppose by any other method. Curiously, the regulation says: "The rejection [of UM coverage] *as required in writing* by the provisions of Section 66-5-301 must be endorsed, attached, stamped or otherwise made a part of the policy." Since the statute clearly does *not* require any such writing, we are left in some doubt as to what the regulation means. What is clear, however, is that the rejection must thereafter be made part of the written insurance policy, one way or the other. If there is a written rejection, it can be attached to the policy or duplicated within the policy. If the rejection is not in writing, like these two cases, then it must appear in writing as part of the policy.

{41} Our case law attempts to fill the gap left by such an awkwardly phrased regulation. Time after time, we have said that an initial rejection of UM coverage, even if signed by the insured, is not good enough; it must thereafter appear in, or be attached to, or "otherwise made a part of" the written policy. The insured must be given a second chance to reflect over a decision to reject UM coverage. *See Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990) ("Upon further reflection, consultation with other individuals, or after merely having an opportunity to review one's policy at home, an individual may well reconsider his or her rejection of uninsured motorist coverage."). Fair enough. And since context is everything in the law, just who are we trying to protect with this construction? More to the point, who is the Insurance Superintendent trying to protect by affording the insured this second chance? Josie Romero comes immediately to mind.

{42} Upon reading the *Romero* opinion, one cannot forget the plight of poor Josie Romero, a 59-year-old widow, purchasing insurance for the first time, who did not even have a driver's license. Although she had rejected UM coverage in writing, it was not made part of the policy, and she apparently had no independent understanding of what she had done. Correctly, the opinion makes reference to the need of insureds like Josie Romero who are "unsophisticated in business affairs," those who need our help and the help of the Insurance Superintendent. *Id.* at 159, 803 P.2d at 248. I agree. It takes no great leap to conclude that Section 66-5-301 and the insurance regulation were written with the average individual and family in mind. The Insurance Superintendent

was likely preoccupied with helping those who need our help, not those who do not.

{43} Justice Ransom's opinion in *Romero* makes clear that the requirement of a writing is not an end in itself but is designed to serve a remedial purpose: "so as to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived." 111 N.M. at 156, 803 P.2d at 245. The purpose of the regulation is to protect those who are easily preyed upon like Josie Romero. I do not believe Justice Ransom's intent, or his language, can be read to apply to every case, regardless of the circumstances, regardless of the need.

{44} Importantly, I do not read Justice Ransom to negate an insured's choice when the insured, like Lockheed and Capitol Motor, seek to *enforce* that choice, not overturn it. Most of the case law on which he relies simply requires *one* written rejection, usually the policy itself if the initial rejection was oral. What purpose, other than to set a trap for the unwary, would there be in requiring not one but two writings, "so as to clearly and unambiguously call to the attention of the insured," when a corporate "insured" like Lockheed or Capitol Motor is fully aware of "the fact that such coverage has been waived?"

{45} This is indeed the point of friction. Most of our UM jurisprudence interpreting this statute and the insurance regulation derives from people like Josie Romero who truly need the "belt and suspenders" approach. Implicit in our opinions is the plight of the individual insured trying to come to terms with indecipherable insurance jargon and policies as dense as any jungle. Even when faced with a knowledgeable insured, we allowed the insured to rescind a rejection that had never found its way into the written policy. *Kaiser v. DeCarrera*, 1996-NMSC-050, 122 N.M. 221, 923 P.2d 588.

{46} We have never, however, forced UM coverage upon an insured who had rejected coverage initially, that rejection appeared in the policy, and the insured went to court to *defend that rejection.* None of our case law has ever applied the insurance regulation to businesses like Lockheed and Capitol Motors who made an informed choice, knew what they were doing, put that choice in the policy, and now seek to ratify not abandon that choice in this litigation. None of our case law has ever said that, even though the rejection is clearly "part of the policy" as the regulation requires, the courts will vitiate that choice because (1) it was not preceded by an additional writing never before required, and (2) an employee who was *not* a party to the insurance contract now claims rights under the contract that his employer has expressly disavowed.

{47} The Legislature or the Insurance Superintendent could make employees mandatory third-party beneficiaries of their employers' insurance contracts. Employees could be given a place at the table when their employers negotiate insurance coverage to benefit the company. Labor unions might negotiate for such access to protect their rank and file. All this is possible, and perhaps desirable, but completely missing from this case. The Legislature or the Insurance Superintendent, not this Court, should make that decision.

{48} When the employer knowingly decides *not* to purchase UM coverage for its employees, this Court has respected that choice. In *Lucero v. New Mexico Public School Insurance Authority*, 119 N.M. 465, 465, 892 P.2d 598, 598 (1995), a school employee driving a vehicle owned and insured by the school district was injured by an uninsured driver. She sued for uninsured motorist coverage from the school district. The school district, as the insured, had excluded employees from the policy's UM coverage, though it is not clear from the opinion whether that rejection was in a separate writing or verbally. It did not seem to make any difference to this Court.

{49} Recognizing that the named insured—the employer—had the right under New Mexico law to reject UM coverage, including for its employees, this Court affirmed that choice, noting that both the insured (the school district) and the insurer agreed (shared the *intent*) that employees were not included within the policy's

UM coverage. Justice Franchini wrote (Justices Frost and Minzner concurring) that, "When both the insurance company and the named insured agreed as to the identity of the third-party beneficiaries [employees] of an insurance contract purchased by the named insured, the court will enforce that interpretation of the contract." *Id.* at 466, 892 P.2d at 599. *Archunde v. International Surplus Lines Insurance Company*, 120 N.M. 724, 729, 905 P.2d 1128, 1133 (Ct. App. 1995), although factually more complex, came to a similar conclusion in which the named insureds, the school bus company and the school district, had rejected UM coverage for their employees. *See also Jaramillo v. Providence Washington Ins. Co.* 117 N.M. 337, 341-42, 871 P. 2d 1343, 1347-48 (1994) (Ransom, J.) ("In cases in which the question is whether a third-party beneficiary is entitled to coverage, if the premium-paying insured and the insurer agree as to what they intended, that should be controlling.").

{50} In short, I would respect the clear, unambiguous, and uncontradicted intent of all parties to these insurance contracts to do as the law allows, and omit UM coverage for their employees. Even if I could be persuaded differently, I would still opt not to apply this opinion to the two employers before us. It seems unfair to do so in this instance. I cannot agree that this opinion was "foreseeable" to anyone who read our prior cases. Lockheed, in particular, appears to have done its homework and should not be faulted for relying on case law that emphasized inclusion of the rejection in the written policy, not in a second, separate writing. It is easy enough to say now that two writings have always been required. Suffice it to say that in these two consolidated cases alone, both district judges and a unanimous panel of the New Mexico Court of Appeals thought otherwise. I would give both Lockheed and Capitol Motors the benefit of considerable doubt as to any such requirement and apply our holding prospectively only.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-035

Filing Date: June 25, 2010

Docket No. 31,433

BEATRICE C. ROMERO and MICHAEL FERREE,

on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION,

Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
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OPINION

CHÁVEZ, Justice.

{1} In this class action lawsuit, Plaintiffs allege that Defendants engaged in an agreement to fix the price of cigarettes from 1993 to 2000. The district court granted summary judgment in

favor of Defendants, because although Plaintiffs offered evidence of parallel pricing, they failed to establish a genuine issue of material fact regarding whether any evidence, in addition to the parallel pricing, tended to exclude independent conduct on Defendants' part, as required by federal substantive law. On appeal, the Court of Appeals rejected the federal "plus factor" approach, and instead held that Plaintiffs could prove a conspiracy by parallel conduct alone, as long as independent conduct was an implausible explanation. *Romero v. Philip Morris, Inc.*, 2009-NMCA-022, ¶¶ 24, 44, 145 N.M. 658, 203 P.3d 873. The Court of Appeals also concluded that when looking at the evidence in the light most favorable to Plaintiffs, a genuine issue of material fact existed, therefore precluding summary judgment. *Id.* ¶¶ 43-44. *Romero v. Philip Morris Inc.*, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

{2} We granted Defendants' petition for writ of certiorari to consider two issues. First, we consider whether the Court of Appeals applied the incorrect standard for summary judgment. Second, we consider whether the Court of Appeals correctly applied federal substantive law regarding alleged agreements to fix prices. Although we agree with the summary judgment standard applied by the Court of Appeals, we hold that the Court of Appeals did not correctly apply federal substantive law as required by NMSA 1978, Section 57-1-15 (1979). Under federal substantive antitrust law, 15 U.S.C. § 1 (2006), evidence of parallel price increases alone is not sufficient in the context of an oligopoly to prove an agreement to fix prices. Such evidence is always ambiguous, and therefore plaintiffs who allege a price-fixing agreement must also provide evidence that tends to exclude the possibility that parallel price increases were the result of independent conduct. Because federal law limits the inferences available to a jury to those that are reasonable, plaintiffs relying upon circumstantial evidence cannot survive summary judgment, as a matter of law, unless the evidence tends to exclude the possibility that the alleged conspirators acted independently. Independent conduct is also referred to in case law as "conscious parallelism," "tacit collusion," or "legal independent conduct." We therefore affirm the district court's grant of summary judgment and reverse the Court of Appeals.

BACKGROUND

{3} The following facts are undisputed. Plaintiffs are "[p]ersons in the State of New Mexico . . . who purchased cigarettes indirectly from Defendants, or any parent, subsidiary or affiliate thereof, at any time from November 1, 1993 to the date of the filing of this action [April 10, 2000]." The original Defendants were Philip Morris, R.J. Reynolds ("RJR"), Brown & Williamson ("B&W"), Lorillard, and Liggett. The events leading up to this lawsuit were set in motion in response to a Philip Morris strategy beginning with an event known as "Marlboro Friday."[1] Prior to Marlboro Friday, Philip Morris, the market leader, had been steadily losing market share to discount and deep discount cigarettes since 1980, when Liggett pioneered the development of generic cigarettes. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 212 (1993). In an attempt to regain market share, Philip Morris announced Marlboro Friday on April 2, 1993, "a nationwide promotion on Marlboro that reduced prices at retail by approximately 20 percent, an average of 40 per pack." In response, RJR and B&W instituted similar promotions. As part of its strategy, Philip Morris announced on July 20, 1993, that there would be a similar reduction on all premium brands, discount brands, and deep discount brands starting on August 9, 1993. Defendants RJR and B&W also followed these price reductions. After these decreases, Defendants began to increase their wholesale list prices on premium and discount cigarettes in near lock-step fashion. Some increases were due to settlements with the 50 states, some because of increases in federal excise taxes, and others were simply planned. Even with these increases, wholesale list prices did not exceed pre-Marlboro Friday

[1] We adopt the Court of Appeals recitation of the facts of the pre-Marlboro Friday events. *See Romero v. Philip Morris, Inc.*, 2009-NMCA-022, ¶¶ 4-10, 145 N.M. 658, 203 P.3d 873.

levels until August 3, 1998, or when adjusted for inflation, ongoing settlement costs, and federal excise taxes, the list prices did not surpass pre-Marlboro Friday amounts until August 1999. During the time period of the alleged agreement to fix prices, 1993 to 2000, Defendants were engaged in competition with one another regarding promotions at the retail level, resulting in a direct reduction of the retail prices of cigarettes.

{4} Plaintiffs filed this class action lawsuit on April 10, 2000, alleging violations of New Mexico antitrust and consumer protection laws. *See* NMSA 1978, § 57-1-1 to -15 (1979, as amended through 1987); NMSA 1978, § 57-12-1 to -22 (1967, as amended through 1999). Defendants filed motions for summary judgment. In granting the motion for summary judgment, the district court held that Plaintiffs had met their initial burden of showing a pattern of parallel behavior, but failed to meet their second burden of showing the existence of plus factors that would tend to exclude the possibility that the alleged conspirators acted independently. Plaintiffs argued that the following were plus factors that tended to exclude Defendants' independent conduct: (1) the economics of the marketplace; (2) Defendants' strong motivation to conspire; (3) the fact that Defendants condensed the price tiers to facilitate their conspiracy; (4) Defendants acted contrary to their own self- interests; (5) alleged conspiratorial meetings in foreign markets; (6) Defendants had engaged in past conspiracies, such as misrepresenting the health consequences of smoking; (7) Defendants monitored their conspiracy through monthly factory shipment data reports prepared by Management Science Associates ("MSA"); (8) opportunities to conspire, including inter-firm communications and meetings; and (9) pricing decisions were made by those in high-level positions. However, the district court relied on the Eleventh Circuit case of *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003), to reject Plaintiffs' plus factors. The district court also held that even with the presentation of plus factors, "there still exists the opportunity for the defendant[s] to rebut the inference of collusion by presenting evidence establishing that no reasonable fact-finder could conclude that they entered into a price-fixing conspiracy." Plaintiffs appealed.

{5} On appeal, the Court of Appeals acknowledged that "Marlboro Friday and the industry-wide price reductions that occurred afterward represented the triumph of competition over oligopolistic price coordination." *Romero*, 2009-NMCA-022, ¶ 27; *see also id.* ¶ 44. Although the Court affirmed summary judgment in favor of Lorillard and Liggett because the evidence showed that they had merely acted "consistent with conscious parallelism," *id.* ¶ 46, the Court reversed summary judgment in favor of Philip Morris, RJR, and B&W because "[a]pplying *Brooke Group*, and relying on the opinions of Plaintiffs' expert, Dr. [Keith] Leffler, we think that a reasonable factfinder could view conscious parallelism as a relatively implausible explanation for the anticompetitive scenario that played out following Marlboro Friday," *Romero*, 2009-NMCA-022, ¶ 44. The Court acknowledged that New Mexico follows "federal case law interpreting Section 1 of the Sherman Act for substantive rules defining the scope of liability under [the New Mexico Antitrust Act] NMAA Section 1." *Id.* ¶ 18. It held that "behavior of market participants characterizable as mere conscious parallelism does not satisfy the conspiracy element requirement of NMAA Section 1," *id.* ¶ 22, and noted that federal courts have recognized the "doctrine of conscious parallelism as a substantive principle of antitrust law," *id.* ¶ 23. The Court also noted that federal law requires plaintiffs to present evidence of "plus factors" that tend to exclude the possibility of independent conduct. *Id.* ¶¶ 23-24. However, it did not follow federal precedent regarding plus factors, but held that "the sounder approach for a New Mexico court is to engage in an independent and rigorous evaluation of the evidence in deciding whether or not the plaintiffs' evidence tends to suggest a degree of coordination that *exceeds* the parallelism that could be accomplished through lawful conscious parallelism." *Id.* ¶ 24 (emphasis added). In addition, the Court held that "[t]he non-existence of conscious parallelism is not a separate element of the plaintiff's case." *Id.* ¶ 25.

> If the plaintiff comes forward with evidence that would allow a reasonable factfinder to exclude lawful conscious parallelism as the most likely explanation for the parallelism proved by the plaintiff, then the plaintiff has made out a prima facie case that would defeat summary judgment. At trial, then, the burden of negating the exculpatory inference of lawful conscious parallelism simply merges into the plaintiff's ultimate burden of convincing the factfinder that the parallelism proved by the plaintiff was more likely than not the result of a conspiracy.

Id. The Court of Appeals then constructed a hypothetical situation in which the jury could find that Defendants entered into an agreement to fix prices. *Id.* ¶¶ 27-30. Although rejecting the concept of plus factors, the Court held that

> [t]estimony by a qualified economics expert that the character or degree of parallelism actually exhibited by prices exceeds the parallelism that economic theory predicts would result from independent competitive behavior is precisely the type of evidence that tends to exclude the possibility that the defendants acted independently . . . [and] constitutes an extremely forceful "plus factor" . . . .

Id. ¶ 32. The Court also held that "Dr. Leffler's testimony is sufficient to meet Plaintiffs' burden of production," *id.*, and that "conscious parallelism in a complex, multi-variable industry is 'improbable,'" *id.* ¶ 35 (citation omitted). In its conclusion, the Court of Appeals noted numerous ways in which the parallelism cited by Plaintiffs could not reasonably have been the result of Defendants' independent conduct. *Id.* ¶¶ 44-45.

{6} As stated previously, we granted certiorari to determine whether the Court misapplied the summary judgment standard and whether the Court failed to follow substantive federal antitrust law. We reverse the Court of Appeals and affirm the district court's grant of summary judgment.

SUMMARY JUDGMENT

{7} Defendants argue that the Court of Appeals applied the incorrect summary judgment standard by referring to the "traditional stringent standard that a movant must meet." *Id.* ¶ 15. The standard, as articulated by the Court of Appeals, is to "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Id.* ¶ 17 (internal quotation marks and citation omitted). This was a correct statement of the standard for summary judgment in New Mexico:

> Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party.

Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (filed 2006) (internal quotation marks and citations omitted). "Summary judgment is reviewed on appeal de novo." *Juneau v. Intel Corp.*, 2006-NMSC-002, 8, ¶ 139 N.M. 12, 127 P.3d 548 (filed 2005).

{8} New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits. *Compare Handmaker v. Henney*, 1999-NMSC-043, ¶ 21, 128 N.M. 328, 992 P.2d 879 (noting that "the policy in New Mexico disfavor[s] summary judgment"), *and Pharmaseal Labs., Inc. v. Goffe*, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977) ("Summary judgment is a drastic remedy to be used with great caution."), *with Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole. . . ."), *and* 11 James William Moore, *Moore's Federal Practice* 56.03[1] (3d ed. 2007) (discussing the trend in the federal courts to use summary judgment as a means of case management and resolution).

Federal courts, on the other hand, following the "*Celotex* trilogy,"[2] have become more inclined to grant summary judgment and "substantially increased the availability of summary judgment and encouraged greater use of the motion by trial courts." 11 Moore, *supra* 56.03[1], at 56-23. The *Celotex* trilogy favored greater use of summary judgment and "gave strong rhetorical support to summary judgment as a means of case management and resolution." 11 Moore, *supra* § 56.03[1], at 56-23; *see also* 56.03[2][c], at 56-28 (noting that *Matsushita* abrogated "big case" and "defendant motive and state of mind" exceptions to summary judgment and allowing summary judgment where it traditionally had not been allowed (internal quotation marks omitted)); § 56.03[3], at 56-30 (noting that *Anderson* requires the courts to consider the substantive evidentiary burden at the summary judgment stage, thus creating a heightened evidentiary burden for those opposing summary judgment); § 56.03[5], at 56-36 (noting that *Celotex* held that movant for summary judgment could meet burden by demonstrating absence of support for essential element of claim and not just affidavits).

{9} We continue to refuse to loosen the reins of summary judgment, as doing so would "turn what is a summary proceeding into a full-blown paper trial on the merits." *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 32, 128 N.M. 830, 999 P.2d 1062 (internal quotation marks and citation omitted). We do not wish to grant trial courts greater authority to grant summary judgment than has been traditionally available in New Mexico. *See id.* ¶¶ 37-38. "Permitting trial courts a license to quantify or analyze the evidence in a given case under whatever standard may apply . . . would adversely impact our jury system and infringe on the jury's function as the trier of fact and the true arbiter of the credibility of witnesses." *Id.* ¶ 38. By our refusal to align our state's approach with that of the federal courts, we do not intend to imply that summary judgment is never appropriate.

[2] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

{10} In New Mexico, summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment. *See Roth v. Thompson*, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992). "By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Goodman v. Brock*, 83 N.M. 789, 792-93, 498 P.2d 676, 679-80 (1972) (citations omitted). Once this prima facie showing has been made, the burden shifts to the non-movant "to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Roth*, 113 N.M. at 335, 825 P.2d at 1245. "A party may not simply argue that such [evidentiary] facts might exist, nor may it rest upon the allegations of the complaint." *See Dow v. Chilili Coop. Ass'n*, 105 N.M. 52, 55, 728 P.2d 462, 465 (1986). Rather, "[t]he party opposing the summary judgment motion must adduce evidence to justify a trial on the issues." *Clough v. Adventist Health Sys., Inc.*, 108 N.M. 801, 803, 780 P.2d 627, 629 (1989) (citation omitted). Such evidence adduced must result in reasonable inferences. *See Montgomery*, 2007-NMSC-002, ¶ 16. "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." *Stambaugh v. Hayes*, 44 N.M. 443, 451, 103 P.2d 640, 645 (1940) (citation omitted). When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment. Only when the inferences are reasonable is summary judgment inappropriate.

{11} In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, the court must "look to the substantive law governing the dispute," *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204. The inquiry's focus should be on whether, under substantive law, the fact is "necessary to give rise to a claim." *Eoff v. Forrest*, 109 N.M. 695, 702, 789 P.2d 1262, 1269 (1990); *see also Martin v. Franklin Capital Corp.*, 2008-NMCA-152, ¶ 6, 145 N.M.

179, 195 P.3d 24 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."); *Parker v. E.I. Du Pont de Nemours & Co.*, 121 N.M. 120, 124, 909 P.2d 1, 5 (Ct. App. 1995) ("A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case."). In this case, substantive federal antitrust law is the filter through which we must determine whether genuine issues of material fact exist. *See* § 57-1-15.

FEDERAL SUBSTANTIVE ANTITRUST LAW: PROVING THE CONSPIRACY

{12} As substantive law is the filter through which we apply summary judgment, and to construe our law in harmony with federal law, *see* 57-1-15, we must first undertake an analysis of substantive federal antitrust law. To establish a violation of Section 1 of the Sherman Act, a plaintiff "must be able to show: (1) concerted action, (2) by two or more persons, (3) which unreasonably restrains interstate or foreign trade or commerce." *In re Med. X-ray Film Antitrust Litig.*, 946 F. Supp. 209, 215 (E.D.N.Y. 1996); *see also* 15 U.S.C. 1. It is important to note that Section 1 is not violated when the alleged conspirators act independently. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) ("Independent action is not proscribed.").

> The essence of a Section 1 claim is the existence of an agreement. Unilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful agreement. Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff.

Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005) (internal quotation marks and citations omitted). Contrary to most markets, it is not always obvious whether firms in an oligopoly have acted independently. *See In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 420 n.24 (S.D.N.Y. 2005) (defining oligopoly as "control or domination of a market by a few large sellers, creating high prices and low output similar to those found in a monopoly" (internal quotation marks and citation omitted)). "[F]irms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd.,* 509 U.S. at 227.

> [A]n oligopolist's price and output decisions will have a noticeable impact on the market and on its rivals. . . . [For example,] in a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. . . . Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently.

VI Phillip E. Areeda & Herbert Hovenkamp*, Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1429a (2d ed. 2003). To summarize, where there are very few sellers (firms) within a market, the actions of one seller will have a noticeable effect on the actions taken by the other sellers. The other sellers may perform a cost-benefit analysis and react to the actions of the leader, producing results similar to an unlawful price-fixing agreement, but actually resulting from lawful, independent action. This "[t]acit collusion [or independent conduct] . . . describes the process, *not in itself unlawful*, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd.*, 509 U.S. at 227 (emphasis added). In an oligopolistic setting, the distinction between lawful, independent conduct and illegal conduct is most at issue when circumstantial evidence is used to prove the existence of an agreement to fix prices.

{13} To prove a violation of Section 1 of the Sherman Act, plaintiffs can produce direct or circumstantial evidence of an illegal agreement to fix prices. *See Monsanto Co*., 465 U.S. at 764. Direct evidence of such an agreement is "explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). In contrast, circumstantial evidence necessarily requires that inferences be drawn. *See Williamson Oil Co.*, 346 F.3d at 1300 ("The problem with this reliance on circumstantial evidence, however, is that such evidence is by its nature ambiguous, and necessarily requires the drawing of one or more inferences in order to substantiate claims of illegal conspiracy."). "While direct evidence, the proverbial 'smoking-gun,' is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998).

{14} As a result of the need to draw inferences from circumstantial evidence and the likelihood that parallel conduct in an oligopoly stems from lawful, independent conduct, federal courts require antitrust plaintiffs to present evidence "that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal quotation marks and citation omitted); *see also Monsanto Co.*, 465 U.S. at 763 (noting that "it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements"); *Williamson Oil Co.*, 346 F.3d at 1300 (holding that evidence tending to exclude independent conduct is necessary only when the plaintiff relies on circumstantial evidence to prove a conspiracy). Without requiring such a showing, pro-competitive conduct, the conduct that the antitrust laws are designed to protect, may be deterred. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 593-94. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . [and plaintiffs] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [them]." *Id.* at 588 (citations omitted).

{15} As a result of the limited inferences that can be drawn from circumstantial evidence and the interdependent nature of an oligopoly, the plaintiffs must present more than evidence of parallel pricing to prove the existence of an agreement between the defendants to fix prices. Although "parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal quotation marks and citation omitted) (alterations in original); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 122 ("[N]o conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."). Evidence of parallel pricing without more is inherently ambiguous in the oligopolistic setting because there are so many different means, lawful and unlawful, by which parallel pricing can be achieved. *See* VI Areeda & Hovenkamp, *supra* ¶ 1431b (discussing the numerous explanations for parallel pricing, including "imperfect express collusion, merely interdependent behavior, and fairly independent and non-interdependent conduct").

{16} It is the judge's duty to review the evidence presented by the plaintiffs and make a threshold legal determination as to whether it tends to exclude the possibility that the defendants acted independently. *See Williamson Oil Co.*, 346 F.3d at 1304 (holding that the judge does not act as fact-finder, but only makes a determination of the "reasonableness of the inferences that c[an] be drawn from the evidence, [which are] threshold legal determinations that appropriately [are] made by the district court"). If the evidence offered by the plaintiff is ambiguous and can equally lead to the conclusion that the alleged conduct was the result of independent

action as opposed to illegal conduct, the plaintiff has failed to establish a genuine issue of material fact that there was a conspiracy. *See Monsanto Co.*, 465 U.S. at 763; *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App. 1992) (holding that failure to establish an essential element of plaintiff's claim is sufficient grounds for summary judgment); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 118 (noting that plaintiffs must "meet [a] demanding standard of proof required in the context of an antitrust case"); *Bell Atl. Corp.*, 550 U.S. at 554 (recognizing "proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action").

{17} To assist in determining which evidence would tend to exclude independent action, federal courts have created "plus factors." "[A]ny showing . . . that 'tend[s] to exclude the possibility of independent action' can qualify as a 'plus factor.'" *Williamson Oil Co.*, 346 F.3d at 1301 (citation omitted). These "'plus factors' . . . remove [the plaintiff's] evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism." *Id.* In determining whether evidence constitutes a plus factor, *i.e.*, tends to exclude independent conduct, the court should consider the following: "[I]f a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor," *id.* at 1310; the evidence presented by the plaintiffs must be economically sensible or plaintiffs must "come forward with more persuasive evidence to support their claim," *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *see also In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 12 (D.D.C. 2004) ("[I]n the face of economic factors dictating that the nonmoving party's theory is irrational, that party must submit evidence to establish that the theory remains practical and genuine despite economic evidence to the contrary."). In addition, "a showing that the defendants' behavior would not be reasonable or explicable (i.e. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade" also constitutes a plus factor. *Williamson Oil Co.*, 346 F.3d at 1301 (internal quotation marks and citation omitted). The requirement of tending to exclude independent conduct necessarily requires that the court view the plaintiffs' evidence in light of the defendants' evidence to determine whether the plaintiffs' evidence tends to exclude the possibility that defendants were acting independently. *See* Rule 1-056(C) NMRA (stating that the judge must review "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits"); *see also Clough*, 108 N.M. at 804-05, 780 P.2d at 630-31 (determining that plaintiff's antitrust conspiracy claim should not survive summary judgment by considering plaintiff's evidence in light of evidence presented by defendants). The phrase "'plus factors' refers simply to the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy." VI Areeda & Hovenkamp, *supra* ¶ 1433e. Whether the courts want to call them plus factors or not, the requirement that the plaintiffs tend to exclude independent conduct does not change.

NEW MEXICO ANTITRUST PLAINTIFFS MUST PRESENT EVIDENCE TENDING TO EXCLUDE THE POSSIBILITY THAT DEFENDANTS ACTED INDEPENDENTLY

{18} Plaintiffs allege that Defendants violated the New Mexico Antitrust Act, which states that "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." Section 57-1-1. To prove a cause of action under the Antitrust Act the Legislature requires that "the Antitrust Act *shall* be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices." Section 57-1-15 (emphasis added). It is therefore the duty of the courts to ensure that New Mexico antitrust law does not deviate substantially from federal interpretations of antitrust law. *See State v. Guerra*, 2001-NMCA-031, ¶ 14, 130 N.M.

302, 24 P.3d 334 ("The word 'shall' as used in a statute is generally construed to be mandatory.").

{19} Federal substantive law as it relates to oligopolies controls in this case. There is no doubt that the tobacco industry, in which five companies manufacture more than 97% of the cigarettes sold in the United States, is a classic oligopoly. *See Williamson Oil Co.*, 346 F.3d at 1291. Because the cigarette industry is an oligopoly, it is likely that when one tobacco company (*i.e.*, Philip Morris) acts in a certain manner (*i.e.*, Marlboro Friday and subsequent price increases), the other firms (RJR, B&W, Lorillard, and Liggett) will determine whether it is in their best interest to follow the leader's actions. As we will discuss below, when Philip Morris began raising prices after Marlboro Friday, RJR's and B&W's conduct in following subsequent price increases was just as likely due to their own independent analysis of what was in their best interests as it was the result of an illegal price-fixing agreement. Therefore, Plaintiffs must present evidence that tends to exclude the possibility that Defendants acted independently or they can not meet their burden of establishing a genuine issue of material fact. Because Plaintiffs rely on circumstantial evidence to prove the existence of a price-fixing agreement, *see Romero*, 2009-NMCA-022, ¶ 20, if they have not presented evidence that tends to exclude the possibility that Defendants acted independently, they have not met their burden of establishing a genuine issue of material fact.

{20} Material facts are those "necessary to give rise to a claim," *Eoff*, 109 N.M. at 702, 789 P.2d at 1269, and to give rise to a Section 1 claim, evidence that tends to exclude independent action by the defendants is necessary to show that there was an unlawful agreement. *See Bell Atl. Corp.*, 550 U.S. at 557 ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a 1 [Sherman Act] complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"); *see also Monsanto Co.*, 465 U.S. at 763 ("On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement."). The United States Supreme Court has explicitly stated that "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Bell Atl. Corp.*, 550 U.S. at 557. Without this showing, an essential element of the conspiracy claim is absent and there can be no issue of material fact.

{21} In rejecting the plus factor approach used by the federal courts and holding that parallel conduct can be enough to prove a conspiracy, the Court of Appeals fails to construe the New Mexico Antitrust Act in harmony with judicial interpretations of federal antitrust law required by Section 57-1-15. *See Romero*, 2009-NMCA-022, ¶ 24. This ignores the United States Supreme Court's holding that "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," *Bell Atl. Corp.*, 550 U.S. at 554, and that plus factors are the tool for reviewing the evidence presented, *see* VI Areeda & Hovenkamp, *supra* 1432a ("We conclude that the Sherman Act 1 requirement of a contract, combination, or conspiracy is not satisfied by uniform anticompetitive pricing that results *merely* from recognized interdependence without the addition of any facilitators."). Contrary to the holding of the Court of Appeals that proof tending to exclude independent conduct is not a separate element of Plaintiffs' case, *Romero*, 2009-NMCA-022, 2¶ 5, we hold that the requirement that only reasonable inferences can be drawn from ambiguous evidence is a substantive component of federal antitrust law, and that Plaintiffs must present evidence tending to exclude independent conduct to ensure uniform application of federal and state laws. *See* 57-1-15.

{22} In reversing the district court and holding that an agreement to fix prices can be shown only with parallel conduct, the Court of Appeals requires a different quantum of proof than the federal court and, as a result, fails to construe our law in harmony with federal law. The Court of Appeals assumes that a jury could find a conspiracy, *see Romero*, 2009-NMCA-022, ¶¶ 27-30, without discussing Defendants' evidence that the in-tandem increases, shifts in market share, and supposed behavior contrary to self-interest were just as likely the result of independent, rational business decisions made to maximize profits, rather than an agreement to fix prices, because any alternative other than following the price increases was a losing option. In its hypothesis, the Court of Appeals errs in accepting certain plus factors with no discussion of whether they actually tend to exclude independent conduct. *Id.* ¶ 29 (discussing signaling and clandestine communications). Additionally, in assuming the jury could find a conspiracy based solely on parallel behavior, the Court allows an inference that is per se unreasonable. *Id.* Rather than reviewing Plaintiffs' evidence in light of all of the evidence presented, the Court asserts that it just upheld its "obligation to view the evidence in the light most favorable to the non-movant and to allow the non-movant the benefit of any reasonable inferences supported by the evidence. . . ." *Id.* ¶ 31. The Court fails to use substantive federal antitrust law as the filter to first determine whether genuine issues of material fact exist in favor of summary judgment. Instead, the Court employs New Mexico's summary judgment standard to overcome the strict requirements of substantive law. This is exactly the rationale rejected in *Matsushita*. *See* 475 U.S. at 587-88 ("Respondents correctly note that '[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." (citation omitted)).

{23} We also disagree with the Court of Appeals in *Romero* that both Dr. Leffler's opinion and *Brooke Group* set forth "major points of departure" from the plus factor approach discussed in *Williamson Oil*. The Court noted that Dr. Leffler stated that "[t]he economic evidence indicates that it is highly unlikely that independent competitive behavior explains the price restructuring and price changes for cigarettes during the alleged conspiracy period." *Id.* ¶ 32 (internal quotation marks omitted). The Court also held that "Dr. Leffler's opinion testimony, if believed, would permit a reasonable factfinder to exclude lawful parallelism as the most likely explanation for the parallelism demonstrated by cigarette prices during the class period." *Id.* Although the Court held that it was "not inclined to appoint [itself an] amateur econo[mist] and attempt to second guess Dr. Leffler's reasoning," *id.* ¶ 39, it did not give consideration to the fact that there were several ambiguities in Dr. Leffler's opinion that were drawn out in his deposition. While Dr. Leffler opined that the parallel price increases were not the result of lawful parallelism, he also agreed that the factors he used to determine the existence of a price-fixing conspiracy could not "tell you one way or the other whether you have conscious parallelism or you've got something beyond conscious parallelism like a price fixing agreement." He also offered the opinion that an explicit agreement was a violation of Section 1 of the Sherman Act as opposed to oligopolistic coordination and there was no explicit agreement in this case. Dr. Leffler stated that rational oligopolists would act to maximize profits, rational oligopolists would have matched the Marlboro Friday price reduction, and RJR and B&W were most likely acting to maximize their profits by failing to re-widen the price gap. Dr. Leffler even went so far as to acknowledge that the cigarette industry "responded as I would have expected them to respond . . . [t]o match the price cut and then to anticipate future price increases, to extend the oligopoly cooperation to the discount sector."

{24} In general, Dr. Leffler's report concludes that following Marlboro Friday, Defendants' actions amounted to illegal price-fixing. However, his statements and responses in his deposition demonstrate that he actually thought it was just as likely that Defendants would have behaved

in the same manner if they were acting independently and not under an illegal price-fixing agreement, because to act any other way would have been less profitable and, as such, against their economic interest.

{25} Without becoming amateur economists, the Court of Appeals could have easily recognized inconsistencies between Dr. Leffler's report and his deposition. Based on these ambiguities in the evidence, it would have been necessary under substantive antitrust law to hold that the evidence did not tend to exclude independent conduct because it was also consistent with independent conduct. *See Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1270 (N.D. Ga. 2002) ("If, when considered in its entirety, [the evidence] is totally ambiguous or to the opposite effect, it is not relevant and may not be relied upon by the jury."). By holding that such ambiguous evidence tended to exclude independent conduct and would allow the jury to reach a reasonable inference, the Court of Appeals failed to ensure uniform application of state and federal antitrust law.

{26} The Court of Appeals also relied heavily on several facets of the United States Supreme Court's analysis in *Brooke Group* to bolster both its reliance on Dr. Leffler's opinion and its conclusion that independent action was an unlikely explanation for the parallel pricing observed during the period of the alleged agreement to fix prices. *Romero*, 2009-NMCA-022, ¶¶ 33-37, 40. In each instance, however, reliance on *Brooke Group* is premised on a misreading of the Supreme Court's analysis. While the Court of Appeals correctly observed that *Brooke Group* recognizes the "inherent limitations" of independent conduct and that it is an "improbable" explanation for "multivariable coordination," that conclusion was based on an analysis of "the net price in the market" or retail pricing, not on list or wholesale prices, which underlie the basis of the claim in the instant case. *Brooke Group Ltd.*, 509 U.S. at 239. Similarly, while *Brooke Group* did analyze "the likelihood that tacit collusion could result in industry-wide, in-tandem increases in the prices of both generic and premium cigarettes," *Romero*, 2009-NMCA-022, ¶ 40, it did so only in the context of retail pricing.

{27} Retail pricing is influenced by so many variables that the cigarette oligopoly cannot exert collective control over it through independent conduct. *See Brooke Group Ltd.*, 509 U.S. at 239 (noting that retail prices are determined in part by "list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers"). Cigarette wholesalers, who buy direct from cigarette manufacturers at wholesale list prices, set prices for retailers, who then set retail prices for consumers. All levels of pricing are affected by various manufacturer discounts and promotions. Therefore, "to coordinate in an effective manner [at the retail level] . . . the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, like consumer stickers or coupons, were difficult to monitor." *Id.* at 239. This complexity explains why independent conduct is an improbable means of coordinating parallel *retail* pricing and why *Brooke Group* suggests that independent conduct should be rejected as a likely explanation in that circumstance. *Id.* This conclusion, however, cannot be logically extended to wholesale list prices, which are simply determined by the manufacturers. *Brooke Group* is very clear that "it would be *unreasonable* to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect *only* list prices," because "in an oligopoly setting . . . price competition is most likely to take place through less observable and less regulable means than list prices." *Id.* at 236 (emphasis added).

{28} Despite these significant distinctions between *Brooke Group* and the instant case, the Court of Appeals nonetheless suggests that "Defendants' theory of the present case seems . . . easily as complex as the recoupment theory rejected in *Brooke Group*." *Romero*, 2009-NMCA-022, ¶ 36. The Court holds that only a "single-tier market" can be effectively controlled by legal oligopolistic coordination, because a two-tier wholesale market is too complex and has too many variables,

making independent conduct an implausible explanation for parallel pricing. *Id.* ¶ 40 ("The present case does not involve the type of simple price leadership in a single-tier market that characterized the tobacco industry prior to the introduction of generic cigarettes."). Finding the two-tier system complex, the Court of Appeals rejects independent conduct as a plausible explanation for the observed list pricing. *Id.* ¶ 37 ("[L]awful oligopolistic coordination was incapable of containing the competition from non-premium cigarettes.").

{29} The point of Marlboro Friday and subsequent price reductions, however, was to simplify the wholesale pricing scheme, collapsing the market from ten pricing tiers to two, so there would be a less complex pricing system. Due to the interdependent nature of an oligopoly, "oligopolistic rationality" can "provide for price increases through . . . price leadership[]" if the other firms believe that following the pricing leader will maximize their profits. VI Areeda & Hovenkamp, *supra* ¶ 1429a-b (internal quotation marks omitted) (discussing interdependent decision-making and how the actions of one firm may result in the independent decision of other firms to follow if doing so will maximize profits). To stem the flow of market share into the discount sector, Philip Morris realized the need to close the price gap between premium and discount cigarettes, and set about undertaking this task with Marlboro Friday and the subsequent price reductions in the premium and discount sectors. With the price gap closed and only two price tiers remaining, Philip Morris was able to take advantage of the expected "oligopolistic rationality" when prices began to ascend to pre-Marlboro Friday levels. Dr. Leffler opined that RJR and B&W were acting as rational oligopolists by following Philip Morris in subsequent price increases to prevent further price cuts similar to Marlboro Friday. Compliance was ensured by the looming threat of continued revenue losses should Philip Morris institute a second Marlboro Friday.[3] By relying on "oligopolistic rationality" and having condensed the ten-tier system to two tiers, Philip Morris used its dominant market position and the inherent interdependencies of the cigarette oligopoly to force the other manufacturers to comply with its subsequent price increases in *both* pricing tiers. These strategic moves were all part of Philip Morris's strategy to "box in its competitors" and advance its own competitive position.

{30} Prior to Marlboro Friday, Philip Morris attempted to box in its competitors and reduce the discount-premium price gap by independently raising generic and discount cigarette prices. However, this attempt failed. *Romero*, 2009-NMCA-022, ¶ 37. No discount cigarette manufacturers responded because with ten pricing tiers and the large price gap between discount and premium cigarettes, discount cigarettes could continue to grow revenue by cannibalizing the premium cigarette market share; it was not in their interest at that point to follow Philip Morris's price leadership, and they had no incentive to do so. Contrary to the Court of Appeals's conclusion that "[t]his evidence [supports] Dr. Leffler's opinion that by itself, lawful oligopolistic coordination was incapable of containing the competition from non-premium cigarettes," *Romero*, 2009-NMCA-022, ¶ 37, this initial failure to control discount list prices simply explains Philip Morris's rationale and motivation for both Marlboro Friday and its subsequent pricing strategy. Philip Morris needed to simplify the pricing structure and exert its market influence before the oligopoly would respond to its price leadership.

{31} Nothing about the cigarette oligopoly's coordination of the wholesale two-tier market is multi-variable or complex as described in *Brooke Group*. Retail pricing, not list pricing, is multivariable and complex and makes independent conduct an improbable explanation for parallel pricing. *See Brooke Group Ltd.*, 509 U.S. at 239. Therefore, simultaneous coordinated pricing in both tiers does not, by itself, tend to exclude

[3] Declaration of RJR CEO: "[B]ased on Marlboro Friday, RJR believed that [Philip Morris] would not allow a competitor to take market share away from Marlboro by cutting prices. Thus, RJR believed, any further price reduction would be futile and would result in lower profits."

independent conduct due to complexity. Rather the opposite is true. It is undisputed by Plaintiffs that Philip Morris's Marlboro Friday was the initiation of a highly competitive strategy. That strategy did not end on Marlboro Friday, but persisted throughout the alleged conspiracy as Philip Morris worked to maintain a narrow price gap between discount and premium cigarettes *and* worked to raise prices in both tiers. With this strategy, Philip Morris maintained its newly-acquired market share and increased its revenue, while manufacturers that depended on the discount sector lost market share and revenue. Philip Morris sought to regain market share it had lost to the discount sector prior to Marlboro Friday, and over a roughly six-year period, it increased wholesale prices to regain the status quo prior to Marlboro Friday.

{32} The result of Philip Morris's market dominance was that premium cigarettes *and* discount cigarettes became subject to interdependent conduct, whereas prior to Marlboro Friday only premium cigarettes were subject to such oligopolistic control. Plaintiffs' expert, Dr. Leffler, stated that Marlboro Friday "caused a restructuring in the industry and a change in the competitive relationships." As a result of this restructuring, oligopolistic functioning and rationale extended to the discount sector where there had been no such functioning prior to Marlboro Friday. Indeed, Dr. Leffler even acknowledged in his deposition that the industry merely "extend[ed] the oligopoly cooperation to the discount sector." As oligopolistic control is lawful in the premium price tier, there is no rationale for arguing that it is illegal in the discount price tier. For these reasons, the Court of Appeals's reliance on *Brooke Group* was misplaced.

{33} Thus, we must determine whether Plaintiffs' proffered evidence of plus factors tends to exclude the possibility that Defendants acted independently. Plaintiffs cite to the following plus factors, in addition to parallel pricing, as tending to exclude the possibility that Defendants acted independently: (1) the economies of the marketplace, such as a highly concentrated market, cigarette fungibility, high barriers to entry in the industry, absence of close substitutes, and a history of collusion; (2) a strong motivation to conspire, resulting from the desperate times facing the cigarette industry, including "a dramatic decline in its sales as a result of . . . increased public awareness of the detrimental health effects of smoking"; (3) the condensation of price tiers to facilitate the conspiracy; (4) actions contrary to self-interest, including Philip Morris's preannouncing its price reductions and Defendants' failure to attempt to re-widen the price gap by reducing discount prices; (5) conspiratorial meetings in other markets; (6) a smoking and health conspiracy; (7) the manner in which Defendants monitored the conspiracy through Management Science Associates ("MSA")[4]; (8) opportunities to conspire; and (9) pricing decisions made at high levels. Although the ambiguities in Dr. Leffler's opinion have previously been discussed, *see supra*, ¶¶ 23-25, we will further review the evidence presented by Dr. Leffler, since this is the only plus factor cited by the Court of Appeals.

{34} We reject Plaintiffs' plus factors for reasons similar to those set forth in *Williamson Oil Co.* because Defendants' conduct is just as consistent with lawful, independent action as it is with price fixing, and therefore it does not tend to exclude independent conduct. We briefly discuss Plaintiffs' plus factors to address why they do not tend to exclude the possibility of independent conduct by Defendants. (1) The majority of the economies of the marketplace to which Plaintiffs cite are nothing more than inherent characteristics of an oligopoly and cannot tend to exclude independent action. *See Holiday Wholesale Grocery Co.*, 231 F. Supp. 2d at 1305. In fact, Plaintiffs' expert agreed that these factors are "conducive to collusion, whether it be in the form of tacit collusion [independent conduct] or

[4] "[MSA] provides data collection, processing, and storage services to numerous Fortune 500 companies, including American Express, MCI, Coca-Cola, and Michelin Tires." "MSA Inc. shipment-to-wholesale data are aggregated, historical data on manufacturer shipments of cigarettes to wholesalers that manufacturers provide to MSA Inc. for processing, and do not contain any cigarette pricing information."

some kind of explicit agreement fixing prices," and that "looking at [these] structural factors alone, just like prices, does not allow you . . . to distinguish between whether the prices in this industry are the result of price fixing conspiracy on the one hand or conscious parallelism on the other hand." In addition, the history of collusion cited by Plaintiffs is based on a 1946 violation of the Sherman Act. *See Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946). However, Plaintiffs do not explain how a case from more than fifty years ago is indicative of a present day price-fixing agreement, especially when only one of the current Defendants, RJR, was a defendant in the 1946 case. *See Williamson Oil Co.*, 346 F.3d at 1317-18. (2) The motivation to conspire cited by Plaintiffs cannot serve as tending to exclude independent conduct because "[p]rofit is a legitimate motive in pricing decisions, and something more is required before a court can conclude that competitors conspired to fix pricing in violation of the Sherman Act." *In re Baby Food Antitrust Litig.*, 166 F.3d at 134-35. (3) When Philip Morris took action to condense the price tiers, it is just as likely that they did so to reduce the price gap and maximize profits as to facilitate a price fixing agreement, and thus this does not tend to exclude independent conduct. (4) Plaintiffs argue that Defendants took actions contrary to self-interest by pre-announcing price decisions and failing to re-widen the price gap. Philip Morris argues that the June 20, 1993 pre-announcement of a price decrease to take effect twenty days later was not a signal to the other cigarette manufacturers, but was made to allow wholesalers and retailers to avoid an immediate reduction in the value of their inventory and to accommodate the burden of implementing a price reduction. *See id.* at 133 (holding that advance price announcements can serve an important purpose in the industry). In addition, failure to re-widen the price gap does not tend to exclude independent conduct. Plaintiffs' expert testified that RJR and B&W were acting as rational oligopolists in following Philip Morris's price reduction, and that RJR and B&W made rational business decisions not to re-widen the price gap because they would not have made more money doing so. *See* VI Areeda &Hovenkamp*, supra* ¶ 1429b (discussing that other firms in an oligopoly will follow the price leader "when they believe that it will maximize industry profits"). (5) The alleged conspiratorial meetings in other markets cannot serve as tending to exclude independent conduct because Plaintiffs offered no support to connect the actions in foreign markets with the actions in the United States. In addition, Plaintiffs' expert testified that he knew of no such connection and price changes in the United States were independent of those in the international market. (6) Similarly, concluding that an alleged smoking and health conspiracy facilitated coordination of a conspiracy in this case would require the jury to engage in speculation, and therefore it does not tend to exclude independent conduct. *See Williamson Oil Co.*, 346 F.3d at 1316-17; *Matsushita Elec. Indus. Co.*, 475 U.S. at 595. (7) The manner in which Defendants monitored the conspiracy through MSA is not evidence tending to exclude independent conduct because there is an equally rational legal explanation for this such as to "devise competitive strategies, gauge the success of their promotions, monitor the impact of new styles or packing on the market, and determine whether increased promotional spending was needed in certain geographic areas to compete with competitors' programs." In addition, Dr. Leffler acknowledged under oath that the information exchanged was not pricing information. As this information is ambiguous at best, it can not be seen as tending to exclude independent conduct. *See Williamson Oil Co.*, 346 F.3d at 1315. (8) Plaintiffs allege that Defendants had many opportunities to conspire because high-ranking officials from each manufacturer met on numerous occasions. However, the fact that Defendants may have met does not reasonably lead to the inference that they conspired to discuss price fixing. "[M]ere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anticompetitive conspiracy. . . ." *Clough*, 108 N.M. at 804, 780 P.2d at 630 (internal quotation marks and citation omitted); *see also Williamson Oil Co.*, 346 F.3d at 1319. (9) Finally, pricing decisions made at high levels do not tend to exclude independent conduct as "[f]irms routinely consolidate

decisionmaking authority in high ranking officers for a multitude of wholly legitimate reasons." *Williamson Oil Co.*, 346 F.3d at 1319. In light of the ambiguous nature of Plaintiffs' plus factors, we hold that they do not tend to exclude independent conduct.

{35} We also affirm the district court's ruling that "even after going through the plus factors, there still exists the opportunity for the defendant to rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price-fixing conspiracy." Plaintiffs and the Court of Appeals erred in failing to acknowledge any legitimate rational explanations for the actions taken by Defendants. Plaintiffs ignore both retail competition and the effect that competition had on the "actual 'transaction' prices." Defendants competed "vigorously" on retail pricing, spending a combined total of over $25 billion. This competition led to RJR and B&W filing a lawsuit against Philip Morris alleging violations of the Sherman Act and unfair competition for conduct that occurred in the midst of the alleged conspiracy. *See R. J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002). RJR and B&W argued that Philip Morris "designed and executed Retail Leaders to monopolize and restrain trade in the United States cigarette market by paying retailers for advantageous display and signage space which Plaintiffs say restricts information needed by consumers, disrupts the price-setting mechanism of the market, and limits Plaintiffs' abilities to promote their products." *Id.* at 365. It would be unreasonable to infer that companies who fiercely competed at the retail level to the extent of suing one another would at the same time agree to fix prices.

{36} Plaintiffs also fail to explain the economic rationale for Defendants competing so fiercely on retail promotions that would undermine any benefit they may have been receiving from a price-fixing conspiracy at the wholesale level. *See Williamson Oil Co.*, 346 F.3d at 1321 ("[I]f prices are fixed . . . there is no rational reason to undertake extremely significant and expanding retail promotional expenditures, which are a paradigmatically competitive activity."). From 1994 to 1999, Philip Morris's increased spending on retail promotions increased by $1.651 billion, which equaled 60% of its operating income. From 1993 to 1999, RJR's increased spending on retail promotions increased by $570 million, which was 141.6% of its operating income. B&W increased its spending on retail promotions from 1992 to 1998 by $492.5 million. This retail competition caused retail prices to vary, "even among brands that were priced identically at list."

{37} In addition, market shares did not remain static but shifted and resulted in clear winners, such as Philip Morris, and clear losers, such as RJR and B&W. Philip Morris walked away a winner by ensuring that the price gap remained at a desirable level, while RJR and B&W, both of which had relied heavily on discount cigarettes, lost market share. During the period of the alleged conspiracy, Philip Morris's market share grew from 42.2% to 50.5%; RJR's share shrunk from 30.6% to 23.0%; and B&W's share declined from 16.6% to 11.7%. These shifts in market share also resulted in substantial revenue adjustments, further highlighting the winners and losers. For example, "in 1999 alone [Philip Morris] realized an additional $2.9 billion in revenues as a result of its cumulative increase in market share since 1993." In 1999, RJR was down approximately $3 billion in annual revenues compared to 1993, and B&W lost $1.3 billion in annual revenues from 1993 to 1999. Plaintiffs offer no evidence to explain why RJR and B&W would participate in a conspiracy that would result in lost market share and revenue. Rather, it is more likely that RJR and B&W acted as they did because it was the best option for them to follow out of a number of bad options. Philip Morris argued that each price increase subsequent to Marlboro Friday was for legitimate business reasons and independently made. Philip Morris stated that Plaintiffs had produced no evidence to support the allegation that the pricing actions taken were "intended to accomplish anything other than to advance [Philip Morris's] economic self-interest." There is no doubt that Marlboro Friday was a competitive act. In fact, Plaintiffs'

economic expert stated that RJR and B&W were acting to maximize their profits in the way they reacted to Marlboro Friday and that any other options, such as attempting to reduce the price gap, would have led to inferior profits. In other words, Defendants had no choice but to follow the lead of Philip Morris and Plaintiffs failed to present evidence showing otherwise.

{38} Defendants made a prima facie case supporting summary judgment by providing evidence of fierce retail competition that undermined the plausibility of a price-fixing agreement, demonstrating that wholesale prices remained lower than pre-Marlboro Friday levels and did not exceed pre-Marlboro Friday levels until almost five years later, and by highlighting the ambiguities in Dr. Leffler's opinion. This evidence showed that Defendants "'had no rational economic motive to conspire, and . . . their conduct is consistent with other, equally plausible explanations.'" *Clough*, 108 N.M. at 804, 780 P.2d at 630 (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 596-97). In reviewing Plaintiffs' plus factors, we find that the district court properly granted summary judgment.

CONCLUSION

{39} Failing to produce evidence tending to exclude independent action, Plaintiffs have not raised a genuine issue of material fact that there was an agreement between Defendants to fix the prices of cigarettes. Therefore, we reverse the Court of Appeals and affirm summary judgment in favor of all Defendants.

{40} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-045

Filing Date: October 19, 2010

Docket No. 31,909

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

RUDY B.,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Monica M. Zamora, District Judge

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OPINION

BOSSON, Justice.

{1} New Mexico law requires a trial judge to hold an evidentiary hearing to determine whether a juvenile, adjudicated as a youthful offender for having committed certain serious criminal offenses, is "amenable" to treatment or rehabilitation in juvenile facilities or should be sentenced to prison as an adult. *See* NMSA 1978, § 32A-2-20 (1993) (amended 2009). Our courts have labored for years debating whether the Sixth Amendment right to a jury trial requires the amenability determination to be made by the jury or by the trial judge as the statute provides. *See State v. Gonzales*, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776, *overruled by State v. Rudy B.*, 2009-NMCA-104, ¶ 53, 147 N.M. 45, 216 P.3d 810.

{2} On the basis of U.S. Supreme Court precedent recently issued in *Oregon v. Ice*, U.S., 129 S. Ct. 711 (2009), we now conclude that the Sixth Amendment does not require a jury determination, and thus, we uphold from constitutional challenge New Mexico's statutory preference for judge-made amenability decisions. In so doing, we reverse the recent contrary opinion of our Court of Appeals and remand for further proceedings.

BACKGROUND

{3} The Court of Appeals succinctly described the events resulting in the prosecution of Rudy B. ("Child") in this case. "Child was involved in a gang fight in a parking lot. Under the impression that one of the other gang members had a gun, Child pulled out his own weapon and began shooting. He hit three people, one of whom was rendered a quadriplegic." *Rudy B.*, 2009-NMCA-104, ¶ 2.

{4} The State then filed a petition in children's court against Child, seventeen years old at the

time, alleging various youthful offender offenses and potentially subjecting him to an adult sentence. Soon thereafter, the State filed notice of its intent to seek adult sanctions and obtained a grand jury indictment, charging Child with three counts of shooting from a motor vehicle (great bodily harm), three counts of aggravated battery (deadly weapon), and one count of unlawful possession of a handgun by a minor, and one count of tampering with evidence. Prior to trial, Child pleaded guilty to two counts of shooting from a motor vehicle (great bodily harm) and to two counts of aggravated battery (deadly weapon) (firearm enhancement). In return, the State agreed to drop the remaining charges.

{5} The plea agreement specified that Child was to be sentenced after an amenability hearing that would be held "pursuant to [Section] 32A-2-20." Section 32A-2-20 requires a trial judge to hold an evidentiary hearing to determine whether a juvenile adjudicated as a youthful offender should be sentenced as a juvenile or as an adult. To sentence a youthful offender as an adult, the trial judge must make two findings (collectively "the amenability determination"): "(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders." Section 32A-2-20(B). The statute provides a list of factors for the trial judge to consider in light of the evidence presented at the amenability proceeding. Section 32A-2-20(C).[1]

{6} Child's agreement further explained that, depending on the outcome of the amenability proceeding, he faced either a juvenile disposition until the age of twenty-one with the Children, Youth & Families Department, or an adult sentence of up to twenty-six years with the Department of Corrections. The agreement also contained a provision in which Child waived "all motions, defenses, objections, or requests" regarding the judgment against him, and "specifically waive[d] his right to appeal as long as the Court's sentence [was] imposed according to the terms of [the] agreement."

{7} At the amenability hearing, the trial judge heard conflicting evidence regarding Child's amenability to treatment or rehabilitation as a juvenile in available facilities. At the conclusion of the hearing, the trial judge explained that her decision as to Child's amenability would turn primarily on "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available," given that Child was eighteen at the time of the hearing. Section 32A-2-20(C)(7). She further explained that the parties had not done an adequate job of educating her regarding the programs and facilities available to treat or rehabilitate Child by the time he reached twenty-one. Because the trial judge felt incapable of rendering an informed decision, she deferred her ruling on Child's amenability until the parties could present additional evidence regarding the available treatment or rehabilitation options.

{8} Based on the evidence presented at a subsequent hearing, the trial judge concluded that no suitable facilities or services were available to treat or rehabilitate Child to a level that would adequately protect the public by the time he turned twenty-one. Consequently, the judge found that Child was not amenable to treatment

[1] Section 32A-2-20 provides, in relevant part, C. In making the findings set forth in Subsection B of this section, the judge shall consider the following factors:

(1) the seriousness of the alleged offense;
(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
(3) whether a firearm was used to commit the alleged offense;
(4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;
(5) the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability;
(6) the record and previous history of the child;
(7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; and
(8) any other relevant factor, provided that factor is stated on the record.

or rehabilitation as a child in available facilities, and that he was not eligible for commitment to an institution for children with developmental disabilities or mental disorders. The judge imposed an adult sentence of twenty-five years imprisonment with the Department of Corrections.

{9} On appeal, our Court of Appeals reversed, holding Section 32A-2-20(B) and (C) facially unconstitutional because its amenability determination was made by a judge and not the jury. *Rudy B.*, 2009-NMCA-104, ¶ 53. In so doing, the Court relied on a string of Sixth Amendment decisions of the U.S. Supreme Court reaching back to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Rudy B.*, 2009-NMCA-104, ¶¶ 15-19. The Court overruled its prior opinion in *Gonzales*, 2001-NMCA-025, which had arrived at the opposite conclusion with regard to these same amenability determinations. *See Rudy B.*, 2009-NMCA-104, ¶¶ 34-35, 53. We granted certiorari to address important and timely constitutional issues under the Sixth Amendment as they affect our statutory process for adjudicating juveniles charged with serious criminal offenses. *See State v. Rudy B.*, 2009-NMCERT-009, 147 N.M. 423, 224 P.3d 650.

DISCUSSION

{10} The State raises two issues on appeal. First, the State contends that the Court of Appeals did not have jurisdiction to consider Child's constitutional challenge to Section 32A-2-20 because Child waived his right to appeal in the plea agreement. Second, the State argues that the Court of Appeals erred when it declared Section 32A-2-20 unconstitutional, largely because it improperly applied the U.S. Supreme Court's recent opinion in *Ice*, U.S., 129 S. Ct. 711. We address each argument in turn.

The Court of Appeals had jurisdiction over this case.

{11} The State maintains that Child's explicit waiver of his right to appeal divested the Court of Appeals of jurisdiction to consider his constitutional challenge to Section 32A-2-20. The State's argument is essentially that appellate jurisdiction rests on the status of an appellant as an "aggrieved party," and that Child "agreed not to be aggrieved" when he waived his right to appeal. *See* N.M. Const. art. VI, § 2 ("[A]n aggrieved party shall have an absolute right to one appeal."). We find the jurisdictional argument unpersuasive.

{12} The State does not cite, and we cannot find, any authority to support the proposition that a *waiver* in a plea agreement of the right to appeal divests the Court of Appeals of *jurisdiction* to hear an appeal in a criminal proceeding. The two cases on which the State relies merely illustrate the well-established principle that a voluntary plea of guilty or *nolo contendere* "'ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds.'" *State v. Chavarria*, 2009-NMSC-020, ¶ 9, 146 N.M. 251, 208 P.3d 896 (quoting *State v. Hodge*, 118 N.M. 410, 414, 882 P.2d 1, 5 (1994)); *see also id.* (limiting review to the question of whether the trial court had jurisdiction to sentence the defendant to life in prison, rather than reaching the merits of the defendant's Eighth Amendment challenge to his life sentence); *State v. Michael S.*, 1998-NMCA-041, ¶ 11, 124 N.M. 732, 955 P.2d 201 (declining to address the child's substantive appellate arguments because they were not based on jurisdictional grounds). These cases do not hold, however, that such a waiver in a plea agreement divests an appellate court of jurisdiction to entertain that appeal.

{13} At bottom, a plea agreement is simply a contract between the State and an accused that affects the rights of the parties but not the court's jurisdiction, which is a creature of statute and the state constitution. *See State v. Simmons*, 2006-NMSC-044, ¶ 12, 140 N.M. 311, 142 P.3d 899 ("We address the plea agreement as a unique form of contract, binding upon both parties, relying on the rules of contract construction."); *State v. Montano*, 2004-NMCA-094, ¶ 7, 136 N.M. 144, 95 P.3d 1059 ("A plea agreement is a form of contract between the State and a defendant.").

A provision of a plea agreement waiving the right to appeal is binding on the parties to the same extent that any contractual provision binds the parties to a particular term of a contract.

{14} Subject matter jurisdiction, on the other hand, implicates a court's "power to decide" the issue before it. *State v. Bailey*, 118 N.M. 466, 469, 882 P.2d 57, 60 (Ct. App. 1994). Put another way, "the term 'jurisdictional error' should be confined to instances in which the court was not competent to act." *State v. Orosco*, 113 N.M. 780, 783, 833 P.2d 1146, 1149 (1992). A court's jurisdiction derives from a statute or constitutional provision. *See State v. Smallwood*, 2007-NMSC-005, ¶ 6, 141 N.M. 178, 152 P.3d 821 ("[O]ur Constitution or Legislature must vest us with appellate jurisdiction.").

{15} With respect to this case, the Legislature vested the Court of Appeals with subject matter jurisdiction over "criminal actions, except those in which a judgment of the district court imposes a sentence of death or life imprisonment." NMSA 1978, § 34-5-8(A)(3) (1983). Child's waiver of his right to appeal does not transform this proceeding into something other than a "criminal action." Nor did the trial court impose a sentence of death or life imprisonment. Hence, Child's waiver does not implicate the "power" or "competen[ce]" of the Court of Appeals to consider his case.

{16} The State did not raise the issue of Child's waiver of his right to appeal to the Court of Appeals, nor did it raise the issue to this Court in its petition for certiorari. Consequently, because this is neither a jurisdictional nor foundational issue that is integral to the resolution of the questions presented in this petition, we do not decide whether the scope of Child's waiver extended to the constitutionality of Section 32A-2-20. *See State v. Javier M.*, 2001-NMSC-030, ¶ 10, 131 N.M. 1, 33 P.3d 1 (holding that this Court may reach "a foundational issue which is integral to a complete and thorough analysis of the specific question presented in the petition for writ of certiorari"); *see also* Rule 12-502(C)(2)(b) NMRA ("[T]he Court will consider only the questions set forth in the petition. . . ."). Therefore, we reject the State's invitation to reverse the Court of Appeals on jurisdictional grounds and proceed to the significant constitutional issue presented in Child's certiorari petition.

Classification of Juvenile Offenders

{17} The State argues that the Court of Appeals should not have overruled *Gonzales* because *Apprendi* does not apply to amenability proceedings for youthful offenders. Before we begin our analysis, we briefly describe New Mexico's three-tiered juvenile offender classification.

{18} The Delinquency Act establishes three levels of juvenile offenders, largely based on the alleged offense leading to the filing of a petition against the child. At the upper extreme are serious youthful offenders, children between the ages of fifteen and eighteen who are charged with first-degree murder. *See* NMSA 1978, § 32A-2-3(H) (1993) (amended 2009). Serious youthful offenders are automatically tried and, if convicted, sentenced as adults. *Id.* (citing *State v. Muniz*, 2003-NMSC-021, ¶ 21, 134 N.M. 152, 74 P.3d 86). At the other end of the spectrum are delinquent offenders, children of any age up to eighteen who have committed other less serious acts "that would be designated as a crime under the law if committed by an adult." Section 32A-2-3(A). Delinquent offenders are tried in the children's court and, if adjudicated, can receive a maximum disposition of commitment to a juvenile facility until their twenty-first birthday. *See* NMSA 1978, § 32A-2-19(B)(1)(c) (1993) (amended 2009).

{19} The intermediate classification of juvenile offender, the youthful offender, has required our repeated attention and is the one relevant to this case. *See, e.g.*, *State v. Jones*, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474. Youthful offenders are children between the ages of fourteen and eighteen who (1) are adjudicated for any of a list of felonies, enumerated by statute, which have consequences less serious than first-degree murder, including the offenses to which Child pleaded guilty in this case, or (2) have three prior, separate felony adjudications within the three years preceding the offense. *See* § 32A-2-3(J). Youthful

offenders also include fourteen-year-old children adjudicated for first-degree murder. *See id.* When a child is an alleged youthful offender, the State may seek an adult sentence by giving notice of its intent to do so within ten days of filing the initial petition. *See* § 32A-2-20(A). The child is then tried in children's court, but according to the Rules of Criminal Procedure for the District Courts. *See* Rule 10-101(A)(2)(b) NMRA. If the child is adjudicated for the alleged offense, the children's court must hold an amenability hearing pursuant to Section 32A-2-20(B)(1), to determine whether it has the discretion to sentence the child as an adult.

The *Apprendi* Line of Cases Through *Cunningham*

{20} Turning to the matter at hand, we begin with an overview of the history of the *Apprendi* rule. In *Apprendi*, the Supreme Court invalidated New Jersey's "hate crime" law, which the trial judge relied on to extend the defendant's sentence after finding by a preponderance of the evidence that the defendant's various weapons-related offenses had been "motivated by racial bias." *Apprendi*, 530 U.S. at 470-71 (internal quotation marks and citation omitted). In striking down the "hate crime" law, the Supreme Court articulated a bright-line rule, predicated on the Sixth Amendment right to a trial by jury as applied to the states through the Fourteenth Amendment. *Id.* at 525. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. As Justice O'Connor predicted in her dissent, the so-called *Apprendi* rule has had a pivotal impact on criminal sentencing procedures across the nation. *See id.* at 524 (O'Connor, J., dissenting) (characterizing the majority's ruling as a "watershed change in constitutional law").

{21} The trend coming out of the Supreme Court's post-*Apprendi* decisions was unmistakable. *See Cunningham v. California*, 549 U.S. 270 (2007) (invalidating California's guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (invalidating the federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating Washington's sentencing scheme); *Ring v. Arizona*, 536 U.S. 584 (2002) (invalidating Arizona's death penalty sentencing scheme); *Apprendi*, 530 U.S. 466 (invalidating New Jersey's sentencing scheme); *see also United States v. O'Brien*, U.S., 130 S. Ct. 2169, 2182 (2010) (holding that the judge's finding—that the weapon used in a drug trafficking crime was a machine gun—violated *Apprendi* because it increased the defendant's mandatory sentence from five to thirty years). The result in each of these cases was the same. The Court applied the bright-line *Apprendi* rule and declared each sentencing scheme unconstitutional because a judge, not a jury, made a factual determination that increased a criminal penalty beyond the statutory maximum that otherwise would have applied without that determination. *But see Booker*, 543 U.S. at 249-50 (remedying the constitutional defect of the federal sentencing guidelines by excising the provision requiring their mandatory application).

{22} The Court did not flinch or deviate from the binary, black-or-white *Apprendi* analysis. If anything, the Court strengthened the *Apprendi* rule when, in response to the State of Washington's defense of its sentencing scheme,[2] it clarified that the "statutory maximum" beyond which a judge, as opposed to a jury, may not increase a sentence is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303. The Court intended its rule to apply literally, regardless of what some warned as "the collateral, widespread harm to the criminal justice system and the corrections process, . . . resulting from the Court's wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries."

[2] The sentencing statute in *Blakely* set the "standard range" for second-degree kidnaping at 49-53 months but allowed a trial judge to sentence a defendant up to ten years based on a finding of "substantial and compelling reasons justifying an exceptional sentence." *Blakely*, 542 U.S. at 299, 325-26 (internal quotation marks and citation omitted).

Cunningham, 549 U.S. at 295 (Kennedy, J., dissenting).

{23} More than once this Court has wrestled with the *Apprendi* rule, most recently in *State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144, where we were compelled to apply the Supreme Court's approach to criminal sentencing to our own statutory framework. In *Frawley*, 2007-NMSC-057, ¶ 22, we overruled an opinion that we had issued less than two years earlier, *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, and held unconstitutional a provision of the Criminal Sentencing Act which allowed a trial judge to increase a defendant's basic sentence by up to one-third upon a finding of certain aggravating circumstances. *See* NMSA 1978, § 31-18-15.1 (1979) (amended 2009). The result in *Frawley* was, as a practical matter, dictated by the Supreme Court's decision in *Cunningham*, 549 U.S. 274, which held that a similar sentencing scheme ran afoul of the *Apprendi* rule. *Frawley*, 2007-NMSC-057, ¶ 22 ("We have no choice but to conclude that Frawley's sentence was altered upwards in contravention of the Sixth Amendment. . . ."). Our opinion in *Frawley* remains good law today, and nothing said in this Opinion should be taken as undermining either its holding or rationale.

{24} If the Supreme Court had stopped at *Cunningham*, we would be hard-pressed to disagree with our Court of Appeals that judge-made amenability determinations under Section 32A-2-20 violate the *Apprendi* rule. If we were to assume—as did the Court of Appeals—that the amenability determination falls within the scope of the *Apprendi* rule, then the Court of Appeals' conclusion would appear correct. After all, Section 32A-2-20(B) and (C) does permit a trial judge to increase a youthful offender's sentence far beyond the juvenile disposition that would otherwise apply, based on findings not made by a jury or admitted by the child relating to non-amenability to treatment or rehabilitation as a juvenile. *See Blakely*, 542 U.S. at 303 (defining "statutory maximum" as the maximum sentence that "a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*"). According to *Blakely*, that "should be the end of the matter." *Id.* at 313. As we explain below, however, we reach a contrary result because we take a different view of the Supreme Court's most recent opinion in *Ice.* Based on *Ice,* we conclude that the *Apprendi* rule, and the Sixth Amendment on which it stands, was never designed to reach collateral decisions like amenability to treatment or rehabilitation that are not tied to the offenses charges.

Oregon v. Ice **Defines the Outer Limit of the** ***Apprendi*** **Rule**

{25} In 2009, the Supreme Court finally marked the outer limit of the *Apprendi* rule in *Ice*, U.S., 129 S. Ct. 711, and in so doing reframed our analysis. In *Ice*, a jury found the defendant guilty of two counts of first-degree burglary and four counts of first-degree sexual assault, stemming from two occasions in which he broke into an apartment and sexually assaulted an eleven-year-old girl. U.S. at, 129 S. Ct. at 715. Oregon's sentencing statute generally requires a trial judge to impose concurrent sentences, limiting the defendant's prison exposure in *Ice* to a maximum of 90 months. But at sentencing the trial judge found that the two burglaries and two sets of sexual assault "constituted 'separate incident[s],'" triggering the judge's statutory discretion to impose consecutive sentences. *Id.* at, 129 S. Ct. at 715-16 (citation omitted). Exercising that discretion, the judge imposed a 340-month sentence from which the defendant appealed. He argued that the sentencing statute violated the *Apprendi* rule because it permitted a trial judge to increase a sentence based on the finding of a fact not submitted to a jury and not proven beyond a reasonable doubt. *Id.* at, 129 S. Ct. at 716. The Oregon Supreme Court agreed with the defendant that the concurrent sentencing statute violated *Apprendi*. *Ice*, U.S. at, 129 S. Ct. at 716.

{26} The U.S. Supreme Court reversed, holding that the *Apprendi* rule simply does not apply. The majority held that the concurrent sentencing statute is beyond "the *scope* of the Sixth Amendment's jury-trial guarantee, as construed in *Apprendi*." *Ice*, U.S. at, 129 S. Ct. at 714 (emphasis

added). In other words, whether Oregon's statute leads to an increase in sentence without a jury finding—the *Apprendi* rule—is irrelevant; the statute does not implicate the constitutional concerns which the rule was meant to address. *See Ice*, U.S. at, 129 S. Ct. at 718.

{27} The Court made clear that it viewed the sentencing statute in *Ice* as fundamentally different from those that it had considered in the previous cases applying the *Apprendi* rule. According to the 5-4 majority, the *Apprendi* rule had only been applied to sentencing in the "offense-specific context," *Ice*, __ U.S. at __, 129 S. Ct. at 714, whereas the defendant in *Ice* was seeking to expand the rule beyond the facts of his offense to consecutive-sentencing findings for "multiple offenses different in character or committed at different times." *Id.* at, 129 S. Ct. at 717. Because of this difference, the central question for the Court was whether to "extend" the *Apprendi* rule to a new area of criminal sentencing law—concurrent or consecutive sentencing—in which the jury traditionally had played no role. *See Ice*, U.S. at, 129 S. Ct. at 717.

{28} To determine whether to extend *Apprendi* to the realm of consecutive sentencing, the Court looked to the "twin considerations" of "historical practice and respect for state sovereignty." *Ice*, U.S. at, 129 S. Ct. at 717. The Court's historical inquiry focused on "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" *Id.* (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002) (plurality opinion)). The Court noted that, historically, the judge had controlled the decision to impose sentences consecutively or concurrently; traditionally the jury had played no role. *Id.* Further, the "prevailing practice" historically had been to impose consecutive sentences; concurrent sentences were the exception. Therefore, Oregon's statutory presumption in favor of concurrent sentences, subject to a finding by the judge, did not impinge upon the traditional role of the jury.

> There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.

Id. at, 129 S. Ct. at 718. For the same reasons, the Court held that the statute did not create an "entitlement" to have the concurrent sentencing findings made by a jury. Rather, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law"—leaving legislatures free to make policy choices unfettered by the *Apprendi* rule insofar as they pertain to areas outside the historical role of the jury. *Ice*, U.S. at, 129 S. Ct. at 718.

{29} Also counseling against extending the *Apprendi* rule to consecutive-sentencing determinations are principles of federalism, or state sovereignty, which include "the authority of States over the administration of their criminal justice systems." *Ice*, U.S. at, 129 S. Ct. at 718. The Court expressed concern over "straitjacketing" the States from pursuing the "'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense.'" *Id.* at, 129 S. Ct. at 719 (quoting *Blakely*, 542 U.S. at 308). Similarly, the Court made a slippery-slope argument that the application of *Apprendi* to consecutive sentencing could extend to other sentencing determinations that judges make, other than the length of incarceration, such as findings relating to the length of supervised release following a prison sentence, terms of community service, and imposing fines or restitution. *Ice*, U.S. at, 129 S. Ct. at 719. "Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings." *Ice*, U.S. at, 129 S. Ct. at 719. Finally, the Court voiced reluctance to burden states with the added administrative difficulties that adhere to the criminal process when juries are involved beyond *Apprendi*'s core concern of safeguarding the traditional role of the jury. *Ice*, U.S. at, 129 S. Ct. at 719.

{30} Perhaps most revealing of new limits for the *Apprendi* rule, Justice Scalia's dissent voiced frustration that the majority opinion "is a virtual copy of the dissents" in each of the prior cases applying the *Apprendi* rule. *Ice*, U.S. at, 129 S. Ct. at 720 (Scalia, J., dissenting). His dissent repeatedly emphasizes that the historical and sovereignty-based arguments relied on by the majority are "the same (the *very* same) arguments" rejected in *Apprendi*. *Ice*, U.S. at, 129 S. Ct. at 721. Justice Scalia is not wrong in his assessment.

{31} *Ice* signals change. The *Ice* majority opinion appears to embrace, for the first time, the point of view taken in the dissenting opinions in the *Apprendi* line of cases. The opinion does appear to represent a pivotal turning point in the Court's Sixth Amendment analysis, signaling a demarcation of how far at least a majority of the Court will extend *Apprendi*'s black-or-white rule. After all, the trial judge in *Ice* did enlarge the defendant's sentence well beyond the statutory maximum based upon a factual determination made by the judge and not the jury. And yet, the Court looked beyond just the obvious, arithmetic impact on sentencing to explore the historical roots—and the limits—of the *Apprendi* rule.

{32} Though we have struggled before in our efforts to divine how the Supreme Court would apply its rule, *see Lopez*, 2005-NMSC-036, we take *Ice* at face value and the majority at its word. The majority made clear that it will not "'expand[] the *Apprendi* doctrine far beyond its necessary boundaries.'" *Ice*, U.S. at, 129 S. Ct. at 719 (quoting *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting)). Our principal difference with the Court of Appeals distills to this one Supreme Court opinion. We think the Court of Appeals placed too little emphasis on *Ice* in reaching its conclusion.

{33} After *Ice*, the *Apprendi* rule continues to apply with full force to judicial findings enlarging criminal sentences that conflict with the traditional domain of the jury. Where a defendant seeks to "extend" the *Apprendi* rule, however, beyond the context of the sentencing statutes in the *Apprendi* line of cases, this Court will engage in a more probing analysis taking into account the historical role of the jury and the effect on principles of federalism.

The findings required by Section 32A-2-20(B) are beyond the scope of the *Apprendi* rule.

{34} We now turn to the substantive issue before us, which is whether the findings required by Section 32A-2-20(B) are unconstitutional because they deprive youthful offenders of a Sixth Amendment right to have a jury make those findings, as that right is defined in *Apprendi* and limited by *Ice*. We begin, as the Supreme Court did in *Ice,* and as our Court of Appeals did in *Gonzales*, with our view that Child's proposal to apply *Apprendi* to Section 32A-2-20(B) would extend the *Apprendi* rule beyond the context in which it arose and previously has been applied. We agree with the State that the findings required by Section 32A-2-20(B), like the findings in *Ice*, are not offense-specific. At its core, Section 32A-2-20(B) mandates a careful balancing of individual and societal interests involving a delinquent child's prospects for reintegration into public life by the time the child turns twenty-one. Importantly, the focus of the findings at issue is on the *child*, not on the particular offense committed. *See* § 32A-2-20(B) (providing that to sentence a youthful offender as an adult, the judge must find that "(1) the *child* is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the *child* is not eligible for commitment to an institution for children with developmental disabilities or mental disorders" (emphasis added)).

{35} Admittedly, the particular circumstances of the child's offense may have some bearing on this decision. For example, some of the *factors* that the judge must weigh under Section 32A-2-20(C) are "offense specific," such as

> (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> (3) whether a firearm was used to commit the alleged offense; [and]

> (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.

However, the judge must also consider a range of other information relating to the child that has little or nothing to do with the charged offenses. *See* § 32A-2-20(C)(5), (7) (providing that the trial judge shall consider "the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability" and "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available").

{36} Regardless of the particular offense of which a youthful offender is adjudicated—or, as this case demonstrates, even the number of offenses—the inquiry under Section 32A-2-20(B) is the same: Can the child be rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one? Questions of rehabilitation and societal protection are exactly what dominated the thinking of the trial judge in this very case. The inquiry is neither offense-specific nor, as we shall see, is it a task traditionally performed by juries. Nonetheless, though we hold that the context and purpose of the findings required under Section 32A-2-20(B) insulate them from the *Apprendi* rule, we think it prudent to submit the offense-specific factors in Section 32A-2-20(C)(2), (3) and (4) to the jury during the trial perhaps by way of special interrogatories. Doing so will place only a minimal burden on the process because it can be done during the trial. We refer this matter to the UJI Committee for Criminal Cases for appropriate action.

Factors Leading to an *Ice* Analysis

{37} We are also persuaded, as was the U.S. Court of Appeals for the Tenth Circuit in *Gonzales v. Tafoya*, 515 F.3d 1097(10th Cir. 2008), that the predictive nature of the findings required by Section 32A-2-20 set them apart from the findings considered in the *Apprendi* cases. *See Gonzales*, 515 F.3d at 1114 (holding on habeas review that the findings required by Section 32A-2-20 do not violate the *Apprendi* rule). As Tenth Circuit Chief Judge Henry noted in *Gonzales*, the Supreme Court has generally applied the *Apprendi* rule to retrospective findings, because such findings are more susceptible to a decision by the jury beyond a reasonable doubt. *Gonzales*, 515 F.3d at 1113. By contrast, the not-amenable-to-treatment and not-eligible-for-commitment findings at issue here are forward-looking determinations, which necessarily involve a level of uncertainty and informed judgment—as opposed to historical fact-finding—that is not typically submitted to a jury. *Cf. Addington v. Texas*, 441 U.S. 418, 429 (1979) ("Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.").

{38} As our courts have seen first-hand, an informed amenability determination can be made only by weighing a thorough knowledge of the resources for treatment and rehabilitation offered by the State against various, and often conflicting, psychological and social evaluations of "the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability." Section 32A-2-20(C)(5). Like the civil commitment findings in *Addington*, the fallibility and lack of precision inherent in the amenability determination "render certainties virtually beyond reach in most situations." 441 U.S. at 430. Indeed, both our Court of Appeals and the Tenth Circuit relied on this distinction when they rejected *Apprendi*-based challenges to Section 32A-2-20. *See Gonzales*, 2001-NMCA-025, ¶¶ 47-48; *Gonzales*, 515 F.3d at 1114. Although the historical/predictive distinction was not relevant in *Ice*, we find it meaningful here.

{39} Additionally, the findings in the *Apprendi* line of cases uniformly occurred in the *adult* criminal context, whereas, the findings required

by Section 32A-2-20(B) arise in the juvenile justice context. *See Gonzales*, 515 F.3d at 1111 (noting that "*Apprendi* did not involve judicial findings that a juvenile should be prosecuted as an adult"). The Supreme Court has traditionally given states wider latitude in adopting particular trial and sentencing procedures for juveniles—including whether to have a jury trial at all. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (holding that the right to a jury trial does not apply to juvenile proceedings). Given that *Ice* expressly instructs us to consider principles of federalism and state sovereignty in determining whether to apply *Apprendi*, we find this distinction particularly significant.

{40} We are persuaded that applying the *Apprendi* rule here—to findings that are not offense-specific, are predictive in nature, and are made in the juvenile context—represents an extension of the circumstances under which the rule has previously been applied. We will therefore look to the "twin considerations" of "historical practice and respect for state sovereignty" to determine whether the Sixth Amendment jury-trial guarantee extends to the findings required by Section 32A-2-20. *Ice*, U.S. at, 129 S. Ct. at 717.

The Jury Historically Played No Role in Sentencing a Child as an Adult

{41} As an initial matter, Child and *Amici* both argue that, although the Sixth Amendment right to a jury trial does not apply to juvenile proceedings under *McKeiver*, New Mexico, nonetheless, confers such a right as a matter of law "when the offense alleged would be triable by jury if committed by an adult." NMSA 1978, § 32A-2-16(A) (2009). *Apprendi*'s Sixth Amendment protections, the argument goes, extend to alleged youthful offenders who are, by definition, charged with an offense that would be triable by a jury if committed by an adult. *See* § 32A-2-3(J) (defining "youthful offender" and listing youthful offender offenses). For the sake of argument, we can concede the point. *See Rudy B.*, 2009-NMCA-104, ¶ 65 (Sutin, J., specially concurring) (noting that youthful offenders are treated as adults who are protected under the Sixth Amendment). However, that is only the beginning of our inquiry. To determine whether *Apprendi* applies, *Ice* teaches that we must look to "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" U.S. at, 129 S. Ct. at 717 (quoting *Harris*, 536 U.S. at 557).

{42} We agree with the Court of Appeals that the historical analysis undertaken in *Ice* would be a poor fit here if the inquiry were limited to whether the post-trial amenability determination required by Section 32A-2-20(B) was within the purview of the jury at the time of the framing of the Bill of Rights. *See Rudy B.*, 2009-NMCA-104, ¶ 23. As we shall discuss, our post-trial amenability proceeding for youthful offenders (as opposed to a pre-trial waiver determination) is unique among the several states and did not exist until 1993 when the Legislature enacted its most recent version of our Children's Code. *See id.*; *see also Jones*, 2010-NMSC-012, ¶ 31 (citing Daniel M. Vannella, Note, *Let the Jury Do the Waive: How Apprendi v. New Jersey Applies to Juvenile Transfer Proceedings*, 48 Wm. & Mary L. Rev. 723, 753 (2006)). However, *Ice*'s focus is on the historical origins of the findings themselves and not on whether those findings occur before or after trial. Therefore, our historical analysis is not limited to the precise setting in which our children's court judges currently make the amenability determination.

{43} Although the timing of our amenability proceeding is unique, the specific inquiry of whether a child is amenable to treatment or rehabilitation is hardly exclusive to New Mexico. Since Cook County, Illinois established the first juvenile court in 1899, all 50 states have enacted some form of juvenile code that emphasizes treatment and rehabilitation, as opposed to punishment, for juvenile offenders. However, the juvenile codes also allow for adult treatment when the child is determined to be incapable of reform. *See* Samuel M. Davis, *Rights of Juveniles 2d: The Juvenile Justice System* § 1:1, at 1-2 (2d ed. 2010). Unlike New Mexico's current, post-adjudicatory proceeding, the overwhelming

majority of states considers the amenability question at the initiation of proceedings against the child at a transfer or "waiver" hearing. *See* Davis, *supra* § 4:1, at 212 (explaining that New Mexico is currently one of only five states that do not "provide by statute for waiver of jurisdiction or a functional equivalent").

{44} The focus of the pre-trial waiver proceeding followed in other states is similar to our post-trial amenability hearing. The judge must determine whether to waive the jurisdiction of the juvenile court in favor of the adult trial court based on the child's amenability to treatment or rehabilitation. Prior to 1993, New Mexico made the amenability determination in a pre-trial waiver proceeding. *See* 1955 N.M. Laws, ch. 205, § 9 (requiring the trial judge to make a finding that the child was not a "proper subject for reformation or rehabilitation" prior to initiating adult proceedings); NMSA 1953, § 13-14-27(A)(2) (Vol. 3, Repl., Part 1); 1975 N.M. Laws, ch. 320, § 4(A)(5). Thus, while New Mexico now makes the amenability determination post-trial, the inquiry is largely the same as that of a pre-trial waiver proceeding: whether the child should be subjected to adult consequences based on the lack of prospects for successful treatment and rehabilitation.

{45} Of the courts to consider whether judge-made, pre-trial waiver determinations violate the right to a jury trial, "the overwhelming weight of authority . . . concludes that *Apprendi* does not apply to juvenile waiver hearings." *State v. Kalmakoff*, 122 P.3d 224, 227 n.29 (Alaska Ct. App. 2005) (citing 15 decisions from other jurisdictions holding that the findings made in waiver proceedings do not violate *Apprendi*); *see also Gonzales*, 515 F.3d at 1116 (same); Vannella, *supra*, at 751 (noting that most of the courts considering whether *Apprendi* applies to waiver proceedings have held that it does not). *But see Commonwealth v. Quincy Q.*, 753 N.E.2d 781, 789 (Mass. 2001) (holding that *Apprendi* requires the prosecution to present sufficient evidence to the grand jury that the child's conduct "involved the infliction or threat of serious bodily harm" to indict a juvenile as a youthful offender), *overruled on other grounds by Commonwealth v. King*, 834 N.E.2d 1175, 1201 n.28 (2005). None of those cases, however, occurred recently enough to apply *Ice* and, therefore, we do not place great reliance upon them here.

{46} Interestingly, the factors that the New Mexico judge must consider under Section 32A-2-20(C) to determine whether to invoke an adult sentence are used in other jurisdictions to determine whether waiver is appropriate. 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.6(d), at 69-70 (2d ed. 2003). These factors are largely identical to a set of criteria laid out by the U.S. Supreme Court in *Kent v. United States*, 383 U.S. 541, 566-67 (1966). The Court offered these factors as considerations that *the trial judge* should weigh in making the waiver decision to ensure procedural fairness and due process in juvenile waiver proceedings.[3] Significantly, of the 45 states that have pre-trial waiver hearings, all of them allow the *judge* "to transfer juveniles

[3] The criteria in *Kent,* 383 U.S. at 566-67, provides as follows:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

to adult court after making specified findings." *Gonzales*, 515 F.3d at 1116 (citing Vannella, *supra*, at 739).

{47} Similarly, since the inception of the first New Mexico Juvenile Code in 1917, our statutes and caselaw make clear that it is the trial judge, not the jury, who decides whether to invoke an adult sentence based on a child's amenability to treatment—whether pre- or post-adjudication. Since 1955, the trial judge has been expressly required by statute to decide whether a child is amenable to treatment or rehabilitation based upon certain findings. *See* 1955 N.M. Laws, ch. 205, § 9 (requiring the trial judge to make a finding that the child was not a "proper subject for reformation or rehabilitation" prior to initiating adult proceedings); § 13-14-27(A)(2); 1975 N.M. Laws, ch. 320, § 4(A)(5); § 32A-2-20(B). Before 1955, the trial judge had the discretion to try and sentence a juvenile as an adult. As this Court explained in *State v. Doyal*, 59 N.M. 454, 286 P.2d 306 (1955), the judge made that decision by weighing the same interests presently required by Section 32A-2-20.

> [M]ay we not fairly assume that in whatever capacity as judge he acts [whether as a judge of the district court or the juvenile court], he will so exercise his discretion as to try no child in the district court for what would have been a felony if done by an adult, if extreme youth of the offender plus other facts in evidence gives reasonable promise of his rehabilitation by treatment in the juvenile court; nor at all save where the demands of society for the prevention and punishment of crime are so compelling as to leave no other alternative.
>
> . . . .
>
> . . . . Never, since our legislature enacted the first Juvenile Delinquency Act, has it attempted to deny district courts their traditional and constitutional power to place on trial one accused of having committed a felony, merely because his age at the time of the offense placed him below the maximum named in the statute for juvenile delinquents.

Doyal, 59 N.M. at 461-62, 286 P.2d at 311-12.

{48} *Doyal* establishes that, since the inception of separate proceedings for juveniles in 1917, the trial judge—not the jury—was responsible for determining whether to try and sentence a child as an adult based on the child's amenability to treatment or rehabilitation. Put simply, the trial judge has decided the child's amenability to treatment or rehabilitation for as long as that determination has been a part of criminal proceedings in New Mexico.

{49} Child argues in the present case that the rebuttable presumption for children between the ages of seven and fourteen, also known as the common-law infancy defense, provides the appropriate historical analog to the modern-day amenability determination. The infancy defense required the prosecution to prove that when a child subject to the rebuttable presumption committed the alleged offense, the child "manifested a consciousness of guilt, and a discretion to discern between good and evil." 4 William Blackstone, *Commentaries on the Laws of England* 23-24 (1769); *see* 2 LaFave, *supra* § 9.6(a), at 62-63. The State had to prove the child's criminal capacity to the jury beyond a reasonable doubt. *See Commonwealth v. Mead*, 92 Mass. 398, 399 (1865) ("[T]he question whether, in committing an offence, such child in fact acted with intelligence and capacity, and an understanding of the unlawful character of the act charged, is to be determined by the jury upon the evidence, and in view of all the circumstances attending the alleged criminal transaction."). Child argues that the finding of infancy and the finding of amenability are essentially the same and, therefore, because the jury historically decided whether the infancy defense was applicable, *Apprendi* should apply.

{50} We are not persuaded. The infancy defense, which acted as a complete bar to criminal liability, was a rebuttable presumption that a child of a certain age could not form the necessary criminal intent to commit the crime of which he was accused. In other words, a child who raised the infancy defense effectively argued that, although he committed the *act* necessary

to constitute the charged offense, he should be relieved from liability because he did not understand the moral consequences of his actions—he was not culpable. Infancy is, thus, a determination of historical fact closely linked to *mens rea*, one of the essential elements of most crimes and historically determined by the jury.

{51} By contrast, the amenability finding does not exonerate the child or render him blameless. As with any criminal proceeding, the jury may find at the adjudicatory stage that a juvenile lacked the requisite *mens rea* to be guilty of the charged offense. *See Addington*, 441 U.S. at 428 (recognizing that *In re Winship,* 397 U.S. 358, 367 (1970), the U.S. Supreme Court held that the state must prove "[the juvenile's act and *intent*] beyond a reasonable doubt" (emphasis added)). Rather, the amenability determination is predictive and focuses on the child's *prospective* capacity for treatment or rehabilitation. This difference persuades us that the jury's traditional determination of infancy is not helpful to our resolution.

{52} Even more to the point, the amenability determination only applies to youthful offenders, who by definition must be at least fourteen years of age, *see* § 32A-2-3(J); whereas, the common-law infancy defense only applied to children between the ages of seven and fourteen. The jury, therefore, played no historical role in determining whether a child over the age of fourteen had the capacity to commit a crime, because at common law such children "had the same capacity as adults" and were commonly treated as such. 2 LaFave, *supra* § 9.6(a), at 62-63. Clearly, we can conclude that the amenability determination is not an "encroachment . . . by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused." *Ice*, U.S. at, 129 S. Ct. at 718. Rather, like the concurrent sentencing statute in *Ice*, the amenability inquiry is a statutory protection granted to juveniles by our Legislature "to temper the harshness of the historical practice," *id.*, which often led to older children being incarcerated next to hardened criminals. *See In re Gault*, 387 U.S. 1, 15 (1967) ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals.").

{53} Neither Child nor the State offer any other historical basis for us to determine whether *Apprendi*'s rule is applicable to the amenability determination, and we can find none. Thus, although the amenability determination was not an aspect of the prosecution of juveniles at the time of the framing of the Bill of Rights, it has been a question for the judge—not the jury—since the creation of the juvenile court systems at the turn of the twentieth century. Put simply, an amenability determination has never been based upon facts "historically found by the jury," and so it cannot be a "threat to the jury's domain" as preserved in the U.S. Constitution. We now turn to the second of *Ice*'s "twin considerations," state sovereignty and principles of federalism.

Principles of federalism preclude the application of *Apprendi* to the amenability finding.

{54} As *Ice* explained, "[w]e have long recognized the role of the States as laboratories for devising solutions to difficult legal problems." U.S. at, 129 S. Ct. at 718-19 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *Ice* further acknowledged the states' traditional sovereign authority over "the administration of their criminal justice system." U.S. at, 129 S. Ct. at 718. The realm of juvenile procedures and sentencing is particularly within the states' area of exclusive control. When considering whether the Sixth Amendment's right to a jury trial extends to juvenile proceedings, the Supreme Court held, "We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . ." *McKeiver*, 403 U.S. at 547.

{55} To be sure, the Supreme Court has made clear that juvenile proceedings must meet minimal constitutional requirements. *Kent* set the minimum procedural requirements for waiver proceedings, 383 U.S. at 566-67; *In re Gault* extended to juveniles the right to notice of charges,

to counsel, to confrontation and to cross-examination of witnesses, and to the privilege against self-incrimination, 387 U.S. at 33-34, 41, 55-56; *In re Winship* gave juveniles the protection of the reasonable doubt standard, 397 U.S. at 367.

{56} At the same time, the Court has repeatedly emphasized that it follows a more deferential approach to state decisions of how to administer their juvenile court systems. "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles." *In re Gault*, 387 U.S. at 14. The amenability determination, being an essential step in the adjudication and disposition of children, is but one example of the independence traditionally afforded to states in this area. As such, our amenability determination is entitled to a level of deference based on traditional principles of federalism and state sovereignty. *See Ice*, U.S. at, 129 S. Ct. at 719 ("This Court should not diminish that role [of states as laboratories] absent impelling reason to do so.").

{57} Given the states' discretion "to experiment further and to seek in new and different ways the elusive answers to the problems of the young," *McKeiver*, 403 U.S. at 547, it would strike us as inconsistent if *Apprendi* or the Sixth Amendment were to mandate a jury finding beyond a reasonable doubt that a child is not amenable to treatment or eligible for commitment. We have little doubt that states have the authority, however ill-advised it may be, to do away with the amenability determination altogether and to prosecute and sentence juveniles as adults. For example, New Mexico is one of 29 states that has enacted "legislative waiver" statutes which *automatically* subject juveniles charged with certain defined crimes to adult proceedings and sentences without the exercise of any judicial discretion. *See* Vannella, *supra*, at 741 (providing that a juvenile between the ages of 15 or 18 who is "charged with and indicted or bound over for trial for first-degree murder"—a so-called "serious youthful offender"—is not entitled to the protections of the Delinquency Act, citing Section 32A-2-3(H)). If our Legislature can deny the right to juvenile procedures and dispositions wholesale without offending the Constitution, then the Legislature ought to be able to extend greater protection to children—and establish a procedure for doing so—without running afoul of the Constitution. *See Ice*, U.S. at, 129 S. Ct. at 719 ("To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense."). This is especially true when the jury has never played a role in making this determination.

{58} Finally, the same administrative burdens noted by the Supreme Court in *Ice* counsel against applying *Apprendi* to amenability determinations. *See Ice*, U.S. at, 129 S. Ct. at 719. If *Apprendi* were to apply to a finding that has never been made by the jury, it seems difficult to limit its reach with respect to the other sentencing determinations that New Mexico allows its judges to make other than the length of incarceration. Applying *Apprendi* to a post-trial amenability determination would require bifurcated proceedings with attendant delay and added cost—a burden we are reluctant to impose absent a clear directive from the Constitution.

{59} In sum, because the amenability determination historically has not been made by the jury, applying *Apprendi* would interfere unnecessarily with New Mexico's traditional discretion in administering a system of juvenile justice. We hold that the amenability determination is not within the scope of the *Apprendi* rule and the Sixth Amendment's guarantee of a jury trial does not apply to amenability proceedings.

CONCLUSION

{60} We reverse the Court of Appeals' determination that Section 32A-2-20 is facially unconstitutional and remand to the Court of Appeals for consideration of Child's remaining appellate arguments that (1) there was insufficient evidence to support the findings necessary to sentence him as an adult, and (2) his separate convictions

for shooting from a motor vehicle resulting in great bodily harm and aggravated battery with a deadly weapon violate constitutional protections against double jeopardy.

{61} IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice (dissenting)

DISSENTING OPINION

CHÁVEZ, Justice, dissenting.

{62} The Framers of the Bill of Rights would be alarmed to learn that a child can be condemned to an adult prison for up to a life sentence without at least the same constitutional protections afforded adults. In New Mexico a child who is "subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult." NMSA 1978, § 32A-2-14(A) (1993) (amended 2009). These rights include a jury trial if the offenses alleged would be triable by jury if committed by an adult. *State v. Eric M.*, 1996-NMSC-056, ¶¶ 5-7, 122 N.M. 436, 925 P.2d 1198; Rule 10-245(A) NMRA. It is unconstitutional to increase an adult's sentence based on additional findings relating to the offense or the offender unless a jury finds such facts beyond a reasonable doubt. *State v. Frawley*, 2007-NMSC-057, ¶ 23, 143 N.M. 7, 172 P.3d 144. The majority concludes that it is constitutional to increase a child's sentence by decades and imprison the child in an adult prison, based on additional findings relating to the offense and the child, even though a judge and not a jury makes those findings and even though the judge finds such facts by something less than a reasonable doubt. Because I believe the time has come for us to unequivocally hold that a youthful offender is entitled to the same constitutional protections as an adult, I respectfully dissent.

{63} In this case, the child was condemned to an adult prison for twenty-five years based on a judge's finding, not beyond a reasonable doubt but by clear and convincing evidence, that the child was not amenable to treatment in an available treatment facility. Without this finding, the judge could only commit the child to the Children, Youth & Families Department until he reached age twenty-one, NMSA 1978, 32A-2-19(B)(1)(d) (1993) (amended 2009); *see also* NMSA 1978, 32A-2-20(B) (1993) (amended 2009), which for this child would have been three and one-half years. Thus, the severe consequence to the child was being confined in an adult prison approximately twenty-two years longer than what his factual concessions alone authorized.

{64} In America an adult cannot be imprisoned unless a jury finds, beyond a reasonable doubt, all of the facts that support imposition of the penalty. *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). If the legislative branch defines a maximum sentence for a discrete crime, but also authorizes a judge to increase the maximum sentence for that discrete crime based on additional findings, the defendant has a Fifth and Sixth Amendment right to have a jury find the additional facts beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This is because at the time the Bill of Rights was framed, the jury traditionally found all facts that the law made essential for the punishment. *Blakely v. Washington*, 542 U.S. 296, 309 (2004).

{65} The United States Supreme Court has clearly defined the statutory maximum sentence for purposes of its analysis.

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may

> impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. at 303-04 (citation omitted). When the judge, and not a jury, finds additional facts "related to the offense or the offender-beyond the elements of the charged offense" as a prerequisite to exercising discretion to increase a sentence beyond the statutory maximum, such a scheme is unconstitutional. *Cunningham v. California*, 549 U.S. 270, 279 (2007). Of course, the defendant may knowingly and voluntarily waive the jury determination or may admit the essential facts for the additional findings.

{66} In New Mexico, the basic sentence for an adult convicted of a non-capital first degree felony is eighteen years in prison, plus a period of parole and/or imposition of a fine not to exceed $15,000. NMSA 1978, § 31-18-15(A)(3), (C), & (E)(3) (1993) (amended 2007). Effective July 1, 2009, a judge may increase the sentence by up to one-third if a jury finds "beyond a reasonable doubt . . . any aggravating circumstances surrounding the offense or concerning the offender." NMSA 1978, § 31-18-15.1(A)(2) & (G) (1979) (amended 2009). Prior to its amendment in 2009, Section 31-18-15.1 authorized the judge to increase a defendant's basic sentence by up to one-third if the judge found aggravating circumstances surrounding the offense or concerning the offender. We held that such a scheme was unconstitutional because the Sixth Amendment gave the defendant the right to have a jury make such findings beyond a reasonable doubt. *Frawley*, 2007-NMSC-057, ¶ 23. The simple and straightforward constitutional requirement is that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 489. It is, however, perfectly constitutional for a judge to "exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute." *Id*. at 481.

{67} The majority acknowledge the *Apprendi* bright-line rule, but then mistakenly depart from it, citing to *Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711 (2009). Majority op. ¶¶ 20-24. In my opinion, it is a mistake to depart from the bright-line rule because *Ice* supports the opposite conclusion reached by the majority for at least three reasons. First, as for adults, the historical practice at common law was for a jury to find all facts that the law made essential for the punishment of a child between the ages of fourteen and eighteen. Second, if we are to honor our state sovereignty, we should not easily discard this State's insistence that a youthful offender has a constitutional right to a jury trial. The approach taken by the majority will mark the first time this Court has lessened the protections of a constitutional right on the altar of state sovereignty. Third, in this case the child was sentenced for a discrete offense not for "multiple offenses different in character or committed at different times." *Ice*, ___ U.S. at ___, 129 S. Ct. at 717.

AT COMMON LAW, A JURY DECIDED ALL FACTS THAT AUTHORIZED IMPOSITION OF AN ADULT SENTENCE ON A CHILD

{68} The majority rely on the "twin considerations . . . historical practice and respect for state sovereignty" in declining to extend *Apprendi* to amenability evidentiary findings. Majority op. ¶ 39 (internal quotation marks and citation omitted). However, the majority has not accurately analyzed historical practice. The *Ice* majority cautiously explained that its historical inquiry is intended to honor common law practices by focusing on "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" ___ U.S. at ___, 129 S. Ct. at 717 (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002) (plurality opinion)). The question is whether the jury function at issue extended down through the centuries into the common law. *Id*.

In this case, the proper question is did the jury historically under common law find all facts essential for imposing an adult sentence on a child? The majority ignores over 125 years of historical common law practice whereby a jury traditionally decided the facts that authorized a child between the ages of fourteen and eighteen to be punished as an adult. Majority op. ¶ 48. Instead, the majority seeks to commence the historical practice in 1917 with the inception of separate juvenile proceedings. Majority op. ¶ 47.

{69} Separate juvenile proceedings did not exist at common law, so it was impossible for the Framers of the Bill of Rights to understand that a judge and not a jury would make findings that authorized the imprisonment of a child in an adult prison. All the Framers could have known was that a fourteen- to eighteen-year-old child who was accused of a crime was (1) treated the same as an adult, and (2) enjoyed the same constitutional protections as an adult. The *Ice* Court's focus was on consecutive sentencing of a defendant for multiple convictions. The *Ice* majority pointed to the historical common law practice of a judge deciding whether to impose consecutive sentences. ___ U.S. at ___, 129 S. Ct. at 718. On this basis alone, *Ice* is distinguishable from this case. The majority cannot point to a common law practice in which the judge made the essential findings, by clear and convincing evidence, that would authorize the judge to sentence the child as an adult. This role was the traditional jury function.

{70} I readily concede that the Legislature sought to temper the harsh effects of punishing a fourteen-year-old the same as an adult when our Legislature enacted a juvenile justice system. This noble effort to emphasize rehabilitation, however, must still pass constitutional scrutiny. We must evaluate the legislation as it is currently written to determine whether it is constitutional.[4] Under the Delinquency Act as it is applied to a youthful offender, the State has exercised its discretion to seek adult punishment for the accused child. The State's focus is no longer on rehabilitation. Its focus is now on punishment of the child to the same degree the State would want to punish an adult for the same crime.

{71} However, proof only of the essential elements of the charged crime is insufficient to impose an adult sentence on a child. To deprive a child of the right to have a jury determine all of the facts essential to punishing him or her as an adult is both fundamentally unfair and unconstitutional. The Legislature "may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt." *Harris*, 536 U.S. at 557.

{72} The Court of Appeals correctly concluded that "the juvenile sentence is the baseline sentence because the adult sentence is available only if the court makes the required [additional] factual findings." *State v. Rudy B.*, 2009-NMCA-104, ¶ 43, 147 N.M. 45, 216 P.3d 810. *Apprendi* and its progeny, including *Ice*, teach that if a defendant is being sentenced for a discrete offense, a jury must make all of the necessary findings unless the defendant waives the jury trial or admits the essential facts. In this case it was not the child's admission that he committed the offenses which authorized the judge to sentence him to an adult sentence in an adult prison. All that the judge was authorized to do with the child's admission is commit the child to the Children, Youth & Families Department until he reached age twenty-one. It was only after additional evidence was presented and the judge made additional findings relating to the offense and to the child that the judge could impose an adult sentence that was decades longer than the juvenile sentence.

THE SENTENCE RUDY B. RECEIVED WAS OFFENSE SPECIFIC

{73} The majority asserts that the findings by the judge were not offense specific and are

[4] As noted by the majority in this case, the juvenile justice system has evolved with different goals at different times. At times the legislation emphasized rehabilitation, and at other times the legislation was more concerned with retribution.

predictive, which set them apart from the findings considered in *Apprendi*. Majority op. ¶¶ 36, 39. Labeling the findings as predictive is not helpful to the analysis.

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Ring v. Arizona, 536 U.S. 584, 602 (2002) (citation omitted) (quoting *Apprendi*, 530 U.S. at 483). The focus is not on form but on effect. *Id*.

{74} Under New Mexico's juvenile justice system, a judge must first make additional findings relating to both the offense and the child before the judge is authorized to sentence the child as an adult. Section 32A-2-20(C)(1)-(4) requires the judge to consider matters related to the offense.[5] The remaining factors focus on the child. In *Cunningham*, the United States Supreme Court rejected as unconstitutional a system where a sentence was increased based on facts relating to the crime, *the accused*, or other facts considered to be circumstances in aggravation. 549 U.S. at 278-79. The New Mexico Supreme Court also found unconstitutional a statutory scheme that allowed a judge to increase a statutory maximum sentence by making additional findings concerning the offense and the offender. *Frawley*, 2007-NMSC-057, ¶ 23.

{75} The essential inquiry is whether the findings involve a sentence for a discrete offense. *Ice*, ___ U.S. at ___, 129 U.S. at 717. It cannot be disputed that the adult sentence received by the child after the sentencing judge made additional findings is related to a discrete crime. He was sentenced as an adult for the specific crimes that he admitted he had committed. The sentencing judge relied on the sentencing statutes that pertained to those crimes. The child admitted that he committed two second-degree felonies and two third-degree felonies with a firearm enhancement. Section 31-18-15 authorized a judge to sentence an adult to twenty-five years total for the same crimes. However, the judge was not entitled to consider the adult sentencing statutes until the judge made additional findings about both the offense and the child.

{76} As we recently noted in *State v. Jones*,

> The finding of non-amenability is the trigger for the court's authority to sentence a youthful offender as an adult. *See* [*State v.*] *Muniz*, 2003-NMSC-021, ¶ 16, 134 N.M. 152, 74 P.3d 86. The finding gives the court the discretion to impose the "adult consequences of criminal behavior" on a child who would be otherwise exempt from adult punishment. [NMSA 1978,] Section 32A-2-2(A) [(1993) (amended 2007)]. Put another way, the finding of non-amenability gives the court the necessary leverage to dislodge a youthful offender from the protective dispositional scheme of the Delinquency Act.

2010-NMSC-012, ¶ 38, 148 N.M. 1, 229 P.3d 474.

{77} In *Jones*, this Court was convinced that the Legislature intended to protect children from the adult consequences of criminal behavior. It is not congruent to state that New Mexico seeks to protect children from adult consequences of criminal behavior, and yet deprive children of the same constitutional protections enjoyed by adults accused of committing similar crimes.

{78} Once we accept that a youthful offender has a right to a jury trial, the youthful offender should benefit from the traditional functions of

[5] In this case, at the time the child entered his plea, he necessarily admitted the essential facts under Section 32A-2-20(C)(2)-(4). Shooting at or from a motor vehicle with great bodily harm requires willful discharge of a firearm that injures a person. NMSA 1978, § 30-3-8(B) (1987) (amended 1993). However, not all crimes that might result in a child being charged as a youthful offender have all of the elements of Section 32A-2-20(C)(2)-(4), such as robbery.

the jury to the same extent as an adult. In *Rudy B.*, Judge Sutin raised a concern in his special concurrence about the United States Supreme Court plurality opinion in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality opinion). 2009-NMCA-104, ¶ 64 (Sutin, J., specially concurring). The *McKeiver* Court held that a juvenile in a delinquency proceeding is not entitled to a jury trial. In my opinion, the *McKeiver* Court would have found a right to a jury trial for a youthful offender in New Mexico. The key rationale for the plurality deciding that children are not entitled to jury trials is because no juvenile under either Pennsylvania or North Carolina law could be confined beyond his or her twenty-first birthday, which suggested to the plurality that the juvenile justice system was rehabilitative and did not necessarily involve criminal prosecution. 403 U.S. at 541. The plurality was concerned that requiring a jury trial in delinquency proceedings would "put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id*. at 545. I doubt the plurality would find a system where a child can be imprisoned for life in an adult prison to be an "intimate, informal protective proceeding."[6] We ourselves recognize that a child charged as a youthful offender is really being tried as an adult and not as a child. For this reason, a grand jury indictment or bind-over order is required and the Rules of Criminal Procedure for the District Court apply. *See* Rule 10-101(A)(2)(b) NMRA. We should not pretend that a child charged as a youthful offender is exclusively in a juvenile rehabilitation system when the State has announced its intention to treat the child as an adult and seek imprisonment in an adult prison. This is particularly true given the inadequate funding of our juvenile justice system and the scarcity of treatment facilities.

{79} Indeed, as I read the record, this child was sent to an adult prison, not because he was not amenable to treatment, but because of the unavailability of facilities. While the court evaluator thought that Rudy B. was only adapting to his environment, those who worked with the child while he was in the juvenile detention facility believed he was amenable to treatment. The licensed psychologist who worked with the child was of the opinion that he was amenable to rehabilitation and pointed to his voluntary attendance in group therapy that focused on issues that make violent acting-out more likely. In fact, although the child had reached the age of majority, instead of remanding him to an adult jail, an exception was made to keep him in the juvenile facility.

{80} The testimony during the hearing was more of a testament to the lack of available resources than about a child who was not amenable to treatment. It was also mentioned that because Rudy B. was not indigent, he did not qualify for some programs, and the managed care organization (Value Options at the time) would not approve his admission into one of its programs because he did not have a history of other hospitalizations or "treatment episodes."

{81} As it pertains to youthful offenders, it seems that the tail is wagging the dog. Simply stated, a youthful offender in New Mexico's current juvenile justice system is treated the way an accused child of the same age was treated at common law. A fourteen- to eighteen-year-old child at common law was entitled to the same constitutional protections as an adult. A youthful offender in New Mexico also should be entitled to the same constitutional protections enjoyed by adults in this state. No matter how much we gloss over it, an amenability hearing is nothing more than a hearing on aggravating circumstances relating to either the offense or the offender.

{82} It is unconstitutional when only a judge, and not a jury, makes the findings necessary to increase an adult's sentence beyond the statutory maximum. In New Mexico, a child faces an even more drastic increase in his or her sentence than an adult faces under the aggravating circumstances scheme contained in Section 31-18-15.1, which we declared unconstitutional. We should

[6] Recently in *Graham v. Florida*, ___ U.S. ___, ___, 130 S. Ct. 2011, 2031 (2010), the United States Supreme Court expressed its disapproval of a juvenile justice system that allows the imposition of a life without parole sentence on a child based on a subjective judgment by a judge or a jury that the child is irredeemably depraved.

not tolerate this disparity in treatment. When the words "no person" appear in the Fifth Amendment of the United States Constitution and the words "the accused" appear in the Sixth Amendment, we should not interpret them to mean "no *adult* person" or "the *adult* accused." Similarly, when Article II, Section 12 of the New Mexico Constitution confers the right of trial by jury "to all" and Article II, Section 18 states that "no person" shall be deprived of liberty without due process of law, we should not interpret them to mean "to all *adults*" or "no *adult* person."

{83} Ironically, if the Legislature wrote a law to mirror reality, it would be constitutional. By this statement, I mean that the Legislature could have written a law that authorized a judge to sentence a child as an adult based solely on the facts relating to the charged offense as found by a jury beyond a reasonable doubt. The judge could then consider the child's amenability to treatment in available facilities to mitigate the adult sentence. Because commitment to a treatment facility would be within the range authorized by law, the judge, not a jury, could find the mitigating facts, but that is not how the legislation is written. The legislation quite clearly requires additional findings before the judge can impose an adult sentence on a child. Because the additional findings must be made by a jury beyond a reasonable doubt, the next question is whether the legislation is unconstitutional on its face or as it is applied.

{84} In my opinion, the legislation is unconstitutional as it is applied, since nothing in the Delinquency Act precludes a judge from empaneling a jury during an amenability hearing. Section 32A-2-20(B) requires "the court" to make the additional findings. This language is different than the language in Section 31-18-15.1, which we declared to be unconstitutional. In Section 31-18-15.1, the Legislature specifically required the judge to make the findings of aggravating circumstances. *Frawley*, 2007-NMSC-057, ¶¶ 27, 31. If we abide by the statutory construction principle that instructs us to attempt to construe a statute to be constitutional, *State v. Flores*, 2004-NMSC-021, ¶ 16, 135 N.M. 759, 93 P.3d 1264, there is precedent for defining "court" to include both the judge and the jury. *Black's Law Dictionary* 352 (6th ed. 1990) ("A body organized to administer justice, and including both judge and jury."). "Court" does not have to be construed to only include a judge, when doing so would render a statute unconstitutional. *See State v. Bean*, 2002 WL 31059235 (N.H. Super. 2002) (unpublished order). Section 32A-2-20(C) refers to having a judge consider certain factors, but it does not preclude a judge from considering such factors as found by a jury beyond a reasonable doubt.

{85} Permitting a jury to make these findings does not create any problems and it is consistent with the jury's traditional role to act as the finder of fact, the community conscience, and as a bulwark between the State and the accused, protecting ordinary people from government overreaching. One of common law's longstanding tenets is that the "'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" *Blakely*, 542 U.S. at 301 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).

{86} In this case, the sentencing judge heard testimony from both lay people and experts before making the findings that authorized her to sentence the child to an adult sentence in an adult prison. Every day in our courtrooms, jurors from a variety of educational and socioeconomic backgrounds are called upon to weigh similar evidence from a variety of experts. Significantly, jurors are also authorized to consider both mitigating circumstances regarding the offense and the defendant in capital punishment proceedings when deciding whether the defendant should be sentenced to death, including whether the defendant "is likely to be rehabilitated." UJI 14-7029 NMRA.[7] Although we may have faith in our trial court judges, our faith is irrelevant. The child and his or her attorney may believe that twelve adult citizens in a jury box will be more reliable

[7] Jurors are also entrusted in civil litigation with finding facts regarding future damages such as loss of earning capacity, future pain and suffering, and such other "predictive findings."

and less idiosyncratic fact finders than a single judge. The child, with advice of counsel, can decide when and under what circumstances to waive a jury trial. We should not preempt that important decision by initially denying the child the full protection of our jury system.

{87} Most of the Bill of Rights is procedural. Procedure distinguishes the rule of law from rule by whim. Steadfast adherence to procedure provides the greatest assurance that there will be equal justice under law. To deprive a child of the same jury protections afforded an adult is not equal justice.

{88} For the foregoing reasons, I respectfully dissent.

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-004

Filing Date: January 24, 2011

Docket No. 32,197

STATE OF NEW MEXICO ex rel. GARY K. KING, Attorney General of the State of New Mexico,

Petitioner,

v.

PATRICK H. LYONS, Commissioner of Public Lands,

Respondent.

ORIGINAL PROCEEDING

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OPINION

BOSSON, Justice.

{1} The Attorney General of New Mexico petitions this Court, for a Writ of Mandamus, requiring the New Mexico Commissioner of Public Lands (Land Commissioner) to comply

with the New Mexico Enabling Act and the New Mexico Constitution, and thus to cancel or discontinue four separate land exchanges of considerable size and complexity. These exchanges would transfer or have transferred state trust land in the White Peak area of Mora and Colfax counties and elsewhere to private ownership in return for certain private land situated in the same area and elsewhere. According to the Land Commissioner, these exchanges will reduce "checkerboard" ownership of state trust land and consolidate state land into larger, contiguous parcels, thereby improving land management and reducing boundary and access issues that have arisen in that area. *See, e.g.*, *State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶¶ 17-18, 63, 145 N.M. 769, 205 P.3d 816.

{2} This Opinion does not pass judgment on either the wisdom or the efficacy of the Land Commissioner's proposed exchanges. Instead, we are asked only to determine whether those exchanges are lawful. Specifically, we inquire whether these exchanges are legally authorized under New Mexico's Enabling Act, a 1910 act of Congress that, among other things, identified public lands for transfer to the state and imposed certain conditions. In our state constitution, the people of New Mexico expressly consented to the provisions of the Enabling Act. *See* N.M. Const. art. XXI, § 9. We conclude that the exchanges are not authorized because they violate the requirements of the Enabling Act, and therefore we issue our Writ of Mandamus in the manner requested by the Attorney General, directing the Land Commissioner to cancel these exchanges. We also give certain additional directives as indicated in this Opinion.

BACKGROUND

I. New Mexico Enabling Act and History of State Trust Land Exchanges

{3} The 1910 Enabling Act provided for New Mexico's admission as a state into the federal union and set forth certain basic conditions for statehood. Act of June 20, 1910, ch. 310, §§ 1-18, 36 Stat. 557 (Enabling Act); N.M. Const. art. XXI, § 9 (adopting the provisions of the Enabling Act). The Act was adopted during New Mexico's constitutional convention, making it "fundamental law to the same extent as if it had been directly incorporated into the Constitution." *Lake Arthur Drainage Dist. v. Field*, 27 N.M. 183, 190, 199 P. 112, 115 (1921).

{4} The Enabling Act required that the people of New Mexico incorporate its mandates into the state constitution, and it specified that those mandates could not be modified without the consent of Congress and a ratifying vote of our citizens. *See* Enabling Act § 2; *see also* N.M. Const. art. XXI, §§ 1-11 (incorporating all Enabling Act measures into the New Mexico Constitution and making the Act irrevocable without the consent of the United States and the people of this State); N.M. Const. art. XIX, § 4 (providing for citizen voting on constitutional amendments); *Bryant v. Bd. of Loan Comm'rs*, 28 N.M. 319, 329, 211 P. 597, 601 (1922) ("Congress contemplated that any change . . . to the use of the proceeds of the lands granted to the state should be effectuated by amendment to the Constitution, and the Constitution . . . provides that the ordinance accepting these grants of land is to be irrevocable without the consent of the United States and the people of the state, and . . . any change in the use and application of the proceeds of these land grants may . . . be done by way of a constitutional amendment.").

{5} Section 10 of the Enabling Act governs state trust land management. The Act granted over thirteen million acres of federal land to the State of New Mexico, to be held in trust for the benefit of various public schools and other institutions. *See* Enabling Act §§ 6-7, 10; 1990 WL 110523 (Cong. Rec.), 136 Cong. Rec. 21,234 (1990) (statement of Sen. Pete Domenici); *United States v. Ervien*, 246 F. 277, 277 (8th Cir. 1917). Our state constitution created the office of Commissioner of Public Lands, vesting it with the "direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as

may be provided by law." N.M. Const. art. XIII, § 2. This Court has long acknowledged that the Land Commissioner's broad authority to manage state trust lands is subject to the terms of the Enabling Act. *See, e.g.*, *Burguete v. Del Curto*, 49 N.M. 292, 295-96, 163 P.2d 257, 259 (1945) (per curiam) ("It's well settled in New Mexico that under the Enabling Act, our Constitution and the statutes based thereupon, the Commissioner of Public Lands has complete dominion, which is to say complete control, over state lands. This 'dominion' is, of course, subject to the restrictions imposed by the Enabling Act, the Constitution, and the statutes, and the manner of its exercise is subject to review by the courts." (citations omitted)).

{6} Section 10 of the Enabling Act defines the Land Commissioner's power to sell or lease state trust land, but also limits those powers. Sale proceeds are deposited in the Land Grant Permanent Fund and invested by the State Investment Officer for the benefit of enumerated public institutions. *See* N.M. Const. art. XII, §§ 2, 7; NMSA 1978, §§ 6-8-1 to -22 (1957) (amended 2010); NMSA 1978, § 19-1-17 (1957) (amended 2010); *State v. Llewellyn*, 23 N.M. 43, 70, 167 P. 414, 423 (1917). Proceeds from leases are distributed directly to the beneficiary institutions. NMSA 1978, §§ 19-1-11, -13 (1989).

{7} Section 10's conditions include the proviso that state trust lands "shall be by the said state held in trust, to be disposed of in whole or in part *only in manner as herein provided.*" (Emphasis added.) When adopted, the only means of disposal provided in the Enabling Act were sale and lease, under certain conditions. The Act provided that land "shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction" with detailed advance notice to the public. Section 10 further provides that "[a]ll lands . . . before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed. . . ." These conditions, crucial to our later discussion in this Opinion, can be summarized as follows: first, disposals of land are limited to the disposals described in the Enabling Act; second, land can only be sold or leased at a public auction to the highest and best bidder; and third, all sales and leases must yield at least the appraised value of the land. As will be discussed more fully in this Opinion, the Enabling Act imposed its conditions and restrictions upon the Land Commissioner's authority to dispose of public lands so as to prevent the kind of corruption and exploitation of the public trust for private advantage that had been widely exposed over the latter part of the 19th Century.

{8} Over time, several attempts have been made to loosen the Enabling Act's constraints on land disposals by amending the Act to provide the Land Commissioner with authority to *exchange* state land, for land held by others without the constraints of the conditions described above. Only once have both Congress and the people of New Mexico voted to provide the Land Commissioner with exchange authority. In 1926, Congress approved an amendment to allow the Land Commissioner and the U.S. Secretary of the Interior to exchange state trust land for national forest land. Act of June 15, 1926, ch. 590, § 1, 44 Stat. 746. New Mexico voters twice rejected the amendment before they approved it in 1932. *See* N.M. Const. art. XXI, § 11. Voters rejected another proposed amendment in 1935, which would have given the Land Commissioner broader authority to exchange land with the federal government.

{9} Significant to our inquiry today, in 1990 New Mexico voters overwhelmingly rejected a proposed amendment of the Enabling Act which would have provided the Land Commissioner with the very authority he seeks to exercise today. The proposed—and defeated—constitutional amendment would have authorized the Land Commissioner to exchange state trust land for land held by private persons or entities, among others. It was defeated by a vote of 57.7 percent against and only 42.3 percent in favor. As will be discussed later in this Opinion, we regard this popular vote as significant. The amendment would not have been necessary had

the Enabling Act authorized exchanges all along. To the contrary, its rejection signifies that a significant majority of our electorate understood at least two things: 1) the Enabling Act did not authorize Land Commissioner exchanges, and 2) the Land Commissioner should not be empowered to conduct such exchanges.

{10} Despite a history of uncertainty surrounding the authority to exchange state trust land, the Land Commissioner has for decades engaged in land exchanges with a variety of state and local *public* entities involving hundreds of thousands of acres of state trust land. Land Commissioner documents submitted to this Court indicate only two exchanges have been conducted with *private* entities: a 1984 exchange of 314 acres of state trust land for 200 acres from United Nuclear Corporation and a 2009 exchange of 28 acres of state trust land for 53 acres of land from Easter Seals Santa Maria El Mirador.[1] The Attorney General has not challenged any exchanges prior to the four challenged exchanges in the present litigation, and as will be explained, this Opinion does not affect any prior exchanges.

II. The Four Challenged Exchanges

{11} In this case, the Attorney General seeks to cancel or prohibit four separate land exchanges, each with a private party: the "Stanley Ranch exchange," the "UU Bar exchange," the "CS Ranch Bar exchange," and the "Galloway exchange." Each exchange involves state trust lands situated in the White Peak area of Mora or Colfax counties. Combined, the exchanges would transfer 14,600 acres of state trust land, at an appraised value of $22,500,000, for approximately 9,560 acres of private land at an appraised value of $23,200,000.

{12} Only the Stanley Ranch exchange has been fully consummated with title passing from the state to the Stanley Ranch. The state has deeded fourteen parcels of land ranging in size from 40 to 1,727 acres, with a total of 7,205.75 acres, valued at $6,356,000. In exchange, the state has received from the Stanley Ranch multiple parcels of land, totaling 3,336.221 acres appraised at $6,413,000. The Stanley Ranch began the exchange process by submitting an "Initial Application" to the State Land Office[2] on October 11, 2007. The application specified parcels of state trust land that the Stanley Ranch sought to acquire through an exchange.

{13} The State Land Office agreed to proceed with the transaction on June 5, 2008, eight months after the initial application, on the condition that certain lands be added to and removed from the proposed exchange. Accordingly, Stanley Ranch completed an amended application on August 5, 2008, and submitted it to the State Land Office. On September 8, 2009, almost two years after the initial application, the State Land Office issued a "Notice of Public Auction for Exchange of Land by Sealed Bid" detailing the land sought by the Stanley Ranch. The notice was published for ten weeks, from September 18 through November 19, 2009. Stanley Ranch submitted the only bid on November 19, 2009, more than two years after its initial application, which was accepted on November 30, 2009. On January 7, 2010, the State Land Office executed an "Exchange Patent," conveying the specified state trust lands to the Stanley Ranch. The State received the specified lands from the Stanley Ranch, and the transaction was closed.

{14} The UU Bar Ranch exchange, not yet completed, involves three parcels of state trust land located in Mora and Colfax counties, ranging in size from 120 to 1,721 acres, totaling

[1] The United Nuclear exchange in 1984 is the only private exchange documented in the "SLO Exchanges by Administration/Action," submitted by the Land Commissioner. That list, however, appears to only document land exchanges consummated before 1987. Attached press releases describe six land exchanges occurring between 2005 and 2009. One of those press releases suggests another private "transfer," an exchange with Easter Seals Santa Maria El Mirador on August 25, 2009.

[2] NMSA 1978, Section 19-1-1 (1912), established the State Land Office, with the Commissioner of Public Lands as its executive officer.

3,431.34 acres and valued at $2,381,000. The Land Commissioner has agreed to transfer this land in exchange for 3,610.19 acres of the UU Bar Ranch property, also in Mora and Colfax counties, valued at $2,383,000. The UU Bar Ranch initiated the exchange on March 5, 2008, submitting an "Initial Application" for land exchange to the State Land Office. Over six months later, on October 1, 2008, the State Land Office informed the UU Bar Ranch that it "would proceed with the land exchange process" and requested further information from the UU Bar Ranch.

{15} On September 15, 2009, the Land Commissioner issued a "Notice of Public Auction for Exchange of Land by Sealed Bid," offering for auction the 3,431.34 acres of state trust land already agreed upon for exchange with the UU Bar Ranch. Notice was published for ten weeks, starting October 1, 2009. The UU Bar Ranch submitted the only bid on December 8, 2009, over a year and a half after its initial application, and was notified of its acceptance on December 17, 2009. For the moment, the State Land Office retains title to these state trust lands.

{16} The CS Ranch and Galloway exchanges have been in negotiation with the State Land Office, but have not yet proceeded to public notice. CS Ranch initiated its proposed exchange by submitting an "Initial Application" on April 9, 2008. The State Land Office responded on July 8, 2008, calling for further investigation into the exchange proposal and reporting that it had advised staff to "proceed with the exchange process." Until the Petition was filed in this case, appraisals and appraisal reviews of the targeted state trust lands were under way, and the State Land Office and CS Ranch were negotiating the details of the exchange.

{17} Under the most recent terms of the exchange, the Land Commissioner contemplates conveying approximately 166 acres of state trust land in Colfax County valued at $734,000; 3,630 acres in Santa Fe County valued at $9,935,000; and 40 acres in Bernalillo County valued at $2,250,000. In return, CS Ranch is offering 2,600 acres of its land in Colfax County valued at $13,480,000. The proposed exchange has been described by the State Land Office as part of the "White's Peak Consolidation Strategy" and "the second of four (4) proposed exchanges," focusing on consolidation and access. When the Attorney General's petition was filed on February 1, 2010, almost twenty-two months had passed since the initial CS Ranch application was filed with the State Land Office.

{18} Finally, the Galloway exchange is the fourth, and smallest, of the four exchanges. It would transfer 160 acres of state trust lands in Colfax County valued at $840,000, in exchange for approximately 110 acres of Galloway land in Colfax County valued at $951,500. On July 10, 2008, William Galloway submitted an "Initial Application" for exchange of public lands. Two months prior to his "Initial Application," Galloway proposed an exchange with the Land Commissioner, declaring his interest in "establish[ing] a dialog/consideration process for swapping certain deeded land," and promoting the exchange as a way to improve land management and public access.

{19} On August 28, 2008, the State Land Office sent Galloway a letter indicating that "further investigation of the suggested exchange [was] warranted" and that the Land Commissioner had "advised staff to proceed with the exchange process." On June 18, 2009, Galloway submitted an "UPDATED Initial Application," indicating that the state trust lands he desired were the "CS Ranch 160 acre tract . . . (part of the global swap occurring)." Galloway further explained that his interest in the land exchange was "[p]art of the global swap happening with many local owners and state of NM." The Galloway exchange had not yet been advertised when, more than eighteen months after Galloway's "Initial Application," the Attorney General filed a petition requesting that this Court stay the exchange.

{20} On February 1, 2010, the Attorney General filed a Petition for Writ of Mandamus challenging the Land Commissioner's authority to conduct the four exchanges described above.

The next day, we granted the Attorney General's request to stay all transactions pending a resolution of the dispute.

DISCUSSION

I. Mandamus Jurisdiction Is Proper

{21} This Court will exercise its original jurisdiction in mandamus

> when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; *see also* N.M. Const. art. VI, § 3 ("The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions. . . ."); NMSA 1978, § 44-2-5 (1884) ("The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law.").

{22} The Attorney General's petition raises questions implicating the Land Commissioner's constitutional ability to engage in land exchanges. As noted, the scope of the Land Commissioner's authority has been the subject of the Enabling Act, congressional acts, the New Mexico Constitution, state legislative initiatives, state and federal judicial opinions, and proposed constitutional amendments. The meaning of the law that created the Land Commissioner's post and established his charge, and the outcome in this case, could have far reaching implications for millions of acres of state trust land and the trust beneficiary institutions. At issue, therefore, are fundamental constitutional questions of the greatest public importance.

{23} This case also demands an expeditious resolution that can only come through our exercise of mandamus. The largest of the land exchanges has already been consummated, another is nearly complete, and the remaining two are in advanced stages of negotiation. Until this dispute is resolved, the legal status of thousands of acres of land, along with the property rights of the private parties involved, hang in the balance. Although the district court has concurrent jurisdiction in mandamus cases, "when issues of sufficient public importance are presented which involve a legal and not a factual determination, we will not hesitate to accept the responsibility of rendering a just and speedy disposition." *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977); *see also State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768 (finding that a significant and purely legal question of government-actor powers under the New Mexico Constitution would find its way to this Court, even if the action began in the district court).

{24} The Land Commissioner contends that alternative channels exist to challenge the exchanges, making mandamus improper. Specifically, he suggests either an administrative contest, declaratory or injunctive relief, or a challenge to the Land Commissioner's regulations under the Administrative Procedures Act. These alternatives are all inadequate.

{25} An administrative contest is permitted by "any persons or corporation claiming any right, title, interest or priority of claim, in or to any state lands, covered by any lease, contract, grant or any other instrument executed by the commissioner." NMSA 1978, § 19-7-64 (1912); *see also* 19.2.15.1 to .18 NMAC (6/30/2004). It also allows "[a] person aggrieved by a decision of the commissioner" to challenge any final agency action in district court. NMSA 1978, § 19-7-67 (1999). Yet the Attorney General is not personally aggrieved by the Land Commissioner's decisions, nor does he have any "right, title,

interest, or priority of claim, in or to any state lands, covered by any lease, contract, grant or any other instrument executed by the commissioner." Section 19-7-64. Rather, the Attorney General is acting on behalf of state interests—state trust land and the beneficiaries of the trust—as the office requires. *See* NMSA 1978, § 8-5-2(A) (1975) ("[T]he attorney general shall . . . prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested."); *State ex rel. Burg v. City of Albuquerque*, 31 N.M. 576, 584-85, 249 P. 242, 246 (1926).

{26} Declaratory judgment, although theoretically an option, does not constitute an adequate remedy at law that would preclude mandamus relief. *See City of Albuquerque v. Ryon*, 106 N.M. 600, 602-03, 747 P.2d 248-49 (1987) (providing that declaratory judgment actions are not intended to substitute for remedies such as mandamus). Finally, the Administrative Procedures Act is not a vehicle for challenge in this case because that act only applies "to agencies made subject to its coverage by law, or by agency rule or regulation if permitted by law." NMSA 1978, § 12-8-23 (1969). No laws or agency rules have been adopted making that act applicable to the State Land Office or the Land Commissioner.

{27} The last issue regarding our exercise of mandamus jurisdiction turns on whether the Attorney General's petition presents a purely legal question concerning a ministerial duty of the Land Commissioner. *See* NMSA 1978, § 44-2-4 (1884) ("[Mandamus] may be issued . . . to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."). "A ministerial act . . . is an act or thing which [a public officer] is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case." *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 332 (1956).

{28} We recognize that the Land Commissioner has broad discretion to manage state trust lands, and mandamus cannot be used to compel an executive officer acting within his discretion. See *Bird*, 91 N.M. at 282, 573 P.2d at 216 (citing *Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976)); *see also* N.M. Const. art. 5, § 1 (creating the executive department and including the "commissioner of public lands"). We have held, however, that mandamus is appropriate to determine the outer bounds of that discretion. *See, e.g.*, *State ex rel. Shepard v. Mechem*, 56 N.M. 762, 767, 250 P.2d 897, 900 (1952); *Sender v. Montoya*, 73 N.M. 287, 292, 387 P.2d 860, 863 (1963) (holding that mandamus is proper when an officer is performing ministerial duties, and explaining that "language . . . , to the effect that mandamus is inappropriate where interpretation and judgment are necessary, must be considered in context, not as an inflexible rule"), *overruled on other grounds by State ex rel. Reynolds v. Molybdenum Corp. of Am.,* 83 N.M. 690, 695, 496 P.2d 1086, 1091 (1972).

{29} We do not question the Land Commissioner's motivation or judgment in engaging in land exchanges. Rather, we address two specific legal questions regarding the Enabling Act's limitations on the Land Commissioner's discretion. We address each of the legal questions in turn. First, "Does the Enabling Act authorize the Land Commissioner to exchange land with private parties, without application of Section 10's sales provisions?" This is a purely legal question that we answer in the negative in Section II. We further conclude that land exchanges for monetary (appraised) value are in-kind sales and are thus subject to the Enabling Act's sales provisions.

{30} Because we conclude that land exchanges for monetary (appraised) value are subject to the Enabling Act's sales provisions, we move on to a second purely legal question: "As a matter of law, do the challenged exchanges comply with the required elements for a valid sale of land, including the requirement of a public auction to the highest and best bidder?" In Section III, we conclude that, as a matter of law, the exchanges do not comply with Enabling Act's Section 10 requirement that "lands shall not be sold or leased, in whole or in part, except

to the highest and best bidder at a public auction." The Land Commissioner is correct that he cannot be compelled to hold a public land offering. That decision is within the Land Commissioner's discretion. If he does decide to sell (or exchange) land, however, the Land Commissioner has an enforceable, ministerial duty to comply with the sales provisions of Section 10 of the Enabling Act. He has no discretion to do otherwise.

{31} It is a factual determination, which we need not reach, whether making land exchanges is generally beneficial to the trust. It is also a factual determination whether the exchanges at issue would benefit the trust. The Land Commissioner makes a cogent argument supporting his conclusion that certain private land exchanges would improve the management and value of state trust lands. We accept the Land Commissioner's argument.

{32} This case hinges upon the meaning of the Enabling Act that created the trust and provided for its administration. Neighbor-to-neighbor exchanges may well be in the best interest of the trust, but if the Enabling Act does not provide the Land Commissioner with authority to conduct exchanges, then they cannot be done. If they are permitted, they must conform to conditions imposed by the Act.

II. The Enabling Act Does Not Permit Exchanges Unless They Are In-Kind Sales

{33} This section addresses the first legal question we posed above regarding the Enabling Act's limitations on the Land Commissioner's discretion: "Does the Enabling Act authorize the Land Commissioner to exchange land with private parties, without application of Section 10's sales provisions?" We conclude that the Enabling Act does not authorize those exchanges. We also recognize, however, that exchanges for appraised monetary value, such as the challenged exchanges, may be considered in-kind sales. Thus, assuming exchanges for monetary value are in-kind sales, they are subject to the Enabling Act's sales provisions, including public auction to the highest and best bidder.

A. *The Enabling Act's Plain Language Limits Land Disposals*

{34} Although Section 10 of the Enabling Act never used the word "exchange" until the word was specifically added in an amendment to give the Land Commissioner exchange power with the Secretary of the Interior, the Land Commissioner interprets the word "dispos[e]" in Section 10 as a general, implicit grant of authority beyond sales or leases to include exchanges. Under that interpretation, the authority to exchange would only be conditioned upon an appraisal of the exchange lands and obtaining at least the appraised value in exchange for the state lands; there would be no companion requirement of notice and public auction to the highest and best bidder. The Land Commissioner reasons that an exchange is a form of disposal, not expressly prohibited by the Enabling Act, and thus it falls within his general "disposal" authority.

{35} We reject the Land Commissioner's interpretation. We cannot accept the notion that use of the word "dispose[d]" in Section 10 grants additional, residual authority to convey trust land beyond a sale or lease. Significantly, Section 10 of the Enabling Act requires that disposals occur "only in the manner provided herein," thus limiting, rather than broadly granting, the Land Commissioner's power to dispose. The word "dispose" appears three times in Section 10 of the Enabling Act:

> [A]ll lands hereby granted . . . shall be . . . held in trust, to be *disposed* of in whole or in part *only in manner as herein provided* and for the several objects specified in the respective granting and confirmatory provisions. . . .
>
> *Disposition* of any of said lands . . . for any object other than that for which such particular lands, or the lands from which

> such money or thing of value shall have been derived, were granted or confirmed, or *in any manner contrary to the provisions of this act,* shall be deemed a breach of trust. . . .
>
> . . . .
>
> All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or *other disposal* thereof shall be made for a consideration less than the value so ascertained. . . .

(Emphasis added.) The first two uses explicitly negate an expansive interpretation. They direct the reader to the Act's limitations (lands are "to be disposed of . . . only in manner as herein provided" and "[d]isposition . . . in any manner contrary . . . shall be deemed a breach of trust"). Any infraction of the Act's limited bounds is prohibited as a "breach of trust."

{36} The third use of "disposal" specifies the "manner" in which disposals of land should occur. It directs that land trust holdings shall be appraised and no sale or other disposal shall be made for a consideration less than appraised value. The Land Commissioner is correct to interpret this passage as requiring an appraisal before any transaction involving state trust land, not only for sales but also for leases. Because leaseholds are also expressly contemplated in Section 10, "sale *or other disposal*" is necessary language to include such conveyances. The phrase "or other disposal," does not create, however, a new universe of possible disposals, such as swaps or exchanges, exempt from the conditions required for sales and leases. We have repeatedly recognized that "[w]here authority is given to do a particular thing and a mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of expressio unius est exclusio alterius." *Fernandez v. Espanola Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 6, 138 N.M. 283, 119 P.3d 163 (internal quotation marks and citation omitted).

{37} The Enabling Act's plain language is more than sufficient to establish the absence of any implicit grant of land exchange power. Despite this, we put forth the congressional history showing the factors that formed the Act's restrictions and the election history that demonstrates voter intent to refrain from amending the Act to allow for land transfers. These histories further illustrate the intended limitations on the Land Commissioner's disposal of land.

B. *Enabling Act Drafters Purposely Constrained Land Commissioner Authority*

{38} To infer broad authority from the word "dispos[e]" would be to construe the Enabling Act precisely in the manner that Congress and the leaders of the New Mexico Territory sought to avoid. The Enabling Act was written to "preclude any license of construction or liberties of inference." *Ervien v. United States*, 251 U.S. 41, 47 (1919). Contrary to the consistent "narrow interpretation" by the U.S. Supreme Court, *see, e.g.*, *United States v. N.M.*, 535 F.2d 1324, 1327 (10th Cir. 1796), the Land Commissioner would have us construe "dispos[e]" to afford additional, broad, and almost unrestrained authority to convey state trust land, subject only to the single requirement that any such disposal obtain at least true appraised value. The Land Commissioner's view, however, would ignore the history that influenced the Enabling Act's restrictions on land disposal. *See* Robert W. Larson, *New Mexico's Quest for Statehood 1846-1912* 268 (1968) ("Lands granted [by the Enabling Act] were placed in a trust to be disposed of by a specified procedure.").

{39} As the Arizona Supreme Court has noted, "the Enabling Act for New Mexico and Arizona marked a complete and absolute departure from the enabling acts under which other states were admitted to the Union." *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947). More specifically, the Enabling Act was a response to, and an attempt to preclude, the types of abuses that had occurred in other states and in territorial New Mexico. *Id.* Unfettered local control of trust lands had

> left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

Id. New Mexico's own scandal involved land covered with valuable timber that had been granted to the Territory of New Mexico through a federal act in 1898; territorial authorities had violated the law in disposing of the timber. *Id.* at 345. The Enabling Act was drafted in the wake of twelve pending U.S. Department of Justice lawsuits in the New Mexico Territory against corporations or against the Territory in conjunction with a corporation. S. Rep. No. 61-454, at 37 (2d Sess. 1910). In addition, it has been widely represented that during the years following the Civil War and leading up to New Mexico's statehood, members of the so-called "Santa Fe Ring," a group of land speculators, including prominent politicians, lawyers, and other leading citizens of the territory, assumed huge land holdings through corrupt practices, taking advantage of legal discrepancies and ignorance of the land law on part of land grant holders. *See generally* David Correia, *Appendix: Land Grant Speculation in New Mexico During the Territorial Period*, 48 Nat. Res. J. 927 (2008).

{40} The history surrounding the Enabling Act demonstrates an intent to prevent future corruption by strictly limiting the ability of the Land Commissioner to dispose of trust lands. *See, e.g.*, Larson, *supra*, at 267 (explaining that the reasons for the "[h]arsh restrictions on the handling of public lands," included in the Senate version of the statehood bill and eventually adopted in the Enabling Act, "may be traced back to the land fraud scandals"). The Enabling Act's land disposal conditions were designed to protect the Land Commissioner from exposure to corrupt and coercive forces. Indeed, Senator Beveridge of Indiana, Chairman of the Committee on the Territories, considered the restrictions on disposal of the land to be "quite the most important item" in the legislation. *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 468 (1967). The Senate Bill stipulated that any conveyance of public trust land must be at a public auction, after adequate public notice, to the highest bidder, at no less than appraised value. In addition, "transactions upon credit" were prohibited unless "accompanied by security." S. Rep. No. 61-454, at 18.

{41} Senator Beveridge had good reason for his opinion that the restrictions on land disposals were the most important part of the Enabling Act legislation. Concerns about disposal of New Mexico's land were held at the highest level of government, by President Roosevelt. *See* 2 Ralph Emerson Twitchell, *The Leading Facts of New Mexican History* 549 (Sunstone Press 2007) (1912). In 1906, when Herbert J. Hagerman was appointed governor of the territory of New Mexico, "[i]t was generally believed that [Hagerman] had been chosen for the express purpose of assisting in uncovering frauds in the sale and disposal of lands . . . to corporations and special interests, to some of which the territorial officials and their friends were parties. . . ." *Id.* at 549.

{42} In authoring and signing the Enabling Act, members of Congress sought to limit the power of the Land Commissioner by requiring transparent and fair disposal of public land for the public's benefit. In addition to discussing the ongoing lawsuits in the Territory, Senator Beveridge's Committee on the Territories Report, accompanying the Senate bill, highlighted testimony by two leaders representing the Territory of New Mexico. *See id.* at 20. At that time, L. Bradford Prince was a former New Mexico Territorial Governor, *id.*, and Charles A. Speiss was President of the New Mexico Constitutional Convention of 1910. *New Mexico Blue Book 2007-2008* 48 (Mary Herrera, Secretary of State ed. 2008). Each New Mexican leader responded to questions from the Committee Chairman:

> **The Chairman**. . . . . I understand you to say in private conversation that you highly approved, as you said every other

> man did who thought of the subject, of the safeguards thrown about the disposition of public lands granted in this bill.
>
> **Mr.** Prince. We approve of the strictest safeguards that can possibly be found in order to insure the perpetuity of that fund and its inviolability.

S. Rep. No. 61-454, at 20. This Court also considers the restrictions on land disposals inviolate. The Report's highlighted testimony continued:

> **The** Chairman. At that point, let me ask you this question: In the bill introduced in the Senate, known as the Senate bill, very careful restrictions have been thrown around the disposition of this land. I understand you to say to me in private conversation that you were entirely satisfied that the restriction could not be made too strong.
>
> **Mr.** Spiess**.** Absolutely, Senator, and more than that. We would have adopted those same restrictions by our constitutional convention—

Id.

> **The** Chairman (interposing): So you have no objection to these restrictions?
>
> **Mr.** Spiess: No sir.

Hearing Before the Committee on Territories, United States Senate, 61st Cong. 19 (1910) (statements by Sen. Albert Beveridge, Chairman, S. Comm. on the Territories). Testimony from Arizona representatives expressed similar support for the restrictions, asserting "the restrictions on such public lands can not be made too broad." S. Rep. No. 61-454, at 21. An Arizona representative even testified that he desired measures that would prevent the public trust lands from being disposed of "in large areas." *Id.* at 20.

{43} While this Court will usually defer to an executive official's discretion, the Enabling Act's conditions and limitations were purposefully designed to circumscribe discretion. *See United States v. New Mexico*, 536 F.2d 1324, 1327 (10th Cir. 1976) ("In construing the Enabling Act, the Supreme Court citing the restrictions placed on the use of the trust lands has consistently applied a narrow interpretation to the terms of the Enabling Act.").

> The central problem which confronted the [Enabling] Act's draftsmen was . . . to devise constraints which would assure that the trust received in full fair compensation for trust lands. The method of transfer and the transferee were material only so far as necessary to assure that the trust sought and obtained appropriate compensation. This is confirmed by the legislative history of the Enabling Act. All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories. Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898. The violations had there allegedly consisted of private sales at unreasonably low prices, and *the committee evidently hoped to prevent such depredations here by requiring public notice and sale.* The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands.

Lassen, 385 U.S. at 463-64 (1967) (emphasis added) (footnotes omitted); *see also State ex rel. State Eng'r v. Comm'n of Pub. Lands*, 2009-NMCA-004, ¶ 30, 145 N.M. 433, 200 P.3d 86 (declining to interpret the terms of the Enabling Act expansively when the congressional intent behind the terms was clear).

{44} The implications of the Land Commissioner's interpretation of the Enabling Act cannot be overstated. The inescapable result of validating these exchanges under his reasoning would be to authorize future public-private exchanges of *any* scale, subjecting millions of acres of trust land to "disposition" at the discretion of the Land Commissioner. We fail to understand why Congress would have taken such pains to safeguard sales and leases for the benefit of the trust, and then leave open all other kinds of "dispositions" from the trust to the vagaries of influence and manipulation. The Land Commissioner's interpretation would open the door to collusive deals and favoritism, a door the framers of the Enabling Act explicitly stated intentions to shut. It would allow private deals favoring select private parties.

C. *The Failed 1990 Constitutional Amendment*

{45} In addition to the Enabling Act's plain language and its historical context, the recent 1990 election further confirms that the Enabling Act does not implicitly authorize exchanges. The proposed 1990 constitutional amendment would have added the following new language to Section 10 of the Enabling Act:

> The State commissioner of public lands may exchange any land granted or confirmed by this Act for any land of the United States or an agency thereof, a State agency or political subdivision, a beneficiary of lands granted or confirmed by this Act, an Indian tribe or pueblo*, or a private entity* when the commissioner finds, after consultation with the chief administrative officer of the affected beneficiary of lands granted or confirmed by this Act, that—
>
> (1) based upon appraisals of the true value thereof, the value of the land to be received by the State is equal to or greater than the land to be conveyed by the State; and
>
> (2) the proposed exchange is beneficial to the interests of the affected beneficiary.

Act of June 20, 1910, Pub. L. No. 101-386, § 1, 104 Stat. 739 (1990) (amending the Act of June 20, 1910) (emphasis added) (quotation marks omitted). The amendment required first a vote of Congress, Enabling Act, § 2(I), then a vote of the New Mexico Legislature, and finally the approving vote of the people, N.M. Const. art. 19, § 4. It failed the popular vote by a substantial margin. The amendment essentially would have given the Land Commissioner the authority to enter into exchanges with private land owners, subject only to appraised value and without a public auction, authority that a 1988 New Mexico Attorney General Opinion had concluded did not exist.

{46} The 1988 Opinion had concluded that "the Commissioner of Public Lands may not exchange state trust lands for lands of equal value held by private persons, local governing bodies, trust land beneficiary institutions, state agencies or federal agencies other than the Interior Department." N.M. Att'y Gen. Op. 88-35 (1988). The Attorney General Opinion had also concluded that, since the Enabling Act requires that lands be assigned a monetary value, then "any disposition of trust lands will be for an agreed upon value and will result in a 'sale' rather than an 'exchange.'" *Id.* Continuing on, the 1988 Opinion had also concluded that, "[b]ecause of the mandatory appraisal, it is not possible for the Commissioner to engage in 'exchanges' of trust land for other land. The conveyances by the Commissioner will be 'sales,' and moreover must comply with the Enabling Act's requirements, including appraisal, advertisement and public auction with sale to the highest bidder." *Id.*

{47} Following the defeat of the proposed 1990 amendment, a subsequent attorney general overruled the 1988 Opinion. *See* N.M. Att'y Gen. Op. 91-15 (1991). The 1991 Opinion concluded that the Enabling Act's use of the word "dispose" gives the Land Commissioner broad authority to convey land beyond just a sale or a lease, including a

private exchange. *Id.* ("The authority of the Commissioner to 'dispose' of public lands granted by the New Mexico Constitution and, with restrictions, by the Enabling Act includes the power to exchange public lands."). The 1991 Opinion also concluded that some of the sale and lease restrictions in Section 10 of the Enabling Act applied to exchanges (such as the requirement for sale at no less than appraised value), but that other restrictions (notice and public auction) did not apply.[3] *Id.* Thus, the 1991 Opinion advised that the Land Commissioner had the very exchange authority the people had rejected in the 1990 popular vote.

{48} The proposal and failure of the 1990 constitutional amendment attests to the lack of legal authority to conduct unrestricted land exchanges with private entities under the Enabling Act. The Land Commissioner disagrees. He argues that the authority to exchange land with private parties existed even before 1990, and that the 1988 Opinion was simply misguided when it asserted the contrary. Accordingly, the proposed (and defeated) amendment was meant merely to "clarify" the preexisting authority. According to the Land Commissioner, the voters' rejection in 1990 meant only that, in their judgment, the Enabling Act did not need clarification because the Land Commissioner had exchange authority all along. We are not persuaded.

{49} Following the Land Commissioner's logic, the legislative machineries of both the U.S. Congress and the State of New Mexico were put into motion simply to clarify an exchange authority that the Land Commissioner already had. And from there, the Land Commissioner's logic would lead us to conclude that the voters' decisive rejection of the proposed amendment was actually an endorsement of his exchange authority.

{50} We operate from a working assumption that the Legislature (and for that matter the U.S. Congress) is well informed about the law and that its legislation is usually "intended to change the law as it previously existed." *Bird*, 91 N.M. at 284, 573 P.2d at 218; *see also Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). We conclude that this intention is especially true for amendments to the State Constitution and the Enabling Act—our most fundamental law.

{51} When New Mexico Senator Domenici addressed the U.S. Senate in support of the proposed amendment, he explained that it would "*permit* the State of New Mexico to exchange . . . lands granted . . . by the United States," and that without the proposed amendment "[u]nder the Enabling Act, the Public Lands Commissioner can only dispose of trust lands by sale or lease to the highest bidder at a public auction." 136 Cong. Rec. 21,234, 1990 WL 110523 (emphasis added). Senator Domenici went on to explain that "New Mexico has not amended its Enabling Act to permit such exchanges, except for the limited purposes of exchanging trust lands for National Forest Lands." *Id.*

{52} Congressman Vento of Minnesota, Chairman of the Subcommittee on National Parks and Public Lands, described the proposed amendment as a "noncontroversial measure" dealing with a "technical . . . problem." 136 Cong. Record 23,619 (1990), 1990 WL 129809. He admitted that the amendment was necessary because of doubt as to "the legal ability of the State, under the enabling act, to carry out . . . exchanges." *Id.*

{53} New Mexico Congressman Skeen urged passage of the "essential" amendment because "current authority is too restrictive to allow the land commissioner to properly carry out his responsibilities." *Id.* at 23,620. In fact, Congressman Skeen advised that "[t]o remedy this void, Congress must pass this legislation allowing a change in the State's Enabling Act. The voters of New Mexico must then approve a constitutional amendment." *Id.* These excerpts suggest that New Mexico's members of Congress knew, and

[3] We note that this Court is not bound by opinions issued by the Attorney General and will give them only such weight as deemed appropriate. *See First Thrift & Loan Ass'n v. State ex rel. Robinson*, 62 N.M. 61, 70, 304 P.2d 582, 588 (1956).

that Congress was surely advised, that without a change in the Enabling Act, the Land Commissioner could not legally engage in private land exchanges no matter how advisable or beneficial they might be.

{54} The voters likely understood the proposed amendment in similar terms. Despite its title, "To clarify the authority of the Commissioner of Public Lands to exchange lands under his control," the thrust of the proposed amendment was a grant of new authority to the Land Commissioner. The 1990 proposed amendment was not the first time the Land Commissioner had attempted to expand his authority, and it was not the first time such an expansion was rejected by the people. Former Land Commissioner Humphries was well aware of this trend when he addressed the Subcommittee on Public Lands, National Parks and Forests in support of the amendment: "[H]istory clearly reveals that the people of New Mexico have acted upon several exchange amendments and have clearly limited the commissioner's authority to exchange." 136 Cong. Rec. 21,235, 1990 WL 110523 (adopting Humphries' earlier subcommittee statement into the record on the Senate floor).

{55} In 1990, the people of New Mexico once again "acted upon" an "exchange amendment[]," and once again they "clearly limited the commissioner's authority to exchange." *Id.* We have no basis to conclude that the way people voted on the issue of the Land Commissioner's exchange authority in 1990 was any different than the way they have always voted. If the Land Commissioner wants exchange authority, then he must ask the people, and if the people turn his proposal down, then he does not have the desired authority. The Land Commissioner would have us engage in logical and semantical gymnastics. Instead, we subscribe to the reasoning that, if the Enabling Act had always granted the Land Commissioner authority to conduct exchanges, there would have been no need for the amendment.[4]

Fain Land & Cattle Co. v. Hassell, 790 P.2d 242, 248 (Ariz. 1990) (in banc); *see also Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 696, 448 P.2d 799, 802 (1968) ("[T]he [constitutional amendment] was defeated, thus showing that the people were not willing to allow [an amendment] to sanction the legislative [action providing the same as the amendment that] would not only thwart the constitutional provision but would circumvent the will of the people as expressed at the ballot box.").

D. *Exchanges for a Minimum Monetary Value May Be Considered In-Kind Sales*

{56} Because disposals are limited to the manner provided within the Enabling Act and exchanges are not provided for, if any exchanges are permitted, such exchanges must be *in-kind sales*. Exchanges of land based on the monetary value of each parcel may be considered equivalent to a sale where the appraised consideration is not cash, but land. Thus, any exchange authority is subject to the same restrictions that apply to all sales governed by Section 10: public notice, a public auction with sale to the highest and best bidder, and sale at a price no less than appraised value.

{57} This understanding of the Enabling Act recognizes the Act's common ground with Arizona's Enabling Act. Arizona is our sister state—the same federal legislation enacted the New Mexico and the Arizona enabling acts, and the Arizona Enabling Act was nearly identical to the New Mexico Enabling Act when Arizona entered the Union. *Compare* Enabling Act, ch. 310,

[4] Unlike the New Mexico Enabling Act, the Arizona Enabling Act was amended authorizing Arizona "to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder." Act of June 5, 1936, ch. 517, § 28, 49 Stat. 1477, 1478 (amending the Enabling Act for the State of Arizona, approved June 20, 1910). The Arizona Supreme Court interpreted the amendment as "Congress merely consent[ing] to removal of the restrictions against exchange of trust land, but . . . not requir[ing] Arizona . . . to amend its constitution or to pass legislation to allow exchanges." *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 249-50 (Ariz. 1990) (in banc) (footnote omitted).

§§ 1-18, 36 Stat. 557, 557-68 *with* §§ 19-35, 36 Stat. 557, 568-79. In *Fain*, the Arizona Supreme Court considered the Arizona Enabling Act. Despite an amendment to the Arizona Enabling Act that "clearly permit[ted] Arizona to authorize exchanges of public trust lands," the court concluded that such exchanges, still subject to the requirement for a minimum monetary value in return, amounted to in-kind sales that were subject to the Enabling Act's sales requirements. *Fain*, 790 P.2d at 246-47; *but see id.* at 253 (Corcoran, J., concurring in result) ("The best indication that an exchange is not a 'sale' . . . is that exchanges were not allowed as 'sales' under the 1910 Enabling Act until it was amended in 1936 to include them. Implicit in that amendment is a recognition by Congress that the Enabling Act of 1910 did not allow exchanges."). *Fain* explained that when "there is a fixed value at which the exchange is to be made," 790 P.2d at 247, the transaction is really a sale with consideration received in-kind rather than as cash, *see id.* at 246-48 (distinguishing its conclusion from jurisdictions that have differentiated between land exchanges and sales by quoting 30 Am. Jur. 2d *Exchange of Property* § 3, 365-66 (1967), which explained that the exchange of properties without measuring the value in terms of money is an exchange, but that the disposal of property for valuable consideration measured in terms of money is a sale).

{58} Although the New Mexico Enabling Act has not been amended to "clearly permit . . . exchanges" like the Arizona Enabling Act, except in terms of exchanges with the U.S. Department of the Interior, we find *Fain* persuasive. A conveyance of land in exchange for other land, when the value is measured in monetary terms, may be considered an in-kind sale. This conclusion is also consistent with the 1988 Opinion by the New Mexico Attorney General, characterizing exchanges for a minimum monetary value as in-kind sales. N.M. Att'y Gen. Op. 88-35. Indeed, given the Enabling Act's restrictions, the Land Commissioner can exchange only if the transaction passes scrutiny as a sale. As noted in *Fain*, Section 10 of the Enabling Act states in the most explicit terms that all state trust lands, leaseholds, timber, and so forth, "shall be appraised at their true value" and cannot be sold or otherwise disposed of "for a consideration less than the value so ascertained." Thus, the Land Commissioner may not dispose of *any* trust land without first establishing its value in monetary terms and obtaining at least that monetary value as consideration.

{59} For all the reasons discussed in this Section, we hold that, as an in-kind sale, any exchange of land must comply with the Enabling Act's sales provisions. We stress that a constitutional amendment remains an option to obtain authority to conduct land exchanges without these restrictions. The Land Commissioner's argument, that the 1988 Attorney General Opinion created so much confusion that congressional action and a constitutional amendment were required, concedes that the same need for such a constitutional amendment exists today. In the meantime, any ambiguity should be construed consistently with congressional intent and electoral will, and both counsel against the Land Commissioner's expansive interpretation.

III. Public Auction to the Highest and Best Bidder

{60} The State Land Office has promulgated regulations that, the Land Commissioner argues, adequately provide for a public auction. We do not dispute whether the four challenged exchanges were conducted under these regulations. Rather, in this Section, we examine the second purely legal question regarding the Enabling Act's limitations on the Land Commissioner's discretion that we put forth above in our mandamus discussion: "As a matter of law, do the challenged exchanges comply with the required elements for a valid sale of land, including the requirement of a public auction to the highest and best bidder?"

A. *A Public Auction Defined*

{61} An auction is "[a] public sale of property to the highest bidder." *Black's Law Dictionary*

149 (9th ed. 2009). In 1876, the Ohio Supreme Court described the history of the auction:

> This practice is said to have originated with the Romans, who gave it the descriptive name of *auction*, an increase, because the offered property was sold to him who would offer the most for it. This method of sale was established by the Romans for the disposal of military spoils, and was conducted *sub hasta*—-that is, under the spear; on such occasions the spear was stuck in the ground. This practice has passed away as to the spear, but the method still continues.

Crandall v. State, 28 Ohio St. 479, 481 (1876). The court described some "modern" variations, including the "Dutch method" and "sale by candle," but concluded that all variations have common elements:

> At auctions the bidders fix by competition the price at which the offered property is sold. This competition is an element of each offer and each bid. Into each of the methods named, competition is a necessary element in the offer, the bid and the act of selling the offered property.

Id. Thus, competition is the means by which an auction achieves the primary goal, obtaining the best return for the seller. Around the same time, the U.S. Supreme Court described its understanding of a public auction: "When the law requires a sale of property, real or personal, to be made at public auction, after due notice, it is for the purpose of inviting competition among bidders that the highest price may be obtained for what is sold." *Porter v. Graves*, 104 U.S. 171, 174 (1881).

{62} Contemporaneously with the passage of New Mexico's Enabling Act, several state courts discussed the required elements for an auction. The Montana Supreme Court interpreted the requirement that "sales of state lands shall be at public auction," to mean "a sale to the highest and best bidder with absolute freedom for competitive bidding." *State ex rel. Danaher v. Miller*, 160 P. 513, 515 (Mont. 1916) (internal quotation marks and citation omitted). The court further warned that "[a]ny agreement . . . to stifle competition or chill the bidding is a fraud upon the principle upon which the sale is founded." *Id.* The Supreme Court of the Territory of Hawaii explained that "competition . . . is that which distinguishes a sale at auction from other sales where the attempt to sell and to agree on a price is made with but one prospective purchaser at a time." *Territory v. Toyota*, 19 Haw. 651, 653 (1909). The Idaho Supreme Court adopted Hawaii's perspective: "In an auction, competition is a necessary element. . . ." *Hammond v. Alexander*, 177 P. 400, 401 (Idaho 1918) (citing *Toyota*, 19 Haw. at 653).

{63} The foregoing opinions, issued around the same time that New Mexico became a state, are some indication of what the framers of the Enabling Act likely meant when they said: "Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction." Over time, courts have continued to focus on the element of competition as essential to a public auction. *See In re Peoples Cab Co.*, 89 F. Supp. 577, 580 (W.D. Pa. 1950) ("[T]he very purpose of an auction . . . is to fetch together all those who may be interested to buy and set them against each other with whatever stimulus that may provide, as opposed to other kinds of sale."); *B.H. Stief Jewelry Co. v. Walker*, 256 S.W.2d 392, 397 (Tenn. Ct. App. 1952) ("Competitive bidding, up or down, is an essential element of an auction sale. A sale at fixed or flat prices, no higher nor lower, is not an auction sale regardless of the manner in which the merchandise is offered for sale at the fixed price."); *State v. Pub. Util. Comm'n of Tex.*, 246 S.W.3d 324, 343-44 (Tex. App. 2008) (explaining the legislature's intent in requiring an auction was to encourage competition); *Kolbo v. Blair*, 379 S.W.2d 125, 129 (Tex. App. 1964) ("[A] sale at public auction is a sale to the highest bidder—its object, a fair price—its means, competition—its results, a sale, presumed as a matter of law to be fairly conducted."); *Mfrs. Hanover Trust Co.*

v. Koubek, 396 S.E.2d 669, 671-72 (Va. 1990) (explaining that a public sale and auction require a competitive environment and that the early policies behind the requirement, protecting financial return, still apply today). We recognize that competition has been an essential element of a public auction since before the time New Mexico adopted the Enabling Act, that it was essential when New Mexico adopted the Enabling Act, and that it is still essential today.

{64} Courts have also emphasized that an auction's purpose is distinct from other types of sales. The Hawaii Territorial Court, for example, instructed that "[t]he main purpose of auction sales is to obtain the best financial returns for the owners of the property sold." *Toyota*, 19 Haw. at 652. The public auction, thus, is a mechanism to make sales using an objective basis, the highest financial gain, to discern between offers. This characteristic of an auction made it an attractive tool when states sought to safeguard public land sales against favoritism. The Minnesota Supreme Court explained that the public auction requirement for sales of its state school lands was "to foster and conserve the school fund, to prevent school lands from being sold at an inadequate price, and to secure competition therefor, and to guard against favoritism in the disposition thereof." *State v. Evans*, 108 N.W. 958, 959 (Minn. 1906)

{65} The U.S. Supreme Court stated that the public auction and notice requirements in the Arizona and New Mexico Enabling Act "were . . . intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands." *Lassen*, 385 U.S. at 464 (considering Arizona's identical Enabling Act); *see also Fain*, 790 P.2d at 248 ("The purpose of [the auction] provision is to ensure that the trust receives the most benefit possible from sale or other use of the trust lands. Without sale at public auction, the trust is not guaranteed the additional profit that might result from competitive bidding." (internal citation omitted)). As previously explained, the "particular abuses" that Congress sought to prevent were "the repeated violations of a similar grant made to New Mexico in 1898 . . . [that] allegedly consisted of private sales at unreasonably low prices, and the [Senate Committee on the Territories] evidently hoped to prevent such depredations here by requiring public notice and sale." *Lassen*, 385 U.S. at 464 (footnote omitted).

{66} Finally, courts recognize that for a valid auction to occur it must be "fair and open." *See, e.g.*, *Springer v. Kleinsorge*, 18 Mo. 152, 163 (1884) ("The offer of property at public auction is itself a proclamation by the seller that the highest bidder, in a fair and open competition, is to obtain the property."). Open competition furthers the purpose of using an auction as a sale mechanism because it dissuades favoritism and encourages objectivity. This raises the question as to what "open" means. Case law and our own Enabling Act's history demonstrate that an auction remains "open" even if general parameters are established for the purpose of ensuring that the highest *bid* also results in the highest financial delivery. In other words, limiting bids to those parties whose credit is secured or parties who have other indicia of reliability in order to guarantee the "best financial returns," is acceptable.

> Some measure of discretion is vested in auctioneers as to the precise methods to be pursued in attaining [the best financial returns], for example, bids need not be accepted from minors or from persons irresponsible either financially or mentally or from drunken persons or from one offering in bad faith or even from one making but a slight raise in his bid over the bid last announced.

Toyota, 19 Haw. at 653.

{67} Section 10 of the Enabling Act incorporates the idea that an "open" auction can be limited to pursue the best financial return as well. S. Rep. No. 61-454, at 18. Significantly, a prior version Section 10 of the New Mexico Enabling Act did not provide for an auction to the "highest *and best* bidder," but rather only the "highest bidder," S. Rep. No. 61-454, at 18. That earlier version also prohibited land sales

on credit, "unless accompanied by security," *id.*, the credit sales provision was later removed, and the term "and best" was added, requiring that the winning bidder be the "highest and best," Enabling Act § 10. The initially proposed limitation on credit sales is precisely the type of limitation contemplated by the requirement that the highest bid also be the "best bid." Requiring sale to the "highest and best" bidder therefore provides for objective selection of the winning bid at a public auction, while ensuring that the sale remain open to competitive bidding.

{68} Thus, the Enabling Act's mandate that sales be only to "the highest and best bidder at a public auction" requires more than just a minimum floor price. It means that the trust beneficiaries have, at least, an opportunity by way of a sale driven by open competition among bidders for the *best* price. The inclusion of the term "best" does not, however, provide discretion in selecting the winning bidder. Just as other courts have done before us, we recognize that the purpose of an auction is to obtain the highest financial return. Further, we recognize that Congress selected a public auction as the mechanism for selling public lands in New Mexico to allow an objective means for buyer selection, thus eliminating the risk of favoritism that was pervasive in public land sales, particularly in the New Mexico Territory before the Enabling Act.

B. *Private Negotiations and Bargaining*

{69} Before today our Court had not discussed the elements required for a valid public auction. In *State ex rel. Otto v. Field*, however, we wrote that the Enabling Act requires the same basis for all bids and bidders and that a *negotiated* contract, established after an auction, would be objectionable because it would defeat that requirement. 31 N.M. 120, 179, 241 P. 1027, 1050 (1925). Other jurisdictions have found that negotiations and bargaining prior to an auction impede competition and are inconsistent with the meaning of a true auction. As we shall see, the presence of extended negotiations with one bidder long before notice to the public of an auction presents a particular problem for the Land Commissioner in this case.

{70} The U.S. Supreme Court long ago recognized the contradiction between private negotiation and public auction. *See Porter v. Graves*. 104 U.S. 171 (1881). In *Porter*, a seller negotiated for the sale of property left intestate, for which state law required sale of the intestate property at a public auction. *Id.* at 172-73. In order to "comply" with that law, the property was advertised and then announced at the sale by the auctioneer as "sold to perfect a contract for sale" to the buyer's company. *Id.* at 173. The Court found that, if the sale were challenged by parties "interested in having the property bring its full value," the sale would surely have been set aside because it was not a valid auction. *Id.* at 174. Continuing on, in language particularly appropriate to the four challenged exchanges in this case, the Court stated:

> To make a private bargain beforehand between the party who wishes to buy and the person authorized to sell, as to the price and other incidents of the contract, and then invoke the forms of a public sale with competition to give effect to the private bargain is a course of procedure well calculated to defeat the purpose for which the public sale is required.

Id. at 174.

{71} Similarly, state courts have found negotiations and bargaining between bidders prior to an auction to be antithetical to a valid auction. In *Hammond*, the Idaho Supreme Court found that a conveyance of state trust land was not sold by auction as required by the state's constitution, when negotiations occurred between the bidding parties. 177 P. at 400-01. Before bidding started, auction participants drew lots among themselves for the parcels of land available and then took turns "bidding," one party per parcel, as determined by the lots drawn. *Id.* Although the court found that not all agreements among prospective bidders would defeat an auction, "if the purpose in so agreeing is to stifle competition, and if it causes the property to be awarded to a bidder, or bidders, for less than

would have otherwise been offered, the vendor may avoid the sale." *Id.* at 401. Because the court found the sale was void, it rejected the writ of mandamus requesting enforcement of the sale. *Id.*

{72} We recognize that bargaining and negotiation between buyers and sellers or between buyers prior to a sale negates the essence of what it means to have a public auction free and open to competition. Rather than seeking the highest financial gain through objective means, negotiation and bargaining design a satisfactory exchange for two parties to the exclusion of the public. *See Black's Law Dictionary*, *supra*, at 169 (defining a bargain as "[a]n agreement between parties for the exchange of promises or performances), 1136 (defining a negotiation as "[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter"). "Negotiation usu[ally] involves complete autonomy for the parties involved, without the intervention of third parties." *Black's Law Dictionary*, *supra*, at 1136.

C. *The Challenged Exchanges*

{73} For the following reasons, the four challenged land exchanges do not comply with the Enabling Act's requirement for a public auction. The undisputed facts on record show that each land exchange process involved extensive private negotiations with specific parties. Those private parties had significant advantages over any possible "competitors." The Land Commissioner "target[ed]" the exchange lands as part of an overall plan, whereby the purpose of the exchanges was not to secure the highest financial gain to the trust through selection of the "highest and best" bid, but rather to accomplish other land management goals. Finally, the means for selecting the winning bid were not objective. Thus, the exchanges embody the elements indicative of favoritism that the drafters of the Enabling Act sought to avoid by requiring public notice and public auction.

{74} In describing the Stanley Ranch exchange, the Land Commissioner concedes that the exchange would not have been possible or desirable to the state:

> In the absence of this kind of discussion and a bidding process that allowed for a single transaction in which certain trust lands would be conveyed for other lands which would justify the disposition, it is unlikely that any kind of transaction could be completed that would provide sufficient benefit to the trust.

In other words, the negotiations that took place for the Stanley Exchange were the only way to accomplish the goals the State Land Office had set for that land exchange. Because no other parties had the opportunity to participate in such discussions that made "any kind of transaction . . . sufficient[ly] benefi[cial] to the trust," there was no competition, no safeguards of objectivity, no openness, and thus no "public auction."

{75} The Land Commissioner insists there was no taint of favoritism. But the requirement of a public auction means that the people should not have to take anyone's word attesting to his or her objectivity. To the contrary, the Enabling Act chose a mechanism to protect against favoritism and stipulated a public auction "to the highest and best bidder" through open competition. The people did not select, and in fact rejected, "private negotiation" as an approved mechanism for the sale of public land.

D. *Lack of Competition*

{76} During oral argument the Attorney General compared the challenged land exchanges to the sale of a tailor-made suit; he questioned whether any true competition could take place when an auctioned product was custom-made for only one particular customer. The metaphor is a good one, if incomplete. More precisely, each transaction is better thought of as an exchange of tailor-made suits, in which the "auctioned" suit is custom-made for the buyer, suits are the preferred currency, and the "winning" suit is custom-made for the seller. No one else has such

a suit, or as a practical matter, can find one. Competition is surely in jeopardy when the bidding party also holds the one and only suit custom-made for the seller.

{77} The uncontested facts demonstrate, more clearly than an exchange of custom-made suits, that the land exchange procedure applied in each of the four challenged exchanges lacked competition. First, each applicant (a neighboring landowner) contacted the State Land Office to specify land desired in exchange for specific land held by the State Land Office. This first step in the exchange procedure allowed the applicant the opportunity to craft the land available for sale to his own interests. While this step of the process, alone, may not have precluded competition entirely, it contributed to the lack of competition when combined with the next steps.

{78} The State Land Office then appraised the exchange proposal for the land's value and its ability to ameliorate management and access issues. If interested in the applicant's proposal, the State Land Office then began working with the applicants to plan a sale that satisfactorily met the interests of both parties—the applicant and the State Land Office. This second step of the exchange process allowed the applicants an extended time period, compared to the notice for any other parties, to design their bids through back and forth communication over a substantial period of time. These communications and adjustments occurred long before other potential bidders were notified that the Land Commissioner would be exchanging land.

{79} Even the Land Commissioner describes this process as a "negotiation" with each private land owner. In the case of the Stanley Ranch exchange, the initial evaluation by the Land Commissioner found "substantial changes would need to be made in order to proceed with the consideration of any exchange." State Land Office staff then spent many months discussing "an exchange that would meet legal requirements and be beneficial to the trust." The Stanley Ranch negotiations took two years before the Land Office announced an "auction." The UU Bar Ranch negotiation took over a year and a half, and the CS Ranch and Galloway exchange negotiations had been going on for over a year and a half before the Attorney General filed its Writ of Mandamus early in 2010.

{80} Based on the foregoing process, by the time an auction was announced by the Land Commissioner at the tail end of the process, one applicant already knew that its previously proposed and negotiated exchange was mutually agreeable. In contrast, all other potential bidders were permitted only ten weeks between announcement of the sale and an opportunity to participate in the sale. During those ten weeks other potential bidders had to (1) ascertain the desirability of the lands offered by the State Land Office, (2) determine the risk/reward of spending the time and money to appraise their lands when another bid already existed that was acceptable to the State, (3) appraise their exchange land, and (4) construct a competitive bid of greater value than the lands offered, either independently or in cooperation with others.

{81} All the while, other potential bidders would know that the Land Commissioner did not have to accept their bids, even if superior in price and ability to perform—because, as we shall see in the discussion below, the Land Commissioner's criteria for selecting the winning bids were not objective, nor were they focused on the "highest and best" bid. Even if competing bids were theoretically possible in the face of the advantages to the bidding landowner and disadvantages to other bidders, the process was designed such that other bidders would not likely succeed. The foregoing procedure made competition—the essential element of an auction—improbable rather than fundamental.

E. *Public Auction Purpose Frustrated*

{82} In addition to the lack of competition, the challenged exchanges and the State Land Office's exchange process frustrate the intended purpose of a public auction as well as the purpose of the Enabling Act's inclusion of the public auction sales requirement. As we discussed, *supra*,

the purpose of an auction is to obtain the highest financial gain, and the purpose of Congress's requirement that an auction be the mechanism used for public land sales was to require an objective means of sale, eliminating the possibility of private favoritism.

{83} We should be candid about the objectives of these particular exchanges. They were designed to achieve a predetermined result. The exchanges were for the purpose of addressing specific land management problems in specific geographical regions—checkerboard areas—that could only be resolved by privately negotiated exchanges with neighboring landowners. Only certain land, however, along the checkerboard border could be exchanged in a manner that would ameliorate land management problems of both the State Land Office and its neighbors. Outside land (land from somewhere else) might be worth more, even a lot more, but it could not address the checkerboarding issue; it would only replace one owner for another into the same checkerboarding problem. It is no stretch for us to recognize that these problems could only be resolved through a privately negotiated exchange, which is exactly what the parties attempted to accomplish.

{84} For example, the Stanley Ranch exchange would provide the ability to fulfill the State Land Office's "plan" for an access road and campsites, all part of creating "a prime recreational and quality hunting area." The UU Bar Ranch proposal was of interest because it offered in-fill parcels. The CS Ranch exchange would allow construction of a loop road and would fill in land holdings. The Galloway proposal would provide in-fill parcels and an access road.

{85} The State Land Office frankly states in its Brief in Opposition, at page 40, that

> [t]he checkerboarding problems in the White Peak area created a "compelling reason" for the Commissioner to *target specific lands for exchange* in order to consolidate, or "unitize," the existing state trust lands in the area, thereby increasing the value of those lands by more than $13 million, enhancing the Commissioner's ability to protect that land, increasing the recreational opportunities available within the area, increasing access to the trust lands, and augmenting grazing revenues.

(Emphasis added.) Not only were the lands *targeted* for exchange, but the State Land Office describes the exchanges as the Land Commissioner exercising his "power to manage lands through exchanges *designed* to address the checkerboarding problems in various parts of the state." (Emphasis added.) The State Land Office's exchange rules, in fact, state that "the commissioner . . . may select the proposal or proposals he determines are the highest and best, that is, the proposal or proposals that he believes will be most beneficial to the trust in accordance with the standards set forth in Subsection A and C of 19.2.21.8 NMAC." 19.2.21.10 NMAC (6/15/2004). Subsection A provides that "[t]he commissioner may enter into an exchange when the commissioner determines that the exchange will result in a material benefit to the trust and the purpose of the exchange would serve the best interests of the trust." 19.2.21.8(A) NMAC (6/15/2004). Subsection C, similarly, allows "the commissioner [to] select another method of determining true value [one that does not involve a qualified appraiser] if he determines that such method is in the best interests of the trust and conform to law." 19.2.21.8(C) NMAC. According to the State Land Office Rules, the purposes of land exchanges are subjectively defined by the Land Commissioner, and financial advantage to the trust is not emphasized as the priority. In line with these rules, both the Stanley Ranch and the UU Bar Ranch bid specifications vested the Land Commissioner with discretion to select the winning bid, based on subjective factors rather than absolute financial benefit to the trust fund. The "Selection of the Winning Bid" provision of the Bid Information Packets for both exchanges provided, in full:

> The Commissioner will exercise his discretion in selecting the exchange proposal which is in the best interest of the State trust, considering the following factors:

(1) the extent to which the appraised value of the Offered Lands, as determined by the Commissioner, exceeds the appraised value of the Exchange Lands;
(2) the effect, if any, that the bidder's proposed use of the Exchange Lands would have on the utility and value of any adjacent state trust lands;
(3) the proximity of the Offered Lands to other state trust lands, and any land management issues;
(4) the difference in acreage between the Offered Lands and the Exchange lands;
(5) any other benefits accruing to, or detriments to, the state trust from the proposed acquisition.

None of the five factors provides an objective, measurable means of distinguishing between bids. Even if a bid were highest in monetary value and demonstrably superior in all respects under factors (1)-(4), factor (5) would give the Land Commissioner discretion to reject that bid based essentially on anything he determined to be in the "best interest" of the trust. Such opportunity for discretion is a direct affront to the purposes of the public auction requirement.

{86} In sum, the four challenged exchanges and the State Land Office exchange procedures, in general, preclude the existence of a public auction. As a matter of law, private negotiation negates the required competition. Further, the Land Commissioner's discretion to select a buyer negates the safeguards intended by the Enabling Act's auction requirement. Without the benefit of an auction's objective means of sale, awards of land only for the highest financial return to the state trust, there is no protection against favoritism. Therefore, such private land exchanges represent a departure from the Land Commissioner's ministerial duties under the Enabling Act. When the Land Commissioner chooses to dispose of land, he must do so by a true public auction.

IV. Scope of the Writ

A. *Completed Exchanges.*

{87} The Land Commissioner exceeded the bounds of permitted authority under the Enabling Act by conducting the Stanley Ranch and the UU Bar Ranch exchanges. Section 10 of the Enabling Act provides that "[e]very sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void. . . ." Under NMSA 1978, Section 19-7-8 (1912), the Land Commissioner has the "power to cancel any lease, contract or other instrument executed by him which shall have been obtained by fraud or executed through mistake or without authority of law." As such, the Stanley Ranch and the UU Bar Ranch exchanges are null and void and must be cancelled. A Writ of Mandamus will issue ordering the Land Commissioner to cancel all documents or other legal instruments purporting to implement these two exchanges including any transfers of title.

B. *The Planned CS Ranch and Galloway Exchanges*

{88} While the CS Ranch and Galloway exchanges have not been consummated with an auction or a transfer of title, they have proceeded thus far in the same manner as the unlawful Stanley Ranch and UU Bar Ranch exchanges. We have held that "Public functionaries may be restrained by mandamus from doing what they know is an illegal act." *Kiddy v. Bd. of Cnty. Comm'rs of Eddy Cnty.*, 57 N.M. 145, 152, 255 P.2d 678, 683 (1953). If these exchanges were to continue as planned, the Land Commissioner would once again be in violation of the Enabling Act. Therefore, a Writ of Mandamus will issue compelling the Land Commissioner to comply with the sales requirements of the Enabling Act and ordering the Land Commissioner not to consummate or proceed any further with the CS Ranch and Galloway exchanges. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 570, 904 P.2d

11, 19 (1995) ("It is well settled that the two processes, mandamus and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by mandamus to compel the performance of a duty, it will exercise its restraining power to prevent a corresponding violation of duty." (quoting *In re Sloan*, 5 N.M. 590, 628, 25 P. 930, 942 (1891))).

C. *Prospective Application*

{89} In light of the previously debated state of the law regarding the question of exchanges, we apply our writ and the reasoning behind it only to the exchanges challenged by the Attorney General in this case and not to any exchanges that may have taken place in the past. *See Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 397 n.7, 881 P.2d 1376, 1382 n.7 (1994) (explaining the availability of selective prospective or modified prospective decisions when the Court explicitly declares such a holding). We do not wish to leave any cloud on previously transferred titles that are not before us.[5] We have previously applied our opinions prospectively when policy considerations compelled such a choice. *See Montano v. Gabaldon*, 108 N.M. 94, 96, 766 P.2d 1328, 1330 (1989) (holding that Valencia County's revenue bonds were unconstitutional but applying the holding prospectively so as not to disturb similar, previous bond transactions that had taken place in reliance on a then-accepted understanding of the law); *see also Hicks v. State*, 88 N.M. 588, 592-93, 544 P.2d 1153, 1157-58 (1975) (abolishing common law sovereign immunity prospectively so as to give the legislature opportunity to create a risk management fund and to institute selective statutory sovereign immunity). We also observe that the Attorney General has not sought to challenge the Land Commissioner's authority to engage in any future exchanges with public entities. Accordingly, we express no view on that subject.

[5] We are led to believe that numerous exchanges with public entities have taken place over the years. At oral argument the Land Commissioner suggested that the State Land Office has exchanged land with numerous private parties as well. However, the only private exchange referenced in the Land Commissioner's briefing was the 1983 United Nuclear Corporation exchange, involving less than 500 acres of land and a recent exchange with Easter Seals Santa Maria El Mirador. After oral argument before this Court and supplemental briefing from the parties, Easter Seals Santa Maria El Mirador and Union Pacific Railroad Company submitted a joint amicus curiae brief, asserting they had each consummated private exchanges for small amounts of land with the Land Commissioner. This Opinion has no effect upon any previous exchanges.

CONCLUSION

{90} The Petitioner's Writ of Mandamus is granted.

{91} IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice (dissenting)

CHARLES W. DANIELS,
Chief Justice (joining in the dissent)

CHÁVEZ, Justice, dissenting.

{92} The Land Commissioner is not simply an auctioneer charged with the responsibility to sell public trust lands. The Commissioner is a trustee of public lands with fiduciary responsibilities to preserve, protect, and manage trust lands so as to make the lands productive for the benefit of the trust beneficiaries to whom he owes an undivided loyalty. The majority has eliminated a seldom used, but occasionally necessary and effective land management strategy available to the Land Commissioner, which can increase the value of the trust corpus and make management of the property more efficient and economical, thereby maximizing the benefit to the trust beneficiaries.

Constraining the Land Commissioner's fiduciary responsibilities and the exercise of his discretion exceeds the limits of our power to issue writs of mandamus, and is detrimental to the interests of the trust lands' beneficiaries. Therefore, I respectfully dissent.

{93} This Court has repeatedly observed that the writ of mandamus is an extraordinary remedy to be reserved for extraordinary circumstances. To ensure that the writ issues only in extraordinary circumstances, since before statehood this Court has required (1) that a party seeking issuance have no other adequate means to attain the desired relief, and (2) the duty sought to be enforced is clear and indisputable. *Regents of Agric. Coll. v. Vaughn*, 12 N.M. 333, 342-43, 78 P. 51, 53 (1904). Other adequate means do exist to challenge the land exchanges at issue, including the remedy provided for in the Enabling Act. N.M. Territorial Laws & Treaties, Enabling Act for New Mexico (Act of June 20, 1910, 36 Stat. 557, ch. 310) ("the Enabling Act"). In addition, as is evident from the briefs filed by both the parties and Amici, the Land Commissioner's duty *not* to exchange trust lands for more valuable and productive lands is neither clear nor indisputable. On the contrary, land exchanges that (1) substantially conform to the requirements of the Enabling Act, (2) are consistent with the best interests of the beneficiaries, and (3) comport with the rules adopted by the Land Commissioner are permissible.

{94} This mandamus proceeding is also inappropriate because whether the subject land exchanges satisfy these criteria requires the development of a factual record. The Commissioner has asserted that the subject land exchanges have increased the value of the trust corpus by $13,000,000 and have met his objectives to (1) improve boundary distinction for trust lands; (2) consolidate holdings so that the State would own 43,000 contiguous acres (25,000 contiguous on the east side of White Peak and 18,000 contiguous on the west side of White Peak); (3) facilitate effective land management strategies; (4) mitigate trespass, vandalism, theft, illegal vehicle use, and poaching; (5) create a quality game and wildlife area; (6) improve existing roads and construct new, all-weather roads to provide safe access; (7) close unnecessary roads to conserve wildlife habitat; (8) develop campgrounds and facilities for hunters and recreational users; (9) implement forest restoration programs to improve forest health and wildlife habitat. Whether the exchanges did in fact increase the value of the trust corpus and meet objectives that are consistent with the best interests of the trust beneficiaries requires the development of facts. Therefore, those with standing who believe these exchanges are inconsistent with the Land Commissioner's fiduciary obligations may sue in a court of general jurisdiction to void any exchange which does not substantially conform with the requirements of the Enabling Act.

I. MANDAMUS IS APPROPRIATE ONLY WHEN THE DUTY AT ISSUE IS CLEAR AND INDISPUTABLE

{95} Although a writ of prohibition cannot lie against a state official, *see State ex rel. Bird v. Apodaca*, 91 N.M. 279, 281-82, 573 P.2d 213, 215-16 (1977) ("Prohibition, by its very nature, will not lie against state officers."), mandamus can be used in a prohibitory manner to prohibit unlawful or unconstitutional official action. *See Kiddy v. Bd. of Cnty. Comm'rs of Eddy Cnty.*, 57 N.M. 145, 152, 255 P.2d 678, 683 (1953) ("Public functionaries may be restrained by mandamus from doing what they know is an illegal act."). In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official's act, we determine whether that act goes beyond the bounds established by the New Mexico Constitution. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 570, 904 P.2d 11, 19 (1995).

{96} The Constitution and laws of New Mexico define the limits of authority for each branch of government. In 1904, the limits of our authority to issue a writ of mandamus were defined by the Territorial Supreme Court when it wrote "[i]t is said by the highest judicial tribunal in the land that, 'mandamus lies to compel the performance

of a statutory duty only when it is clear and indisputable.'" *Vaughn*, 12 N.M. at 342-43, 78 P. at 53 (quoting *Bayard v. United States ex rel. White*, 127 U.S. 246, 250 (1888)). We have never abandoned the requirement of a clear and indisputable duty as essential for the issuance of a writ of mandamus. *Johnson v. Vigil-Giron*, 2006-NMSC-051, ¶ 22, 140 N.M. 667, 146 P.3d 312. Instead, because it is such an extraordinary writ that must be issued only in extraordinary circumstances, we have carefully defined its limits.

> Mandamus is a drastic remedy to be invoked only in extraordinary circumstances. The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested. [A] writ of mandamus is available only to one who has a clear legal right to the performance sought; it is available only in limited circumstances to achieve limited purposes.

State ex rel. Coll v. Johnson, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277 (internal quotation marks and citations omitted).

> While mandamus will not lie to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his duties, it is nevertheless well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting.

State ex rel. Four Corners Exploration Co. v. Walker, 60 N.M. 459, 463, 292 P.2d 329, 331-32 (1956) (citations omitted). "A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done." *State ex rel. Perea v. Bd. of Comm'rs of De Baca Cnty.*, 25 N.M. 338, 340, 182 P. 865, 866 (1919). Therefore, our jurisprudence instructs that before we are empowered to issue a writ of mandamus, (1) the boundaries of the duty at issue must be clear and indisputable, (2) the public official must not have discretion in the performance of the duty, and (3) there must not exist another plain, speedy, and adequate remedy in the ordinary course of law.

{97} In this case, despite notice to the public as required by the Land Commissioner's rules, 19.2.21.9(D) NMAC, only one bid was received, and no members of the public objected to the bid process. The Attorney General has not filed this mandamus proceeding on behalf of any specific beneficiary who contends that the Land Commissioner breached his fiduciary duty to them by engaging in the subject land exchanges. The Attorney General does not contend that the Land Commissioner failed to comply with the Enabling Act's public notice requirements; failed to open the bidding to all members of the public; engaged in an exchange of trust lands for a value that was less than the true appraised value of the trust lands; or that the exchange will not serve the best interests of the trust beneficiaries by making management of the trust corpus more efficient and economical. Instead, the Attorney General contends that the Land Commissioner did not comply with the public auction requirements because the Commissioner required competing bidders to offer, at a minimum, land with at least the same value as the trust land, and only for all of the trust land the Commissioner proposed to dispose of. These bid requirements, argues the Attorney General, substantially constrained the public auction to achieve a predetermined result. In other words, the Attorney General wants this Court to hold that the Land Commissioner must allow a bidder to bid for trust land in cash, land, other items of value or a combination thereof, and the bidder may also bid on a portion of the land being offered at auction.

{98} Thus, the question before us is whether the Land Commissioner has a clear and indisputable duty to allow bidders to offer any and all forms of consideration and on any portion of the land the Commissioner seeks to dispose of in a

public auction. As will be discussed, this duty is not clear and indisputable. The Land Commissioner has the discretion to establish the terms of the auction that are in the best interests of the trust beneficiaries. In addition, there are adequate remedies, including the remedy given in Section 10 of the Enabling Act, that authorize an action to enforce the provisions of the Enabling Act and render null and void any "sale, lease, conveyance or contract of or concerning any of the [trust] lands" which are not made in "substantial conformity with the provisions of [the Enabling] act." Enabling Act § 10.

{99} Despite the Attorney General's narrow complaints, the majority has raised its own concerns with the auction process and would preclude the Land Commissioner from having any discussions with a potential bidder before the auction and from considering any criteria other than financial criteria. I do not agree that such discussions are precluded. Instead, such discussions will aid the Land Commissioner in defining the best interests of the trust beneficiaries, thus defining a bid's minimum requirements. Any member of the public is still invited to meet or exceed the minimum bid requirement. The Land Commissioner may still be called to answer whether such a bid exceeded the true appraised value of the trust land and whether the bid was in the trust beneficiaries' best interests. When evaluating which is the highest and best bid that is consistent with the trust beneficiaries' best interests, immediate revenue is not the only consideration.

II. FIDUCIARY DUTIES OF THE LAND COMMISSIONER

{100} New Mexico Constitution Article XIII, Section 2 delegates to the commissioner of public lands the responsibility to "select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law."[6] To carry out these constitutional responsibilities, the Legislature empowered the Commissioner to "make rules and regulations for the control, management, disposition, lease and sale of state lands." NMSA 1978, § 19-1-2 (1953). *See also State ex rel. Otto v. Field*, 31 N.M. 120, 133, 241 P. 1027, 1032 (1925) ("The commissioner was given ample power to make rules and regulations 'for the control, management, disposition, lease and sale of state lands.'"). On August 5, 1992, the Land Commissioner adopted State Land Office Rule 21, which specifically addresses land exchanges. 19.2.21 NMAC (recodified 12/13/02). The Commissioner is also authorized by statute to "execute and authenticate for the state all deeds, leases, contracts or other instruments affecting" state lands. Section 19-1-2.

{101} The New Mexico Enabling Act declares that all lands granted to the State of New Mexico are to be held in trust. 36 Stat. 557, Sec. 10 (1910). "[T]he emergence of the trust concept was originally initiated by the states," and Congress influenced by these practices, "incorporated trust language into the last enabling act that created the states of New Mexico and Arizona." Sean E. O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, a Hobson's Choice?*, 8 N.Y.U. Envtl. L. J. 163, 184 (1999) (footnotes omitted). The trust concept arose because although some trust land was lost due to incompetence or corruption, most of the land was lost because states regularly chose to rapidly sell the lands for the purpose of funding schools. Sally K. Fairfax, et al., *School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 807 (1992). However, states began to recognize that liquidating trust lands would make sustaining a continuing source of funding difficult. O'Day, *supra*, at 182. As a result, the trend in the states shifted from dissipating the trust lands they had been granted by the federal government to retaining those lands. *Id.* at 181.

[6] New Mexico Constitution Article XXIV, Section 1 reserves unto the Legislature the authority to specify the terms and conditions of leases and contracts reserving a royalty to the State from minerals, geothermal steam, and waters on lands confirmed to the State by the act of Congress of June 20, 1910 (the Enabling Act).

> One consequence of this gradual and implicit evolution toward land retention is that the states continue to have a choice regarding whether to sell or retain the lands. Even today, like the federal government, the states continue to engage in land sales and exchanges. Hence, the shift to retention does not imply that no state trust lands will ever be sold, but rather that the presumption is in favor of retaining rather than disposing of the lands.

Fairfax, *supra*, at 824 & 824 n.93 (footnotes omitted) ("State trust land managers tend to maintain a portfolio of lands for investment and management purposes. . . . All states except California engage in land exchanges to block in their scattered sections. Oregon and Arizona have moved particularly effectively in this direction.").

{102} New Mexico has interpreted the trust language in the Enabling Act as creating a charitable trust with the beneficiaries comprised of the citizens of New Mexico. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶¶ 9-10, 130 N.M. 368, 24 P.3d 803. However, the Land Commissioner's undivided loyalty is to the designated beneficiaries and not the State as a whole. *State ex rel. Shepard v. Mechem*, 56 N.M. 762, 770, 250 P.2d 897, 902 (1952) (funds from lands granted by the Enabling Act may not be used to defray general government expenses). In *Ervien v. United States*, 251 U.S. 41, 48 (1919), the United States Supreme Court held that the New Mexico Land Commissioner could not expend money derived from the sale of trust lands to promote the state. The Court reasoned that "[t]here is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." *Id.* at 47; *see also Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 468 (1967) ("the purposes of Congress require that the Act's designated beneficiaries 'derive the full benefit' of the grant" (citation and footnote omitted)); *Cnty. of Skamania v. State*, 685 P.2d 576, 580 (Wash. 1984) (en banc) ("A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests."). The beneficiaries of the trust lands at issue are identified as the public schools in New Mexico, New Mexico State University, Las Vegas Medical Center, New Mexico Military Institute, New Mexico Tech, New Mexico School for the Deaf, the State Penitentiary, Miners' Colfax Medical Center, the School for the Blind, and charitable and penal reform.

{103} The Commissioner is subject to the same fiduciary obligations as any private trustee. *Cnty. of Skamania*, 685 P.2d at 580. "All powers of trusteeship are held in the trustee's fiduciary capacity and must be exercised in good faith and to serve the interests of the beneficiaries." Restatement (Third) of Trusts § 86, cmt. b (2007). A trustee's duties include the protection and management of the trust property to provide returns or other benefits to the trust, *id.* § 76; duty of prudence, *id.* § 77; and loyalty, *id.* § 78. To carry out these duties, the Commissioner must decide whether it is better for the trust beneficiary to sell the lands and invest the receipts or retain and manage the lands. When the Commissioner retains and manages trust lands, he must also be concerned about the allocation of personnel and management resources to make the land productive, maintain fences and roads, prevent overgrazing, control soil erosion, minimize trespass damage and the risk of fires, and enhance wildlife habitat, among other duties. The benefit to the trust is maximizing revenues and profits while minimizing the costs incurred to manage the property. Accordingly, the Commissioner should have the flexibility to manage the land in a manner that enhances the opportunity for the largest return consistent with the beneficiaries' objectives. The objectives of the beneficiaries can hardly be said to be the consumption of the entire trust corpus.

{104} The flexibility required to manage the land necessarily calls for the exercise of discretion consistent with the terms and purpose of the trust or as required by the exercise of the trustee's fiduciary duties. *Id.* § 87. A court should not interfere with a trustee's exercise of a discretionary power when that exercise is reasonable

and consistent with the trust purposes and the trustee's fiduciary duties. *Id*. The purpose of the Enabling Act is to prevent the sale of land at unreasonably low prices. *Lassen*, 385 U.S. at 464. Indeed, written into Section 10 of the Enabling Act is the requirement that no sale or other disposal of trust property be made for a consideration less than the true appraised value of the trust property. *Id*. Thus, one of the express purposes of the Enabling Act is to obtain the fair market value of the property being sold. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 637 (10th Cir. 1998).

{105} We have held that the Land Commissioner has broad discretion to decide the policy question of how he or she will offer trust lands for sale and the quantity of land to sell. *Stovall v. Vesely*, 38 N.M. 415, 418-19, 34 P.2d 862, 864-65 (1934) (citing *Field*, 31 N.M. at 149-50, 241 P. at 1039).

> "It seems to us that this language is in accord with our view that, under the Enabling Act, Constitution, and statutes of New Mexico, the commissioner may sell or hold the state lands as his judgment and discretion may dictate, and that he may exercise 'entire discretion as to the time of selling these lands and the extent to which they should be sold,' and that no one has the right to compel the commissioner to sell the lands in its [sic] entirety or otherwise, and that, if he elects to sell the land otherwise than in its entirety, he is within his jurisdiction to do so. To hold otherwise would lead to an absurd result. * * * As we have seen, the commissioner was given almost unlimited power with respect to the public lands owned by the state 'except as may be otherwise specifically provided by law.' * * * Nowhere in the statute is any provision made for any supervisory control over the acts of the commissioner excepting in the case of contest concerning lands when an appeal may be taken from the decision of the commissioner to the district court. He is responsible alone to the electorate for any lack of proper business capacity or any misdoings in office."

Id. at 419, 34 P.2d at 864-65 (quoting *Field*, 31 N.M. at 150-56, 241 P. at 1039-41).

{106} The *Field* Court's interpretation of the broad discretion enjoyed by the Commissioner is consistent with that of other jurisdictions. *See Campana v. Arizona State Land Dep't*, 860 P.2d 1341, 1344 (Ariz. Ct. App. 1993) (land commissioner can establish the terms of sale that are in the trust's best interests and has discretion as to how to structure the proposed sale); *Pike v. State Bd. of Land Comm'rs*, 113 P. 447, 454-55 (Idaho 1911) (commissioner did not abuse discretion in advertising for auction 24,000 acres of land without allowing bids for smaller parcels); *Big Island Small Ranchers Ass'n v. State*, 588 P.2d 430, 437 (Haw. 1978) (commissioner did not abuse his discretion by auctioning 42,000 acres of land at one time). In addition, when a power is granted by statute, everything necessary to carry out the power will be implied. *Kennecott Copper Corp. v. Emp't Sec. Comm'n*, 78 N.M. 398, 402, 432 P.2d 109, 113 (1967). This Court has held that the general power granted to the Land Commissioner should not be limited by implication unless its exercise would interfere with, frustrate, or to some extent defeat the purpose for which the power was granted. *Field*, 31 N.M. at 154, 241 P. at 1041 (internal quotation marks and citation omitted).

III. ALL PARTIES AND AMICI AGREE THAT THE ENABLING ACT DOES NOT EXPRESSLY PRECLUDE LAND EXCHANGES

{107} Section 10 of the Enabling Act does impose upon the Commissioner certain non-discretionary obligations. The trust lands must be appraised at their true value, the money or other things of value obtained from the disposition of the lands must be used for specified purposes, and the consideration received must at least equal the true appraised value of the trust lands. Section 10 also imposes certain duties on the Commissioner with respect to the sale or lease of trust lands. The lands must be sold at a public auction to the highest and best bidder, with specific requirements for public notice of the auction. There must also be

a true value appraisal of the lands and the lands cannot be sold for less than the appraised value or the minimum price fixed in the Enabling Act. 36 Stat. 557, § 10 (1910). However, none of the restrictions in the Enabling Act expressly or implicitly forbid the Commissioner or the State from exchanging land. Indeed, the parties to this case and Amici do not contend that the Enabling Act imposes a clear and indisputable duty on the State not to exchange trust lands.

{108} On the contrary, the Attorney General himself states that "[n]either the Enabling Act nor other authorities expressly provide for or prohibit the acceptance of land as consideration in a sale of State Trust Lands." In fact, the Attorney General issued two competing opinions on this subject, one in 1988 suggesting that a land exchange was not permissible, and a second one overruling that opinion in 1991, making it clear that land exchanges are permissible. In his 1991 opinion, the Attorney General stated "[t]he authority of the Commissioner to 'dispose' of public lands granted by the New Mexico Constitution and, with restrictions, by the Enabling Act includes the power to exchange public lands." N.M. Att'y Gen. Op. 91-15 (1991), *overruling* N.M. Att'y Gen. Op. 88-35 (1988). The Attorney General conceded as much during oral argument. He was asked, "Are you saying that the Commissioner cannot exchange for land, period?" His response was an unequivocal "No, absolutely not." Expanding on the discussion, the Attorney General stated "Our position is that there's a limited, narrow authority to do land exchanges under existing law, and that authority exists in those cases where you can hold a meaningful public auction." Regarding whether the current Attorney General agreed with the Attorney General who wrote the 1991 opinion, during oral argument the present Attorney General said that he "fundamentally agreed with the conclusions of that opinion." The Attorney General also did not challenge the Commissioner's authority to accept public or private land in exchange for trust lands.

{109} Amicus Curiae New Mexico School for the Blind, relying on the Enabling Act, the New Mexico Constitution, and New Mexico case law, argues that exchanges are clearly permitted. Amicus Curiae University of New Mexico, relying on the Enabling Act and standard rules of statutory construction, argues that the plain language of the Enabling Act authorizes land exchanges. Amicus Curiae Easter Seals and Union Pacific Railroad Company also conclude that the Enabling Act does not forbid land exchanges. Amicus Curiae New Mexico Wildlife Federation and the National Wildlife Federation do not argue that the Enabling Act clearly and indisputably forbids land exchanges; they simply urge this Court not to address the legality of land exchanges between the Commissioner and state or federal governmental entities. This suggested approach is not helpful because the Enabling Act does not distinguish between the disposition of trust lands to private or public parties. The only reference to the exchange of lands from the federal government is in the last paragraph of Section 10, where an exchange of state land for consideration of less than or equal to the appraised value of the state land is permissible. This would imply that other land exchanges are permissible so long as they are for consideration equal to or greater than the appraised value of the state land.

IV. THE ENABLING ACT ALLOWS LAND EXCHANGES

{110} However, there is other language in Section 10 that can reasonably be interpreted to allow land exchanges. The second paragraph of Section 10 provides, in part, that

> [d]isposition of any of said lands, or of any money *or thing of value directly or indirectly derived therefrom*, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust.

(Emphasis added.) A "thing of value" derived from the disposition of land could quite clearly encompass land received in consideration for the

disposition of the trust lands. The inclusion of money in the sentence also implies that consideration other than money may be accepted in the disposition of land.

{111} This last point is corroborated in the fourth paragraph of Section 10, which reads in part: "All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained." Two observations can be made about this language. First, the language pertains to the "sale or other disposal" of lands, leaseholds, timber and other products. Second, the language refers to "consideration," not just money. In *Field*, 31 N.M. at 144, 241 P. at 1037, this Court acknowledged the obvious—the expression "dispose of" is not synonymous with the word "sell."

> It will be noted under the provisions of our Constitution the lands may be held or disposed of. In the language of the Supreme Court of the United States. . . . The expression "to dispose of" is very broad, and signifies more than "to sell." Selling is but one mode of disposing of property. . . . And again, it is said that, when a contract respecting property contains an agreement to be performed by the owner of it when he shall "dispose of" or "sell" it, it is obvious that the words "dispose of" are not synonymous with the word "sell"; and their meaning must be determined by considering the remainder of the contract.

Id. (internal quotation marks and citations omitted).

{112} Although the majority concludes that the phrase "disposal thereof" refers to "leasehold," Maj. Op. ¶ 38, the seventh paragraph of Section 10 suggests that the Commissioner may do more than sell or lease the land. The seventh paragraph reads, in pertinent part: "Every *sale, lease, conveyance or contract of or concerning any of the lands* hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void." (Emphasis added.) If the Commissioner were limited to selling or leasing trust property, then why would Congress refer to other conveyances or contracts concerning the trust properties? Why would the Legislature mandate the Commissioner to "make rules and regulations for the control, management, *disposition, lease and sale* of state lands" and authorize the Commissioner to "execute and authenticate for the state all *deeds, leases, contracts or other instruments affecting such lands"*? Section 19-1-2 (emphasis added). Why would the New Mexico Constitution specify that the Commissioner "shall select, locate, classify and have the direction, control, care and disposition of all public lands"? N.M. Const. art. XIII, § 2. We do not interpret statutes in a way that renders language superfluous. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 29, 147 N.M. 523, 226 P.3d 622.

V. THE COMMISSIONER'S PUBLIC NOTICE AND PUBLIC AUCTION REQUIREMENTS FOR A LAND EXCHANGE SUBSTANTIALLY CONFORM WITH THE PROVISIONS OF THE ENABLING ACT

{113} I am of the opinion that the Enabling Act may be reasonably construed to allow land exchanges, provided that (1) the exchange is for land with a value at least equal to the value of the trust lands, and (2) the exchange is consistent with the best interests of the trust beneficiaries. I am also of the opinion that the exchange may take place without a public auction, since the third paragraph of Section 10 reads "lands shall not be sold or leased . . . to the highest and best bidder at a public auction," not "lands shall not be sold, leased *or otherwise disposed of* . . . to the highest and best bidder at a public auction." Nevertheless, the Commissioner's rules pertaining to land exchanges closely follow the sale requirements in the Enabling Act. Specifically, the rules require an appraisal of the true value of the lands proposed for exchange and public notice, and the public at large is invited to submit competing

proposals. 19.2.21.8(C) NMAC; 19.2.21.9(D) NMAC. A competitive selection process for land exchanges is required. 19.2.21.2 NMAC.

{114} The specific questions raised by the Attorney General in his petition for writ of mandamus are whether the subject land exchanges comply with the public auction requirement when the Commissioner required bids composed of land with a value equal to the true fair market value of the trust lands and also required bidders to bid on all of the trust lands being offered. The questions raised by the Attorney General are answered by *Field* and *Vesely*. In those cases, we made it clear that "no one has the right to compel the commissioner to sell the lands in its [sic] entirety or otherwise, and that, if he elects to sell the land otherwise than in its entirety, he is within his jurisdiction to do so." *Field*, 31 N.M. at 151, 241 P. at 1039; *Stovall*, 38 N.M. at 418-19, 34 P.2d at 864-65. Just as the Commissioner may decide when to sell or how much land to sell, he or she is the one to decide the terms and conditions that would be in the best interests of the trust beneficiaries.

> [I]t may not be doubted that the Legislature of 1912, in creating the state land office, intended that the commissioner should exercise the power theretofore reposed in the commissioner of public lands to use his discretion in making deeds, contracts, and grants upon such terms and conditions as he may deem for the best interests of the state.

Field, 31 N.M. at 164, 241 P. at 1044.

{115} In this case, the Commissioner offered a specified quantity of trust lands for land with a value at least equal to the true appraised value of the trust lands. However, a bidder was not precluded from offering a cash bonus. I fail to understand why we would yield to the Attorney General's demand when it is the Land Commissioner who has the fiduciary duty regarding our trust lands. The Attorney General seeks to protect the best interests of the bidders, not the best interests of the trust beneficiaries.

{116} The majority raise concerns in addition to those expressed by the Attorney General. The majority conclude that it is not a public auction if the Commissioner has pre-public auction discussions with a bidder and the Commissioner is limited to accepting the greatest financial return when deciding what is the "highest and best bid." Instead of analyzing the Commissioner's duties through the lens of his fiduciary responsibilities to the trust beneficiaries, the majority analyze his responsibilities as if he or she were simply an auctioneer.

{117} When scrutinized through the lens of the Commissioner's fiduciary obligations, the Commissioner has discretion to enter into pre-auction discussions and to determine which is the highest and best bid. The Commissioner has established a detailed procedure for land exchanges in Rule 19.2.21.8(A) NMAC with the "best interests of the trust" the watchword. The Commissioner may have "preliminary informal discussions or other preliminary communications with potential exchange applicants prior to any exchange application or exchange proposal being submitted and prior to any publication soliciting exchange proposals." 19.2.21.9(A) NMAC. Only after an application is filed and "the commissioner determines that the proposed exchange appears to offer sufficient benefit to the trust and an advertisement soliciting proposals for the exchange has not already been published, the commissioner shall cause an advertisement soliciting further exchange proposals to be published." 19.2.21.9(B)(6) NMAC. Within a reasonable time after the published closing date, the Commissioner "may select the proposal or proposals he determines are the highest and best, that is, the proposal or proposals that he believes will be most beneficial to the trust in accordance with the standards set forth in Subsections A and C of 19.2.21.8 NMAC above, and reject the rest." 19.2.21.10(A) NMAC. He is not obligated to accept the proposal of the party who initially applied for the land exchange. Instead, the initial land exchange proposal is what informs the Commissioner regarding the minimum standards for the public auction. In the final analysis, the Commissioner may decide that it is not in the

best interests of the trust beneficiaries to accept any bid, in which case he may reject all bids. 19.2.21.10(A) NMAC.

{118} The majority has declared this procedure invalid. Maj. Op. ¶ 70. I am more persuaded by the following analysis of the Hawaii Territorial Supreme Court in *Fasi v. King*, 41 Haw. 461, 1956 WL 10320 (1956).

> So, in this case, a situation is presented where a prospective purchaser states to the commissioner that it desires to purchase a parcel of land which in location and area is suited for a particular type of use that it is contemplating and that it is willing to make improvements thereon of specified minimum cost. The commissioner determines that the proposal is in the interest of the development of the area in which the land is located. She makes a decision to offer the land for sale. The board of public lands agrees. *The decision is not that the sale be made to this prospective purchaser. The decision is that here is a proposal for improvement which is in the interest of the development of the area; here is a prospective purchaser who is willing to meet the minimum standard of improvement which is deemed desirable by the commissioner and the board; there may be other prospective purchasers who may be willing to exceed that standard; so let the Territory offer the land for sale with conditions to assure that at least that minimum standard will be met.*

Id. at 468 (emphasis added). Pre-auction discussions will assist the Commissioner in determining the minimum standards that will help him or her develop new and profitable strategies that are consistent with enhancing the trust corpus and honoring the best interests of the trust beneficiaries. The public auction itself will permit the public to exceed the minimum standards, thus giving rise to the highest and best bid.

{119} In this case, the Commissioner asserts that the land exchange will increase the value of the trust corpus by $13,000,000 and make management of the land more efficient and economical. Advertising these minimum standards seems to me to be consistent with the Commissioner's fiduciary obligations. Certainly other minimum standards will shrink the universe of minimum bidders, yet we would not declare such minimum standards to be invalid. For example, in leasing lands for grazing, the Commissioner might insist on the bidder having specified minimum levels of competence, such as range management experience or education in order to ensure a level of competence that will help protect the land from overgrazing, soil erosion, damage to streams, and other damage. These management strategies are better left to the Commissioner's discretion. His position is not apolitical. Because he is an elected official, the pressures of the general public may very well influence his management strategies. However, we should not interfere with his discretion when the exercise of that discretion is proven to be in the trust beneficiaries' best interests.

{120} With respect to the highest and best bid, immediate revenue is not the sole consideration in determining the trust beneficiaries' best interests. *Campana*, 860 P.2d at 1344. The requirement of a highest and best bid is not for the bidders' benefit; it is for the benefit of the trust beneficiaries. *Bancamerica-Blair Corp. v. State Highway Comm'n*, 95 S.W.2d 1068, 1070-71 (Ky. Ct. App. 1936), *superseded by statute on other grounds as stated in Pendleton Bros. Vending, Inc. v. Commonwealth Finance & Admin. Cabinet*, 758 S.W.2d 24 (Ky. 1988). However, because the consideration for the land is not limited to money, the Commissioner must exercise judgment to determine whether the bids would advance the interests of the trust and its beneficiaries. *See Brown v. City of Phoenix*, 272 P.2d 358, 363-64 (Ariz. 1954). As minimum security to the trust beneficiaries, the Enabling Act requires that the trust lands be appraised at their true value, and the consideration received must at least equal that appraised value. Enabling Act § 10. If in addition to obtaining consideration with at least equal the true appraised value of the trust lands the Commissioner is able to reduce the expense of land management and prevent the

destruction of the trust property, one cannot contend that the Commissioner has breached his fiduciary duty. In addition, the concerns expressed by Congress when enacting the Enabling Act will have been allayed, since the land will not have been disposed of for less than its fair value.

VI. VOTER REJECTION OF A CONSTITUTIONAL AMENDMENT DOES NOT DEFINE THE STATUS QUO

{121} The majority finds significant to its analysis the 1990 voter rejection of an amendment to the Enabling Act. Maj. Op. ¶ 9. The proposed amendment sought to "*clarify* the authority of the Commissioner of Public Lands to exchange lands under his control." The fact that the electorate rejected the amendment does not define the status quo; we must still interpret existing law. Law is not made by defeating bills or constitutional amendments. *State ex rel Udall v. Pub. Employees Ret. Bd.*, 118 N.M. 507, 512, 882 P.2d 548, 553 (Ct. App. 1994), *rev'd on other grounds*, 120 N.M. 786, 907 P.2d 190 (1995). Rejection of legislation does not offer any insight into the meaning of existing law. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent"); *Ingersoll v. Palmer*, 743 P.2d 1299, 1318 (Cal. 1987) ("We can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law."); *State ex rel. Douglas v. Beermann*, 347 N.W.2d 297, 305 (Neb. 1984). I am not persuaded that the popular vote is significant to the analysis in this case.

{122} History teaches us that the rejection of an amendment does not define the limits of the law. For example, the Child Labor Constitutional Amendment, which would have authorized Congress to limit, regulate, and prohibit the labor of persons under eighteen years of age, was never ratified. Yet the Fair Labor Standards Act has provisions designed to protect the educational opportunities of youth, prohibit their employment in jobs that are detrimental to their health and safety, and restrict the hours that youth under sixteen years of age can work. Fair Labor Standards Act of 1938, 29 U.S.C. § 212 (1974). The constitutionality of the Fair Labor Standards Act has been upheld. *United States v. Darby*, 312 U.S. 100 (1941). The Equal Rights Amendment, which provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," was never ratified. Yet the Civil Rights Act of 1964 forbids discrimination on account of gender.

{123} Finally, if indeed the 1990 popular vote rejecting amendment of the Enabling Act is as significant as the majority suggests, then why has the majority declined to follow the will of the people during that same election when they declined to validate, ratify, and confirm all exchanges completed by the Land Commissioner before January 1, 1990? If I were persuaded that the Commissioner has a clear and indisputable duty not to engage in land exchanges, I would enforce the Enabling Act as written and declare the land exchanges void. I cannot agree that this Court has the authority to apply its holding prospectively when the Enabling Act itself provides that "[e]very sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed . . . not made in substantial conformity with the provisions of this act shall be null and void." Enabling Act § 10.

{124} For the foregoing reasons, I respectfully dissent.

EDWARD L. CHÁVEZ,
Justice

I CONCUR:

CHARLES W. DANIELS,
Chief Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-006

Filing Date: February 17, 2011

Docket No. 32,806

NEW ENERGY ECONOMY, INC.,

Petitioner,

v.

HON. SUSANA MARTINEZ, Governor of the State of New Mexico, F. DAVID MARTIN, Secretary of the New Mexico Environment Department, and SANDRA JARAMILLO, New Mexico State Records Administrator,

Respondents.

Consolidated with:

Docket No. 32,811

AMIGOS BRAVOS, CABALLO CONCERNED CITIZENS GROUP,

Petitioners,

v.

HON. SUSANA MARTINEZ, Governor of the State of New Mexico, F. DAVID MARTIN, Secretary of the New Mexico Environment Department, and SANDRA JARAMILLO, New Mexico State Records Administrator,

Respondents.

ORIGINAL PROCEEDING

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OPINION

CHÁVEZ, Justice.

{1} Does the State Records Administrator have a clear, indisputable, and mandatory duty to publish regulations[1] filed with the State Records Center and Archives (Records Center) by the Environmental Improvement Board (EIB) and the Water Quality Control Commission (WQCC), despite a request by the Acting Secretary of the New Mexico Environment Department to delay publication for ninety days? We answer this question in the affirmative for four reasons. First, the powers and duties of the EIB, the WQCC, and the Records Center do not fall

[1] Although "regulations" are included in the definition of "rule" under Section 14-4-2(C) of the State Rules Act, throughout this opinion we refer to the action of the EIB and the WQCC as the adoption of "regulations" rather than "rules."

under either the Governor's or the Secretary's authority. Second, Executive Order 2011-001, relied upon by the Acting Secretary in his request to the Records Center, did not apply to the subject regulations because the Executive Order applies only to regulations under the Governor's authority. Third, rules promulgated by the State Records Administrator mandate that regulations filed with the Records Center must be published within a specified time frame after being properly submitted by the issuing authority. Fourth, the Records Center erred in not publishing the regulations that the issuing authorities, the EIB, and the WQCC submitted for publication. Accordingly, we issued a writ of mandamus ordering the State Records Administrator to publish the regulations.

BACKGROUND

{2} On December 6, 2010, after a two-year rule-making process, the EIB adopted a regulation pursuant to the Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to -15 (1971) (as amended through 2009), and the Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -17 (1967) (as amended through 2009), to be codified as Regulation 20.2.100 NMAC. On December 13, 2010, EIB Chair Gay Dillingham transmitted Regulation 20.2.100 to the Records Center for filing and publication pursuant to Section 14-4-3 of the State Rules Act, NMSA 1978, §§ 14-4-1 to -11 (1967) (as amended through 1995). The regulation was filed with the Records Center at 10:40 a.m. on December 27, 2010. The Records Center scheduled the regulation for publication in the January 14, 2011 edition of the New Mexico Register.

{3} On December 15, 2010, following a year-long rule-making process, the WQCC, pursuant to its authority under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1967) (as amended through 2009), adopted a new set of regulations for discharges from dairy facilities, to be codified as Regulation 20.6.6 NMAC. On December 21, 2010, WQCC Chair Sarah Cottrell transmitted the regulations for filing to the Records Center; and the Records Center accepted the regulations for filing on December 23, 2010 at 10:07 a.m. These regulations were also scheduled to be published in the January 14, 2011 edition of the New Mexico Register.

{4} On January 1, 2011, newly elected Governor Susana Martinez issued Executive Order 2011-001, which formed a small business-friendly task force and suspended all proposed and pending rules and regulations under the Governor's authority for a ninety-day review period. On January 4, 2011, John Martinez, the director of the Administrative Law Division (ALD) of the Records Center, sent an e-mail to the Governor's general counsel, Jessica Hernandez, drawing her attention to a number of rules and regulations that were filed and scheduled for publication in the January 14, 2011 edition of the New Mexico Register. Mr. Martinez stated:

> I have read Executive Order 2011-001 which establishes a 90-day freeze on rule-making. I am writing you because there are 34 rules that were filed during the last administration but will not be published in the New Mexico Register until January 14, 2011. We plan on publishing these rules unless we receive written notification from the issuing authorities in the respective agencies that these rule filings should be pulled back. The major issue for the ALD is that today is the rule filing deadline meaning that we will have to know by the end of today if any of these rule filings will not be published. Beginning tomorrow, the text will be type set and cannot be changed after that point.
>
> I have attached a report of the 34 rule filings that are slated to be published on January 14, 2011. Please note that the State Records Center and Archives (noted in the report as the Commission of Public Records) is an independent agency not under the authority of the Governor.

{5} Ms. Hernandez responded by telling Mr. Martinez that the regulations should not be

published because the Governor's executive order applied to the regulations. She also asked him to identify the "point people" for the issuing agencies. Mr. Martinez replied to Ms. Hernandez that the Records Center would "need written notification from the respective *Issuing Agencies* stating the desire to cancel the rule filing[s] that occurred last month" and attached a list of the issuing authorities. (Emphasis added.) The issuing authority for the EIB was identified as Gay Dillingham, Chair of the EIB. The issuing authority for the WQCC was identified as Sarah Cottrell, Chair of the WQCC.

{6} During the afternoon of January 4, 2011, Ms. Hernandez sent a high priority e-mail to the contact persons for various administrative agencies and departments requesting that they send written notification to Mr. Martinez to suspend publication of the regulations listed. Soon afterward, Acting Cabinet Secretary of the New Mexico Environment Department Raj Solomon e-mailed Mr. Martinez, requesting suspension of the publication of the two environmental regulations at issue in this case. Soon after that Respondent F. David Martin was nominated to be the Department Secretary and is awaiting confirmation.

{7} After learning that publication of the regulations was suspended, Petitioners, as proponents of the adoption of Regulations 20.6.6 and 20.2.100, each filed a petition for writ of mandamus under Rule 12-504 NMRA against Governor Martinez, the Secretary of the New Mexico Environment Department (Secretary), and the State Records Administrator. Petitioners sought an order compelling the State Records Administrator to reinstate the filing of Regulations 20.6.6 and 20.2.100 and to then publish them. Petitioners also sought an order compelling the Governor and the Secretary to rescind their cancellation of the filings and to refrain from interfering with the lawful process by which final administrative regulations are filed with and published by the Records Center. In their respective petitions, Petitioners alleged that Governor Martinez and Secretary-designate Martin exceeded the limits of their constitutional authority in violation of the separation of powers doctrine and that the State Records Administrator had a non-discretionary ministerial duty to publish the regulations.

{8} The State Records Administrator, represented by Attorney General Gary King, filed a response stating the Administrator did not have an "opinion and takes no substantive position on the issues raised," but will "abide by the ultimate ruling of the Court concerning the publication of the rules at issue." Governor Martinez and Secretary-designate Martin responded, asserting that (1) Petitioners lack standing; (2) the dispute is not ripe; (3) mandamus is inappropriate because factual issues exist; (4) the State Records Administrator has discretion regarding when regulations should be published; (5) Petitioners failed to exhaust the administrative remedies created by the Governor in her Executive Order; and (6) the Governor has authority to temporarily suspend the publication of regulations.

{9} We conclude that Petitioners do have standing. Petitioners actively participated in the administrative rule-making proceedings, and more importantly they have raised an issue of great public importance, namely whether the Governor and the Secretary-designate have exceeded their constitutional authority by ordering an independent agency to breach a clear, indisputable, and non-discretionary duty. This dispute is also ripe because filing with the Records Center and publication in the New Mexico Register control the right to appeal, the regulations' effective dates, and the regulations' validity and enforceability. The factual issue regarding whether Respondents cancelled the regulations is immaterial because the relevant issue is whether publication of the regulations was suspended. Whether the regulations were properly adopted may not be appropriately raised in these proceedings, but may be the subject of an appeal of the regulations. The State Records Administrator has adopted rules that mandate when regulations are to be published, and therefore lacks discretion when to publish regulations that are submitted by an issuing authority. Finally, because the Governor does not

have authority over the EIB, the WQCC, or the Records Center, Petitioners were not bound to exhaust the administrative remedies detailed in Executive Order 2011-001. Indeed, we conclude that on its face, Executive Order 2011-001 does not apply to the regulations at issue, since the subject regulations are not "under the authority of the Governor." Therefore, we have declined to issue a writ of mandamus to Governor Martinez and Secretary-designate Martin. However, because the State Records Administrator has a clear, indisputable, and non-discretionary duty to publish these regulations, the Court's writ of mandamus is appropriate.

MANDAMUS IS PROPER BECAUSE PETITIONERS HAVE STANDING TO COMPEL PERFORMANCE OF A DUTY THAT IS CLEAR, INDISPUTABLE, AND NON-DISCRETIONARY

{10} Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable. *Johnson v. Vigil-Giron*, 2006-NMSC-051, ¶ 22, 140 N.M. 667, 146 P.3d 312; *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 331-32 (1956). "A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done." *State ex rel. Perea v. Bd. of Comm'rs of De Baca County*, 25 N.M. 338, 340, 182 P. 865, 866 (1919).

{11} "The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277 (internal quotation marks and citation omitted). However, even where a party is not beneficially interested, we will grant standing under the great public importance doctrine, and have done so when the case raises concerns about the separation of powers doctrine. *Id*. ¶ 21.

{12} In this case, Petitioners filed petitions with the EIB and the WQCC proposing regulations as they were permitted to do under Sections 74-2-6(A) and 74-6-6(B). It is uncontradicted that they participated in the administrative proceedings until the regulations were adopted and submitted to the Records Center. It is also undisputed that the Records Center accepted the regulations for filing and had scheduled the regulations for publication in the January 14, 2011 edition of the New Mexico Register. The filing of regulations with the Records Center is critical because a regulation cannot become effective until thirty days after its filing with the Records Center, Sections 74-2-6(F) and 74-6-6(E), and the filing date triggers the time to appeal the regulation, Sections 74-2-9(B) and 74-6-7(A). In addition, under Section 14-4-5 and Regulation 1.24.10.16(E) of the Administrative Code, "[n]o rule shall be valid and enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act." Not only do these provisions explain Petitioners' potential beneficial interest, they also illustrate why this matter is ripe. Filing and publication are conditions precedent to a regulation being effective, valid, and enforceable and begin a litigant's appellate rights.

{13} We do not need to decide whether Petitioners have an actual beneficial interest because we conclude that they have standing under the great public importance doctrine. "[T]his Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance." *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). Cases in which "great public importance" standing has been recognized involve "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution—a government in which the three distinct departments . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21 (alteration in original) (internal quotation marks and citations omitted). Petitioners have asserted that the Governor and

the Secretary have exceeded the limits of their constitutional powers by temporarily suspending publication of the regulations in this case. For the reasons that follow, we agree that the Governor and the Secretary do not have authority over the EIB, the WQCC, and the Records Center.

EIB POWERS AND DUTIES THAT ARE INDEPENDENT OF THE GOVERNOR

{14} The Legislature created the Department of Environment in the executive branch under Section 9-7A-4 of the Department of Environment Act. NMSA 1978, §§ 9-7A-1 to -15 (1991) (as amended through 2005). The administrative head of the Department is the Secretary, who is responsible to the Governor for the Department's operation. Sections 9-7A-5 to -6. By contrast, under Section 74-1-4 of the Environmental Improvement Act, the Legislature created the EIB. Each of the seven members of the EIB is appointed by the Governor with the Senate's advice and consent. *Id.* However, under Section 9-7A-12 of the statutes that empowered it to promulgate regulations, the EIB's powers, duties, and responsibilities are explicitly exempt from the authority of the Secretary.

{15} The EIB is required to promulgate all regulations applying to persons and entities outside the Environment Department, Section 74-1-5, and in specified areas of the law, Section 74-1-8. Specifically as it relates to this matter, the EIB has the responsibility to "adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act." Section 74-2-5(B)(1). The process for the EIB's rule-making authority under the Air Quality Control Act is outlined in Section 74-2-6. Subsection A permits any person to recommend or propose regulations to the EIB. *Id.* Under Subsection F, regulations adopted by the EIB shall become effective thirty days after their filing under the State Rules Act. *Id.* Any appeal of the regulations must be made to the New Mexico Court of Appeals within thirty days of the date of the EIB's filing of the regulation with the Records Center. Section 74-2-9(A)-(B); § 14-4-5.

WQCC POWERS AND DUTIES THAT ARE INDEPENDENT OF THE GOVERNOR

{16} The WQCC was created under Section 74-6-3 of the Water Quality Act. Only four of its fourteen members are appointed by the Governor. *Id*. Like the EIB, under the statutes that empowered it to promulgate regulations, the WQCC's powers, duties, and responsibilities are explicitly exempt from the authority of the Secretary. Section 9-7A-13. The WQCC is responsible for, among other things, adopting, promulgating, and publishing regulations to prevent or abate water pollution, Section 74-6-4(E); and it is specifically mandated to adopt regulations for the dairy industry, Section 74-6-4(K). The process for the WQCC's rule-making authority is outlined in Section 74-6-6. Under Subsection B, "[a]ny person may petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard." *Id.* Under Subsection E, any regulation, standard, or amendment adopted by the WQCC becomes effective thirty days after its filing under the State Rules Act. *Id.* Any appeal of the regulations must be made to the New Mexico Court of Appeals within thirty days of the date of the regulation's filing by the WQCC with the Records Center. Section 74-6-7(A); § 14-4-5.

RECORDS CENTER POWERS AND DUTIES THAT ARE INDEPENDENT OF THE GOVERNOR

{17} The State Rules Act requires any agency that promulgates a regulation to submit the regulation to the Records Center. Section 14-4-2(A) defines "agency" as including boards and commissions. Section 14-4-2(C) defines "rule" as including "any rule, regulation, order, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule or to affect persons not members or employees of such issuing agency." The Records Center was created under the Public Records Act, NMSA 1978, Sections 14-3-1 to -25 (1959) (as amended through 2005), and is under the

supervision and control of the State Records Administrator, who in turn is employed by and serves at the pleasure of the State Commission of Public Records. Section 14-3-4; § 14-3-8. Once the Records Center receives a regulation, it must (1) note on the filed document the date and hour of filing, (2) maintain the original copy as a permanent record, (3) publish the regulation in a timely manner in the New Mexico Register, and (4) compile the regulation into the New Mexico Administrative Code (NMAC). Section 14-4-3. The New Mexico Register must be published at least twice a month. Section 14-4-7.1(A). The State Records Administrator is required by law to adopt and promulgate rules necessary for the implementation and administration of the publication of rules in the New Mexico Register and which set forth the procedures for compiling the rules in the NMAC. Section 14-4-7.1(E).

{18} Chapter 24 of Title 1 sets forth the procedures for compiling rules in the NMAC and Title 1, Chapter 24, Part 15 sets forth the rules pertaining to the New Mexico Register. The objective of the New Mexico Register is to inform the public regarding rule-making activity within the executive branch. 1.24.15.6 NMAC. The objective of the NMAC is to establish standards for uniform rule filings to ensure that rules are readily identifiable and available for public inspection. 1.24.10.6 NMAC.

{19} The following administrative rules inform our decision. First, "[t]he records center shall not accept a rule filing signed by other than the issuing authority, or a formally appointed designee." 1.24.10.10(C) NMAC. Second,

> [n]o rule shall be valid and enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act. If properly submitted and not published as a result of error, the rule shall be deemed to have been published three weeks after filing with the records center.

1.24.10.16(E) NMAC. Third, "[t]he records center shall refuse to file written material if it is not a rule as defined in 1.24.1.7 NMAC or if the materials submitted for rule filing do not conform to the style and format requirements detailed in 1.24.10 NMAC." 1.24.10.17(A) NMAC. Fourth, "[m]aterial that is filed after the cut-off date for publication shall be published in the next issue, and, if necessary, the effective date shall be modified." 1.24.15.11(D)(2) NMAC. The Records Center publishes a submittal deadlines and publication dates schedule on its website at http://www.nmcpr.state.nm.us/nmregister/.

{20} In this case, the EIB Chair was the issuing authority for regulations adopted by the EIB. Mr. Martinez, on behalf of the Records Center, specifically identified the EIB Chair as the issuing authority. Respondents do not contend that the Secretary was formally designated as the issuing authority for regulations adopted by the EIB. The Secretary is not the issuing authority since the law clearly provides that the EIB's powers, duties, and responsibilities under Section 74-2-5 and other statutes are explicitly exempt from the Secretary's authority. Section 9-7A-12. Therefore, the Records Center should have declined to recognize the Acting Secretary's request to suspend publication of Regulation 20.2.100.

{21} With respect to publication in the New Mexico Register, it is uncontradicted that the Records Center accepted Regulation 20.2.100 for filing on December 27, 2010. Section 14-4-3 requires the Records Center to publish a regulation in a timely manner. Without more, the requirement to publish in a timely manner would not be the type of clear and indisputable duty that would warrant issuance of a writ of mandamus. However, Regulation 1.24.15.11(D)(2) NMAC, adopted to specifically address publication in the New Mexico Register, states that "[m]aterial that is filed after the cut-off date for publication shall be published in the next issue. . . ." Under the 2010 submittal and publication schedule published by the Records Center, regulations submitted to the Records Center between December 16, 2010 and January 4, 2011 were to be published in the January 14, 2011 edition of the New Mexico Register. Because Regulation 20.2.100 was submitted after December 16, 2010 and before January 4, 2011, the Records Center

was required to publish it in the January 14, 2011 edition of the New Mexico Register. The Records Center did not have discretion to delay publication. We note that there is no provision in the NMAC that specifically permits an agency to withdraw publication of a regulation that had been accepted for filing by the Records Center. Although Regulation 1.24.10.17 of the Administrative Code specifically addresses when a regulation is to be rejected for filing and publication, Respondents do not contend that this provision applies in this case. We do not need to answer whether an issuing authority may withdraw its request to publish a filed regulation because in this case the issuing authority did not make such a request and the Records Center did not have discretion to delay publication.

{22} The same analysis applies with respect to Regulation 20.6.6 filed with the Records Center by the WQCC on December 23, 2010. The WQCC Chair was the issuing authority for regulations adopted by the WQCC and was identified as such by Mr. Martinez of the Records Center. Respondents do not contend that the Secretary was formally designated as the issuing authority for regulations adopted by the WQCC. The Secretary is not the issuing authority because the law clearly provides that the powers, duties, and responsibilities of the WQCC under Section 74-6-4 and other statutes are explicitly exempt from the Secretary's authority. Section 9-7A-13. Therefore, the Records Center should have declined to recognize the Acting Secretary's request to suspend publication of Regulation 20.6.6. Because Regulation 20.6.6 was submitted after December 16, 2010 but before January 4, 2011, the Records Center was required to publish the regulation in the January 14, 2011 edition of the New Mexico Register. It was error for the Records Center not to publish these regulations in the New Mexico Register on January 14, 2011.

CONCLUSION

{23} The State Records Administrator breached a clear, indisputable, and non-discretionary duty to publish regulations accepted for filing with the Records Center. Therefore, a writ of mandamus ordering the Records Center to publish Regulations 20.6.6 and 20.2.100 forthwith has been issued. To the extent the attorney for Governor Martinez, acting as her agent, and Acting Secretary Solomon ordered the Records Center not to publish these regulations, they were without constitutional or statutory authority to do so. On its face, Executive Order 2011-001 only applies to rules and regulations under the Governor's authority; therefore, a writ of mandamus compelling the Governor to refrain from further interference with the proper and lawful filing and publication of regulations under the State Rules Act is denied. Finally, a writ against Secretary-designate Martin is also not warranted since Secretary-designate Martin did not issue the order to temporarily suspend publication of the regulations.

{24} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-012

Filing Date: March 9, 2011

Docket No. 31,891

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

VICTOR GONZALES,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI ROBERT MERLE SCHWARTZ, District Judge

Gary K. King, Attorney General
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Santa Fe, NM

for Petitioner

Gorence & Oliveros, P.C.
Robert J. Gorence
Albuquerque, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} The State appeals a district court order suppressing methamphetamine evidence based on its conclusion that a traffic stop of Defendant Victor Gonzales was an unconstitutional pretext to a narcotics investigation. During the suppression hearing, Detective Carlos Gallegos, who had been monitoring Defendant's activities during the day in question, testified that he coordinated the traffic stop of Defendant for a window tint violation by asking Officer Thomas Griego to make the stop and arranging for a canine unit to be present at the time of the stop. Detective Gallegos wanted the vehicle stopped to follow up on information he received from a confidential informant that sometime that afternoon or evening, Defendant would be transporting a large amount of methamphetamine south of Albuquerque. The detective referred to the stop as pretextual and testified that he did not believe he had reasonable suspicion or probable cause to stop Defendant for a narcotics investigation. A search of the vehicle pursuant to a search warrant revealed a large quantity of methamphetamine.

{2} Defendant filed a motion to suppress the evidence contending, among other things, that the stop was pretextual in violation of the New Mexico Constitution. The trial judge announced his intention to deny the motion in a letter concluding that the patrol officer who stopped Defendant did have reasonable suspicion to stop Defendant for a window tint violation, and therefore, under *Whren v. United States*, 517 U.S. 806 (1996), the stop was constitutional. The trial judge noted that whether a pretextual stop violates the New Mexico Constitution was at the time a matter of first impression and offered to certify the question for an interlocutory appeal. However, on the same date as the letter ruling, the Court of Appeals issued its Opinion in *State v. Ochoa* (*Ochoa III*), 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143 (op. filed Nov. 3, 2008), holding that a pretextual traffic stop violates Article II, Section 10 of the New Mexico Constitution if the real purpose for the stop is not supported by reasonable suspicion or probable cause, and the officer would otherwise not have stopped the vehicle. *Ochoa III*, 2009-NMCA-002, ¶ 40. The trial court reconsidered its letter ruling sua sponte and entered an order suppressing the evidence, relying on *Ochoa III*. The Court of Appeals affirmed.

{3} We interpret *Ochoa III* to require a determination whether the real reason for the stop is supported by objective evidence of reasonable

suspicion. If the answer is yes, the stop is constitutional. Because *Ochoa III* had not been published at the time of the evidentiary hearing and the trial court did not conduct such an analysis, we reverse and remand for a hearing consistent with *Ochoa III*.

BACKGROUND

{4} On July 20, 2006, Detective Gallegos, who was assigned to the Valley Narcotics Unit of the Albuquerque Police Department, asked Officer Griego to stop a certain gold-colored Chevy Tahoe if he agreed that its window tint violated the law. He also instructed the officer to conduct the stop as he normally would while other officers conducted a narcotics investigation. In addition, Detective Gallegos arranged for Detective Daniel Campbell, who operated a canine unit, to be present at the time of the stop. The three officers followed Defendant for approximately one mile before Officer Griego stopped Defendant near the intersection of Coors and Blake in Albuquerque at approximately 8:45 p.m. The narcotics dog was walked around the exterior of the vehicle, which had two open doors, and alerted to the presence of narcotics. Defendant refused to consent to a search of his vehicle. Detective Campbell left the scene and obtained a warrant to search the vehicle, where methamphetamine was eventually found.

{5} Defendant was indicted for trafficking methamphetamine contrary to NMSA 1978, Section 30-31-20 (2006), and conspiracy to commit trafficking of methamphetamine, contrary to NMSA 1978, Section 30-28-2 (1979). Defendant was also cited for a window tint violation, but the citation was later voluntarily dismissed by the police because Defendant was being prosecuted on felony charges. Defendant filed a motion to suppress the evidence, arguing, among other things, that the traffic stop was pretextual, in violation of his rights under the New Mexico Constitution.

{6} During the suppression hearing, Detective Gallegos testified that on July 20, 2006, a confidential informant called and told him that an individual named Victor Gonzales would be transporting a large amount of methamphetamine south out of Albuquerque that afternoon or evening. The informant also told Detective Gallegos the name of the street on which he believed Victor Gonzales resided.

{7} Armed with this information, Detective Gallegos conducted a background investigation and discovered a booking slip photograph taken after the misdemeanor arrest of a man named Victor Gonzales. The detective also set up a surveillance operation of Defendant's residence. At approximately 4:00 p.m., he visually identified a suspect who matched the booking slip photograph of Victor Gonzales. The suspect arrived in a white Mustang, parked in the driveway, and entered the residence. Shortly thereafter, a gold-colored Chevy Tahoe was seen pulling out of the garage. Detective Gallegos was unable to determine the identity of the Chevy Tahoe's driver due to the vehicle's dark window tint. Other officers on the detective's team followed the Chevy Tahoe to a local car wash, where one of them initiated an innocuous conversation with the driver and confirmed that his name was Victor. The suspect then drove the Chevy Tahoe back to the residence, parked in the garage, and drove off in the white Mustang. The detective followed as the suspect drove the Mustang to a second residence several miles to the north. Four men came out of the second residence to meet the suspect. Two of them got into the Mustang while the other two remained on the street conducting what the detective believed to be "some sort of countersurveillance." The three men in the Mustang returned to the suspect's residence and pulled into the garage. A short time later, the Chevy Tahoe was again seen backing out of the garage, and Detective Gallegos followed as it proceeded south on Coors Boulevard. The detective asked uniformed Patrol Officer Griego to stop the Chevy Tahoe for a window tint violation near the intersection of Coors and Blake and arranged for a canine unit to be present.

{8} During the evidentiary hearing, while attempting to clarify the reason for the stop, the

trial judge asked Detective Gallegos, "[s]o in your estimation, based on the narcotics investigation and the surveillance that day, you didn't feel you had enough reasonable suspicion to pull the vehicle over, absent the tint violation?" Detective Gallegos answered:

> I just wanted to – yes. I mean, I felt it was still kind of a thin investigation up to that point, I didn't feel like I had any reasonable suspicion or probable cause. I mean, everything was falling in order with what the informant had told me, but I didn't want to violate his rights by conducting a car stop without him doing anything wrong. . . . So we decided do [sic] conduct a pretextual stop with a traffic violation and then as a pretextual stop occurred, to begin a narcotics investigation at that point.

{9} The trial judge wrote a letter to the attorneys advising them that he was "denying the Defendant's Motion to Suppress Physical Evidence based on *Whren vs. U.S.*, 517 U.S. 806 (1996) and *State vs. Ochoa* [*Ochoa I*], [2006-NMCA-131,] 140 N.M. 573[, 144 P.3d 132] (2006)." He emphasized that the Court of Appeals in *Ochoa I* never reached the issue of a pretextual stop, which meant to the trial judge that whether a pretextual stop violates the New Mexico Constitution remained an issue of first impression. Three days later the trial judge wrote to the attorneys and announced that because the Court of Appeals had issued an Opinion in *Ochoa III*, holding that pretextual stops violate the New Mexico Constitution, he was going to suppress the evidence. The trial judge stated, "[b]ecause the traffic stop of Mr. Gonzales was admittedly pretextual, the evidence found in the motor vehicle is suppressed. The Court commends the investigating police officer's candor in this case."

{10} On appeal, the Court of Appeals affirmed in an unpublished Memorandum Opinion, concluding that the trial court was correct because "the officer testified that the real reason for the stop was pretextual." *State v. Gonzales*, No. 29,297, slip op. at 9 (N.M. Ct. App. Jul. 29, 2009). We granted the State's petition for writ of certiorari to determine whether the trial court correctly applied the Court of Appeals analysis in *Ochoa III*. We conclude that the trial court did not analyze whether the real reason for the stop, i.e., a narcotics investigation, was objectively supported by reasonable suspicion. Because this is a necessary requirement of *Ochoa III*, we reverse and remand to the trial court.

OCHOA III REQUIRES A DETERMINATION THAT THE UNRELATED MOTIVE FOR A STOP IS NOT SUPPORTED BY REASONABLE SUSPICION BEFORE A STOP IS CONSIDERED PRETEXTUAL

{11} In *State v. Ochoa* (*Ochoa II*), 2008-NMSC-023, ¶ 22, 143 N.M. 749, 182 P.3d 130, we remanded the case to the Court of Appeals with instructions "to determine whether the stop was pretextual and, if so, whether article II, section 10 prohibits pretextual stops." *Id.* On remand, the Court of Appeals acknowledged that the question of whether pretextual stops violate the New Mexico Constitution was a matter of first impression. *Ochoa III*, 2009-NMCA-002, ¶ 1. The Court began by recognizing that "the Fourth Amendment of the United States Constitution does not protect citizens against pretextual stops," citing to the United States Supreme Court opinion in *Whren*. *Id*. ¶ 8. The Court next described the widespread criticism of *Whren*, *id*. ¶¶ 13-19; noted this Court's historical willingness to afford greater protection from unreasonable searches and seizures, including automobiles, under the New Mexico Constitution, *id*. ¶¶ 22-24; and chose to depart from *Whren* and other federal constitutional law because the Court found "the federal analysis unpersuasive and incompatible with our state's distinctively protective standards for searches and seizures of automobiles," *id*. ¶ 12.

{12} The Court of Appeals defined a pretextual stop as "a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but is executed

as a pretense to pursue a 'hunch,' a different more serious investigative agenda for which there is no reasonable suspicion or probable cause." *Id*. ¶ 25. To assist trial courts in determining whether an unconstitutional pretextual stop has occurred, the Court of Appeals outlined a three-step approach. First, the State has the burden to establish reasonable suspicion to stop the motorist. If the State fails in its burden, the stop is unconstitutional. *Id.* ¶ 40. Second, if the State satisfies its burden, the defendant may still establish that the seizure was unreasonable by proving that the totality of the circumstances indicates the officer had an unrelated motive to stop the motorist that was not supported by reasonable suspicion. If the defendant does not satisfy the burden, the stop is constitutional. *Id.* Third, if the defendant satisfies the burden, there is a presumption of a pretextual stop, and the State must prove that the totality of the circumstances supports the conclusion that the officer who made the stop would have done so even without the unrelated motive. *Id*.

{13} In this case, the trial judge was persuaded that the officer's candor in admitting that the stop was pretextual was sufficient to conclude that the stop was unconstitutionally pretextual. Looking at the evidence in the light most favorable to Defendant, who prevailed, *see State v. Van Dang*, 2005-NMSC-033, ¶ 14, 138 N.M. 408, 120 P.3d 830, we conclude that there was sufficient evidence to support a finding that the stop would not have occurred except for the unrelated motive to conduct a narcotics investigation. Detective Gallegos basically testified that he orchestrated the stop of Defendant by Patrol Officer Griego, who otherwise would not have been aware of Defendant's presence. Detective Gallegos testified that he followed Defendant as Defendant traveled south on Coors. Detective Gallegos then had to pull over to allow Officer Griego to drive up and conduct the stop on Defendant. Detective Gallegos had also directed a canine unit to be present at the moment Defendant was stopped.

{14} What is not clear is whether the trial judge also concluded that Detective Gallegos lacked a reasonable suspicion to stop Defendant for the unrelated motive–a narcotics investigation. Under *Ochoa III*, this analysis is a necessary prerequisite to concluding that a pretextual stop is unconstitutional. Detective Gallegos did testify, in response to questions from the trial judge, that he did not believe he had reasonable suspicion to stop Defendant for a narcotics investigation, despite his surveillance of Defendant and the information he received from a confidential informant who previously had provided him with accurate information in unrelated cases.

{15} In analyzing whether an officer has reasonable suspicion, the trial court must look at the totality of the circumstances, and in doing so it may consider the officer's experience and specialized training to make inferences and deductions from the cumulative information available to the officer. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). However, an officer's subjective belief about whether the officer had a reasonable suspicion is not conclusive. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964 ("Police officers possess reasonable suspicion when they are 'aware of specific articulable facts' that, judged objectively, 'would lead a reasonable person to believe criminal activity occurred or was occurring.'" (citation omitted)). *Cf. State v. Prince*, 2004-NMCA-127, ¶ 21, 136 N.M. 521, 101 P.3d 332 ("The . . . agent used a lawful traffic stop to perform an unrelated drug investigation when he himself knew there was no reasonable suspicion to detain Defendant for such purpose.").

{16} In this case, Defendant had the burden to prove that the real motive for the stop was not supported by a reasonable suspicion under *Ochoa III*. During oral argument, defense counsel gave this Court a litany of questions he would have explored with Detective Gallegos had he known that the issue was whether there was reasonable suspicion to stop Defendant for a narcotics investigation. The State relied on *Whren* and argued that the reasonable suspicion to investigate the narcotics case was supported by the canine alert, which followed a stop based

on a reasonable suspicion of a window tint violation. Obviously neither party foresaw the approach ultimately taken by the Court of Appeals in *Ochoa III*. In addition, the trial judge overruled his prior letter decision without benefit of argument or an opportunity for either party to present additional evidence that might have informed his decision under *Ochoa III*. We would be speculating that when the trial judge found that "[t]he traffic stop that was conducted on Defendant's vehicle was pretextual," the trial judge necessarily found that the confidential informant was not reliable, and Detective Gallegos did not corroborate predictive details sufficient to rise to the level of reasonable suspicion. Although our appellate determination of reasonable suspicion is based on a de novo review, we review any factual questions under a substantial evidence standard, looking at the evidence in the light most favorable to the prevailing party. *State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57. We take defense counsel at his word that he would have developed a different record under the circumstances. In its reply brief, the State also noted that at the time of the suppression hearing, it could not have known that the Court of Appeals would adopt a new rule regarding pretextual stops and the test that would be applied for such a rule. We also believe that the State should be at liberty to develop whatever record it believes is required by *Ochoa III*. *See Pinnell v. Bd. of Cnty. Comm'rs*, 1999-NMCA-074, ¶ 14, 127 N.M. 452, 982 P.2d 503 (cautioning against engaging in fact-finding at the appellate level when a party has not had a full opportunity to develop the record).

CONCLUSION

{17} For the foregoing reasons, we reverse the Court of Appeals and remand to the trial court to conduct a hearing on Defendant's motion to suppress consistent with this Opinion.

{18} **IT IS SO ORDERED.**

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice (specially concurring)

BOSSON,
Justice (specially concurring)

{19} I concur in the remand for the reasons ably set forth in the Court's Opinion. However, I wish to note that this Court has not yet written on the subject of pretextual stops under our state constitution. *State v. Ochoa* is a Court of Appeals opinion in which this Court first granted and then quashed certiorari. 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143, *cert. granted*, 2008-NMCERT-012, 145 N.M. 572, 203 P.3d 103, *and cert. quashed*, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794. As one of the dissenting votes in that decision to quash, I continue to believe that *Ochoa* was wrongly decided and that we should follow the Fourth Amendment analysis set forth in *Whren v. United States*, 517 U.S. 806, 814, 116 S.Ct. 1769, 1776 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."), a rare unanimous opinion of that Court. However, at least for now, *Ochoa* is the law of the land within our state borders, and therefore our duty lies in overseeing its fair application to both the state and the accused, a purpose achieved by remand in this case.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-018

Filing Date: May 13, 2011

Docket No. 32,905

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al.,

Petitioners,

v.

HON. SUSANA MARTINEZ, Governor of the State of New Mexico,

Respondent,

and

STATE OF NEW MEXICO,

Real Party in Interest.

ORIGINAL PROCEEDING

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for Respondent

OPINION

CHÁVEZ, Justice.

{1} May the Governor use the broad removal authority under Article V, Section 5 of the New Mexico Constitution to remove members of the Public Employee Labor Relations Board (PELRB) who have the responsibility to adjudicate the merits of disputes involving the Governor? We answer this question of first impression in the negative for three reasons. First, none of the PELRB members serve at the pleasure of the Governor because the Public Employee Bargaining Act (the Act) obligates the Governor to appoint one member recommended by organized labor, one member recommended by public employers, and one neutral member jointly recommended by these two appointees. Second, the Governor's responsibility under the Act and Article V, Section 4 of the New Mexico Constitution to "take care that the laws be faithfully executed" clearly requires that the Governor respect the Act's requirement for continuity and balance by not attempting to remove appointed members of the PELRB. Third, constitutional due process requires a neutral tribunal whose members are free to deliberate without fear of removal by a frequent litigant in that forum, such as the Governor. Accordingly, a writ of mandamus has issued ordering the reinstatement of PELRB members John Boyd and Duff Westbrook, effective immediately, and otherwise enjoining their removal.

BACKGROUND

{2} The PELRB is composed of three members appointed by the Governor, whose appointment power is circumscribed as follows: "The governor shall appoint one member recommended by organized labor representatives actively involved in representing public employees, one member recommended by public employers actively involved in collective bargaining and one member jointly recommended by the other two appointees." NMSA 1978, § 10-7E-8(A) (2003). The Act is silent regarding how and whether a board member may be removed. On March 1, 2011, Governor Susana Martinez removed all members of the PELRB. John Boyd was the member duly

appointed by the Governor's predecessor on the recommendation of labor, and his term expires on June 30, 2011. Martin Dominguez was the member duly appointed by the Governor's predecessor on the recommendation of public employers, and his term expires on June 30, 2012. Duff Westbrook was appointed as the neutral board member on the recommendation of Boyd and Dominguez. Westbrook's term expired on June 30, 2010. However, under the provisions of Article XX, Section 2 of the New Mexico Constitution, Westbrook serves until his successor is duly qualified, unless he is lawfully removed. *See Denish v. Johnson*, 1996-NMSC-005, ¶ 54, 121 N.M. 280, 910 P.2d 914. All PELRB members serve three-year terms and are eligible for reappointment to an unlimited number of terms. Section 10-7E-8(B).

{3} The PELRB has rule-making authority, NMSA 1978, § 10-7E-9(A) (2003), and it is empowered to adjudicate disputes and enforce the provisions of the Act, NMSA 1978, § 10-7E-12(A)(3), (C) (2005). With respect to hearings, the Legislature mandated that the PELRB adopt procedures that meet all minimal due process requirements of the federal and state constitutions. Section 10-7E-12(B). Because the State is a public employer subject to the provisions of the Act, the PELRB will adjudicate disputes involving the Governor. NMSA 1978, § 10-7E-4(S) (2003) (stating that a public employer includes the state and its political subdivisions). According to Petitioners, seventeen cases currently pending before the PELRB directly involve the Governor's executive department, a contention unchallenged by the Governor.

{4} Petitioners are organized labor representatives actively involved in representing public employees. They seek a writ of mandamus prohibiting the Governor from removing Boyd and Westbrook from the PELRB,[1] arguing that the Governor's removal authority under Article V, Section 5 does not extend to members of the PELRB because the Governor's appointment of its members is purely ministerial, and their removal would violate the separation of powers doctrine and offend due process. In order for Petitioners to prevail, we must be persuaded that a writ of mandamus is being issued only to compel the performance of a ministerial duty that is clear and indisputable. *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 23, 149 N.M. 207, 247 P.3d 286. A writ of mandamus may be used in a prohibitory manner to prohibit unconstitutional official action. *See Kiddy v. Bd. of Cnty. Comm'rs*, 57 N.M. 145, 152, 255 P.2d 678, 683 (1953) ("Public functionaries may be restrained by mandamus from doing what they know is an illegal act."). In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official's act; we determine whether that act goes beyond the bounds established by the New Mexico Constitution. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 570, 904 P.2d 11, 19 (1995).

{5} The Governor counters that her actions are consistent with this Court's broad interpretation of Article V, Section 5 in *State ex rel. New Mexico Judicial Standards Commission v. Espinosa*, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197. In *Espinosa*, we declined to abrogate the Governor's removal authority by implication, instead requiring an express limit on the power articulated by the Legislature. *Id.* ¶ 25. The Governor argues that because the Act does not expressly curtail the Governor's removal authority, she was authorized to remove Boyd and Westbrook from the PELRB. If our consideration of the issue were limited to the Act, we might agree with the Governor. However, the competing constitutional provisions that require the Governor to faithfully execute the laws and to comply with the due process clause, which has been interpreted to require a neutral tribunal not subject to upheaval through removal by one of the litigants,

[1] Governor Martinez also terminated the Public Employee Labor Relations Director on February 5, 2011. Petitioners also seek a writ prohibiting the Governor from "interfering in the Board's decision to hire an Executive Director." The Governor agrees that she is not empowered to hire the Executive Director and therefore will not interfere in the hiring for this position. Finally, Petitioners did not seek the reinstatement of Dominguez.

compel our conclusion that the Governor may not arbitrarily remove members of this adjudicatory board.

THE GOVERNOR MUST ENSURE THAT THE INTENDED GOALS OF DULY ENACTED LEGISLATION ARE EFFECTUATED

{6} Article III, Section 1 of the New Mexico Constitution sets forth the general parameters of the separation of powers in state government. Article IV empowers the Legislature to create the law. Article V, Section 4 requires the Governor to "take care that the laws be faithfully executed." In order to carry out this constitutional mandate, the Governor is required to apply his or her full energy and resources to ensure that the intended goals of duly enacted legislation are effectuated. *Op. of the Justices to the Senate*, 376 N.E.2d 1217, 1221 (Mass. 1978).

{7} The question in this case is whether the Governor's removal of the members of the PELRB is at odds with the Governor's responsibility to ensure that the Act's intended goals are effectuated. We conclude that it is. Under the Act's structure, the Governor does not have the absolute power to appoint any person to the PELRB. The Governor has a clear and indisputable duty to appoint one representative for labor, one for management, and the third based on the designation by the other two appointees. Section 10-7E-8(A); S. Barry Paisner & Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees,* 37 N.M. L. Rev. 357, 377 (2007) ("The governor is *required* to appoint a member that has been recommended by organized labor, a member that has been recommended by public employers, and a member that the two other appointees have jointly recommended." (emphasis added)). When labor, management, or the two appointees insist on recommending only one person to the Governor for appointment, the Governor, under the plain wording of the Act, must appoint the person who was recommended.

{8} The Legislature's stated purpose in promulgating the Act sets forth the rationale for the Governor's limited role in the appointment of PELRB members and the importance of a continuously operating PELRB. In particular, the Legislature established the following purpose for the Act:

> The purpose of the Public Employee Bargaining Act is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

NMSA 1978, § 10-7E-2 (2003). These notions of "harmonious and cooperative relation[s]" and the "orderly operation and functioning of the state" have been interpreted by the Court of Appeals to encompass a "balancing of policies" in crafting the Act. *Id.*; *see also Int'l Ass'n of Firefighters v. City of Carlsbad*, 2009-NMCA-097, ¶ 13, 147 N.M. 6, 216 P.3d 256. In the context of the PELRB's composition, the Court of Appeals has concluded that the Legislature intended the PELRB to be a "balanced and, therefore, neutral body." *City of Albuquerque v. Montoya*, 2010-NMCA-100, ¶ 10, 148 N.M. 930, 242 P.3d 497, *cert. granted*, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147. This neutral and balanced character is achieved by allowing both labor and management to designate one member and then empowering those two representatives to select a neutral, consensus third member. *See id.*; § 10-7E-8(A). To ensure a continuously operating PELRB, the Legislature established a board with three staggered terms and enacted a provision that enables members to serve an unlimited number of terms. Sections 10-7E-8(B), (E). Article XX, Section 2 complements this scheme by requiring incumbent members to retain office "until his successor has duly qualified." *Id.* Therefore, by mandating a balanced and continuously operational PELRB, the Legislature gave

effect to its priority that labor relations between government workers and the state be harmonious, cooperative, and coincide with "at all times, the orderly operation and functioning of the state and its political subdivisions." Section 10-7E-2.

{9} The removal of the board member selected by the unions casts a pall over the operations of the PELRB and evinces a willingness to interfere with the unions' right to designate a board member of their choice. The Act expressly prohibits an employer from interfering with a public employee's rights under the Act. NMSA 1978, § 10-7E-19(B) (2003). Through her actions, the Governor has disrupted the PELRB's careful balance as envisioned by the Legislature.

CONSTITUTIONAL DUE PROCESS PROHIBITS ARBITRARY REMOVAL OF BOARD MEMBERS BY THE GOVERNOR WHO ADJUDICATE DISPUTES INVOLVING THE GOVERNOR

{10} Due process considerations are also implicated because when the Governor reserves the power to remove board members at any time and for any reason, the Governor exerts subtle coercive influence over the PELRB, further compromising its balanced and fair character. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

> At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present. The inquiry is not whether the [b]oard members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Reid v. N.M. Bd. of Exam'rs in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979) (citations omitted).

{11} What is significant in this case is that the PELRB adjudicates disputes involving the Governor and all the myriad executive department agencies under her control, including determining whether the Governor or her appointees have engaged in prohibited labor practices under Section 10-7E-19. Because the PELRB is empowered to make decisions that may adversely affect the executive branch, the PELRB must remain free from the executive's control. The PELRB cannot remain free from the executive's control or coercive influence if we conclude that the members of the PELRB serve at the pleasure of the Governor. The Act's statutory scheme for the appointment of PELRB members provides adequate guarantees that an independent, unbiased decision maker will be selected, and thus comports with the requirements of due process. However, interpreting Article V, Section 5 to empower the Governor to arbitrarily remove its members would not comport with the requirements of due process.

ESPINOSA IS INAPPOSITE BECAUSE BROAD REMOVAL AUTHORITY OVER THE PELRB WOULD DIRECTLY CONTRAVENE THE LEGISLATURE'S PURPOSE IN PROMULGATING THE ACT AND CONFLICT WITH THE GOVERNOR'S DUTY TO FAITHFULLY EXECUTE THE LAWS

{12} The Governor urges us to adhere to our broad interpretation of Article V, Section 5 in *Espinosa*. Article V, Section 5, in relevant part, reads as follows: "The governor shall nominate and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for and may remove any officer appointed by him [or her] unless otherwise provided by law." A narrow majority of the *Espinosa* Court declared a strong disapproval of implied abrogations of the Governor's constitutional removal authority. 2003-NMSC-017, ¶ 25

(citing *Flaska v. State*, 51 N.M. 13, 20, 177 P.2d 174, 178 (1946) ("It is presumed that the people expressed themselves in careful and measured terms in framing the constitution and that *they left as little as possible to implication*." (emphasis added) (internal quotation marks and citations omitted))).

{13} In *Espinosa*, members of the Judicial Standards Commission (Commission) challenged then-Governor Bill Richardson's authority to remove the Commission's six gubernatorial appointees *en masse*. 2003-NMSC-017, ¶ 1. One argument advanced by the *Espinosa* petitioners was that the language in Article VI, Section 32, which created the Commission, "impliedly" prohibits the application of the Governor's Article V, Section 5 removal powers to the Commission. 2003-NMSC-017, ¶ 18. The petitioners contended that a provision setting forth staggered terms for Commission members, *id.* ¶ 18, coupled with a provision that explicitly prescribes the manner by which Commission vacancies shall be filled but is silent as to removal, evinced an "intent . . . to deny the Governor the authority to remove members," *id.* ¶ 23. We rejected the petitioners' invitation to impliedly abrogate the Governor's removal power, finding that the Legislature has demonstrated a willingness to "provide[] for both staggered terms and gubernatorial removal power," *id.* ¶ 21, and "frequently addresses both the power to fill a vacancy and the power to remove," *id.* ¶ 23. As a result, we concluded that Article V, Section 5 and Article VI, Section 32 coexist as "harmonious constitutional provisions." *Id.* ¶ 23. Having dispensed with the petitioners' argument, the majority concluded that "[w]ithout a compelling reason to hold otherwise," Article V, Section 5 authorized the Governor to arbitrarily remove executive appointees from the Commission. *Espinosa*, 2003-NMSC-017, ¶ 27.

{14} In this case, there are three compelling reasons to hold otherwise. First, in *Espinosa* the Governor had absolute appointment authority–that is, the Governor was at liberty to appoint anyone he chose to the Commission. That is not so in this case, where the Governor has a clear and indisputable duty to appoint those members designated by labor, management, and a neutral designated by the labor and management designees. Second, in *Espinosa* the appointees were not empowered to adjudicate disputes involving the Governor. In this case, the PELRB must decide disputes involving the Governor. Third, in *Espinosa* we could read the competing constitutional provisions harmoniously, whereas in this case, we cannot read the competing duty of the Governor to faithfully execute the laws, with her appointment and removal authority, or with the due process requirements of our Constitution as interpreted by this Court.

CONCLUSION

{15} For the foregoing reasons, a writ of mandamus has issued ordering the reinstatement of members Boyd and Westbrook to the PELRB, effective immediately, and otherwise enjoining their removal.

{16} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CELIA FOY CASTILLO,
Judge
Sitting by Designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-045

Filing Date: December 14, 2011

Docket No. 33,028

**STATE OF NEW MEXICO ex rel.
HON. MIMI STEWART,
HON. BEN LUJAN,
HON. ELEANOR CHAVEZ,
HON. ANTONIO LUJAN,
HON. MIGUEL GARCIA, and
HON. CISCO McSORLEY,
members of the New Mexico
Legislature and citizens of New Mexico,**

Petitioners,

v.

**HON. SUSANA MARTINEZ,
Governor of the State of New Mexico,
HON. DIANNA J. DURAN,
Secretary of State of New Mexico,
and HON. CELINA BUSSEY,
Secretary of New Mexico
Department of Workforce Solutions,**

Respondents,

and

**HON. GARY KING, Attorney General of
the State of New Mexico,**

Intervenor.

ORIGINAL PROCEEDING

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for Intervenor

OPINION

CHÁVEZ, Justice.

I. INTRODUCTION

{1} The New Mexico Legislature passed House Bill 59 during the 2011 legislative session. H.B. 59, 50th Leg., 1st Sess. (N.M. 2011) [hereinafter H.B. 59]. House Bill 59 sought to amend five different sections of the Unemployment Compensation Law (the Act), NMSA 1978, §§ 51-1-1 to -59 (1936, as amended through 2010), in order to address the impending insolvency in the unemployment compensation fund. In addition to reducing benefits to the unemployed, House Bill 59 increased employer contributions to the unemployment compensation fund over the contributions

that would be made in 2011. H.B. 59, § 51-1-11(I)(6). Governor Susana Martinez partially vetoed House Bill 59 by striking one of the variables in Section 51-1-11(I)(6) that was necessary to calculate employer contributions beginning on January 1, 2012. The Petitioners, each of whom are legislators, seek a writ of mandamus invalidating Governor Martinez's partial veto. Because the effect of the partial veto was to exempt most employers from making what would otherwise be mandatory contributions to the unemployment compensation fund for calendar year 2012, we hold that the partial veto was invalid. We therefore issue a writ of mandamus ordering that House Bill 59 be reinstated as passed by the Legislature.

II. BACKGROUND

A. The Unemployment Compensation Law

{2} When the Legislature first enacted the Act in 1936, the legislators found it worthwhile to include "[a]s a guide to the interpretation and application" of the Act, a "declaration of state public policy." 1936 N.M. Laws (Special Session), ch. 1, § 2. The declaration stated that

> [e]conomic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. . . . The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. *The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State requires the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.*

Id. (restated as NMSA 1978, § 51-1-3) (emphasis added). The Act establishes an unemployment compensation fund and the parameters for unemployment benefit eligibility. *See generally* NMSA 1978, §§ 51-1-1 to -59. In relevant part to this Opinion, the Act establishes employers' rates of contribution to the unemployment compensation fund based on "benefit experience." *See* NMSA 1978, § 51-1-11 (2010). Less-established employers, who have not yet had "accounts chargeable" for thirty-six months, are charged a flat rate of two percent. *Id.* Subsection F. More-established employers, on the other hand, which have "accounts chargeable" with benefits for the preceding thirty-six months, contribute to the unemployment compensation fund on the basis of (1) *the employer's record*, and (2) *the condition of the fund*, according to Section 51-1-11(I). *See* § 51-1-11(F). There are exceptions to this framework for certain employers that have recently acquired other "employing units," *see* § 51-1-11(F)(1), and for certain employers conducting business outside New Mexico, *see* § 51-1-11(F)(2).

{3} Section 51-1-11(I) of the Act provides that the more-established employers' annual contribution rates are determined by the combined effect of two variables, a reserve rate ("Reserve Rate") assigned to each employer and an annual contribution rate schedule ("Contribution Schedule"). Section 51-1-11(I)(4) provides a chart called the "table of employer reserves and contribution rate schedules," which determines an employer's contribution rate based on the intersection of the row representing the employer's Reserve Rate and the column representing the Contribution Schedule. *See* § 51-1-11(I)(4). The Reserve Rate is dependent on a particular employer's unemployment record; it is calculated "by the excess of the employer's total contributions over total benefit charges computed as a percentage of the employer's average payroll reported for contributions." Section 51-1-11(I)(1).

{4} In any given year, the Contribution Schedule is the same for all established employers. The Contribution Schedule ranges from Schedule 0 to Schedule 6. *See* § 51-1-11(I)(2)(a)-(g). Determining the relevant Contribution Schedule

has varied over the years. During some years a statutory formula was applied to determine the relevant schedule, while during other years the Legislature specified which schedule would be applied for a given year. When determined by formula, the Contribution Schedule is inversely related to the condition of the unemployment compensation fund. Section 51-1-11(I)(2). The Contribution Schedule increases when the unemployment fund, as a percentage of total payrolls, decreases. *Id.* Likewise, when the amount in the fund becomes a larger proportion of total payrolls (i.e., the fund becomes healthier), the Contribution Schedule decreases, lowering employers' annual contribution rates. *Id.* Prior to House Bill 59, Section 51-1-11(I) of the Act provided that "for each calendar year *after 2011*," the Contribution Schedule to be applied depended on a calculation based on a statutory formula. Section 51-1-11(I)(2) (2010) (emphasis added). House Bill 59 amended Section 51-1-11(I)(2) by changing the effective date for calculating the Contribution Schedule by formula to "each calendar year *after 2012*." H.B. 59, § 51-1-11(I)(2) (emphasis added).

{5} In addition to delaying the onset of a formula-based Contribution Schedule, House Bill 59 set a fixed Contribution Schedule for the year 2012, making the variable independent from the relative health of the unemployment fund. *See* H.B. 59, § 51-1-11(I)(6), as passed by the Legislature ("[F]rom January 1, 2012 through December 31, 2012, each employer making contributions pursuant to this subsection shall make a contribution at the rate specified in Contribution Schedule 3."). It set the Contribution Schedule for 2012 at Schedule 3, higher than both the fixed Contribution Schedule in 2010 (Schedule 0), § 51-1-11(I)(6) (2010), and the fixed Contribution Schedule for 2011 (Schedule 1), *id.* (2011). Thus, under House Bill 59 as passed by the Legislature, the Contribution Schedule continued to be specified by the Legislature independent from the health of the unemployment compensation fund for 2011 and 2012, H.B. 59, § 51-1-11(I)(5)-(6), but set by formula beginning in 2013, H.B. 59, § 51-1-11(I)(2). Because the health of the fund is not known, it is not clear what the 2012 Contribution Schedule would be if it was set by the formula, a matter that gains importance with Governor Martinez's partial veto.

B. Partial Veto to House Bill 59

{6} Governor Martinez vetoed one substantive provision from House Bill 59, the provision of Section 51-1-11(I) that fixed the 2012 Contribution Schedule at Schedule 3.[1] She explained her veto in an executive message:

> While solvency [of the unemployment compensation fund] is a legitimate concern, the rate increase [implemented by the Legislature] is not triggered by insolvency.
>
> The reason the contribution rate would increase is because the current law locking the rate at Schedule 1 will sunset on December 31, 2011. Once that law sunsets, the rate will again be determined by the floating calculation. To avoid the floating calculation, this bill arbitrarily sets the contribution rate at Schedule 3, beginning January 1, 2012. However, the legislature could have instead continued the contribution rate at Schedule 1 and thus prevented any tax increase, regardless of the status of the fund.

House Executive Message No. 40, 2011 Regular Session at 2. The "floating calculation" to which the Governor refers is the Contribution Schedule set by formula, as explained above. The "increase" to which the Governor refers must be a comparison of the fixed Contribution Schedule in 2011, Schedule 1, with the fixed Contribution Schedule in 2012, Schedule 3, because the formula-based schedule is not known. As previously mentioned, it is not clear if the formula-based Schedule would have been higher or lower than Schedule 3. What is clear, however, is that with either a floating Contribution Schedule or Schedule 3, all employers would have been

[1] In addition, she deleted the "and" that preceded the vetoed provision of the subsection, making the remainder of Section 51-1-11(I) grammatically correct.

obligated to make some level of contribution to the fund. The veto message expresses the intent to use the line-item veto to eliminate the "arbitrarily set" Contribution Schedule. By implication, Governor Martinez intended to continue the mandatory employer contributions, but at a lower rate.

{7} The Governor's veto, however, did not accomplish a reversion to a "floating calculation" for the Contribution Schedule or to any schedule. By retaining the provision of House Bill 59 that delayed the onset of a formula-set Contribution Schedule until 2013, H.B. 59, § 51-1-11(I)(2), and vetoing only the language that provided for a fixed, interim Contribution Schedule, H.B. 59, § 51-1-11(I)(6), the Governor's veto, perhaps inadvertently, left a void, as there is no Contribution Schedule for 2012. Without a Contribution Schedule in 2012, there is no basis with which to determine employer contributions to the unemployment fund by established employers for calendar year 2012. These employers have effectively been exempted from what has been a mandatory contribution requirement since the Act's inception. *See* § 51-1-3 ("[T]he general welfare of the citizens of this state requires . . . the compulsory setting aside of unemployment reserves."); *see also* § 51-1-9(A) ("Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to the payments of contributions under the Unemployment Compensation Law."); § 51-1-11(F) (2010) ("For such an [established] employer, the contribution rate shall be determined pursuant to Subsection I of this section on the basis of the employer's record and the condition of the fund.").

C. A Writ of Mandamus Is Proper in this Case

{8} This Court has ruled on the constitutionality of a governor's veto in past cases involving writs of mandamus. *See State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 364, 524 P.2d 975, 980 (1974). Initially, we did not address the merits of the petition for writ of mandamus filed in this case because, in her executive message, the Governor expressed her intent to include the Act on the agenda of the 2011 Special Session on redistricting. Because the special session took place before the effective date of the language vetoed by Governor Martinez, addressing the issue during the special session would have been a plain, speedy, and adequate remedy in the ordinary course of law that was available to Petitioners; therefore, a writ of mandamus was not warranted. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277 ("Mandamus is a drastic remedy to be invoked only in extraordinary circumstances" and when there is not "a plain, speedy and adequate remedy in the ordinary course of law." (internal quotation marks and citations omitted)). In addition, this was not a situation in which legislators would have had to override the Governor's veto by a two-thirds majority pursuant to Article IV, Section 22 of the New Mexico Constitution. While a veto override may not constitute an adequate remedy if a veto is unconstitutional, only a majority of the Legislature would have needed to vote favorably on legislation introduced during the special session in order for it to reach the Governor's desk.

{9} When no resolution was reached on the issue during the 2011 Special Session, Petitioners asserted that their petition was ripe and asked us to rule on the merits. The next legislative session in January 2012 will not start, much less produce a possible remedy, until after the language at issue in House Bill 59 takes effect. Therefore, we have exercised our discretion to decide the merits of the petition.

D. The Veto Is Invalid Because What Remained Resulted in an Unworkable and Incomplete Act

{10} Petitioners assert two arguments in support of their petition for a writ of mandamus invalidating Governor Martinez's partial veto and reinstating House Bill 59 as written by the Legislature. First, House Bill 59 is not a bill appropriating money, and therefore the Governor does not have the authority to partially veto the legislation.

Second, if House Bill 59 is a bill appropriating money, Governor Martinez's partial veto is invalid because it distorts the legislators' intent in enacting House Bill 59. In response, the Governor contends that House Bill 59 is a bill appropriating money, and that because she struck the entirety of Section 51-1-11(I)(6), the veto is constitutional.

{11} The Governor has constitutional authority to approve or disapprove any part or item of any bill appropriating money. N.M. Const. art. IV, § 22. Any bill appropriating money is not synonymous with the General Appropriation Act. *State ex rel. Dickson v. Saiz*, 62 N.M. 227, 233-34, 308 P.2d 205, 209 (1957). This partial veto power permits the Governor to meaningfully participate in the appropriations process. *Id*. Significantly, the Legislature cannot circumvent the Governor's veto power by the careful drafting of legislation. *Kirkpatrick*, 86 N.M. at 364, 524 P.2d at 980 ("The Legislature may not properly abridge that power by subtle drafting of conditions, limitations or restrictions upon appropriations."). Conversely, the Governor may not exercise the partial veto power to "in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences." *Id*. at 365, 524 P.2d at 981.

{12} Ordinarily, we would first answer whether the bill being partially vetoed is an appropriation bill, because if the bill does not appropriate money, the Governor does not have constitutional authority to partially veto the bill. *See Chronis v. State ex rel. Rodriguez*, 100 N.M. 342, 344, 670 P.2d 953, 955 (1983) ("[B]ecause the Act does not appropriate money, we hold that the Governor's veto power was invalidly exercised in violation of Article IV, Section 22 [of the New Mexico Constitution]."). However, the dispositive and perhaps less complex question in this case is whether the Governor's partial veto of House Bill 59 destroyed the whole of the item or part, leaving a workable piece of legislation without creating legislation that is inconsistent with the Act. Therefore, for purposes of this Opinion, we assume, without deciding, that House Bill 59 is a bill appropriating funds.

{13} To begin the analysis, we acknowledge that the Governor of the State of New Mexico has broad veto authority. *State ex rel. Coll v. Carruthers*, 107 N.M. 439, 442, 759 P.2d 1380, 1383 (1988) ("New Mexico differs from most other states with item-veto provisions because it allows the broadest possible veto authority by additionally providing authority to veto 'parts', not only 'items'."). This authority stems from the Constitutional Convention that "specifically adopted a proposal which increased the partial veto power to parts of bills of general legislation which contained incidental items of appropriation." *Saiz*, 62 N.M. at 235, 308 P.2d at 210 (internal quotation marks and citation omitted).

{14} We have previously considered the contours of this power. We recognized in *Saiz* that this ability to veto parts was a "quasi-legislative" function.

> Our Constitution does not, necessarily, foreclose the exercise by one department of the state of powers of another but contemplates in unmistakable language that there are certain instances where the overlapping of power exists. Indeed, when the Governor exercises his right of partial veto he is exercising a quasi-legislative function.

62 N.M. at 236, 308 P.2d at 211. We held in *Kirkpatrick*, however, that the Governor could overstep such power by eliminating substantive parts of a bill.

> The power of partial veto is the power to disapprove. . . . It is not the power to enact or create new legislation by selective deletions. . . . Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences.

86 N.M. at 365, 524 P.2d at 981.

{15} Thus, a Governor uses the partial veto properly if the veto eliminates or destroys the whole of an item or part, otherwise leaving intact the legislative intent regarding the remaining provisions in the bill. All language that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid. In addition, the remaining legislation must continue to be a workable piece of legislation.

{16} For example, in *Saiz*, we held that New Mexico Governor John E. Miles constitutionally vetoed a "part" of a bill appropriating money. 62 N.M. at 236, 308 P.2d at 210-11. The part of the bill that he vetoed consisted of several nonconsecutive provisions, all relating to the same purpose. Each of the vetoed subsections and portions of subsections was part of the amended bill's language that were enacted to permit Sunday alcohol sales. To illustrate, Governor Miles's message stated that he had vetoed:

> All part [sic] of sub-section (a) of Section 1204, which reads as follows:
>
> Provided, however, that the licenses of retailers shall allow them to sell and deliver alcoholic liquors, and the licenses of dispensers and clubs shall allow them to sell, serve, deliver and permit the consumption of alcoholic liquors on their licensed premises on Sundays between the hours of 2:00 P.M. and 11:00 P.M. in municipalities within or composing local option districts, and in counties composing local option districts, outside of the limits of the municipalities therein situated, if a majority of all votes cast at an election in any such municipality or county are in favor of the sale of alcoholic liquors on Sundays in each municipality or county.
>
> All of sub-section (b) of Section 1204.
>
> All of sub-section (c) of Section 1204.
>
> That part of sub-section (d) of Section 1204, which reads as follows:
>
> or on any Sunday between 2:00 A.M. and 2:00 P.M. and between 11:00 P.M. and midnight;
>
> All that part of sub-section (e) of Section 1204, which reads as follows:
>
> in any municipality or county which has not voted in favor of the sale of alcoholic liquor on Sundays therein, under the provisions of this Act.

Id. at 232, 308 P.2d at 208 (internal quotation marks omitted) (quoting the Governor's veto message).

{17} We held that it did not matter that the veto eliminated entire subsections, portions of other subsections, or portions of the bill that were not adjacent to one another. *Id.* at 236, 308 P.2d at 210-11. Each of the vetoed provisions needed to be eliminated in order for the Governor to fully amend the bill so as not to permit alcohol sales on Sunday. Each provision that was vetoed made up the "part" of the bill that permitted alcohol sales on Sunday.

> [Governor Miles] went through the bill before him with meticulous care, lifting from it, wherever found, the part or parts germane to the subject about to be proscribed, and which together, made up a rounded whole, and took such part or parts from the bill. It mattered not where in the bill they rested if they constituted an integral part of the subject being partially vetoed—out they came!

Id. at 237, 308 P.2d at 212 (per curiam, on motion for rehearing). The "challenged act [was] not invalid or unconstitutional on any of the grounds raised against it, including the claim that the act [was] bad because the partial veto applie[d] to part of a section or sub-section." *Id.* at 236, 308 P.2d at 210. Had the Governor only stricken one or two of the provisions that referred to alcohol sales, leaving other related provisions intact, the veto would not have been complete and would have otherwise distorted the remaining provisions in a way that made the remaining bill

unworkable. For example, had the Governor not vetoed the portions of Subsections (d) and (e), the legislation would have been ambiguous regarding what was meant by reference to Sunday liquor sales.

{18} We adopted our approach in *Saiz* by considering the approach taken by several other state supreme courts. *See id.* For example, in *Cascade Telephone Co. v. Tax Commission of Washington*, one of the primary cases upon which we relied in *Saiz*, the Washington Supreme Court considered state constitutional language that allowed a governor to partially veto a "section or sections, item or items." 30 P.2d 976, 977 (Wash. 1934). Despite the use of the word "sections" in the Washington Constitution, the Washington Supreme Court concluded that the reference did not mean the "sections" designated by the legislature, but rather the parts of the bill related by subject matter: "By the artful arrangement of the subject-matter and an arbitrary division into sections, the Governor's power might be unduly limited or enlarged without reason." *Id.* The Washington Supreme Court concluded that the Washington Constitution's reference to "sections" intended groupings based on subject matter and not simply what was termed a "section" in the passed legislation. *Id.* Likewise, Governor Miles's veto in *Saiz* eliminated a "part" of the bill, despite the noncontiguous provisions, due to the vetoed provisions' shared subject matter. 62 N.M. at 236, 308 P.2d at 210-11.

{19} In *Saiz* we also relied on Wisconsin jurisprudence because the Wisconsin Constitution has a partial veto provision almost identical to New Mexico's. 62 N.M. at 235, 308 P.2d at 210. In *State ex rel. Wisconsin Telephone Co. v. Henry*, 260 N.W. 486 (Wis. 1935), the Wisconsin governor had vetoed portions of a bill that authorized a certain tax and appropriated the revenues for emergency relief. *See State ex rel. Sundby v. Adamany*, 237 N.W.2d 910, 915 (Wis. 1976) (describing the facts underlying the *Henry* dispute). The vetoed portions declared the bill's intent and created an agency to administer the fund. *Id*. The Wisconsin Supreme Court held that the constitution's reference to "part or parts" empowered the governor to veto any part or parts of an appropriation bill, "regardless of their nature, unless they constitute inseparable conditions or provisos upon the particular appropriation involved." *Id*. Inseparability was not a concern in *Henry* because there was no "expressly stated connection between the parts disapproved and the parts which were approved by the Governor." 260 N.W. at 491. The Wisconsin Supreme Court in *State ex rel. Martin v. Zimmerman*, 289 N.W. 662 (Wis. 1940) later applied the *Henry* separability test for the completeness of a veto, holding that a veto was proper because it left behind "an effective and enforceable law on fitting subjects for a separate enactment by the legislature." *Martin*, 289 N.W. at 665.

{20} The Wisconsin Supreme Court's opinion in *Adamany* is also instructive. In *Adamany*, the Wisconsin governor vetoed several provisions in a bill appropriating money, each of which required five percent of the electors from towns, villages, cities, and counties to sign and file a petition in order for the respective governing bodies to hold a referendum vote on particular tax increases. 237 N.W. at 911-12. The effect of the governor's vetoes was that the governing bodies of towns, villages, cities, and counties would *always* be required to hold a referendum in order to increase that particular tax, not just when five percent of the voters in the particular jurisdiction signed a petition requesting a referendum. *Id.* at 912. The Wisconsin Supreme Court upheld the veto because "even if the result effectuates a change in legislative policy, *as long as the portion vetoed is separable and the remaining provisions constitute a complete and workable law*," the veto is valid. *Id.* at 916 (emphasis added). In addition, the vetoes were upheld because they did not cause any inconsistency within the rest of the bill. In fact, the court commented that the governor's vetoes had eliminated confusion that had existed in the legislation prior to the veto. *Id.* at 918 ("Moreover, the vetoes resolved an inconsistency created by the sections immediately preceding each challenged section.").

{21} In this case, the Governor's veto message expressed disapproval of House Bill 59's "arbitrary" Contribution Schedule, Schedule 3,

for 2012. The veto deleted only the language that set the Contribution Schedule to Schedule 3 for 2012 and retained the language that delayed the sunrise of the formula-based Schedule until 2013. The Governor's veto, however, did not return the Act to its former language, providing for the default, formula-based Schedule, or to any schedule for 2012. Rather, the veto arbitrarily eliminated the Contribution Schedule variable used to determine established employer contributions to the unemployment compensation fund for the year 2012. Unlike the veto in *Saiz*, the Governor's veto did not completely delete all the provisions in House Bill 59 that would have addressed the concerns described in the Governor's veto message. Instead, the Governor's veto deleted a portion of the bill that specifically related to another portion of the bill that was retained: the "after 2012" language found in House Bill 59, Section 51-1-11(I)(2), had been added to delay the formula-based Contribution Schedule during 2012, the year for which the vetoed provision had provided an interim, fixed Contribution Schedule.

{22} Here, unlike the veto upheld in *Adamany*, the Governor's veto creates, rather than eliminates, inconsistencies within both House Bill 59 and the Act as a whole. As mentioned earlier in this Opinion, the Act's purpose statement provides that employer contributions will be "*compulsory*," § 51-1-3 (emphasis added), and other provisions of House Bill 59 provide that established employers' contribution rates "*shall* be determined . . . on the basis of the employer's record and the condition of the fund as of the computation date for the calendar year," H.B. 59, § 51-1-11(F) (emphasis added). The Governor's veto eliminates established employers' contributions for 2012 by making it impossible to determine the 2012 employer contribution rate. By only deleting certain language, the setting of the 2012 Contribution Schedule to Schedule 3, and leaving other phrases relating to the same subject matter intact, the delay of a formula-based Contribution Schedule until after 2012, the Governor's veto impermissibly left an incomplete and unworkable Act.

{23} Because we conclude that the Governor's partial veto had the effect of altering the remainder of the Act by nullifying its application to established employers in 2012, we hold that the veto was unconstitutional. Both parties have urged us to reinstate House Bill 59 as passed by the Legislature in the event we conclude that the partial veto is invalid. Accordingly, we issue the writ, reinstating House Bill 59 as passed by the Legislature.

III. CONCLUSION

{24} We hold that the partial veto to House Bill 59 is unconstitutional because after the Governor vetoed the language regarding the increase to the 2012 Contribution Schedule from Schedule 1 to Schedule 3, what remained was an unworkable piece of legislation. For the foregoing reasons, we hold that the partial veto to House Bill 59 is constitutionally invalid. Accordingly, we issue a writ of mandamus ordering the reinstatement of House Bill 59 as passed by the Legislature.

{25} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

RODERICK KENNEDY,
Judge
Sitting by designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-004

Filing Date: February 22, 2012

Docket No. 32,436

ESTATE OF DANIEL RALPH GUTIERREZ, by and through his personal representative, JANET JARAMILLO, individually and as next friend of SAGE G., JORDAN G., and NOAH G.,

Plaintiffs-Petitioners,

v.

METEOR MONUMENT, L.L.C. d/b/a ALAMEDA METEOR,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Timothy L. Garcia, District Judge

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OPINION

CHÁVEZ, Justice.

{1} On August 31, 2003, while driving at approximately 7:00 p.m., Defendant Dean Durand crashed his Ford Bronco into a motorcycle driven by Daniel Gutierrez, ultimately resulting in Gutierrez's death. Durand admitted that earlier in the afternoon and up until 6:00 p.m., while at the business establishment operated by Defendant Meteor Monument, L.L.C., he had consumed seven twelve-ounce cans of beer and a twenty-four-ounce can of malt liquor, which has a higher alcohol content. He also testified that he consumed three ounces of malt liquor after 6:00 p.m. and ingested heroin and crack cocaine shortly before the accident. Approximately three and one-half hours after the accident, Durand's blood alcohol level was recorded at 0.09 gms/100 ml.

{2} Gutierrez's estate and family successfully sued both Durand and Meteor for Gutierrez's wrongful death. Only the verdict against Meteor is at issue in this appeal. The causes of action against Meteor were four-fold: (1) that Meteor was liable under the Alcohol Licensees Liability Act, also known as the New Mexico Dram Shop Liability Act (Dram Shop Liability Act), NMSA 1978, § 41-11-1 (1986), for serving alcohol to Durand when it was reasonably apparent that he was intoxicated; (2) that Meteor was negligent in hiring, supervising, and retaining Durand, knowing that he was an alcoholic and permitting him to consume alcohol in excess while working for Meteor ("negligent supervision"); (3) that Meteor was vicariously liable for the negligence of its employees; and (4) that Meteor's conduct was so egregious that it was liable for punitive damages under the dram shop and employment causes of action.

{3} Meteor appealed to the Court of Appeals, raising five issues. First, Meteor contended that the evidence was insufficient to support a verdict on the dram shop liability cause of action because there was no evidence that identified which Meteor employee served Durand, nor was there any evidence from which the jury could find that Durand's intoxication was reasonably

apparent to that server. Second, Meteor claimed as a matter of law that it could not be vicariously liable for Durand's actions because there was no evidence that Durand was in the scope of his employment at the time of the accident. Third, Meteor contended it did not have notice that the negligent supervision claim included Durand as one of its employees. Fourth, Meteor argued that the scope of employment instruction given by the trial court at the request of both parties was erroneous because the instruction inappropriately conflated vicarious liability and the negligent supervision causes of action. Fifth, Meteor contended that the evidence was insufficient to support a punitive damages verdict against it. *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, LLC*, No. 28,799, slip op. at 1 (N.M. Ct. App. May 18, 2010).

{4} The Court of Appeals reversed the dram shop liability verdict and remanded the negligent supervision verdict for a new trial, and therefore it did not address the punitive damages claim. Slip op. at 19. Regarding the dram shop claim, the Court of Appeals concluded as a matter of law that the evidence was insufficient to support a finding that it was reasonably apparent to Meteor that Durand was intoxicated at the time he was sold alcohol because there was no evidence in the record identifying who sold Durand the alcohol. Slip op. at 17. Regarding the employment claims, the Court of Appeals agreed with Gutierrez that "employer vicarious liability was not argued" to the jury, slip op. at 8, nor could it have been, because the facts did not support a finding that Durand was acting in the course and scope of his employment at the time of the accident, slip op. at 9. This holding has not been challenged. However, with respect to the negligent supervision claim, the Court of Appeals concluded that Gutierrez did not include a claim for negligent supervision of Durand in his complaint, nor was such a claim clearly argued at trial, slip op. at 8, although the claim "was clearly contemplated by Plaintiffs and the court throughout the course of the trial," slip op at 12. In addition, the Court of Appeals concluded that scope of employment was not at issue in the negligent supervision claim. Slip op. at 13-14. Therefore, the Court determined that the jury was unable to decide the actual issues before it (1) because the jury was given a scope of employment instruction, (2) because of the confused fashion in which the case was argued, and (3) because in answering two jury questions, the trial court advised the jury that to hold Meteor liable, it must find that Durand was in the scope of his employment. Slip op. at 14. This confusion and uncertainty resulted in the Court of Appeals remanding the negligent supervision claim for a new trial, and therefore it did not reach the punitive damages issue. Slip op. at 15. Meteor did not cross-appeal.

{5} After granting Gutierrez's petition for writ of certiorari regarding the dram shop claim, we conclude that (1) identification of the server was not essential, and (2) the circumstantial evidence in this case was sufficient for a jury to find that it was reasonably apparent to Meteor that Durand was intoxicated at the time he was last served alcohol. Regarding the negligent supervision claim, although the pleadings in this case are not a model of clarity, the trial court did not err in holding that Meteor was on notice that the negligent supervision claim included Durand as an employee. In addition, scope of employment may be a factor in a negligent supervision claim; both Gutierrez and Meteor requested a scope of employment instruction and agreed with the trial court's answers to the jury questions regarding that instruction. As a result, this error was invited, and the trial court did not abuse its discretion in rejecting Meteor's motion for a new trial. We therefore reverse the Court of Appeals and remand to that Court to address the issue regarding punitive damages.

I. PLAINTIFFS PRESENTED ENOUGH EVIDENCE UNDER THE DRAM SHOP LIABILITY ACT FOR THE JURY TO REASONABLY FIND THAT IT WAS "REASONABLY APPARENT" TO DURAND'S SERVER THAT DURAND WAS INTOXICATED AT THE TIME OF SERVICE.

{6} To establish a defendant's liability under the New Mexico Dram Shop Liability Act, a

plaintiff must prove that the defendant licensee "(1) sold or served alcohol to a person who was intoxicated; (2) it was reasonably apparent to the licensee that the [patron] . . . was intoxicated; and (3) the licensee knew from the circumstances that the [patron] . . . was intoxicated." Section 41-11-1(A). The issue before us is whether, after viewing the evidence in the light most favorable to the jury verdict, we are convinced that the verdict cannot be sustained either by the evidence or reasonable inferences therefrom. *Gonzales v. New Mexico Dep't of Health*, 2000-NMSC-029, ¶ 18, 129 N.M. 586, 11 P.3d 550.

{7} Meteor contends that there is no evidence to support a finding that it was reasonably apparent to its employee-server that Durand was intoxicated at the time he was served. The Court of Appeals agreed. *Gutierrez*, No. 28,799, slip op. at 17. Initially the Court of Appeals acknowledged that a reasonable jury could find that Meteor's employees sold alcohol to Durand when Durand was intoxicated, and based on both the circumstances and Durand's history of alcoholism, it was reasonably apparent to Meteor's employees at the time they sold alcohol to Durand that he was intoxicated. Slip op. at 16. However, despite this acknowledgment, the Court of Appeals, applying a de novo standard of review, slip op. at 7, reversed the district court because "there [was] no evidence in the record regarding who sold the alcohol to Durand and, therefore, no evidence to support a finding that [Meteor] knew that Durand was drunk based on what was reasonably apparent." Slip op. at 17.

{8} We disagree with the Court of Appeals that the identity of the server who actually sold or served alcohol to a patron is a prerequisite to proving dram shop liability. In *Plummer v. Devore*, 114 N.M. 243, 247, 836 P.2d 1264, 1268 (Ct. App. 1992), *overruled on other grounds by State v. Martinez*, 2007-NMSC-025, ¶ 21, 141 N.M. 713, 160 P.3d 894, the Court of Appeals found sufficient evidence to support liability in a dram shop case without looking to the identity of the server. There are two reasons why evidence of who actually served the patron is immaterial: (1) the reasonably-apparent prong is based on an objective standard—not what the actual server subjectively perceived about the patron's level of intoxication; and (2) circumstantial evidence can support a finding of what should have been reasonably apparent to a server regarding whether the patron was intoxicated at the time he or she was served alcohol.

A. The "Reasonably-Apparent" Prong Creates An Objective Standard.

{9} We have consistently interpreted legislation using the adverb "reasonably" as imposing an objective standard. In *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170, we interpreted an "acted reasonably" requirement for self-defense as an objective, rather than subjective, element. Similarly, in *Shull v. New Mexico Potash Corp.*, 111 N.M. 132, 134, 802 P.2d 641, 643 (1990), we contrasted the subjective "good faith" standard with the objective "reasonable" standard. *Accord Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 27-28, 766 P.2d 280, 287-88 (1988) (same). As we explained in *Rudolfo*, 2008-NMSC-036, ¶ 17 (internal quotation marks and citation omitted), "the ['acted reasonably'] requirement is objective in that it focuses on the hypothetical behavior of a reasonable person acting under the same circumstances as the defendant." In *Plummer*, the Court of Appeals applied an objective standard to the reasonably-apparent prong when it concluded that the evidence was sufficient to support a finding that the server, who was unidentified, "knew or should have known" that the patron was intoxicated at the time the patron was sold alcohol. 114 N.M. at 247, 836 P.2d at 1268.

{10} Our interpretation of the reasonably-apparent prong as creating an objective standard is in accord with how other jurisdictions have interpreted similar dram shop act language. In *Becks v. Pierce*, 638 S.E.2d 390 (Ga. Ct. App. 2006), the Georgia Court of Appeals recognized that its dram shop act holds servers liable "if a provider in the exercise of reasonable care should

have known" that the patron was intoxicated. *Id.* at 393 (internal quotation marks and citation omitted). In *Hutchens v. Hankins*, 303 S.E.2d 584 (N.C. Ct. App. 1983), the North Carolina Court of Appeals interpreted its dram shop act to impose liability where the server "knew or should have known that the patron was in an intoxicated condition at the time he or she was served." *Id.* at 594-95. In *Perseus, Inc. v. Canody*, 995 S.W.2d 202, 206-07 (Tex. App. 1999), the Texas Court of Appeals implicitly read its statute's "apparent to the provider" requirement to create an objective test. The *Perseus* court defined "apparent," a term also used in our Dram Shop Liability Act, as "[t]hat which is obvious, evident, or manifest; what appears, or has been made manifest. That which appears to the eye or mind; open to view; plain; patent." *Id.* at 206 (quoting *Black's Law Dictionary* 88 (5th ed. 1979) (internal quotation marks omitted)). The court reasoned that "[i]t is not the actual observation of conduct that makes the conduct 'apparent.' Rather, conduct is apparent when it is visible, evident, and easily observed." *Id.* at 206. The court therefore concluded that the "apparent" language indicated an objective standard. *Id.*

{11} The *Perseus* court explained its rationale for applying an objective standard, as follows:

> Were we to construe the statutory "apparent to the provider" requirement [to be subjective], then a provider of alcohol could always escape liability by merely turning a blind eye to signs of intoxication that are plain, manifest, and open to view. Surely this is not what the Legislature intended when it enacted legislation to hold providers responsible when they serve obviously intoxicated individuals.

Id. The Georgia Supreme Court echoed this same concern in *Riley v. H & H Operations, Inc.*, 436 S.E.2d 659, 661 (Ga. 1993), reasoning that "a construction of [its dram shop act] requiring *actual* knowledge would render the Act an ineffective sanction, since only when the defendant admitted its own knowledge could the plaintiff prevail."

{12} Similarly, in *Miller v. Ochampaugh*, 477 N.W.2d 105, 109 (Mich. Ct. App. 1991), the Michigan Court of Appeals held that Michigan's dram shop act requirement that the intoxication be "apparent to an ordinary observer" was an objective standard. The court reasoned, "had the Legislature wished to create a subjective standard, it could have worded the dramshop act accordingly." *Id.* The *Miller* court also expressed concern that the "adoption of a subjective standard would essentially do away with the dramshop cause of action," noting that a defendant could escape liability if the serving employee simply testified that he or she did not personally observe the patron to be intoxicated. *Id.* We agree and are persuaded that, in New Mexico, the Legislature intended the reasonably-apparent prong to require an objective standard of proof.

B. Plaintiffs May Rely on Circumstantial Evidence other Than Evidence at the Time of Service to Prove what was Reasonably Apparent to the Server.

{13} Although Meteor acknowledges that circumstantial evidence may support a finding under the reasonably-apparent prong, it contends that the circumstantial evidence must be from witnesses who were present at the time of service. Meteor does not cite case law to support this argument; instead it advances a policy argument that "the use of circumstantial evidence could be stretched to the point that evidence that is remote in either time or place could be used to find a licensee liable." We disagree. Again, the Court of Appeals opinion in *Plummer* is instructive. In *Plummer*, the Court of Appeals found sufficient evidence to support a finding under the reasonably-apparent prong, despite the lack of evidence from witnesses who were present at the time the patron was served alcohol. 114 N.M. at 247, 836 P.2d at 1268. The evidence in *Plummer* consisted of testimony from the patron regarding the length of time he was present at the bar, the results of a Breathalyzer test, and expert testimony interpreting the results of the test. *Id.*

{14} Other states with similar dram shop acts allow circumstantial evidence to be used to prove what the server should have known of the patron's intoxication. In *Kish v. Farley*, 24 A.D.3d 1198 (N.Y. App. Div. 2005), New York's intermediate appellate court explicitly addressed this issue. It stated that "visible intoxication may be established by circumstantial evidence," *id.* at 1200, and that no "direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the alcohol was served" is required, *id.* (internal quotation marks and citation omitted). *See also Perseus*, 995 S.W.2d at 206-07 (holding that proof that the server actually witnessed the drunken behavior was not required).

{15} Applying this principle, in *Cadillac Cowboy, Inc. v. Jackson*, 69 S.W.3d 383, 389-90 (Ark. 2002), the Arkansas Supreme Court found sufficient evidence that the patron was visibly intoxicated at the time of service, based on evidence that the patron consumed several beers before going to a club, followed by consuming at least one mixed drink at the club, combined with a police officer's testimony that the patron appeared intoxicated at the accident scene. Similarly, in *Studer v. Veterans of Foreign Wars Post 3767*, 925 N.E.2d 629, 637 (Ohio Ct. App. 2009), the Ohio Court of Appeals found a genuine issue of material fact as to what was apparent to the server based on several pieces of circumstantial evidence: the patron had consumed four beers before arriving at the serving bar; he had then consumed nine beers at the bar; he was a regular at the bar in question; bar employees had many chances to observe the patron at the bar; he appeared drunk at the time of his arrest shortly after the car accident following service; and he had a blood alcohol content well over the legal limit.

{16} In permitting the plaintiff to rely on circumstantial evidence that the patron's intoxication was obvious at the time of service, the *Studer* court reasoned:

> [I]t is logical to presume that a liquor permit holder, or its employee(s), may never make the admission that they continued to serve a person after that person exhibited signs of intoxication. For a liquor permit holder to make such an admission would be to concede liability on his behalf. Thus, the only way for a third party injured by an intoxicated person to substantiate his claim against the liquor permit holder would be by use of circumstantial evidence.

Id. at 636-37 (internal quotation marks and citation omitted). In summary, because the reasonably-apparent prong in the Dram Shop Liability Act is based on an objective standard, and because circumstantial evidence at a time other than the time of service may be sufficient to prove what a server should have known regarding the level of the patron's intoxication at the time the patron was served, the identity of the server is not essential. We next turn to the evidence in this case to determine whether the evidence was sufficient for the jury to find Meteor liable to Gutierrez under the Dram Shop Liability Act.

C. Plaintiffs Presented Sufficient Evidence Under the "Reasonably-Apparent" Prong.

{17} In assessing the sufficiency of the evidence, we review for substantial evidence. *See Weststar Mortg. Corp. v. Jackson*, 2003-NMSC-002, ¶ 8, 133 N.M. 114, 61 P.3d 823. "In reviewing the jury verdict for substantial evidence, we examine the record for relevant evidence such that a reasonable mind might accept as adequate to support a conclusion," viewing the facts in the light most favorable to the verdict. *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 10, 136 N.M. 647, 103 P.3d 571 (internal quotation marks and citations omitted).

{18} Meteor contends that the only testimony regarding Durand's appearance at the time of sale was Durand's own testimony that he did not think he appeared drunk when he was last sold a

beer by Meteor. Durand testified at his deposition that he was not intoxicated at the time Meteor employees sold him beer on the day of the accident, but later stipulated that he was intoxicated at the time Meteor employees sold him the beer that same day. He also testified that Meteor's employees knew that he was drinking while working on August 31, 2003, because sometimes one of the employees would ask him for a drink. Durand believed that he could not have appeared intoxicated, boasting that he could still walk straight, and that in the past he would drink 18-20 beers and then drive to buy more beer. However, other evidence at trial calls into question Durand's self-assessment.

{19} The manager admitted that Durand's alcoholism was "pretty well-known" among Meteor employees. The manager also testified that Durand, a daily patron who also worked there, was usually visibly intoxicated by 3:00 p.m. Durand testified that the Meteor place of business is the only place he bought his beer. *See Studer*, 925 N.E.2d at 637 (noting that "[s]ignificantly, [the patron] was a regular at the . . . [bar] and admitted to consuming about eight beers per day"). Durand testified that the store's employees who were working on the day of the accident knew that when he purchased beer he was working and that he had been drinking all day long, because they observed him doing so. *See Plummer*, 114 N.M. at 247, 836 P.2d at 1268 (relying in part on the length of time that the patron spent at the bar); *Studer*, 925 N.E.2d at 637 (finding relevant that the servers had plenty of opportunities to observe the patron while on the premises).

{20} Moreover, Durand admitted that he drank seven twelve-ounce cans of beer and one twenty-four-ounce can of malt liquor, which has a higher alcohol content than regular beer, while he was at the Meteor business establishment. *See Plummer*, 114 N.M. at 247, 836 P.2d at 1268 (relying in part on the quantity of alcohol that the patron had consumed before the relevant service). Approximately one hour after Durand left Meteor, he crashed into Gutierrez. Officer Richard Castillo, who investigated the accident, testified that Durand's appearance indicated that Durand was intoxicated. He further testified that Durand's speech was slurred and his eyes were bloodshot. When Officer Castillo administered field sobriety tests to Durand, Durand was unable to complete the tests as instructed. Durand swayed heavily from side to side and missed the tip of his nose when he was asked to touch it with his forefinger. *See Studer*, 925 N.E.2d at 637 (an officer's observation of the patron at the accident scene was relevant to the patron's drunken state at the earlier time of service). Five hours after the accident and six hours after he was sold his last beer by Meteor, Durand's blood alcohol level was 0.09 gms/100 ml. *See Plummer*, 114 N.M. at 247, 836 P.2d at 1268 (relying in part on the patron's blood alcohol level). All of this circumstantial evidence was sufficient to support a jury finding that Durand was intoxicated at the time Meteor employees sold him beer and that it was reasonably apparent that he was intoxicated. Although Durand attributed his dangerous driving and poor performance on field sobriety tests to his consumption of illegal drugs minutes before the accident, the jury was free to reject this testimony.

II. BECAUSE BOTH PARTIES REQUESTED INSTRUCTIONS ON SCOPE OF EMPLOYMENT AND AGREED WITH THE COURT'S ANSWERS TO JURY QUESTIONS REGARDING SCOPE OF EMPLOYMENT, FUNDAMENTAL ERROR DOES NOT WARRANT A REMAND FOR A NEW TRIAL.

{21} The Court of Appeals remanded the negligent supervision claim for a new trial for three reasons. First, it was not clear in either the pleadings or during trial that Gutierrez contended that Meteor was negligent in hiring, supervising, and retaining Durand. *Gutierrez*, No. 28,799, slip op. at 8. Second, the Court of Appeals disagreed with the trial court that if the scope of employment instruction was given in error, it was not fundamental error. Slip op. at 14. Third, because scope of employment was not an issue in this case, the jury was misdirected. Slip op. at 14-15.

{22} The Court of Appeals recognized that Meteor never objected to either of these jury instructions or counsel's arguments. Slip op. at 10-11. However, the Court decided that these errors, in sum, "created an environment in which the jury would have been unable to fairly determine the actual issues before it," and cited to a case reviewing unpreserved jury instruction error for fundamental error. Slip op. at 14.

{23} Gutierrez contends that the Court of Appeals was wrong to remand this case for a new trial under the fundamental error doctrine because this doctrine does not apply in civil cases and, in any event, because Meteor actively advocated for the instructions, there was no fundamental error. Meteor did not appeal the Court of Appeals' remand of the negligent supervision claim for a new trial. However, Meteor defends the Court of Appeals' remand, arguing that the Court did not rely on fundamental error because Meteor preserved all of the issues considered by the trial court, and the Court of Appeals was correct to conclude after a de novo review that the jury was confused or misdirected by the jury instruction on scope of employment. As part of this argument, Meteor contends that it did not have notice that Gutierrez alleged that Durand was one of the employees whom Meteor negligently supervised. *See Gutierrez*, No. 28,799, slip op. at 8, 10-12.

{24} Regarding the notice issue, we acknowledge that the pleadings in this case did not expressly list Durand as an employee whom Meteor negligently hired, supervised, or retained. In the pretrial order, which governed the proceedings, Gutierrez alleged that Meteor "negligently hired, trained, supervised, and retained [Nena] Brackeen, John Brackeen, and other employees and agents." Although it would have been a simple matter to name Durand as one of the "other employees," we agree with the trial court that the claim was "sufficiently pled [and] factually presented." The evidence during trial from witnesses and transcripts of depositions preserved for use during trial was primarily focused on Meteor's hiring and supervision of Durand. The evidence developed by Gutierrez was that the employees knew that Durand was an alcoholic, he consumed alcohol while performing work for Meteor, he was served alcohol while he worked, and he drove away from work after having consumed alcohol. Although the pleadings were imperfect, as was the trial of this case, Meteor had sufficient notice that Durand was the focus of Gutierrez's negligent supervision claim. In any event, Meteor has neither argued nor demonstrated any prejudice as a result of the negligent supervision claim being submitted to the jury. The trial court did not abuse its discretion when it allowed the claim of negligent supervision of Durand to go to the jury. *See Bellet v. Grynberg*, 114 N.M. 690, 692, 845 P.2d 784, 786 (1992) (no abuse of discretion in allowing a claim that was not well-pled unless the defendant did not have a fair opportunity to defend against the claim, creating prejudice).

{25} The more complicated issue concerns the scope of employment instruction that was given to the jury. Generally when a plaintiff seeks to hold an employer vicariously liable for the negligence of its employees, whether the employees' negligence occurred in the scope of their employment may be at issue. *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 40, 142 N.M. 583, 168 P.3d 155. However, even when an employee is alleged to have negligently caused injury to a plaintiff outside the employee's scope of employment, scope of employment may still be a factor for the jury to consider under a negligent hiring, supervision, or retention claim. *Id*.

{26} In this case, Gutierrez and Meteor each prepared a scope of employment instruction to be submitted to the jury. While the parties and the trial court were settling the jury instruction on the negligent supervision claim, the trial judge suggested that the parties needed to define the employer-employee relationship in the body of the negligent supervision instruction. Meteor's attorney advised the trial court that he also wanted to define scope of employment for the jury at that point in the instructions.

{27} Gutierrez's attorney indicated that he had the scope of employment instruction in his

package of proposed instructions. Meteor's attorney next persuaded the trial court to modify the scope of employment instruction to specify that "Defendant Dean Durand's acts of smoking crack cocaine and injecting heroin were not within the scope of his employment." However, this was not without objection from Gutierrez, who contended that the revision of the standard uniform jury instruction seems to "completely negate the idea that anything Dean Durand does would be within the scope of employment." Thus, Gutierrez suggested that if the language proposed by Meteor were added, the trial court should also add that "[d]rinking alcohol and being served alcohol is within the course and scope of employment." Meteor responded, "[w]ell, that's a fact issue for the jury." Although the parties did not describe for the trial court the specifics of why they wanted a scope of employment instruction, they both wanted the instruction. Meteor appeared to believe that the instruction was significant on the issue of Durand drinking on the job. As we have indicated, scope of employment may be a factor for the jury to consider in a negligent supervision case. *Lessard*, 2007-NMCA-122, ¶ 40. How the parties thought that scope of employment might be a factor for the jury was not revealed to the trial court, but what is clear is that both parties wanted a scope of employment instruction. The trial court rejected Gutierrez's scope of employment instruction by modifying it at Meteor's request.

{28} During its deliberations, the jury asked two questions related to the scope of employment instruction. First, it asked whether, in order to find Meteor liable, it had to find both that Durand was an employee of Meteor and that he was "acting within the scope of his employment at the time of the occurrence." The trial court responded, with the consent of all parties, that both elements needed to be proven to find Meteor liable under the claim for negligent supervision. Second, the jury asked whether it could assess punitive damages if it found that Durand was an employee but was not acting in the scope of employment at the time of the occurrence. The trial court again responded, with the consent of all parties, that the jury could not assess punitive damages against Meteor if they found that Durand was not acting in the scope of his employment at the time of the occurrence.

{29} After the jury returned its verdict, Meteor moved for judgment as a matter of law notwithstanding the verdict and for a new trial. In this motion, Meteor did not challenge either the scope of employment instruction or the employer liability jury instruction, but rather insisted that these jury instructions were "the law of the case," quoting *Payne v. Hall*, 2004-NMCA-113, ¶ 18, 136 N.M. 380, 98 P.3d 1030. Meteor capitalized on these instructions to urge the trial court to conclude that there was insufficient evidence to support the jury's verdict.

{30} It was not until the hearing on Meteor's motion for judgment as a matter of law that Meteor first contended that the scope of employment instruction should not have been given. Meteor argued that the scope of employment instruction mixed vicarious liability and direct liability for negligent hiring and "may have colored the whole jury deliberations." Meteor went on to argue that there was no evidence that Durand was in the scope of his employment at the time of the accident. The trial court replied that the argument was that "the scope of his employment was getting drunk and his employer letting him get drunk and then leaving and putting the public at risk." Meteor disagreed with the trial court's interpretation.

{31} The post-trial objection to the scope of employment instruction is not sufficient for Meteor to have preserved this error. *See Kelly v. La Cueva Ranch Co.*, 25 N.M. 674, 678, 187 P. 547, 548 (1920) ("It is not the function of a motion for a new trial to raise propositions not raised in the progress of the cause."). The time to object to the scope of employment instruction was at the time it was tendered, not in a post-trial motion. *See Williams v. Town of Silver City*, 84 N.M. 279, 281, 502 P.2d 304, 306 (Ct. App. 1972) (applying the principle that issues not raised until the judgment notwithstanding the verdict are "too late to be the subject of review"). Meteor cannot have it both ways. By requesting the scope of employment instruction and then insisting post-trial that

it was the law of the case, Meteor endorsed the instruction. Meteor's post-trial argument that the scope of employment instruction should not have been given was simply too late.

{32} Therefore, because Meteor did not object to the instruction before it went to the jury, we agree with Gutierrez that the Court of Appeals had to have remanded the case for a new trial based on fundamental error. The fundamental error doctrine provides that a court may remand for a new trial where an error is so fundamental that it puts the jury's verdict into grave doubt. *See State v. Reyes*, 2002-NMSC-024, ¶¶ 41-42, 132 N.M. 576, 52 P.3d 948, *abrogated on other grounds by Allen v. LeMaster*, 2012-NMSC-001, ¶ 36, ___ N.M. ___, ___ P.3d ___. The fundamental error doctrine is codified in Rule 12-216(B)(2) of the Rules of Appellate Procedure, which provides: "This rule shall not preclude the appellate court from considering . . . in its discretion, questions involving . . . (2) fundamental error. . . ." There is nothing in the rule's text to indicate that this discretion is confined only to criminal cases.

{33} However, this Court has applied the doctrine in civil cases under the most extraordinary and limited circumstances. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶¶ 19, 20, 150 N.M. 398, 259 P.3d 803; *Payne*, 2006-NMSC-029, ¶¶ 37-38. In *Payne*, a successive tortfeasor claim that was relatively new to New Mexico jurisprudence, the plaintiff argued on appeal that the jury was confused about what law to apply, based on instructions to which she had not objected at trial. 2006-NMSC-029, ¶¶ 8-9, 31. This Court agreed that the instructions at issue "were particularly likely to confuse the jury." *Id.* ¶ 35. We recognized that the plaintiff had in fact suggested some of the offending instructions, and noted that we usually do not "grant a new trial if the original error was the fault of the complaining party." *Id.* ¶ 37. However, because the case was unique in that at the time of the trial, there were no uniform jury instructions for successor tortfeasor cases, and there was very little case law on the subject, which was in flux, we remanded for a new trial. *Id*. ¶ 38.

{34} Here, unlike in *Payne*, while no uniform jury instruction on negligent hiring existed at the time of trial, *see* UJI 13-1647 NMRA Use Note (adopted December 3, 2010), well-established case law laying out the elements of negligent hiring did exist. *See Valdez v. Warner*, 106 N.M. 305, 307-08, 742 P.2d 517, 519-20 (Ct. App. 1987) (describing the standard for negligent hiring); *see also Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶¶ 10, 22-24, 137 N.M. 64, 107 P.3d 504 (discussing causation in the negligent hiring context); *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 729, 688 P.2d 333, 339 (Ct. App. 1984) (recognizing that a showing of "scope of employment" is unnecessary under a negligent hiring theory). Because Meteor invited jury instruction error in the face of established case law on this issue, it would be improper to reward Meteor with a new trial based on these errors. Allowing a party "to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice." *State v. Collins*, 2007-NMCA-106, ¶ 27, 142 N.M. 419, 166 P.3d 480 (internal quotation marks and citation omitted).

{35} As a final note, even if it were error, we doubt that this error was fundamental, because a finding of "scope of employment" was consistent with a finding of causation under the negligent supervision theory. The trial court adopted this analysis below, finding that this jury instruction error was not fundamental, but rather harmless, because the "scope of employment" instruction could "be reconciled with all of the factual requirements" under the negligent supervision claim.

III. CONCLUSION.

{36} Because the Court of Appeals erred both in reversing the jury verdict under the Dram Shop Liability Act and in granting a new trial under Plaintiffs' negligent supervision claim, the Court of Appeals is reversed and this case is remanded to the Court of Appeals to consider the issue regarding punitive damages.

{37} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-006

Filing Date: February 21, 2012

Docket No. 33,386

ANTONIO MAESTAS and BRIAN FRANKLIN EGOLF, JR., members of the New Mexico House of Representatives, and JUNE LORENZO, ALVIN WARREN, ELOISE GIFT and HENRY OCHOA,

Petitioners,

v.

HON. JAMES A. HALL, District Judge Pro Tempore of the First Judicial District Court,

Respondent,

and

SUSANA MARTINEZ, in her capacity as Governor of New Mexico, et al.,

Real Parties in Interest,

and

MAURILIO CASTRO, BRIAN FRANKLIN EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY and ROXANE SPRUCE BLY, PUEBLO OF LAGUNA, PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF ZUNI, PUEBLO OF SANTA ANA, PUEBLO OF ISLETA, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA and LEON REVAL, NAVAJO NATION, LORENZO BATES, DUANE H. YAZZIE, RODGER MARTINEZ, KIMMETH YAZZIE and ANGELA BARNEY NEZ,

Intervenors.

Consolidated with:

Docket No. 33,387

TIMOTHY Z. JENNINGS, in his official capacity as President Pro Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners,

v.

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her capacity as New Mexico Governor, and JOHN A. SANCHEZ in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate,

Real Parties in Interest,

and

JONATHAN SENA, DON BRATTON, CARROLL LEAVELL, GAY KERNAN, CONRAD JAMES, DEVON DAY, MARGE TEAGUE, MONICA YOUNGBLOOD, JUDY MCKINNEY, JOHN RYAN, MAURILIO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY and ROXANE SPRUCE BLY, PUEBLO OF LAGUNA,

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OPINION

CHÁVEZ, Justice.

{1} One of the most precious personal rights in a free society is the right to vote for the candidate of one's choice. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote is the essence of our country's democracy, and therefore the dilution of that right strikes at the heart of representative government. The idea that every voter must be equal to every other voter when casting a ballot has its genesis in the Equal Protection Clause, U.S. Const. amend. XIV, § 1 (Equal Protection Clause), and is commonly referred to as the "one person, one vote" doctrine. As stated by the United States Supreme Court in the seminal case of *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), "[b]y holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Therefore, when it comes to preserving an adult citizen's right to vote, there is no more important task for the Legislature and the Governor to perform than the decennial reapportionment of districts for state and national elective offices.

{2} At issue in this case is the apportionment of the New Mexico House of Representatives following the 2010 federal census. It is undisputed that the House of Representatives at this time is unconstitutionally apportioned. The Legislature passed House Bill 39, which reapportioned the House, during the 2011 Special Session. Governor Susana Martinez vetoed House Bill 39.[1] Because the lawmaking process failed to create constitutionally-acceptable districts, the burden fell on the

[1] The Legislature was unable to pass reapportionment legislation relating to the Congress. Governor Martinez vetoed legislation reapportioning the Public Regulation Commission and the state Senate. The district court's decision regarding these elective offices is not challenged.

judiciary to draw a reapportionment map for the House. To accomplish this we designated retired District Judge James Hall, a hard-working jurist with an impeccable reputation for both fairness and impartiality, to assume this arduous undertaking.

{3} After eight days of testimony and the submission of numerous reapportionment maps by the parties, the district court adopted, in part, the third alternative plan submitted by the attorneys representing Governor Martinez and Lieutenant Governor John Sanchez (Executive Alternative Plan 3). Petitioners filed petitions for a writ of superintending control asking this Court to assume jurisdiction over the case. Petitioners asked this Court to either reverse the district court and adopt an alternative plan or remand the case with instructions regarding the legal standards that the district court should apply. Petitioners argued that the district court incorrectly applied the law for reapportionment (1) by not protecting against the dilution of minority voting rights under the Voting Rights Act; (2) by prioritizing the smallest deviations from ideal population equality over the traditional redistricting principles; and (3) by selecting a partisan plan. In addition, Petitioners raised issues such as due process and separation of powers that were addressed in an order we entered on February 10, 2012, or that are otherwise deemed to be without merit.

{4} We granted Petitioners' requests for writs of superintending control by assuming jurisdiction in this matter and established an extremely expedited briefing schedule designed to permit this Court to conduct oral argument and issue a decision forthwith in an effort not to delay the House elections. Before this year this Court had never been asked to decide the legal principles that would govern our courts when they draw reapportionment maps. After reading the parties' briefs and listening to oral argument, we entered an order articulating the legal principles that should govern redistricting litigation in New Mexico and remanded the case to the district court for further proceedings consistent with the order.

BACKGROUND AND PROCEDURAL HISTORY

{5} The House of Representatives must be composed of seventy members elected from single-member districts that are contiguous and as compact as is practicable and possible. N.M. Const. art. IV, § 3(C); NMSA 1978, § 2-7C-3 (1991). The 2010 federal census indicates that the population in New Mexico is 2,059,179 people, an increase of 13.2 percent over the population documented by the 2000 census. *Profile of General Characteristics for the United States*, United States Census Bureau (2010). The ideal House district population, under the one person, one vote principle, would be 29,417 people. The current House districts deviate from the ideal population with percent deviations ranging from negative 24.3 to a positive 100.9, for a total deviation range of 125.2 percent. The population in West Albuquerque and Rio Rancho indicate that these areas combined can support three additional house districts. Slower growth in North Central New Mexico, Southeastern New Mexico, and Central Albuquerque indicate that these areas each currently have one district too many.

{6} The need to reapportion elected offices in the New Mexico House of Representatives is readily apparent from the above summary of population growth and shifts. The Legislature has the responsibility to reapportion its membership. *See* N.M. Const. art. IV, § 3(D). The bipartisan New Mexico Legislative Council unanimously adopted "Guidelines for the Development of State and Congressional Redistricting Plans" and formed a bipartisan Interim Redistricting Committee to prepare to fulfill the Legislature's constitutional responsibility. The Interim Redistricting Committee developed redistricting plans and invited public input regarding the plans so as to make recommendations to the Legislature in advance of the September 6, 2011 Special Session called by Governor Martinez.

{7} During the summer of 2011, the Interim Redistricting Committee held public hearings throughout New Mexico and gathered input from citizens and special interest groups. Possible

redistricting plans were presented to the public for their input. Demographer Brian Sanderoff and his company, Research & Polling, Inc., worked with Republican and Democrat legislators to create plans requested by individual legislators or their caucuses. A common theme expressed by citizens during these hearings was their desire to keep their municipalities and communities unified so that their representatives would better represent their interests and values. The Native American leadership fully participated in the public meetings and worked closely with the Legislature throughout the process to convey their concerns and preferences for Native American voting districts. The Native American leaders also attempted to communicate with the Governor's Office both prior to and during the Special Session to convey their preferences, but they did not receive a response.

{8} During the entire legislative process, including the Special Session, over 200 redistricting plans were drafted by Research & Polling. Many of those plans were introduced during the Special Session and debated in committee and on the floor of both legislative chambers. No redistricting plan introduced during the Special Session was identified as proposed or approved by Governor Martinez. House Bill 39, which reapportioned the House, passed both the House and the Senate without a single Republican vote in favor of the bill. Governor Martinez later vetoed the bill.

{9} Numerous complaints by various parties were filed in different state district courts challenging the constitutionality of the current distribution of voters under the State and Congressional maps. We found it appropriate to exercise our superintending control because this is not the first time New Mexico courts have been imposed upon to reapportion political maps. *See Jepsen v. Vigil-Giron*, No. D-0101-CV-02177 (N.M. D. Ct. January 24, 2002). We consolidated all of the cases and appointed retired District Judge James Hall to preside over the redistricting litigation.

{10} During the trial, the district court was initially presented with six complete House redistricting plans: (1) the Legislative Plan passed by the Legislature as House Bill 39; (2) the Executive Plan; (3) the James Plan; (4) the Sena Plan; (5) the Egolf Plan; and (6) the Maestas Plan. The Multi-Tribal/Navajo Nation plaintiffs also submitted partial plans to address the concerns of the Native American population in New Mexico. As the trial progressed, nine additional plans were tendered by certain parties, some to address criticisms raised during the testimony of various witnesses and others to respond to the district court's request. In addition to numerous lay witnesses, seven expert witnesses, some demographers and other political scientists, testified in favor of and in opposition to certain maps.

{11} The executive plaintiffs tendered Executive Alternative Plan 3, which was adopted in part by the district court, into evidence on the last day of testimony. The Governor's demographer who drew the plan was not available to testify. In addition, other expert witnesses who had previously introduced methodologies for assessing the partisan performance of plans and compliance with historic state policies were also not available to testify. Brian Sanderoff, the earlier-mentioned demographer, who had assisted legislators from all parties to prepare redistricting maps, testified about Executive Alternative Plan 3. He noted that the plan had significant partisan performance changes and that the plan could have been drawn without such significant changes.

{12} The district court entered detailed findings of fact and conclusions of law rejecting the Legislative Plan and other plans submitted by the parties. The Legislative Plan was rejected because it systematically left North Central and Southeastern New Mexico underpopulated, which diluted the votes of the persons in the more populated areas of the state: specifically West Albuquerque, Rio Rancho, and Doña Ana County. An overriding, related concern was the Legislative Plan's failure to consolidate a district in North Central New Mexico. The district court rejected another proposed plan because of "significant partisan bias." It rejected one plan

because of "highly partisan incumbent pairings" and another plan because of the pairing of "the only Republican incumbent in north central New Mexico with a Democratic incumbent and splits Los Alamos [from] White Rock." Other plans were rejected because of the failure "to establish Native American districts as contained in the Multi-Tribal/Navajo Nation Plan under the Voting Rights Act."

{13} The district court adopted Executive Alternative Plan 3, with a minor modification, because it found that the plan prioritized low population deviations between districts, adhered to the requirements of the Voting Rights Act, and reasonably satisfied secondary reapportionment policies. The district court acknowledged that Executive Alternative Plan 3 impacted partisan performance measures, but determined that because all of the plans had some partisan effect, it was compelled not to allow partisan considerations to control the outcome of its decision.

GOVERNING PRINCIPLES

{14} Our review of whether the district court applied the correct legal standards in selecting a redistricting plan is de novo. *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶ 6, ___ N.M. ___, ___ P.3d ___. As mentioned earlier, the "one person, one vote" doctrine applied by the United States Supreme Court in *Reynolds*, 377 U.S. at 558 (internal quotation marks and citation omitted), is grounded in the Equal Protection Clause. This doctrine prohibits the dilution of individual voting power by means of state districting plans that allocate legislative seats to districts of unequal populations, thereby diminishing the relative voting strength of each voter in overpopulated districts. While the United States Supreme Court has held that population equality is the paramount objective of apportionment for congressional districts, *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983), state legislative district plans require only "*substantial*" population equality, *see Gaffney v. Cummings*, 412 U.S. 735, 748 (1973). According to the results of the 2010 census, ideal population equality among each of the seventy House Districts in New Mexico would be 29,417 persons. However, such mathematical precision is not mandated by the Equal Protection Clause. *See Reynolds*, 377 U.S. at 577. Adherence to the requirements of the Voting Rights Act is essential, and justifiable considerations, such as incorporating legitimate and rational state policies relevant to our representative form of government, may result in deviations from ideal population equality. *See id.* at 577-81.

VOTING RIGHTS ACT

{15} Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, prohibits any State or political subdivision from imposing any electoral practice "which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). If districts are drawn in such a way that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive, geographically insular minority group of sufficient size, those districts will not be in compliance with Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). The *Gingles* Court defined three threshold conditions for establishing a Section 2 violation. "[T]he minority group must be able to demonstrate [(1)] that it is sufficiently large and geographically compact to constitute a majority in a single-member district[; (2)] that it is politically cohesive[; and (3)] that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* at 50-51 (footnotes omitted). If these three preconditions are established, then a violation of Section 1973(a) of the Voting Rights Act occurs if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

{16} The essential inquiry is whether, as a result of the way the districts are structured, the protected minority group does "not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44 (internal quotation marks and citation omitted). Relevant to this essential inquiry are the non-exclusive factors set forth in the Senate Report on the 1982 amendments to the Voting Rights Act, which include

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . ; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value.

Gingles, 478 U.S. at 44-45 (citing S. Rep. No. 97-417 (1982), at 28-29, U.S. Code Cong. & Admin. News 1982, at 205-07).

{17} For the purposes of Section 2 of the Voting Rights Act, only eligible voters affect a group's opportunity to elect candidates. Therefore, the question is whether the minority group has a citizen voting-age majority in the district. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427-29 (2006). Also under Section 2, because the injury is vote dilution, the *Gingles* compactness inquiry considers "the compactness of the minority population, not . . . the compactness of the contested district." *Bush v. Vera*, 517 U.S. 952, 997 (Kennedy, J., concurring) (referring to *Gingles*, 478 U.S. 30). A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.* at 979. Section 2 compactness should take into consideration "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* at 977; *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993) (reasoning that traditional districting principles "are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines").

{18} In this case, the district court's Findings of Fact 42 through 60 support adopting the Multi-Tribal/Navajo Nation partial plan. These findings by the district court have not been challenged on appeal, and therefore any redistricting plan must contain the Multi-Tribal/Navajo Nation partial plan.

{19} The Egolf petitioners, however, have raised the issue of whether the district court applied the correct legal standard to its analysis of the Hispanic community in and around Clovis, New Mexico. The district court found that "[t]he Hispanic community in and around Clovis is sufficiently large and geographically compact to constitute a majority in a single-member district," that the community "is politically cohesive," and that "Anglos in the area vote sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate."

{20} A federal three-judge panel had previously found a detailed history of racial and ethnic discrimination affecting the Clovis minority population. *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984). That panel found a violation of federal law and redrew House District 63 to include compact and politically cohesive Clovis minorities and make the district a performing,

effective, majority-minority district. *Id*. "Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Although House District 63 was reshaped in the *Jepsen* court-ordered redistricting plan, it remains an effective majority-minority district. In the present trial, there was no evidence to establish that the relevant population had materially changed so as to no longer require an effective majority-minority district. Therefore, the same considerations that led to a redrawing of House District 63 in 1984 continue to be relevant to the history of voting-related discrimination in this area. As a result, on remand the district court should determine whether the relevant population is an effective Hispanic citizen voting-age population. Any redistricting plan ultimately adopted by the district court should maintain an effective majority-minority district in and around the Clovis area unless specific findings are made based on the record before the district court that Section 2 Voting Rights Act considerations are no longer warranted.

MINOR DEVIATIONS BASED ON LEGITIMATE AND RATIONAL STATE POLICY ARE PERMISSIBLE

{21} Although ideal population equality and whether a plan dilutes the vote of any racial minority are primary considerations in drawing a districting map, minor deviations from absolute population equality are tolerated to permit states to pursue legitimate and rational state policies relevant to our representative government. *See Mahan v. Howell*, 410 U.S. 315, 321-22 (1973) (recognizing that more flexibility is constitutionally permissible with respect to state legislative reapportionment than in congressional reapportionment). We interpret the United States Supreme Court to require courts to consider "the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973). Adhering to state policies is a way in which courts can give effect to the will of the majority of the people. *Preisler v. Secretary of State*, 341 F. Supp. 1158, 1161-62 (D.C. Mo. 1972).

{22} Because the promotion of legitimate and rational state policies will often necessitate "minor deviations" from absolute population equality, the United States Supreme Court has held that such minor deviations alone are insufficient to establish a prima facie case of invidious discrimination. *Voinovich*, 507 U.S. at 161. So what constitutes a minor deviation? In *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the United States Supreme Court held that redistricting plans with a maximum population deviation below ten percent fall within the category of minor deviations that are insufficient to establish a prima facie violation of the Equal Protection Clause.

{23} The following methodology is used to calculate deviation percentages. First, the population deviation of a district is the percentage by which a district's population is above or below the ideal population. The ideal population is determined by dividing the total population by the total number of districts in the state. "Total deviation" is determined by adding the absolute deviation of the district with the largest population to the absolute deviation of the district with the smallest population. The total deviation can also be thought of as the range of population deviations.

{24} If ten percent is the maximum allowable deviation, then a legislative plan with five percent deviations or less in each district will be prima facie constitutional because the total absolute deviation will not exceed ten percent. Conversely, legislative plans with a total population deviation greater than ten percent are prima facie unconstitutional. *See Brown*, 462 U.S. at 842-43. The New Mexico State Legislature has declared it to be state policy not to consider a redistricting plan that includes any district with a total population that deviates more than plus or minus five

percent from ideal. Thus, no district may contain a population that deviates more than plus or minus 1,470 persons from the ideal population of 29,417.

{25} However, simply because a plan has minor deviations that are prima facie constitutional does not mean that such plans are immune from judicial challenge. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1340-41 (N.D. Ga. 2004) (rejecting Georgia's redistricting plans for its state legislature, although the plans contained maximum deviations under ten percent). An equal protection challenge will lie "if the plaintiff can present compelling evidence that the drafters of the plan used illegitimate reasons for population disparities and created the deviations *solely* to benefit certain regions at the expense of others." *See Legislative Redistricting Cases*, 629 A.2d 646, 657 (Md. 1993).

{26} Yet plans with prima facie constitutional ten-percent deviations are plans drawn by a legislature that have become law. In contrast to legislatively-drawn plans, court-drawn plans are held to a higher standard, and "must ordinarily achieve the goal of population equality with little more than de minimus variation." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). The United States Supreme Court has not defined what constitutes de minimus variations for a court-drawn plan.[2] However, unlike a legislative body that does not have to articulate the policy reasons for minor deviations from ideal population equality, unless the range of deviations exceeds ten percent, a court must enunciate the historically significant state policy or unique features that it relies upon to justify deviations from ideal population equality. *Connor v. Finch*, 431 U.S. 407, 419-20 (1977).

[2] Deviations in court-drawn maps have varied with some in the range of five to ten percent. *See Burling v. Chandler*, 804 A.2d 471 (N.H. 2002) (per curiam) (court-drawn map with 9.26 percent deviations in House plan); *Below v. Gardner*, 963 A.2d 785 (N.H. 2002) (court-drawn map with 4.96 percent deviations in Senate plan); *Chapman v. Meier*, 407 F. Supp. 649 (D.N.D 1975), *on remand from* 420 U.S. 1 (1975) (court-drawn map with 6.6 percent deviations).

PERMISSIBLE STATE POLICIES WHICH JUSTIFY POPULATION DEVIATIONS

{27} When called upon to draw a redistricting map, a court acts in equity and may adopt a plan submitted by a party, modify such a plan, or draw its own map. *See O'Sullivan v. Bryer*, 540 F. Supp. 1200, 1202-03 (D.C. Kan. 1982). The most fundamental tenet of judicial administration and independence is that "the process must be fair, and it must [also] appear to be fair." *See Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (internal quotation marks and citation omitted). This concept of judicial independence, that judges decide the merits of a case based on the facts and the law before them, without fear or favor, is particularly important in this area, which is fundamentally a political dispute. As Justice Felix Frankfurter observed in *Colegrove v. Green*, 328 U.S. 549, 554 (1946), "[t]he one stark fact that emerges from a study of the history of [legislative] apportionment is its embroilment in politics, in the sense of party contests and party interests." Thus, his strong recommendation was that "[c]ourts ought not to enter this political thicket." *Id*. at 556. Unfortunately, because of the inability of our sister branches of government to find a way to work together and address the most significant decennial legislation to affect the voting rights of the adult citizens of our State, the judiciary in New Mexico finds itself embroiled in this political thicket.

{28} Because the redistricting process is embroiled in partisan politics, when called upon to draw a redistricting map, a court must "do so with both the appearance and fact of scrupulous neutrality." *Peterson*, 786 N.E.2d at 673. To avoid the appearance of partisan politics, a judge should not select a plan that seeks partisan advantage. Thus, a proposed plan that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by someone without a political agenda is unacceptable for a court-drawn plan. *See Wilson v. Eu*, 823 P.2d 545, 576-77 (Cal. 1992) (in bank) (rejecting plans submitted by the parties because each had calculated partisan political consequences, the details of which were unknown, leaving no

principled way for the court to choose between the plans, while knowing that the court would be endorsing an unknown but intended political consequence if it chose one of the plans).

{29} A court's adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality. *Peterson*, 786 N.E.2d at 673. Although some courts are indifferent to political considerations such as incumbency or party affiliation, *Burling v. Chandler*, 804 A.2d 471, 474 (N.H. 2002) (per curiam), other courts question the wisdom of such indifference, *Gaffney*, 412 U.S. at 753 ("It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.").

{30} The district court heard several of the parties' expert witnesses testify about court-drawn plans and partisan neutrality. One of the executive's expert witnesses who testified in this case agreed that a court should not select a plan that gives one political party a partisan advantage. Dr. Keith Gaddie testified that how political balance is shifted by the court plan when compared to the baseline map is an important consideration. Dr. Theodore Arrington also testified that when courts draw redistricting plans, there is more partisan balance and more competitive districts. Dr. Thomas Lloyd Brunell, the executive's other expert witness, put it more bluntly: "[c]ourts . . . try not to advance the purposes or the ability of one party to really elect a lot more people than the status quo. . . ." Whether these experts would have expressed concern about Executive Alternative Plan 3 is not known because they had testified before this plan was introduced into evidence.

{31} Despite our discomfort with political considerations, we conclude that when New Mexico courts are required to draw a redistricting map, they must do so with the appearance of and actual neutrality. The courts should not select a plan that seeks partisan advantage. As was evident from the numerous plans drawn in this case, parties are capable of drawing maps that seek to give themselves a partisan advantage. This was true even when the party was able to maintain de minimus population deviations. When a court is required to draw a redistricting map, it is a desirable goal for the court to draw a partisan-neutral map that complies with both the one person, one vote doctrine and the requirements of the Voting Rights Act. To accomplish this goal, partisan symmetry may be one consideration. Although partisan asymmetry is not a reliable measure of *unconstitutional* partisanship, *League of United Latin Am. Citizens*, 548 U.S. at 420, it should be considered as "a measure of partisan fairness in electoral systems," *id.* at 466 (Stevens, J., concurring in part and dissenting in part). In addition, maintaining the political ratios as close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the neutrality required in such a politically-charged case. Districts should be drawn to promote fair and effective representation for all, not to undercut electoral competition and protect incumbents. It is preferable to allow the voters to choose their representatives through the election process, as opposed to having their representative chosen for them through the art of drawing redistricting maps. We believe that consistent and non-discriminatory application of historic legislative redistricting policies, in conjunction with limited flexibility in the court's search for ideal population equality, will be effective tools in drawing redistricting maps that avoid partisan advantage. In applying these rules, a court may be well advised to employ the services of an expert under Rule 11-706 NMRA.

{32} However, because redistricting is primarily the responsibility of the State Legislature, courts must look at previous plans and policies when drawing redistricting maps. Even plans that pass the Legislature but fail to be enacted into law, such as House Bill 39, are due "thoughtful consideration." *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 197 (1972). Thoughtful consideration is important

because redistricting ordinarily involves criteria, policies, and standards that have been publicly deliberated by both the legislative and the executive branches of government in the exercise of their political judgment. More importantly, it is during the legislative process that the public regularly participates by commenting on policies and plans and observing the legislators deliberate the virtues of different policies and plans during open meetings. The Legislature is the voice of the people, and it would be unacceptable for courts to muzzle the voice of the people simply because the Legislature was unable, for whatever reason, to have its redistricting plan become law.

{33} Adhering to policies adopted by the Legislature gives effect to the will of the majority of the people and is permissible in redistricting litigation. *See White*, 412 U.S. at 795-96. Other courts have looked to state policies when drawing a redistricting plan. *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005) (directing that a court should apply traditional state districting principles); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), *aff'd*, 507 U.S. 981 (1993) (a court may look to several neutral criteria in drawing a redistricting plan that is politically fair); *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002) ("Widely recognized 'neutral redistricting criteria' may be considered" when drawing a redistricting map.").

{34} The bipartisan New Mexico Legislative Council adopted guidelines which set forth policies that are similar to policies that have been recognized as legitimate by numerous courts. Testimony during the trial revealed that these guidelines, or other guidelines very similar in substance, have been followed in New Mexico since 1991. These guidelines were followed by the court in *Jepsen*, and should be considered by a state court when called upon to draw a redistricting map. The policies set forth in the guidelines that are relevant to state districts include:

> b. State districts shall be substantially equal in population; no plans for state office will be considered that include any district with a total population that deviates more than plus or minus five percent from the ideal.
>
> . . .
>
> d. Since the precinct is the basic building block of a voting district in New Mexico, proposed redistricting plans to be considered by the legislature shall not be comprised of districts that split precincts.
>
> e. Plans must comport with the provisions of the Voting Rights Act of 1965, as amended, and federal constitutional standards. Plans that dilute a protected minority's voting strength are unacceptable. Race may be considered in developing redistricting plans but shall not be the predominant consideration. Traditional race-neutral districting principles (as reflected below) must not be subordinated to racial considerations.
>
> f. All redistricting plans shall use only single-member districts.
>
> g. Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries. In addition, and to the extent feasible, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

{35} Some comment is necessary regarding these guidelines. Single-member districts are required by Section 3(C), Article IV of the New Mexico Constitution. Districts designed with contiguous precincts that are as compact as practicable are intended to comply with the requirements of NMSA 1978, Section 2-7C-3. Compactness and contiguity are important considerations because these requirements help to reduce travel

time and costs. These considerations make it easier for legislative candidates to campaign for office, and once they are elected, to maintain close and continuing contact with the people they represent. It has also been suggested that compactness and contiguity greatly reduce, although they do not eliminate, the possibilities of gerrymandering. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 326-34 (1991).

{36} Similarly, considering political and geographic boundaries furthers our representative government. Minimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods allows constituencies to organize effectively and decreases the likelihood of voter confusion regarding other elections based on political subdivision geographics. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992).

{37} With respect to the legislative policy of preserving communities of interest, we recognize that this criterion may be subject to varying interpretations. We interpret communities of interest to include a contiguous population that shares common economic, social, and cultural interests which should be included within a single district for purposes of its effective and fair representation. *See O'Sullivan*, 540 F. Supp. at 1204. The rationale for giving due weight to clear communities of interest is that "[t]o be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents." *Prosser*, 793 F. Supp. at 863.

{38} Incumbency considerations present their own difficulties. The United States Supreme Court in *Karcher*, 462 U.S. at 740, held that the legislative policy of avoiding contests between incumbents was included among legitimate objectives, which "on a proper showing could justify minor population deviations." *See also White*, 412 U.S. at 791 ("[I]n the context of state reapportionment . . . the fact that 'district boundaries may have been drawn [to] minimize[] the number of contests between present incumbents does not in and of itself establish invidiousness.'" (quoting *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)); *Gaffney*, 412 U.S. at 752. However, incumbency protection cannot be justified if it is simply for the benefit of the officeholder and not in the interests of the constituents. *League of United Latin Am. Citizens*, 548 U.S. at 403.

{39} In summary, we interpret United States Supreme Court precedent to permit courts encumbered with the responsibility to draw redistricting maps to be guided by legislative policies underlying state plans to the extent the policies do not violate either the constitution or the Voters Rights Act. *Perry v. Perez*, ___ U.S. ___, ___, 132 S. Ct. 934, 941-42 (2012) (per curiam). A court is not required to rigidly adhere to maximum population equality as long as the court can enunciate the state policy on which it relies in deviating from the ideal population. By only deviating for enunciated state policy reasons, the court complies with the constitution and furthers the state's interests. In this case, we interpret the district court to have concluded that it was bound to a plus-or-minus one-percent population deviation with the sole exception of addressing the requirements of the Voting Rights Act. This conclusion does not conform to our view of the proper legal standard to be applied in redistricting cases as articulated above. Thus, we remanded this matter to the district court to draw its own redistricting map to avoid, to the extent possible, partisan bias, and to determine whether it could implement legitimate state policies by employing a more flexible approach to ideal population equality without departing from constitutional considerations.

THE DISTRICT COURT SHOULD HAVE SCRUTINIZED ALL OF THE PLANS FOR POLITICAL CONSIDERATIONS

{40} The district court considered evidence regarding the partisan bias of various plans, and acknowledged the same in its findings of fact and conclusions of law. However, the plan ultimately adopted by the district court, Executive

Alternative Plan 3, did not undergo the same scrutiny for partisan bias that the majority of the plans that were previously considered had undergone. The executive parties introduced Executive Alternative Plan 3 into evidence on the last day of trial, after the political science experts who had scrutinized the plans before the district court were no longer available to testify. This plan was introduced during the testimony of Brian Sanderoff. Mr. Sanderoff pointed out the existence of significant partisan performance changes as compared with previously introduced executive plans; plans which the district court had previously heard from experts were partisan-neutral. Consistent with that testimony about partisan performance changes, the district court found that Executive Alternative Plan 3 increased Republican swing seats from five to eight over prior partisan-neutral executive plans. In addition, the number of majority Republican districts increased from 31 in the original executive plan to 34 in Executive Alternative Plan 3.[3] Mr. Sanderoff testified that Executive Alternative Plan 3 could have been drafted with less partisan change, perhaps with the use of slightly greater population deviations. Because of both this testimony and the district court's rejection of other plans for perceived partisan bias considerations, and because of its own recognition that the plan contained significant partisan performance changes, the district court should have rejected Executive Alternative Plan 3 as well. At a minimum, the district court should have slowed the process down enough to determine whether the significant partisan performance changes could have been ameliorated by consideration of legitimate state policies and a more flexible approach to population deviations that would not offend the constitution.

{41} The incumbent pairings in Executive Alternative Plan 3 appear to have contributed to the plan's partisan performance. Six districts were consolidated in areas that were underpopulated, two strong Democrat districts in North Central New Mexico, two strong Republican districts in Southeastern New Mexico, and a strong Republican district and a strong Democrat district that were consolidated in Central Albuquerque. The consolidated North Central district remained a strong Democrat district and the consolidated Southeastern district remained a strong Republican district. However, the consolidated Central Albuquerque district became a strong Republican district. When the vacant districts were moved to the more populous areas West of Albuquerque, two strong Republican and one strong Democrat districts were created. The result was a partisan swing of two strong seats in favor of one party. The three new seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in the overpopulated areas on the West side of Albuquerque and in Rio Rancho, a result we do not question. However, the source of those three seats has a questionable partisan bias. Two of the consolidated seats, one a Democrat-Democrat consolidation in North Central New Mexico, and the other a Republican-Republican consolidation in Southeastern New Mexico, are partisan-neutral in effect. The third consolidated district in Central Albuquerque is the one that raises questions. Despite combining a Republican and a Democrat seat, it resulted in a strongly partisan district favoring one party, in effect tilting the balance for that party without any valid justification. The resulting district is oddly shaped in an area where compactness is apparently relatively easy to achieve, suggesting, at least in part, that the district was created to give political advantage to one party. This result was not politically neutral and raises serious questions regarding its propriety in a court-ordered plan that should be partisan-neutral and fair to both sides. Stated differently, a more competitive district should have been created if at all practicable to avoid this political advantage to one political party and disadvantage to the other. Competitive districts are healthy in our representative government because competitive districts allow for the ability of voters to express changed political opinions and preferences. *See Alexander*, 51 P.3d at 1212.

{42} Although consolidation of districts coupled with moving one of the consolidated districts

[3] How these findings of fact are relevant and material to the status quo was not completely developed at the district court level.

is not the only way to address population disparities when drawing new district boundaries to comply with the Equal Protection Clause, in this case the district court appropriately exercised its equitable powers to insist on the consolidation of districts in the underpopulated regional areas of North Central and Southeastern New Mexico, as well as Central Albuquerque. The problem previously noted with the Central Albuquerque consolidation is not the fact that the consolidation occurred, but the manner in which the consolidation was accomplished.

SPECIFIC INSTRUCTIONS ON REMAND

{43} In our previous order, we remanded this matter to the district court to draw a redistricting map with the assistance of an expert under Rule 11-706. The district court was instructed to include the Multi-Tribal/Navajo Nation partial plan within any redistricting map that the district court will draw. In addition, we required the district court to reject all of the previously submitted plans because of the political advantage sought by the parties. The accusation that we ordered the district court to reduce Republican seats in the House originates in the imagination of the accuser. We asked the court to draw its own map with the desired goal being to draw a partisan-neutral map that complies with both the one person, one vote constitutional doctrine, the requirements of the Voting Rights Act, and considers other historical and legitimate state redistricting principles. Although it has been suggested that a partisan-neutral map is illusory, the history of this case proves otherwise. The parties were able to draw maps that gave them each a political advantage and with population deviations that likely would have passed constitutional scrutiny. A court, with a cautious eye toward neutrality, can make the good faith effort to draw a map that advantages neither political party.

{44} Other concerns were alluded to in the order with the expectation that the district court would give such concerns due consideration. However, the order does not specifically direct the district court what to do, if anything, about those concerns. The district court continues to have the discretion necessary to carry out its equitable jurisdiction.

{45} We provided the district court with the following instructions which we repeat here so as to document the instructions in this published opinion.

> In doing so, the district court should rely, as much as possible, on the evidence presently in the record, and it should not admit additional evidence from the parties. The district court should consider historically significant state policies as discussed herein through the use, where justified, of greater population deviations as set forth in the Legislative Council guidelines. At the district court's discretion, the parties may be permitted, but are not entitled, to file briefs identifying what state policies are supported by the evidence in the record that will assist the court in drawing a plan that results in less partisan performance changes and fewer divisions of communities of interest than the plan it adopted. Also in the district court's discretion, Brian Sanderoff would be a permissible candidate to serve as a Rule 11-706 expert, because of time constraints and his established expertise. Whether or not to use any of the maps that were introduced into evidence as a starting point, including Executive Alternative Plan 3, is within the discretion of the district court. The parties shall have an opportunity to comment on a preliminary plan proposed by the district court before it ultimately adopts a final plan. The final map must take into account the following considerations:
>
> 1. *Population deviations*. Executive Alternative Plan 3 achieved very low population deviations, but it was at the expense of other traditional state redistricting policies, the most evident being the failure to keep communities of interest, such as municipalities, intact. Some cities were divided to maintain low population deviations among

the different districts. On remand, the district court should consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations. While low population deviations are desired, they are not absolutely required if the district court can justify population deviations with the non-discriminatory application of historical, legitimate, and rational state policies.

2. *Partisan performance changes*. On remand, the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides. If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate, and rational state policies, including through the use of higher population deviations, then the district court should do so.

3. *As part of the review of partisan performance changes, the district court should consider the partisan effects of any consolidations*. Any district that results from a Democrat-Republican consolidation, if that is what the district court elects to do, should result in a district that provides an equal opportunity to either party. In the alternative, some other compensatory action may be taken to mitigate any severe and unjustified partisan performance swing. The performance of created districts as well as those left behind should be justified.

4. *Hispanic "Majority" District in House District 67*. It does not appear that the district court considered Hispanic citizen voting-age populations in reaching its decision, and it should do so on remand. Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades.

CONCLUSION

{46} For all of the foregoing reasons, we remand this matter to the district court to draw its own House redistricting map, taking into consideration the legal principles we have announced herein. The district court was "urged to make every effort to conclude this matter expeditiously, no later than February 27th, 2012, or otherwise advise this Court." All claims raised by Petitioners have been addressed in this Court's Order No. 33,386, dated February 10, 2012, or are considered to be without merit. We emphasize that the principles articulated herein apply only to court-drawn maps. After this opinion was filed and before it was released for official publication, the district court entered a final decision complying with this Court's remand order. We take this opportunity to publish the district court's final decision as Appendix A to our opinion to document the history of this case and for future reference in the event New Mexico courts are called upon in the future to reapportion elective offices.

{47} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

JONATHAN B. SUTIN,
Judge
Sitting by designation, dissenting

SUTIN,
Judge (dissenting).

{48} I respectfully dissent.

{49} Twelve years on the Court of Appeals has taught me to abide by rules relating to standard of proof and review. I therefore look at Judge Hall's work under that framework, instead of how the Majority frames its approach.

{50} The Majority reviews solely on a de novo basis. Majority Opinion ¶ 14. But the manner in which the Majority reviews on that basis necessarily combines weighing and finding facts as well as applying law. This case is not one involving pure questions of law. As the Majority acknowledges, Judge Hall sat as a court in equity. He had considerable discretion in arriving at his determinations. He considered all of the facts, and he made his determinations based on facts he thought supported his determinations. Judge Hall did not abuse his discretion—abuse of discretion is the traditional standard of review in equity. Judge Hall weighed and found facts, and nothing shows that his findings were not supported by substantial evidence—sufficiency of evidence is the traditional standard of review in regard to fact weighing and fact finding.

{51} The Majority justifies its approach for this reapportionment setting based on a theory that it "has a constitutional mandate to establish what the rule of law is and to clarify the law if it has not been interpreted correctly." Majority Order 13 (¶ 8). In my view, the Majority is out of bounds. Judge Hall did not interpret any law incorrectly. And, while the Majority has the prerogative to state what the rule of law is in New Mexico and to clarify the law, I see no reason for the Majority to have by-passed and ignored the traditional and important deference as to credibility determinations, fact finding, proof sufficiency, and discretion in equity given to trial judges, and then itself essentially assume the role of the trial judge while at the same time also then reviewing its own work. Long ago New Mexico stepped away from the territorial practice and procedure where a trial judge tried a case and, when the case was appealed, the same judge acting in the capacity of Supreme Court Justice reviewed his own decision for error. The Majority should not have stepped into Judge Hall's judicial shoes in this case.

{52} I expressed a good deal of my thoughts in my necessarily hurried dissent attached to the Majority's Order entered in this matter on February 10, 2012. For what it is worth as the lone wolf in this case, I repeat that dissent below because it is the Majority's Opinion and not its Order that is published. Also, because of time constraints, I was unable to address in my dissent to the Order the merits of the issues that were decided by the Majority in that Order, I will address the merits here.

Clovis

{53} In regard to Clovis, looking at the totality of circumstances based on the proof presented, Judge Hall saw no Voting Rights Act violation. He was in no way required to continue in force the nearly twenty-eight-year-old, elephant-truncated, unnaturally divided district created in *Sanchez*. Majority Opinion ¶ 20. The burden was on those contending that no change should be made to that then legally gerrymandered district to prove that no change should be made. The Majority errs in placing the burden on Judge Hall to have shown that certain population changes occurred in the district over the years that required a change. Further, it appears that the resulting district retained an Hispanic voting age population above 50%. In addition, Judge Hall found that "[a]ll of the plans before the Court contain a significant number of Hispanic majority districts; however, the Court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn. Judge Hall also found that "[o]f all the plans presented to the Court, Executive Alternate Plans 1, 2, and 3 maintain the highest number of districts with a Hispanic [voting age population] over 50%."

{54} I would not hang my hat as the Majority does on *League of United Latin American Citizens* (*LULAC*). Majority Order 8, 12 (¶ 7); Majority Opinion ¶¶ 17, 31, 38. "The unique

question of law" in *LULAC* was "whether it was unconstitutional for Texas to replace a lawful redistricting plan 'in the middle of a decade,' for the sole purpose of maximizing partisan advantage." 548 U.S. at 456. *LULAC* is a congressional redistricting case with very different facts and issues. Within the *Gingles* totality of the circumstances, Voting Rights Act evaluation requirement, *LULAC* addressed the proportionality factor and then considered citizen voting age population on a statewide basis after the district court made a finding regarding statewide citizen voting age population. *Id.* at 438. *LULAC* does not set down a rule or principle that necessarily governs Judge Hall's determinations.

{55} Those challenging the reapportionment with respect to Clovis failed in Judge Hall's assessment to prove the *Gingles* factors that would require a conclusion that the Voting Rights Act was violated and a remedial district must be formed. Furthermore, beyond the *Gingles* factors, neither the Majority nor a party has pointed out where data showing the percent of Hispanic citizen voting age population in the district in question was proved. In fact, one must question whether any underlying evidentiary support even exists to support such data for the particular district at issue. Brian Sanderoff, who worked on this case for the Legislative Council Service, and who apparently is Judge Hall's new Rule 706 expert at the strong suggestion of the Majority, testified that there was no data indicating the exact percentage of Hispanic citizen voting age population in the existing districts or in the districts contained in any of the plans. I believe the Majority erred in requiring Judge Hall to rethink the evidence, and the lack thereof, or obtain further evidence in order to arrive at what the Majority essentially holds is a mandatory Voting Rights Act remedial district. Majority Opinion ¶¶ 19-20; Majority Order 20-21 (¶ 4).

Minimum Population Deviation

{56} In regard to the one man-one vote requirement embedded in constitutional law, it is obvious that Judge Hall was very much aware of and attuned to the applicable United States Supreme Court and federal cases, as well as state case law. He knew the law on acceptable deviation from minimum population requirements. He did not misunderstand, misconstrue, or misapply the law in any regard. He applied the law correctly. He deviated where it was necessary under the Voting Rights Act or under any legitimate State interest to do so. In adopting the Native American Plan in order to protect Native American interests, the Executive and Judge Hall had to deal with population dispersion "ripple-effect" complications resulting from that plan's insertion in the map. Judge Hall did not deviate where the circumstances and proof offered failed, in his view, to establish any Voting Rights Act violation or to establish that a legitimate State interest would require deviation. I believe the Majority erred in concluding that Judge Hall misconstrued the law or did not apply the law correctly and in instructing Judge Hall to rethink the evidence and change his mind so as to provide for even further deviation notwithstanding his view that proof requiring any such deviation was lacking.

Partisan Effect

{57} I think the Majority is mistaken in thinking that the "public will" is measured solely or even primarily from an un-enacted legislative plan and is also mistaken in its thinking that plans can be fully partisan free. The legislative plan passed with all Republicans and some Democrats voting against passage. The Governor, elected by a will of the majority of voters, vetoed the plan. No attempt was made to override the veto. A highly qualified and experienced retired First Judicial District Court (Santa Fe) judge, who reflected no partisanship, scrupulously studied the facts and the law, and came to a considered and principled determination. Lawyers known to be highly partisan on both sides presented evidence and arguments. The Majority's view that "thoughtful consideration" means give more credence to the un-enacted legislative plan than to that offered and eventually modified by the Executive has no basis in law or reason. In no way has the "will of the majority of the people" or the "voice of

the people" been "muzzle[d,]" Majority Opinion ¶¶ 21, 32-33, in the process here.

{58} In challenging partisan effect, Petitioners Jennings and Lujan, as well as Maestas, indicated in their opening briefs that unlawful partisan bias is to be "significant." In their petition for writ of superintending control, Petitioners Maestas and Egolf used the phrases "blatant partisan bias" and "demonstrably partisan effect." Petitioner Egolf used "severe" in his opening brief. Petitioners Jennings and Lujan also used the phrase "significant partisan change" in their response brief. The Majority faults Judge Hall for not "slow[ing] the process down enough to determine whether the *significant* partisan performance changes could have been ameliorated[.]" (Emphasis added.) Majority Opinion ¶ 40. Yet the Majority has not shown how any partisan effect here rises to a level of significance, severity, or blatancy sufficient to call for Judge Hall to rethink his work to arrive at "less partisan change[,]" *id.*; Majority Order 20 (¶¶ 2-3), much less to arrive at the Majority's required neutrality. Nor has the Majority shown how a new plan addressing a purported Republican swing-seat advantage will not result in an attackable maintenance of some Democratic advantage. Judge Hall certainly did not indicate, with respect to swing seats, that there existed "significant" Republican partisan performance advantage and, when one considers Mr. Sanderoff's full testimony, Judge Hall could in his sound discretion have refused to view any Republican performance swing-seat advantage as justification for arriving at a different plan. Maintenance of and changes in seats of one party or the other is an understandable effect of the reapportionment process. As the majority recognizes, Judge Hall sat as a judge in a court of equity. Majority Order 6 (¶ 3). Considerably more must exist here to say that Judge Hall abused his discretion.

Other Matters

{59} Among other statements and implications in the Majority's Opinion that have given me pause are the following. First, Judge Hall, and thus his plan, did not "seek[]" partisan advantage. Majority Opinion ¶ 31. He did not try to "advance the purposes or the ability of one party to really elect a lot more people than the status quo." Majority Opinion ¶ 30 (internal quotation marks omitted). Judge Hall expressly did not allow partisan considerations to control the outcome of [his] decision." Furthermore, as I have discussed earlier in this dissent, Judge Hall's plan in no way produced any degree of even unintended partisan effect that required it to be overturned.

{60} Second, I believe that the Majority's various statements that attempt to show the Executive in bad light go nowhere. Despite implications to the contrary, nothing in the record indicates that those challenging Judge Hall's plan did not receive a fair hearing or were denied the opportunity to later examine the Executive's expert or to call their own expert back, and nothing indicates that the Executive acted in bad faith.

{61} Third, boiling the important cases down in terms of one man-one vote and population deviations based on legitimate state interests, cases in which the plans were enacted into law are inapposite. *Chapman* and *Connor* control here. *See also Reynolds*, 377 U.S. at 579 (stating that the "*overriding* objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the [s]tate" (emphasis added)). It bears repeating that Judge Hall did deviate, where he deviated he justified the deviation, and where Judge Hall did not deviate the record fails to reflect that those now challenging his plan justified deviations they felt were required under the law.

{62} Fourth, the Majority's "appearance of and actual scrupulous neutrality," Majority Opinion ¶ 31, principle does not hold water. It relies on misguided notions of "seek[ing] partisan advantage" and on "maintaining the political ratios as close to the status quo as is practicable[.]" *Id.* Return to the status quo can only mean return to the now, unconstitutional, over-ten-years-old-population districts—involving districts

that have dramatically changed in population and districts that gave rise to the Democratic House seat total of thirty-eight and the Republican House seat total of thirty-two in 2011. There exists no recognizable validity to that status quo approach. Further, the partisan issue here is one seat gained by Republicans, hardly something to require Judge Hall to return to the creative drawing board in search of the illusory notion of neutrality. Voters will "choose their representatives[,]" *id.*, just fine under Judge Hall's plan. The idea that Judge Hall was not "consistent and non-discriminatory" in applying legitimate State interests, *id.*, marginalizes, if not repudiates, a trial judge's basic and essential work and role in determining whether sufficient evidence exists to support a claim of inconsistency and discriminatory application of those interests. Such a notion outright and erroneously rejects Judge Hall's having given thoughtful consideration to the plans, policies, and interests. That rejection has no support in the record. Further, it seems to me a bit far fetched to engage in the hyperbolic phrases of "giv[ing] effect to the will of the majority of the people" and the "unaccept[ability] for courts to muzzle the voice of the people." Majority Opinion ¶¶ 32-33. Contrary to the view of the Majority, I believe that the integrity and legitimacy of the judiciary was not at risk in Judge Hall's hands nor were they diminished by Judge Hall's plan.

{63} Fifth, based on what I have discussed throughout my dissents, the view that Judge Hall's plan "did not undergo the same scrutiny for partisan bias that the majority of the plans that were previously considered had undergone[,]" Majority Opinion ¶ 40, is unsupported in the record.

Conclusion

{64} The Majority Opinion is long on the law but falls short on the battlefield decisions. Determinations expressly or impliedly holding that Judge Hall violated the Fourteenth Amendment and the Voting Rights Act are unsupported in the record. The actual effects about which the Majority is concerned, even if valid to any degree, are too insubstantial to require the remand and "do over" required of Judge Hall. Other than its references to the Clovis area with unsupportable reliance on citizen voting age population data, and its concern about partisan effect relating to one district in Central Albuquerque, the Majority points to no particular district it considers to be unlawfully established. Its tail-end instruction that Judge Hall "consider whether additional cities, such as Deming, Silver City, and Las Vegas[] can be maintained whole through creating a plan with greater than one-percent deviations." Majority Order 19 (¶ 1); Majority Opinion ¶ 45(1), has little, if any basis in the Majority's Order or Opinion. Based on the Majority's problematic review approach and erroneous intrusion into Judge Hall's bailiwick, on the Majority's unsupported view that Judge Hall incorrectly interpreted the law, on the Majority's vague analyses of actual error on Judge Hall's part requiring remand to revamp the plan, and on the minimal impact of whatever swing-seat advantage the Republicans may have gained, one must wonder why the Majority has gone to the lengths it has to overturn Judge Hall's plan.

{65} Based on what I have set out above and below, I respectfully dissent. The Majority should have affirmed Judge Hall and his plan, while at the same time setting out whatever rules or principles the Court thought constituted the rules courts of this State should follow in reapportionment cases.

{66} The foregoing dissent has been prepared as Judge Hall is no doubt attempting to create a new plan that follows the dictates of the Majority. That plan will no doubt be affirmed by the Majority, given what Judge Hall is instructed to do.[4] My only hope is that Judge Hall does not expressly confess error.

[4] Different than the language and tenor of its Order, the Majority now attempts to ameliorate what it has instructed by saying that the Order did "not specifically direct the district court what to do, if anything," about the Majority's "concerns[,]" and that the district court "continues to have the discretion necessary to carry out its equitable jurisdiction." Majority Opinion ¶ 44.

Repeat of Dissent to Order Previously Entered

{67} The Majority's decision that its order be filed immediately has allowed me time and opportunity to only generally address why I oppose the remand requiring Judge Hall to revamp the plan according to the rules laid down by the Majority. The immediacy has not allowed me time and opportunity to rebut the Majority's determinations on the merits of the issues as contained in the order. Based on the detail in the order deciding the merits of the issues, and the requirement that Judge Hall change the plan, I tend to doubt that any follow-up Majority opinion will be needed, and I tend to doubt that the extensive detailed work required for a dissent will be useful.

{68} I respectfully oppose entry of the Majority's remand order. There exists no need to require Judge Hall to consider facts and law that he has already thoroughly considered. There exists no need for reconsideration of how Judge Hall applied the law of population deviation when it is clear that he understood the law and did not misapply it. Nor is there a need to remand for Judge Hall to reconsider facts (implying, it seems, to also change his mind) relating to any alleged Fourteenth Amendment or Voting Rights Act violation or relating to secondary factors such as communities of interest.

{69} Of course, this Court is not to rubber stamp Judge Hall's work and plan. At the same time, however, it is important to note that the Supreme Court's appointment of Judge Hall was purposeful and an excellent choice. Judge Hall was a highly respected judge for his fairness, good judgment, principled and rational decisions, seasoned analytic ability, and his ability to grasp complex issues. In his known judicial capacity, Judge Hall did not act arbitrarily. In these important circumstances, Judge Hall would not and did not, here, create a plan that he saw or felt or believed contained any partisan effect or bias that violated the Fourteenth Amendment. He would not have put forth a plan if the evidence supported a determination that the plan violated the Voting Rights Act. He would not have created a plan that would fail to withstand strict scrutiny. In his consideration of secondary factors, he would not have created a plan that, in his view, failed to protect communities of interest.

{70} Reapportionment cases are known for their rampant partisanship, whether at the legislative level or in the court. The cases are complex. Population increase over ten years requires change. Redistricting is necessary. Expert map drawers, political scientists, and historians are involved. Witness testimony and documentary evidence fills volumes. The quest for the perfectly neutral reapportionment map devoid of partisan effect or bias is illusory. Parties and courts quote what they want from the United States Supreme Court and lower federal courts, as well as from state courts, for favorable language to support their positions.

{71} The overriding goal is population equality and to serve the constitutional principle of "one man-one vote." Once in court, the search involves pathways through various proposed plans offered by partisans. Those in power want to keep their seats and obtain more seats; those out of power want to keep their seats and obtain more seats. The court must give thoughtful consideration to the plans and listen to the arguments. First and foremost, the court sits in equity and tries to structure a plan within the constraints of the Fourteenth Amendment and the Voting Rights Act.

{72} If, in drawing a plan, the court exceeds minimal population deviation, the court must justify the deviation based on legitimate state interests which appear to consist of traditional state redistricting policies and practices. Here, the court started with the clear constitutional mandate of minimum deviation from population equality. At some point, Judge Hall determined that he was required to substantially deviate from population equality with regard to Native American communities in order to satisfy the requirements of the Voting Rights Act. Judge Hall appropriately justified the deviation. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (explaining what proof is necessary for a court to

find a violation of Section 2 of the Voting Rights Act).

{73} With respect to the population deviation that Judge Hall maintained at minimal levels, he had nothing to "justify" because that minimal deviation is what the law requires unless a deviation is necessary to satisfy legitimate state interests. Those attacking minimal deviation have the burden of advocating for a particular deviation and then justifying the deviation based on legitimate state interests. To the extent parties launched that attack, Judge Hall determined that the evidence presented was insufficient to require a deviation. To the extent that parties attacked Judge Hall's plan because it unfairly diluted Hispanic voting power, Judge Hall determined that the evidence presented was insufficient to support any claimed violation of the Fourteenth Amendment or the Voting Rights Act. Moreover, all of the plans split some communities of interest. Furthermore, communities of interest are defined in many different ways, they are what they are based on the eyes of the beholder, and are, for the most part, partisan driven.

{74} The parties now attacking Judge Hall's plan submitted extensive requested findings of fact and conclusions of law stating the various reasons why their respective plans should be adopted by the court. Judge Hall did not adopt their requested findings, thereby effectively finding against those parties and the propriety of their plans. The parties have not attacked with the required specificity Judge Hall's findings of fact, among which are: that his plan includes thirty districts with Hispanic voting age population over 50%, maintaining the highest number of districts with a Hispanic voting age population over 50%; that incorporating the Native American plans caused the number of swing districts of 49-51% to increase from five to eight, and the number of majority Republican performance districts (over 50%) to reach 34; that his plan avoids splitting communities of interest (particularly the Native American communities of interest) to a reasonable degree; that he gave thoughtful consideration to all plans (plus amended, modified, and alternative), including the unenacted Legislative Plan; that he considered the totality of circumstances when considering whether the plan violated the Voting Rights Act.

{75} The issues on which the Majority want to remand this case are intensely fact-based and fact-driven. This Court should not and has no need to (1) disregard the exceptional care Judge Hall took in determining whether the parties attacking the plan and advocating their own plans fulfilled their proof burdens and (2) draw a conclusion that, as a matter of law, those parties proved a Fourteenth Amendment or Voting Rights Act violation or that some secondary factor necessarily overrides the plan.

{76} Nothing in this case shows that Judge Hall failed to consider all of the evidence presented. Nothing shows that he failed to give thoughtful consideration to everything offered by the parties. From the record and from his extensive findings of fact and conclusions of law, it is readily apparent that Judge Hall considered all of the evidence and gave thoughtful consideration to the presentations of the parties.

{77} Judge Hall looked at the various plans, discussed his concerns about several of them, and made suggestions to parties about how they might improve the palatability of their plans by considering certain changes. Some made changes; others did not. This was the process Judge Hall chose instead of attempting to draw a virgin plan. In fact, to adopt aspects of plans proposed by the executive and legislative parties following extensive testimony and plan modifications indicates a process that considers the will of the people.[5] I do not agree with the Majority that Judge Hall's process was flawed because it did not satisfy a requirement of judicial neutrality or independence.

[5] I note that the "will of the people" was involved here from start to finish. While the legislative plan passed the House, all Republicans and a few Democrats voted against passage, the Governor vetoed the plan, any veto override was unlikely and not attempted, Judge Hall rejected the legislative plan, and several parties advocating their interests fully presented their positions and views at trial.

{78} In my view, nothing in the Majority's cited case of *Peterson v. Borst*, 786 N.E.2d 668 (Ind. 2003), which involved a City-County redistricting plan, requires remand. I see no basis on which to question Judge Hall's or "the judiciary's" neutrality and independence given the nature of the trial; the manner in which Judge Hall conducted the trial; the parties' full opportunity to present their witnesses, documents, and arguments; Judge Hall's detailed study of the various plans; and his interactions with the parties and recommended plan changes. Judge Hall handled this case "in a manner free from any taint of arbitrariness or discrimination." *See id.* at 672 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

{79} Ultimately, based on how he viewed all of the various plans and any modifications made, and based on how he evaluated the credibility of the witnesses, the models, the various analyses, and the reasonableness of testimony and counsel's arguments, Judge Hall thought that the Executive Plan, as modified, was a fair, reasonable, and appropriate plan.

{80} All plans suffered from partisan effect. Will any plan be devoid of some partisan effect? The parties that contend that the plan must be overturned state the standard to be "severe" and "significant" partisan bias. There exists no evidence in this case that Judge Hall intended or adopted a plan that violated the Fourteenth Amendment because of severe or significant partisan bias. Nothing in the plan shows any egregiousness, and nothing in the evidence indicates that any attempt at neutrality (which, although not a word used in the Order, is what I believe the Majority actually requires) or, even as the Order indicates, "less partisan effect," will relieve the challengers or the Majority of their view that any Republican advantage that results in seat gain from the status quo constitutes a partisan bias that violates the Fourteenth Amendment. Democrats keep their statewide majority under the plan. Several districts with Republican advantage are competitive. Judge Hall's plan was in no way driven by partisan bias. Nothing in the record indicates that Judge Hall's goal, much less overriding goal, was to effect partisan change. If the Majority wants Judge Hall to move things around to obtain "less partisan effect," does that take us to some sort of status quo, and will the status quo violate population shifting requirements? The answer to the question of partisan bias can depend in part on tests or models used. Several were under consideration. Judge Hall was not required to apply any one of them in particular or to rely on them as the sole basis on which to decide whether the proof showed a partisan effect or bias that violated the Fourteenth Amendment. Furthermore, no evidence bound Judge Hall to find that there was actual harm or undue prejudice to Democrats, who continue to maintain a majority of the seats in the House.

{81} There exists no basis on which to learn more from Judge Hall on any issue. Nothing in the record shows that Judge Hall abused his discretion in any respect. He did not misapprehend or misconstrue the law. He was in no way arbitrary. He does not need to provide further explanation about his determinations. Nothing proves that the plan will create serious problems in the future. This matter is not in need of remand. Judge Hall's plan is an appropriate stopping place. The election process needs to go forward now, without a delay of reconsideration or instruction essentially requiring Judge Hall to reduce Republican seats, without the delay of a 706 expert already shown through his testimony to have opinions about issues in the case, and without a delay involving the required opportunity to comment on any new plan or any changes. The stopping point of Judge Hall's plan is eminently more wise and fair than the stopping point of the next, reconstituted plan, with no fair opportunity to follow allowing the party opposing the plan to obtain relief in this Court.

JONATHAN B. SUTIN,
Judge

APPENDIX A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANNE SPRUCE BLY Plaintiffs, v.	)	
DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives, Defendants.	)	NO. **D-101-CV-2011-02942** CONSOLIDATED WITH **D-101-CV-2011-02944** **D-101-CV-2011-02944** **D-101-CV-2011-02945** **D0101-CV-2011-03016** **D-101-CV-2011-03099** **D-101-CV-2011-03107** **D-202-CV-2011-09600** **D-506-CV-2011-00913**

DECISION ON REMAND

This matter returns back before this Court on remand from the New Mexico Supreme Court. Following an evidentiary hearing on the merits regarding the redistricting of the New Mexico House of Representatives, this Court entered its Findings of Fact and Conclusions of Law and adopted a redistricting plan for the House of Representatives. In this Decision, the initial plan adopted by this Court will be referred to as the "First Court-Adopted Plan."

The First Court-Adopted Plan was reviewed by the New Mexico Supreme Court. The Supreme Court issued an Order (hereinafter "the Remand Order") returning the case to this Court with specific instructions on remand. Subsequently, the Supreme Court issued an Opinion (hereinafter "the Opinion") in Maestas, et al. v. Hall, No. 33386, which further addressed the issues in this case and the Remand Order.

The Remand Order directed this Court to draw a new reapportionment plan with the assistance of an expert under Rule 11-706 NMRA. The Remand Order stated that Brian Sanderoff of Research & Polling, Inc. would be a permissible candidate to serve in the role of a Rule 11-706 expert. Remand Order at pp. 18-19. This Court appointed Mr. Sanderoff as the Rule 11-706 expert. As suggested by the Remand Order, the parties were given an opportunity to file briefs identifying state policies that would assist the Court in drawing a plan that results in less partisan performance changes and fewer divisions of communities of interest. The Remand Order further directed that this Court "should rely, as much as possible on the evidence presently in the record, and it should not admit additional evidence from the parties."[6] Remand Order at p. 18.

[6] In what appears to be a violation of this Supreme Court directive, the Egolf Plaintiffs submitted an Affidavit from The-

Following the receipt of the briefs and with the assistance of Mr. Sanderoff, the Court developed two preliminary plans which were provided to the parties for comment. The parties commented on the preliminary plans.[7] This Court now adopts the plan identified as Preliminary Plan No. 1 without change. For purposes of this Decision, this plan will now be referred to as the Final District Court Plan. This written Decision is intended to set forth this Court's conclusions in light of the Remand Order and Opinion of the Supreme Court.

In the Remand Order, the Supreme Court identified four areas in which the Supreme Court agreed with certain determinations made in the First Court-Adopted Plan. Remand Order at pp. 17-18. First, the Supreme Court agreed that the Native American districts should be included without change in the final court map. Second, the Supreme Court concluded that this Court "appropriately exercised its equitable powers to insist on the consolidation of districts in the underpopulated regional areas of North Central and Southeastern New Mexico, as well as Central Albuquerque." Remand Order at p. 17. Specifically, the Supreme Court recognized the partisan neutral nature of a Democrat-Democrat consolidation in North Central New Mexico and a Republican-Republican consolidation in Southeastern New Mexico. Remand Order at p. 15. Third, the Supreme Court agreed that this Court was not required to adopt the Legislative Plan as long as it gave that plan thoughtful consideration.[8] Fourth, the Supreme Court agreed that this Court was not required to preclude Governor Martinez from introducing plans during the litigation. In addition, in the Opinion, the Supreme Court specifically required this Court to reject all previously submitted plans "because of the political advantage sought by the parties." Opinion at p. 32.

In the Remand Order, the Supreme Court noted that the starting point for the creation of a final plan was left to this Court's discretion. After consideration, this Court concludes that the most appropriate starting point is the First Court-Adopted Plan. This Court adopts the First Court-Adopted Plan as the starting point for two reasons. First, the parties had an opportunity during the course of trial to evaluate and present evidence regarding the First Court-Adopted Plan, both in its final form and in earlier iterations of the plan ultimately adopted by this Court. If this Court were to develop a completely new plan from scratch at this time, the parties' input would be limited to a three-day comment period which would seem insufficient for a completely new plan (as opposed to a modification of a plan on which they already had input).

The second reason that this Court has used the First Court-Adopted Plan as a starting point is that the Supreme Court agreed with two important components of the First Court Adopted-Plan, i.e., the inclusion of the Native American districts without change and the consolidations of certain districts. Of the plans submitted during trial, only the final few plans submitted by the Executive Defendants and the First Court-Adopted Plan included both the Native American

odore Arrington, a witness who testified during the trial. In response to a Motion to Strike Dr. Arrington's Affidavit, the Egolf Plaintiffs contend that the Affidavit is appropriate because it is a part of their "comment" on the Court's Preliminary Plans. This argument is not persuasive. Clearly, an affidavit from an expert witness is evidence and the Supreme Court was quite clear that the parties not submit additional evidence; therefore, this Court does not consider the Affidavit of Dr. Arrington or any of the arguments based on that specific evidence.

Using a slightly different approach, the Maestas Plaintiffs submitted two proposed redistricting maps to this Court, but contend that the maps submitted are "for illustrative purposes only." Maestas Brief on Remand at p. 5. While it may be arguable whether this approach violates the letter of the Supreme Court directive, it certainly violates the spirit of the Remand Order. As a result, this Court does not consider the actual maps submitted by the Maestas Plaintiffs, but does consider the comments contained in the Maestas briefs.

[7] Preliminary Plan No. 2 included a different pairing of legislators in the North Central region. Although one party had initially proposed this new pairing in the briefs, no party argued that this Court should adopt Preliminary Plan No. 2 in their comments on the proposed plans and several parties contended that Preliminary Plan No. 2 was not based on the evidence presented at trial. After considering the issue, this Court agrees that the existing court record does not support the adoption of Preliminary Plan No. 2.

[8] This Court's thoughtful consideration of the Legislative Plan is specifically addressed in the Findings of Fact and Conclusions of Law. See Findings of Fact Nos. 32-41 and Conclusions of Law 27-28. All of those findings and conclusions are still applicable.

districts without change and the basic consolidations which the Supreme Court approved (i.e., a Democrat-Democrat consolidation in North Central New Mexico, a Republican-Republican consolidation in Southeastern New Mexico and a Democrat-Republican consolidation in Central Albuquerque[9]). Because the other plans introduced at trial do not include these two important components, this Court rejected the other plans as potential starting points.

With that background, this Court addresses the specific instructions of the Supreme Court on remand as follows:[10]

> 1. *Population deviations.*
>
> On remand, the district court should consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations. While low population deviations are desired, they are not absolutely required if the district court can justify population deviations with the non-discriminatory application of historical, legitimate, and rational state policies.

Remand Order at p. 19.

In the First Court-Adopted Plan, the population deviation between districts ranged from +1.69% above the ideal population for a district to -4.99% below the ideal population for a district, a total range of 6.68%. The Remand Order of the Supreme Court directs this Court to determine whether additional cities can be maintained whole with additional deviations.[11]

In the Final District Court Plan, Las Vegas and Deming are maintained whole within a single district. In addition, in contrast to the First Court-Adopted Plan, Mountainair and Tijeras are each contained within a single district in the Final District Court Plan.

Because Silver City was specifically identified in the Remand Order, this Court and the

[9] The concerns of the Supreme Court regarding the Democrat-Republican consolidation in Central Albuquerque are addressed below.

[10] As to each of the Supreme Court's four specific instructions, this Decision sets out the specific directive language of the Remand Order.

[11] The Remand Order contains the following language: "In this case, the district court concluded that it was bound to a plus-or-minus one-percent population deviation with the exception of addressing Voting Rights Act infractions." Remand Order at pp. 13-14. This language was modified slightly in the Opinion which reads: "In this case, we interpret the district court to have concluded that it was bound to a plus-or-minus one-percent population deviation with the sole exception of addressing the requirements of the Voting Rights Act." Opinion at p. 27.

With all due respect to the Supreme Court, the Findings of Fact and Conclusions of Law do not support such an interpretation. This Court's Findings of Fact and Conclusions of Law do not adopt a +/- one percent deviation standard with the sole exception being violations of the Voting Rights Act. This Court made specific findings regarding Native American communities of interest. Findings of Fact Nos. 58, 59, 60, 67, 69 and 74. This Court also specifically concluded that more substantial deviations were justified not only based on the Voting Rights Act, but also based on significant state policies including protection of communities of interest. Conclusions of Law Nos. 24, 27, 33 and 34.

In fact, the standard adopted by the Supreme Court as to population equality and deviations is identical to the standard adopted and applied by this Court. In the Opinion, the Supreme Court examines the case law related to the application of legitimate and rational state policies on reapportionment plans and notes that, for plans which are "drawn by a legislature that have become law," ten-percent deviations are prima facie constitutional. Opinion at pp. 14-17. The Supreme Court goes on to set forth the standard as it relates to court-drawn plans:

> In contrast to legislatively-drawn plans, court-drawn plans are held to a higher standard, and "must ordinarily achieve the goal of population equality with little more than de minimus variation." *Chapman v. Meier,* 420 U.S. 2, 27 (1975). The United States Supreme Court has not defined what constitutes de minimus variations for a court-drawn plan. However, unlike a legislative body that does not have to articulate the policy reasons for minor deviations from ideal population equality, unless the range of deviations exceed ten percent, a court must enunciate the historically significant state policy or unique features that it relies upon to justify deviations from ideal population equality. *Connor v. Finch*, 431 U.S. 407, 419-20 (1977).

Opinion at pp. 17-18 (footnote omitted). In the footnote omitted here, the Supreme Court notes that court-drawn plans have had deviations of +/–4.96%, +/–6.6% and +/–9.26%, all percentages which are similar to the deviation of 6.68% in the First Court-Approved Plan.

Although some parties argued for a different standard during the trial, the legal standard on population equality that was adopted and applied by this Court matches the Supreme Court's recitation of the applicable law almost word-for-word. See Conclusions of Law Nos. 6, 8 and 17.

Rule 11-706 expert examined Silver City closely to determine if it was possible to unify Silver City within one district while still complying with the criteria set forth by the Supreme Court in the Remand Order and Opinion. As explained below, this Court ultimately concluded that Silver City could not be unified without violating the Supreme Court's clear direction that the plan be partisan-neutral.

The southwest area of New Mexico presents difficult challenges in this redistricting cycle. Under the current map, three districts (Districts 32, 38 and 39) are included in Grant, Hildago, Luna and Sierra Counties. The largest communities in these counties are Silver City, Lordsburg, Deming and Truth or Consequences. Under the current map, Silver City is split between District 38 (which is a Republican performing district with a Republican incumbent) and District 39 (which is a Democrat performing district with a Democrat incumbent). The Republican incumbent in District 38 lives in Silver City. The Democrat incumbent in District 39 lives very near Silver City in Bayard.

Based on the most recent census, this area of New Mexico no longer has sufficient population to support three full House districts. In fact, the population in this area is sufficient to support approximately 2½ House districts. As a result, at least one of these districts must now extend into Dona Ana County (where some population increases have occurred) for additional population. This expansion into Dona Ana County is necessary even if population deviations are expanded to +/- 5 percent.

Unifying Silver City presents two problems. First, it is difficult (but not impossible) to unify Silver City and still keep Lordsburg, Deming and Truth or Consequences unified in a single district. In other words, unifying Silver City most often results in splitting at least one of the other three communities. All four communities cannot be kept intact without pairing additional incumbents and/or impacting the partisan neutrality of the plan.

More importantly, unifying Silver City results in partisan change to these districts. In the split of Silver City under the current map, the precincts within Silver City which are part of District 39 tend to be more Democratic, while the precincts within Silver City which are part of District 38 tend to be more Republican than those precincts in District 39. The incumbent in District 38 lives within the city limits of Silver City; therefore, in the absence of an additional pairing of incumbents[12], a unified Silver City would have to be included within District 38. Because this would involve the inclusion of additional precincts which tend to be more Democratic, District 38 would change from a Republican majority district to a Democrat majority district if Silver City is unified in District 38.[13] The Court and the Rule 11-706 expert examined whether this partisan change could be avoided through the use of higher deviations; however, the partisan change occurs even if deviations are increased to +/- 5 percent.

For redistricting purposes, the competing interests here are unifying communities of interest as opposed to partisan neutrality. These competing interests cannot be accommodated by increased deviations up to +/- 5 percent. In the Remand Order and the Opinion, the Supreme Court emphasizes the importance of both partisan neutrality and unifying communities of interest; however, the Supreme Court does not give any guidance as to which of these two interests are to be given preference when they are in conflict and when that conflict cannot be removed with increased deviations.

This Court concludes that, in the particular circumstances present in southwestern New Mexico, maintaining partisan neutrality must take precedence over the admirable goal of

[12] This Court examined the possibility of pairing the two incumbents in the Silver City area. Under the Supreme Court directives, such a Democrat-Republican pairing would have to provide an equal opportunity to either party. Remand Order, p. 20. Accomplishing this goal would be very difficult without splitting communities other than Silver City. Moreover, the partisan performance measures for the newly created district would alter the partisan balance. Unlike the population growth in Rio Rancho and the west side of Albuquerque which can clearly be identified as supporting two Republican and one Democrat seat, identifying the appropriate partisan makeup of a new seat in the southwest area of the state is virtually impossible.

[13] An explanation of the methodology used to determine whether a particular district is Republican majority or Democrat majority is set forth below. See p. 10.

unifying Silver City. This Court reaches this conclusion for several reasons. First, all plans must spilt some municipalities and communities of interest. Second, the current plan divides Silver City. Third, under most scenarios, unifying Silver City results in the split of at least one other substantial community in the region. Finally, the Supreme Court disapproved of this Court's adoption of the First Court-Approved Plan at least partially on the grounds that it had different partisan consequences than earlier versions of the Executive Plan. Many of the modifications from earlier versions of the Executive Plan were modifications made with the specific purpose of keeping identified communities of interest unified. See Findings of Fact Nos. 68 and 69 and Conclusions of Law 32 and 33. Because the Supreme Court concluded that the partisan effects of unifying additional communities of interest violated the requirement of partisan neutrality in the First Court-Approved Plan, this Court is hesitant to adopt a plan that unifies Silver City with attendant partisan consequences.[14]

2. *Partisan performance changes.*

> On remand, the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides. If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate, and rational state policies, including through the use of higher population deviations, then the district court should do so.

Remand Order at p. 20.

In reviewing the Remand Order and Opinion, the Supreme Court identified the following partisan performance changes and bias in the First Court-Adopted Plan: 1) the First Court-Adopted Plan increased Republican swing seats from five to eight over prior executive plans (Remand Order at p. 14); 2) the number of majority Republican districts increased from 31 in the original executive plan to 34 in the First Court Adopted Plan (Remand Order at pp.14-15); and 3) the incumbent pairings in the First Court-Adopted Plan contributed to partisan performance changes. (Remand Order at p. 15).[15] While the Remand Order compares the First Court-Adopted Plan to earlier executive plans in terms of majority Republican districts and Republican swing seats, the Opinion focuses more on the status quo: "[M]aintaining the political ratios as close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the neutrality required in such a politically-charged case." Opinion at pp. 21-22.

The first step for this Court in carrying out the direction of the Supreme Court is to identify what constitutes the "status quo" in terms of the political ratios to be maintained. The Supreme Court gives no specific guidance on this issue. Both at the trial and in briefs submitted on remand, several parties argued that the Court should adopt the present political ratio between Republicans and Democrats in the New Mexico House of Representatives as the "status quo." See, e.g., Sena Plaintiffs Objections to Preliminary Plans No. 1 and 2, at p. 31. This Court rejects that approach because it places too much emphasis on the outcome of the most recent election. One need only consider the difference in results between the last two elections (2008 and 2010) to conclude that no single election accurately reflects the "status quo" for the State of New Mexico.

[14] The Court and the Rule 11-706 expert examined additional suggestions to unify other municipalities submitted by the parties in their comments on the preliminary plans. When those suggestions were incorporated into the plan, the result generally was some change in the partisan neutrality of the plan. Not surprisingly, the change in partisan neutrality generally benefitted the political party aligned with the party proposing the change. After discussion of each suggested change, the Court concludes that the partisan consequences of the proposed changes outweigh the potential benefit of the proposed unification of the identified municipality; therefore, the suggested changes were not adopted.

[15] The issue of incumbent pairings is addressed below.

Instead, this Court concludes that a more appropriate measure of the "status quo" is the partisan make up of the current districts as reflected in the political performance data for each district as compiled by Research & Polling, Inc.[16] Although the trial testimony contained some criticism of the Research and Polling formula, the formula does have the advantage of considering elections over the majority of the most recent decade, as opposed to focusing on a single election.

Applying this measure to the current districts, the political ratio for the "status quo" is 32 Republican majority districts and 38 Democrat majority districts. Because the Supreme Court Opinion mandates that the political ratios be maintained at the status quo, the Final District Court Plan incorporates the ratio of 32 Republican majority districts and 38 Democrat majority districts.[17]

In order to reach the political ratio under the status quo as required by the Supreme Court, this Court adjusted district boundaries for two districts so that those districts moved from slight Republican majority districts to slight Democrat majority districts. The two districts selected were District 32 and District 49. The Court selected these two districts because they are slight Democrat majority districts in the current plan. If one of the goals of the Supreme Court remand is to maintain the political ratios that exist under the "status quo," it made sense to consider these districts so that they do not change their slight majority Democrat status in the current plan. In addition, it should be noted that both of these districts remain competitive districts.

In the Remand Order and Opinion, the Supreme Court also noted that Republican swing seats increased in the First Court-Adopted Plan as compared to earlier executive plans. The First Court-Adopted Plan included eleven Republican majority districts within the swing seat category (defined as 50% to 53.9%) and five Democrat majority seats within the swing seat category. Although it is not completely clear, it appears that the Supreme Court was concerned that the First Court-Adopted Plan contained significantly more Republican majority seats in the swing category, thereby giving Republicans a slight advantage in closely contested districts. To address this concern, the Final District Court Plan includes a total of fifteen districts in the swing category. Of these, eight are Republican majority districts and seven are Democrat majority districts. In the current districts, there are nine Republican majority districts and six Democrat majority districts. While the distribution of those seats across the spectrum from 50% to 53.9% can never be identical between the parties, the distribution resulting in the Final District Court Plan is relatively symmetrical. See the Political Performance chart attached to Preliminary Plan No. 1.

Finally, it is worth noting that the Final District Court Plan maintains very similar political performance percentages in the individual swing

[16] The Research and Polling partisan performance measurement is essentially the average of all statewide races that were held in New Mexico from 2004 to 2010, excluding outlier races in which a candidate won/lost by more than 20%. These results were then segmented at the legislative district level for each of the plans. This index does not include the legislative district races for various logistical and statistical reasons. The partisan performance measure is intended to show how the average statewide Democratic and Republican candidates have performed historically in each district. It is not intended to predict the outcome of each legislative race. The outcome of specific legislative races will be affected by many other factors such as the quality and resources of the candidates as well as the mood of the state and nation at the time of the election. Despite this, the partisan measure appears to be a very accurate indicator of the party's candidate that may win the general election. Currently there are only three incumbents who are of the opposite party of what the measure indicates. And in each case, the partisan percentage is very close to indicating a toss up race: 49.3%, 50.6%, and 51.8%.

[17] In responding to the preliminary plans, the James Plaintiffs contend that the political ratio in the Final District Court Plan is not 38-32 because District 24 is evenly split at 50 percent. There are three responses to this contention. First, the split is not exactly 50-50; the actual calculation for District 24 is 50.03% Republican. A 50-50 split appears in the map packet only because the table only identifies percentages to one-tenth of a percentage point. Second, District 24 is the district that results from the Republican-Democrat pairing in Albuquerque. The Supreme Court has directed that this district should provide an equal opportunity to either party. Remand Order at p. 20. Finally, the current plan includes one district, District 43, which appears as a 50-50 split in the map packet but in reality is 50.02% Republican. To the extent it is argued that the political ratio in the Final District Court Plan is 38 Democrat majority districts, 31 Republican districts and one evenly split district, that ratio would also match the current districts as well.

districts, as compared to the current districts.[18] In the Opinion, the Supreme Court notes that "[c]ompetitive districts are healthy in our representative government because competitive districts allow for the ability of voters to express changed political opinions and preferences." Opinion at p. 31. In the Final District Court Plan, the competitive seats under the current plan remain competitive.

> 3. *As part of the review of partisan performance changes, the district court should consider the partisan effects of any consolidation.*
>
> Any district that results from a Democrat-Republican consolidation, if that is what the district court elects to do, should result in a district that provides an equal opportunity to either party. In the alternative, some other compensatory action may be taken to mitigate any severe and unjustified partisan performance swing. The performance of created districts as well as those left behind should be justified.

Remand Order at p. 20.[19]

In the First Court-Adopted Plan, an incumbent pairing was created in central Albuquerque between Representative Al Park (Democrat) and Representative Jimmie Hall (Republican) in District 28. The Supreme Court concluded that this consolidation "resulted in a strongly partisan district favoring one party, in effect tilting the balance for that party without any valid justification." Remand Order at p. 16. The Supreme Court also observed that District 28 in the First Court-Adopted Plan was an "oddly shaped" district. Id.

In the Final District Court Plan, this Court again adopts a Democrat-Republican consolidation in Central Albuquerque because such a consolidation is consistent with the overall population trends of the state. Because the Supreme Court has directed that any such pairing must provide an equal opportunity to either party, the Final District Court Plan adopts an incumbent pairing between Representative Al Park (Democrat) and Representative Conrad James (Republican) in District 24. Due to the political makeup of the individual precincts, it would be difficult (if not impossible) to create a district which pairs Representative Park and Representative Hall and results in near equality in the political performance percentages. As a result, the Court identified District 24 as a district which could pair Representative Park with a Republican legislator and still produce near equality in the political performance percentages. While the resulting District 24 is not as compact as the Court would prefer, the district does maintain some approximation of the shape of the prior District 24.

[18] In this regard, District 7 and District 8 may require some explanation. These two districts are in the Los Lunas/Belen area and are the subject of much argument from the parties because they are highly competitive districts. These districts are closely interrelated and changes in one district almost always affect the other. Consideration of these districts was further complicated by the fact that both share a boundary with District 49, which is a district that has been returned to a Democrat majority district under the mandate from the Supreme Court. To accomplish this, some Democrat leaning precincts in Belen were moved to District 49 while some Republican leaning precincts in Los Lunas were moved to District 8. Finally, there are communities within District 7 and District 8 which are split. In an apparent effort to gain a slight advantage in these competitive districts, some parties submitted suggestions under the guise of attempting to unify certain communities. Ultimately, the Final District Court Plan balanced these competing issues as follows: Both District 7 and District 8 remain as competitive districts, but District 7, which under the current plan had a Republican majority performance percentage, now has a Democrat majority performance percentage. Conversely, District 8, which under the current plan had a Democrat majority performance percentage, now has a Republican majority performance percentage. While both Los Lunas and Belen remain split under the District Court Final Plan, Los Lunas is now split between only two districts (District 7 and District 8) rather than three districts as is the case under the current plan.

[19] The final sentence in this provision of the Remand Order states: "[t]he performance of created districts as well as those left behind should be justified." This Court interprets this sentence to apply if this Court elected to include some consolidation other than those contained in the First Court-Adopted Plan. To the extent this Court needs to provide justification for the created districts in the Final District Court Plan, this Court would adopt the following statement of the Supreme Court: "The three new seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in those high-growth areas on the west side of Albuquerque and in Rio Rancho, a result we do not question." Remand Order at p. 15.

4. *Hispanic "Majority" District in House District 67*

> It does not appear that the district court considered Hispanic citizen voting age populations in reaching its decision, and it should do so on remand. Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in Voting Rights Act litigation, and it has been represented, as least in effect, for the past three decades.

Remand Order at p. 20-21.[20]

During the trial, this Court heard evidence regarding the minority population in Clovis and the history of District 63. Under the current plan, the bulk of the Hispanic population in and around Clovis was included District 63, a geographically large district which stretched from Clovis east through Fort Sumner and Santa Rosa, extending to the western boundary of Guadalupe County. The incumbent in District 63 resides in Santa Rosa, approximately 100 miles from Clovis. Under the current plan, the Hispanic voting age population in District 63 is 54.6%.[21]

In the First Court-Approved Plan, the Court adopted a plan which changed District 63 and District 67. The First Court-Approved Plan reconfigured District 67 as a compact, majority Hispanic voting age population district which included the principle minority populations in Clovis and Portales. Previously, District 67 had not been a majority Hispanic voting age population district; therefore, the First Court-Approved Plan added one additional majority Hispanic voting age population district to this area of the state. Under the First Court-Approved Plan, District 63 changed to a geographically large, but still compact, district which extended from Fort Sumner and Santa Rosa to the northeast corner of New Mexico. The Hispanic voting age population of District 63 remained relatively constant at 54.0%.

In adopting the First Court-Approved Plan, this Court noted the substantial increase in the number of majority Hispanic voting age population districts contained in the plan overall (Finding of Fact No. 71), but concluded, based on the totality of the circumstances, there was not "persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn." Conclusion of Law No. 26.

[20] The first sentence of this remand provision sets forth a very serious allegation regarding this Court's prior decision. The Remand Order contends that this Court did not consider Hispanic citizen voting age populations in reaching the decision. The consideration of minority voting issues is one of the central responsibilities of a Court in redistricting cases, both from a legal and a moral perspective. Given the Findings of Fact and Conclusions of Law, it is very difficult for this Court to understand how the Supreme Court could conclude that this Court did not consider Hispanic citizen voting age populations in reaching its decision. As it relates to the minority community in Clovis, this Court made specific findings regarding that community. Findings of Fact Nos. 64, 65 and 66. Most importantly, this Court made the specific finding that "Executive Alternate Plan 1 provides for a Hispanic majority VAP district in and around Clovis." Finding of Fact No. 66. This is the same district that is included in the First Court-Adopted Plan. The fact that the very district that contains the most significant Hispanic community in Clovis is a majority Hispanic voting age district should be a clear indication that this Court did consider Hispanic voting age populations in reaching a decision.

Moreover, a review of the entire First Court-Adopted Plan shows that this Court paid close attention to Hispanic voting age populations. This Court entered five Findings of Fact and Conclusions of Law specifically addressing Hispanic voting age population. Findings of Fact Nos. 64, 65, 66, and 71 and Conclusions of Law No. 26. Under the current plan, there are twenty-seven majority Hispanic voting age population districts. In the First Court-Adopted Plan, the number of majority Hispanic voting age population districts is increased to thirty. Of all the plans submitted to this Court by the Legislative Defendants, the James Plaintiffs, the Sena Plaintiffs, the Egolf Plaintiffs, the Maestas Plaintiffs, and the Executive Defendants, this Court selected a plan that had the highest number of majority Hispanic voting age population districts. This Court made an express finding to this effect. Finding of Fact No. 71.

The omission of these facts from the majority Opinion is important because the Opinion will become a permanent part of New Mexico law through its publication in the New Mexico Reports. Future readers of the majority Opinion, both in New Mexico and outside the state, will be left with the mistaken impression that this Judge failed to consider Hispanic voting age population in rendering a decision in this case, when in fact both the plan that was adopted and the Findings of Fact and Conclusions of Law demonstrate thorough consideration of minority populations.

[21] At the time of the litigation in *Sanchez v. King*, No. 82-00670M (D.N.M. 1984), the Hispanic population in District 63 was well below 50%.

This Court was of the view that the burden of proof on the need for a particular minority-majority district rested with the party proposing such a district.

The Supreme Court Opinion shifts the burden of proof on this issue as it relates to a majority-minority district in Clovis: "Any redistricting plan ultimately adopted by the district court should maintain an effective majority-minority district in and around the Clovis area unless specific findings are made based on the record before the district court that Section 2 Voting Rights Act considerations are no longer warranted." Opinion at p. 14. This shift in the burden of proof changes the outcome. This Court cannot find on the present record that any party affirmatively proved that Section 2 Voting Rights Act considerations are no longer warranted; therefore, this Court interprets the remand from the Supreme Court to require that District 63 remain as close as possible to its present configuration and that, at a minimum, the percentage of the Hispanic voting age population not be decreased. These requirements are met in the Final District Court Plan. In the Final District Court Plan, 89.7% of the population in current District 63 is also contained within the boundaries of District 63. The Hispanic voting age population for District 63 in the Final District Court Plan is 57.0%, an increase of 2.4% over the current District 63. These changes do result in a decrease in the Hispanic voting age population in District 67 down to 39.7%, thereby reducing by one the total number of majority Hispanic voting age population districts in New Mexico.

For the reasons set forth above, this Court concludes that the District Court Final Plan complies with the Remand Order of the Supreme Court. Counsel for the Secretary of State is directed to immediately prepare an Amended Judgment and Final Order consistent with this Decision, obtain approval as to all counsel as to form, and submit it to the Court for immediate entry.[22]

Dated: _____

James A. Hall
District Judge Pro Tempore

Copies to counsel of record via e-filing system.

[22] This Court would like to thank Brian Sanderoff, Michael Sharp and all the staff at Research and Polling, Inc. for their assistance as the Rule 11-706 expert. Their work was invaluable to this Court in addressing the issues raised in the remand from the Supreme Court.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-018

Filing Date: June 1, 2012

Docket No. 32,510

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

MICHAEL SWICK,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Louis P. McDonald, District Judge

Jacqueline Cooper, Chief Public Defender
Kathleen T. Baldridge, Assistant Appellate Defender
Santa Fe, NM

for Petitioner

Gary K. King, Attorney General
Joel Jacobsen, Assistant Attorney General
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} On the morning of January 21, 2006, Michael Swick, along with his cousin, Benito Lopez, and the victim, Alex Ogle, began a day of cruising and drinking alcohol in a borrowed Jeep. The three rode around for most of the day getting the Jeep stuck. Late in the afternoon, Swick and his cousin also consumed cocaine. They decided to walk because the Jeep was stuck and it was getting dark. Shortly thereafter, Swick's cousin returned to the Jeep to get warmer clothes.

{2} After getting a jacket from the Jeep, Swick's cousin walked back toward the place where he had left Swick and Ogle. When he arrived, he found Swick standing, holding a large 15-pound rock, with Ogle lying on the ground beneath him. Swick had stabbed Ogle and bludgeoned him on the head with the rock. Swick and his cousin walked from the crime scene and had agreed to steal a car as they approached the home of Carlos and Rita Atencio. Mrs. Atencio answered the door, and they told her that their Jeep was stuck. She let them in so that they could use the telephone. When they entered the house, Swick stabbed Mrs. Atencio, and both men continued to beat, stab, and slash her and her husband. Swick and his cousin left with $14.00 and a van owned by the Atencios.

{3} Swick was indicted with first-degree murder for Ogle's killing. The indictment also charged him with 25 additional counts for the offenses at the Atencio home, including conspiracies, attempted first-degree murders, aggravated batteries with a deadly weapon, aggravated burglaries with a deadly weapon, and aggravated burglaries based on the battery of Mr. and Mrs. Atencio.

{4} During the second day of trial, Swick had an outburst in court and had to be restrained by court security officers. Some of the jurors witnessed the incident. The trial court attempted to remedy the situation by extensively polling the jurors and asking whether they could be fair after the incident, to which all of the jurors answered yes. Swick moved for a mistrial, which was denied by the trial court.

{5} At the close of the State's case, defense counsel tendered an instruction to the trial court for voluntary manslaughter as a result of sufficient provocation and, in the alternative, an instruction for self-defense. The trial court

declined to give an instruction for self-defense. The trial court did instruct the jury on voluntary manslaughter, concluding that it was for the jury to determine whether Swick acted with sufficient provocation. However, without objection, the trial court instructed the jury on second-degree murder, although it neglected to include "without sufficient provocation" as an element of the crime.

{6} The jury found Swick guilty of second-degree murder of Ogle as a step-down from first-degree murder and guilty of all of the remaining charges against him related to the Atencios. Swick appealed to the New Mexico Court of Appeals, raising issues regarding double jeopardy, jury instructions, and challenging the trial court's denial of his motion for a mistrial. The Court of Appeals upheld all of his convictions, holding that (1) Swick's convictions for two counts of attempted murder and two counts of aggravated battery with a deadly weapon did not violate the double jeopardy prohibition pursuant to *State v. Armendariz*, 2006-NMSC-036, ¶¶ 24-25, 140 N.M. 182, 141 P.3d 526; *see State v. Swick*, 2010-NMCA-098, ¶¶ 20-21, 148 N.M. 895, 242 P.3d 462; (2) Swick's convictions for one count of aggravated burglary (deadly weapon) and two counts of aggravated burglary (battery) did not violate the double jeopardy prohibition, *Swick*, 2010-NMCA-098, ¶¶ 28-29; (3) it was not fundamental error to issue an erroneous jury instruction on second-degree murder when subsequent proper instructions corrected the error, *id.* ¶¶ 7-8; (4) an instruction on self-defense was not warranted in this case, *id.* ¶¶ 17-18; and (5) the trial court did not abuse its discretion by denying Swick's motion for a mistrial, *id.* ¶ 34. We granted Swick's petition for writ of certiorari, and we (1) vacate both of Swick's convictions for aggravated battery with a deadly weapon and his two convictions for aggravated burglary based on battery because these convictions violate the constitutional prohibition against double jeopardy; (2) remand to the trial court for a new trial on the second-degree murder conviction because the instruction regarding second-degree murder was erroneous; (3) affirm the trial court's rejection of the self-defense jury instruction; and (4) affirm the trial court's denial of the motion for a mistrial. Accordingly, we affirm the Court of Appeals in part and reverse in part.

I. DOUBLE JEOPARDY

{7} After leaving the scene of Ogle's killing, Swick and his cousin decided to steal a car and ended up at the home of the Atencios. When they arrived they found several vehicles in the Atencio yard, but none were operable. Swick's cousin then knocked on the door, and Mrs. Atencio answered. They asked if they could come in and use the phone, to which Mrs. Atencio responded, "Yeah, come in." As soon as she let them in the house, Swick rushed past his cousin and stabbed Mrs. Atencio in the back. Swick then went to Mr. Atencio, who was sitting on the couch, and began to beat and stab him. They left with $14.00 and a van owned by the Atencios.

{8} Swick was convicted of eleven felony counts arising from his conduct at the Atencio residence and contends that four counts must be vacated. He contends that the prohibition against double jeopardy was violated when he was convicted of (1) two counts of first-degree attempted murder and two counts of third-degree aggravated battery arising out of unitary conduct, and (2) two counts of aggravated burglary (battery) and one count of aggravated burglary (deadly weapon) arising out of unitary conduct. Regarding the first claim, the Court of Appeals affirmed Swick's convictions without reaching the merits, citing *State v. Glascock*, 2008-NMCA-006, ¶ 26, 143 N.M. 328, 176 P.3d 317, for the proposition that the Court of Appeals is bound by Supreme Court precedent established in *Armendariz*. *Swick*, 2010-NMCA-098, ¶ 21.

{9} The Court of Appeals also rejected Swick's second double jeopardy claim regarding the aggravated burglary convictions. The Court of Appeals assumed that the conduct underlying the two convictions was unitary and therefore limited its analysis to whether the Legislature authorized multiple punishments for aggravated burglary under different theories. *Id*. ¶¶ 25, 29.

The Court of Appeals held that the Legislature authorized multiple punishments because NMSA 1978, Sections 30-16-4(B) (burglary involving a deadly weapon) and 30-16-4(C) (burglary involving battery) (1963) addressed different social evils that required separate punishments—to deter criminals from using deadly weapons in burglaries versus to address actual physical injury to persons during burglaries. *Swick*, 2010-NMCA-098, ¶¶ 26, 29. The Court of Appeals acknowledged that the same quantum of punishment is prescribed for each subsection, suggesting that separate punishments may be inappropriate.[1] *Id.* ¶ 29. Despite this acknowledgment, the Court of Appeals concluded that the Legislature intended multiple punishments. *Id.* ¶¶ 28-29.

{10} A double jeopardy challenge is a constitutional question of law which we review de novo. *See State v. Gallegos*, 2011-NMSC-027, ¶ 51, 149 N.M. 704, 254 P.3d 655. The Fifth Amendment of the United States Constitution prohibits double jeopardy and is made applicable to New Mexico by the Fourteenth Amendment. U.S. Const. amends. V & XIV, § 1; *Benton v. Maryland*, 395 U.S. 784, 787 (1969). It functions in part to protect a criminal defendant "against multiple punishments for the same offense." *State v. Gutierrez*, 2011-NMSC-024, ¶ 49, 150 N.M. 232, 258 P.3d 1024 (internal quotation marks and citations omitted). There are two classifications of double jeopardy multiple-punishment cases. The first is the double-description case, where the same conduct results in multiple convictions under different statutes. *Gallegos*, 2011-NMSC-027, ¶ 31. The second is the unit-of-prosecution case, where a defendant challenges multiple convictions under the same statute. *Id*. As will be explained below, Swick's first double jeopardy challenge is a double-description case, while his second is a unit-of-prosecution case.

A. Separate Convictions for Attempted Murder and Aggravated Battery Arising From the Same Conduct Violate the Prohibition Against Double Jeopardy.

{11} Double-description claims are subject to the two-part test set forth in *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991). First we consider whether the conduct underlying the two convictions was unitary (the same conduct). If it is not, then there is no double jeopardy violation. If it is unitary, we consider whether it was the Legislature's intent to punish the two crimes separately. *Id*. at 13, 810 P.2d at 1233. In analyzing legislative intent, we first look to the language of the statute itself. *State v. Frazier*, 2007-NMSC-032, ¶ 21, 142 N.M. 120, 164 P.3d 1. If the statute does not clearly prescribe multiple punishments, then the rule of statutory construction established in *Blockburger v. United States*, 284 U.S. 299 (1932) applies. *Swafford*, 112 N.M. at 14, 810 P.2d at 1234.

{12} Under *Blockburger*, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. If the statute is "vague and unspecific," *Gutierrez*, 2011-NMSC-024, ¶ 59 (internal quotation marks omitted), or written in the alternative, courts must consider the State's legal theory in assessing whether each provision requires proof of a fact which the other does not. *Id*. ¶ 58.

{13} If each statute requires proof of a fact that the other does not, it may be inferred that the Legislature intended to authorize separate punishments under each statute. *Swafford*, 112 N.M. at 9, 14, 810 P.2d at 1229, 1234. However, this is only an inference that leads to an examination of other indicia of legislative intent. *Id.* at 14, 810 P.2d at 1234. "Legislative intent may be gleaned

[1] This Court and the Court of Appeals have used the quantum of punishment to support the proposition that the Legislature did not intend to punish the two crimes separately, both when the amount of punishment is the same and when the amount differs. *Compare Swick*, 2010-NMCA-098, ¶ 29 ("The quantum of punishment under either subsection is the same, which might suggest that separate punishments are inappropriate."), *with Armendariz*, 2006-NMSC-036, ¶ 25 ("In comparing the quantum of punishment for each offense, the difference in the amount of punishment is arguably an indication that the Legislature did *not* intend [the offenses] to be separately punishable.").

from the statutory schemes by identifying the particular evil addressed by each statute; determining whether the statutes are usually violated together; comparing the amount of punishment inflicted for a violation of each statute; and examining other relevant factors." *State v. Pedro Gonzales*, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992). If after examining the relevant indicia the legislative intent remains ambiguous, the rule of lenity requires us to presume that the Legislature did not intend multiple punishments for the same conduct. *Swafford*, 112 N.M. at 15, 810 P.2d at 1235.

{14} We previously held in *Armendariz* that the Legislature authorized multiple punishments for attempted murder and aggravated battery,[2] even when they arise from the same conduct. *Armendariz*, 2006-NMSC-036, ¶¶ 24-25. In *Armendariz*, as in this case, the defendant was convicted of attempted first-degree murder and aggravated battery arising from the same conduct. *Id*. ¶ 5. After a "chaotic altercation" between the two victims and the defendant outside a bar, the defendant left the scene. However, the defendant returned with a gun and shot both victims. One of the victims survived. *Id*. ¶ 4. The defendant challenged his convictions, arguing that the Legislature did not intend to punish each crime separately when the underlying conduct for both charges was unitary. *See id*. ¶ 23. The State did not dispute that the conduct underlying the offense was unitary, so the *Armendariz* Court proceeded to the second prong of the *Swafford* analysis. *Armendariz*, 2006-NMSC-036, ¶ 23.

{15} The *Armendariz* Court first applied the *Blockburger* test and found that each crime contained an element that the other did not. *Armendariz*, 2006-NMSC-036, ¶ 24. Attempted murder requires proof of an overt act, intent to commit murder, and failure to complete the crime, which are not elements required to prove aggravated battery. *Id*. Aggravated battery requires an unlawful application of force, which is not an element of attempted murder. *Id*. Therefore, the Court concluded that a presumption arose that the Legislature intended separate punishments under these two statutes. *Id.*

{16} The *Armendariz* Court then looked to other indicia of legislative intent. *Id*. ¶ 25. First, the Court recognized that attempted murder and aggravated battery were enacted to address different social harms, punishing the state of mind in attempted murder and punishing actual harm in aggravated battery. *Id*. Second, the Court reasoned that there was no language in either statute which indicated an intent that these crimes were alternative ways of committing the same crime. *Id*. Third, the Court explained that the two crimes do not necessarily have to be violated at the same time. *Id*. In other words, a defendant can commit attempted murder without also committing battery. The *Armendariz* Court used these three indicia to find a presumption of legislative intent to allow separate punishments. *Id.* The *Armendariz* Court also recognized that the Legislature may not have intended separate punishments because the punishment for attempted first-degree murder is triple the punishment for aggravated battery.[3] *Id*. However, the Court held that this disparity in punishment was insufficient to overcome what it considered to be a presumption of legislative intent to punish both crimes separately. *Id*. Despite legislative intent remaining ambiguous, the *Armendariz* Court did not apply the rule of lenity, and therefore it upheld the defendant's convictions for both attempted murder and aggravated battery arising from the same conduct. *See id*.

{17} Swick has asked this Court to overrule our holding in *Armendariz*. The factors we consider before overruling a prior decision are:

> 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so

[2] NMSA 1978, § 30-2-1 (1963, as amended through 1994) (murder); NMSA 1978, § 30-28-1 (1963) (attempt to commit a felony); and aggravated battery, NMSA 1978, § 30-3-5 (1969) (aggravated battery).

[3] Attempted first-degree murder is a second-degree felony punishable by imprisonment for nine years. *See* NMSA 1978, § 31-18-15(A)(6) (2007); § 30-28-1(A). Aggravated battery is a third-degree felony punishable by imprisonment for three years. *See* § 31-18-15(A)(9).

> that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification.

State v. Riley, 2010-NMSC-005, ¶ 34, 147 N.M. 557, 226 P.3d 656 (quoting *State v. Pieri*, 2009-NMSC-019, ¶ 21, 146 N.M. 155, 207 P.3d 1132). "[W]hen one of the aforementioned circumstances convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent." *Pieri*, 2009-NMSC-019, ¶ 21 (internal quotation marks and citations omitted).

{18} Three of the *Riley* factors do not apply to this case. The second factor, justifiable reliance, which is most important in cases implicating property and contract rights, and least important in cases involving procedural and evidentiary rules, is not present in this case. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *see also Arizona v. Gant*, 556 U.S. 332, 349-50 (2009) (rejecting the State's argument in that case that police officers relied on the "*Belton* rule," and therefore developed a cognizable reliance interest that justified upholding the rule). The State could not have relied on *Armendariz* to its detriment because the double jeopardy prohibition is applied at the conclusion of a case to prevent multiple punishments. The third factor, which analyzes whether the rule is only a remnant of an abandoned doctrine, is likewise inapplicable. The test established in *Swafford,* 112 N.M. at 13, 810 P.2d at 1233, is hardly "a remnant of abandoned doctrine," although the principles of double jeopardy have developed since *Swafford* and have been modified by *Gutierrez*, 2011-NMSC-024, ¶ 58. Subject to subsequent modifications, *Swafford* remains the test to be applied in every case challenging convictions on double jeopardy grounds. Finally, the fourth and final factor does not apply because the Legislature has not modified the statutes defining Swick's crimes since *Armendariz* was decided.

{19} However, the first *Riley* factor, which examines whether the rule is so unworkable so as to be intolerable, does apply. While the precedent established in *Armendariz* is efficient and predictable, stare decisis is neither an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). We conclude that the modifications to double jeopardy jurisprudence make this Court's opinion in *Armendariz* so unworkable as to be intolerable. We therefore overrule *Armendariz*. We will show how the modifications to our double jeopardy jurisprudence since deciding *Armendariz* lead us to conclude that the Legislature did not intend multiple punishments for attempted murder and aggravated battery arising from the same conduct because the latter is subsumed by the former. *See Gutierrez*, 2011-NMSC-024, ¶ 56.

{20} The parties in this case do not dispute that the underlying conduct supporting both convictions was unitary. Swick explicitly asserted in his opening brief that the conduct underlying these two convictions was unitary. The State did not challenge this assertion in its answer brief. Thus, the question before this Court is whether the Legislature authorized multiple punishments under the statutes for attempted murder and aggravated battery with a deadly weapon for the same conduct. We conclude that it did not.

{21} Since we decided *Armendariz*, this Court has modified the *Blockburger* analysis to be used in New Mexico. *See Gutierrez*, 2011-NMSC-024, ¶ 58. In *Gutierrez*, we rejected the approach used in *Armendariz*, which is a strict elements test, in order to be more in line with United States Supreme Court precedent. *Gutierrez*, 2011-NMSC-024, ¶ 58. We clarified that, in the abstract, the application of *Blockburger* should not be so mechanical that it is enough for two statutes to have different elements. *Gutierrez*, 2011-NMSC-024, ¶ 58. Instead, we held in *Gutierrez* that when a statute is "vague and unspecific," *id.* ¶ 59 (internal quotation marks omitted), our courts must evaluate legislative intent by considering the State's legal theory independent of the particular

facts of the case, *id*. ¶ 58. Our courts may do this by examining the charging documents and the jury instructions given in the case. *Id*. ¶ 53.

{22} According to Counts III and IV of the indictment in this case, to prove first-degree attempted murder, the State had to prove:

> That on or about the 21st day of January, 2006, in Sandoval County, New Mexico, the above named defendant, did attempt to commit Murder, in that the defendant intended to commit Murder, and began to do an act which constituted a substantial part of Murder, but failed to commit the offense, contrary to §30-28-01, and §30-02-01, NMSA 1978, as amended.

Although the indictment, the jury instructions, and the verdict forms are silent as to the identity of the attempted-murder victims, it is clear that the victims are Carlos and Rita Atencio.

{23} Counts V and VI, which charge third-degree aggravated battery with a deadly weapon, read:

> That on or about the 21st day of January, 2006, in Sandoval County, New Mexico, the above-named defendant, did touch or apply force to Carlos Atencio, [Count V or Rita Atencio, Count VI] with [a] knife, [a] cane, and a leg from a chair or table, which was a deadly weapon, intending to injure Carlos Atencio, [Count V or Rita Atencio, Count VI], or another, contrary to §30-3-5, NMSA 1978, as amended.[4]

{24} As this Court recognized in *Armendariz*, attempted murder and aggravated battery are not always committed together. 2006-NMSC-036, ¶ 25. However, under *Gutierrez*, when the two statutory crimes are committed together, as they were in this case, the trial court must look to the State's theory of the case and the elements of the crime charged if one of the statutes is a generic, multi-purpose statute that is "vague and unspecific." 2011-NMSC-024, ¶ 59 (internal quotation marks omitted). The Legislature is always free to express its intent to punish the same conduct under more than one statute. However, if legislative expression is absent and one statute is subsumed by the other, then convictions for both cannot stand. *Swafford*, 112 N.M. at 14, 810 P.2d at 1234.

{25} Under the attempted murder statutes, §§ 30-28-1 & 30-2-1, many forms of conduct can support the "began to do an act which constituted a substantial part of Murder" element. Therefore, attempted murder is a generic, multipurpose statute that is "vague and unspecific," and we must look to the State's theory of the case to inform what "began to do an act which constituted a substantial part of Murder" means *in this case*. When doing so, we are persuaded that the State used the aggravated batteries to prove the element of "began to do an act which constituted a substantial part of Murder." The State argues that, even after an examination of the charging document and the jury instructions, the elements of the attempt statute are still vague. It is true that one must infer what the "began to do an act" element is after reading the charging document or the jury instructions. However, the State does not offer an alternative act that could have been the basis for this element. As Justice Bosson stated in his special concurrence in *Gutierrez*, "[a] prosecutor should not be allowed to defeat the constitutional protections afforded by the double jeopardy clause" by clever indictment drafting. 2011-NMSC-024, ¶ 79 (Bosson, J., specially concurring).

{26} The State's legal theory at the outset of trial was that after Swick entered the Atencios' home, he "proceed[ed] to try [to] kill them." Moreover, the State proffered the same testimony to prove the aggravated batteries as it did to prove the attempted murders, which was that Swick beat, stabbed, and slashed Mr. and Mrs. Atencio after entering their home. Finally, the State, in its closing argument, after giving the elements of attempted murder, asked the jury, "[w]hy is this attempted murder and not

[4] The jury instructions substantially mirrored the language of the charging document for both crimes.

just aggravated battery?" After a recitation of the same evidence that the State used to support the aggravated battery charge earlier in its closing, it concluded with "[t]his kind of excessive violence is supportive of an intent to kill."

{27} The theory of the State's case to support the charges of aggravated battery with a deadly weapon and also the charges of attempted murder was that Swick beat, stabbed, and slashed the Atencios. In other words, considering the State's theory of the case, the aggravated battery elements were subsumed within the attempted murder elements. When this occurs, the double jeopardy prohibition is violated, and "punishment cannot be had for both." *Swafford*, 112 N.M. at 14, 810 P.2d at 1234.

{28} We find *Brown v. Ohio*, 432 U.S. 161, 167 (1977), instructive on this point. In *Brown*, the United States Supreme Court recognized that each state court has the "final authority" to interpret its state's legislation. *See id.* Consistent with this principle, the Court in *Brown* upheld the Ohio Court of Appeals' holding construing joyriding as a lesser-included offense of auto theft, where the statutory language left ambiguous whether the greater offense included all of the elements of the lesser offense. *See id.* at 162 & n.1, 163 & n.2. The *Brown* Court recognized that state courts may properly conclude that one offense subsumes another, despite ambiguous language, through statutory construction. *See id.* at 166-68. By looking to the legal theory of the case, that is precisely what we do here. *See Davis v. State*, 770 N.E.2d 319, 324 (Ind. 2002) (vacating a conviction for aggravated battery when there was a reasonable possibility that the jury relied on the same act by the defendant to convict the defendant of aggravated battery as it did to convict the defendant of attempted murder); *People ex rel. Walker v. Pate*, 292 N.E.2d 387, 390 (Ill. 1973) (observing that it was error for a district court to impose sentences for both aggravated battery and attempted murder because the convictions arose from the same conduct and aggravated battery is a lesser-included offense of attempted murder).

{29} Even if the elements of attempted murder do not subsume the elements of aggravated battery, an examination of these statutes leads us to conclude that Swick's convictions violate the double jeopardy prohibition, contrary to the holding in *Armendariz*, for two reasons. First, the social harms addressed by each statute do not conclusively indicate an intent to punish separately. Regarding social harms, the *Armendariz* Court concluded that "[t]he prohibition against attempted murder is directed at protecting a person's life and the statute is directed at punishing a person's state of mind, whereas the prohibition against aggravated battery is directed at protecting a person from bodily injury and the statute is directed at punishing actual harm." 2006-NMSC-036, ¶ 25. Another reasonable assessment of the social harms is that both statutes address the social evil of harmful attacks on a person's physical safety and integrity. Both statutes punish overt acts against a person's safety but take different degrees into consideration. The aggravated battery statute concerns itself with the intent to harm and the attempted murder statute concerns itself with the intent to harm fatally. However, this is only one factor to consider in the analysis. Even if we accept as true that different social harms may be addressed by each statute, *Swafford* explained that "[i]f the punishment attached to an offense is enhanced to allow for kindred crimes, these related offenses may be presumed to be punished as a single offense." 112 N.M. at 15, 810 P.2d at 1235. Aggravated battery committed with an intent to cause great bodily harm is punishable by three years in prison. NMSA 1978, §§ 31-18-15(A)(9) (2007), 30-3-5(C). However, when the aggravated battery is committed with an intent to kill (attempted murder), the Legislature has enhanced the punishment to nine years. *See* §§ 31-18-15(A)(6), 30-2-1, 30-28-1. In other words, the Legislature intended that Swick be punished more harshly when he stabbed the Atencios with the intent to kill them rather than with the intent merely to injure them.

{30} Second, the rule of lenity should have been applied in Swick's favor. The United States Supreme Court has held that when doubt

regarding legislative intent remains, ambiguity "must be resolved in favor of lenity." *Whalen v. United States*, 445 U.S. 684, 694 (1980). We apply the rule of lenity in this case because reasonable minds can differ as to the Legislature's intent in punishing these two crimes. *Santillanes v. State*, 115 N.M. 215, 221, 849 P.2d 358, 364 (1993). And when we apply the rule of lenity to convictions under the attempted murder and aggravated battery with a deadly weapon statutes arising from unitary conduct, we must hold that multiple convictions cannot stand.

{31} Because our application of *Blockburger* has been modified to bring it closer in line with United States Supreme Court precedent, we overrule *Armendariz* and vacate the convictions that carry the lesser punishment. *See State v. Santillanes*, 2001-NMSC-018, ¶¶ 28, 30, 130 N.M. 464, 27 P.3d 456 ("'[T]he general rule requires that the lesser offense be vacated' in the event of impermissible multiple punishments. . . . We believe that the degree of felony . . . is an appropriate measure of legislative intent regarding which of two offenses is a greater offense." (internal citation omitted)); *see also Jones v. Thomas*, 491 U.S. 376, 387 (1989) ("[W]here *concurrent* sentences are imposed, unlawful imposition of two sentences may be cured by vacating the shorter of the two sentences."); *People v. Fuentes*, 258 P.3d 320, 326 (Colo. App. 2011) ("[W]e must maximize the effect of the jury's verdict and retain the greatest number of convictions and longest sentence."); *State v. Polson*, 145 S.W.3d 881, 897 (Mo. Ct. App. 2004) ("[W]e can cure the violation [of the double jeopardy prohibition] by ordering that the shorter of the [two] sentences be vacated." (internal quotation marks and citation omitted)); *State v. Valenzona*, 2007-Ohio-6892, ¶ 36 ("Public policy suggests that where two charges are allied offenses of similar import, the offense with the longer sentence should be preferred over the offense with the shorter sentence." (internal quotation marks and citation omitted)); *State v. Scribner*, 746 A.2d 145,147-48 (Vt. 1999) ("Vacating the shorter sentence fully vindicates defendant's rights."). Therefore, because the two convictions for third-degree aggravated battery and the two convictions for attempted murder violate the prohibition against double jeopardy, we remand this case to the trial court to vacate the two convictions for aggravated battery with a deadly weapon.

B. Two Convictions for Aggravated Burglary While Committing a Battery and one Conviction for Aggravated Burglary with a Deadly Weapon Arising from a Single Unauthorized Entry Violate the Prohibition Against Double Jeopardy.

{32} Swick's second double jeopardy argument challenges his two convictions for aggravated burglary while committing a battery, § 30-16-4(C), and one conviction for aggravated burglary with a deadly weapon, § 30-16-4(A). The Court of Appeals upheld Swick's convictions, *Swick*, 2010-NMCA-098, ¶ 29, assuming without deciding that the convictions were based on the same conduct, *id*. ¶¶ 23-25. However, the Court of Appeals held that the convictions constituted separate and distinct offenses because a separate underlying theory regarding the protected social interests supports each of the two offenses, and because Subsections A and C have different elements and different purposes. *Swick*, 2010-NMCA-098, ¶¶ 24-29. We agree that these subsections have different elements. However, we conclude that the Legislature has clearly defined the unit of prosecution to be based on an unauthorized entry with the intent to commit a felony therein.

{33} We apply a unit-of-prosecution analysis because we are examining multiple convictions under the same statute. *See Gallegos*, 2011-NMSC-027, ¶ 31. This analysis requires courts to determine the unit of prosecution intended by the Legislature by employing a two-part test, both parts of which are concerned with legislative intent. *Id.* ¶¶ 31-32. First, courts must analyze the statute at issue to determine whether the Legislature has defined the unit of prosecution. If the unit of prosecution is clear from the language of the statute, the inquiry is complete.

If the unit of prosecution is not clear from the statute at issue, including its wording, history, purpose, and the quantum of punishment that is prescribed, courts must determine whether a defendant's acts are separated by sufficient "indicia of distinctness" to justify multiple punishments. *Id.* ¶ 31 (internal quotation marks and citation omitted). In this case, we do not reach the second part of the test because we conclude that the Legislature defined the unit of prosecution to be an unlawful entry with intent to commit a felony therein.

{34} Section 30-16-4 defines the relevant elements for aggravated burglary as follows:

> Aggravated burglary consists of the unauthorized entry of any . . . dwelling . . . , with intent to commit any felony or theft therein and the person either:
>
> A. is armed with a deadly weapon;
> B. after entering, arms himself with a deadly weapon;
> C. commits a battery upon any person while in such place, or in entering or leaving such place.

{35} The State's theory is that Swick committed three aggravated burglaries, and that the first aggravated burglary occurred when he entered the Atencios' home without authority and armed with a knife. The State argues that the crime of aggravated burglary under Section 30-16-4(A) was complete the instant Swick entered the dwelling with a deadly weapon. The State also contends that the second and third aggravated burglaries occurred when Swick used the knife to commit battery upon the Atencios while he was inside the dwelling. However, these contentions are not supported or contemplated by the statute and we therefore decline to divide one offense into separate means used to accomplish the ultimate goal, which was the unlawful entry into the dwelling with the intent to commit a felony therein. *State v. LeFebre*, 2001-NMCA-009, ¶¶ 18, 23, 130 N.M. 130, 19 P.3d 825 (vacating one of the defendant's convictions for resisting, evading, or obstructing an officer under several subsections of the same statute, NMSA 1978, § 30-22-1 (1981) (providing that evading could take place either on foot or in a vehicle, because it was all part of the unitary conduct to evade officers). *See also Gallegos*, 2011-NMSC-027, ¶ 55 (inferring that "the Legislature established what we will call a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed"). This is particularly true when the State concedes that the conduct underlying Swick's three convictions for aggravated burglary was unitary because Swick "could not have committed [the aggravated burglaries based on the batteries] without first arming himself with the knife."

{36} Nonetheless, the State argues that threatening a homeowner with a deadly weapon is one social evil that Section 30-16-4 addresses, and battering a homeowner during a burglary is another. Even assuming this to be an accurate characterization of the social evils to be addressed by the statute, it is clear from the structure of the statute alone that *each aggravated burglary requires an unauthorized entry*. When there is only one entry, only one of these aggravating factors is needed to support punishing the burglary as a second-degree felony instead of a third-degree felony. *See* NMSA 1978, §§ 30-16-3 (1971), 30-16-4. Therefore, we need not go on to the second step of the unit-of-prosecution analysis and hold that when there is only one unauthorized entry, there can only be one aggravated burglary. Section 30-16-4.

{37} Courts in other jurisdictions with similar aggravated burglary statutes have also held that a defendant cannot be convicted of more than one aggravated burglary when there is only one unauthorized entry. For example, in *Fuentes*, two men, including the defendant, forced their way into a house and assaulted two victims. 258 P.3d at 322. The defendant was found guilty of assault and two counts of first-degree burglary based upon the two assaults. *Id.* at 321. The defendant argued that the double jeopardy clause precluded his conviction of the two counts of

first-degree burglary because there was only one entry, although two people were assaulted. *Id*. at 322.

{38} The Colorado Court of Appeals phrased the question as follows: "we must determine whether defendant's assault on two people in the course of a single unlawful entry of an occupied structure constitutes the same offense or multiple offenses under the first degree burglary statute." *Id*. at 323. Colorado's first-degree burglary statute provides:

> A person commits first degree burglary if the person knowingly enters unlawfully, or remains unlawfully after a lawful or unlawful entry, in a building or occupied structure with intent to commit therein a crime, other than trespass as defined in this article, against another person or property, and if in effecting entry or while in the building or occupied structure or in immediate flight therefrom, the person or another participant in the crime assaults or menaces any person, or the person or another participant is armed with explosives or a deadly weapon.

Id. (quoting Colo. Rev. Stat. § 18-4-202(1) (2010) (internal quotation marks omitted).

{39} The court noted that the Colorado first-degree burglary statute encompassed the same elements as the second-degree burglary statute, which is violated when a person "knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property." *Id.* (quoting Colo. Rev. Stat. § 18-4-203(1) (2010) (internal quotation marks omitted). The Colorado Court of Appeals noted that burglary is a form of trespass coupled with an intent to commit a crime in a building. *Id*.

{40} The prosecution contended that even if the second-degree burglary statute is primarily concerned with property interests, the "first degree burglary [statute] is primarily intended to protect persons because the additional elements proscribe conduct that poses great danger to others." *Id*. at 324. The Colorado Court of Appeals rejected this argument because although the additional elements address risk to persons, these elements only "modify and aggravate the principal crime of burglary; they do not change the gravamen of the crime." *Id*. Thus, the court held that "a single entry can support only one conviction of first degree burglary, even if multiple assaults occur." *Id*. at 325.

{41} The *Fuentes* Court also cited other state court opinions that were in accord with its holding and which had burglary statutes similar to the burglary statutes in Colorado. *Id*. at 325. *See, e.g.*, *State v. DeWitt*, 101 P.3d 277, 285 (Mont. 2004) (holding that it was error for the district court not to dismiss one count of aggravated burglary because there was only one unauthorized entry); *State v. Brooks*, 53 P.3d 1048, 1050 (Wash. Ct. App. 2002) (recognizing that it was improper to analogize burglary to robbery, making the number of victims the focus of the analysis, because the focus should be on the number of entries). The *Fuentes* Court acknowledged that the state was free to charge a defendant with assaultive crimes if the evidence supports such a charge, but that the state cannot do so under the aggravated burglary statute if there was only one unlawful entry. *Fuentes,* 258 P.3d at 325.

{42} The approach taken in these cases is persuasive and consistent with New Mexico jurisprudence. To summarize, the simple burglary statute in New Mexico provides, in relevant part, that "[b]urglary consists of the unauthorized entry of any . . . dwelling . . . with the intent to commit any felony or theft therein." Section § 30-16-3. The aggravated burglary statute encompasses the same elements as simple burglary but increases the punishment if the defendant "A. is armed with a deadly weapon; B. after entering, arms himself with a deadly weapon; [or] C. commits a battery upon any person while in such place. . . ." Section 30-16-4; *see State v. DeGraff*, 2006-NMSC-011, ¶ 28, 139 N.M.

211, 131 P.3d 61 (recognizing the implied "or" in the aggravated burglary statute, § 30-16-4). When there is only one entry into a dwelling, only one of these aggravating factors is needed to support punishing the burglary as a second-degree felony instead of a third-degree felony. *See* §§ 30-16-3, -4.

{43} In this case, there was only one unlawful entry with the intent to commit a felony therein, and thus there was only one burglary that could be enhanced to an aggravated burglary. Both Mr. and Mrs. Atencio testified that Swick entered their home only once. Swick's cousin also testified that he and Swick entered the home only once in order to steal a vehicle. The State attempted to justify the two charges of aggravated burglary based on battery by pointing to two victims and then attempted to justify the aggravated burglary because Swick "had a knife from the time he killed . . . Ogle." Although the facts that Swick battered the Atencios and that Swick was armed with a knife before the unauthorized entry support enhancing the burglary to an aggravated burglary, it is clear that the Legislature intended that only one subsection enhance the punishment for a single unauthorized entry. This approach is logical and consistent with the principles of double jeopardy because Swick was also convicted of two counts of armed robbery, NMSA 1978, § 30-16-2 (1973); two counts of aggravated battery with a deadly weapon, § 30-3-5(C); and two counts of attempted murder, §§ 30-2-1 & 30-28-1, for the same assaultive conduct that took place after the unlawful entry.

{44} Because Swick's convictions under three subsections of Section 30-16-4 violate the prohibition against double jeopardy, we remand to the trial court to vacate Swick's two convictions for aggravated burglary based on battery.

II. JURY INSTRUCTIONS

{45} At the close of the State's case, defense counsel tendered two different instructions to the trial court regarding Ogle's death, one for voluntary manslaughter as a result of sufficient provocation, and, in the alternative, a self-defense instruction. The defense maintained that Ogle stabbed Swick before Swick stabbed Ogle. Detective Traxler and Officer Wiese both testified during trial that Swick's knife wound could have been defensive in nature. Defense counsel argued that this type of injury would cause fear in an ordinary person and that it made Swick fearful for his life. The State contended that Swick could not have been acting in self-defense resulting from fear and "be sufficiently provoked at the same time." The trial court refused to give an instruction on self-defense, but it did instruct the jury on voluntary manslaughter. However, the trial court gave the jury the second-degree murder instruction that applies when voluntary manslaughter is *not* a lesser-included offense, even though the trial court had determined that voluntary manslaughter was a lesser-included offense in this case. The instruction that was given to the jury, UJI 14-211 NMRA, omits the element of the statute that requires the State to prove beyond a reasonable doubt that the defendant did not act with sufficient provocation. Section 30-2-1(B). *Compare* UJI 14-210 NMRA *with* UJI 14-211. Neither party objected to this instruction.

{46} Because this issue was not raised below, we will review for fundamental error, *State v. Sosa*, 1997-NMSC-032, ¶ 23, 123 N.M. 564, 943 P.2d 1017, "or if substantial justice has not been done." *State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991) (internal quotation marks and citation omitted). The exacting standard of review for reversal for fundamental error requires "the question of guilt [be] so doubtful that it would shock the conscience [of the court] to permit the verdict to stand." *Sosa*, 1997-NMSC-032, ¶ 24. With regard to jury instructions, fundamental error occurs when, because an erroneous instruction was given, a court has no way of knowing whether the conviction was or was not based on the lack of the essential element. *Osborne*, 111 N.M. at 662-63, 808 P.2d at 632-33.

A. The Trial Court Erred in Issuing An Instruction on Second-Degree Murder That Omitted The Essential Element "Without Sufficient Provocation."

{47} The trial court gave the following jury instruction, based on UJI 14-211, for second-degree murder:

> For you to find the defendant, Michael Swick, guilty of second degree murder, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant, Michael Swick, killed Alex Ogle;
> 2. The defendant, Michael Swick knew that his acts created a strong probability of death or great bodily harm to Alex Ogle;
> 3. This happened in New Mexico, on or about the 21st day of January, 2006.

See UJI 14-211.

{48} The title of this jury instruction indicates that it is applicable when "voluntary manslaughter [*is*] *not* [a] lesser-included offense" of second-degree murder, *id.* (emphasis added), and its Use Note states that the instruction applies "only when second-degree murder is the lowest degree of homicide to be considered by the jury," *id.* Use Note 1. When voluntary manslaughter is a lesser-included offense, an additional element is added to the instruction between elements 2 and 3 of UJI 14-211. Swick points out that UJI 14-210, the instruction that *should have been* given to the jury, provides the following:

> For you to find the defendant Michael Swick guilty of second degree murder, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant, Michael Swick, killed Alex Ogle;
> 2. The defendant, Michael Swick, knew that his acts created a strong probability of death or great bodily harm to Alex Ogle;
> 3. *The defendant, Michael Swick, did not act as a result of sufficient provocation*;
> 4. This happened in New Mexico, on or about the 21st day of January, 2006.

See UJI 14-210.

{49} Although the trial court incorrectly instructed the jury regarding second-degree murder, the trial court correctly instructed the jury regarding voluntary manslaughter with UJI 14-220. Instruction 14-220 includes an explanation of the difference between second-degree murder and voluntary manslaughter, which is sufficient provocation. The jury was also given UJI 14-222 NMRA, which defines "sufficient provocation."

{50} The State contends that because the jury was instructed to consider the instructions as a whole, the voluntary manslaughter instruction and the instruction defining "sufficient provocation" provided the jury with enough guidance to cure the defect in the second-degree murder instruction. Swick counters that notwithstanding the instructions regarding voluntary manslaughter, it is not valid to presume the jury understood that an element, which the State had the burden of proving beyond a reasonable doubt, was missing from the second-degree murder instruction.

{51} Swick also asserts that the trial court's step-down instruction based on UJI 14-250 NMRA prevented the jury from moving on to voluntary manslaughter after reaching a unanimous guilty verdict on second-degree murder without considering the missing element. UJI 14-250 requires the jury to first address the highest degree of the crime charged, which in this case is first-degree murder. If the jury had found Swick guilty of first-degree murder, their deliberations regarding murder would have ended, and the jury would have returned a verdict of guilty of first-degree murder. However, under the step-down instruction, if unable to agree that Swick was

guilty of first-degree murder, the jury was to consider second-degree murder next, and if unable to agree that Swick was guilty of second-degree murder, the jury was to consider voluntary manslaughter. Because the jury in this case agreed that Swick was guilty of second-degree murder, defense counsel argues that, under the step-down instruction, the jury never would have reached either the voluntary manslaughter instruction or the instruction defining "sufficient provocation."

{52} The State disagrees that the step-down instruction prevented the jury from properly considering voluntary manslaughter. The State asserts that the procedural, nonsubstantive step-down instruction does not direct the jury to disregard any elements in the voluntary manslaughter instruction and concludes that "there is no reason to believe the jury did so." Finally, the State argues that evidence to convict Swick of second-degree murder was not so doubtful that it would shock the conscience of this Court to allow the second-degree murder conviction to stand. *See State v. Cunningham*, 2000-NMSC-009, ¶ 13, 128 N.M. 711, 998 P.2d 176 ("The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputabl[e], or open to such question that it would shock the conscience to permit the conviction to stand."(internal quotation marks and citation omitted)).

{53} The Court of Appeals agreed with the State, relying on *Cunningham*, in which this Court held that a failure to include an essential element in the elements section of an instruction is not fundamental error if other instructions given to the jury adequately address the excluded element. *Swick*, 2010-NMCA-098, ¶¶ 7-10 (citing *Cunningham*, 2000-NMSC-009, ¶ 21). Among other claims, the defendant in *Cunningham* appealed his conviction of first-degree murder based on the trial court's issuance of an instruction that was missing an essential element. 2000-NMSC-009, ¶¶ 1, 8. The defendant argued that when a trial court instructs the jury on self-defense, the trial court must add the language "[t]he defendant did not act in self defense" to the elements section of the instruction for the homicide crime being charged. *Cunningham*, 2000-NMSC-009, ¶ 9 (internal quotation marks omitted). In *Cunningham*, the trial court failed to add either that language or any reference to unlawfulness or self-defense in the essential elements section of the instruction. *See id*. ¶¶ 8-9.

{54} However, the trial court in *Cunningham* did give a separate self-defense instruction that included both the three elements of self-defense and the following language: "The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense you must find the defendant not guilty." *Id*. ¶ 7 n.2 (internal quotation marks omitted). The *Cunningham* Court reviewed for fundamental error rather than reversible error because the issue was not preserved below by the defendant. *Id*. ¶¶ 10-11. We distinguished *Cunningham* from *State v. Parish*, 118 N.M. 39, 878 P.2d 988 (1994), which found that it was reversible error when an elements instruction omits a reference to self-defense or unlawfulness. *Cunningham*, 2000-NMSC-009, ¶¶ 16-17; *see also Parish*, 118 N.M. at 42, 878 P.2d at 991 (explaining that reversible error review only asks whether "a reasonable juror would have been confused or misdirected"). Unlike the instruction given in *Cunningham*, the self-defense instruction given in *Parish* failed to properly place the burden on the State to prove that the defendant did not act in self-defense. *Cunningham*, 2000-NMSC-009, ¶ 17. After explaining the difference between fundamental error standard of review and reversible error standard of review, we affirmed the defendant's first-degree murder conviction, reasoning that the defendant failed to meet the high burden of proving fundamental error, and that the instruction adequately placed the burden of disproving self-defense on the State. *Id*. ¶¶ 17, 20-21, 24.

{55} However, when the jury instructions have not informed the jury that the State had the burden to prove an essential element, such as unlawfulness or an absence of self-defense, convictions have been reversed for fundamental error. *State v. Armijo*, 1999-NMCA-087, ¶ 25,

127 N.M. 594, 985 P.2d 764. The controlling question, which we answer affirmatively in this case, is whether "without sufficient provocation" is an essential element of second-degree murder when the jury is instructed on voluntary manslaughter as a potential lesser-included offense.

{56} "In determining what is or is not an essential element of an offense, we begin with the language of the statute itself, seeking of course to give effect to the intent of the legislature." *State v. Green*, 116 N.M. 273, 276, 861 P.2d 954, 957 (1993) (internal quotation marks and citation omitted). The language of the second-degree murder statute provides, "Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree. . . ." Section 30-2-1(B). A plain reading of the statute indicates that "without sufficient provocation" is an essential element of the crime. *See Green,* 116 N.M. at 276, 861 P.2d at 957. Therefore, the State must prove beyond a reasonable doubt that the defendant acted without sufficient provocation.

{57} Unlike the other instructions given in *Cunningham* that placed the burden on the State to prove that the defendant did not act in self-defense, the instruction defining "sufficient provocation" in this case did not specify that it was the State's burden to prove that Swick acted without sufficient provocation. The instruction only provided:

> "Sufficient provocation" can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition. The "provocation" is not sufficient if an ordinary person would have cooled off before acting.

UJI 14-222. Like unlawfulness, "without sufficient provocation" is an essential element, and it should have been included in the instruction on second-degree murder. Because this element was missing from the instruction, there was no way for the jury to know that the State had the burden of proving beyond a reasonable doubt that Swick acted without sufficient provocation in order to prove that he committed second-degree murder.

{58} Because we have no way of knowing whether the jury understood that it was the State's burden to prove that Swick acted without sufficient provocation, allowing the conviction to stand would "shock the conscience of this Court and constitute a clear miscarriage of justice." *Osborne*, 111 N.M. at 663, 808 P.2d at 633. Therefore, we reverse Swick's conviction for second-degree murder, and this case is remanded to the trial court for a new trial consistent with this opinion.

B. The Trial Court Did Not Err in Denying Swick's Proposed Self-Defense Instruction.

{59} Swick also argues that the jury should have been instructed on self-defense because enough evidence was presented at trial to allow reasonable minds to differ on the issue of self-defense. Swick maintains that his trial attorney detailed all of the evidence that supported instructing the jury on self-defense. The State responds that, given the extent and severity of Ogle's injuries, reasonable minds could not differ regarding all of the elements of self-defense. The Court of Appeals held that Swick's response, which ultimately caused Ogle's death, "cannot be regarded as objectively reasonable" and affirmed the decision of the trial court not to give the instruction. *Swick*, 2010-NMCA-098, ¶ 18.

{60} "The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo." *State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438. In order to warrant jury instructions on self-defense, evidence must be sufficient to allow reasonable minds to differ regarding all elements of the defense. *See State v. Jacob Gonzales*, 2007-NMSC-059, ¶ 19,

143 N.M. 25, 172 P.3d 162. "If any reasonable minds could differ, the instruction should be given." *State v. Rudolfo*, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170. An instruction on self-defense requires that "(1) the defendant was put in fear by an apparent danger of immediate death or great bodily harm, (2) the killing resulted from that fear, and (3) the defendant acted reasonably when he or she killed." *Id.* ¶ 17 (internal quotation marks and citations omitted). "When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction[s]." *State v. Boyett*, 2008-NMSC-030, ¶ 12, 144 N.M. 184, 185 P.3d 355 (alteration in original) (internal quotation marks and citations omitted).

{61} The State asserts that Swick did not offer enough evidence to support a self-defense instruction, analogizing this case to *State v. Lopez*, 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727. In *Lopez*, the defendant appealed his conviction for first-degree murder, claiming that the trial court erred in not giving the jury an instruction on self-defense. *Id*. ¶ 22. After a night of drinking and taking drugs with the victim, Lopez stabbed the victim multiple times and crushed his skull with a rock. *Id*. ¶ 3. Lopez claimed that he murdered the victim after the victim drew a knife. *Id*. Lopez's story was corroborated by several witnesses, including one who testified that she saw Lopez after the murder and he had what could have been a stab wound on his cheek. *Id.* ¶ 24. Another witness testified that he also saw Lopez after the murder and he had a cut and a scar on his face. *Id*. We held that this was enough evidence to meet the first requirement because evidence of an appearance of immediate danger supports an inference of a defendant's fear. *Id*. ¶ 25.

{62} However, we went on to hold that there was not enough evidence of the second and third requirements to allow reasonable minds to differ when the defendant responded to the alleged attack by stabbing the victim fifty-four times. *Id*. ¶¶ 25-26. We concluded that this type of killing was more consistent with rage or hatred than with fear and that there was not sufficient evidence to support a finding that it was reasonable for Lopez to respond in such a manner. *Id*. ¶ 26.

{63} In this case, there is enough evidence to support the first element of self-defense. Like the defendant in *Lopez*, Swick supported the first requirement with evidence that he sustained a "serious, defensive-type stab wound to his hand that required medical attention." Moreover, Swick also offered the testimony of Officer Wiese and Detective Traxler that Swick told them Ogle was the person who stabbed him and that the wound on Swick's hand could possibly be defensive, as opposed to self-inflicted. Swick's cousin also testified that Swick told him Ogle stabbed him. Under *Lopez*, such evidence would be enough to support the first element of self-defense.

{64} However, Swick does not point to any evidence in the record that his fear motivated the killing, other than a request to draw such an inference. On the other hand, the State introduced evidence that would make such an inference appear to be unreasonable. Dr. Michelle Berry, who performed the autopsy on Ogle, testified that there were at least seven distinct stab wounds in the upper left area of the chest with the possibility of additional overlapping stab wounds in this area, a stab wound in the middle of the chest, one on the face, and one on the back. She also testified that there were multiple injuries to Ogle's face consistent with blunt force trauma that could have been caused by the 15-pound rock that was in evidence. This evidence, like the evidence of the victim's injuries in *Lopez*, does not support a reasonable inference that fear caused Swick to kill Ogle.

{65} Even assuming that Swick initially attacked Ogle out of fear, the evidence could not support a finding that Swick acted reasonably. Several cases hold that a defendant is not entitled to a self-defense instruction when the defendant's response to the threat was unreasonable. For example, in *State v. Martinez*, 95 N.M. 421, 423, 622 P.2d 1041, 1043 (1981), *holding limited on other grounds by Sells v. State*, 98 N.M. 786, 788, 653 P.2d 162, 164 (1982), we held that "if the defendant was in

fact acting in self-defense, it would not have been necessary for him to shoot the victim through the arm and chest, wrap a cord around the victim's neck, and beat the victim [in] the head" until his skull was smashed. In contrast, in *State v. Branchal*, 101 N.M. 498, 503-04, 684 P.2d 1163, 1168-69 (Ct. App. 1984), the Court of Appeals held that a self-defense jury instruction was warranted when the defendant testified that she shot the victim once because she was afraid he would shoot her or one of her children. *Id.* at 501-02, 684 P.2d at 1166-67. Because we do not find evidence on which reasonable minds can differ as to the second and third elements of self-defense in Swick's case, we agree with the Court of Appeals that the trial court did not err in rejecting Swick's self-defense instruction.

III. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL.

{66} During the second day of trial, Swick had an outburst in court where he abruptly stood up and stated, "I'm going to have to go somewhere, man. I can't handle this." This outburst occurred just as the trial court was recessing the trial. Court security officers had to restrain Swick in order to control him. Some jurors witnessed this incident.

{67} The next morning the trial court polled the jurors individually to determine what they saw and heard, and then asked them whether what they witnessed, if anything, would impact their ability to be fair and impartial. More than half of the fifteen jurors saw Swick's outburst or the security guards restraining him or both. Each juror indicated in turn that neither the outburst incident nor shackling Swick in the courtroom during the remainder of the trial would affect the juror's fairness and impartiality in deciding the case based on the evidence presented. The trial court proceeded with the trial and also ordered that Swick be bound and shackled for the remainder of the trial. Defense counsel moved for a mistrial, explaining that because many of the jurors had witnessed the outburst incident on the previous day and would now see Swick bound and shackled, Swick would be unfairly prejudiced. The trial court denied the motion without explanation. Swick's final argument is that the trial court erred in denying his motion for a mistrial following this incident.

{68} "A denial of a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Johnson*, 2010-NMSC-016, ¶ 49, 148 N.M. 50, 229 P.3d 523. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations omitted).

{69} Swick contends that, notwithstanding the voir dire conducted by the trial court, he was prejudiced because the jurors could not forget the incident and might have improperly used it as proof of a propensity for violence. The State responds that the trial court did not abuse its discretion because the trial court promptly dealt with the outburst to ensure that the jurors could be impartial after witnessing the incident. The State also emphasizes that a defendant should not be able to benefit from his or her own misbehavior. To support its position, the State cites *State v. Paul*, 83 N.M. 527, 529, 494 P.2d 189, 191 (Ct. App. 1972), in which the Court of Appeals held that a defendant should "not . . . be permitted to gain from his outbursts."

{70} The trial court decided to have Swick bound and shackled because it concluded that it would be the best way to handle the situation consistent with the trial court's firmly held belief in having the criminal defendant present at trial. The trial court's precautions themselves, emphasizing that restraining Swick during the trial did not indicate his guilt or innocence and asking each juror whether Swick's appearance in shackles during the trial would affect that juror's ability to remain impartial, reflected the court's impartiality in this case. The trial court did not

abuse its discretion in denying the motion for mistrial, and thus we affirm the Court of Appeals' holding.

IV. CONCLUSION

{71} Consistent with this opinion, we (1) remand to the trial court to vacate Swick's two convictions for aggravated battery and his two convictions for aggravated burglary based on battery; (2) affirm the rulings of the trial court regarding the self-defense jury instruction and the motion for a mistrial; and (3) remand to the trial court for a new trial on the second-degree murder conviction.

{72} **IT IS SO ORDERED.**

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-019

Filing Date: June 1, 2012

Docket No. 32,789

BANI CHATTERJEE,

Petitioner-Petitioner,

v.

TAYA KING,

Respondent-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Daniel A. Sanchez, District Judge

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OPINION

CHÁVEZ, Justice.

{1} Bani Chatterjee (Chatterjee) and Taya King (King) are two women who were in a committed, long-term domestic relationship when they agreed to bring a child into their relationship. Chatterjee pleaded in the district court that during the course of their relationship, and with Chatterjee's active participation, King adopted a child

(Child) from Russia. Chatterjee supported King and Child financially, lived in the family home, and co-parented Child for a number of years before their commitment to each other foundered and they dissolved their relationship. Chatterjee never adopted Child. After they ended their relationship, King moved to Colorado and sought to prevent Chatterjee from having any contact with Child.

{2} Chatterjee filed a petition in the district court to establish parentage and determine custody and timesharing (Petition). Chatterjee alleged that she was a presumed natural parent under the former codification of the New Mexico Uniform Parentage Act,[1] NMSA 1978, Section 40-11-3 (1986), Section 40-11-5 (1997), and Section 40-11-21 (1986). She further claimed to be the equitable or de facto parent of Child, and as such, was entitled to relief.[2] In response to Chatterjee's Petition, King filed a motion to dismiss pursuant to Rule 1-012(B) NMRA. In the motion to dismiss, King neither admitted nor denied any of the facts that Chatterjee claimed in her Petition. King instead argued that Chatterjee was a third party who was seeking custody and visitation of Child and that NMSA 1978, Section 40-4-9.1(K) (1999) of the Dissolution of Marriage Act, NMSA 1978, §§ 40-4-1 to -20 (1973, as amended through 2011), prohibits a third party from receiving custody rights absent a showing of unfitness of the natural or adoptive parent. The district court dismissed the Petition for failure to state a claim upon which relief could be granted.

{3} Chatterjee then appealed to the Court of Appeals, which affirmed in part, reversed in part, and remanded to the district court. *Chatterjee v. King*, 2011-NMCA-012, ¶ 40, 149 N.M. 625, 253 P.3d 915, *cert. granted*, 2011-NMCERT-001, 150 N.M. 560, 263 P.3d 902. The Court of Appeals held that Chatterjee did not have standing to seek joint custody absent a showing of King's unfitness because she is neither the biological nor the adoptive mother of Child. *Id*. ¶ 29. The Court further held that presumptions establishing a father and child relationship cannot be applied to women, and a mother and child relationship can only be established through biology or adoption. *Id.* ¶¶ 27-29. Judge Vigil, who dissented in the Court of Appeals opinion, believed that Chatterjee had standing to pursue joint custody under the extraordinary circumstances doctrine. *Id*. ¶ 49 (Vigil, J., dissenting). The Court of Appeals reversed the district court's dismissal concerning the opportunity for Chatterjee to seek standing for visitation and remanded to the district court, instructing the district court to determine whether visitation with Chatterjee would be in Child's best interests. *Id*. ¶¶ 39-40. On remand, the district court appointed a guardian ad litem for Child and accepted the guardian ad litem's recommendation that contact and visitation with Chatterjee would be in Child's best interests.

{4} The question in this case is whether Chatterjee has pleaded sufficient facts in her Petition to give her standing to pursue joint custody of Child under the Dissolution of Marriage Act. Whether Chatterjee has standing to pursue joint custody depends on whether Chatterjee has pleaded facts sufficient to establish that she is an interested party under Section 40-11-21 of the New Mexico Uniform Parentage Act (UPA). Her pleading sets forth facts, which, if true, establish that she has a personal, financial, and custodial relationship with Child and has openly held Child out as her daughter, although she is neither Child's biological nor adoptive mother.

{5} We hold that a natural mother is an interested party who has standing to pursue joint custody of a child. We conclude, based on

[1] Uniform Parentage Act, NMSA 1978, §§ 40-11-1 to -23 (1986, as amended through 2004; repealed by Laws 2009, ch. 215, § 19, effective January 1, 2010; recodified as New Mexico Uniform Parentage Act, NMSA 1978, §§ 40-11A-101 to -903 (2010)). This opinion refers to the version of the UPA that was in effect at the time of the original lawsuit. The "hold out provision" discussed at length in this opinion has been limited by the Legislature in the new enactments. *See* § 40-11A-204. The disposition in this case, however, would not be impacted by the limitations.

[2] Because we find that a plain reading of the Uniform Parentage Act gives Chatterjee standing to seek custody, we do not reach her arguments on extraordinary circumstances or constitutionality.

the facts and circumstances of this case, that the facts pleaded by Chatterjee are sufficient to confer standing on her as a natural mother because (1) the plain language of the UPA instructs courts to apply Section 40-11-5(A)(4), which specifies criteria for establishing a presumption that a man is a natural parent, to women because it is practicable for a woman to hold a child out as her own by, among other things, providing full-time emotional and financial support for the child; (2) commentary by the drafters of the UPA supports application of the provisions related to determining paternity to the determination of maternity;[3] (3) the approach in this opinion is consistent with how courts in other jurisdictions have interpreted their UPAs, which contain language similar to the New Mexico UPA; and (4) New Mexico's public policy is to encourage the support of children, financial and otherwise, by providers willing and able to care for the child.

I. SECTION 40-11-21 ESTABLISHES A BASIS FOR STANDING FOR "ANY INTERESTED PARTY."

{6} Chatterjee argues that she has standing to establish parentage as an interested party under Section 40-11-21 of the UPA because she has held Child out as her child pursuant to Section 40-11-5(A)(4). Section 40-11-21 provides that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of the Uniform Parentage Act [40-11-1 NMSA 1978] applicable to the father and child relationship apply."

{7} While there is no case law in New Mexico holding that a person alleging a natural parent relationship under the UPA is per se an interested party, our courts have recognized that the Legislature "clearly intended" that the UPA have broad application. In *In re Estate of DeLara*, 2002-NMCA-004, ¶ 13, 131 N.M. 430, 38 P.3d 198, the Court of Appeals concluded that the use of the term "any interested party" in Sections 40-11-7 and 40-11-21, coupled with the extraordinary twenty-one year statute of limitations, Section 40-11-23, indicates the Legislature's intent to apply the UPA broadly. The Court recognized that this reading was in line with New Mexico's strong public policy favoring child support, which is important to both the child and the state. *DeLara*, 2002-NMCA-004, ¶ 13.

{8} Moreover, the Court of Appeals has treated the "interested party" standard under the UPA as a fact-sensitive inquiry, considering the particular facts of each case. *See, e.g.*, *Sisneroz v. Polanco*, 1999-NMCA-039, ¶¶ 18, 20, 22, 126 N.M. 779, 975 P.2d 392 (holding that, under the facts of the case, a mother had standing to bring a suit for retroactive child support under the UPA); *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, ¶¶ 3-4, 125 N.M. 471, 963 P.2d 548 (holding that a twenty-year-old adult was an interested party and, until the age of twenty-one, eligible to seek support and a determination of paternity); *Tedford v. Gregory*, 1998-NMCA-067, ¶ 13, 125 N.M. 206, 959 P.2d 540 (same).

{9} We agree that a case-by-case analysis is the best way to determine whether an action is appropriate under the UPA. Chatterjee claims that she openly held out Child as her natural child from the moment that she and King brought Child to New Mexico from Russia and therefore that she should be able to establish a parent and child relationship under Section 40-11-5(A)(4), which creates a presumption of paternity. Section 40-11-5(A)(4), which we refer to as the "hold out provision," provides that "[a] man is presumed to be the natural father of a child if . . . he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child." Any person who is able to establish presumed natural parenthood under Section 40-11-5(A)(4) would qualify as an interested party. Therefore, we must now determine whether Chatterjee, as a woman, can establish a presumed natural parent and child relationship under Section 40-11-5(A)(4).

[3] "Paternity," *see*, *e.g.*, Section 40-11-5, and "maternity" refer to legal determinations of parenthood.

II. THE UPA REQUIRES COURTS TO APPLY PROVISIONS RELATING TO THE FATHER AND CHILD RELATIONSHIP TO WOMEN WHEN IT IS PRACTICABLE TO DO SO.

{10} Chatterjee argues that the Court of Appeals erred in holding that none of the UPA provisions relating to the father and child relationship may be applied to women. She claims that this holding directly contradicts the plain language of Section 40-11-21. King responds that the UPA provisions establishing paternity should not be applied to women because the UPA expressly provides the ways in which maternity can be established. We agree with Chatterjee. We find support for Chatterjee's argument not only in the plain language of the statute itself, but also in the purpose of the UPA, the application of paternity provisions to women in jurisdictions with similar UPA provisions, and in public policy that encourages the love and support of children from able and willing parents.

{11} "Statutory interpretation is an issue of law, which we review de novo." *N.M. Indus. Energy Consumers v. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. When reviewing a statute, our courts aim to effectuate the Legislature's intent in passing the statute. *See id*. ¶ 20. When attempting to determine the Legislature's intent, "[w]e look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id*.

{12} In addition to looking at the statute's plain language, we will consider its history and background and how the specific statute fits within the broader statutory scheme. *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939. When a statute is ambiguous, this may include an assessment of how its construction implicates public policy. *See State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022. Because we consider statutes in the context of the broader act in which they are situated, we read them in conjunction with statutes addressing the same subject matter, ensuring a harmonious, common-sense reading. *State v. Muniz*, 2003-NMSC-021, ¶ 14, 134 N.M. 152, 74 P.3d 86, *superseded by statute on other grounds as recognized in State v. Tafoya*, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 *and State v. Jones*, 2010-NMSC-012, ¶ 19, 148 N.M. 1, 229 P.3d 474.

A. The Plain Language Of Sections 40-11-4(A) And 40-11-21, Read Together, Requires This Court To Apply The Hold Out Provision In Section 40-11-5(A)(4) To Alleged Mothers.

{13} We begin our analysis with Section 40-11-2 of the UPA, which states that a "'parent and child relationship' means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship." For a mother, Section 40-11-4(A) provides that "the natural mother may be established by proof of her having given birth to the child, *or as provided by Section [40-11-21 NMSA 1978]*." (Emphasis added.) Section 40-11-21 states that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of the Uniform Parentage Act applicable to the father and child relationship apply."

{14} The Court of Appeals held that reading Section 40-11-21 to allow Chatterjee to establish parentage through Section 40-11-5(A)(4) was impracticable. *Chatterjee*, 2011-NMCA-012, ¶ 27. The Court also held that reading Section 40-11-5 to apply to women would render Section 40-11-4(A), which provides for how a woman may establish natural motherhood, "'surplusage or meaningless.'" *Chatterjee*, 2011-NMCA-012, ¶ 27 (quoting *Int'l Ass'n of Firefighters v. City of Carlsbad*, 2009-NMCA-097, ¶ 11, 147 N.M. 6, 216 P.3d 256 ("We seek to give meaning to all parts of the statute, such that no portion is rendered surplusage or meaningless.")). It reasoned that the Legislature, in

enacting Section 40-11-4(A), created separate sections for how a woman as opposed to a man can prove natural parenthood, implying that it intended each sex to have different means available for proving parenthood. *See Chatterjee*, 2011-NMCA-012, ¶ 27. The Court therefore concluded that applying the means for proving paternity to proving maternity would contravene the Legislature's intent. *See id*. ¶¶ 10, 27. We disagree.

{15} It is practicable to apply Section 40-11-5 to determine maternity in certain circumstances. "Practicable" is defined as "reasonably capable of being accomplished; feasible." *Black's Law Dictionary* 1291 (9th ed. 2009). Section 40-11-5(A)(4), which establishes a parental presumption, is reasonably capable of being accomplished by either a man or a woman. Section 40-11-5(A)(4) provides, in relevant part, that "[a] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child." Because the presumption is based on a person's conduct, not a biological connection, a woman is capable of holding out a child as her natural child and establishing a personal, financial, or custodial relationship with that child. This is particularly true when, as is alleged in this case, the relationship between the child and both the presumptive and the adoptive parent occurred simultaneously.

{16} In addition, by limiting proof of natural motherhood to biology under Section 40-11-4(A), the Court of Appeals renders meaningless the clear instruction in Section 40-11-4(A) that a "natural mother may [also] be established . . . as provided by Section 21 [40-11-21 NMSA 1978]." *See Int'l Ass'n of Firefighters*, 2009-NMCA-097, ¶ 11. A straightforward reading of Section 40-11-4(A) is that motherhood may be established by giving birth, by adoption, and in any other way in which a father and child relationship may be established when it is practicable to do so. Because it is practicable for a woman to hold a child out as her own, the plain language instructs us to recognize that Section 40-11-5(A)(4) relating to the father and child relationship also applies to the mother and child relationship.

{17} This interpretation is not only expressly required; it is consistent with our obligation to read related statutes in harmony. *See Smith*, 2004-NMSC-032, ¶ 10. If Section 40-11-4(A) is interpreted as narrowly as the Court of Appeals suggests, all other forms of parentage allowed under the language "or as provided by Section 21 of the Uniform Parentage Act" would not be recognized in New Mexico as valid parent-child relationships. We simply cannot read this language out of the statute.

{18} Moreover, we seek to avoid an interpretation of a statute that would raise constitutional concerns. *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991), *reaff'd in State ex rel. Regents of E. N.M. Univ. v. Baca*, 2008-NMSC-047, ¶ 10, 144 N.M. 530, 189 P.3d 663 ("It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." (internal quotation marks and citation omitted)). In *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 36, 126 N.M. 788, 975 P.2d 841, we held that classifications based on gender are presumptively unconstitutional. In this case, the Court of Appeals' reading would yield different results for a man than for a woman in precisely the same situation. If this Court interpreted Section 40-11-5(A)(4) as applying only to males, then a man in a same-sex relationship claiming to be a natural parent because he held out a child as his own would have standing simply by virtue of his gender, while a woman in the same position would not. In other words, if two men were in Chatterjee's and King's exact situation, Chatterjee's male counterpart would have standing under Section 40-11-5(A)(4) of the UPA to establish parentage, while Chatterjee would not. We avoid this disparate treatment, giving effect to the Legislature's intent, with a plain and simple application of Section 40-11-5(A)(4) to both men and women under Section 40-11-21.

B. The Drafters of the Original upa Intended That Provisions Relating to the Father and Child Relationship Apply to Women in Appropriate Situations.

{19} The authors of the Uniform Parentage Act of 1973 (the original UPA), anticipating situations such as this case, provided in a comment that masculine terminology was used for the sake of simplicity and not to limit application of its provisions to males. Indeed, the commentary relating to Section 21 of the original UPA, which was adopted by New Mexico in 1986, instructs courts on how to apply Section 21:

> This Section permits the declaration of the mother and child relationship where that is in dispute. Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 are written principally in terms of the ascertainment of *paternity*. While it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these—already complex—provisions with references to the ascertainment of *maternity*. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 should be applied.

Unif. Parentage Act § 21 cmt. (1973), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.htm.

{20} There is no indication that our Legislature intended a different reading of this statute in New Mexico when it adopted the original UPA in its entirety, with only minor revisions, in 1986. *Wallis v. Smith*, 2001-NMCA-017, ¶ 9, 130 N.M. 214, 22 P.3d 682. The commentary from the original UPA, together with the explicit instruction given in Section 40-11-21, which provides that the paternity provisions may apply as far as practicable to establish natural motherhood, indicate that the Legislature intended Section 40-11-5(A)(4) to apply to both men and women. Because Section 40-11-21 instructs courts to apply provisions relating to the father and child relationship to mother and child relationships, then Section 40-11-5(A)(4) must also be applied to women.

C. Other Jurisdictions with Statutes Virtually Identical to the New Mexico upa Have Applied Provisions Relating to the Father and Child Relationship to Mother and Child Relationships.

{21} In *Elisa B. v. Superior Court*, 117 P.3d 660, 666-67 (Cal. 2005), the California Supreme Court held that it is practicable to apply the hold out provision of the California UPA—equivalent to the provision at issue in this case—to women. The district court found that the petitioner was obligated to pay child support under the equitable estoppel theory. *Id*. at 664. The California Court of Appeal reversed the district court, reasoning that California case law, *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993), which held that a child could not have three natural parents (one father and two mothers), prevented it from recognizing the petitioner as a second parent. *Elisa B.*, 117 P.3d at 665-66. The California Supreme Court reversed the Court of Appeal, holding that the petitioner, the "woman who agreed to raise children with her [same-sex] partner, supported her partner's artificial insemination . . . and received the resulting twin children into her home and held them out as her own, is the children's *parent under the Uniform Parentage Act* and has an obligation to support them." *Id*. at 662 (emphasis added).

{22} In coming to this conclusion, the California Supreme Court relied solely on the language of the California UPA,[4] explaining that the

[4] King incorrectly interprets the holding of *Elisa B*., claiming that the court's application of the California UPA paternity provision to a woman in that case was "only possible under a recently enacted version of the [California] domestic partnership statutes." Contrary to King's claim, however, the *Elisa B.* court explained that "[a]lthough . . . the UPA contains separate provisions defining who is a mother and who is a father, it expressly provides that in determining the existence

Court of Appeal's reliance on *Johnson* was misplaced because that holding had been abrogated by the California domestic partnership statutes. *Elisa B.*, 117 P.3d at 666. The *Elisa B.* court distinguished the matter it declined to support in *Johnson*, recognition of three natural parents in a surrogacy arrangement, from the issue in *Elisa B.*, which was whether a child could have two natural parents, both of whom are women. *See Elisa B.*, 117 P.3d at 666.

{23} The *Elisa B.* court did not rely on California's domestic partnership statutes to reach its conclusion. The two women neither registered as domestic partners nor adopted each other's children. *Id*. at 663. The *Elisa B.* court also went to great lengths to explain that, prior to the effective date of the domestic partnership statutes, it had held that a child could have two mothers in a second parent adoption case. *Id*. at 666. *Elisa B.* also recognized that the California Court of Appeal had, prior to the enactment of the domestic partnership statutes, applied the hold out provision of the California UPA to women who were not the biological mothers of the children they held out as their own. *See id.* at 667; *see also In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Cal. Ct. App. 2003) (applying the hold out provision to the child's half-sister because "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family")*; In re Karen C.*, 124 Cal. Rptr. 2d 677, 681-82 (Cal. Ct. App. 2002) (finding that a woman with no biological connection to a child could be a presumed mother under the hold out provision traditionally applied to fathers).

{24} Since *Elisa B.* was decided, California has applied the hold out provision to women in varying factual situations. With a fact pattern similar to the case before us, in *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 7-8 (Cal. Ct. App. 2011), the California Court of Appeal applied the hold out provision of the California UPA in analyzing whether an alleged second mother was a natural parent. The court held that she could establish she was a natural parent because (1) she received the children into her home and held them out as her natural children, (2) she and the adoptive mother were in a committed relationship when the children were adopted, (3) the two women verbally agreed that the second mother would provide for the adoptive mother and their children, and (4) the second mother took time off from work to be present for the birth of one of the children. *S.Y.*, 134 Cal. Rptr. 3d at 8-11. The Court has also applied the hold out provision of the California UPA to a grandmother seeking a determination of parentage, but held that she was not a presumed parent because she had openly held the child out as her grandson, not her son. *In re Bryan D.*, 130 Cal. Rptr. 3d 821, 830-31 (Cal. Ct. App. 2011).

{25} The Colorado Court of Appeals has also interpreted the Colorado UPA clause, "[i]nsofar as practicable, the provisions of [the Colorado UPA] applicable to the father and child relationship apply," as enabling language applicable to the paternity provisions relating to women. *In re S.N.V.*, ___ P.3d ___, 2011 WL 6425562 at *2 (Colo. App. 2011) (second alteration in original) (internal quotation marks and citation omitted). A dispute arose between the biological mother and the wife of the biological father as to who was the legal mother of the child. *Id*., ___ P.3d at ___, 2011 WL 6425562 at *1. The biological mother claimed that the child was conceived in a consensual relationship with the biological father. *Id*. The wife claimed that she and her husband had a surrogacy arrangement with the biological mother. *Id*. The wife filed an action under the Colorado UPA to establish the parentage of the child. *Id*. The court held that an action to determine legal maternity "may be brought by any woman who is presumed to be the child's mother under [Colo. Rev. Stat.] Section 19-4-105 [(2008)]"—the equivalent of Section 40-11-5 of the New Mexico UPA—which provides paternity presumptions. *See In re S.N.V.*, ___ P.3d at ___, 2011 WL 6425562 at *2.

{26} The *In re S.N.V.* court based its holding on three provisions of the Colorado UPA, including Colo. Rev. Stat. Section 19-4-122 (1987)—the

of a mother and child relationship, '[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply.'" 117 P.3d at 665 (citation omitted).

identical equivalent of Section 40-11-21 of the New Mexico UPA—which states that "[a]ny interested party may bring an action to determine the existence . . . of a mother and child relationship. Insofar as practicable, the provisions of this article [of the Colorado UPA] applicable to the father and child relationship apply." ___ P.3d at ___, 2011 WL 6425562 at *2. Using this language, the court held that, in that situation, the wife could establish a presumption of maternity based on marriage or on holding out the child as her natural child,[5] and bolstered its holding with Colo. Rev. Stat. Section 19-4-125 (1987), which provides that, when appropriate, "the word 'father' shall mean 'mother.'" *In re S.N.V.*, ___ P.3d at ___, 2011 WL 6425562 at *2.

{27} The Oregon Court of Appeals has also applied statutes establishing parentage presumptions based on marital status to women. *Shineovich & Kemp*, 214 P.3d 29, 39-40 (Or. Ct. App. 2009). Although this case dealt with a parentage presumption arising from artificial insemination, it presented essentially the same issue facing this Court: whether a statute creating a presumption of parentage written in terms of paternity should be applied to similarly situated women.

{28} In *Shineovich*, the Oregon Court of Appeals held that a statute recognizing a husband's parentage based on his consent to assisted reproduction was unconstitutional unless it was equally applied to women in same-sex relationships who consent to their partners' inseminations. *Id*. at 39-40. The court in *Shineovich* analyzed two statutes that were being challenged on the grounds that applying parentage presumptions simply on the basis of marriage was discriminatory. *Id*. at 33-34. The challenger was a woman who could not be in a legally-recognized marriage with her former same-sex partner because Oregon did not recognize same-sex marriage. *Id*. at 32-33. However, the challenger functioned as the child's co-parent from birth until the couple's relationship ended. *Id*. at 32. The biological mother, who was the challenger's former partner, argued that even given this alleged parent and child relationship, the statutes could not provide relief because the challenger had not consented in writing to the insemination. *Id*. at 37.

{29} The court held that the statute was unconstitutional because it did not require that there be at least the possibility of a biological relationship with the child. *Id*. at 39. In other words, all it required was conduct that indicated an intent to parent. The statute simply creates a presumption that the consenting husband of an artificially inseminated woman is the child's legal parent, regardless of biological connection. *See id*. The court held that the Oregon statute that provided standing was unconstitutional as applied because there was no compelling justification to deny same-sex couples the right to enjoy that presumption. *Id*. at 40. Therefore, the court extended the presumption to similarly situated women.[6] *Id*.

D. Public Policy Strongly Supports Applying Section 40-11-5(A)(4) to Women.

{30} The New Jersey Superior Court reached the same conclusion that the *Shineovich* court reached in a case involving similar facts, *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005), *abrogated by In re*

[5] Colorado's statutes creating those presumptions are virtually identical to New Mexico's. *See* § 40-11-5(A)(1), (4) ("A man is presumed to be the natural father of a child if: (1) he and the child's natural mother are or have been married to each other and the child is born during the marriage . . . ; [or] (4) while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child.").

[6] King contends that *Shineovich* is inapposite, arguing that the statute that gave the challenger standing was not found in the Oregon UPA but under the Oregon Family Fairness Act, which provides domestic partners with the same rights as married couples. However, the statute is not a provision in the Oregon Family Fairness Act but rather is found in Oregon's domestic relations statutes, and uses language substantially similar to the artificial insemination provision of the New Mexico UPA. The Oregon statute that provided standing in *Shineovich* is found in Title 11 (Domestic Relations) of Chapter 109 (Parent and Child Rights and Relationships), at Section 109.243 (Artificial Insemination). The Oregon Family Fairness Act, in contrast, is found in Or. Rev. Stat. 106.300 to 106.340.

T.J.S., 16 A.3d 386, 396 (N.J. Super. Ct. 2011) (distinguishing *Robinson* on the facts, but opining, in dicta, that *Robinson* was in error for "relying upon the [child's] 'best interest' standard in deciding the issue of parentage"). However, the rationale for that holding was more policy-based. In *Robinson*, a same-sex couple that was still together wanted an adjudication of parentage from the court for the non-biological mother. *Id*. at 1037. The couple raised their petition in the context of challenging the presumption of parentage afforded to husbands of artificially-inseminated wives. *Id*.

{31} In finding that the presumption of parentage should be extended to a same-sex partner who consents to a biological mother's artificial insemination, the court made certain observations that we find persuasive. First, the court recognized that parents have an obligation to support their children "in any possible combination and permutation of marriage . . . , method for conception of the child, and arrangements that intended parents make to have children. *Otherwise we have children for whom nobody has responsibility. . . . It is necessary law for the new century.*" *Id*. at 1039-40 (internal quotation marks and citation omitted). Next, the court provided information from the 2000 United States Census, which revealed that "[t]he average American family (generally thought to be mom, dad and two children) applies, in fact, to only 23.5% of the American population, a decrease from 45% in 1960." *Id*. at 1040. Therefore, the court reasoned, "[i]t is in the State's best interest to insure that parents are identifiable" because the responsibility of caring for the children falls directly to citizenry of the state if the parents do not bear financial responsibility. *Id*. at 1039 (internal quotation marks and citation omitted); *see id.* at 1042.

{32} As the New Jersey Superior Court recognized in *Robinson*, the state has a strong interest in ensuring that a child will be cared for, financially and otherwise, by two parents. *Id.* at 1039, 1042. If that care is lacking, the state will ultimately assume the responsibility of caring for the child. This is one of the primary reasons that the original UPA was created, and it makes little sense to read the statute without keeping this overarching legislative goal in mind. *See* Unif. Parentage Act Prefatory Note (1973) ("[I]t is expected that this Act will fulfill an important social need in terms of improving the states' systems of support enforcement.").

{33} The original UPA was also written to address the interest that children have in their own support. The rationale underlying the original UPA is that every child should be treated equally, regardless of the marital status of the child's parents. *See* Unif. Parentage Act § 2, § 2 cmt. (1973). In deciding illegitimacy cases, the United States Supreme Court recognized that it is "illogical and unjust" for a state to deny a child's essential right to be supported by two parents simply because the child's parents are not married. *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (internal quotation marks and citation omitted). The Court also noted, regarding irresponsible parenthood, that "no child is responsible for his [or her] birth and penalizing the illegitimate child is an ineffectual . . . way of deterring the parent." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). With this in mind, we see no reason for children to be penalized because of the decisions that their parents make, legal or otherwise. *See Plyler v. Doe*, 457 U.S. 202, 220, 223-24, 230 (1982) (holding that it is improper to create an underclass of children who are held responsible for the illegal actions of their parents because the children could "affect neither their parents' conduct nor their own status" (internal quotation marks and citation omitted)).

{34} Consistent with the underlying policy-based rationale of the New Mexico UPA that equality in child welfare requires laws that achieve equality in parentage, Child's need for love and support is no less critical simply because her second parent also happens to be a woman. Experts in child psychology recognize that sometimes the law is too limiting when it comes to actually addressing what is in the child's best interests. The attachment bonds that form between a child and a parent are formed regardless of a biological or legal connection. *See*

Joseph Goldstein et al., *Beyond the Best Interests of the Child* 27 (rev. ed. 1979). These bonds are formed as a result of "provision of physical and emotional care, continuity or consistency in the child's life, and emotional investment in the child." Nat'l Research Council & Inst. of Med., *From Neurons to Neighborhoods: The Science of Early Childhood Development* 234-35 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000). The law needs to address traditional expectations in light of current realities to keep up with the changing demographic of American families and to protect the children born into them.

{35} Indeed, New Mexico courts have long recognized that children may form parent-child bonds with persons other than their legal parents. This Court has previously recognized that a grandfather could be awarded custody over a biological father's objections. *See Cook v. Brownlee*, 54 N.M. 227, 228-29, 220 P.2d 378, 378-79 (1950). We have also held that a trial court had the power to award custody to an uncle with whom a child had bonded over the biological mother's objection, even absent the mother's unfitness. *See Ex parte Pra*, 34 N.M. 587, 588, 590-91, 286 P. 828, 828, 829-30 (1930).

{36} Additionally, the New Mexico Court of Appeals has already embraced the idea of a child having two mothers in appropriate situations. In *A.C. v. C.B.*, 113 N.M. 581, 585, 829 P.2d 660, 664 (Ct. App. 1992), the Court of Appeals held that a "[p]etitioner's sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation."[7] In *Barnae v. Barnae*, 1997-NMCA-077, ¶ 10, 123 N.M. 583, 943 P.2d 1036, the Court of Appeals again recognized a lesbian partner's standing to assert a legal right to a continuing relationship with a child. As such, Chatterjee should not be disqualified from being a presumed parent simply because she is a woman.

[7] Because the second mother in *A.C.* claimed to have a custody agreement with the other legal mother, the Court of Appeals analyzed the case under the parties' agreement and not under the UPA. *Id.* at 583-84, 829 P.2d at 662-63.

{37} It is inappropriate to deny Chatterjee the opportunity to establish parentage, when denying Chatterjee this opportunity would only serve to harm both Child and the state. In our view, it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents. The better view is to recognize that the child's best interests are served when intending parents physically, emotionally, and financially support the child from the time the child comes into their lives. This is especially true when both parents are able and willing to care for the child. Therefore, we hold that the Legislature intended that Section 40-11-5(A)(4) be applied to a woman who is seeking to establish a natural parent and child relationship with a child whom she has held out as her natural child from the moment the child came into the lives of both the adoptive mother and the presumptive mother.

III. THIS IS NOT AN APPROPRIATE ACTION IN WHICH TO REBUT THE PRESUMPTION OF NATURAL PARENTHOOD BECAUSE "NATURAL" AND "BIOLOGICAL" ARE NOT SYNONYMOUS TERMS AS USED IN THE NEW MEXICO UPA.

{38} It is undisputed in this case that Chatterjee is neither the biological mother nor the adoptive mother of Child. Regardless of the parties' agreement to co-parent Child, the Court of Appeals considered this issue and concluded that only biological and adoptive mothers have standing to seek custody. *See Chatterjee*, 2011-NMCA-012, ¶¶ 27-29. The Court of Appeals relied on *Black's Law Dictionary* to interpret the term "natural mother" in Section 40-11-4(A) of the New Mexico UPA as synonymous with both "birth mother" and "biological mother." *Chatterjee*, 2011-NMCA-012, ¶ 29. However, resorting to the dictionary is unnecessary when the Legislature itself has set forth the criteria for determining whether a woman is a natural mother. The Legislature did not limit the analysis to the simple question of whether the woman is the "birth mother." Had the Legislature intended to

do so, Section 40-11-4(A) would read only "the natural mother may be established by proof of her having given birth to the child." Instead, the Legislature provided an alternative for establishing the existence of a "natural mother"—referring to Section 40-11-21, which leads to testing the presumptions given in Section 40-11-5 against the facts.

{39} Had the Legislature intended to equate "natural mother" with "birth mother" or "biological mother," it would have said so. In other related contexts, the Legislature has defined a parent as the "biological or adoptive parent." For example, the Legislature defines a "parent," in relevant part, as "a biological or adoptive parent" in the Children's Code. NMSA 1978, § 32A-1-4(P) (2009). The history of Section 32A-1-4(P) is additional proof that the Legislature distinguishes between a "natural" and a "biological" parent. In 1994 the word "parent" was defined to "include[] a *natural* or adoptive parent." (Emphasis added.) In 1995 the Legislature replaced the word "natural" with the word "biological." *Compare* § 32A-1-4(P) (2009), *with* § 32A-1-4(O) (2005). If, as posited by the Court of Appeals, the Legislature equates the word "natural" with "biological," there would have been no need for the Legislature to amend the definition of "parent" in 1995. Thus, if the Legislature, for purposes of the UPA, intended that "natural" motherhood could only be proved through a biological connection, then it would have used the term "biological" as it did in the Children's Code.

{40} The mischief that is created when a court resorts to a dictionary to define a term that is already defined in a statute is illustrated when we define "natural father" by referring to *Black's Law Dictionary*.[8] At "natural father," *Black's* instructs the reader to "[s]ee *biological father*." *Black's Law Dictionary*, *supra*, at 1126. *Black's* defines "biological father" as "[t]he man whose sperm impregnated the child's biological mother." *Id*. at 682. Although impregnating a woman with sperm is one way for a man to be presumed to be the child's "natural father" under the UPA, Section 40-11-5 of the UPA lists several alternative criteria by which a man can be presumed to be the child's "natural father."[9]

{41} We recognize that presumptions under Section 40-11-5 may be rebutted by clear and convincing evidence. *See* § 40-11-5(C); *see also Lane v. Lane*, 1996-NMCA-023, ¶ 10, 121 N.M. 414, 912 P.2d 290 (concluding that any presumption in that case was automatically rebutted by a showing of a husband's sterility but ultimately recognizing the non-biological father as the natural father). However, the presumption of parentage should only be rebutted *in an appropriate action*. *See* § 40-11-5(C).

{42} Our Legislature has not defined "appropriate action," but sister jurisdictions with similar UPA provisions are instructive. In *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002), the California Supreme Court held that a presumed father's admission that he was not the child's biological father did not necessarily rebut the presumption of fatherhood that arose by receiving the child into his home and openly holding out the child as his own. *Id.* at 937, 941. The court held that it was inappropriate to rebut the presumption when there was no other man claiming parental rights and because denying the presumed father's claim would leave the child fatherless. *Id*. at 941. However, the court was careful not to suggest that every man who begins living with a woman who is pregnant or who has a child or children automatically becomes a presumed father simply by virtue of those facts, even against his wishes. *Elisa B.*, 117 P.3d at 670; *see Nicholas H.*, 46 P.3d at 940. The California Supreme Court has since opined that "[t]he Legislature surely did not intend to punish a man like

[8] We interpret "identical words used in different parts of the same act [as having] the same meaning." *State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284, 154 P.3d 659 (alteration in original) (internal quotation marks and citation omitted).

[9] Section 40-11-6(A) also provides that the husband of his artificially-inseminated wife is the natural father of the child thereby conceived, regardless of the fact that there is no possibility that the husband is the biological father.

the one in *Nicholas H.* who voluntarily provides support for a child who was conceived before he met the mother, by transforming that act of kindness into a legal obligation." *Elisa B.*, 117 P.3d at 670. Nonetheless, we agree with the California Supreme Court that the legislature, by using the phrase "*in an appropriate action*," limited the circumstances for rebuttal of the parentage presumption. *Nicholas H.*, 46 P.3d at 936 (internal quotation marks and citation omitted).

{43} The California Supreme Court also considered the appropriateness of rebutting the presumption of parenthood in *Elisa B.*, 117 P.3d at 669. The court upheld the presumption, despite clear and convincing evidence that the petitioner was not the biological mother of the children, for three reasons. First, the court concluded that this was not an appropriate action in which to rebut the presumption "because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother." *Id*. at 670. Second, the petitioner voluntarily expressed an intention to accept the responsibilities and enjoy the benefits of parenthood together with her partner from before the children were conceived through the first years of the children's lives. *Id*. Finally, there was no competition from any other person claiming to be the children's second parent. *Id*. Allowing rebuttal of the presumption in that case would have left the children without the support of a second parent, and that responsibility would ultimately fall to the county if the petitioner did not assume it. *Id*.

{44} Colorado also considers the appropriateness of the action before allowing an action rebutting a presumption to move forward. In *In re A.D.*, 240 P.3d 488 (Colo. App. 2010), the Colorado Court of Appeals held that the case was not an appropriate action in which to rebut the presumption because the presumptive father and the child "shared a preexisting bond of love and affection" and "the child would face possible trauma if she lost all contact with him." *Id.* at 490. The mother argued that the statutory definition of a "parent and child relationship" automatically precluded the man from presumptive father status because he was neither the biological nor the adoptive father. *Id*. at 491. The mother did not challenge the sufficiency of the evidence that the presumed father and her child had established a parent and child relationship, but contended that he was precluded by the words of the statute alone. *Id*. In rejecting the mother's argument, the Colorado Court of Appeals concluded that the Colorado UPA "does not elevate the presumption of biology over the presumption of legitimacy" and "nothing in the statutory provisions . . . provides that an admission by a man . . . that he is not the child's biological father conclusively rebuts [a parentage] presumption." *Id*.

{45} The Washington Supreme Court similarly considers the appropriateness of the rebuttal action, focusing on the best interests of the child. *See McDaniels v. Carlson*, 738 P.2d 254, 262 (Wash. 1987) (en banc) (announcing a four-factor, best-interests-of-the-child test to apply when the court is faced with a paternity challenge from "outside the present family").

{46} Likewise in New Mexico, biology does not exclusively determine who is a "natural parent," whether that person is male or female, under the New Mexico UPA. Indeed, in *Tedford*, 1998-NMCA-067, ¶ 15, the Court of Appeals recognized the importance of considering the child's best interests when making a paternity determination. The Court articulated the best-interests-of-the-child standard as follows:

> [T]he trial court does not automatically assume that a [biological] paternity determination is in the best interest of the child. Where a child is young and has already established a close emotional bond with the presumed father, and where the trial court determines that it would be detrimental to the child's welfare to compromise the continuity of that established relationship, the court will not determine paternity solely on the basis of a biological relationship between the child and the putative father.

Id.

{47} Because we do not reach the merits of this case, we do not decide whether the district court action in which Chatterjee would seek to establish parentage would be an appropriate court proceeding in which to rebut her presumption of parentage, if indeed she is able to establish the presumption. We do, however, find persuasive the factors considered by courts in California, Colorado, and Washington.

IV. CHATTERJEE IS AN "INTERESTED PARTY" AS DEFINED BY THE NEW MEXICO UPA, AND THEREFORE SHE HAS STANDING TO ESTABLISH A PARENT AND CHILD RELATIONSHIP.

{48} When considering whether a complaint states a cause of action, we "accept as true all facts well pleaded." *C & H Constr. & Paving, Inc. v. Found. Reserve Ins. Co.*, 85 N.M. 374, 376, 512 P.2d 947, 949 (1973) (internal quotation marks and citation omitted). Chatterjee asserted facts below sufficient to establish that she is an interested party because her allegations satisfy the hold out provision of Section 40-11-5(A)(4). In her complaint, Chatterjee alleged that she and King were in a committed relationship from 1993 to 2008; she traveled with King to Russia to adopt Child during that relationship in 2000; she has openly held Child out to the world as her daughter ever since Child arrived in New Mexico from Russia; Child believes that Chatterjee is her parent; Child lived with both Chatterjee and King in the same house from May 2000 through August 2008; and Chatterjee provided financial and emotional support to both King and Child throughout this time period. These allegations satisfy a presumption of natural motherhood by applying Section 40-11-5(A)(4), and neither party disputes that a presumptive natural mother qualifies as an "interested party" under Section 40-11-21.

{49} The fact that Chatterjee did not adopt Child does not impact our decision. Section 40-11-5 of the New Mexico UPA delineates the ways in which parentage can be presumed. Thus, our Legislature has recognized that there will be many situations in which someone is caring for a child but has not taken any steps to legalize that relationship. While taking legal action is the best way to ensure that both the alleged parent and the child have rights arising from that relationship, both our Legislature and this Court have indicated a willingness to confer rights to relationships that have not been legally established. This is so because parental rights are not automatically conferred when there is a biological relationship, but rather when an alleged parent has taken the responsibility of caring for a child. *See Helen G. v. Mark J.H. (In re Adoption Petition of Bobby Antonio R.)*, 2008-NMSC-002, ¶ 44, 143 N.M. 246, 175 P.3d 914. Considering the specific facts of this case, we hold that Chatterjee has alleged sufficient facts to attempt to establish that she is an interested party, and therefore she has standing to establish parentage under Section 40-11-21 of the New Mexico UPA.

V. NATURAL PARENTS HAVE STANDING TO SEEK CUSTODY UNDER THE DISSOLUTION OF MARRIAGE ACT, REGARDLESS OF THE FITNESS OF ANOTHER PARENT.

{50} Regarding joint custody, the Court of Appeals held that, since Chatterjee could not establish a natural mother and child relationship under the New Mexico UPA, she therefore could not seek custody under the Dissolution of Marriage Act absent a showing of King's unfitness. *See Chatterjee*, 2011-NMCA-012, ¶¶ 13-15, 22, 24; *see also* § 40-4-9.1(K) ("When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent."). However, as discussed above, Section 40-11-5(A)(4) is applicable to women attempting to establish a parent and child relationship because it is practicable to do so. Therefore, if Chatterjee is able to establish a parent and child relationship under the New Mexico UPA, she will then have standing as a natural parent

to seek joint custody of Child under the Dissolution of Marriage Act. *See Roth v. Bookert* (*In re Adoption of J.J.B.*), 119 N.M. 638, 652, 894 P.2d 994, 1008 (1995) (the public policy of New Mexico regarding custody matters is secured in Section 40-4-9.1(K) and should be applied "when a family breaks up"); *see also Grant v. Cumiford*, 2005-NMCA-058, ¶¶ 2, 13, 137 N.M. 485, 112 P.3d 1142 (applying Section 40-4-9.1 in determining a custody dispute, even though the parties were never married).

{51} Our courts have recognized a parental preference doctrine when determining custody as against the government and third parties. *Shorty v. Scott*, 87 N.M. 490, 493, 535 P.2d 1341, 1344 (1975); *see also Brito v. Brito*, 110 N.M. 276, 279, 794 P.2d 1205, 1208 (Ct. App. 1990) ("[I]n a custody contest between a parent and a non-parent who has no legal right to custody, the natural parent has preference over a non-parent."). However, the parental preference doctrine does not apply between two parents in a custody dispute. *See Shorty*, 87 N.M. at 493, 535 P.2d at 1344; *Brito*, 110 N.M. at 279, 794 P.2d at 1208. As we have explained in detail, our holding gives Chatterjee the opportunity to seek joint custody as a natural parent, assuming that her allegations of the parent and child relationship she has with Child are true. Therefore, the parental preference doctrine would not apply in this case.

VI. CONCLUSION.

{52} Chatterjee has standing to bring an action to establish a parent and child relationship with Child pursuant to Section 40-11-21 because she has alleged sufficient facts to establish that she is a presumed natural parent under Section 40-11-5(A)(4). Assuming that all of her allegations are true, Chatterjee would then have standing to seek joint custody as a natural parent under Section 40-4-9.1 of the Dissolution of Marriage Act. We reverse the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

{53} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PATRICIO M. SERNA,
Justice

CHARLES W. DANIELS,
Justice

RICHARD C. BOSSON,
Justice, specially concurring

BOSSON,
Justice (specially concurring).

{54} I agree with the outcome reached by the majority, but on narrower grounds. I write out of concern that this Opinion might be interpreted to expand the population of presumed parents in a manner that would shake settled expectations of custody rights and child support responsibilities. If interpreted narrowly, the majority Opinion applies existing law to evolving, contemporary fact patterns, which is a good thing. If interpreted broadly, however, the majority Opinion could be read to impose seismic changes in custody and child support relationships that neither the New Mexico Uniform Parentage Act (UPA), NMSA 1978, §§ 40-11-1 to -23 (1986, as amended through 2004), nor sound policy authorizes, at least not in my judgment.

{55} The majority Opinion holds that Chatterjee has standing to pursue shared custody of Child because the presumptions of paternity listed in Section 40-11-5 of the applicable UPA apply equally to women as presumptions of maternity when practicable. *See supra* ¶¶ 5-6, 10-37. In order to reach this conclusion, I believe we need to address other questions that do not hinge upon Chatterjee's gender. *First, when is a nonadoptive, nonbiological individual a presumed parent under the holding-out provision of the UPA? Then, when does biology (the lack of*

a biological relationship) rebut such a presumption of parentage?

{56} Without answering these questions, the majority Opinion concludes that Chatterjee has standing to pursue custody because "[h]er pleading sets forth facts, which, if true, establish that she has a personal, financial, and custodial relationship with Child and has openly held Child out as her daughter, although she is neither Child's biological nor adoptive mother." *See supra* ¶ 4. But is concluding that Chatterjee has openly held out Child as her daughter the end of the inquiry? Not in my opinion.

{57} Let me explain my concerns through a hypothetical. Suppose a hypothetical Mother has two children with men who are no longer involved in their lives for whatever reason, including death. Eventually, Mother begins a serious relationship with a hypothetical Man who moves in and lives happily with Mother and her two young children. Man assists in financial aspects of the household, which almost automatically includes expenses that support the children. At times he refers to himself as the children's father, for example in conversations with neighbors, perhaps on school documents and so forth, either for convenience purposes or perhaps because he truly does wish to become the children's father. Mother may or may not know that Man refers to himself in this way, but we will assume she does. Mother actively considers the possibility of marriage and that some day Man might adopt her two children.

{58} After a few years, however, the relationship sours, and Mother asks Man to leave. It is over. But Man decides he does not want it to end entirely; he wants to share legal custody over the two children. Perhaps his motives are pure; perhaps he is just vindictive and extortionate. Whatever the motive, he alleges standing as a presumed father who has held out the children as his "own" and has established a financial, personal, and custodial relationship with them. He files in court and, as a presumed father, demands a full-blown custody hearing to prove his merits. The best interests of the children, he argues, require his presence in their lives, and Mother, whether out of spite or sincerity, is not acting in a manner consistent with those best interests. Mother finds herself in a custody battle to retain control over her own children.

{59} A claim of presumed parenthood can be equally abused in the other direction. Perhaps Man chooses to end the relationship, never really interested in custody over the children. But it is the Mother who demands permanent child support from him, alleging that Man has become, however reluctantly, a presumed father by virtue of his holding out.

{60} Neither of these scenarios strikes me as desirable from a policy point of view. They appear to run counter to conventional expectations among both professionals and the public at large. After all, the Mother in my hypothetical, completely fit as a parent, has never agreed to surrender her custodial rights to anyone. Should my hypothetical Man even have standing to pursue his claim? According to my reading of the UPA, such claims veer far outside the essential intent and structure of the statute. Yet we need to be careful, lest the majority Opinion be read to lay a legal basis for such claims.

{61} The majority Opinion is not clear what facts Chatterjee has alleged sufficient to establish that she openly held out Child as her own. Therefore, it is also not clear whether hypothetical Man, like Chatterjee, would have standing to pursue custody as a "presumed parent" under the holding-out provision. I believe Chatterjee's situation is distinct, and I write to explain why. Without this clarification and resulting narrowing of the Opinion, I fear the consequences of my hypothetical. As explained earlier, I fear that Man could force Mother to defend her sole custody rights in court, leaving the ultimate determination to a best-interests analysis by a judge, and only after prolonged, highly expensive, and totally unnecessary litigation. And, to make matters worse, if Man has deeper pockets than Mother, he might well win.

{62} The majority states that "New Mexico courts have long recognized that children may

form parent-child bonds with persons other than their legal parents."[10] *Supra* ¶ *35.* While I do not disagree, the point seems irrelevant, unless everything boils down to a "best interests" determination. For most of this Court's history, "the primary purpose of paternity suits [was] to insure the putative father meets his obligation to help support the child." *Aldridge ex rel. Aldridge v. Mims*, 118 N.M. 661, 665, 884 P.2d 817, 821 (Ct. App. 1994) (citing *State ex rel. Human Servs. v. Aguirre*, 110 N.M. 528, 530, 797 P.2d 317, 319 (Ct. App. 1990)); *see also In re Estate of DeLara*, 2002-NMCA-004, ¶ 10,131 N.M. 430, 38 P.3d 198 ("The primary purpose of a paternity proceeding is to compel the father to support his child. Our Supreme Court has characterized child support as a parent's most important single obligation. . . . . The state also has an interest in children being supported by their father. Our law reflects a strong public policy in favor of support. We interpret the UPA against this backdrop." (internal quotation marks and citations omitted)).

{63} In fact, there is only one prior New Mexico case in which a litigant cited the UPA as the basis for establishing parentage and thus, for standing to gain custody rights *for* a presumed father as opposed to child support *from* one. *See Lane v. Lane,* 1996-NMCA-023, ¶ 10, 121 N.M. 414, 912 P.2d 290. All other New Mexico cases apply the UPA to establish paternity in the child support context or in the context of paternal grandparents seeking visitation rights. And, as we shall see, the putative father in *Lane* was not successful under the holding-out provisions of the UPA. *Id.* ¶ 11. Given this limited history, this case poses questions of first impression regarding the UPA for which we truly do not have precedent. While it is self-evident that Chatterjee should have the same rights as a similarly-situated male, the more basic question asks whether and under what circumstances should such a male have standing to be considered a presumed natural parent under the Act.

{64} We have certain traditional legal avenues for asserting parental rights over nonbiological children, primarily through adoption. Adoption can be complicated but, at the very least, it has a set legal protocol. It alerts everyone concerned, just like executing a will, of the solemnity of the occasion and its permanent consequences. "[T]here are advantages to the formality of court-approved adoption pursuant to statute. The formality of the occasion impresses upon those involved the importance of making a considered decision. To predicate an adoption on simply the existence of a loving relationship may often produce results contrary to the intent of those involved." *Otero v. City of Albuquerque*, 1998-NMCA-137, ¶ 15, 125 N.M. 770, 965 P.2d 354 (citations omitted)).

{65} We should be wary of interpreting statutes in a way that would dilute the need for such formality, relying instead upon the more ambiguous standard of "best interests." Thus, legal parenthood by holding out should generally track the requirements for legal descendance by holding out, also known as "equitable adoption," which is construed narrowly, *see Poncho v. Bowdoin*, 2006-NMCA-013, ¶¶ 19-36, 138 N.M. 857, 126 P.3d 1221 (rejecting a biological father's argument that another man had equitably adopted his son, made in order to avoid paying child support). The *least* needed for an equitable adoption is that "'acts or omissions induced the child to believe that [the child] was the foster parent's biological or formally adopted child.'" *Otero*,

[10] The majority's assertion that this Court "held that a trial court had the power to award custody to an uncle with whom a child had bonded over the biological mother's objection, even absent the mother's unfitness" is not supported by our precedent. *See supra* ¶ 35 (citing *Ex parte Pra*, 34 N.M. 587, 588, 590-91, 286 P. 828, 828, 829-30 (1930)). The mother in *Ex parte Pra* was unfit; she had abandoned her one-month-old child, leaving him with the uncle, and then she neglected the child for nine years. *Ex Parte Pra*, 34 N.M. at 588-89, 286 P. at 829. We clarified that narrow holding in *Shorty v. Scott.* In *Scott* we recognized that the mother in *Ex Parte Pra* "was impliedly found unfit in the overall sense since she had effectively abandoned her child when he was but one month old and totally neglected him for nine years." 87 N.M. 490, 494 n.8, 535 P.2d 1341, 1345 n.8 (1975). The majority also cites *Cook v. Brownlee,* 54 N.M. 227, 228-29, 220 P.2d 378, 378-79 (1950) as an example of this Court favoring parent-child bonds over biological relationships. *See supra* ¶ 35. In that case, we awarded custody to a grandfather over a biological father's objections, but only because the biological father had abandoned his child. *Cook*, 54 N.M. at 228-29, 220 P.2d at 378-79.

1998-NMCA-137, ¶ 6 (quoting Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 Vand. L. Rev. 711, 767 (1984)).

Presumed Parenthood Under the "Openly Holds Out" Presumption

{66} Section 40-11-5 of the UPA lists circumstances under which a man should be presumed to be the "natural father" of a child, including the "openly holds out" provision. While I believe that the term "natural" generally means *biological*, the "presumptions of paternity" are just presumptions. Thus, to be a *presumed* natural father, one need not be an actual biological father. The UPA anticipates that there may be multiple presumed fathers, foreclosing the possibility that all presumed natural fathers are biologically related to a child. *See* § 40-11-5(B) ("If two or more men are presumed under this section to be the child's father, an acknowledgment by one of them may be effective only with the written consent of the other or pursuant to Subsection C of this section."). Thus, I agree with the majority that we are not precluded from considering Chatterjee a presumed parent on the basis of biology alone. Unfortunately though, biology would also not preclude my hypothetical Man from asserting a "presumed father" status—which I submit most observers would agree is not a good thing—unless we examine more closely what it takes to qualify as a "holding out" parent. I now turn to that question.

{67} The holding out provision under Section 40-11-5(A)(4) requires that "[a man] openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child." Although,"natural" in the context of "natural child," again, likely means biological in most cases, the provision does not require an assertion of, or an actual, biological relationship. It just requires that a presumed parent *hold a child out* as a natural child, meaning treating the child in the same way that a person would treat his or her biological child. Whether Chatterjee can allege that she has established a personal, financial, or custodial relationship with Child is not yet at issue. Whether Chatterjee "openly held out [Child] as [her] natural child," and exactly what that means, definitely is at issue. So too, is what my hypothetical Man should be required to allege by way of holding out before he could gain "presumed natural parent" status under the UPA and force hypothetical Mother to defend her sole custody status in court.

{68} Cases from our own Court of Appeals as well as from California jurisprudence illustrate at least three common themes that define holding out a child as one's natural child. In each, the presumed parent (1) acted as a parent from the time the child was born or adopted; (2) assumed ongoing responsibilities to the child through legal and financial declarations; and (3) was recognized by the child's family, including another parent or the child, as the child's parent. This strikes me as a narrower class of presumed parents and significantly so, one that might just deter hypothetical Man from pursuit of custody.

{69} "[T]he purpose behind the presumed parent designation . . . 'is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.'" *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 11-12 (Dist. Ct. App. 2011) (quoting *In re Sabrina H.*, 217 Cal. App. 3d 702, 708 (Dist. Ct. App. 1990)). A party acts as a parent from birth or adoption when, for example, he "enjoy[s] regular visitation with each child since birth," *Mintz v. Zoernig*, 2008-NMCA-162, ¶ 11, 145 N.M. 362, 198 P.3d 861, he treats the child as his own from the child's birth until years later when the mother no longer permits it, *Lane*, 1996-NMCA-023, ¶¶ 5-7, or he lives with the child from the child's birth until the baby is 22 months old and supports the child and mother financially with earnings until the mother no longer permits it, *Librers v. Black*, 28 Cal. Rptr. 3d 188, 190 (Dist. Ct. App. 2005).

{70} A party assumes ongoing responsibilities through legal or financial declarations, for example, when he asserts his visitation rights in court, acknowledges that he is the natural father

of children in a stipulated order, and is registered as the father with the vital statistics bureau. *See Mintz*, 2008-NMCA-162, ¶ 11. Or, he does so when he appears on a child's birth certificate and lists the child as a child of the marriage in divorce document. *See Lane*, 1996-NMCA-023, ¶ 6. Or, he does so when he signs a voluntary declaration of paternity so that he could provide the child with medical and other benefits. *See Librers*, 28 Cal. Rptr. 3d at 190. A party is recognized as a parent by another parent and by the child when, for example, he along with his wife tells family and friends that a child is his and his wife encouraged him to be an active parent, *Lane*, 1996-NMCA-023, ¶ 5, when the child calls him "Da Da," *Librers*, 28 Cal. Rptr. 3d at 190, when the child believes he is her biological father due to both her parents' behavior and assertions, *Lane*, 1996-NMCA-023, ¶ 3, or when he is asked, and agrees, to be *the* male role model in the children's lives and is the only other parent the children have known, *see Mintz*, 2008-NMCA-162.

{71} In *S.Y.*, the California case with facts most similar to Chatterjee's allegations, a host of factors led to the reviewing court's conclusion that a woman held two adopted children out as her natural children under the UPA holding-out provision. 134 Cal. Rptr. 3d at 11. The woman acted as a parent from the time the children were adopted until her partner refused to allow her to do so. *Id.* She acted as a parent by telling her partner, with whom she had a committed relationship, that she would support the partner and co-parent a child when her partner sought to conceive and then adopt; she then assisted with the children's care, finances and activities, and allowed her partner to use her middle name as part of one of the children's names. *Id.* The woman assumed ongoing financial obligations by naming the children as beneficiaries on "everything." *Id.* The children and the woman's partner recognized the woman as the children's mother by giving her Mother's Day cards year-after- year, and by participating in a ceremony typically only attended by family members. *Id.* In addition, the woman's parents considered and treated the children as their grandchildren in terms of shared time and financial savings. *Id.*

{72} Chatterjee's allegations are likewise sufficient to establish that she held Child out as her natural child. Chatterjee acted as a co-parent to Child for many years and until King refused to allow her to do so. Like the woman in *S.Y.*, Chatterjee was in a committed relationship with King when, together, they brought Child into their home. Chatterjee and King brought Child to the United States from Russia, with the intention Child would have two mothers. The only reason King's, and not Chatterjee's, name appeared on the adoption papers was their mutual agreement not to risk complications from Russian law and custom in regard to same-sex adoption and Chatterjee's ethnic origin. Child went by a combined surname, including Chatterjee's last name. Chatterjee assumed ongoing obligations by naming Child as a dependent on her health insurance plan and retirement plan. Child and King referred to Chatterjee as Child's mother. Chatterjee and King told others that Chatterjee was Child's mother. Comparatively, Chatterjee alleges more facts than the woman in *S.Y.*; Chatterjee held out Child as her own in the same way that King held out Child as her own from the time Child came into their lives and until King terminated Chatterjee's visits with Child.

{73} Under this high standard for "hold[ing] out," my hypothetical Man rightfully would have a difficult case to allege, much less prove, that he was a "presumed natural parent." In the hypothetical, Man was not involved in bringing Mother's children into the household, unlike Chatterjee who helped create the essential familial relationship. The children would not use or have Man's name. Man may or may not have listed the children formally on any legal documents as his own or as dependents in any formalized manner. It is not clear what role the children or the children's Mother would have considered hypothetical Man to have. To even come close to presumed parent status, Man must not just prove, but he must initially allege such facts. Hypothetical Man would have to make clear whether the children or Mother represented Man to others as the children's father, and in what context, or whether anyone else in the children's family

would have believed Man to be the children's father. There would have to be evidence and allegations that hypothetical Man had assumed ongoing financial or legal obligations for the children.

{74} Absent most of the foregoing, I do not believe that hypothetical Man could even allege that he has held himself out as a presumed natural parent. Thus, unlike Chatterjee, he would not have standing under the UPA, thereby avoiding the seismic shift in settled legal expectations that I outlined at the beginning of this discussion. Similarly, hypothetical Mother could not seek child support from hypothetical Man under the holding-out provision. All this follows, and justly so, as long as we take a disciplined view of what it really takes to become a presumed natural parent.

{75} My narrow view of what it means to be a presumed natural parent by holding out draws support from subsequent modifications to the UPA. The modern UPA drafters had similar concerns. They addressed those concerns explicitly when they amended the model UPA in 2002, although it does not provide for situations in which a child is adopted. The new model UPA, adopted in 2002, and the present-day UPA, adopted in 2009, amend the presumption of fatherhood so that it applies only to persons who, for "*the first two years of the child's life, reside[s] . . . in the same household with the child and openly h[olds] out the child as [his or her] own*." UPA § 704 (1973); *accord* NMSA 1978, § 40-11A-704 (2009) (emphasis added). The comments explaining this change state that

> [b]ecause there was no time frame specified in the 1973 act, the language fostered uncertainty about whether the presumption could arise if the receipt of the child into the man's home occurred for a short time or took place long after the child's birth. To more fully serve the goal of treating nonmarital and marital children equally, the "holding out" presumption is restored, subject to an express durational requirement that the man reside with the child for the first two years of the child's life.

UPA § 704.

{76} While we cannot rely solely on statutory amendments to the New Mexico UPA that occurred after the events of this case, the amendment does afford some indication of the correct policy envisioned by our Legislature. I believe our Legislature intended from the beginning that the holding-out provision should apply narrowly to the very creation of the family unit and not loosely to a subsequent relationship formed years later.

Rebutting the Presumption of Parenthood

{77} When should a court rebut a presumption of parentage based on holding out? We have never addressed this question, but several years ago our Court of Appeals did, perhaps precipitously, in *Lane*, 1996-NMCA-023. In *Lane*, evidence that the presumed father was *not* the biological father was held to rebut a presumption of natural parentage based on holding out. *Id.* ¶ 10. The UPA directs, however, that a presumption of natural parenthood "may" be rebutted in an "appropriate action," suggesting a less mechanical approach. *See* § 40-11-5(C).

{78} Long before the UPA, courts grappled with when to allow evidence of biology to interfere with established familial units.

> The presumption of legitimacy was a fundamental principle of the common law. Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. As explained by Blackstone, nonaccess could only be proved "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, extra *quatuor maria* [beyond the four seas]) for above nine months. . . ." And, under the common law both in England and here,

> "neither husband nor wife [could] be a witness to prove access or nonaccess." The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquillity of States and families," a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate. Even though, as bastardy laws became less harsh, "[j]udges in both [England and the United States] gradually widened the acceptable range of evidence that could be offered by spouses, and placed restraints on the 'four seas rule' . . . [,] the law retained a strong bias against ruling the children of married women illegitimate.

Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989), *rehearing denied*, 492 U.S. 937, *and superseded by statute as stated in Jones v. Trojak*, 586 A.2d 397 (Pa. Super. Ct. 1990) (citations omitted).

{79} The majority asserts that "the Court of Appeals recognized the importance of considering the child's best interest when making a paternity determination" in *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540. *See supra* ¶ 46. To clarify, *Tedford* recognized that a child's best interests is a *factor in determining whether to rebut a presumption of natural parentage* in some jurisdictions, once a presumption of paternity is established. 1998-NMCA-067, ¶ 15. This means that, *before* best interests becomes part of the paternity analysis, a parent must establish presumed parenthood, such as through the holding-out provision of the UPA. For example, if a biological father challenges another presumed parent's relationship after a child has established a father-child relationship with the presumed father, then a court would be justified in not permitting biology to rebut the presumption. *See Tedford*, 1998-NMCA-067, ¶ 15. This is because "when the child involved in such proceeding is a minor and has developed a close emotional attachment to the presumed parents . . . court recognition of another parent would be emotionally or otherwise damaging to the child." *Id*. ¶ 17. *Tedford* recognized that a best interests of the child theory should apply to protect a child from losing a parent, rather than to protect a parent from payment of child support. *Id.* ¶ 18.

{80} This *Tedford* dicta closely tracks the reasoning employed in California cases, such as *In re Raphael P.*, 118 Cal. Rptr. 2d 610 (Dist. Ct. App. 2002). *In re Raphael P.* held that when there are "competing claims of would-be parents who wished to raise the child," then "[f]ollowing the biological tie did not deprive the child of a parent." *Id.* at 623. As such, a biological determination of parenthood was appropriate. Conversely, determining parenthood through biology would be inappropriate if a finding of a biological tie would override an existing familial relationship. *Id.* at 624. The court noted that the UPA provisions describing genetic and blood tests refer to testing "alleged" fathers, not "presumed fathers," suggesting that biology should not generally rebut presumed parenthood. *Id.* at 625.

{81} The California Supreme Court applied this reasoning most famously in *In re Nicholas H.*, when an admittedly nonbiological, presumed father sought custody of a boy whose mother was not able or willing to care for him and no other man claimed fatherhood. 46 P.3d 932, 934 (Cal. 2002). The California Supreme Court reasoned that the case was not the "*appropriate action*" for rebuttal of a parental presumption: "the Legislature is unlikely to have had in mind an action like this—an action in which no other man claims parental rights to the child, an action in which rebuttal of the [statutory] presumption will render the child fatherless." *Id.* at 941.

{82} California courts have continued to apply this logic, not permitting biology to rebut

a parental presumption based on holding out, in diverse scenarios. *See, e.g.*, *Elisa B. v. Superior Ct.*, 117 P.3d 660 (Cal. 2005); *Librers*, 28 Cal. Rptr. 3d 188. In *Librers*, the trial court rebutted a boyfriend's presumption of fatherhood because he was not biologically related to a child. *Librers*, 28 Cal. Rptr. 3d at 194. The trial judge had worried that recognizing boyfriend as a presumed father would mean that any custodial male of a child could make a claim of presumed fatherhood. *Id.* at 193. In overturning the trial court's position, the appellate court agreed that, if a custodial male *truly held the child out as his own*, such situations were possible: "a boyfriend, uncle or housemate who . . . holds the child out as his own is not disqualified from asserting parental rights and responsibilities to the child by virtue of his lack of a biological attachment." *Id.* Significantly, in *Librers* the boyfriend alleged that he had acted as the father in every way since the child's birth until the mother refused to let him do so. *Id.* Likewise, in *Elisa B.*, a woman could not use biology to rebut the presumption that she was a natural mother of her former partner's children who were conceived by invitro-fertilization once facts established the presumption under the UPA's holding out provision. 117 P.3d at 670.

{83} The bottom line is that a presumption of parentage based on holding out, once properly asserted, is a strong presumption only rebutted in limited circumstances. The new model UPA and modern UPA resolve the issue of rebuttal explicitly, in a way that I believe reflects this case law and the policy behind it. A court may deny genetic testing if "(1) the conduct of the mother or the presumed or acknowledged father *estops* that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father." NMSA 1978, § 40-11A-608(A)(1) and (2) (2009). Then, nine factors provide guidance as to whether to grant a motion for genetic testing:

> (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;
>
> (2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;
>
> (3) the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;
>
> (4) the nature of the relationship between the child and the presumed or acknowledged father;
>
> (5) the age of the child;
>
> (6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
>
> (7) the nature of the relationship between the child and any alleged father;
>
> (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
>
> (9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.

Section 40-11A-608(B)(1) to (9). Many factors would apply in a future case like Chatterjee's and would weigh against rebutting her presumption of parentage with genetic testing. *See* § 40-11A-608(B)(2), (4), (5), (6) & (9).

{84} Given the foregoing reasoning, biological evidence should not rebut Chatterjee's presumption of parentage because doing so would deprive Child of a parent. Hypothetical Man or hypothetical Mother, on the other hand, cannot establish the parental presumption in relation to hypothetical Man, and therefore, he would have no presumptive parental status to rebut. Thus, while Chatterjee should have standing to pursue custody of Child, hypothetical Man would not, nor could hypothetical Mother force him to pay child support.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-018

Filing Date: May 9, 2013

Docket No. 33,182

MOONGATE WATER COMPANY, INC., a New Mexico Public Utility,

Plaintiff-Petitioner,

v.

CITY OF LAS CRUCES,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Robert E. Robles, District Judge

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OPINION

CHÁVEZ, Justice.

{1} The Public Regulation Commission (PRC) issued Moongate Water Company (Moongate) a certificate of public convenience and necessity (CCN) authorizing Moongate, as a public utility, to provide water to an area located outside the city limits of Las Cruces, New Mexico, which we shall label the "certificated area." Las Cruces later annexed three undeveloped tracts of land within Moongate's certificated area, and Las Cruces committed itself to provide water to this area despite Moongate's CCN. We address two questions in this appeal. First, does Moongate have a right to provide water within the certificated area to the exclusion of Las Cruces? Second, did Las Cruces engage in an unlawful taking of Moongate's property entitling Moongate to just compensation when Las Cruces chose to provide water within the certificated area? We answer the first question in the negative because Las Cruces is not subject to the Public Utilities Act (the PUA), NMSA 1978, Sections 62-1-1 to -6-28 (1884, as amended through 2003) and NMSA 1978, Sections 62-8-1 to -13-15 (1941, as amended through 2003).[1] We also answer the second question in the negative because on the record before us, Moongate has not proven that it had established infrastructure and was already serving customers in the annexed area. Absent such proof of a tangible loss, a public utility is not entitled to just compensation when a municipality lawfully exercises its right to serve in the public utility's certificated area. We therefore affirm the Court of Appeals and reverse the district court.

BACKGROUND

{2} In 1983 the PRC issued Moongate, as a public utility, a CCN that was extended in 1984, authorizing Moongate to provide water services in an area which at the time was outside the Las Cruces city limits. Las Cruces, a home-rule

[1] S*ee* NMSA 1978, § 62-13-1 (1993) (defining the PUA).

municipality, subsequently annexed three undeveloped tracts of land within Moongate's certificated area, subdivided the land, and committed itself to provide the subdivisions with municipal water service. Moongate filed a complaint against Las Cruces seeking (1) an injunction and declaratory judgment stating that Moongate was exclusively authorized to serve the three subdivisions, (2) compensation for inverse condemnation of its allegedly exclusive right to serve the subdivisions, and (3) compensation for a regulatory taking of its alleged exclusive right to serve.

{3} Las Cruces filed a motion for summary judgment on all counts of the complaint, and Moongate filed a memorandum in opposition and cross-motion for summary judgment on the second and third counts (inverse condemnation and regulatory takings issues). The district court granted Moongate's motion on the second and third counts, and concluded that because Moongate's rights under the CCN were exclusive, Las Cruces was liable for damages as a result of the taking or inverse condemnation to the extent that damages could be proven. The district court held a trial on the issue of damages and ultimately concluded that Moongate had failed to prove damages; therefore, none were awarded.

{4} Moongate appealed to the Court of Appeals on the issue of damages. Las Cruces appealed the district court's determination that Moongate's rights were exclusive and that there had been a taking. The Court of Appeals reversed the district court's determination that the CCN guaranteed Moongate exclusive service rights. *Moongate Water Co. v. City of Las Cruces*, 2012-NMCA-003, ¶ 2, 269 P.3d 1. The Court also concluded that the district court erred in granting summary judgment in Moongate's favor because the grant was based on the district court's finding that Moongate had exclusive service rights under its CCN. *Id*. ¶ 27. Moongate appealed to this Court, and we granted certiorari. *Moongate Water Co. v. Las Cruces*, 2012-NMCERT-001, 291 P.3d 599.

{5} Moongate argues that (1) its CCN is a "valuable property right[]" and gives it the exclusive right to provide water in the certificated area, and although the PRC cannot regulate municipalities operating outside of the PUA such as Las Cruces, those municipalities cannot override the rights granted to public utilities by the PRC; (2) the only way that an unregulated municipality may take over or invade a certificated area is to either submit to PRC regulation or effectuate a taking via the power of eminent domain; and (3) by invading Moongate's certificated area, Las Cruces has "damaged" Moongate's property, thereby effectuating a taking that requires just compensation.

DISCUSSION

{6} This case hinges on the interpretation of various statutes. Statutory interpretation is an issue of law that we review de novo. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860. When this Court construes statutes, "our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. In doing so, we employ canons of statutory construction, and look first to the plain meaning of the statute. *Id.* We give words their ordinary meaning, and if the statute is clear and unambiguous, we "refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted).

A. Moongate's Ccn Does Not Prevent Las Cruces From Competing With Moongate In Its Certificated Area

{7} The PUA is "a comprehensive regulatory scheme granting the PRC the policy-making authority to plan and coordinate the activities of New Mexico public utilities." *Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 16, 140 N.M. 6, 139 P.3d 166. The PRC has the authority and responsibility to issue CCNs, which must be obtained by public utilities

prior to any construction, operation, or extension of any public utility plant or system. Section 62-9-1(A).

{8} However, with two exceptions, municipalities are not subject to the PUA. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 588, 904 P.2d 28, 37 (1995). The first exception that would bring a municipality under the PRC's authority is set forth in NMSA 1978, Section 62-6-5 (1993). It allows municipalities to "elect to come within the provisions of [the PUA] and to have the utilities owned and operated by it, either directly or through a municipally owned corporation, regulated and supervised under the provisions of [the PUA]." Las Cruces has not elected to become subject to the PUA, and therefore this exception is inapplicable to this case. The second exception brings municipalities with a population of more than 200,000 within the provisions of the PUA in certain circumstances. NMSA 1978, § 62-9-1.1(A), (C) (1991); *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. Las Cruces does not have a population of more than 200,000, and therefore Las Cruces is not subject to the PUA.

{9} Instead, municipalities are regulated under the provisions of NMSA 1978, Sections 3-23-1 to -10 (1953, as amended through 2001), and NMSA 1978, Sections 3-27-1 to -9 (1953, as amended through 1994). Therefore, while the PRC has exclusive jurisdiction to regulate public utilities, it has no authority over utilities owned and operated by most municipalities. NMSA 1978, § 62-6-4(A) (2003) ("The [PRC] shall have general and exclusive power and jurisdiction to regulate and supervise every public utility. . . . Nothing in this section, however, shall be deemed to confer upon the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipal corporation. . . .").

{10} If Las Cruces were subject to the PUA, the outcome would be clear. Section 62-9-1.1(A) describes the situation at hand and requires a specific remedy:

> Notwithstanding any other provision of the [PUA], or any provision of the Municipal Code, or any privilege granted under either act, if any municipality that has not elected to come within the terms of the [PUA] . . . constructs or extends or proposes to construct or extend its water or sewer line or system or water pumping station or reservoir into a geographical area described in a [CCN] granted by the [PRC] to a public utility rendering the same type of service, the [PRC], on complaint of the public utility claiming to be injuriously affected thereby, shall, after giving notice to the municipality and affording the municipality an opportunity for a hearing with respect to the issue of whether its water or sewer line, plant or system actually intrudes or will intrude into the area certificated to the public utility, determine whether such intrusion has occurred or will occur. If the [PRC] determines such an intrusion has occurred or will occur, the municipality owning or operating the water or sewer utility shall cease and desist from making such construction or extension in the absence of written consent of the public utility involved and approval of the [PRC].

This language clearly describes resolution of disputes between public utilities and municipalities not otherwise subject to the PUA when a municipality invades a certificated area. However, this section still does not resolve the problem in the present case, since Subsection C provides that "[f]or purposes of this section, 'municipality' means any municipality that has a population of more than two hundred thousand." Section 62-9-1.1(C). Thus, this section does not apply to Las Cruces. The Legislature expressed its clear intention to exclude smaller municipalities from the limits placed on larger municipalities that invade a certificated area.

{11} Moongate argues that despite the plain meaning of Section 62-9-1.1(C), the expression of policy set forth in NMSA 1978, Section 62-3-2.1 (1991), requires this Court to hold that Las

Cruces cannot invade Moongate's certificated area. Section 62-3-2.1(C) explains:

> A rational basis exists to prohibit intrusion of municipal water or sewer facilities or service into areas in which a public utility furnishes regulated services until that municipality elects to come within the terms of the [PUA], in which event both systems will be brought into parity of treatment with respect to the [PRC]'s independent jurisdiction and power to prevent unreasonable interference between competing plants, lines and systems. Without such controls as provided by Section 62-9-1.1 NMSA 1978, the declared policy of the [PUA], the provision of reasonable and proper utility services at fair, just and reasonable rates and the general welfare, business and industry of the state may be frustrated.

{12} We agree with the Court of Appeals' discussion of this particular statutory language. *See Moongate*, 2012-NMCA-003, ¶¶ 18, 20-21. The Legislature expressed a desire to prohibit unreasonable municipal intrusion into territory that is already being served by public utilities, but it failed to enact any operative language, other than Section 62-9-1.1, to accomplish that goal. Because Section 62-9-1.1(C) explicitly excludes municipalities with a population of less than 200,000, we cannot construe either it or Section 62-3-2.1 as prohibiting Las Cruces from competing with Moongate in the certificated area at issue. Indeed, nothing in either the PUA or the statutory sections that regulate municipalities stops Las Cruces from providing service in the certificated area. Here, the area at issue was annexed by Las Cruces, which extended the corporate boundaries of the city, and it is therefore clear that Las Cruces may provide water in the certificated area. In fact, pursuant to Section 3-27-8(A), municipalities that operate a water system are authorized to furnish water even outside their corporate boundaries. Thus, contrary to Moongate's assertions, Las Cruces may provide utility service in the certificated area, even though the city has not elected to come under the provisions of the PUA.

{13} We addressed an analogous situation in *Morningstar*, 120 N.M. at 581, 904 P.2d at 30, when a municipality extended its water services into territory that had previously been exclusively served by a water users' association. The water users' association argued that the municipality was encroaching on its service area and sought protection under the PUA by filing a complaint with the PRC. *Id.* at 582, 904 P.2d at 31. We held that the water users' association could not invoke the protections set forth in Section 62-9-1.1(A) because the municipality was not subject to the PUA under either exception. *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. Similarly, in this case, Las Cruces is not subject to the PUA, which means that Moongate cannot invoke any protections set forth in the provisions in the PUA, including those contained in Section 62-9-1.1. *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. While the Legislature is clearly concerned about possible encroachment by municipalities into public utilities' service areas, it also made clear that the protections contained in the PUA do not cover municipalities except under very limited circumstances.

{14} Moongate has called our attention to the Court of Appeals' opinion in *Fleming v. Town of Silver City*, 1999-NMCA-149, ¶ 6, 128 N.M. 295, 992 P.2d 308, which states in dicta that

> a municipal water system does not fall within the purview of the PUA except that the regulation of the PUA extends to prohibit a municipality from operating within the service area of a regulated public utility until the municipality exercises its option to subject itself to regulation under the PUA so that both it and the existing utility may be regulated to avoid unreasonable and unnecessary duplication of plant and resources.

The Court cites Section 62-3-2.1(C) in support of this statement of the law. However, the PUA is clear and unambiguous to the extent that it excludes municipalities from being subject to its provisions. Section 62-3-3(E). Because the plain meaning of the statute is clear, we cannot engage

in further interpretation. As we explained previously, Section 62-3-2.1 is a statement of policy. The operative language is found in Section 62-9-1.1, and it does not apply to Las Cruces. When and if the Legislature chooses to bring smaller municipalities into the scope of Section 62-9-1.1, it will amend the statute to do so.

{15} In short, Moongate's CCN grants it exclusive service rights only against utilities that are subject to the PRC's authority. Nothing in the PUA suggests that issuing a CCN should allow the PRC to restrict the actions of a municipal utility that would otherwise fall outside of its jurisdiction. We conclude that the PRC's authority extends only as far as its ability to regulate, and because it has no ability to regulate Las Cruces, a CCN issued by the PRC has no limiting effect on the city. *See S. Union Gas Co. v. N.M. Pub. Util. Comm'n*, 1997-NMSC-056, ¶ 7, 124 N.M. 176, 947 P.2d 133 ("[T]he [PRC] cannot legitimately exercise jurisdiction over [a party] unless [that party] properly falls within the [PRC]'s statutorily defined jurisdiction."). The Court of Appeals' dicta in *Fleming* is incorrect insofar as it suggests otherwise. Moongate's CCN does not prevent a municipality with a population of less than 200,000 from competing with Moongate in its certificated area. We therefore affirm the Court of Appeals to the extent that it concluded that "Moongate's CCN did not grant [it] exclusive service rights against [Las Cruces'] water utility." *Moongate*, 2012-NMCA-003, ¶ 24.

B. Loss of An Abstract Right to Serve is Not A Compensable Taking

{16} We now address Moongate's regulatory taking claim. Even though Moongate's CCN does not prevent Las Cruces from providing service in the certificated area, this does not necessarily preclude the possibility that Las Cruces effectuated a taking in doing so. The district court granted summary judgment in favor of Moongate on the basis that its CCN gave it exclusive service rights as against Las Cruces. We disagree with the district court's conclusion and hold that a taking can occur, even in the absence of a public utility's exclusive right to furnish water under a CCN, if the CCN holder can prove that it had established infrastructure and was already serving customers in the area interfered with by the municipality.

{17} Article II, Section 20 of the New Mexico Constitution and the Fifth Amendment to the United States Constitution forbid the taking of private property for public use without just compensation. *See, e.g.*, *Bd. of Educ. v. Thunder Mountain Water Co.*, 2007-NMSC-031, ¶ 8, 141 N.M. 824, 161 P.3d 869 (explaining the takings protections set forth in the federal and state constitutions); *State ex rel. State Highway Comm'n v. Chavez*, 77 N.M. 104, 106, 419 P.2d 759, 760 (1966) (explaining that the right of access is a property right that cannot be taken or damaged without just compensation). In evaluating takings claims under the New Mexico Constitution, "we turn to [both] federal [and state] cases for guidance, since '[o]ur state Constitution provides similar protection' to the Takings Clause in Amendment V of the United States Constitution." *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 19 n.1, 146 N.M. 1, 206 P.3d 112 (quoting *Thunder Mountain*, 2007-NMSC-031, ¶ 8 (third alteration in original)).

{18} A regulatory taking, which Moongate asserts occurred here, occurs when the government regulates the use of land, but does not condemn it, i.e., take title to the property. *Manning v. Mining & Minerals Div.*, 2006-NMSC-027, ¶ 22, 140 N.M. 528, 144 P.3d 87. "The general rule is that a regulation which imposes a reasonable restriction on the use of private property will not constitute a 'taking' of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his [or her] property." *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 144-45, 646 P.2d 565, 571-72 (1982). If a regulatory taking has occurred, an action lies for inverse condemnation. *See Townsend v. State ex rel. State Highway Dep't*, 117 N.M. 302, 304,

871 P.2d 958, 960 (1994) (action in inverse condemnation is the exclusive remedy when property is taken or damaged for public use by a governmental entity that has failed to pay just compensation or initiate condemnation proceedings).

{19} Municipalities have "the authority to condemn privately operated water . . . facilities for public use." *United Water N.M., Inc. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-007, ¶ 23, 121 N.M. 272, 910 P.2d 906; Section 3-27-2(A), (G). We have required condemning authorities to pay just compensation to public utilities when taking tangible property, such as a water line extension and associated property. *Thunder Mountain*, 2007-NMSC-031, ¶¶ 3, 5. In this case, Moongate frames its takings claim as whether Las Cruces "could take Moongate's exclusive service rights" without just compensation. At oral argument, we asked Moongate's counsel what property was being taken that required compensation. Moongate reiterated that the property requiring just compensation was its exclusive right to serve. Essentially, Moongate asks us to require compensation for the fair market value of the lost potential opportunity to serve.

{20} The district court found that in at least some of the certificated area, "[a]t most, Moongate lost only a few potential residential water customers as a result of the City's annexation . . . and agreement to provide water . . . utility service." Additionally, the district court found that "Moongate had no infrastructure on any of the three tracts of land and no customers on any of the properties," and it "had no ownership interest in any of the land[]." The district court also found that "Moongate had no physical assets in the areas in issue, and that no physical asset of any kind was taken by the City from Moongate." Further, the district court found that "[i]t was undisputed that, absent significant infrastructure improvements, Moongate could not serve . . . the Dos Suenos subdivision," and the developer had requested that Las Cruces provide utility services to the area. The district court also found that "Moongate has not incurred, and will not incur, any costs to serve the subject subdivisions." Essentially, the district court found that any lost profits were speculative because they were based on a hypothetical future income stream.

{21} Since there can be no taking of exclusive service rights if the rights are not exclusive as to the party that has allegedly taken them, and the district court's findings of fact indicate that Moongate had no tangible assets on the certificated area, the City has not engaged in a taking. If Moongate had proved that it had invested in production capacity to serve the area, built a plant or other infrastructure, and Las Cruces then took over service or began competing in the certificated area, this would be an entirely different issue, which might justify compensation under a stranded assets theory. Indeed, at oral argument, counsel for Las Cruces conceded that there would have been a taking if that had been the situation.

{22} We have defined stranded assets or stranded costs "as those costs that . . . utilities currently are permitted to recover through their rates but whose recovery may be impeded or prevented by the advent of competition in the industry." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 7, 127 N.M. 272, 980 P.2d 55 (internal quotation marks and citation omitted); *see also City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 238 (Tex. 2001) ("[S]tranded costs are investments in or the cost of tangible assets" that it is in the public interest for utilities to recover). For example, if Moongate had proven that Las Cruces' actions rendered tangible assets worthless, Moongate could have legitimately argued that its investment in those assets was compromised, and therefore it was entitled to compensation under a stranded assets theory. However, Moongate did not make that argument, and the district court's findings of fact and conclusions of law make it clear that Moongate failed to demonstrate any loss at all. Significantly, Moongate itself identifies the alleged "exclusive service rights" as the property that requires just compensation—it does not point to any tangible asset that has been affected by Las Cruces' actions. Therefore, we cannot conclude that Las Cruces has engaged in

a taking, and we hold that in the absence of any proof of tangible loss—i.e., physical taking or stranded costs—a public utility is not entitled to just compensation when a municipality lawfully exercises its right to serve in the public utility's certificated area.

{23} Moongate cites case law from other jurisdictions to support the proposition that a municipality that invades a public utility's certificated area has taken property which requires just compensation. Although the authorities relied upon by Moongate are distinguishable, the reasoning and analyses in these cases were useful to this Court in reaching its conclusion. For example, in *City of Jackson v. Creston Hills, Inc.*, 172 So. 2d 215, 217-18, 220 (Miss. 1965), the court held that the city of Jackson had engaged in a taking when it invaded certificated territory where a public utility had established infrastructure ("two deep wells, two submersible pumps, two pressure tanks, water mains, service lines and other sundry property"), *id.* at 217-18, and was already providing service to customers in the area. Notably, the court found error in the district court's decision to value the CCN separately for calculation of damages. *Id.* at 221-22. Another example is *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089, 1102-03 (Del. 1990), in which the Supreme Court of Delaware held that the city of Seaford could not take customer accounts from a public utility unless just compensation was paid. The municipality began to provide service to two commercial customers which the public utility had served up to that point. *Id.* at 1091. Like *City of Jackson*, *Delmarva* supports the proposition that a municipality engages in a taking when actual (rather than potential) customers or infrastructure is involved. *See Delmarva*, 575 A.2d at 1103; *City of Jackson*, 172 So. 2d at 218. These cases, however, do not support that a taking has occurred when a right to serve has been compromised and no infrastructure or customers were involved.

CONCLUSION

{24} The district court erred in granting summary judgment in favor of Moongate. Therefore, we affirm the Court of Appeals to the extent that it determined that Moongate's CCN does not guarantee exclusive service rights against Las Cruces. We also conclude that the loss of an abstract right to serve, without tangible loss, is not compensable as a taking. We remand to the district court to enter judgment for Las Cruces.

{25} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

BARBARA J. VIGIL,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-040

Filing Date: August 22, 2013

Docket No. 33,687

ELANE PHOTOGRAPHY, LLC,

Plaintiff-Petitioner,

v.

VANESSA WILLOCK,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Alan M. Malott, District Judge

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OPINION

CHÁVEZ, Justice.

{1} By enacting the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -13 (1969, as amended through 2007), the Legislature has made the policy decision to prohibit public accommodations from discriminating against people based on their sexual orientation. Elane Photography, which does not contest its public accommodation status under the NMHRA, offers wedding photography services to the general public and posts its photographs on a password-protected website for its customers. In this case, Elane Photography refused to photograph a commitment ceremony between two women. The questions presented are (1) whether Elane Photography violated the NMHRA when it refused to photograph the commitment ceremony, and if so, (2) whether this application of the NMHRA violates either the Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution, or (3) whether this application violates the New Mexico Religious Freedom Restoration Act (NMRFRA), NMSA 1978, §§ 28-22-1 to -5 (2000).

{2} First, we conclude that a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the NMHRA and must serve same-sex couples on the same basis that it serves opposite-sex couples. Therefore, when Elane Photography refused to photograph a same-sex commitment ceremony, it violated the NMHRA in the same way as if it had refused to photograph a wedding between people of different races.

{3} Second, we conclude that the NMHRA does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another. The purpose of the NMHRA is to ensure that businesses offering services to the general public do not discriminate against protected classes of people, and the United States Supreme Court has made it clear that the First Amendment permits such regulation by states. Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws. We also hold that the NMHRA is a neutral law of general applicability, and as such, it does not violate the Free Exercise Clause of the First Amendment.

{4} Finally, we hold that the NMRFRA is inapplicable in this case because the government is not a party. For these reasons, we affirm the judgment of the Court of Appeals.

BACKGROUND

{5} The NMHRA prohibits, among other things, discriminatory practices against certain defined classes of people. *See* § 28-1-7. In 2003, the NMHRA was amended to add "sexual orientation" as a class of persons protected from discriminatory treatment. 2003 N.M. Laws, ch. 383, § 2. "Sexual orientation" is defined in the NMHRA as "heterosexuality, homosexuality or bisexuality, whether actual or perceived." Section 28-1-2(P). In this case, we are concerned

with discrimination by a public accommodation against a person because of that person's real or perceived homosexuality—that person's propensity to experience feelings of attraction and romantic love for other members of the same sex.

{6} "Public accommodation" is defined in the NMHRA as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private." Section 28-1-2(H). Thus, a business that elects not to offer its goods or services to the public is not subject to the NMHRA.

{7} Vanessa Willock contacted Elane Photography, LLC, by e-mail to inquire about Elane Photography's services and to determine whether it would be available to photograph her commitment ceremony[1] to another woman. Elane Photography's co-owner and lead photographer, Elaine Huguenin, is personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs. Huguenin responded to Willock that Elane Photography photographed only "traditional weddings." Willock e-mailed back and asked, "Are you saying that your company does not offer your photography services to same-sex couples?" Huguenin responded, "Yes, you are correct in saying we do not photograph same-sex weddings," and thanked Willock for her interest.

{8} In order to verify Elane Photography's policy, Willock's partner, Misti Collinsworth, e-mailed Elane Photography and inquired about its willingness to photograph a wedding, without mentioning the sexes of the participants. Huguenin sent Collinsworth a list of pricing information and an invitation to meet with her and discuss her services. A few weeks later, Huguenin again e-mailed Collinsworth to follow up.

{9} Willock filed a discrimination complaint against Elane Photography with the New Mexico Human Rights Commission for discriminating against her based on her sexual orientation in violation of the NMHRA. The Commission concluded that Elane Photography had discriminated against Willock in violation of Section 28-1-7(F), which prohibits discrimination by public accommodations on the basis of sexual orientation, among other protected classifications. It awarded Willock attorneys' fees, which Willock later waived. No other monetary or injunctive relief was granted.

{10} Elane Photography appealed to the Second Judicial District Court for a trial de novo pursuant to Section 28-1-13(A). *See* NMSA 1978, § 39-3-1 (1955) ("All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law."). Elane Photography sought a reversal of the award of attorneys' fees, a declaratory judgment that it had not discriminated on the basis of sexual orientation, and a ruling that its rights had been violated, among other relief. The parties filed cross-motions for summary judgment, and the district court granted summary judgment for Willock. Elane Photography again appealed, and the Court of Appeals affirmed. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 1, 284 P.3d 428. We granted certiorari.

{11} Elane Photography argues before this Court that: (1) it did not discriminate on the basis of sexual orientation, and therefore it did not violate the NMHRA; or, alternatively, (2) by requiring Elane Photography to accept clients against its will, the NMHRA violates the protection of the First Amendment against compelled speech; (3) the NMHRA violates Elane Photography's First Amendment right to freely exercise its religion; and (4) the NMHRA violates Elane Photography's right under the NMRFRA to freely exercise its religion. For the reasons that follow, we reject Elane Photography's arguments and affirm summary judgment for Willock.

[1] Willock referred to the event as a "commitment ceremony" in her e-mail to Elane Photography. However, the parties agree that the ceremony was essentially a wedding—Elane Photography emphasizes that there were vows, rings, a minister, flower girls, and a wedding dress, and Willock uses the word "wedding" to describe the ceremony in her brief. We use the terms "wedding" and "commitment ceremony" interchangeably.

DISCUSSION

{12} The parties agree on the facts in this case, and the only question for this Court to consider is whether Willock is entitled to judgment as a matter of law. *See Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 ("Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law."). On appeal, we review a grant of summary judgment de novo. *Id.*

I. ELANE PHOTOGRAPHY REFUSED TO SERVE WILLOCK ON THE BASIS OF HER SEXUAL ORIENTATION IN VIOLATION OF THE NMHRA

{13} The NMHRA seeks to promote the equal rights of people within certain specified classes by protecting them against discriminatory treatment. *See Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 14, 139 N.M. 12, 127 P.3d 548 ("The NMHRA protects against discriminatory treatment. . . ."). To accomplish this goal, the NMHRA makes it unlawful for "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, *sexual orientation*, gender identity, spousal affiliation or physical or mental handicap." Section 28-1-7(F) (emphasis added). The Court of Appeals affirmed the district court's holding that Elane Photography was a public accommodation under Section 28-1-2(H), *Elane Photography*, 2012-NMCA-086, ¶ 18, and Elane Photography did not challenge that holding in this appeal. Accordingly, Elane Photography waived its right to challenge that conclusion as a matter of New Mexico law. *See Fikes v. Furst*, 2003-NMSC-033, ¶ 8, 134 N.M. 602, 81 P.3d 545 ("[I]t is improper for this Court to consider any questions except those set forth in the petition for certiorari."). We therefore accept the Court of Appeals' conclusion that at the time of its interactions with Willock and Collinsworth, Elane Photography was a public accommodation as defined in Section 28-1-2(H), and as such, was subject to Section 28-1-7(F) of the NMHRA. *See Elane Photography*, 2012-NMCA-086, ¶¶ 14, 18.

{14} Elane Photography argues that it did not violate the NMHRA because it did not discriminate on the basis of sexual orientation when it refused service to Willock. Instead, Elane Photography explains that it "did not want to convey through [Huguenin]'s pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners'] beliefs." Elane Photography argues that it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings. However, Elane Photography's owners testified that they would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other. Elane Photography also argues in its brief that it would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same-sex marriage. For example, Elane Photography states that it "would have declined the request even if the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual." Therefore, Elane Photography reasons that it did not discriminate "because of . . . sexual orientation," § 28-1-7(F), but because it did not wish to endorse Willock's and Collinsworth's wedding.

{15} The NMHRA prohibits discrimination in broad terms by forbidding "any person in any public accommodation to make a distinction, *directly or indirectly*, in offering or refusing to offer its services . . . because of . . . sexual orientation." Section 28-1-7(F) (emphasis added). Elane Photography is primarily a wedding photography business. It provides wedding photography services to heterosexual couples, but it refuses to work with homosexual couples under equivalent circumstances.

{16} Elane Photography's argument is an attempt to distinguish between an individual's

status of being homosexual and his or her conduct in openly committing to a person of the same sex. It was apparently Willock's e-mail request to have Elane Photography photograph Willock's commitment ceremony to another woman that signaled Willock's sexual orientation to Elane Photography, regardless of whether that assessment was real or merely perceived. The difficulty in distinguishing between status and conduct in the context of sexual orientation discrimination is that people may base their judgment about an individual's sexual orientation on the individual's conduct. To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA.

{17} The United States Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, ___ U.S. ___, ___, 130 S. Ct. 2971, 2980 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society and sought formal recognition from the school. The Christian Legal Society required its members to affirm their belief in the divinity of Jesus Christ and to refrain from "'unrepentant homosexual conduct.'" *Id.* & *id.* n.3. Hastings refused to recognize the organization on the ground that it violated Hastings' nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. *Id.* at ___, 130 S. Ct. at 2980. The Christian Legal Society argued that "it [did] not exclude individuals because of sexual orientation, but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong." *Id.* at ___, 130 S. Ct. at 2990 (internal quotation marks omitted). The United States Supreme Court rejected this argument, stating:

> Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.*, at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Id. We agree that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret the NMHRA as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation.

{18} In this case, we see no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone's conduct of publicly committing to a person of the same sex. Our role is to determine and follow the intent of the Legislature, *State v. Hall*, 2013-NMSC-001, ¶ 9, 294 P.3d 1235, and the NMHRA evinces a clear intent to prevent discrimination as it is broadly defined in Section 28-1-7(F). New Mexico has a strong state policy of promoting equality for its residents regardless of sexual orientation. *See* Section 28-1-7 (defining unlawful discriminatory practices); NMSA 1978, § 29-21-2 (2009) (prohibiting profiling by law enforcement on the basis of sexual orientation); NMSA 1978, § 31-18B-2(D) (2007) (including sexual orientation as a protected status under the Hate Crimes Act); *Chatterjee v. King*, 2012-NMSC-019, ¶ 36, 280 P.3d 283 (recognizing that a child can have two legal parents of the same sex); *In re Jacinta M.*, 1988-NMCA-100, ¶ 11, 107 N.M. 769, 764 P.2d 1327 (holding that a children's court could not find a custodian unsuitable solely because of his or her sexual

orientation). As a matter of New Mexico law, the NMHRA prohibits a public accommodation from refusing to serve a client based on sexual orientation, and Elane Photography violated the law by refusing to photograph Willock's same-sex commitment ceremony.

{19} We are not persuaded by Elane Photography's argument that it does not violate the NMHRA because it will photograph a gay person (for example, in single-person portraits) so long as the photographs do not reflect the client's sexual preferences. The NMHRA prohibits public accommodations from making any distinction in the services they offer to customers on the basis of protected classifications. Section 28-1-7(F). For example, if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers. The NMHRA does not permit businesses to offer a "limited menu" of goods or services to customers on the basis of a status that fits within one of the protected categories. Therefore, Elane Photography's willingness to offer some services to Willock does not cure its refusal to provide other services that it offered to the general public. Similarly, it does not help Elane Photography to argue that it would have turned away heterosexual polygamous weddings or heterosexual persons pretending to have a same-sex wedding. Those situations are not at issue here, and, if anything, these arguments support a finding that Elane Photography intended to discriminate against Willock based on her same-sex sexual orientation. Therefore, we hold that Elane Photography discriminated against Willock on the basis of sexual orientation in violation of the NMHRA.

II. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY'S FIRST AMENDMENT RIGHTS

{20} Elane Photography challenges enforcement of the NMHRA on the grounds that enforcement of the law violates its right to free speech and the free exercise of its religion under the First Amendment to the United States Constitution. For the reasons that follow, we reject both of these arguments.

A. The Nmhra Does Not Violate Elane Photography's Free Speech Rights

{21} Specifically regarding its free speech rights, Elane Photography argues that the NMHRA compels it to speak in violation of the First Amendment by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners' personal beliefs. We disagree.

{22} The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This prohibition applies equally to state governments. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming without deciding that free speech and press rights are incorporated by the Due Process Clause of the Fourteenth Amendment); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms [of speech, assembly, and petition] are protected by the Fourteenth Amendment from invasion by the States."). United States Supreme Court precedent makes it clear that the right to speak freely includes the right to refrain from speaking. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

{23} Elane Photography observes that photography is an expressive art form and that photographs can fall within the constitutional protections of free speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (observing that abstract art and instrumental music are "unquestionably shielded" by the First Amendment). Elane Photography also states that in the course of its business, it creates and edits photographs for its clients so as to tell a positive story about each

wedding it photographs, and the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage. Elane Photography concludes that by requiring it to photograph same-sex weddings on the same basis that it photographs opposite-sex weddings, the NMHRA unconstitutionally compels it to "create and engage in expression" that sends a positive message about same-sex marriage not shared by its owner.

{24} The compelled-speech doctrine on which Elane Photography relies is comprised of two lines of cases. The first line of cases establishes the proposition that the government may not require an individual to "speak the government's message." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). The second line of cases prohibits the government from requiring a private actor "to host or accommodate another speaker's message." *Id.* Elane Photography argues that by requiring it to photograph same-sex weddings on the same basis as opposite-sex weddings, the NMHRA violates both prohibitions. We address each argument in turn.

1. The NMHRA does not compel Elane Photography to speak the government's message

{25} The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), in which the United States Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require "affirmation of a belief and an attitude of mind," *id.* at 633, and that the state had impermissibly "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," *id.* at 642.

{26} Similarly, in *Wooley*, 430 U.S. at 717, the United States Supreme Court held that the State of New Hampshire could not constitutionally punish a man for covering the state motto on the license plate of his car. The *Wooley* plaintiffs considered "Live Free or Die," the state motto, "repugnant to their moral, religious, and political beliefs," *id.* at 707, and they raised a First Amendment challenge to the state's law forbidding residents to hide or alter the motto. *Id.* at 709, 713. The *Wooley* Court framed the question presented as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his [or her] private property in a manner and for the express purpose that it be observed and read by the public" and concluded that the measure was unconstitutional. *Id.* at 713.

{27} Elane Photography reads *Wooley* and *Barnette* to mean that the government may not compel people "to engage in unwanted expression." However, the cases themselves are narrower than Elane Photography suggests; they involve situations in which the speakers were compelled to publicly "speak the government's message." *Rumsfeld*, 547 U.S. at 63. In *Wooley* and *Barnette*, the respective states impermissibly required their residents to affirm or display a specific government-selected message: "Live Free or Die" in *Wooley*, 430 U.S. at 707, and allegiance to the flag in *Barnette*, 319 U.S. at 632-33. Both cases stand for the proposition that the First Amendment does not permit the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. However, unlike the laws at issue in *Wooley* and *Barnette*, the NMHRA does not require Elane Photography to recite or display any message. It does not even require Elane Photography to take photographs. The NMHRA only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.

{28} Furthermore, the laws at issue in *Wooley* and *Barnette* had little purpose other than to promote the government-sanctioned message. *See*

Wooley, 430 U.S. at 716-17 (rejecting the state's contentions that (1) the state motto made it easier for law enforcement to identify improper license plates, and (2) the state hoped "to communicate to others an official view as to proper appreciation of history, state pride, and individualism"); *Barnette*, 319 U.S. at 640 (identifying "national unity" as the goal of compulsory flag salutes (internal quotation marks and citation omitted)). The *Barnette* Court noted that the dissenting students' choice not to salute the flag "[did] not bring them into collision with rights asserted by any other individual." 319 U.S. at 630. That is not the case here, where Elane Photography's asserted right not to serve same-sex couples directly conflicts with Willock's right under Section 28-1-7(F) of the NMHRA to obtain goods and services from a public accommodation without discrimination on the basis of her sexual orientation. Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm. *See Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (stating that the purpose of Title II of the Civil Rights Act of 1964 was "to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" (internal quotation marks and citation omitted)); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (discussing the economic impact of discrimination in public accommodations).

{29} The fact that compliance with the NMHRA will require Elane Photography to produce photographs for same-sex weddings to the extent that it would provide those services to a heterosexual couple does not mean that the NMHRA compels speech in the manner of the laws challenged in *Wooley* and *Barnette*. Elane Photography's argument here is more analogous to the claims raised by the law schools in *Rumsfeld*. In that case, a federal law made universities' federal funding contingent on the universities allowing military recruiters access to university facilities and services on the same basis as other, non-military recruiters. 547 U.S. at 52-53. A group of law schools that objected to the ban on gays in the military challenged the law on a number of constitutional grounds, including that the law in question compelled them to speak the government's message. *Id.* at 52, 53, 61-62. In order to assist the military recruiters, schools had to provide services that involved speech, "such as sending e-mails and distributing flyers." *Id.* at 60.

{30} The United States Supreme Court held that this requirement did not constitute compelled speech. *Id.* at 62. The Court observed that the federal law "neither limits what law schools may say nor requires them to say anything." *Id.* at 60. Schools were compelled only to provide the type of speech-related services to military recruiters that they provided to non-military recruiters. *Id.* at 62. "There [was] nothing . . . approaching a Government-mandated pledge or motto that the school [had to] endorse." *Id.*

{31} The same situation is true in the instant case. Like the law in *Rumsfeld*, the NMHRA does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications. Section 28-1-7(F). The fact that these services may involve speech or other expressive services does not render the NMHRA unconstitutional. *See Rumsfeld*, 547 U.S. at 62 ("The compelled speech to which the law schools point is plainly incidental to the [law's] regulation of conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (internal quotation marks and citation omitted)). Elane Photography is compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple. *See id.* at 62 (speech assisting military recruiters was "only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters").

2. The NMHRA does not compel Elane Photography to host or accommodate the message of another speaker

a. *State laws prohibiting discrimination by public accommodations do not constitute compelled speech*

{32} The second line of compelled-speech cases deals with situations in which a government entity has required a speaker to "host or accommodate another speaker's message." *Id.* at 63. Elane Photography argues that a same-sex wedding or commitment ceremony is an expressive event, and that by requiring it to accept a client who is having a same-sex wedding, the NMHRA compels it to facilitate the messages inherent in that event. Elane Photography argues that there are two messages conveyed by a same-sex wedding or commitment ceremony: first, that such ceremonies exist, and second, that these occasions deserve celebration and approval. Elane Photography does not wish to convey either of these messages.

{33} The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. *See Hurley*, 515 U.S. at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. . . . [T]he focal point of [such statutes is] rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."). The United States Supreme Court has found constitutional problems with some applications of state public accommodation laws, but those problems have arisen when states have applied their public accommodation laws to free-speech events such as privately organized parades, *id.* at 566, 573, 580-81, and private membership organizations, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659, 659 n.4 (2000).[2] Elane Photography, however, is an ordinary public accommodation, a "clearly commercial entit[y]," *id.* at 657, that sells goods and services to the public.

{34} The NMHRA does not, nor could it, regulate the content of the photographs that Elane Photography produces. It does not, for example, mandate that Elane Photography take posed photographs rather than candid shots, nor does it require every wedding album to contain a picture of the bride's bouquet. Indeed, the NMHRA does not mandate that Elane Photography choose to take wedding pictures; that is the exclusive choice of Elane Photography. Like all public accommodation laws, the NMHRA regulates "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *See Hurley*, 515 U.S. at 572 (describing the Massachusetts public accommodation law). Elane Photography argues that because the service it provides is photography, and because photography is expressive, "some of [the] images will inevitably express the messages inherent in [the] event." In essence, then, Elane Photography argues that by limiting its ability to choose its clients, the NMHRA forces it to produce photographs expressing its clients' messages even when the messages are contrary to Elane Photography's beliefs.

{35} Elane Photography has misunderstood this issue. It believes that because it is a photography business, it cannot be subject to public accommodation laws. The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work. If Elane Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography's choice of whom to photograph or not. The difference in the present case is that the

[2] *Dale* also was decided on freedom of association grounds. *Id.* at 644. Elane Photography has not argued that its right of expressive association was violated.

photographs that are allegedly compelled by the NMHRA are photographs that Elane Photography produces for hire in the ordinary course of its business as a public accommodation. This determination has no relation to the artistic merit of photographs produced by Elane Photography. If Annie Leibovitz or Peter Lindbergh worked as public accommodations in New Mexico, they would be subject to the provisions of the NMHRA. Unlike the defendants in *Hurley* or the other cases in which the United States Supreme Court has found compelled-speech violations, Elane Photography sells its expressive services to the public. It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so. The NMHRA requires that Elane Photography perform the same services for a same-sex couple as it would for an opposite-sex couple; the fact that these services require photography stems from the nature of Elane Photography's chosen line of business.

{36} The cases in which the United States Supreme Court found that the government unconstitutionally required a speaker to host or accommodate another speaker's message are distinctly different because they involve direct government interference with the speaker's own message, as opposed to a message-for-hire. In two cases, the Court found a compelled-speech problem where the government explicitly required a publisher to distribute an opposing point of view. In the first of these cases, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974), the United States Supreme Court invalidated Florida's "'right of reply'" statute. The law provided that if a candidate for public office was criticized in a Florida newspaper, the candidate could demand that the newspaper print his or her reply, free of cost, in as conspicuous a location as the criticism that had appeared. *Id.* The Court expressed concern that the statute might deter editors from printing criticism of candidates, thereby chilling political news coverage and commentary in the state. *Id.* at 257. Furthermore, the statute unconstitutionally wrested control over editorial decisions about "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials" away from the editors and into the hands of the state. *Id.* at 258.

{37} Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4, 20-21, 26 (1986) (plurality opinion; Marshall, J., concurring in judgment), a plurality of the United States Supreme Court held unconstitutional a decision by the California Public Utilities Commission to allow a third-party group to send out messages with a utility's billing statements. The utility had traditionally distributed a newsletter to its customers with its monthly billing statements. *Id.* at 5 (plurality opinion). The Public Utility Commission decided that the space in the billing envelopes belonged to the customers, not to the utility, and it allowed an intervenor in a ratemaking proceeding involving the utility to send out messages in the utility's billing envelopes four times per year. *Id.* at 5-6, 13 (plurality opinion). Citing *Tornillo*, the United States Supreme Court held that this decision unconstitutionally compelled the utility to accommodate the intervenor's speech. *Pacific Gas*, 475 U.S. at 9-13 (plurality opinion). The Court noted that the Commission's ruling required the utility to disseminate messages that were hostile to the utility's own interests, *id.* at 14 (plurality opinion), and, depending on what the intervenors said, the utility might "be forced either to appear to agree with [the intervenors'] views or to respond," when it would have preferred to remain silent on an issue. *Id.* at 15 (plurality opinion).

{38} In both *Pacific Gas* and *Tornillo*, the government commandeered a speaker's means of reaching its audience and required the speaker to disseminate an opposing point of view. Nothing analogous occurred in the present case. Elane Photography is not required to print the names and addresses of rival photographers in its albums, nor does Elane Photography distribute a newsletter in which the government has required it to print someone else's ideas. Instead, the allegedly compelled message is Elane Photography's own work on behalf of its clients, which it distributes only to its clients and their loved

ones. The government has not interfered with Elane Photography's editorial judgment; the only choice regulated is Elane Photography's choice of clients.

{39} In addition, although Elane Photography raises concerns that its speech will be chilled, there is no risk of a chilling effect in this case. In *Tornillo*, the "'right of reply'" statute could have discouraged newspapers from printing criticism of political candidates. 418 U.S. at 257. By contrast, the relevant choice facing Elane Photography and similar businesses is not whether to publish a story, as in *Tornillo*, but whether to operate as a public accommodation. If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it will be subject to the antidiscrimination provisions of the NMHRA. If a commercial photography business believes that the NMHRA stifles its creativity, it can remain in business, but it can cease to offer its services to the public at large. Elane Photography's choice to offer its services to the public is a business decision, not a decision about its freedom of speech.

{40} In *Pacific Gas* and *Tornillo*, a government entity overtly required a speaker to publicize an opposing message. Elane Photography cites a third case, *Hurley*, in which the compelled-speech violation was more subtle. In *Hurley*, 515 U.S. at 560-61, the private organizers of the Boston St. Patrick's Day parade denied the application of a group of gay, lesbian, and bisexual Irish-Americans (known as GLIB) to march as a unit in the parade. *Id.* at 561. Massachusetts courts held that this constituted discrimination on the basis of sexual orientation. *Id.* at 561, 563-64. The United States Supreme Court reversed, holding that the parade did not discriminate against gay participants; instead, the issue was "the admission of GLIB as its own parade unit carrying its own banner," which had unquestionable expressive content. *Id.* at 572, 581.

{41} *Hurley* is different from the instant case in two significant ways. First, the Massachusetts courts appear to have erroneously classified the privately organized parade as a public accommodation. *See id.* at 573 ("[T]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."). Second, parades by their nature express a message to the public. *Id.* at 568. By requiring the parade organizers to include GLIB, the Massachusetts courts directly altered the expressive content of the parade. *Id.* at 572-73. The presence of a group in a parade carries expressive weight, and *Hurley* implicated associational rights as well as free-speech rights. *Id.* at 565; *see Dale*, 530 U.S. at 659 ("Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here."). Elane Photography argues that photographs are also inherently expressive, so *Hurley* must apply to this case as well. However, the NMHRA applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not. By way of analogy, the NMHRA could not dictate which groups a parade organizer had to include. However, if a business sold parade-planning services, and that business operated as a public accommodation, the NMHRA would prohibit that business from refusing to offer parade-planning services to persons because of their sexual orientation. Thus, Elane Photography's reliance on *Hurley* is misplaced.

{42} Elane Photography's situation is actually clearer than that of our hypothetical business that organized parades, because even a parade for hire would still be a public event. *See id.* at 568 (describing the public nature of parades and their dependence on parade-watchers). By contrast, Elane Photography does not routinely publish for or display its wedding photographs to the public. Instead, it creates an album for each customer and posts the photographs on a password-protected website for the customers and their friends and family to view. Whatever message Elane Photography's photographs may express, they express that message only to the clients and their loved ones, not to the public.

{43} We note that when Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio. However, if Elane Photography offers its services to the public, the NMHRA requires Elane Photography to provide those same services to clients who are members of a protected class under the NMHRA.

b. *Observers are unlikely to believe that Elane Photography's photographs reflect the views of either its owners or its employees*

{44} Elane Photography also argues that if it is compelled to photograph same-sex weddings, observers will believe that it and its owners approve of same-sex marriage. The United States Supreme Court incorporates the question of perceived endorsement into its analysis in cases that involve compulsion to host or accommodate third-party speech. *See, e.g.*, *Hurley*, 515 U.S. at 577 ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade . . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."). The *Hurley* Court observed that admitting GLIB or any other organization into a parade would likely be perceived as a message from the parade organizers "that [GLIB's] message was worthy of presentation and quite possibly of support as well." *Id.* at 575. Therefore, the Court further observed that the government's forced inclusion of GLIB compromised the parade organizer's "right to autonomy over [its] message." *Id.* at 576.

{45} In contrast to *Pacific Gas* and *Tornillo*, the United States Supreme Court has not found compelled speech violations where the government has not explicitly required a publisher to disseminate opposing points of view *and* where observers are unlikely to mistake a person's compliance with the law for endorsement of third-party messages, as in *Hurley*. In *Rumsfeld*, the United States Supreme Court rejected not only the law schools' argument that they were forced to speak the government's message, but also their argument that they were required to host the recruiters' speech in such a way that violated compelled speech principles. 547 U.S. at 64-65 ("[The law schools'] accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."). The law schools in *Rumsfeld* worried that "treat[ing] military and nonmilitary recruiters alike . . . could be viewed as sending the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do." *Id.* The *Rumsfeld* Court held that students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," and that the law schools were free to express their disagreement with the military's policy. *Id.* at 65.

{46} *Rumsfeld* drew on earlier cases that had considered whether observers would conflate the speech of third parties with the opinions of the parties to the suit. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 76-78 (1980), a California shopping center was sued under a California constitutional provision that required privately owned shopping centers to allow individuals to engage in expressive activities on their premises. The shopping center argued that the state could not constitutionally compel it "to participate in the dissemination of an ideological message." *Id.* at 86-87. The United States Supreme Court rejected the argument, *id.* at 88, holding that because the shopping center was a business establishment that was open to the public, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner." *Id.* at 87. The Court also noted that the government had not dictated any particular message or engaged in viewpoint discrimination and that the shopping center could disavow the third-party

messages by posting its own signs. *Id.* "Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.*

{47} Elane Photography makes an argument very similar to one rejected by the *Rumsfeld* Court: by treating customers alike, regardless of whether they are having same-sex or opposite-sex weddings, Elane Photography is concerned that it will send the message that it sees nothing wrong with same-sex marriage. Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom). As in *Rumsfeld* and *PruneYard*, Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey. We note that after *Rumsfeld*, many law schools published open letters expressing their continued opposition to military policies and military recruitment on campus. *See, e.g.*, Dean's Letter Regarding Military Recruiting on Campus & Faculty Letter Regarding Military Recruitment, Columbia Law School, http://web.law.columbia.edu/careers/military-recruiting-on-campus (last visited Aug. 9, 2013); Military Recruitment Policy, University of Dayton School of Law, http://www.udayton.edu/law/career_services/military_recruitment_policy.php (last visited Aug. 9, 2013); Employer Recruiting Policies and Guidelines, Harvard Law School, http://www.law.harvard.edu/current/careers/ocs/employers/recruiting-policies-employers/index.html#Non-Discrimination (last visited Aug. 9, 2013). Elane Photography and its owners likewise retain their First Amendment rights to express their religious and political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.

c. *Elane Photography's allocation of its work time does not raise First Amendment concerns*

{48} Elane Photography next argues that when its employees spend time taking and editing photographs of same-sex weddings, they have less time to spend doing their preferred work of photographing opposite-sex weddings. Therefore, by Elane Photography's reasoning, the state has interfered with Elane Photography's message, just as it did in *Pacific Gas* and *Tornillo*. In *Tornillo*, the newspaper had limited space to print its stories, and printing replies by politicians took up space in which the newspaper could have published other material. 418 U.S. at 256-57. Similarly, the utility in *Pacific Gas* was required to share the space inside its billing envelopes; when a third party used the space, the utility could not distribute its own newsletter without paying additional postage. 475 U.S. at 5-6 (plurality opinion). The instant case is different because Elane Photography does not produce a publication whose limited space has been taken over by the government.

{49} Instead, Elane Photography's complaint is based on its staff's limited time. Elane Photography argues that if it accepts same-sex couples as clients, its employees must "spend a day shooting pictures and three to four weeks selecting, editing, and arranging images" of the clients' weddings, when they would prefer to spend this time working on images of heterosexual weddings. Therefore, it argues, the NMHRA interferes with Elane Photography's own speech.

{50} We disagree because the allocation of work time is a matter of personal preference, not compelled speech, and it is not constitutionally protected. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (rejecting Thirteenth Amendment challenge to law requiring motel to serve African-American guests). By their nature, laws prohibiting discrimination in public accommodations require businesses and their employees to spend time and energy serving customers whom they might prefer not to serve. *See Hurley*, 515 U.S. at 578 (describing

common law public accommodation rules as guaranteeing that individuals "will not be turned away merely on the proprietor's exercise of personal preference"). These laws apply even when the businesses provide skillful or physically intimate services. *See Bragdon v. Abbott*, 524 U.S. 624, 628-29 (1998) (applying public accommodations provisions of the Americans with Disabilities Act to dental practice). This is the purpose of antidiscrimination laws: they force businesses to treat customers alike, regardless of their race, religion, or other protected status. These laws are necessary precisely because some businesses would otherwise refuse to work with certain customers whom the laws protect.

{51} Antidiscrimination laws have been consistently upheld as constitutional. *See, e.g.*, *Hurley*, 515 U.S. at 572 ("[Public accommodations laws] do not, as a general matter, violate the First or Fourteenth Amendments."); *Heart of Atlanta Motel*, 379 U.S. at 242-44, 258, 261 (sustaining Title II of the Civil Rights Act of 1964 against challenges based on the Commerce Clause and the Fifth and Thirteenth Amendments). Elane Photography's desire to work with heterosexual rather than homosexual couples does not give it license to violate the NMHRA.

3. There is no exemption from antidiscrimination laws for creative or expressive professions

{52} There are no cases from either New Mexico jurisprudence or that of the United States Supreme Court that would compel a conclusion that the NMHRA violates Elane Photography's freedom of speech because it is engaged in a creative and expressive profession. We decline to draw the line between "creative" or "expressive" professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity. For example, a flower shop is not intuitively "expressive," but florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic. Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws. These suggestions are not idle hypotheticals: we take judicial notice of a variety of situations in which florists, bakeries, and other wedding vendors have refused to serve same-sex couples. *See, e.g.*, Lee Moran, *Baker refuses to make wedding cake for lesbian couple*, N.Y. Daily News (Feb. 4, 2013), http://www.nydailynews.com/news/national/baker-refuses-wedding-cake-lesbian-couple-article-1.1254776; Annette Cary, *Arlene's Flowers in Richland sued by gay couple*, Tri-City Herald (Apr. 18, 2013), http://www.tri-cityherald.com/2013/04/18/2361691/arlenes-flowers-in-richland-sued.html (quoting a florist as objecting to "using her time and *artistic talent* to support an event . . . that she believes is wrong" (emphasis added)); *see also Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 ECN, Order (Haw. Circ. Court 1st Cir. Apr. 15, 2013) www.lambdalegal.org/sites/default/files/2013-04-15_-_cervelli_order.pdf (finding that a bed and breakfast violated Hawaii's public accommodation law when it refused service to a same-sex couple and granting partial summary judgment for declaratory and injunctive relief).

{53} We are persuaded by cases suggesting that the First Amendment does not exempt creative or expressive businesses from antidiscrimination laws. In *Hishon v. King & Spalding*, 467 U.S. 69, 71-73 (1984), the United States Supreme Court reversed the dismissal of a Title VII employment discrimination complaint against the law firm of King & Spalding. In doing so, the Court rejected the firm's argument that by applying antidiscrimination laws to the firm's selection of its partners, the government "would infringe [First Amendment] constitutional rights of expression or association." *Id.* at 78. The Court held that "[i]nvidious private discrimination may be

characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* (alteration in original) (internal quotation marks and citation omitted). Legal work unquestionably involves creative and expressive skill and effort, but antidiscrimination laws still govern how a law firm runs its business.

{54} Elane Photography attempts to distinguish *King & Spalding* by arguing that the type of compelled-speech claim Elane Photography advances should apply only to public accommodations law because such an exemption "would protect a firm's decision not to advocate an argument that its partners cannot in good conscience advance." However, this decision would already be protected under New Mexico law. The NMHRA does not prohibit a law firm, even one that is a public accommodation, from turning away clients with whose views the firm disagrees or with whom it simply does not wish to work. *See* § 28-1-7(F) (prohibited grounds do not include ideology or personal dislike). What the NMHRA forbids, and what Elane Photography's proposed exception would allow, is for a law firm to turn away a client because the firm finds the client offensive on the basis of a protected classification. Accepting Elane Photography's argument would exempt from antidiscrimination laws any business that provided a creative or expressive service. Such an exemption would not be limited to religious objections or to sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse service on any protected basis, including race, national origin, religion, sex, or disability.

{55} Elane Photography also suggests that enforcing the NMHRA against it would mean that an African-American photographer could not legally refuse to photograph a Ku Klux Klan rally. This hypothetical suffers from the reality that political views and political group membership, including membership in the Klan, are not protected categories under the NMHRA. *See* § 28-1-7(F) (prohibiting public accommodation discrimination based on "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap"). Therefore, an African-American could decline to photograph a Ku Klux Klan rally. However, the point is well-taken when the roles in the hypothetical are reversed—a Ku Klux Klan member who operates a photography business as a public accommodation would be compelled to photograph an African-American under the NMHRA. This result is required by the NMHRA, which seeks to promote equal rights and access to public accommodations by prohibiting discrimination based on certain specified protected classifications.

{56} However, adoption of Elane Photography's argument *would* allow a photographer who was a Klan member to refuse to photograph an African-American customer's wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African-Americans in a positive light or be interpreted as the photographer's endorsement of African-Americans. A holding that the First Amendment mandates an exception to public accommodations laws for commercial photographers would license commercial photographers to freely discriminate against any protected class on the basis that the photographer was only exercising his or her right not to express a viewpoint with which he or she disagrees. Such a holding would undermine all of the protections provided by antidiscrimination laws.

{57} In short, we conclude that the NMHRA's prohibition on sexual-orientation discrimination does not violate Elane Photography's First Amendment right to refrain from speaking. The government has not required Elane Photography to promote the government's message, nor has the government required Elane Photography to facilitate third parties' messages, *except* to the extent that Elane Photography already facilitates third parties' messages, for hire, as part of the services that it offers as a for-profit public accommodation. Even if the services it offers are creative or expressive, Elane Photography must offer its services to customers without regard for the customers' race, sex, sexual orientation, or other protected classification.

B. The Nmhra Does not Violate Elane Photography's First Amendment Free Exercise Rights

{58} Elane Photography argues that enforcement of the NMHRA against it for refusing to photograph Willock's wedding violates its First Amendment right to freely exercise its religion. *See* U.S. Const. amend. I (Congress shall make no law prohibiting the free exercise of religion).

{59} It is an open question whether Elane Photography, which is a limited liability company rather than a natural person, has First Amendment free exercise rights. Several federal courts have recently addressed this question with differing outcomes. *Compare, e.g.*, *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, slip op. at 11, ___ F.3d ___, ___ (3d Cir. July 26, 2013, No. 13-1144) ("[W]e conclude that for-profit, secular corporations cannot engage in religious exercise. . . ."), *with Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013) ("[T]he [plaintiffs'] use of the corporate form is not dispositive of the [free exercise] claim."). However, it is not necessary for this Court to address whether Elane Photography has a constitutionally protected right to exercise its religion. Assuming that Elane Photography has such rights, they are not offended by enforcement of the NMHRA.

{60} Under established law, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks and citation omitted).[3] In order to state a valid First Amendment free exercise claim, a party must show either (a) that the law in question is not a "neutral law of general applicability," *id.* (internal quotation marks and citation omitted) or (b) that the challenge implicates both the Free Exercise Clause and an independent constitutional protection, *id.* at 881, or possibly (c) that the law operates "in a context that len[ds] itself to individualized government assessment of the reasons for the relevant conduct." *Id.* at 884. Elane Photography does not claim that the individualized assessment situation is applicable to the present case. We address its claims under the other two categories below.

1. The NMHRA is a neutral law of general applicability

{61} The United States Supreme Court elaborated on the rule concerning "law that is neutral and of general applicability" in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993). A law is not neutral "if [its] object . . . is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. It is not generally applicable if it "impose[s] burdens only on conduct motivated by religious belief" while permitting exceptions for secular conduct or for favored religions. *Id.* at 543. These inquiries are related, *id.* at 531; the Court observed that improper intent could be inferred if the law was a "'religious gerrymander'" that burdened religion but exempted similar secular activity. *Id.* at 534-35. If a law is neither neutral nor generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32; *see also id.* at 546 ("The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not water[ed] . . . down but really means what it says." (internal quotation marks and citation omitted)).

{62} In *Lukumi Babalu Aye*, the city of Hialeah had passed several ordinances that prohibited

[3] Congress attempted to overrule *Smith* by passing the Religious Freedom Restoration Act of 1993 (USRFRA), 42 U.S.C. §§ 2000bb (2006). However, the application of the USRFRA to state and local laws was held unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 511, 519 (1997). The *Smith* standard continues to be good law for evaluating federal free exercise challenges to state actions. *See Christian Legal Soc'y*, ___ U.S. at ___ n.24, ___ n.27, 130 S. Ct. at 2993 n.24, 2995 n.27 (applying *Smith* standard).

religious sacrifice of animals but exempted secular slaughterhouses, kosher slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests. *Id.* at 526-28, 536, 543-44. The Court held that this was a "religious gerrymander," *id.* at 535, the result of which was "that few if any killings of animals [were] prohibited other than Santeria sacrifice," *id.* at 536. The Court concluded that "[t]he ordinances had as their object the suppression of religion" and were therefore nonneutral. *Id.* at 542. The Court then examined whether the ordinances were generally applicable and whether the government was selectively burdening only religiously motivated conduct. *Id.* at 542-43. The Court did not precisely define the standard for assessing general applicability, but it did observe that the Hialeah ordinances were grossly under-inclusive with respect to the laws' stated goals, *id.* at 543-45, and it concluded that the laws burdened "only . . . conduct motivated by religious belief." *Id.* at 545. The Court applied strict scrutiny to the ordinances and found them unconstitutional. *Id.* at 546-47.

{63} Elane Photography argues that the NMHRA is not generally applicable and that this Court therefore should apply strict scrutiny to the application of the NMHRA to Elane Photography. Elane Photography identifies several exemptions from the antidiscrimination provisions of the NMHRA and argues that these exemptions make it not generally applicable. Specifically, Elane Photography points to Section 28-1-9(A)(1), which exempts sales or rentals of single-family homes if the owner does not own more than three houses,[4] and Section 28-1-9(D), which exempts owners who live in small multi-family dwellings and rent out the other units. Elane Photography argues that these exemptions, like those in *Lukumi Babalu Aye*, "impermissibly prefer the secular to the religious."

{64} This is a misreading of Section 28-1-9. Unlike the exemptions in *Lukumi Babalu Aye*, the exemptions in Section 28-1-9(A) and (D) apply equally to religious and secular conduct. Neither subsection discusses motivation; homeowners who meet the criteria of Section 28-1-9(A) and (D) are permitted to discriminate regardless of whether they do so on religious or nonreligious grounds. Therefore, the NMHRA does not target only religiously motivated discrimination, and these exemptions do not prevent the NMHRA from being generally applicable. These exemptions also do not indicate any animus toward religion by the Legislature that might render the law nonneutral; similar exemptions commonly appear in housing discrimination laws, including the federal Fair Housing Act. *See* 42 U.S.C. § 3603(b)(1) & (2) (2012) (exempting from compliance "any single-family house sold or rented by an owner," provided such "owner does not own more than three such . . . houses" and subject to additional limitations, and also exempting "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his [or her] residence").

{65} Elane Photography also argues that the exemptions to the NMHRA for religious organizations undercut the purpose of the statute. In particular, Elane Photography highlights Section 28-1-9(B) and (C), which in its reading permits religious organizations to "decline same-sex couples as customers."

{66} Once again, Elane Photography's interpretation rests on a distorted reading of the statute. Section 28-1-9(B) allows religious organizations to "limit[] admission to or giv[e] preference to persons of the same religion or denomination or [to make] selections of buyers, lessees or tenants" that promote the organization's religious principles. In the context of "buyers, lessees or tenants," "buyers" clearly refers to purchasers of real estate rather than retail customers. *Id.* Subsection (C) exempts religious organizations from provisions of the NMHRA

[4] The owner also may not engage in discriminatory advertising. Section 28-1-9(A). In addition, if the seller was not the most recent occupant of the house, he or she is exempt from the NMHRA for only one sale per twenty-four month period. Section 28-1-9(A)(2).

governing sexual orientation and gender identity, but only regarding "employment or renting." If a religious organization sold goods or services to the general public, neither subsection would allow the organization to turn away same-sex couples while catering to opposite-sex couples of all faiths. Subsection (B) permits religious organizations to serve only or primarily people of their own faith, as well as to discriminate in certain limited real estate transactions; Subsection (C) applies only to employment and, again, to real estate.

{67} In other words, neither of the religious exemptions in Section 28-1-9 would permit a religious organization to take the actions that Elane Photography did in this case. Furthermore, these exemptions do not prevent the NMHRA from being generally applicable. Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion. *See, e.g.*, *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) (observing that the United States Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices" and listing examples). Such exemptions are generally permissible, *see Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (upholding religious exemption to Title VII of the Civil Rights Act of 1964 against an Establishment Clause challenge), and in some situations they may be constitutionally mandated, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, ___ U.S. ___, ___, 132 S. Ct. 694, 705-06 (2012) (holding that the First Amendment precludes the application of employment discrimination laws to disputes between religious organizations and their ministers).

{68} The exemptions in the NMHRA are ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion. We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.

2. Elane Photography has not adequately briefed its hybrid rights claim

{69} In *Smith*, the United States Supreme Court left open the possibility that a neutral law of general applicability could nevertheless be unconstitutional if the law infringed both free exercise rights and an independent constitutional protection. 494 U.S. at 881. The Court recognized that in pre-*Smith* cases, it had sometimes applied more rigorous scrutiny to neutral, generally applicable laws. *Id.* The Court distinguished those cases by characterizing them not as simple free exercise cases, but as "hybrid situation[s]," *id.* at 882, in which the free exercise claims were raised "in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881. Elane Photography mentions that because it raised both a free exercise claim and a compelled-speech claim, it has made a hybrid-rights claim under which the NMHRA should receive strict scrutiny.

{70} This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("[T]o present an issue on appeal for review, an appellant must submit argument and authority as required by rule." (emphasis omitted)). "We will not review unclear arguments, or guess at what [a party's] arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. *See State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 ("We remind counsel that we are not required to do their research. . . ."). This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to

the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments.

{71} Elane Photography devotes a single three-sentence paragraph to its hybrid-rights claim, stating that a hybrid claim exists because it has raised a compelled-speech claim and a free exercise claim under the NMRFRA. However, as discussed in this opinion, neither of these claims is independently viable, and Elane Photography offers no analysis to explain why the two claims together should be greater than the sum of their parts. Elane Photography cites two cases, *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), and *Health Services Division, Health & Environment Dep't v. Temple Baptist Church*, 1991-NMCA-055, 112 N.M. 262, 814 P.2d 130, but provides no explanation of how or why we should apply these precedents to the facts of this case. As a matter of New Mexico law, Elane Photography's briefing of its hybrid-rights claim is inadequate to permit us to review the issue. For this reason, we do not consider its hybrid-rights argument.

III. ENFORCEMENT OF THE NMHRA DOES NOT VIOLATE THE NMRFRA BECAUSE THE NMRFRA IS NOT APPLICABLE IN A SUIT BETWEEN PRIVATE PARTIES

{72} Finally, Elane Photography argues that the Commission's enforcement of the NMHRA against it violates the New Mexico Religious Freedom Restoration Act. The NMRFRA provides:

> A government agency shall not restrict a person's free exercise of religion unless:
>
> A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and
>
> B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Section 28-22-3. "Free exercise of religion" is defined as "an act or a refusal to act that is substantially motivated by religious belief." Section 28-22-2(A).

{73} Willock argues, and the Court of Appeals held, that the NMRFRA did not protect Elane Photography's refusal to photograph Willock's wedding, even though the refusal was religiously motivated, because the NMRFRA "was not meant to apply in suits between private litigants." *Elane Photography*, 2012-NMCA-086, ¶ 46. There is no other case law on this point in New Mexico; the Court of Appeals relied on federal cases interpreting the federal Religious Freedom Restoration Act. *Id.* ¶¶ 46-47.

{74} The NMRFRA states that "[a] person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government agency*." Section 28-22-4(A) (emphasis added). Elane Photography argues that the phrase "against a government agency" modifies "appropriate relief," rather than "a judicial proceeding." In other words, Elane Photography argues that although the relief available is limited, the NMRFRA can be invoked even when the government is not a party.

{75} However, the statute is violated only if a "government agency" restricts a person's free exercise of religion. Section 28-22-3. A "government agency" includes "the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities." Section 28-22-2(B). The list of government agencies does *not* include the Legislature or the courts. It could be expected that the Legislature would have included itself and the courts in Section 28-22-2(B) if it meant the NMRFRA to apply in common-law disputes or private enforcement actions. Instead, the examples of government agencies are exclusively administrative or executive entities.

{76} Moreover, the structure of the NMRFRA as a whole suggests that the Legislature contemplated that the statute would apply only to legal actions in which the government was a party. The only relief authorized by the statute is "injunctive or declaratory relief against a government agency," § 28-22-4(A)(1), or "damages pursuant to the Tort Claims Act" with attorneys' fees and costs, § 28-22-4(A)(2). Nowhere does the NMRFRA authorize damages or injunctive relief against a non-governmental party.

{77} Elane Photography argues that because Willock's suit was adjudicated by the New Mexico Human Rights Commission, which is presumably a "government agency" for purposes of Section 28-22-2(B), the Commission's decision against it qualifies as a restriction of its free exercise of religion. However, Elane Photography appealed the Commission's determination to a New Mexico district court for a trial de novo pursuant to Section 28-1-13(A). The instant appeal concerns the district court's grant of summary judgment for Willock; the Commission is not a party to this case, and its order no longer has any legal effect. *See* § 39-3-1 (stating that appeals to the district court for trials de novo "shall be tried anew . . . as if no trial had been had below"). Willock argues, and we agree, that the Commission acted merely as an administrative tribunal to decide the dispute between Elane Photography and herself. The government's adjudication of disputes between private parties does not constitute government restriction of a party's free exercise rights for purposes of the NMRFRA.

{78} For the reasons stated above, we hold that as a matter of New Mexico law, the New Mexico Religious Freedom Restoration Act is inapplicable to disputes in which a government agency is not a party.

CONCLUSION

{79} Elane Photography's refusal to serve Vanessa Willock violated the New Mexico Human Rights Act, which prohibits a public accommodation from refusing to offer its services to a person based on that person's sexual orientation. Enforcing the NMHRA against Elane Photography does not violate the Free Speech or the Free Exercise clause of the First Amendment or the NMRFRA. For these reasons, we affirm the grant of summary judgment in Willock's favor.

{80} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

CHARLES W. DANIELS,
Justice

BARBARA J. VIGIL,
Justice

RICHARD C. BOSSON,
Justice, specially concurring

BOSSON,
Justice, specially concurring.

{81} In 1943 during the darkest days of World War II, the State of West Virginia required students to salute the American flag and decreed that refusal to salute would "be regarded an Act of insubordination" which could lead to expulsion for the student and criminal action against the parent. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626-29 (1943). Some students refused to salute, believing as Jehovah's Witnesses "that the obligation imposed by law of God is superior to that of laws enacted by temporal government." *Id.* at 629. They looked for authority in the Bible, Book of Exodus, Chapter 20, verses 4 and 5: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them." *Id.* (internal quotation marks omitted). Jehovah's Witnesses considered "the

flag is an 'image' within this command," which they were bound by God not to salute. *Id.*

{82} In a ringing endorsement of the First Amendment, the United States Supreme Court struck down the West Virginia statute, noting the irony of the state's position: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. And again, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. In his concurrence, Justice Black had this to add:

> The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

Id. at 643 (Black, J., concurring). Considering the times, the *Barnette* opinion stands today as an act of the utmost courage; it represents one of the Court's finest moments.

{83} Jonathan and Elaine Huguenin see themselves in much the same position as the students in *Barnette*. As devout, practicing Christians, they believe, as a matter of faith, that certain commands of the Bible are not left open to secular interpretation; they are meant to be obeyed. Among those commands, according to the Huguenins, is an injunction against same-sex marriage. On the record before us, no one has questioned the Huguenin's devoutness or their sincerity; their religious convictions deserve our respect. In the words of their legal counsel, the Huguenins "believed that creating photographs telling the story of that event [a same-sex wedding] would express a message contrary to their sincerely held beliefs, and that doing so would disobey God." If honoring same-sex marriage would so conflict with their fundamental religious tenets, no less than the Jehovah's Witnesses in *Barnette*, how then, they ask, can the State of New Mexico compel them to "disobey God" in this case? How indeed?

{84} Twenty-four years later, during the zenith of the Civil Rights era, the Supreme Court provided a partial answer. In *Loving v. Virginia*, the State of Virginia, like sixteen similarly situated states with miscegenation laws, prohibited marriage between the white and black races, making it a crime punishable by imprisonment. 388 U.S. 1, 4, 6 (1967). Such laws arose as an incident of slavery and were common in Virginia and elsewhere since early times. *Id.* at 6. The Lovings, an interracial couple, had been lawfully married elsewhere and wanted to live openly as husband and wife in Virginia. *Id.* at 2-3. For their honesty, they were prosecuted and convicted; their prison sentences were suspended on condition that they leave Virginia and not return for 25 years. *Id.* at 3. The Virginia trial judge, in justifying the convictions, drew strength from his view of the Bible:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Id. at 3. Whatever opinion one might have of the trial judge's religious views, which mirrored those of millions of Americans of the time, no one questioned his sincerity either or his religious conviction. In affirming the Lovings' convictions, Virginia's highest court observed the religious, cultural, historical, and moral roots that justified miscegenation laws. *See id.*

{85} The Supreme Court struck down Virginia's miscegenation statute. *Id.* at 11-12. Observing that

"[t]he freedom to marry has long been recognized as one of the vital personal rights essential in the orderly pursuit of happiness by free men," the Court held categorically that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. State laws, even those religiously inspired, may not discriminate invidiously on the basis of race.

{86} There is a lesson here. In a constitutional form of government, personal, religious, and moral beliefs, when *acted upon* to the detriment of someone else's rights, have constitutional limits. One is free to believe, think, and speak as one's conscience, or God, dictates. But when actions, even religiously inspired, conflict with other constitutionally protected rights—in *Loving* the right to be free from invidious racial discrimination—then there must be some accommodation. Recall that *Barnette* was all about the students; their exercise of First Amendment rights did not infringe upon anyone else. The Huguenins cannot make that claim. Their refusal to do business with the same-sex couple in this case, no matter how religiously inspired, was an affront to the legal rights of that couple, the right granted them under New Mexico law to engage in the commercial marketplace free from discrimination.

{87} But of course, the Huguenins are not trying to prohibit anyone from marrying. They only want to be left alone to conduct their photography business in a manner consistent with their moral convictions. In their view, they seek only the freedom *not* to endorse someone else's lifestyle. *Loving*, therefore, does not completely answer the question the Huguenins pose. To complete the circle, we turn to our third case.

{88} *Heart of Atlanta Motel, Inc. v. United States*, upheld the federal Civil Rights Act of 1964, a milestone enactment which, among other achievements, declared invidious discrimination unlawful, not just by the state but by private citizens, when providing goods and services in the sphere of public accommodations. 379 U.S. 241, 246, 261-62 (1964). The Act declared: "'All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.'" *Id.* at 247. A watershed achievement, the Act vindicated nearly a century of frustrated effort to fulfill the promise of the Fourteenth Amendment, to end not only slavery but all of its traces as well. *See id.* at 244-46. And ending second-class citizenship, being denied a seat in a restaurant or a room in an inn—purely on the basis of one's race or religion—was a goal that drove the passage of the Act. *See id.* at 252-53.

{89} By the time of the success of the Civil Rights Act of 1964, many states had already passed their own public accommodation laws. *See id.* at 358-59 (noting that thirty-two states already had public accommodation laws); *see also* Lisa Gabrielle & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 240 (1978) (recognizing that "the existence of numerous state laws facilitated Congress' acceptance of Title II" of the Civil Rights Act). Today, many states have Human Rights Acts similar to New Mexico's. *See, e.g.*, 775 Ill. Comp. Stat. Ann. 5/1-102(A) (2010); Iowa Code Ann. § 216.7 (2007); Md. Code Ann., State Government § 20-304 (2009); Nev. Rev. Stat. Ann. § 651.070 (2011). Public accommodations have been expanded to preclude invidious discrimination in most every public business, including the Huguenin's photography business. Prohibited classifications have been enlarged from the historical classes—race, religion, gender, national origin—to include sexual orientation. *See, e.g.,* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 Cal. L. Rev. 1169, 1190 (2012) ("Twenty-one states and the District of Columbia cover sexual orientation in their antidiscrimination laws governing employment, housing, and public accommodations."). The New Mexico Legislature has

made it clear that to discriminate in business on the basis of sexual orientation is just as intolerable as discrimination directed toward race, color, national origin, or religion. *See* NMSA 1978, § 28-1-7(F) (2004). The Huguenins today can no more turn away customers on the basis of sexual orientation—photographing a same-sex marriage ceremony—than they could refuse to photograph African-Americans or Muslims.

{90} All of which, I assume, is little comfort to the Huguenins, who now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views.

{91} On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.

{92} In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship. I therefore concur.

RICHARD C. BOSSON,
Justice

Justice Edward L. Chávez

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-045

Filing Date: September 12, 2013

Docket No. 33,874

JOE ROBERT ENCINIAS,

Plaintiff-Petitioner,

v.

WHITENER LAW FIRM, P.A. and RUSSELL WHITENER,

Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Eugenio S. Mathis, District Judge

Will Ferguson & Associates
David M. Houliston
Albuquerque, NM

Roger V. Eaton
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Santa Fe, NM

for Amicus Curiae New Mexico Public Schools Insurance Authority

OPINION

CHÁVEZ, Justice.

{1} This case concerns an action for legal malpractice based on the defendant law firm's failure to file suit within the statute of limitations. The viability of the malpractice suit hinges on whether the underlying cause of action, a claim against a school district for injuries inflicted on one student by another, would have been barred by sovereign immunity or permitted by the Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -30 (1953, as amended through 2013). We conclude that the plaintiff has raised a genuine issue of material fact regarding the viability of the underlying suit under the premises liability provision of the TCA, § 41-4-6(A). For this reason, we reverse the Court of Appeals and vacate the district court's grant of summary judgment. We also conclude that the plaintiff may pursue his misrepresentation claim against the defendant law firm.

BACKGROUND

{2} The plaintiff, Joe Robert Encinias, claims that in late September of 2004, he was badly beaten by a classmate or classmates at Robertson High School in Las Vegas, New Mexico. The alleged attack itself took place outside of the school property, on a street that the school had cordoned off so that students could patronize food vendors there. Encinias claims that he lost consciousness during the attack, but he recalls waking up alone on the street. In early October, Encinias was treated at a hospital for severe

internal injuries that he alleges were sustained during the beating.

{3} In January 2006, Encinias and his parents retained defendants Russell Whitener and the Whitener Law Firm (collectively Whitener) to represent Encinias in a possible suit against Robertson High School and the Las Vegas School District. However, Whitener never filed a complaint in the case.[1] In April 2006, the Encinias family contacted Whitener to check on the status of the case. Whitener asked the family to re-submit its paperwork. Encinias alleges that Whitener lost the documents that Encinias had submitted earlier and had done no work on the case. In the fall of 2006, the Encinias family contacted Whitener over concerns that the statute of limitations would run out. In fact, the statute of limitations ran two years after the incident, in late September or early October 2006.[2] *See* § 41-4-15(A) (stating that TCA suits must be "commenced within two years after the date of occurrence resulting in loss, injury or death"), *held unconstitutional on other grounds as recognized by Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 4, 136 N.M. 498, 100 P.3d 204. A Whitener attorney testified that he and his colleagues had been aware of the statute of limitations, but they had allowed it to run because they were concerned about the strength of the case and thought that they could get around the statute. In August 2007, Whitener realized that the case was barred. In February 2008, the firm decided not to pursue the suit. Whitener waited until the spring of 2008 to tell the family that it had missed the statute of limitations.

{4} In October 2008, Encinias filed suit against Whitener for legal malpractice and misrepresentation, among other claims that have subsequently been abandoned. The district court granted summary judgment for Whitener on all claims. The Court of Appeals affirmed the grant of summary judgment, *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 2, 294 P.3d 1245, and rejected Encinias's malpractice claim, concluding that the TCA did not waive the school district's immunity, *id.* ¶ 24. The Court also held that summary judgment was proper on Encinias's misrepresentation claim because Encinias did not establish that he suffered damages as a result of Whitener's misconduct. *Id.* ¶ 29.

{5} Encinias argues on appeal for reversal of summary judgment on both the legal malpractice and the misrepresentation claims. This Court granted certiorari.

DISCUSSION

{6} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. This is a legal question that is reviewed de novo on appeal. *Id.*; *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548. When we review a motion for summary judgment, we "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). Courts in New Mexico "view summary judgment with disfavor," *id.* ¶ 8, and consider it "a drastic remedy to be used with great caution." *Pharmaseal Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753, 568 P.2d 589.

[1] Encinias alleges that a complaint was filed, and the Court of Appeals echoes that claim, *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 1, 294 P.3d 1245, but the record neither supports that allegation nor contains a copy of any complaint in the case, and New Mexico court records do not reflect that any complaint was filed.

[2] The first amended complaint states that the incident occurred on or about September 30, 2004. If the incident occurred on September 29, as Encinias alleges in his brief, the statute of limitations would have ended on September 29, 2006. *See* § 41-4-15(A) (establishing two-year statute of limitations). However, if the incident occurred on September 30, Section 41-4-15(A) would place the end of the limitations period on September 30, 2006, which was a Saturday. According to Rule 1-006(A) NMRA, if the end of a limitations period falls on a Saturday or Sunday, the limitations period is extended to the next business day. Therefore, if the incident occurred on September 30, the limitations period ran on Monday, October 2, 2006.

A. Malpractice claim

{7} Encinias argues that Robertson High School and the school district were negligent in failing to protect him from being attacked, and further negligent in failing to respond to the attack or notice that it had occurred. Encinias also argues that he would have had a viable cause of action against the school district for negligent maintenance or operation of a public building. *See* § 41-4-6(A). However, due to Whitener's failure to file a complaint within the two-year statute of limitations, any claim Encinias had against the school district is now barred. *See* § 41-4-15(A) (establishing statute of limitations for the TCA). Encinias now attempts to recover from Whitener on a theory of legal malpractice.

{8} The elements of legal malpractice are: "(1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the [client]." *Sharts v. Natelson*, 1994-NMSC-114, ¶ 10, 118 N.M. 721, 885 P.2d 642 (alteration in original) (internal quotation marks and citation omitted). The only issue before this Court is the third element, loss to the client. Under New Mexico law, the plaintiff in a legal malpractice suit must prove this loss by demonstrating by a preponderance of the evidence that he or she would have prevailed on the underlying claim. *Richardson v. Glass*, 1992-NMSC-046, ¶ 10, 114 N.M. 119, 835 P.2d 835 ("Plaintiff had the burden of not only proving her counsel's negligence, but also that she would have recovered at trial in the underlying action."); *George v. Caton*, 1979-NMCA-028, ¶¶ 46-47, 93 N.M. 370, 600 P.2d 822 ("In a malpractice action . . . the measure of damages is the value of the lost claims, i.e., the amount that would have been recovered by the client except for the attorney's negligence."); *see also Andrews v. Saylor*, 2003-NMCA-132, ¶ 15, 134 N.M. 545, 80 P.3d 482 (stating that the preponderance-of-the-evidence standard is applicable to legal actions). In this case, the Court of Appeals held that because sovereign immunity would have barred the underlying claim, the loss of the claim did not damage Encinias. *See Encinias*, 2013-NMCA-003, ¶ 24 (holding that school did not waive its immunity and affirming summary judgment in favor of Whitener).

{9} In general, the state is immune from tort suits. Section 41-4-4(A). The exceptions to this rule are the specific waivers of immunity contained in the TCA. *Id.* The provision of the TCA at issue in this case is Section 41-4-6(A), which waives the state's immunity for injury "caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings." We have stated that this section "may appropriately be termed a 'premises liability' statute." *Bober v. N.M. State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644, 808 P.2d 614. The Legislature has declared that "[l]iability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty," § 41-4-2(B), so we infer that the waiver of liability in Section 41-4-6(A) incorporates the concepts of premises liability found in our case law.

{10} Like common-law premises liability, the waiver in Section 41-4-6(A) is not limited to injuries occurring on the defendant's property. *Bober*, 1991-NMSC-031, ¶ 27; *see also Stetz v. Skaggs Drug Ctrs., Inc.*, 1992-NMCA-104, ¶ 9, 114 N.M. 465, 840 P.2d 612 ("[*Bober*] merely applied the traditional rule that on[e] who owns or controls 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."). Also like common-law premises liability, the waiver is not limited to injuries resulting from a physical defect on the premises. *Bober*, 1991-NMSC-031, ¶¶ 26-27; *Callaway v. N.M. Dep't of Corr.*, 1994-NMCA-049, ¶ 17, 117 N.M. 637, 875 P.2d 393 (noting this Court's rejection of a narrow "physical defect" standard); *see also Coca v. Arceo*, 1962-NMSC-169, ¶ 2, 19, 71 N.M. 186, 376 P.2d 970 (reversing summary judgment for the defendant where the plaintiff alleged that the owners of the bar should have

protected the plaintiff from battery by another patron). Instead, we interpret Section 41-4-6(A) broadly to waive immunity "where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government." *Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 3, 107 N.M. 204, 755 P.2d 48. "The waiver applies to more than the operation or maintenance of the physical aspects of the building, and includes safety policies necessary to protect the people who use the building." *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 9, 140 N.M. 205, 141 P.3d 1259.

{11} Such a condition could take many forms. In *Castillo*, we held that wild dogs roaming the grounds of a housing project "could represent an unsafe condition upon the land" that would waive the defendant county's immunity under Section 41-4-6(A). 1988-NMSC-037, ¶¶ 1, 9. In *Bober*, the potentially unsafe condition was a high volume of cars exiting a parking lot after a concert. 1991-NMSC-031, ¶ 2. A city creates a dangerous condition if it operates a municipal swimming pool with an inadequate number of lifeguards. *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 15, 123 N.M. 353, 940 P.2d 459. A prison creates a dangerous condition by allowing known gang members to congregate in a recreation room that is shielded from observation by guards. *Callaway*, 1994-NMCA-049, ¶¶ 4, 19. Most recently, this Court held that a public school creates an unsafe condition for its students when it actively violates the students' individualized education programs and then fails to follow proper emergency procedures. *Upton*, 2006-NMSC-040, ¶¶ 18-21.

{12} This Court has also made it clear that there are limits to the waiver of immunity in Section 41-4-6(A). In *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 16, 120 N.M. 680, 905 P.2d 718, this Court held that a municipal summer camp's failure to supervise young children at a playground did not waive the town's immunity from suit. *Id.* ¶¶ 4, 16. The child was injured when he fell off a slide, not by any defect in the playground itself, and the playground was generally "a safe area for children." *Id.* ¶¶ 3, 14. Whitener correctly cites *Espinoza* for the proposition that there is no waiver of immunity under Section 41-4-6(A) for negligent supervision. Whitener also relies on *Pemberton v. Cordova*, 1987-NMCA-020, 105 N.M. 476, 734 P.2d 254, for the proposition that a school does not waive its immunity by failing to prevent one student from attacking another.

{13} However, neither *Espinoza* nor *Pemberton* precludes recovery under the facts argued by Encinias. Whitener is correct that *Pemberton* states a general rule that schools are not liable for one student's battery of another. *See* 1987-NMCA-020, ¶ 3. *Pemberton* is based on a narrow reading of Section 41-4-6(A) that has since been discredited, *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 14, 124 N.M. 488, 952 P.2d 978, but its central premise, when analyzed under a premises liability theory, is still valid. *See Espinoza*, 1995-NMSC-070, ¶ 9 (discussing *Pemberton*). There can be no waiver under Section 41-4-6(A) without a dangerous condition on the premises, and a single act of student-on-student violence does not render the premises unsafe. In *Pemberton*, one student "allegedly struck and injured" another, but there does not seem to have been any allegation of a broader pattern of violence at the school, or any facts to suggest that the school, in the exercise of ordinary care, could have discovered that the violence was about to occur and that the school could have protected the student from injury. 1987-NMCA-020, ¶ 2. The plaintiff in *Pemberton* specifically alleged negligent supervision but did not allege that the school was negligent in failing to exercise reasonable care to discover and prevent dangerous conditions caused by people on its premises. *See Coca*, 1962-NMSC-169, ¶ 7 (explaining the duty of a business to protect patrons from the harmful acts of third persons if the business could have discovered that such acts were about to be done, and could have protected against the injury.). By contrast, in the present case, Encinias has produced an affidavit from an assistant principal at the school stating that "[t]he area where the vendor trucks parked was considered to be a 'hot zone' for

potential trouble around the school. 'Hot zones' were locations where students congregate and where there has been a history of problems that exist such as fights."

{14} While one student's battery of another would not generally waive a school's immunity under Section 41-4-6(A), a school's failure to address a pattern of student violence in a particular area might create an unsafe condition on the premises. Our case law has been clear that failure to address a pattern of violence is *not* merely failure to supervise. In *Espinoza*, this Court explained that negligent supervision did not waive the town's immunity because the playground maintained by the town was essentially safe: "There were no gangs threatening the children, no free-roaming dogs, no influx of traffic, no improperly maintained equipment." 1995-NMSC-070, ¶ 14. A municipality has no duty to supervise children in an ordinary playground, but *Espinoza* suggests that it would have a duty to exercise reasonable care to prevent injury to visitors from harmful conditions, including a pattern of violence in playgrounds. *Id.* Similarly, *Callaway* establishes that a prison may not release new inmates into a poorly monitored space with known gang members and items that could be used as weapons. 1994-NMCA-049, ¶¶ 4, 19. This does not create a waiver of immunity for negligent supervision, but it does mean that prisons cannot turn a blind eye to threats to their inmates' safety. *See Espinoza*, 1995-NMSC-070, ¶ 13 (stating that *Callaway* "did not rely on negligent supervision," but rather on the fact that the prison's security practices endangered the entire prison population).

{15} In enacting the TCA, the Legislature expressed an intent to waive the state's immunity in situations that would subject a private party to liability under our common law. *See* § 41-4-2(B) (incorporating "traditional tort concepts"). Therefore, the facts of a case will support a waiver under Section 41-4-6(A) if they would support a finding of liability against a private property owner.

{16} New Mexico law imposes a duty on businesses to protect their patrons from "the harmful acts of third persons if, by the exercise of reasonable care, the proprietor could have discovered that such acts were being done or about to be done, and could have protected against the injury by controlling the conduct of the other patron." *Coca*, 1962-NMSC-169, ¶ 7 (citing II Restatement of Torts § 348 (1934) (now covered by Restatement (Second) of Torts § 344 (1965)). It is well established that the owner of a business may be liable even for a third party's intentional criminal acts on its premises. In *Reichert v. Atler*, 1994-NMSC-056, ¶¶ 1, 3, 117 N.M. 623, 875 P.2d 379, this Court held that the owners of a bar reputed to be dangerous were liable for their proportion of fault in a wrongful death suit arising from a murder in the bar. The bar had "a reputation as being one of the most dangerous bars in Bernalillo County and [had] been . . . the scene of numerous shootings, stabbings, and assaults," but the bar had no professional security personnel on staff. *Id.* ¶ 3. On the evening of the murder, a bar employee witnessed the victim and the perpetrator arguing, and the victim told the employee that he feared the perpetrator, the perpetrator carried a gun, and he had heard that the perpetrator had killed someone. *Id.* ¶ 2. The employee did not call the police or otherwise protect the victim, and the courts held that the owners of the bar "breached a duty to provide adequate security to protect patrons of the bar, including [the victim], who was specifically a foreseeable victim of harm." *Id.* ¶¶ 2, 4, 12.

{17} The operative principle that justified holding business proprietors liable in *Reichert*, 1994-NMSC-056, and *Coca*, 1962-NMSC-169, is the same as the principle found in *Espinoza*, 1995-NMSC-070, ¶ 14, and *Callaway*, 1994-NMCA-049, ¶¶ 4, 19. Just as businesses must exercise reasonable care to discover and prevent dangerous conditions caused by people on their premises, *Coca*, 1962-NMSC-169, ¶ 7, so must the government. The question is not about general supervision; the question under a premises liability theory of recovery involving third-party conduct is whether the government exercised reasonable care to discover and

prevent dangerous conditions caused by people on its premises. The government does not "have the duty to do everything that might be done," § 41-4-2(A), but it can be liable for the violent acts of a third party if the government reasonably should have discovered and could have prevented the incident. Like businesses, the government's "duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised . . . also increases." *See* UJI 13-1320 NMRA.

{18} In this case, Encinias has established a genuine issue of material fact as to whether there was a dangerous condition on the premises of the high school. The assistant principal's statement that the area where the attack occurred was a "hot zone" for student violence would not be enough, taken alone, to support a finding of liability, but it *is* enough to raise questions about the degree of student violence and the school's efforts to discover and prevent student violence in that area. *See Upton*, 2006-NMSC-040, ¶ 25 (holding that the plaintiffs' claim would constitute a waiver of immunity under Section 41-4-6(A) *if proven* and that the plaintiffs were entitled to have a factfinder consider the claim). The assistant principal was in a position to know the location and frequency of student fights, and her affidavit, although vague, was more than a mere repetition of the allegations in the complaint. *See Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 43, 148 N.M. 646, 241 P.3d 1086 ("The non-moving party may not simply rely upon the allegations of his or her pleading."). Encinias has also introduced evidence that the area in which the alleged beating occurred was not monitored by security cameras and that the security guards and teachers assigned to monitor the area were not present at the time of the attack. If Encinias is able to demonstrate that there was a history of student violence in the area by the food trucks, the lack of security measures could indicate that the school failed to address the problem. We hold that Encinias has established the existence of a genuine issue of material fact regarding the presence of a dangerous condition at the school, and summary judgment on the malpractice claim is therefore inappropriate. We therefore reverse the Court of Appeals on this issue.

B. Misrepresentation claim

{19} Encinias also appeals the summary judgment against him on his misrepresentation claim. Encinias describes three grounds for the misrepresentation claim: (1) Whitener failed to pursue the underlying claim in a timely fashion, (2) Whitener failed to inform Encinias that no work had been done on the case, and (3) Whitener failed to inform Encinias when it became clear that the statute of limitations had passed. The first theory was not set forth in Encinias's amended complaint, and we do not consider it here. *See Albuquerque Prods. Credit Ass'n v. Martinez*, 1978-NMSC-003, ¶ 14, 91 N.M. 317, 573 P.2d 672 ("It is fundamental that matters not brought into issue by the pleadings and upon which no decision of the trial court has been sought, or fairly invoked, cannot be raised on appeal." (citing NMSA 1953, § 21-12-11 (1974), *now codified as amended in* Rule 12-216 NMRA)). We consider the other two theories below.

{20} In New Mexico, "misrepresentation can be by either commission or omission." *In re Stein*, 2008-NMSC-013, ¶ 35, 143 N.M. 462, 177 P.3d 513. The Court of Appeals acknowledged that the record suggests that Whitener might have improperly withheld information from Encinias. *Encinias*, 2013-NMCA-003, ¶ 29. However, the Court of Appeals also held that Encinias had failed to demonstrate that he suffered damages as a result of the misrepresentation, and affirmed summary judgment against him for that reason. *Id.* ¶¶ 29-30. We reverse the Court of Appeals for two reasons. First, with the malpractice claim reinstated, it is not necessarily accurate that Encinias "was not damaged by Whitener's misrepresentations." *Id.* ¶ 30. Second, contrary to the holding of the Court of Appeals, *id.*, damages are not an element of fraudulent misrepresentation. *Garcia v. Coffman*, 1997-NMCA-092, ¶¶ 34-36, 124 N.M. 12, 946 P.2d 216; *see also* UJI 13-1633 NMRA (stating that "[a] party is liable for damages proximately caused by [his] [her] fraudulent

misrepresentation," but not listing damages in elements of fraudulent misrepresentation).

{21} Encinias argues that Whitener committed misrepresentation by failing to inform Encinias that the statute of limitations had passed. (It is not clear from the first amended complaint whether Encinias alleged negligent or fraudulent misrepresentation, but he clarified before the district court that he alleged both types.) Encinias's first amended complaint states that Whitener should have made this disclosure in July of 2007. However, the statute of limitations ran in the fall of 2006. Even if Whitener had informed Encinias of the problem during the summer of 2007, the suit would still have been barred. As the Court of Appeals observed, Encinias does not allege that he suffered any damages other than the loss of the underlying suit. *Encinias*, 2013-NMCA-003, ¶ 30. Therefore, compensatory damages are not available for misrepresentation under this theory. Without actual damages, Encinias cannot pursue a claim for negligent misrepresentation; nominal and punitive damages are not available in a negligence action absent proof of actual damages. *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 14, 117 N.M. 761, 877 P.2d 567.

{22} However, nominal and punitive damages are available in suits for intentional torts, and Encinias can pursue both in a claim for fraudulent misrepresentation. *Id.* ¶ 15. To prove fraudulent misrepresentation, a plaintiff must demonstrate by clear and convincing evidence that (1) a representation of fact was made (either by commission or by omission) that was not true, (2) the defendant made the representation knowingly or recklessly, (3) the representation was made with the intent to induce the plaintiff to rely upon it, and (4) that the plaintiff relied on the representation. UJI 13-1633; *see also Stein*, 2008-NMSC-013, ¶ 35 (misrepresentation may be committed by omission). In this case, Whitener realized in the summer of 2007 that the case was barred, but Whitener did not disclose this fact to Encinias until the spring of 2008. Encinias has produced some evidence suggesting that by delaying this disclosure, Whitener made it more difficult for Encinias to collect evidence supporting his underlying claim for the malpractice suit. If the Whitener law firm knowingly or recklessly led Encinias to believe that his suit was still viable, then Encinias might be entitled to nominal or punitive damages. Encinias requested punitive damages in his complaint, so these damages should not come as a surprise to Whitener.

{23} Whitener's sole defense to the misrepresentation claim before this Court is that the Encinias family knew the statute of limitations, so they could not have been misled. However, Whitener specifically (and erroneously) assured the family in October 2006 that the statute of limitations had *not* run, and it is reasonable for clients to assume that they can rely on their attorneys' legal advice. On this record, Encinias has raised a genuine issue of material fact about whether Whitener fraudulently misrepresented the viability of Encinias's underlying claim.

{24} Encinias also alleges that Whitener committed misrepresentation by failing to inform the Encinias family in May 2006 that the firm had not done any work on Encinias's case. Encinias's mother states in an affidavit that she approached Whitener in April 2006, several months after retaining Whitener, and asked what progress the firm had made on Encinias's case. Mrs. Encinias states that Whitener asked her to fill out new paperwork, including a new fee agreement. Encinias now alleges that the firm lost the family's paperwork and had done no work until after April 2006. Failure to inform Encinias that the firm had done no work on the case for three months could constitute fraudulent misrepresentation, if it was done knowingly or recklessly. *See generally* UJI 13-1633 (listing elements of fraudulent misrepresentation).

{25} The failure to disclose also might constitute negligent misrepresentation under Restatement (Second) of Torts § 552 (1977). *See Stotlar v. Hester*, 1978-NMCA-067, ¶ 13, 92 N.M. 26, 582 P.2d 403 (adopting the Restatement standard); *see also* UJI 13-1632 NMRA, Comm. Commentary. If Whitener had informed Encinias that the firm had lost Encinias's paperwork and had done no work on his case, Encinias could

have retained a different attorney and filed a complaint before the statute of limitations ran. Therefore, Whitener's failure to disclose that no work had been done damaged Encinias's ability to pursue his case against the school district. Encinias has raised a genuine issue of material fact about whether his claim would have been successful, and he can seek compensatory damages from Whitener for the loss of the underlying case.

CONCLUSION

{26} We hold that Encinias has raised a genuine issue of material fact as to whether there was a dangerous condition on the premises of Robertson High School that would have waived immunity under Section 41-4-6(A). Therefore, summary judgment in favor of Whitener is inappropriate. Furthermore, we hold that Encinias should be able to pursue his misrepresentation claim, both because he might have suffered actual damages as a result of Whitener's misrepresentations and because fraudulent misrepresentation does not require actual damages. For these reasons, we reverse the Court of Appeals and vacate the district court's grant of summary judgment so that Encinias may pursue his misrepresentation claim against Whitener.

{27} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

TIMOTHY L. GARCIA,
Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-003

Filing Date: December 19, 2013

Docket No. 34,306

ROSE GRIEGO and KIMBERLY KIEL, MIRIAM RAND and ONA LARA PORTER, A.D. JOPLIN and GREG GOMEZ, THERESE COUNCILOR and TANYA STRUBLE, MONICA LEAMING and CECELIA TAULBEE, and JEN ROPER and ANGELIQUE NEUMAN,

Plaintiffs-Real Parties in Interest,

v.

MAGGIE TOULOUSE OLIVER,
in her official capacity as Clerk of Bernalillo County, and
GERALDINE SALAZAR,
in her official capacity as Clerk of Santa Fe County,

Defendants-Real Parties in Interest,

and

STATE OF NEW MEXICO, ex rel.,
NEW MEXICO ASSOCIATION OF COUNTIES, as the collective and organizational representative of New Mexico's thirty-three (33) Counties, and
M. KEITH RIDDLE,
in his official capacity as Clerk of Catron County,
DAVE KUNKO,
in his official capacity as Clerk of Chaves County,
ELISA BRO,
in her official capacity as Clerk of Cibola County,
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in her official capacity as Clerk of Colfax County,
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in her official capacity as Clerk of Curry County,
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and

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Santa Fe, Rev. Talitha Arnold, Rev. Kathryn A.
Schlechter, Rising Sun Ministries, Metropolitan
Community Church of Albuquerque

OPINION

CHÁVEZ, Justice.

{1} "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." N.M. Const. art. II, § 4. These inherent rights, enjoyed by all New Mexicans, appear along with twenty-three other provisions known as the New Mexico Bill of Rights, which include the right to bear arms, freedom of speech, freedom of the press, freedom from unreasonable government searches and seizures, due process, and the equal protection of the laws. *See* N.M. Const. art. II, §§ 6, 10, 17, 18. When government is alleged to have threatened any of these rights, it is the responsibility of the courts to interpret and apply the protections of the Constitution. The United States Supreme Court explained the courts' responsibility as follows:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Thus, when litigants allege that the government has unconstitutionally interfered with a right protected by the Bill of Rights, or has unconstitutionally discriminated against them, courts must decide the merits of the allegation. If proven, courts must safeguard constitutional rights and order an end to the discriminatory treatment.

{2} Interracial marriages were once prohibited by laws in many states until the United States Supreme Court declared such laws unconstitutional and ordered an end to the discriminatory treatment. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."). The same-gender couples in this case, all of whom are in long-term, committed relationships, some of whom have raised foster and adoptive children together, allege that they have a constitutional right under the Due Process and Equal Protection provisions of New Mexico's Bill of Rights to enter into civil marriages and to enjoy the concomitant legal rights, protections, and responsibilities of marriage. Consistent with our constitutional responsibility to determine whether legislation offends the New Mexico Constitution, the question we must answer is whether the State of New Mexico may decline to recognize civil marriages between same-gender couples and therefore deprive them of the rights, protections, and responsibilities available to opposite-gender married couples without violating the New Mexico Constitution.

{3} Although this question arouses sincerely-felt religious beliefs both in favor of and against same-gender marriages, our analysis does not and cannot depend on religious doctrine without violating the Constitution.[1] *See* N.M. Const. art. II, § 11; *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("[O]ne religious denomination cannot be officially preferred over another."). Instead we must depend upon legal principles to analyze the statutory and constitutional bases for depriving same-gender couples from entering into a purely secular civil marriage and securing the accompanying rights, protections, and responsibilities of New Mexico laws. Our holding will not interfere with the religious freedom of religious

[1] Every man [or woman] shall be free to worship God according to the dictates of his [or her] own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his [or her] religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

N.M. Const. art. II, § 11.

organizations or clergy because (1) no religious organization will have to change its policies to accommodate same-gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs. *See* NMSA 1978, § 28-1-9(B) & (C) (1969, as amended through 2004) (describing exemption of religious organizations from the New Mexico Human Rights Act).

Summary

{4} We conclude that although none of New Mexico's marriage statutes specifically prohibit same-gender marriages, when read as a whole, the statutes have the effect of precluding same-gender couples from marrying and benefitting from the rights, protections, and responsibilities that flow from a civil marriage. Same-gender couples who wish to enter into a civil marriage with another person of their choice and to the exclusion of all others are similarly situated to opposite-gender couples who want to do the same, yet they are treated differently. Because same-gender couples (whether lesbian, gay, bisexual, or transgender, hereinafter "LGBT") are a discrete group which has been subjected to a history of discrimination and violence, and which has inadequate political power to protect itself from such treatment, the classification at issue must withstand intermediate scrutiny to be constitutional. Accordingly, New Mexico may neither constitutionally deny same-gender couples the right to marry nor deprive them of the rights, protections, and responsibilities of marriage laws, unless the proponents of the legislation—the opponents of same-gender marriage—prove that the discrimination caused by the legislation is "substantially related to an important government interest." *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 120 P.3d 413 (internal quotation marks and citation omitted).

{5} The opponents of same-gender marriage assert that defining marriage to prohibit same-gender marriages is related to the important, overriding governmental interests of "responsible procreation and childrearing" and preventing the deinstitutionalization of marriage. However, the purported governmental interest of "responsible procreation and childrearing" is not reflected in the history of the development of New Mexico's marriage laws. Procreation has never been a condition of marriage under New Mexico law, as evidenced by the fact that the aged, the infertile, and those who choose not to have children are not precluded from marrying. In addition, New Mexico law recognizes the right of same-gender couples to raise children. NMSA 1978, § 32A-5-11 (1993) (recognizing parties who are eligible to adopt children); *see also Chatterjee v. King*, 2012-NMSC-019, ¶ 84, 280 P.3d 283 (Bosson, J., specially concurring) (recognizing the right of a former same-gender partner who supported both the child and her former partner to have standing to seek custody of the child). Finally, legislation must advance a state interest that is separate and apart from the classification itself. It is inappropriate to define the governmental interest as maintaining only opposite-gender marriages, just as it was inappropriate to define the governmental interest as maintaining same-race marriages in *Loving*. Therefore, the purported governmental interest of preventing the deinstitutionalization of marriage, which is nothing more than an argument to maintain only opposite-gender marriages, cannot be an important governmental interest under the Constitution.

{6} We conclude that the purpose of New Mexico marriage laws is to bring stability and order to the legal relationship of committed couples by defining their rights and responsibilities as to one another, their children if they choose to raise children together, and their property. Prohibiting same-gender marriages is not substantially related to the governmental interests advanced by the parties opposing same-gender marriage or to the purposes we have identified. Therefore, barring individuals from marrying and depriving them of the rights, protections, and responsibilities of civil marriage solely because of their sexual orientation violates the Equal Protection Clause under Article II, Section 18 of the New Mexico Constitution. We hold that the State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights,

protections, and responsibilities that derive from civil marriage under New Mexico law.

Procedural history

{7} A marriage license is "required under New Mexico law as evidence that a marriage fully complies with all requirements of the law." *Rivera v. Rivera*, 2010-NMCA-106, ¶ 19, 149 N.M. 66, 243 P.3d 1148. Therefore, denying marriage licenses to same-gender couples would be tantamount to denying them the right to enter into a civil marriage with all of its attendant legal rights, protections, and responsibilities. New Mexico County Clerks (Clerks) are delegated the responsibilities of issuing marriage licenses to couples who are qualified to enter into civil marriages and filing the licenses once the couples are married. NMSA 1978, § 40-1-10(A) (1905, as amended through 2013). The Doña Ana County Clerk voluntarily began issuing marriage licenses to same-gender couples on August 21, 2013. Several other Clerks did the same, while others did not do so until ordered by a court; yet others continued to decline to issue marriage licenses to same-gender couples. A number of lawsuits were initiated as a result of the Clerks' actions.

{8} Plaintiffs filed their complaint in *Griego*, seeking a declaration "that it is unlawful to deny same-sex couples the freedom to marry on the basis of sex or sexual orientation because such denial deprives them of fundamental rights and liberties." They also sought a permanent injunction requiring, in part, that "Defendants implement and enforce all aspects of the state's marriage law . . . without discriminating on the basis of sex or sexual orientation" and that Defendants treat Plaintiffs "once married . . . [,] equally with all other married couples under the Constitution and laws of New Mexico."

{9} On August 29, 2013, following an initial declaratory judgment in *Griego*, the New Mexico Association of Counties, as the organizational representative for the State's thirty-three Clerks, filed an unopposed motion to intervene based on a common question of law under Rule 1-024(B)(2) NMRA, stating their future intentions to "seek immediate review from the state Supreme Court." The Clerks asserted that they have a "need for an immediate ruling that is applicable statewide and that resolves the constitutional questions at the highest level of appellate review."

{10} On September 3, 2013, the district court issued its final declaratory judgment stating that the refusal to issue marriage licenses to otherwise qualified same-gender couples violated Article II, Section 18 of the New Mexico Constitution. On September 5, 2013, the Clerks filed, and we accepted, a verified petition for writ of superintending control. Prior to accepting the writ in this case, this Court had denied two separate verified petitions for writs of mandamus "without prejudice to the parties to pursue litigation of issues in the lower court with a right to request expedited review." *See Hanna v. Salazar*, No. 34,216 (non-precedential order, N.M. Sup. Ct. Aug 15, 2013); *Griego v. Oliver*, No. 34,227 (non-precedential order, N.M. Sup. Ct. Aug. 15, 2013). Both cases were subsequently decided in the district courts. *See State ex rel. Hanna v. Salazar*, No. D-0101-CV-2013-02182, Aug. 22, 2013; *Griego v. Oliver*, D-202-CV-2013-02757, Sept. 3, 2013. In addition, a number of other district courts have issued writs or orders requiring Clerks to issue marriage licenses to same-gender couples in New Mexico. *See State ex rel. Stark v. Martinez*, No. D-820-CV-2013-295, alternative writ of mandamus issued in the Eighth Judicial District Court on August 27, 2013 affecting Taos County; *State ex rel. Newton v. Stover*, No. D-132-CV-2013-00094, alternative writ of mandamus issued in the First Judicial District Court on August 29, 2013 affecting Los Alamos County; *Katz v. Zamarripa*, No. D-608-CV-2013-00235, final order and permanent injunction issued in the Sixth Judicial District Court on September 5, 2013 affecting Grant County. Other cases are awaiting the outcome of the petition for writ of superintending control that is presently before this Court.[2]

[2] These cases include *Gering v. Garbagni*, No. D-1329-CV-2013-01715 (Sandoval County) and three cases brought by state legislators to challenge the validity of licenses

Our exercise of superintending control is appropriate in this case

{11} Article VI, Section 3 of the New Mexico Constitution provides that "[t]he supreme court shall have . . . superintending control over all inferior courts; it shall also have power to issue . . . writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." When we deem it appropriate, we exercise our power of superintending control "to control the course of ordinary litigation in inferior courts . . . even when there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment." *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶¶ 7-8, 120 N.M. 619, 904 P.2d 1044 (internal quotation marks and citations omitted).

{12} In *Schwartz*, we exercised our discretion to decide a double jeopardy question that had created uncertainty in the courts "[i]n order to provide a prompt and final resolution to this troubling question." *Id.* ¶ 9. The Clerks urge us to exercise our power of superintending control as we did in *Schwartz* because they are also in a position of uncertainty regarding their responsibilities to issue same-gender marriage licenses.

{13} The record before us reflects the uncertainty described by the Clerks. At the time this petition was filed, eight New Mexico counties were issuing marriage licenses to same-gender couples, while twenty-four were not. By October 23, 2013, the date of oral argument before this Court, over 1,466 marriage licenses had been issued.

{14} We requested briefing to consider the merits of this case because (1) the parties complied with this Court's order to pursue litigation in the lower courts and thereafter requested expedited review; (2) the varying positions of the courts and the Clerks regarding the issuance of licenses to same-gender couples created chaos statewide; (3) the Clerks are performing a duty under state law and they express uncertainty and disagreement about how to proceed; (4) there are currently more than 1,400 same-gender couples whose New Mexico marriages may not be recognized for the purpose of receiving federal benefits due to the lingering uncertainty about the law in New Mexico; and (5) there is a high volume of cases ruled upon by district courts and pending throughout New Mexico regarding the common question of law regarding whether same-gender marriage is lawful in New Mexico. Once we agreed to hear this case we invited and accepted amicus curiae briefs to ensure that the important issues before us were adequately briefed and argued to this Court. We affirm the district courts and grant the writ of superintending control.

The real parties in interest who seek to marry

{15} The real parties in interest in this case (Plaintiffs) are six same-gender couples from four New Mexico counties who wish to marry and who were the plaintiffs in the Second Judicial District Court case of *Griego v. Oliver*, No. D-202-CV-2013-02757. Plaintiffs include accountants, interior designers, real estate brokers, teachers, small business owners, and engineers at our national laboratories. Many are active in community service; they volunteer and work for non-profit organizations, and serve on municipal boards and city councils. They have formed stable family units involving mutual protection and support, and together they have raised children, cared for aging parents, and tried to have those family units formally recognized through both legal and ceremonial means.

{16} As of August 16, 2013, the date they filed their second amended complaint, Plaintiffs Rose Griego (Rose) and Kimberly Kiel (Kim) had been in a committed relationship for eight years; Plaintiffs Miriam Rand (Miriam) and Ona Lara Porter (Ona) had been in a committed relationship for twenty-five years; Plaintiffs

already issued, in some cases where individual Clerks have issued marriage licenses to same-gender couples, even without a court order directing them to do so. *Sharer v. Ellins*, No. CV-2013-2061 (Doña Ana County); *Sharer v. Rivera*, No. D-412-CV-2013-00367 (San Miguel County); *Sharer v Carabajal*, No. D-1314-CV-2013-01058 (Valencia County).

Aaron Joplin (A.D.) and Greg Gomez (Greg) had been in a committed relationship for seven years; Plaintiffs Therese Councilor (Therese) and Tanya Struble (Tanya) had been in a committed relationship for twenty-three years and own a business together; Plaintiffs Monica Leaming (Monica) and Cecilia Taulbee (Cecilia) had been in a committed relationship for fifteen years; and Plaintiffs Jen Roper (Jen) and Angelique Neuman (Angelique) had been in a committed relationship for the past twenty-one years.

{17} Several of the Plaintiff couples raise or have raised children and grandchildren together. Miriam and Ona raised three children together during the course of their twenty-five-year relationship. Their youngest daughter, who was only three when Miriam and Ona combined households, legally changed her surname to Porter-Rand to reflect the importance of both of the mothers in her life. Their middle daughter, Cherif, is physically disabled and can no longer care for her fourteen-year-old daughter, who has cerebral palsy. Ona has adopted Cherif's daughter and Miriam plans to initiate a second-parent adoption. Until the adoption is finalized, Miriam does not have automatic legal authority to make important decisions for her granddaughter, whom she is helping to raise. Monica and Cecilia raised Cecilia's three children to adulthood during their fifteen-year relationship; all three children consider Monica as another parent, and she considers them to be her children. Similarly, Kim's college-aged children refer to Rose as their step-mother. A.D. and Greg have no biological children, but they maintain a relationship with their former long-term foster child they raised who is now an adult, who calls them both Dad. Jen and Angelique adopted three preschool-age brothers from the custody of the Children, Youth & Families Department and have raised them together. The two youngest boys live with their mothers, while the eldest left home after enlisting in the United States Army following his graduation from high school. All three brothers support their mothers' efforts to legally marry.

{18} The inability to legally marry has adversely impacted several of the Plaintiff couples who have endured significant familial and medical hardships together. On one occasion, when Rose was hospitalized, the hospital refused to provide Kim with any information about Rose's condition or treatment until Rose's other family members arrived, despite the fact that it was Kim who took Rose to the hospital. Miriam and Ona cared for each other's aging parents, and both women's mothers passed away within one year of each other. However, Miriam was not eligible for bereavement leave when Ona's mother died, and Ona was not eligible for bereavement leave when Miriam's mother died. Also, due to restrictive next-of-kin and family-only limitations on visitation and medical decision-making, Miriam and Ona were forced to pretend to be sisters. Jen was diagnosed with an aggressive form of brain cancer in late 2012, and doctors told her she had eighteen months to live. After surgery to partially remove the tumor, Jen suffered a stroke, which impaired some of her physical and cognitive functions. At the time Plaintiffs filed their complaint, Jen had been placed in an assisted living facility, and Angelique was spending several hours each day with her. Because Jen and Angelique could not legally marry, Angelique could not collect spousal benefits as a result of Jen's disability, despite their twenty-one-year relationship.

When read as a whole, New Mexico marriage statutes prohibit same-gender marriages

{19} We begin our legal discussion with an analysis of New Mexico marriage statutes to determine whether the statutes authorize or prohibit same-gender marriages. If the statutes can be interpreted to authorize same-gender marriages, including all of the rights, protections, and responsibilities that come with being married, the constitutional questions raised by Plaintiffs are irrelevant. *See Chatterjee*, 2012-NMSC-019, ¶ 18 ("[W]e seek to avoid an interpretation of a statute that would raise constitutional concerns.").

{20} Our principal goal in interpreting statutes is to give effect to the Legislature's intent. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d

1047. The Legislature first enacted our State's basic marriage statutes in 1862. Our analysis begins with NMSA 1978, Section 40-1-1 (1862-63), which provides that "[m]arriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." "Each couple desiring to marry pursuant to the laws of New Mexico shall first obtain a license from a county clerk of this state and following a ceremony conducted in this state file the license for recording in the county issuing the license." Section 40-1-10(A). Although the references to the phrase "contracting parties" in Section 40-1-1 and the term "couple" in Section 40-1-10(A) are gender-neutral and suggest that same-gender marriages may not be prohibited, we must read these phrases in context with other statutes relating to marriage. *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." (internal quotation marks and citation omitted)).

{21} As early as 1905, the Legislature also developed forms "[t]o insure a uniform system of records of all marriages hereafter contracted, and the better preservation of said record for future reference. . . ." 1905 N.M. Laws, ch. 65, § 7. The forms included an application for marriage license, a marriage license, and a marriage certificate. *Id*. § 8. The application and marriage license did not contain any gender-specific designations. However, the marriage certificate required signatures from both the "groom" and the "bride." *Id*. "Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance." *New Mexico Attorney Gen. v. New Mexico Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 26, 309 P.3d 89. In the context of marriage, "groom" and "bride" are gender-specific terms. *See The American Heritage Dictionary* 230 (5th ed. 2011) (defining "bridegroom" as "[a] man who is about to be married or has recently been married" and "bride" as "[a] woman who is about to be married or has recently been married").

{22} In 1961, the Legislature amended the application form for a marriage license to specifically call for a "Male Applicant" and a "Female Applicant." NMSA 1978, § 40-1-18 (1953, amended 1961). The marriage certificate also required the signatures of a groom and a bride. The amendment of the application form and the fact that the marriage forms have remained the same since 1961 suggest that the Legislature intended a civil marriage to be between a man and a woman. The consanguinity provisions contained in NMSA 1978, Section 40-1-7 (1876, as amended through 2013) that void marriages between a male and certain female relatives and between a female and certain male relatives also suggest that the Legislature did not intend to permit same-gender couples to marry. Finally, the provisions in NMSA 1978, Chapter 40, Article 2 (1901, as amended through 1973) that define the rights of married persons generally refer to "husband and wife"[3]; the provisions in NMSA 1978, Chapter 40, Article 3 (1907, as amended through 1997) address the property rights of "husband and wife"[4]; and the provisions in NMSA 1978, Chapter 40, Article 4 (1901, as amended through 2011) address the dissolution of marriage between "husband and wife."[5] *See Garcia v. Jeantette*, 2004-NMCA-004, ¶ 18, 134 N.M. 776, 82 P.3d 947 ("'Either party,' as that term is used in Section 40-4-7(A), can logically only refer to the parties to the underlying domestic relations proceeding, that is, husband and wife."). "Husband" and "wife" are gender-specific terms. *See Black's Law Dictionary* 810, 1735 (9th ed. 2009) (defining "husband" as "[a] married man" and "wife" as "[a] married woman").

{23} Thus, we conclude that a mix of gender-neutral and gender-specific terminology in the domestic relations statutes does not mean that the Legislature intended to authorize marriage between same-gender couples. On the contrary, we conclude that the statutory scheme reflects a legislative intent to prohibit same-gender marriages. *See Goodridge v. Dep't of Pub. Health*,

[3] *See, e.g.*, §§ 40-2-1, -8.
[4] *See, e.g.*, §§ 40-3-1, -12.
[5] *See, e.g.*, § 40-4-3.

798 N.E.2d 941, 953 (Mass. 2003) (Because state law is "silent as to the consanguinity of male-male or female-female marriage applicants . . . the Legislature did not intend that same-sex couples be licensed to marry."); *Li v. State*, 110 P.3d 91, 96 (Or. 2005) (en banc) (state law specifies that marriage is a civil contract entered into by a male and a female); *Baker v. State*, 744 A.2d 864, 869 (Vt. 1999) (state law specifies that marriage licenses specify "bride," which is defined as a woman, and "groom," which is defined as a man).

{24} Even if we were to conclude that the gender-neutral language in Sections 40-1-1 and 40-1-10 authorizes same-gender marriages, we could not avoid the constitutional challenge raised by Plaintiffs. Plaintiffs "seek vindication not only of their constitutional right to marry, but their entitlement to all the essential protections and responsibilities attendant on marriage." Interpreting our statutes to authorize committed same-gender couples to enter into civil marriage will grant them the rights and privileges available to opposite-gender married couples in approximately one thousand statutes and federal regulations that refer to a person's marital status, thereby avoiding a constitutional challenge on that basis. *See United States v. Windsor*, ___ U.S. ___, ___, ___, 133 S. Ct. 2675, 2694, 2695-96 (2013) (striking down Section 3 of the federal Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (1977); 28 U.S.C. § 1738C (1997)), and holding that the federal government must extend federal marital benefits to same-gender couples lawfully married in states that recognize same-gender civil marriages[6]). However, the phrasing of many of New Mexico's statutes limits the concomitant state-based rights, protections, and responsibilities of marriage to opposite-gender married couples. *See* nn.3 & 4, *supra*. Were we to interpret the marriage statutes as permitting same-gender marriages, we would still have to decide whether depriving same-gender married couples of concomitant state-based marital rights, protections, and responsibilities violates the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution. Therefore, despite the lack of an express legislative prohibition against same-gender marriage, we will analyze the constitutionality of denying same-gender couples the right to marry and depriving them of "the essential protections and responsibilities attendant on marriage."

Plaintiffs' constitutional challenge is based on equal protection and a claim that the right to marry is a fundamental right

{25} Plaintiffs contend that New Mexico's laws denying same-gender couples the same right to a civil marriage as that enjoyed by opposite-gender couples violates the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution because it discriminates against them on the basis of either their sex or their sexual orientation. *See id.* ("No person shall be . . . denied equal protection of the laws."). Plaintiffs also contend that the right to marry is a fundamental right and the State's interference with the exercise of this right also violates the New Mexico Constitution. Plaintiffs do not claim that New Mexico's marriage laws violate the United States Constitution.

{26} We will address the equal protection challenge before discussing the fundamental rights issue. We interpret the equal protection challenge to raise two questions: (1) do committed

[6] Since the filing of *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, federal agencies have engaged in a pattern and practice of limiting the extension of benefits to same-gender couples who have a valid marriage certificate, declining to extend the benefits to same-gender couples in a civil union or domestic partnership. This pattern and practice is what prompted New Jersey to declare its civil union legislation unconstitutional. *Garden State Equal. v. Dow*, ___ A.3d ___, ___, 2013 WL 6153269, at *1 (N.J. Super. L. 2013); *affirmed by Garden State Equal. v. Dow*, ___ A.3d ___, ___, 2013 WL 5687193, at *1 (N.J. 2013). Governor Christie withdrew his appeal of the Superior Court decision, thus leaving the court's decision making same-gender marriage legal in New Jersey the controlling law. *See* Kate Zernike and Marc Santora, *As Gays Wed in New Jersey, ChristieEnds Court Fight,* N.Y. Times, Oct. 21, 2013, http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html.

same-gender couples have a constitutional right to be married, and (2) do they have a constitutional right to the rights, protections, and responsibilities afforded to married opposite-gender couples?

{27} We apply the equal protection approach announced in *Breen* to answer these two constitutional questions. This approach generally requires us to first determine whether the legislation creates a class of similarly situated individuals and treats them differently. 2005-NMSC-028, ¶ 10. If it does, we then determine the level of scrutiny that applies to the challenged legislation and conclude the analysis by applying the appropriate level of scrutiny to determine whether the legislative classification is constitutional.

Same-gender couples who seek to marry are situated similarly to opposite-gender couples who seek to marry

{28} Plaintiffs contend that they are similarly situated to opposite-gender couples who seek to be married because they also are in committed and loving relationships. Some of these Plaintiffs are raising families, similar to many opposite-gender couples who also seek to be married. They assert that recognition of their status as married couples will provide them with a stable framework within which to care for each other and raise families, similar to opposite-gender couples who want to marry and raise their families.

{29} The opponents of same-gender marriage concede that same-gender couples may be similarly situated to opposite-gender couples with respect to their love and commitment to one another, but they contend that these similarities are beside the point. The opponents contend that the government's overriding purpose for recognizing and regulating marriage is "responsible procreation and child-rearing," which they describe as the ability of a married couple to naturally produce children. In addition, because same-gender couples do not have the natural capacity to create children through their sexual relationships, the opponents contend that same-gender couples cannot be similarly situated to opposite-gender couples.

{30} To determine whether same-gender and opposite-gender couples who seek to marry are similarly situated with respect to NMSA 1978, Chapter 40, "we must look beyond the classification to the purpose of the law." *New Mexico Right to Choose/NARAL v. Johnson* (*NARAL*), 1999-NMSC-005, ¶ 40, 126 N.M. 788, 975 P.2d 841(internal quotation marks and citation omitted). None of the parties dispute the fact that children benefit from stable family relationships. However, the history of New Mexico's marriage statutes does not support the contention that the overriding purpose of Chapter 40 is "responsible procreation and childrearing." Our review of the marriage statutes dating back to 1862 has not revealed any language, either implicit or explicit, that requires applicants for a marriage license to attest to their ability or intention to conceive children through sexual relationships. Counsel for the opponents of same-gender marriage also cannot cite to any such language.

{31} Fertility has never been a condition of marriage, nor has infertility ever been a specific ground for divorce. Beginning in 1884, a divorce could only be granted on specific grounds, which at the time only included "adultery, cruel or inhuman treatment and abandonment." 1884 Compiled Laws of New Mexico, Title X, ch. II, § 998. In 1915, "impotency" was added as another specified ground for divorce, 1915 Compiled Laws of New Mexico, ch. LV, § 2773, but neither infertility nor unwillingness to have children has ever been specific grounds for divorce.

{32} Even assuming arguendo that procreation is the overriding purpose of the New Mexico marriage laws, same-gender and opposite-gender couples are still similarly situated, yet they are treated differently. Opposite-gender couples who are incapable of naturally producing children, or who simply do not intend to have children, are not prohibited from marrying, and they still benefit from concomitant marital rights, protections, and responsibilities. In addition, just

as opposite-gender couples may adopt or have children utilizing assisted reproduction, so too may same-gender couples. However, opposite-gender couples who adopt or have children utilizing assisted reproduction are not prohibited from marrying, and they and their families benefit from state-granted marital rights, protections, and responsibilities. Same-gender couples are prohibited from marrying, and they and their families are deprived of the rights, protections, and responsibilities available under our marriage laws, even if they choose to have a family by adoption or assisted reproduction.

{33} Procreation is not the overriding purpose of the New Mexico marriage laws. The purpose of the New Mexico marriage laws is to bring stability and order to the legal relationships of committed couples by defining their rights and responsibilities as to one another, their property, and their children, if they choose to have children. This purpose is self-evident from the structure of our laws. NMSA 1978, Chapter 40, Article 1 (1859, as amended through 2013) generally describes our marriage laws. Civil marriage is purely secular; it is a civil contract. Section 40-1-1. The civil contract must be solemnized during a ceremony by ordained clergy or certain other designated officials who are not ordained clergy. Section 40-1-2. With respect to children, the general marriage laws provide that "[a] child born to parents who are not married to each other has the same rights pursuant to the law as a child born to parents who are married to each other." Section 40-1-16(A).

{34} NMSA 1978, Chapter 40, Article 2 generally describes the rights of married persons. It begins by specifying that the "[h]usband and wife contract toward each other obligations of mutual respect, fidelity and support." Section 40-2-1. Other provisions in Article 2 describe in general terms marriage settlements or separation contracts, requiring that any such agreements be in writing. Section 40-2-4.

{35} NMSA 1978, Chapter 40, Article 3 defines the property rights of a married couple and establishes equality in property ownership by enacting the Community Property Act, NMSA 1978, §§ 40-3-6 to -17 (1973, as amended through 1997). Section 40-3-7. Gender-neutral language is used throughout the Community Property Act. *See* §§ 40-3-6 to -17. NMSA 1978, Chapter 40, Article 4 provides for the orderly dissolution of a marriage. *See* §§ 40-4-1 to -20. Finally, the Family Preservation Act, NMSA 1978, §§ 40-15-1 to -4 (2005), also supports our conclusion that the overriding purpose of our marriage laws is the stability of marriage for the benefit of married couples and their families. "The purpose of the Family Preservation Act is to confirm the state's policy of support for the family and to emphasize the responsibilities of parents and the state in the healthy development of children and the family as an institution." Section 40-15-2. These statutes do not indicate a legislative concern with whether a couple procreates. Instead, these statutes, when considered as a whole, evince an overriding concern with protecting the stability of family units, whether they are procreative or not.

{36} We conclude that same-gender couples who are in loving and committed relationships and want to be married under the laws of New Mexico are similarly situated to opposite-gender couples who likewise are in loving and committed relationships and want to be married. Other courts that have considered this issue have also found that same-gender and opposite-gender couples who want to marry are similarly situated. In *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), the California Supreme Court concluded that the two classes are similarly situated because:

> Both groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine "'whether distinctions between the two groups justify the unequal treatment.'"

Id. at 435 n.54 (quoting *People v. Hofsheier*, 129 P.3d 29, 37 (Cal. 2006)), *superseded by constitutional amendment as stated in Strauss v. Horton*, 207 P.3d 48, 115 (Cal. 2009) and *Hollingsworth v. Perry*, ___ U.S. ___, ___, 133 S. Ct. 2652, 2659 (2013).

{37} In *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), the opponents of same-gender marriages argued that same-gender couples are not similarly situated to opposite-gender couples because same-gender couples seek to marry someone of the same sex, unlike opposite-gender couples. *Id.* at 423-24. The Connecticut Supreme Court rejected this argument, noting that other than wanting to marry someone of the same sex, same-gender couples otherwise meet all of the eligibility requirements for marriage, including the public safety requirements of age and consanguinity. *Id*. at 424. In addition, same-gender couples "share the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and they share the same interest in having a family and raising their children in a loving and supportive environment." *Id*.

{38} The Iowa Supreme Court advanced a similar rationale in recognizing that same-gender couples are similarly situated to opposite-gender couples.

> Therefore, with respect to the subject and purposes of Iowa's marriage laws, we find that the plaintiffs are similarly situated compared to heterosexual persons. Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples. Moreover, official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples.

Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009). We are persuaded that the same analysis applies to same-gender couples in New Mexico who want to get married. Having concluded that same-gender and opposite-gender couples who want to marry are similarly situated, we next consider the level of scrutiny to apply.

Intermediate scrutiny applies because the legislation at issue affects a sensitive class

{39} Three potential levels of scrutiny are available under an equal protection challenge. First, if the statutes treat a suspect class differently, the least deferential standard of review, strict scrutiny, applies, and the burden is on the party supporting the statutes to prove that the legislation furthers a compelling state interest. *Breen*, 2005-NMSC-028, ¶ 12. Second, if the statutes treat differently a sensitive class such as persons with a mental disability, an intermediate standard of review applies, which requires the party supporting the statutes to prove that the legislation is substantially related to an important governmental interest. *Id*. ¶ 28. Third, if the statutes in question are social or economic legislation that do not treat a suspect or sensitive class differently, the most deferential standard of review, rational basis, applies, and the burden is on the party challenging the statutes to prove that the legislation is not rationally related to a legitimate governmental purpose. *Id*. ¶ 11.

{40} Plaintiffs contend that strict scrutiny should be applied to their equal protection challenge because prohibiting their marriages denies same-gender couples rights based on their sex. They cite *NARAL*, 1999-NMSC-005, ¶ 43, to support their argument that New Mexico legislation which creates gender-based classifications must have a "compelling justification" to satisfy the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution.

{41} We do not agree that the marriage statutes at issue create a classification based on sex. Plaintiffs have conflated sex and sexual orientation. The distinction between same-gender and

opposite-gender couples in the challenged legislation does not result in the unequal treatment of men and women. On the contrary, persons of either gender are treated equally in that they are each permitted to marry only a person of the opposite gender. The classification at issue is more properly analyzed as differential treatment based upon a person's sexual orientation.

{42} The New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1953, as amended through 2007), was amended in 2003 to add "sexual orientation" as a class of persons protected from discriminatory treatment. 2003 N.M. Laws, ch. 383, § 2. "Sex" had already been a protected class. 2001 N.M. Laws, ch. 347, § 1. "Sexual orientation" is defined in the NMHRA as "heterosexuality, homosexuality or bisexuality, whether actual or perceived." Section 28-1-2(P). In this case, we are concerned with those individuals who want to marry someone of the same gender, whether they are homosexual, bisexual, or transgender. Other New Mexico legislation offers protection based on sexual orientation as well as gender. *See* NMSA 1978, § 29-21-2 (2009) (prohibiting profiling by law enforcement officers on the basis of sexual orientation as well as other characteristics); NMSA 1978, § 31-18B-2(D) (2007) (including sexual orientation as a protected status under the Hate Crimes Act, NMSA 1978, §§ 31-18B-1 to -5 (2003, as amended 2007)). The need to add "sexual orientation" to these statutes would have been unnecessary if "sex" as a protected class encompassed an individual's sexual orientation. *See Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation.").

{43} Many courts that have considered the issue have applied the equal protection analysis in same-gender marriage cases based upon sexual orientation, not gender. *See In re Marriage Cases*, 183 P.3d at 436-40 (declining to analyze the equal protection challenge on the basis of sex because the distinct class is more properly viewed as being based on sexual orientation); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (same); *see also Lewis v. Harris*, 908 A.2d 196, 212-16 (N.J. 2006) (evaluating equal protection challenge in a same-gender marriage case on the basis of sexual orientation). Our analysis of sex discrimination cases has been gender-based, scrutinizing the historical discrimination against women. *NARAL*, 1999-NMSC-005, ¶¶ 36, 41, 47. For these reasons, we conclude that in a case involving same-gender marriage, the equal protection challenge should not be analyzed as a case involving sex discrimination, but must be analyzed as a case involving discrimination based on a person's sexual orientation.

Classification on the basis of sexual orientation requires intermediate scrutiny

{44} Plaintiffs contend that even if the classification at issue is based on an individual's sexual orientation, such a classification should be treated as a suspect classification requiring strict scrutiny. A suspect class is "a discrete group 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Richardson v. Carnegie Library Rest., Inc.*, 1988-NMSC-084, ¶ 27, 107 N.M. 688, 763 P.2d 1153 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 36, 125 N.M. 721, 965 P.2d 305). Race, national origin, and alienage are considered suspect classifications. *Richardson*, 1988-NMSC-084, ¶ 27. In addition, we have treated gender-based statutory classifications as suspect. *See NARAL*, 1999-NMSC-005, ¶ 27.

{45} In *NARAL*, we acknowledged that federal courts have analyzed gender discrimination cases by applying intermediate scrutiny, but we chose to apply a greater level of scrutiny. *Id*. ¶ 37. We held that legislation which involved gender-based classifications would be presumed to be unconstitutional, and the government would have the burden of establishing a compelling justification for

the legislation. *Id.* ¶¶ 36, 43. A key rationale for applying strict scrutiny was the 1973 addition of the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution, which added the language "[e]quality of rights under law shall not be denied on account of the sex of any person." *See NARAL*, 1999-NMSC-005, ¶ 29. Before this addition, Article II, Section 18 had only the language "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M. Const. art. II, § 18 (1972). We concluded that to honor the intent of the citizens of New Mexico to expand the guarantees of our Equal Protection Clause, we were obligated to apply a level of scrutiny greater than the one that was being applied by federal courts, particularly because the United States Constitution does not have a counterpart to New Mexico's Equal Rights Amendment. *NARAL*, 1999-NMSC-005, ¶¶ 29, 37 (quoting *Op. of the Justices to the House of Representatives*, 371 N.E.2d 426, 428 (Mass. 1977) ("'To use a standard . . . which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.'")).

{46} Another key rationale for applying strict scrutiny to gender-based classifications was the history of invidious discrimination against women, including restrictions on their rights to vote, hold public office, *NARAL*, 1999-NMSC-005, ¶¶ 32-34, and other "early laws [that] continued to reflect the common-law view 'that women were incapable mentally of exercising judgment and discretion and were classed with children, lunatics, idiots, and aliens insofar as their political rights were concerned.'" *Id.* ¶ 34 (quoting *State v. Chaves de Armijo*, 1914-NMSC-021, ¶ 27, 18 N.M. 646, 140 P. 1123). We credited the Equal Rights Amendment with causing the amendment and repeal of many of these laws. *NARAL*, 1999-NMSC-005, ¶ 35. Based on this analysis, we concluded that the "Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of . . . gender-based discrimination," and therefore "requires a searching judicial inquiry concerning state laws that employ gender-based classifications." *Id*. ¶ 36.

{47} In this case, the issue we must decide is whether a classification based on an individual's sexual orientation parallels classifications based on gender, race, national origin, and alienage, and whether it should therefore be treated as a suspect classification. The opponents of same-gender marriage argue that same-gender couples are not even a sensitive class because same-gender couples "possess political power that vastly exceeds their small percentage of the population," and therefore, if they do not qualify as a sensitive class, they cannot be considered a suspect class. These opponents illustrate the political power of same-gender couples by pointing to achievements that they have attained with respect to same-gender marriages[7]:

> The Democratic Party has included redefining marriage in its official party platform. *See* Platform Standing Comm., 2012 Democratic Nat'l Convention Comm., *Moving America Forward* . . . 18 (2012), *available at* http://www.democrats.org/democratic-national-platform.
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> The President and his administration support same-sex marriage. *See* Josh Earnest, *President Obama Supports Same-Sex Marriage*, The White House Blog (May 10, 2012, 7:31 PM), http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage. [http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf.]
>
> During the last five years, legislatures in seven United States jurisdictions—New Hampshire, Vermont, New York, the District

[7] "[T]his Court—or any court, trial or appellate—may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts." *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶¶ 26, 25-28, 147 N.M. 583, 227 P.3d 73 (citing *Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶ 55, 110 N.M. 621, 798 P.2d 571 (Montgomery, J., concurring in part, dissenting in part) (*Trujillo I*)), *overruled in later appeal on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 36 (*Trujillo II*).

> of Columbia, Minnesota, Delaware, and Rhode Island—have voted to redefine marriage. *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws,* National Conference of State Legislatures ([current on] July 26, 2013), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.
>
> Last year, the citizens of three States—Maine, Maryland, and Washington—decided to redefine marriage through a direct vote of the people. *See* Richard Socarides, *Obama and Gay Marriage: One Year Later*, The New Yorker (May 6, 2013), http://newyorker.com/online/blogs/newsdesk/2013/05/obama-and-gay-marriage-one-year-later.html.

{48} Focusing on the political powerlessness prong is a reasonable strategy for the opponents of same-gender marriage because whether same-gender couples (the LGBT community) are a discrete group who have been subjected to a history of purposeful unequal treatment is not fairly debatable. Until 1975, consensual sexual intimacy between persons of the same gender was prohibited and actively prosecuted in New Mexico courts under anti-sodomy laws. *See* NMSA 1953, § 40A-9-61 (1963) ((Vol. 6, 2d Repl. Pamp.), repealed, Laws 1975, ch. 109, § 8). Convictions for sodomy in New Mexico were upheld despite constitutional challenges to these laws. *See State v. Elliott*, 1976-NMSC-030, ¶ 9, 89 N.M. 305, 551 P.2d 1352 (reversing the Court of Appeals insofar as it held the sodomy statute unconstitutional). However, perhaps more importantly, as we previously noted in paragraph 42, *supra*, New Mexico has recently enacted legislation to prohibit discrimination against individuals based upon their sexual orientation, 2003 N.M. Laws, ch. 383, § 2; enacted legislation to prohibit law enforcement officers from profiling individuals based on their sexual orientation, § 29-21-2; and added sexual orientation as a protected class under hate crimes legislation, § 31-18B-2(D). None of this legislation would have been required if the LGBT community was not a discrete group which has experienced a history of purposeful unequal treatment and acts of violence.

{49} Refocusing on the contention that the LGBT community is not politically powerless, we recognize that they have had some recent political success regarding legislation prohibiting discrimination against them. However, we also conclude that effective advocacy for the LGBT community is seriously hindered by their continuing need to overcome the already deep-rooted prejudice against their integration into society, which warrants our application of intermediate scrutiny in this case. *See Breen*, 2005-NMSC-028, ¶¶ 28-29 (applying intermediate scrutiny to legislation adversely affecting persons with mental disabilities because their political advocacy remains seriously hindered despite their gains in society). The political advocacy of the LGBT community continues to be seriously hindered, as evidenced by the uncontroverted difficulty in determining whether LGBTs are under-represented in positions of political power, because many of them keep their sexual orientation private to avoid hostility, discrimination, and ongoing acts of violence. *See* Richard M. Valelly, *LGBT Politics and American Political Development*, Annu. Rev. Polit. Sci. 2012. 15:313-32 (2012). FBI statistics show that the rates of hate crimes committed against individuals based on sexual orientation have remained relatively constant over the past two decades, although they have risen slightly in the past few years, both in absolute numbers and expressed as a percentage of all types of hate crimes. Fed. Bureau of Investigation, Uniform Crime Reports: Hate Crime Statistics 1996 through 2012, *available at* http://www.fbi.gov/about-us/cjis/ucr/ucr-publications. It is reasonable to expect that the need of LGBTs to keep their sexual orientation private also hinders or suppresses their political activity. *See Windsor v. United States*, 699 F.3d 169, 184-85 (2d Cir. 2012) ("their position 'has improved markedly in recent decades,' but they still 'face pervasive, although at times more subtle, discrimination . . . in the political arena.'" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973)).

{50} Although the LGBT community has had political success, they have also seen their gains repealed by popular referendums. *Romer v. Evans*, 517 U.S. 620 (1996) and *In re Marriage Cases* provide two good examples. In *Romer*, numerous municipalities in Colorado enacted ordinances that prohibited discrimination against gays and lesbians in housing, employment, education, public accommodations, and health and welfare services. 517 U.S. at 623-24. In response to the enactment of such ordinances, the voters of Colorado amended the Colorado Constitution to preclude the three branches of government at any level of state or local government from protecting gays and lesbians against discrimination. C.R.S.A. Const. art. 2, § 30b; *Romer*, 517 U.S. at 624. The constitutional amendment adopted by the voters reads:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. (internal quotation marks omitted). In *Romer*, the United States Supreme Court invalidated the Colorado constitutional amendment because it violated the Equal Protection Clause of the United States Constitution. *Id*. at 632-33. California provides another example. After the California Supreme Court filed its opinion in *In re Marriage Cases*, California voters passed Proposition 8, which amended the California Constitution to provide that "'[o]nly marriage between a man and a woman is valid or recognized in California.'" Cal. Const., Art. I, § 7.5; *Hollingsworth v. Perry*, ___ U.S. ___, ___, 133 S. Ct. 2652, 2659 (2013).

{51} At the time this case was argued in October 2013, only a minority of states had enacted laws identifying "sexual orientation" as a protected class for purposes of anti-discrimination laws.[8] Only six states had recognized the validity of and enacted legislation permitting same-gender marriages, or civil unions, at the time this opinion was filed: Delaware, 79 Del. Laws ch. 19 (2013); Minnesota, 2013 Minn. Sess. Law Serv. 74 (West); New Hampshire, 2009 N.H. Laws 60-66; New York, N.Y. Dom. Rel. Law § 10-a (Consol. 2011); Rhode Island, R.I. Gen. Laws § 15-1-1 (2013); and Vermont, 2009 Vt. Acts & Resolves 3. Four states, Massachusetts, California, Iowa, and Connecticut, interpreted their respective constitutions to require same-gender marriages. *See In re Marriage Cases*, 183 P.3d at 452; *Kerrigan,* 957 A.2d at 482; *Varnum*, 763 N.W.2d at 904; *Goodridge*, 798 N.E.2d at 968. In three states, Maine, Maryland, and Washington, the electorate voted in favor of same-gender marriages. Ashley Fetters, Same-Sex Marriage Wins on the Ballot for the First Time in American History, theatlantic.com (Nov. 7, 2012), http://www.theatlantic.com/ sexes/archive/2012/11/same-sex-marriage-wins-on-the-ballot-for-the-first-time-in-american-history/264704/ (listing the wording of each ballot proposal). Finally, three states, New Jersey, Illinois, and Colorado, have legislation that grants same-gender couples an alternative to civil marriage and makes available to them many of the benefits granted to married couples. *See* Colo. Rev. Stat. §§ 14-15-102 to -119 (2013); 750 Ill. Comp. Stat. 75/1 to 75/90 (2011); N.J. Stat. Ann. 37:1-28 to -36 (2006).[9] The history we have just recounted demonstrates that the members of the LGBT community do not have sufficient political strength to protect themselves from purposeful discrimination.

{52} To complete the analysis of whether intermediate scrutiny should apply, we must answer whether members of the LGBT community have

[8] Twenty state civil or human rights acts prohibit discrimination against consumers based on their sexual orientation. *See* Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 Cardozo J.L. & Gender 781, 782 n.11 (Spring 2013).

[9] Held unconstitutional by *Garden State Equal. v. Dow*, ___ A.3d at ___, 2013 WL 5687193, at *2. *See* n.6, *supra*.

been subjected to a history of discrimination and political powerlessness based on a characteristic that is relatively beyond their control. *Breen*, 2005-NMSC-028, ¶ 21. This requirement cannot mean that the individual must be completely unable to change the characteristic. *See In re Marriage Cases*, 183 P.3d at 442 (recognizing that other classifications such as religion and alienage that receive heightened scrutiny do so despite the fact that individuals can change their religion or become citizens); *Varnum*, 763 N.W.2d at 893 ("The constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change."). Instead, the question is whether the characteristic is so integral to the individual's identity that, even if he or she could change it, would it be inappropriate to require him or her to do so in order to avoid discrimination? We agree with those jurisdictions which have answered this question affirmatively regarding LGBTs. *See Kerrigan*, 957 A.2d at 438-39 (holding that gays and lesbians are entitled to consideration as a quasi-suspect class because "they are characterized by a central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual's sense of self") (internal quotation marks and citation omitted); *see also In re Marriage Cases*, 183 P.3d at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Varnum*, 763 N.W.2d at 893 (same).

{53} Therefore, we conclude that intermediate scrutiny must be applied in this case because the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination. As we noted in *Breen*, to apply intermediate scrutiny, the class adversely affected by the legislation does not need to be "completely politically powerless, but must be limited in its political power or ability to advocate within the political system." 2005-NMSC-028, ¶ 18. Nor does intermediate scrutiny require the same level of extraordinary protection from the majoritarian political process that strict scrutiny demands. *Id.* It is appropriate for our courts to apply intermediate scrutiny, "even though the darkest period of discrimination may have passed for a historically maligned group." *Id.* ¶ 20. Our decision to apply intermediate scrutiny is consistent with many jurisdictions which have considered the issue. *Windsor v. United States*, 699 F.3d at 185; *Kerrigan*, 957 A.2d at 475-76; *Varnum*, 763 N.W.2d at 896.

It is unclear whether the right to marry is a fundamental right requiring strict scrutiny

{54} Before we proceed to analyze the legislation under intermediate scrutiny, we must address Plaintiffs' argument that a strict scrutiny level of review is required because an individual's right to marry the person of his or her choice is a fundamental right. The opponents of same-gender marriage respond to Plaintiffs' argument by redefining the right pursued by Plaintiffs as being the right to marry a person of the same gender. They contend that the right to marry someone of the same gender is not a fundamental right because it is not deeply rooted in New Mexico history and tradition, nor is it an important constitutional right because no state constitutional provision guarantees such a right. We conclude that the correct question is whether the right to marry is a fundamental right requiring strict scrutiny, which is a question that has not been answered by the United States Supreme Court. For the following reasons, we determine that we do not need to definitively answer this difficult question.

{55} Civil marriage is considered to be a civil right. *See, e.g.*, *Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (quoting *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). The United States Supreme Court also has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth

Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *see also Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). When fundamental rights are affected by legislation, the United States Supreme Court has applied strict scrutiny when determining whether the legislation is constitutional. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). However, regarding marriage, the United States Supreme Court does not demand "that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Zablocki*, 434 U.S. at 386. For example, in *Turner v. Safley*, 482 U.S. 78, 81, 95-97 (1987), the Supreme Court rejected the lower court's application of strict scrutiny to a prisoner's right to marry, noting that the prisoner's fundamental right to marry, "like many other rights, is subject to substantial restrictions as a result of incarceration." *Id*. at 95. In *United States v. Windsor*, the Supreme Court left unanswered the level of scrutiny it was applying to same-gender marriages. ___ U.S. at ___, 133 S. Ct. at 2706 (Scalia, J., dissenting, noting that the majority "does not apply strict scrutiny, and its central propositions are taken from rational-basis cases"). We conclude from the United States Supreme Court's equivocation in these cases that whether the right to marry is a fundamental right requiring strict scrutiny is a question that remains unanswered. We do not need to answer this question here because Plaintiffs prevail when we apply an intermediate scrutiny level of review under an equal protection analysis.

Denying same-gender couples the right to marry and all of the rights, protections, and responsibilities available under state and federal law does not survive intermediate scrutiny

{56} We will uphold the statutes at issue in this case if the opponents of same-gender marriage can prove that denying same-gender couples the right to marry—with all of its attendant statutory rights, protections, and responsibilities—is substantially related to an important governmental interest. *See Breen*, 2005-NMSC-028, ¶ 30. Once the governmental interest is identified, we must balance that interest against the burdens placed on the sensitive class compared to others who are similarly situated. *Id*. ¶ 31. We consider whether the legislation is over- or under-inclusive in its application, and attempt to determine whether the legislation is the least restrictive alternative for protecting the important governmental interest. *Id*. ¶ 32.

{57} We have interpreted the argument of the opponents of same-gender marriage as suggesting that there are three governmental interests for prohibiting same-gender couples from marrying in the State of New Mexico. First, they argue that the governmental interest in promoting responsible procreation justifies the same-gender marriage prohibition. Second, they argue that the governmental interest in responsible child rearing justifies depriving same-gender couples who marry from the benefits and protections of marriage laws. Third, they suggest that allowing same-gender couples to marry will result in the deinstitutionalization of marriage because people will spend a smaller proportion of their adult lives in intact marriages than they have in the past. During oral argument, opponents admitted that they lacked evidence to show that allowing same-gender marriages would result in married couples divorcing at an increased rate. Because this contention is not supported by the evidence in the record, the contention is without merit. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 114 P.3d 1050 (the party with the burden of proof in a constitutional challenge must support his or her argument with a "firm legal rationale" or evidence in the record (internal quotation marks and citation omitted)). To the extent that the deinstitutionalization argument was intended to inject into the analysis moral disapprobation of homosexual activity and tradition—that marriage has traditionally been between a man and a woman—both justifications have been rejected.

{58} In *Lawrence v. Texas*, 539 U.S. 558, 582 (2003), the United States Supreme Court made

it clear that it has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." It is not appropriate to define the State's interest as maintaining the tradition of marriage only between opposite-gender couples, any more than it was appropriate to define the state's interest in *Loving*, 388 U.S. at 12, as only maintaining same-race marriages. Articulating the governmental interest as maintaining the tradition of excluding same-gender marriages because "the 'historic and cultural understanding of marriage' has been between a man and a woman—cannot in itself provide a [sufficient] basis for the challenged exclusion. To say that the discrimination is 'traditional' is to say only that the discrimination has existed for a long time." *Kerrigan*, 957 A.2d at 478.

{59} We are left to decide whether prohibiting same-gender marriage with all of its attendant rights, protections, and responsibilities is substantially related to the purported important governmental interests in "responsible procreation and child-rearing," which we have already indicated are not supported in the history of New Mexico's marriage legislation. It is the marriage partners' exclusive and permanent commitment to one another and the State's interest in their stable relationship that are indispensable requisites of a civil marriage.

{60} We separately consider the purported governmental interests in responsible procreation and responsible child rearing. Regarding responsible procreation, we fail to see how *forbidding* same-gender marriages will result in the marriages of *more* opposite-gender couples for the purpose of procreating, or how *authorizing* same-gender marriages will result in the marriages of *fewer* opposite-gender couples for the purpose of procreating. The discriminatory classification is also glaringly under-inclusive. Discriminatory legislation is under-inclusive if the classification does not include all of those who are similarly situated with respect to the purpose of the law. *Dandridge v. Williams*, 397 U.S. 471, 529 (1970) (Marshall, J., dissenting). Regarding the purported legislative goal of responsible procreation, the legislation is under-inclusive because the statutes do not prohibit opposite-gender couples from marrying, even if they do not procreate because of age, physical disability, infertility, or choice.[10] Finally, although it is not clear what the opponents of same-gender marriage mean by "responsible procreation," when childless same-gender couples decide to have children, they necessarily do so after careful thought and considerable expense, because for them to raise a family requires either lengthy and intrusive adoption procedures or assistive reproduction.

{61} Same-gender couples are as capable of responsible procreation as are opposite-gender couples. We conclude that there is not a substantial relationship between New Mexico marriage laws and the purported governmental interest in responsible procreation.

{62} The final issue is whether denying the rights and protections of federal and state laws to same-gender couples who want to marry and have families by adoption or assisted reproduction furthers the State's purported interest in promoting responsible child rearing. In this case, no one denies that LGBT individuals are fully capable of entering into the kind of loving and committed relationships that serve as the foundation for families, or that they are capable of responsibly caring for and raising children. The 2010 United States Census reported that at that time, there were 111,033 households headed by same-gender couples with their own children residing in their households, and that of those households, 1,038 were in New Mexico. *United States Census 2010* and *2010 American Community Survey, Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence*

[10] It is doubtful that the government could preclude any couple from marrying because they are unwilling or unable to procreate. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

of Own Children, available at http://www.census.gov/hhes/samesex/files/ supp-table-AFF.xls. The New Mexico Court of Appeals has held that "a person's sexual orientation does not automatically render the person unfit to have custody of children." *A.C. v. C.B.*, 1992-NMCA-012, ¶ 19, 113 N.M. 581, 829 P.2d 660. This Court has held that same-gender couples have custody rights to children under the New Mexico Uniform Parentage Act, NMSA 1978, §§ 40-11A-101 to -903 (2009), because, among other reasons, "it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents." *Chatterjee*, 2012-NMSC-019, ¶¶ 5, 37. The American Psychological Association, which filed a brief amicus curiae in this case, cites to studies indicating that there is no scientific evidence that parenting effectiveness is related to the parents' sexual orientation. *See* M.E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment,* 16 Applied Developmental Sci. 98-111 (2012); M.E. Lamb & C. Lewis, *The Role of Parent-Child Relationships in Child Development,* in *Developmental Science: An Advanced Textbook* 429-68 (M.H. Bornstein & M.E. Lamb eds., 5th ed. 2005); C.J. Patterson & P.D. Hastings, *Socialization in the Context of Family Diversity,* in *Handbook of Socialization: Theory and Research* 328-51 (J.E. Grusec & P.D. Hastings eds., 2007).

{63} We need not go further than the record in this case for persuasive evidence that same-gender parents are responsible parents. As we have previously discussed, many of the Plaintiffs in this case have been in long-term, committed relationships, and many of them are raising or have raised children and grandchildren. Plaintiffs Miriam and Ona have been in a committed relationship for twenty-five years and have raised three children and one grandchild. Plaintiffs A.D. and Greg have been in a committed relationship for seven years and have raised a foster child together. Plaintiffs Monica and Cecilia have been in a committed relationship for fifteen years and have raised three daughters together. Plaintiffs Jen and Angelique have been in a committed relationship for twenty-one years and have raised three adopted sons together, one of whom is serving our country as an enlisted soldier in the United States Army.

{64} We fail to see how depriving committed same-gender couples, who want to marry and raise families, of federal and state marital benefits and protections will result in responsible child rearing by heterosexual married couples. In the final analysis, child rearing for same-gender couples is made more difficult by denying them the status of being married and depriving them of the rights, protections, and responsibilities that come with civil marriage. Innumerable statutory benefits and protections inure to the benefit of a married couple. We have identified several relating to community property rights in this opinion. *See* §§ 40-3-7 to -17 (1975) (addressing the property rights of "husband and wife"). The New Mexico Probate Code contains other benefits and protections. *See* NMSA 1978, § 45-2-807(a) (1975, as amended through 1993) (one-half of the community property goes to the surviving spouse); NMSA 1978, § 45-3-203(A)(2) (1975, as amended through 2011) (granting priority of the appointment as personal representative to the surviving spouse if the decedent did not nominate a personal representative or exclude the surviving spouse as a devisee). Married persons are granted property exemptions from creditors, receivers, or trustees to preserve essential resources and a home for the family. *See* NMSA 1978, §§ 42-10-1 to -13 (1887, as amended through 2007) (listing types of exemptions). Wrongful death damages are allocated to a surviving spouse when a tortfeasor causes the death of a spouse. *See* NMSA 1978, § 41-2-3(A) (1882, as amended through 2001) (allocating wrongful death damages to the surviving spouse). A spouse has priority to make healthcare and end-of-life decisions for an incapacitated spouse, NMSA 1978, § 24-7A-1(G) (1995, as amended through 2009), by virtue of being a spouse, NMSA 1978, § 24-7A-5(B)(1) (1995, amended 1997). Conversely, a member of an unmarried couple must establish the quality and quantity of the relationship with his or her incapacitated partner—issues that

frequently become contentious—before he or she can make healthcare and end-of-life decisions on behalf of the incapacitated partner. *See* § 24-7A-5(B)(2) ("[A]n individual in a long-term relationship of indefinite duration with the patient" may act as a surrogate to make healthcare decisions for the patient.).

{65} Children are also both directly and indirectly the beneficiaries of the statutory benefits and protections available to a married couple. Children benefit from the presumption of legitimacy when they are born to a married couple. Section 40-11A-204(A). In the event of separation or divorce, children benefit from orderly child custody proceedings, § 40-4-9; child support, § 40-4-11; joint custody, § 40-4-9.1(B); and the important doctrine which requires courts to consider the best interests of the child. In addition, as we noted in *Chatterjee*, the best interests of a child do not depend on a parent's sexual orientation or marital status. 2012-NMSC-019, ¶¶ 34-37.

{66} We have not attempted to provide an exhaustive list of the statutory rights and protections available to a married couple, but the essence of many of the statutes that we have identified is to assist with the stability of the relationship and the safeguarding of important collective resources. The burdens on same-gender couples who want to marry and who are deprived of federal and state benefits and protections, compared to opposite-gender couples who want to marry and are therefore eligible for federal and state benefits and protections, is readily apparent and, if same-gender marriages are not legally permitted, inequitable. The enhanced income and the laws that create financial security for married couples are important sources of stability for a family bonded by marriage. This is evident not only during end-of-life circumstances, but also in the event of a separation or divorce. By denying same-gender couples the right to marry, the Legislature also deprives them of the protections of New Mexico divorce laws. Instead, same-gender couples and their children are forced into courts of equity without the benefit of property division laws, child support, child custody, and visitation laws that minimize uncertainty for the family unit.

{67} Excluding same-gender couples from civil marriage prevents children of same-gender couples from enjoying the security that flows from the rights, protections, and responsibilities that accompany civil marriage. There is no substantial relationship between New Mexico's marriage laws and the purported governmental interest of responsible child rearing. There is nothing rational about a law that penalizes children by depriving them of state and federal benefits because the government disapproves of their parents' sexual orientation.

{68} We invited the active participation in this case of amici curiae to ensure that the important issues before us were properly and thoroughly briefed and argued to this Court. The parties and amici have had ample opportunity to articulate a constitutionally adequate justification for limiting marriage to opposite-gender couples. The supposed justifications for the discriminatory legal classification are categorically at odds with the comprehensive legislative scheme that is intended to promote stable families and protect the best interests of children. Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution.

Remedy

{69} Having declared the New Mexico marriage laws unconstitutional, we now determine the appropriate remedy. We decline to strike down our marriage laws because doing so would be wholly inconsistent with the historical legislative commitment to fostering stable families through these marriage laws. Instead, "civil marriage" shall be construed to mean the voluntary union of two persons to the exclusion of all others. In addition, all rights, protections, and responsibilities that result from the marital relationship shall

apply equally to both same-gender and opposite-gender married couples. Therefore, whether they are contained in NMSA 1978, Chapter 40 or any other New Mexico statutes, rules, regulations, or the common law, whenever reference is made to marriage, husband, wife, spouse, family, immediate family, dependent, next of kin, widow, widower or any other word, which, in context, denotes a marital relationship, the same shall apply to same-gender couples who choose to marry.

{70} With respect to the forms required by Section 40-1-18, gender-neutral language shall be utilized by the Clerks. Section 40-1-17 states that "the form of application, license and certificate shall be substantially as provided in Section 40-1-18." Therefore, to comply with the New Mexico Constitution, gender-neutral language shall be utilized in identifying the applicants and spouses.

{71} We grant a writ of superintending control and order the courts to mandate compliance with the holdings and rationale of this opinion.

{72} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

BARBARA J. VIGIL,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-014

Filing Date: May 8, 2014

Docket Nos. 33,896, 33,949

JAMES RODRIGUEZ, individually and as representative of the Estates of JANELL L. RODRIGUEZ and DAVID RODRIGUEZ, deceased, LEANN AGUILAR, DOMENIC A. RODRIGUEZ, JUAN M. TERRAZAS, individually and as representative of the Estate of VIVIANA E. TERRAZAS, deceased, LUDIVINA TERRAZAS ENRIQUEZ, and BILLY J. TRUJILLO, as next friend of ISAIAH TRUJILLO,

Plaintiffs-Petitioners,

v.

DEL SOL SHOPPING CENTER ASSOCIATES, L.P. a/k/a DEL SOL SHOPPING CENTER, BGK PROPERTIES, INC., BGK REALTY, INC., BGK PROPERTY MANAGEMENT, L.L.C., and BGK EQUITIES III, INC.,

Defendants-Respondents,

and

MARIA C. BUSTAMANTE, as representative of the Estate of MICHAEL SOLCHENBERGER, and his wife LYDIA SOLCHENBERGER, deceased,

Plaintiffs-Petitioners,

v.

BGK PROPERTIES, INC., DEL SOL SHOPPING CENTER ASSOCIATES, L.P., and CONCENTRA HEALTH SERVICES, INC.,

Defendants-Respondents.

and

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Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI Sarah M. Singleton and Clay Campbell, District Judges

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OPINION

CHÁVEZ, Justice.

{1} In this opinion we clarify and expressly hold that foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases. We reaffirm our adoption of Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 comment j (2010), *see Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶¶ 15, 18, 148 N.M. 646, 241 P.3d 1086, and require courts to articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited. Foreseeability is a fact-intensive inquiry relevant only to breach of duty and legal cause considerations. What may not be foreseeable under one set of facts may be foreseeable under a slightly different set of facts. Therefore, foreseeability cannot be a policy argument because foreseeability is not susceptible

to a categorical analysis. We do not hold that courts may never consider foreseeability; however, when a court does so, it is to analyze no-breach-of-duty or no-legal-cause as a matter of law, not whether a duty exists.

BACKGROUND

{2} In these consolidated cases, a truck crashed through the front glass of the Concentra Medical Clinic (Concentra) in the Del Sol Shopping Center (Del Sol) (collectively Defendants) in Santa Fe, killing three people and seriously injuring several others. Both groups of Plaintiffs (collectively Plaintiffs) sued Del Sol's owners and operators, alleging that Del Sol negligently contributed to the accident by, among other things, failing to adequately post signage; failing to install speed bumps; failing to erect barriers that would have protected buildings, employees, and visitors from errant vehicles; or failing to use other traffic control methods in the parking lot. Relying on *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶¶ 8–9, 146 N.M. 520, 212 P.3d 408, both district courts granted summary judgment and found that this accident "was not foreseeable" as a matter of law, and therefore found that no duty existed.

{3} On appeal, the Court of Appeals consolidated the two cases and affirmed the district courts' common ruling on summary judgment that Defendants "had no duty to protect Plaintiffs inside the building from criminally reckless drivers." *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2013-NMCA-020, ¶ 1, 297 P.3d 334, *cert. granted*, 2013-NMCERT-001. After an exhaustive analysis of New Mexico precedent, the Court of Appeals correctly rejected the foreseeability-driven duty analysis relied upon by the district courts, stating that it was affirming both cases based on a "policy-driven duty analysis advanced by the Restatement (Third) of Torts . . . and recently embraced by our New Mexico Supreme Court in *Edward C.* . . . , 2010-NMSC-043, ¶ 15." *Del Sol*, 2013-NMCA-020, ¶ 1. We agree with the Court of Appeals that New Mexico case law has created confusion regarding the extent to which foreseeability considerations are relevant to the legal determination of duty. *Id.* ¶¶ 6–11. We will not belabor the discussion of the cases that have caused the confusion, including *Edward C.*, which noted that foreseeability plays some role, although it is limited, in the determination of duty. Instead, we take this opportunity to explain why foreseeability should not be considered when determining duty, both generally and when considering the analysis of the Court of Appeals in these cases. We overrule prior cases insofar as they conflict with this opinion's clarification of the appropriate duty analysis in New Mexico. And because we conclude that the Court of Appeals analysis is a no-breach-of-duty analysis more than a policy-driven duty analysis, we reverse the Court of Appeals.

DISCUSSION

{4} Foreseeability and breach are questions that a jury considers when it decides whether a defendant acted reasonably under the circumstances of a case or legally caused injury to a particular plaintiff. *Torres v. State*, 1995-NMSC-025, ¶ 15, 119 N.M. 609, 894 P.2d 386. Juries are instructed that "[a]s the risk of danger that should reasonably be foreseen increases, the amount of care required also increases." UJI 13-1603 NMRA. Foreseeability as it relates to breach of duty is a general analysis and does not require that the particular harm to the plaintiff have been anticipated. *See Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 23, 137 N.M. 64, 107 P.3d 504 ("Foreseeability does not require that the particular consequence should have been anticipated, but rather that some general harm or consequence be foreseeable." (internal quotation marks and citation omitted)). The argument before the jury when it is determining whether breach occurred is whether the foreseeable likelihood and severity of injuries that might have occurred due to the defendant's conduct warranted the additional precautions argued by the plaintiff. *See Ford v. Bd. of Cnty. Comm'rs*, 1994-NMSC-077, ¶ 12, 118 N.M. 134, 879 P.2d 766 (holding that "the ordinary principles of negligence . . . govern a landowner's conduct as to a licensee

and invitee. A landowner or occupier of premises must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk."). These ordinary arguments relate to breach of duty and legal cause, and are not policy arguments that would justify a no-duty determination or modification of an existing duty.

{5} In these cases, the Court of Appeals framed the issue as "[w]hat duty should owner/occupants of a shopping center in New Mexico have to protect business invitees within its buildings from vehicles that depart the confines of designated parking areas?" *Del Sol*, 2013-NMCA-020, ¶ 12. The Court of Appeals then correctly summarized the law in paragraphs 13 and 14 of its opinion. *Id.* The owner/occupier owes a duty of ordinary care under the circumstances, *Ford*, 1994-NMSC-077, ¶ 12, including the duty to exercise ordinary care to prevent harmful conduct from a third person, even if the third person's conduct is intentional, *Reichert v. Atler*, 1994-NMSC-056, ¶ 11, 117 N.M. 623, 875 P.2d 379. The duty of ordinary care applies unless the owner/occupier can establish a policy reason, unrelated to foreseeability considerations, that compels a limitation on the duty or an exemption from the duty to exercise ordinary care. There are a number of cases that illustrate how policy considerations limit the duty of ordinary care.

{6} In *Edward C.*, we found a policy reason to modify, albeit minimally, the duty of ordinary care for owners/occupiers of commercial baseball stadiums. 2010-NMSC-043, ¶ 40. The owners/occupiers asked this Court to adopt the "baseball rule," which imposes upon owners/occupiers only a limited duty of care to assure the safety of spectators. *Id.* ¶¶ 8–10. Under the baseball rule, the proprietor of the baseball stadium only has a duty (1) to screen the area of the field behind home plate, and (2) to a sufficient extent, to protect those spectators from being struck by a ball leaving the field of play. *Id.* ¶ 23. We concluded that the unique relationship between the baseball stadium owners/occupiers and their fans, along with the spectators' desire to participate in the game by catching foul balls, warranted a modification of the duty to exercise ordinary care. *Id.* ¶¶ 25, 40. However, we were unwilling to modify the duty of ordinary care to the extent desired by the stadium owners/occupiers. *Id.* ¶¶ 8, 10, 40. Instead, we held that a baseball stadium's owners/occupiers have a duty to "exercise[] ordinary care not to increase the inherent risk of being hit by a projectile leaving the field [of play]," which is symmetrically balanced against the spectators' duty to exercise care to protect themselves from the same risk. *Id.* ¶ 41. The stadium owners'/occupiers' duty of ordinary care remained undisturbed for other premises liability claims. *Id.*

{7} By contrast, in *Baldonaldo v. El Paso Natural Gas Co.*, 2008-NMSC-005, ¶ 2, 143 N.M. 288, 176 P.3d 277, we adopted a policy-based approach to modify the firefighter's rule first recognized in *Moreno v. Marrs*, 1984-NMCA-077, ¶¶ 20–21, 102 N.M. 373, 695 P.2d 1322, which precluded firefighters from recovering for injuries sustained while fighting a fire, except in very limited circumstances. In *Baldonado*, the firefighters asked us to abolish the firefighter's rule entirely because it was outdated, "as evidenced by the several jurisdictions that [had] abolished the rule." 2008-NMSC-005, ¶ 8. We declined to abolish the firefighter's rule, but held that policy considerations—the need to encourage the public to request rescue from firefighters while discouraging the public from creating the need for rescue through reckless or intentional acts—warranted a modification of the existing rule. *Id*. ¶¶ 15–18, 21. We expanded firefighters' right to pursue litigation, but only if the defendant was alleged to have acted recklessly or intentionally. *Id.* ¶ 18.

{8} Restatement (Third) of Torts itself cites two New Mexico cases to illustrate the difference between a policy-driven and a foreseeability-driven approach to a duty analysis. The first case, *Chavez v. Desert Eagle Distributing Co.*, 2007-NMCA-018, 141 N.M. 116, 151 P.3d 77, is an example of a duty analysis inconsistent with the Restatement approach. Restatement (Third) of Torts, *supra*, § 7 cmt. j at 101–02 (reporter's note

to cmt. j). The second case, *Gabaldon v. Erisa Mortgage Co.*, 1997-NMCA-120, 124 N.M. 296, 949 P.2d 1193, *affirmed in part, reversed in part on other grounds*, 1999-NMSC-039, ¶ 39, 128 N.M. 84, 990 P.2d 197, is cited as representative of the approach recommended by the Restatement. Restatement (Third) of Torts, *supra*, § 7 cmt. j at 102 (reporter's note to cmt. j).

{9} In *Desert Eagle*, the question was whether a distributor who sold alcohol to a casino owed a duty to plaintiffs injured by a drunk driver who was served alcohol by the casino. 2007-NMCA-018, ¶ 1. The Court of Appeals held that the distributor did not owe a duty to the plaintiffs, discussing at length why it was not foreseeable to the distributor that the casino would serve alcohol to an intoxicated patron. *Id.* ¶¶ 17–24. The foreseeability-driven analysis is what drew criticism in the Restatement. Curiously, the Court of Appeals stated that had the plaintiffs' alleged facts indicating the distributor knew that the casino would serve alcohol in violation of the law, it would have been easier to find foreseeability. *Id.* ¶ 23. This statement by the Court of Appeals illustrates how fluid the foreseeability analysis can be depending on changing fact patterns—a reason for courts *not* to assess foreseeability when considering the existence of a duty. Foreseeability considerations should not be used by a judge to determine the scope of duty, because not even the most experienced judge is capable of anticipating all possible facts that might affect future foreseeability determinations in similar cases.

{10} However, the *Desert Eagle* court articulated a much stronger policy reason why the distributor did not have a duty—the "legislature wanted to limit liability for alcohol-related injuries and deaths resulting from the sale or service of alcohol to those who actually exercised some degree of control over the service or consumption of alcohol." 2007-NMCA-018, ¶ 31. Had the *Desert Eagle* court limited its analysis to the policy consideration, its approach would have been consistent with the Restatement.

{11} In *Gabaldon*, the Court of Appeals considered whether to recognize a new duty for non-possessory landlords. The question regarding duty was whether the lessor of a wave pool park had a legal duty to exercise ordinary care in selecting the tenant of the park. 1997-NMCA-120, ¶ 17. The *Gabaldon* court stated "[w]here the discussion of duty involves recognition of a new cause of action, or as here, extension of a recognized theory to a new setting, the issue is better framed as a question of policy." *Id.* ¶ 21. The Court of Appeals articulated policy reasons to support its holding that when:

> the property is designed, intended and required to be used for a particular purpose, and the use has highly dangerous potentialities involving a substantial risk to the general public, and such danger or risk to the public is such that it may be foreseen by the lessor, the lessor owes a duty of reasonable care in selecting and entrusting such property to a lessee.

Id. ¶ 46 (internal quotation marks and citation omitted). The Court of Appeals left the foreseeability considerations for the jury. *Id.* ¶¶ 48–49 (finding that the lessor's knowledge that the lessee did not have experience in the operation of a wave pool created genuine issues of material fact). The policy-driven approach employed by the *Gabaldon* court was cited with approval in Restatement (Third) of Torts, *supra*, § 7 comment j at 102 (reporter's note to comment j).

{12} In the *Del Sol* cases, the Court of Appeals exempted owners/occupiers of shopping centers from the duty of ordinary care to protect invitees within its buildings from vehicles that departed the confines of designated parking areas. *Del Sol*, 2013-NMCA-020, ¶ 29. To arrive at its no-duty determination, the Court of Appeals considered (1) the nature of the activity, (2) the parties' relationship to the activity, and (3) public policy. *Id.* ¶ 14. Regarding the nature of the activity and the parties' relationship to the activity, the Court was persuaded by statistical evidence that there was a "sheer improbability and lack of inherent danger" of vehicle-pedestrian accidents *within* the related businesses. *Id.* ¶ 16. The flaw in the analysis is that it is a foreseeability-driven analysis, as

evidenced by the authorities on which the Court of Appeals relied. *See, e.g.*, *Eckerd-Walton, Inc. v. Adams*, 190 S.E.2d 490, 492 (Ga. Ct. App. 1972) (finding that a merchant could not reasonably anticipate that a negligent motorist would attempt to drive through a store); *Mack v. McGrath*, 150 N.W.2d 681, 686 (Minn. 1967) (concluding that liability cannot be predicated on the remote possibility that a vehicle would jump a curb and expose tenants to injury).

{13} The cases relied upon by the Court of Appeals could be read to invoke the concept of remoteness as articulated by Justice Ransom's dissent in *Calkins v. Cox Estates*, 1990-NMSC-044, ¶¶ 23–25, 110 N.M. 59, 792 P.2d 36, and his special concurrence in *Solon v. WEK Drilling Co.*, 1992-NMSC-023, ¶ 21, 113 N.M. 566, 829 P.2d 645. Unfortunately, remoteness also tends to invite a discussion of the particular facts of a case, despite Justice Ransom's admonition that "[r]emoteness, however, is not a fact. It is a policy." *Calkins*, 1990-NMSC-044, ¶ 23 (Ransom, J., dissenting). Justice Ransom may have seen remoteness solely as a policy determination and not a factual one. However, remoteness often leads toward a discussion of the facts in a particular case; insofar as it does so, it is not a discussion of policy. Since remoteness invites a discussion of particularized facts, we do not approve of using remoteness as the basis for a policy determination. A determination of no duty based upon the foreseeability, improbability, or remote nature of the risk is inconsistent with the Restatement approach, which provides that only "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." Restatement (Third) of Torts, *supra*, § 7(b).

{14} In New Mexico, juries are instructed to consider the foreseeability of risk of injury from a third person in premises liability cases. UJI 13-1320 NMRA ("The [owner's][occupant's] duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [owner] [occupant] also increases."). The greater the probability for foreseeable injury to result from certain behavior and the greater the range of severity of injury, the more careful the defendant is required to be. In contrast, the defendant does not have to be as careful when the probability of injury is not as likely, which is relevant to the breach of duty questions usually reserved for the jury. The duty to exercise ordinary care does not only arise in situations where there is an inherent danger. *See Saiz v. Belen Sch. Dist.*, 1992-NMSC-018, ¶ 20, 113 N.M. 387, 827 P.2d 102 ("Activities that are 'inherently dangerous' represent an intermediate category of hazardous activity between those that are nonhazardous (or only slightly so), in which harm is merely a foreseeable consequence of negligence, and activities that are ultrahazardous, in which the potential for harm cannot be eliminated by the highest degree of care."), *limitation of holding on other grounds recognized by Gracia v. Bittner*, 1995-NMCA-064, ¶ 18, 120 N.M. 191, 900 P.2d 351.

{15} The Court of Appeals also concluded that there was not anything about Del Sol and its adjacent parking lot that "justifies a broadened standard of care owed to visitors." *Del Sol*, 2013-NMCA-020, ¶ 17. However, Plaintiffs are not seeking a broadened standard of care; they simply contend that Del Sol breached the duty of ordinary care. Implicit in the Court of Appeals' determination is that if there was something about the Del Sol parking lot—some significant difference in the fact pattern—the result may have been different. This also suggests a foreseeability-driven analysis. Once a court begins to rely on factual details in deciding whether to modify the duty of ordinary care or exempt a defendant from that duty, the court is really determining that there has been no breach of duty. Similarly, a court's concern that the plaintiffs are seeking a broader standard of care is a concern about whether the plaintiffs expect too much of the defendants—something more than what is reasonable—which is relevant to the issue of breach of duty, not whether a duty is owed, and breach of duty questions are usually reserved for the jury.

{16} Regarding public policy considerations, the Court of Appeals began its analysis by stating that it would apply public policy as the primary barometer in ascertaining the "scope of ordinary care" owed by Defendants to Plaintiffs. *Id.* ¶ 18. As a preliminary matter, we note that Restatement (Third) of Torts, *supra*, § 7 comment j is concerned with the scope of duty, and not with the scope of ordinary care. *See Edward C.*, 2010-NMSC-043, ¶¶ 14, 18. This distinction is more than semantic, because to be concerned about the scope of ordinary care is to be concerned about whether a defendant's conduct was reasonable—a breach of duty analysis. Restatement (Third) of Torts, *supra*, § 7 cmt. i (discussing the mistake that courts sometimes make when they "inaptly express" a determination that there was no breach of duty as a matter of law in terms of no duty). On the other hand, concerns about the scope of duty require a judge to articulate policy considerations when modifying the duty of ordinary care or exempting a class of defendants from the duty of ordinary care in a class of cases.

{17} The Court of Appeals' specific policy considerations centered around the lack of any:

> "laws, codes or ordinances promulgated by the legislature, nor any governing body, that mandate the placement of barriers sufficient to prevent vehicles that leave the designated roadway from crashing through businesses in a strip mall." Similarly, nothing in the record presented by any plaintiff indicates that Defendants' parking lot was not in full compliance with applicable state and local building codes.

Del Sol, 2013-NMCA-020, ¶ 18. Plaintiffs did not plead a theory of negligence per se—that Defendants violated a mandatory law or ordinance. Instead, Plaintiffs' complaint is based solely on a claim that Defendants breached a duty of ordinary care. Full compliance with codes, laws, or ordinances that are silent with respect to the relevant issue—the need for protective devices to minimize risk from vehicle-building collisions—cannot dictate whether the duty of ordinary care should be modified. The only conclusion that can be drawn from such silence is that the legislative branches of local or state government have simply not addressed the issue. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 14, 134 N.M. 43, 73 P.3d 181 (holding that silence only means that the Legislature has not spoken). Codes and regulations are minimum standards. Santa Fe, N.M. Code 1988 ch. 7-1.1(A)(4) (as amended through January 8, 2014) (adopting the 2009 International Building Code, by and through the 2009 New Mexico Commercial Building Code found at NMAC 14.7.2); *see, e.g.*, 14.7.2.6 NMAC ("The purpose of this rule is to establish minimum standards for the general construction of commercial buildings in New Mexico."). We have also previously rejected the notion that compliance with codes and regulations is conclusive evidence that someone has exercised ordinary care. *Brooks v. Beech Aircraft Corp.*, 1995-NMSC-043, ¶ 38, 120 N.M. 372, 902 P.2d 54. Juries are instructed that:

> What is customarily done by those engaged in the supplier's business is evidence of ordinary care. However, what ought to be done is fixed by a standard of ordinary care, whether it is usually complied with or not.
>
> Compliance with [industry [customs] [standards] [codes] [rules___ [or] [governmental [rules] [standards] [codes___ is evidence of ordinary care, but it is not conclusive.

UJI 13-1405 NMRA. Instead, these are considerations that go to the issue of the defendant's reasonableness.

{18} The Court of Appeals also rejected two categories of evidence tendered by Plaintiffs to prove that Defendants failed to act reasonably in order to conclude that Defendants were exempt from the duty of ordinary care. *Del Sol*, 2013-NMCA-020, ¶¶ 19–20. First, the Court rejected the affidavit of Plaintiffs' safety expert, which was supported by academic publications in safety engineering, that identified hazards on Defendants' property that contributed to the errant vehicle crashing into the

building and methods to minimize the hazards. *Id.* Second, the Court did not find persuasive several photographs of other local businesses that have installed safety features similar to those identified by Plaintiffs' safety engineer. *Id.* ¶ 19. The Court of Appeals was not persuaded that the proffered evidence "legally establishes a norm of professional safety giving rise to an expanded duty to protect." *Id.* ¶ 20. The Court also expressed the opinion that more safety precautions than those recommended by the safety engineer would be necessary to "have definitively prevented a runaway vehicle from crashing through Del Sol's storefronts" and "have prevented the injuries and loss of life." *Id.* In summary, the Court of Appeals did not believe that the proffered evidence "indicate[d] that Del Sol's election not to employ such safety devices [fell] beneath professional norms of safety," nor did the evidence "establish a newly applicable safety norm, a building code-derived regulation, or a public policy" that would support "the heightened standards of safety advanced by Plaintiffs." *Id.* ¶¶ 20–21.

{19} Weighing the evidence in this matter is not a proper policy consideration for departing from the duty of ordinary care. In these cases, Plaintiffs tendered the affidavit and photographs of other local businesses that have installed protective devices as evidence of what type of reasonable precautions should be taken and have been taken to avoid vehicle-building crashes. If a jury is persuaded that Plaintiffs are asking too much of Defendants, the jury will decline to hold Defendants liable, not because no duty of ordinary care was owed, but because even having the duty of ordinary care, Defendants either acted reasonably under the circumstances or their breach of duty did not legally cause the injuries and deaths at Concentra. Courts should not engage in weighing evidence to determine whether a duty of care exists or should be expanded or contracted—weighing evidence is the providence of the jury; instead, courts should focus on policy considerations when determining the scope or existence of a duty of care.

{20} We also reject the notion that requiring owners/occupiers of buildings and land to exercise ordinary care makes them "absolute insurers of patron safety" from:

> remote mechanical and human fallibility . . . forcing businesses into one of three undesirable alternatives: (1) significantly revis[ing] the physical and aesthetic layout of buildings and parking lots at substantial expense, (2) retain[ing] the status quo and risk[ing] the enormous cost of catastrophic liability, or (3) clos[ing] down the business premises entirely.

Id. ¶ 27. First and foremost, the notion ignores our comparative fault system and the weight a jury will give to foreseeability considerations. Second, the presumptive undesirable alternatives identified by the Court of Appeals do not appear to be supported by any evidence. *Id.* At a minimum, the affidavit of Plaintiffs' safety engineer and the photos of other businesses in the vicinity, which are apparently still in business, that have safety features the expert opines would be reasonable to minimize the danger of vehicle-building crashes, create a genuine issue of material fact. *Id.* ¶¶ 20–21.

{21} The Court of Appeals also concluded that Del Sol could not have "anticipated, prevented, or even reacted to" the runaway truck, and the Court therefore could "discern no basis on the facts of these cases to legally extend a 'duty to protect' visitors from runaway vehicles into the responsibility of ordinary care applicable to Defendants." *Id.* ¶ 24. To say that Del Sol could not have "anticipated" is to say that the event was not foreseeable, an approach the Court of Appeals sought to avoid, and which we reject in determining the existence of a duty. To say that Del Sol could not have "prevented, or even reacted to" a runaway truck has no bearing on whether a duty exists; rather, it questions whether Del Sol acted reasonably and did not breach the duty of ordinary care.

{22} In essence, the Court of Appeals' analysis is focused predominantly on foreseeability considerations and the reasonableness of Defendants' conduct. Foreseeability

determinations are reserved for a jury because such determinations require the jury's common sense, common experience, and its consideration of community behavioral norms. The multiple perspectives, shared and diverse experiences of a jury inform its decision-making. As stated by the United States Supreme Court over one hundred years ago, "[i]t is assumed that twelve [people] know more of the common affairs of life than does one [person], that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (1 Wall.) 657, 664 (1873). This assumption is reflected in the Seventh Amendment of the United States Constitution and Article II, Sections 12 and 14 of the New Mexico Constitution, which are the only provisions in our constitutions that command citizen participation in our democracy—service on a jury, whether it is a grand jury, criminal or civil—for the benefit of every other citizen. N.M. Const. art. II, §§ 12 & 14; NMSA 1978, § 38-5-1 (1969, as amended through 2006). New Mexico state courts take this duty seriously and have cautiously guarded the right to jury trial in civil cases by erring on the side of allowing factual issues to be decided by juries. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 9, 148 N.M. 713, 242 P.3d 280.

{23} As an example of a court that correctly resisted the effort to conflate a breach-of-duty analysis with the duty analysis in a vehicle-building collision case, Restatement (Third) of Torts, *supra*, § 7 comment i cites *Marshall v. Burger King Corp*., 856 N.E.2d 1048 (Ill. 2006). Although we deem the foreseeability discussion of the *Marshall* majority unnecessary, *id.* at 1060, we agree with the ultimate conclusion that an owner/occupier owes a duty of ordinary care in vehicle-building collision cases, *id.* at 1059–60.

{24} Courts are not powerless to dismiss cases as a matter of law, despite our holding that a foreseeability-driven duty analysis is inappropriate. A court may still decide whether a defendant did or did not breach the duty of ordinary care as a matter of law, or that the breach of duty did not legally cause the damages alleged in the case. However, these determinations are materially different than a no-duty or modified-duty analysis. The court must determine that no reasonable jury would find that the defendant breached the duty of ordinary care or that the breach legally caused the plaintiff's damages. *Torres v. El Paso Elec. Co*., 1999-NMSC-029, ¶ 26, 127 N.M. 729, 987 P.2d 386 ("[A] directed verdict is appropriate only when there are no true issues of fact to be presented to a jury. A trial court should not grant a motion for directed verdict unless it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result." (alteration added) (internal quotation marks and citations omitted)), *overruled on other grounds by Herrera*, 2003-NMSC-018, ¶ 23 n.3. This determination requires judges to abandon their own personal thoughts regarding the merits of cases and to imagine the thoughts of twelve adult citizens from a variety of socio-economic backgrounds—such as scientists, college faculty, laborers, uneducated, rich, poor, persons with different political persuasions—and what that diverse group might find regarding the merits of a case. The judge can enter judgment as a matter of law only if the judge concludes that no reasonable jury could decide the breach of duty or legal cause questions except one way. Because neither the Court of Appeals nor the district court judges engaged in this analysis, we reverse and remand to the district courts for proceedings consistent with this opinion.

CONCLUSION

{25} Foreseeability is not a question for courts to consider when determining the existence of a duty, or whether to limit or eliminate an existing duty in a particular class of cases. Instead, courts must articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant does or does not have a duty or that an existing duty should be limited.

{26} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Senior Justice

RICHARD C. BOSSON,
Justice

MICHAEL D. BUSTAMANTE,
Judge

Sitting by designation

BARBARA J. VIGIL,
Chief Justice and

CHARLES W. DANIELS,
Justice
Recused

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-023

Filing Date: June 19, 2014

Docket No. 33,604

MARTIN RAMIREZ, a/k/a RICHARD G. SANCHEZ, JR.,

Petitioner-Respondent,

v.

STATE OF NEW MEXICO,

Respondent-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
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OPINION

CHÁVEZ, Justice.

{1} In *State v. Paredez*, 2004-NMSC-036, ¶ 19, 136 N.M. 533, 101 P.3d 799, we held that a criminal defense attorney who represents a noncitizen client "must advise that client of the specific immigration consequences of pleading guilty" to pending charges. An attorney's failure to do so will be ineffective assistance of counsel if the client is prejudiced. *Id*. Ramirez pleaded guilty in 1997 and now asserts that his attorney did not advise him about any immigration consequences of his pleas. The question in this case is whether our holding in *Paredez* applies retroactively and, if it does, whether Ramirez has a claim for ineffective assistance of counsel that could justify withdrawal of his pleas.

{2} We hold that *Paredez* applies retroactively to 1990, the year that this Court began to prohibit courts from accepting a guilty plea from a defendant without fulfilling the following requirements: the court must (1) ascertain that the defendant understood that a conviction may have an effect on the defendant's immigration status; (2) obtain an affidavit from the defendant that the judge personally advised the defendant of the possible effect of a conviction on the defendant's immigration status; and (3) obtain a certification from the defendant's attorney that the attorney had conferred with the defendant and explained in detail the contents of the affidavit signed by the defendant. *See* Form 9-406 NMRA (1990); Rule 5-303(E)(5) NMRA (1990); Rule 6-502(D)

(2) NMRA (1990); Rule 7-502(E)(2) NMRA (1990); & Rule 8-502(D)(2) NMRA (1990). These requirements were not new in 1997 at the time Ramirez pleaded guilty, and they were "designed to ensure a guilty plea is made knowingly and voluntarily." *See State v. Garcia*, 1996-NMSC-013, ¶ 8, 121 N.M. 544, 915 P.2d 300 (stating that "New Mexico has long recognized that for a guilty plea to be valid it must be knowing and voluntary").

BACKGROUND

{3} On January 4, 1997, Martin Ramirez was arrested and charged with possession of up to one ounce of marijuana and two other misdemeanors, contrary to NMSA 1978, Section 30-31-23(B)(1) (1990, amended 2011) (possession of up to one ounce of marijuana); NMSA 1978, Section 30-31-25.1 (1981, amended 2001) (possession of drug paraphernalia); and NMSA 1978, Section 30-22-3 (1963) (concealing identity), respectively. He appeared in metropolitan court for a custody arraignment two days later and pleaded guilty to all three charges on the advice of his public defender. In 2009, Ramirez learned that his guilty pleas in 1997 rendered him "inadmissible to the United States."[1] Ramirez filed a petition for writ of error coram nobis in the district court, seeking to vacate his metropolitan court guilty pleas on the basis of ineffective assistance of counsel. Ramirez's undisputed contentions are that he first met with his attorney right before his arraignment and that the attorney advised him that if he pleaded guilty to the charges, which he did, his sentence would be to time already served. Also apparently uncontested is Ramirez's assertion that his attorney never advised him about any immigration consequences of his guilty pleas, which was in direct conflict with the requirement that Form 9-406 (1990) be completed by the judge, the defendant, and the defendant's attorney if the defendant was represented by counsel. Form 9-406(9) (1990) required the judge to certify nine facts, including "[t]hat the defendant understands that a conviction may have an effect upon the defendant's immigration or naturalization status." Form 9-406 (1990) also required the defendant as an affiant to certify under oath that the judge had so advised the defendant. Finally, Form 9-406 (1990) required the defendant's attorney to certify "that [the attorney] has conferred with [the attorney's] client with reference to the execution of [the] affidavit and that [the attorney] has explained in detail its contents."

{4} We cannot determine from the record before us whether Form 9-406 (1990) was filed in this case because Ramirez's case files from both the metropolitan court and the public defender department were destroyed prior to the present appeal. Nonetheless, we presume that guilty plea Form 9-406 (1990) was properly utilized. *See Doe v. City of Albuquerque*, 1981-NMCA-049, ¶ 8, 96 N.M. 433, 631 P.2d 728 ("[W]e will indulge all presumptions in favor of the correctness of the procedures in the trial court.").

{5} During the hearing regarding Ramirez's petition to set aside his guilty pleas, Ramirez's counsel stated that had Ramirez known about the immigration consequences of his guilty pleas, "he would not have taken that step at that point." The Court stated that all parties were in agreement regarding Ramirez's contentions, and the State did not disagree. The court accepted as true Ramirez's allegation that he would not have entered guilty pleas in his misdemeanor charges had his attorney advised him of the immigration consequences. However, the court denied Ramirez's writ, reasoning that *Paredez* did not apply retroactively.

[1] The United States Citizenship and Immigration Services (USCIS), which operates under the Department of Homeland Security, sent Ramirez its decision on his application for waiver of grounds of inadmissability on June 22, 2009. In its decision, USCIS cited Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(2)(A)(i)(II)) to inform Ramirez that his pleas of "guilty" to the charges of possession of marijuana and other misdemeanors fell within the scope of immigration and citizenship disqualifications, or inadmissibility. The USCIS decision also explained why the discretionary power of the Attorney General to waive inadmissibility was not granted to Ramirez, despite the fact that he established that he has a child who is a United States citizen, whom he would be forced to leave behind.

{6} On appeal, the Court of Appeals held that *Paredez* and its federal corollary, *Padilla v. Kentucky*, 559 U.S. 356, 359–60 (2010) (holding that the Sixth Amendment guarantee of effective assistance of counsel requires a defendant's attorney to advise the defendant that pleading guilty to charges of transporting marijuana would result in deportation), apply retroactively in the State of New Mexico. *State v. Ramirez*, 2012-NMCA-057, ¶ 16, 278 P.3d 569. We granted the State's petition for writ of certiorari. Since we granted the State's petition, the United States Supreme Court filed its opinion in *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103 (2013), which stated that its holding in *Padilla* should not apply retroactively in federal courts because *Padilla* announced a new rule of criminal procedure. *Id.* at ___, 133 S. Ct. at 1107–08. We decline to follow *Chaidez* and we affirm the Court of Appeals because since 1990, the New Mexico Supreme Court rules and forms have required an attorney to certify having engaged the client in detail in a guilty plea colloquy that included immigration consequences. Because the requirements that Form 9-406 imposes are not new in New Mexico, our holding in *Paredez* imposing requirements that were effective in 1990 applies retroactively to 1990, the adoption date of the Form 9-406 amendment that required a defendant to understand the possible immigration consequences of a plea conviction.

DISCUSSION

{7} In *Paredez*, we held that criminal defense attorneys must determine the immigration status of their clients and must advise the client who is not a United States citizen specifically regarding the immigration consequences of a guilty plea, including whether the guilty plea is virtually certain to result in the client's deportation. 2004-NMSC-036, ¶ 19. Three key reasons motivated our holding. First, "[d]eportation can often be the harshest consequence of a non-citizen criminal defendant's guilty plea, so that 'in many misdemeanor and low-level felony cases . . . [he or she] is usually much more concerned about immigration consequences than about the term of imprisonment.'" *Id.* ¶ 18 (second alteration and omission in original) (quoting Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541, 545 (2004)). Second, "requiring . . . such advice is consistent with the spirit of [the 1992 predecessor to Rule 5-303(E)(5)], which prohibits the district court from accepting a guilty plea without first determining that the defendant has an understanding of the immigration consequences of the plea." *Paredez*, 2004-NMSC-036, ¶ 19. Forms 9-406 (applicable to the district courts) and 9-406A NMRA (applicable to magistrate, metropolitan, and municipal courts) are used in New Mexico courts in the course of accepting a guilty plea. *See* Rules 5-303(E)(5), 6-502(D)(2), 7-502(E)(2), & 8-502(D)(2) (predicating acceptance of a guilty plea by a district, magistrate, metropolitan, or municipal court, respectively, on that court's colloquy with the defendant directly, assuring the defendant's understanding of the immigration consequences of the plea). Third, a noncitizen defendant's knowing and voluntary guilty plea depends upon that defendant having received proper advice regarding the immigration consequences of the plea. *Paredez*, 2004-NMSC-036, ¶ 19.

{8} In *Paredez*, we also explained what would constitute deficient advice, and therefore ineffective assistance of counsel. *See id.* ¶¶ 13–14; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that to establish ineffective assistance of counsel, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense"). Advising a client that deportation is not a consequence when deportation is a possibility, advising the client that deportation is only a possibility when it is a virtual certainty, or failing to give the client any advice at all regarding immigration consequences all constitute evidence of deficient advice that could satisfy the first prong for ineffective assistance of counsel. *Paredez*, 2004-NMSC-036, ¶¶ 15–16. Proof that the defendant would not have pleaded guilty except for the deficient advice demonstrates prejudice. *See id.* ¶ 20. If the defendant is prejudiced by the deficient advice, the attorney's representation was ineffective, and the defendant may withdraw the guilty plea. *See id.* ¶ 19.

{9} Whether *Paredez* should apply retroactively is an issue of first impression in New Mexico. We review the retroactive application of a judicial opinion de novo. *Kersey v. Hatch*, 2010-NMSC-020, ¶ 14, 148 N.M. 381, 237 P.3d 683.

{10} *Chaidez* declined to retroactively apply *Padilla*, *Paredez*'s federal corollary, because *Padilla* represented a "new rule" under the federal analysis formulated in *Teague v. Lane*, 489 U.S. 288, 290–92 (1989) (adopting the view that "new rules [of criminal procedure are] not . . . applicable to those cases that have become final before the new rules were announced"), *holding limited on other grounds by Lockhart v. Fretwell*, 506 U.S. 364, 372–73 (1993). *Chaidez*, ___ U.S. at ___, 133 S. Ct. at 1107–08 ("*Padilla* thus announced a 'new rule.'"). The State concedes that this Court is not required to follow *Chaidez*. *See Danforth v. Minnesota*, 552 U.S. 264, 280–81 (2008) (holding that *Teague* was not intended "to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions").

{11} Pursuant to *Teague*, New Mexico does not give retroactive effect to a new criminal procedure rule. *See Kersey*, 2010-NMSC-020, ¶¶ 1, 25. The test determines whether a previously issued judicial opinion introduced a new rule of criminal procedure or merely expanded upon an already established rule. *See id.* Under *Teague*, "new rules generally should not be afforded retroactive effect unless (1) the rule is substantive in nature, in that it alters the range of conduct or the class of persons that the law punishes, or (2) although procedural in nature, the rule announces a watershed rule of criminal procedure." *Kersey*, 2010-NMSC-020, ¶ 25 (internal quotation marks and citations omitted). A "new rule" is one that "breaks new ground or imposes a new obligation on the States . . . [or where] the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* ¶ 16 (internal quotation marks and citations omitted). A rule that is not deemed a "new rule" by this test may apply retroactively.

{12} Although in *Chaidez* the United States Supreme Court clarifies "that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent," ___ U.S. at ___, 133 S. Ct. at 1108, the Court held that *Padilla* imposed "a new obligation" on attorneys to counsel their clients about the immigration consequences of their pleas, *id.* at 1110–11 (internal quotation marks and citation omitted). Rule 11 of the Federal Rules of Criminal Procedure governs the taking of guilty pleas. *See* Fed. R. Crim. P. 11. Prior to *Chaidez*, immigration consequences were not part of the plea colloquy under Rule 11(b). However, in 2013, after *Chaidez*, Rule 11 was amended to require the court to "inform the defendant of, and determine that the defendant understands, the following . . . that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." Fed. R. Crim. P. 11(b)(1)(O).

{13} Unlike the federal system, since 1990 New Mexico has required attorneys in all trial courts to advise their clients of the details of the plea colloquy. Form 9-406 was amended in 1990 to, among other things, require the judge to advise the defendant that a conviction may have an effect on the defendant's immigration status. Form 9-406 (1990), applicable to all New Mexico trial courts, also obligated the attorney to certify having explained the plea colloquy to the client in detail. As it existed after amendment in 1990, and as it appeared in 1997 when Ramirez pleaded guilty, Form 9-406 (which applied to Rules 5-303, 6-502, 7-502, and 8-502) provided:

STATE OF NEW MEXICO
COUNTY OF _____
IN THE _____ COURT

STATE OF NEW MEXICO

v. No. _____

John Doe

GUILTY PLEA PROCEEDING

The defendant personally appearing before me, I have ascertained the following facts, noting each by initialing it.

Judge's
Initial

_____ 1. That the defendant understands the charges set forth in the (complaint) (information) (indictment).

_____ 2. That the defendant understands the range of possible sentence for the offenses charged, from a suspended sentence to a maximum of _____.

_____ 3. That the defendant understands the following constitutional rights which the defendant gives up by pleading (guilty) (guilty but mentally ill):

_____ (a) the right to trial by jury, if any;

_____ (b) the right to the assistance of an attorney at all stages of the proceeding, and to an appointed attorney, to be furnished free of charge, if the defendant cannot afford one;

_____ (c) the right to confront the witnesses against him and to cross-examine them as to the truthfulness of their testimony;

_____ (d) the right to present evidence on his own behalf, and to have the state compel witnesses of his choosing to appear and testify;

_____ (e) the right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt.

_____ 4. That the defendant wishes to give up the constitutional rights of which the defendant has been advised.

_____ 5. That there exists a basis in fact for believing the defendant is (guilty) (guilty but mentally ill) of the offenses charged and that an independent record for such factual basis has been made.

_____ 6. That the defendant and the prosecutor have entered into a plea agreement and that the defendant understands and consents to its terms. (Indicate "NONE" if a plea agreement has not been signed.)

_____ 7. That the plea is voluntary and not the result of force, threats or promises other than a plea agreement.

_____ 8. That under the circumstances, it is reasonable that the defendant plead (guilty) (guilty but mentally ill).

_____ 9. *That the defendant understands that a conviction may have an effect upon the defendant's immigration or naturalization status.*

On the basis of these findings, I conclude that the defendant knowingly, voluntarily and intelligently pleads (guilty) (guilty but mentally ill) to the above charges and accept such plea. A copy of this affidavit shall be made a part of the record in the above-styled case.

_____ _____
District Judge Date

CERTIFICATE BY DEFENDANT

I certify that the judge personally advised me of the matters noted above, that I understand the constitutional rights that I am giving up by pleading (guilty) (guilty but mentally ill) and that I desire to plead (guilty) (guilty but mentally ill) to the charges stated.

_____
Defendant

Subscribed and sworn to
before me this _____
day of _____, 19_____

_____
Clerk, Notary or Other Officer Authorized to Administer Oaths

The undersigned attorney hereby certifies that he has conferred with his client with reference

to the execution of this affidavit and that he has explained in detail its contents.

_____
Defense Counsel

[As amended, effective September 1, 1990.]

(Emphasis added.)

{14} A rule may be viewed as new if its "result was not dictated by precedent existing at the time the defendant's conviction became final." *Kersey*, 2010-NMSC-020, ¶ 16 (internal quotation marks and citations omitted). The *Chaidez* majority concluded that *Padilla* announced a new rule because until *Padilla* the United States Supreme Court "had declined to decide whether the Sixth Amendment had any relevance to a lawyer's advice about matters not part of a criminal proceeding." *Chaidez*, ___ U.S. at ___, 133 S. Ct. at 1110. However, in 1990 the New Mexico Supreme Court required lawyers to advise their clients about immigration consequences as part of the criminal guilty plea proceeding. *See* Form 9-406 (1990). Our holding today aligns with Justice Sotomayor's dissent in *Chaidez*, where she wrote,

> *Padilla* did nothing more than apply the existing rule of *Strickland* . . . in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea.

Chaidez, ___ U.S. at ___, 133 S. Ct. at 1114 (Sotomayor, J., dissenting) (internal citation omitted).

{15} We surveyed the professional norms relevant in New Mexico, which indicate that counsel was obligated at the time of Ramirez's arraignment and pleas to certify having conferred with Ramirez about the plea affidavit, including potential immigration consequences of a guilty plea. These professional norms were hardly novel, even in 1990. In 1982, the American Bar Association stated the importance of criminal defense attorneys advising clients about the effect a guilty plea might have on immigration consequences. *See* 3 ABA Standards for Criminal Justice 14–3.2 cmt., at 75 (2d ed. 1982). The United States Supreme Court acknowledged ABA Standard 14–3.2 in *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 323 n.48 (2001) ("[T]he American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" (quoting ABA Standard 14–3.2 cmt., at 75)); Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, at 209 (Frank J. Remington ed., 1966) ("Effective counseling regarding the likely consequences of the guilty plea requires the lawyer to have intimate knowledge of sentencing provisions and procedures.").

{16} At the time Ramirez entered his guilty pleas, additional immigration-specific and general guidelines existed which counseled defense attorneys on how to competently advise clients regarding immigration consequences. In 1995, the National Legal Aid and Defender Association recognized that "[i]n order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of: . . . (3) other consequences of conviction such as deportation." National Legal Aid & Defender Association, *Performance Guidelines for Criminal Defense Representation* Guideline 6.2(a)(3) (1995); F. Lee Bailey & Kenneth J. Fishman, *Handling Misdemeanor Cases* § 3.7, at 5–6 (2d ed. 1992) ("In misdemeanor cases, the possible consequences of a conviction may be so drastic that the defendant must take his or her chances on a trial. . . . A convicted alien may be deported.").

{17} Although we may have decided to follow the majority opinion in *Chaidez* had we not historically included checks regarding immigration consequences in our guilty plea proceedings, the fact is that the State of New Mexico has had such a requirement since 1990. While there is no record of Form 9-406 (1990) or the corresponding plea colloquy in this case, we have held in

other cases where counsel has failed to properly advise a client during the plea entry phase that not even a record of the court's adherence to the plea colloquy cures the ineffective assistance of counsel. *See State v. Hunter*, 2006-NMSC-043, ¶ 29, 140 N.M. 406, 143 P.3d 168 (holding that where a district court "properly conducted the plea hearing, adhering to our rules governing the entry of pleas," that proper plea hearing could not "cure a defect caused by ineffective advice of counsel"). In this case, the presumptive plea colloquy between the court and Ramirez required the court to determine whether Ramirez was aware of the potential immigration consequences of his guilty pleas; and the rule prescribing that determination by the court had existed in that form for seven years preceding Ramirez's arraignment and pleas. We hold today that Ramirez has a viable claim for withdrawal of his 1997 guilty pleas based on ineffective assistance of counsel pursuant to Form 9-406 (1990), which required attorneys to inform their clients in detail of the possible immigration consequences of a guilty plea. We fail to see how our holding in *Paredez*—seven years after Ramirez's pleas and fourteen years after Form 9-406 was amended to require that the trial court assure a defendant's understanding that a guilty plea could affect the defendant's immigration status—announced a new rule.

CONCLUSION

{18} We affirm the Court of Appeals and remand this case to the district court to allow Ramirez the opportunity to claim ineffective assistance of counsel and seek withdrawal of his guilty pleas.

{19} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

BARBARA J. VIGIL,
Chief Justice

PETRA JIMENEZ MAES,
Senior Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-024

Filing Date: June 26, 2014

Docket No. 34,266

**STATE OF NEW MEXICO, ex rel.,
GARY K. KING, Attorney General,**

Plaintiff-Appellant,

v.

**B&B INVESTMENT GROUP, INC.,
d/b/a CASH LOANS NOW, and
AMERICAN CASH LOANS, LLC,
d/b/a AMERICAN CASH LOANS,**

Defendants-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS

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OPINION

CHÁVEZ, Justice.

{1} In January 2006, two former payday lenders, B&B Investment Group, Inc., and American Cash Loans, LLC (Defendants), began to market and originate high-cost signature loans of $50 to $300, primarily to less-educated and financially unsophisticated individuals, obscuring from them the details of the cost of such loans. The loans were for twelve months, payable biweekly, and carried annual percentage rates (APRs) ranging from 1,147.14 to 1,500 percent. The Attorney General's Office (the State) sued Defendants, alleging that the signature loan products were procedurally and substantively unconscionable under the common law and that they violated the Unfair Practices Act (UPA), NMSA 1978, Sections 57-12-1 to -26 (1967, as amended through 2009).

{2} The district court found that Defendants' marketing and loan origination procedures were unconscionable and enjoined certain of its practices in the future, but declined to find the high-cost loans substantively unconscionable, concluding that it is the Legislature's responsibility to determine limits on interest rates. Both parties appealed. We affirm the district court's finding of procedural unconscionability. However, we reverse the district court's refusal to find that the loans were substantively unconscionable because under the UPA, courts have the responsibility to determine whether a contract results in a gross disparity between the value received by a person and the price paid. We conclude that the interest rates in this case are substantively unconscionable and violate the UPA.

I. BACKGROUND

{3} Defendants market, offer, and originate high-interest, small-principal loans that they call "signature loans," from retail storefronts in Albuquerque, Farmington, and Hobbs, New Mexico. Signature loans are unsecured loans which require only the signature of the borrower, along with verification of employment, home address, identity, and references. Borrowers take out loans of $50 to $300 in principal, which are scheduled for repayment in biweekly installments over a year. Signature loans carry APRs between 1,147.14 and 1,500 percent.

{4} Defendants are subprime lenders from Illinois who opened several payday lending operations in New Mexico in the early 2000s because, according to company president James Bartlett, "there was no usury cap" here. Before 2006, Defendants' loan portfolios were predominantly "payday loans" which, like signature loans, are small-principal, high-interest loans. *See* Nathalie Martin, *1000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 Ariz. L. Rev. 563, 564 (2010). Payday loans differ from signature loans primarily in the length of time they take to mature: payday loan terms are between fourteen and thirty-five days, whereas Defendants' signature loans are yearlong. Prior to 2007, when legislation was passed to limit payday lending, payday loans could be rolled over indefinitely, which essentially turned them into medium- to long-term loans that had the effect of keeping the borrower in debt for extended periods of time, similar to the signature loans at issue here. *See* the 2007 amendments to the New Mexico Small Loan Act of 1955 (Small Loan Act), NMSA 1978, §§ 58-15-31 to -39 (1955, as amended through 2007); *see also* Martin, *supra*, at 585–88 (discussing the similarities between signature loans and payday loans).

{5} Defendants converted their loan products from payday to signature loans in Illinois in 2005, after the Illinois legislature enacted its Payday Loan Reform Act. 815 Ill. Comp. Stat. 122/1-1, 1-5 (2005). Defendants also converted their loan products from payday to signature loans in New Mexico just before the New Mexico Legislature implemented extensive payday loan reforms in 2007. *See* § 58-15-32. Signature loan products are not subject to the restrictions placed on payday loans by the 2007 amendments to the Small Loan Act because they do not meet the definition of payday loans. *Compare* § 58-15-2(E) (defining installment loan) *with* § 58-15-2(H) (defining payday loan). By 2008, Defendants no longer marketed payday loans at their stores. Defendants admitted their signature loans "definitely could be a substitute product" for payday loans.

{6} Defendants extend signature loans to the working poor; they lend exclusively to people who provide proof of steady employment but who, by definition, are either unbanked or underbanked. The Federal Deposit Insurance Corporation (FDIC) defines unbanked households as those without a checking or savings account, and underbanked households as those that have a checking or savings account but rely on alternative financial services. Federal Deposit Insurance Corporation, 2011 FDIC National Survey of Unbanked and Underbanked Households, Executive Summary at 3 n.2 (Sept. 2012), http://www.fdic.gov/householdsurvey/. The State's expert testified, and Defendants admit, that signature loans are "alternative financial services." All signature loan borrowers are at least underbanked, and those borrowers without a checking or savings account are unbanked. These borrowers are highly likely to live in poverty: in New Mexico, one-third of all unbanked households and almost one-quarter of all underbanked households earn less than $15,000 per year.[1] Federal Deposit Insurance Corporation, *supra*, Detailed State and MSA Tables, Appendices H-I, Table H-68, Household Banking Status by Demographic Characteristics: New Mexico at 71. Borrowers' testimony bears out the fact that Defendants target the working poor.

{7} One borrower, Oscar Wellito, testified that he took out a signature loan from Defendants after he went bankrupt. He was supporting school-aged children while trying to service debt obligations with two other small loan companies. He earned about $9 an hour at a Safeway grocery store, which was not enough money to make ends meet, yet too much money to qualify for public assistance. "That's why," he testified, "I had no choice of getting these loans, to feed my kids, to live from one paycheck to another paycheck." He needed money for groceries, gas, laundry soap, and "whatever we need to survive from one payday to another payday." Mr. Wellito borrowed $100 from Defendants. His loan carried a 1,147.14 APR and required repayment in

[1] In 2014, the federal poverty level for a family of four in the 48 contiguous states and the District of Columbia was $23,850. Annual Update of the HHS Poverty Guidelines, 79 Fed. Reg. 3593-01, 3593 (Jan. 22, 2014).

twenty-six biweekly installments of $40.16 with a final payment of $55.34. Thus, the $100 loan carried a total finance charge of $999.71.

{8} Another borrower, Henrietta Charley, took out a loan from Defendants for $200 that carried the same 1,147.14 APR as Mr. Wellito's loan. Ms. Charley, a medical assistant and mother of three, earned $10.71 per hour working thirty-two hours per week in the emergency department of the San Juan Regional Medical Center. She earned around $615 in take home pay every two weeks, while her monthly expenses, excluding food and gas, exceeded $1,000. Ms. Charley's ex-husband would only pay child support "every now and then," and when she did not receive that supplemental income, she would fall behind on her bills. She needed a loan to buy groceries and gas. Defendants gave her a $200 signature loan with a total finance charge of $2,160.04.

{9} After borrowers brought complaints to the Attorney General, the State sued Defendants under the UPA, which prohibits "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce." Section 57-12-3. Unconscionable trade practices are defined in relevant part as an "extension of credit . . . that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." Section 57-12-2(E). The State identified numerous business practices that it argued were procedurally unconscionable, and alleged that the loan terms were substantively unconscionable. The State sought restitution, civil penalties, and injunctive relief. The State also sued Defendants for violating New Mexico's common law of substantive and procedural unconscionability.

{10} The district court adjudicated liability in a four-day bench trial, and found that Defendants had not violated Section 57-12-2(E)(2), but that they had violated Section 57-12-2(E)(1).[2] The district court correspondingly found that the loans were not substantively unconscionable, but they were procedurally unconscionable under common law. The evidence adduced at trial is discussed below.

{11} The State appealed, claiming the district court erred in three ways: first, by failing to correctly interpret and apply Section 57-12-2(E)(2), reading the substantive unconscionability prong in such a way that the section would become meaningless; second, by failing to apply the common law doctrine of substantive unconscionability to the loans; and third, by denying the State's requested restitution. Defendants cross-appealed, claiming the district court erred in determining that the loans violated Section 57-12-2(E)(1), and in determining that the loans violated the common law of procedural unconscionability. The Court of Appeals certified the case to this Court pursuant to NMSA 1978, Section 34-5-14(C)(2) (1972). We accepted certification.

II. STANDARD OF REVIEW

{12} Because the litigation in this case involved a determination of whether a contract was unconscionable, we review de novo. "By both statute and case law, we review whether a contract is unconscionable as a matter of law." *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901 (citing NMSA 1978, § 55-2-302 (1961) ("providing that courts, as a matter of law, may police against contracts or clauses found unconscionable")); *see also Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 19, 144 N.M. 464, 188 P.3d 1215 (stating that unconscionability "is a matter of law and is reviewed de novo."). The district court's factual findings are reviewed for substantial evidence. *See Landavazo v. Sanchez*, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283 ("[The] court views the evidence in the light most favorable to support the findings of the trial court."). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Id.*

[2] The district court misstated Section 57-12-2(E)(1) as Section 57-12-1(E)(1) in the final paragraph of its decision.

III. DISCUSSION

A. There was substantial evidence to support the district court's judgment that Defendants' loans were procedurally unconscionable and violated Section 57-12-2(E)(1)

{13} Section 57-12-2(E)(1) defines an unconscionable trade practice as any extension of credit that "takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" and is detrimental to the borrower. Defendants challenge the sufficiency of the evidence for the district court's finding that they violated Section 57-12-2(E)(1). To support the district court's ruling, there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment. Section 57-12-2(E). We conclude that substantial evidence supports the district court's findings as to each of these elements.

1. *Evidence of borrowers' lack of financial sophistication*

{14} There was substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption. The district court heard from Defendants that a "[s]ignature loan primarily is for someone that is an unbanked person [or] underbanked." As discussed above, all signature loan borrowers are by definition underbanked because they are utilizing alternative financial services. Ms. Charley is an example of an underbanked borrower because although she had access to a bank account, she only used it to receive child support payments. A subset of Defendants' borrowers are unbanked, like Mr. Wellito, who testified he never had a bank account because he could not afford to open one. The district court heard evidence about demographic characteristics of unbanked and underbanked New Mexicans, as well as their behavioral and cognitive biases, which were borne out by borrower testimony. We will discuss each piece of demographic and cognitive evidence in turn.

{15} Demographically, unbanked and underbanked New Mexicans have significantly less education than the general population, are disproportionately living in poverty, and are more likely to be people of color. *See generally* Federal Deposit Insurance Corporation, National Survey of Unbanked and Underbanked Households (Dec. 2009). Their education levels are lower: the State presented evidence that in over 25 percent of unbanked and underbanked households, no one holds a high school degree, and in only a handful of unbanked households—just over 9 percent—does anyone have any college education at all. Federal Deposit Insurance Corporation, *supra*, Appendix B, Detailed State Tables, Table B-33, Banking Status by Household Characteristics: New Mexico at 102. They are more likely to be poor: 27.9 percent of unbanked households and 24.2 percent of underbanked households in New Mexico lived on less than $15,000 per year in 2009. *Id.* Over 50 percent of underbanked households live on less than $30,000 per year. *Id.* They are also more likely to belong to an ethnic minority: 41.6 percent of Hispanic households are unbanked or underbanked, and 58.3 percent of "other" households (defined as non-Hispanic, non-black, and non-white, which is a category that includes Native Americans) are unbanked or underbanked. *Id.*

{16} Behaviorally and cognitively, unbanked and underbanked New Mexicans exhibit heuristic biases that work to their detriment. The State's expert, Professor Christopher Peterson,[3] testified that these borrowers exhibit certain cognitive biases that lead them to make decisions that are contrary to their interests. They exhibit unrealistic optimism, or fundamental attribution error, meaning that they overestimate their ability to control future circumstances and underestimate

[3] Professor Peterson is a law professor and associate dean at the University of Utah whose area of research is consumer finance with a particular focus on high-cost, small-principal loans.

their exposure to risk. Thus, these borrowers have unrealistic expectations about their ability to repay these loans. They also exhibit intemporal biases, meaning they tend to focus on short-term gains, while discounting future losses they might suffer. Thus, borrowers focus on the promise of quick cash, and fail to make more considered judgments about the long-term costs of the loan. They also are subject to "framing" and "anchoring" effects, meaning that the way the price of a loan is framed at the outset may distort the prospective borrower's perception of the cost, and the borrower will retain that initial perception. If the cost initially is framed as being very low, such as $1.50 per day, a borrower will "anchor" his or her expectations on that claim and have difficulty reassessing the true costs once more information becomes available. Finally, borrowers are subject to information overload, meaning that when they are presented with a technically complex loan agreement, they cease trying to understand the terms at all because they realize they will not be able to understand all of the pricing features.

{17} These cognitive biases were confirmed in a New Mexico-specific study of borrower perceptions at the point of sale in the high-cost lending environment, which Professor Peterson relied on to formulate his opinion. *See* Martin, *supra*, 52 Ariz. L. Rev. at 596–613. In that study of 109 borrowers, Professor Martin found that 75 percent of borrowers could not identify the APR of their small-principal, high-interest loan at the point of sale, or mistakenly believed that the interest rate was between one and 100 percent. *Id.* at 600–01. Additionally, borrowers could not reliably distinguish whether their loans were payday or installment loans, suggesting that the labels—as far as borrowers were concerned—are a distinction without a difference. *Id.* at 586 n.123.

{18} Moreover, these cognitive biases were consistent with borrower testimony. Mr. Wellito and Ms. Charley testified that they thought they would be able to pay off their loans early, which is consistent with the unrealistic optimism bias described by Professor Peterson. Evidence of intemporal bias was shown by Mr. Wellito's testimony that he took out the loan because Defendants' advertisements made it "look[] so easy," like "the money's there and . . . [y]ou just walk in and you just get it . . . [and] you pay it all off." Ms. Charley also testified that she took out the signature loan because it looked like an "easy" way out of her financial distress. The theory of framing and anchoring effects and information overload was consistent with statements from borrowers who testified that they focused on the biweekly payment amount and did not consider the long-term costs of the loan. Borrowers also testified that loan origination at Defendants' stores took about 10 minutes and was a hurried "sign here, sign there" process, which is further evidence that the borrowers may have been subject to information overload at the time of loan origination.

{19} Beyond cognitive biases, borrowers' simple lack of knowledge, experience, ability, or capacity in credit transactions was evident from their testimony. Mr. Wellito, who had never had a bank account in his life, could not accurately describe how interest is calculated, stating that interest is "when you borrow money . . . you pay a little bit more to have them lend you the money." He did not know that interest is quoted in terms of a percentage, and did not understand that it is better for the buyer if the number is lower. Ms. Charley had not taken out a small loan before and did not understand that her loan would require sixteen interest-only payments. Another borrower, Rose Atcitty, understood only the amount she would have to pay and the date she would have to start repayment when she took out her signature loan; she was not told about the interest rate or the finance charge, and did not understand that it was a year-long loan. This testimony shows that these were not sophisticated borrowers, but borrowers who lacked knowledge of basic consumer finance concepts and had little experience in banking and credit markets.

2. *Evidence of Defendants' exploitation of borrowers' disadvantage*

{20} There was substantial evidence that Defendants took advantage of borrowers' deficits. Defendants directed their employees to describe the loan cost in terms of a misleading daily rate.

Employees were instructed to tell customers that interest rates are typically "between $1.00 and $1.50 per day, per one hundred you borrow." Defendants admitted that this was a factually inaccurate rate. At $1 per day, the finance charge for one year would be $365, and at $1.50 per day, the finance charge would be $547.50, but Defendants knew that the actual finance charge for one year would be at least $1,000. Defendants would also advertise that they were selling loans at 50 percent off, when in fact the only thing that was 50 percent off was the interest on the first installment payment on the loan.

{21} Defendants aggressively pursued borrowers to get them to increase the principal of their loans. "Maximize Every Customer's Principle [sic] Balance" and "maximize every opportunity that presents itself" was the mandate. Defendants directed employees to take time every day to give every customer a "courtesy call[]" to "make them aware of the possibility of rewriting their loan if there is availability on their account." Employees were also directed to "CALL[] ACTIVE FILES TO INCREASE PRINCIPAL" with the objective of "increas[ing the] principal amount borrowed to build store." The script for the courtesy calls was as follows:

> Your account balance as of today is $_____, and your credit available is $_____. Renewing your loan with us today Mr./Mrs._____ would put an extra $____ in your pocket which I'm sure would come in handy with back to school, last minute vacations or anything else that comes up towards the end of Summer. Would you like me to get things ready for you to come in today and take care of this?

At least one store employee described a practice of calling customers who were one payment away from paying off their loans to encourage them to take out another loan.

{22} Defendants also instructed their employees to withhold amortization schedules from customers. The store manual instructed, "PRINT OUT THE **AMORTIZATION SCHEDULE** FOR THE FILE, BUT NEVER GIVE ONE TO A CUSTOMER!" Mr. Bartlett claimed that this entire instruction was a "misprint" in the 2007 store manual, and explained that the reason he had included it again in the 2010 version is that it was an instruction he had "overlooked when revising" the manual. He stated that although "that is exactly what [the store manual] says," Defendants actually train their employees to give out amortization schedules "to everybody." Borrowers, however, testified that they had not received amortization schedules. The district court did not credit Mr. Bartlett's testimony, finding instead that Defendants have a practice of withholding the schedules.

{23} Amortization schedules revealed the signature loans were interest-only loans for extended periods of time. For example, the amortization schedule in Ms. Charley's file showed that she would have to make sixteen biweekly payments of $90.68 each before any of her payments would be allocated toward her principal. According to her amortization schedule, on the seventeenth biweekly payment, she would finally pay off the first $1.56 toward her principal. Thus, Ms. Charley would have to make timely payments totaling $1,541.56 over thirty-four weeks (seventeen biweekly payments) before her loan balance would fall below the principal she borrowed. Defendants did not explain this to Ms. Charley, nor did they give her a copy of the amortization schedule.

{24} All of these practices were mandated by Defendants' own confidential employee manuals, demonstrating that they were systematic company policies, as opposed to isolated incidents. These practices were confirmed by the testimony of both store employees and borrowers.

3. *Evidence of gross unfairness and detriment*

{25} There was substantial evidence that Defendants' practices took advantage of borrowers to a grossly unfair degree. We consider whether borrowers were taken advantage of to a grossly unfair degree by looking at practices

in the aggregate, as well as the borrowers' characteristics. *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838. In *Ribble*, the Court of Appeals considered a bank's pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple's ranch:

> [T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a "grossly unfair degree" because of (1) the Ribbles' advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15. Similarly, the pattern of conduct by Defendants in this case shows they were leveraging the borrowers' cognitive and behavioral weaknesses to Defendants' advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico. This evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a "grossly unfair degree."

{26} Defendants argue that the State failed to prove detriment because it "offered no evidence as to whether the individual borrower thought the loan transaction worked to his or her detriment." The UPA does not require a subjective, individualized showing of detriment. *See* § 57-12-4 (stating that the UPA is to be construed in line with Federal Trade Commission (FTC) interpretations and federal court decisions); *see also Fed. Trade Comm'n v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (rejecting individualized proof of detriment and stating "[i]t would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action. This is . . . a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class. . . . It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer."); *Fed. Trade Comm'n v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) ("Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the [FTC Act]."). We may presume detriment from the evidence that Defendants' corporate practices took unfair advantage of borrowers' disadvantages to a gross degree. *See Fed. Trade Comm'n v. Nat'l Bus. Consultants, Inc.*, 781 F. Supp. 1136, 1141 (E.D. La. 1991) ("[T]he FTC does not need to prove individual reliance on defendants' material representations and omissions; rather, the proper standard to establish reliance in an FTC action, as here, is based on a pattern or practice of deceptive behavior."). Thus, there was sufficient evidence of detriment to the borrowers, and substantial evidence supported the district court's ruling that Defendants violated Section 57-12-2(E)(1).

{27} For the same reasons, there was also substantial evidence supporting the finding of procedural unconscionability as understood in common law. Procedural unconscionability may be found where there was inequality in the contract formation. *Cordova*, 2009-NMSC-021, ¶ 23. Analyzing procedural unconscionability requires the court to look beyond the four corners of the contract and examine factors "including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Id.* As discussed at length above, the relative bargaining strength and sophistication of the parties is unequal. Moreover, borrowers are presented with Hobson's choice: either accept the quadruple-digit interest rates, or walk away from the loan. The substantive terms are preprinted on a standard form, which is entirely nonnegotiable. The interest rates are set by drop-down menus in a computer program that precludes any modification of the offered rate. Employees are forbidden

from manually overriding the computer to make fee adjustments without written permission from the companies' owners: manual overrides "will be considered in violation of company policy and could result with . . . criminal charges brought against the employee and or termination." Because these contracts are prepared entirely by Defendants, who have superior bargaining power, and are offered to the weaker party on a take-it-or-leave-it basis, Defendants' loans are contracts of adhesion. *See Fiser*, 2008-NMSC-046, ¶ 22 (discussing the factors that create an adhesive contract). "Adhesion contracts generally warrant heightened judicial scrutiny because the drafting party is in a superior bargaining position," *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 44, 150 N.M. 398, 259 P.3d 803, and although they will not be found unconscionable in every case, "an adhesion contract is procedurally unconscionable and unenforceable when the terms are patently unfair to the weaker party." *Id.* (internal quotation marks and citation omitted). Under these circumstances, there is substantial evidence that Defendants' loans are procedurally unconscionable under common law.

B. The district court's permanent injunction is an appropriate remedy

{28} The UPA grants the State the right to seek restitution, civil penalties, and injunctive relief for unfair trade practices. Section 57-12-8(B) (empowering the Attorney General to "petition the district court for temporary or permanent injunctive relief and restitution"); § 57-12-11 (allowing the Attorney General to recover a civil penalty of up to $5,000 per willful violation). The district court granted the State a permanent injunction. "An injunction is an equitable remedy." *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P.*, 1998-NMCA-005, ¶ 19, 124 N.M. 440, 952 P.2d 435. "The application of equitable doctrines and the granting of equitable relief rests in the sound discretion of the district court." *Moody v. Stribling*, 1999-NMCA-094, ¶ 30, 127 N.M. 630, 985 P.2d 1210. The grant or denial of equitable remedies is reviewed for abuse of discretion. *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 9, 123 N.M. 526, 943 P.2d 560. "Such discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law." *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 26, 115 N.M. 690, 858 P.2d 66, *holding limited on other grounds by Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶¶ 34–35, 147 N.M. 157, 218 P.3d 75. "An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason." *Id.* (internal quotation marks and citation omitted).

{29} The district court permanently prohibited Defendants from (1) targeting borrowers to try to increase the amount of their principal debt obligation until the borrower's file had become inactive for at least sixty days; (2) quoting the cost of signature loans "in terms of a daily or other nominal amount . . . or in any other amount than that which is mandated by the federal Truth in Lending Act," in advertising materials or during loan origination; (3) engaging in any practice that focuses the borrower's attention on the loan's installment payment obligation "without also clearly, conspicuously, and fully disclosing and explaining the cost of the loan if repaid over the course of the full repayment term"; and (4) representing that the loans will be in any way "easy" to repay. The district court also ordered Defendants to (1) provide all borrowers with a copy of the amortization schedule; (2) provide information regarding a substantive legal defense and contact information for the Attorney General's Office when communicating with a borrower in connection with debt collection; and (3) revise employee manuals to reflect these changes.

{30} Because there was substantial evidence supporting the district court's findings that Defendants' lending practices were procedurally unconscionable, the district court had the authority to grant this injunctive relief pursuant to Section 57-12-8(B). The injunction attempts to remedy Defendants' procedurally unconscionable practices and is narrowly tailored to address each practice. We see nothing improper about the injunction.

C. The loans were substantively unconscionable under common law and the UPA

{31} The district court concluded that it was precluded from ruling on substantive unconscionability absent an express statutory prohibition of the interest rates at issue, and without considering the evidence on each individual loan issued by Defendants. We disagree with both conclusions.

{32} "Unconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." *Cordova*, 2009-NMSC-021, ¶ 21. Substantive unconscionability is found where the contract terms themselves are "illegal, contrary to public policy, or grossly unfair." *Id.* ¶ 22 (quoting *Fiser*, 2008-NMSC-046, ¶ 20). In determining whether a contract term is substantively unconscionable, courts examine "whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." *Id.* "Contract provisions that unreasonably benefit one party over another are substantively unconscionable." *Id.* ¶ 25. Thus, substantive unconscionability can be found by examining the contract terms on their face—a simple task when, as here, all substantive contract terms were nonnegotiable, and embedded in identical boilerplate language. *See id.* ¶ 22. The test for substantive unconscionability as outlined in *Cordova* simply asks whether the contract term "is grossly unreasonable and against our public policy under the circumstances." *Id.* ¶ 31. We hold it is grossly unreasonable and against public policy to offer installment loans at 1,147.14 to 1,500 percent interest for the following reasons.

{33} Courts are not prohibited from deciding whether a contract is grossly unreasonable or against public policy simply because there is not a statute that specifically limits contract terms. In a landmark case on substantive unconscionability, *Williams v. Walker-Thomas Furniture Co.*, the District of Columbia Circuit Court reversed the District of Columbia Court of Appeals on precisely this issue. 350 F.2d 445, 448 (D.C. Cir. 1965). In that case, the court of appeals had determined that, although it "[could not] condemn too strongly appellee's conduct" in selling a woman a $514 stereo set "with full knowledge that appellant had to feed, clothe and support both herself and seven children" on a $218 monthly income, it would not find the contract unconscionable because it found no caselaw or legislation that would support a declaration that the contract at issue was contrary to public policy. *Id.* The circuit court reversed, stating "[w]e do not agree that the court lacked the power to refuse enforcement [of] contracts found to be unconscionable." *Id.* Even in the absence of binding precedent or statutory power, the circuit court held that "the notion that an unconscionable bargain should not be given full enforcement is by no means novel." *Id.* We agree with the reasoning of *Williams*. Ruling on substantive unconscionability is an inherent equitable power of the court, and does not require prior legislative action. "Equity supplements the common law; its rules do not contradict the common law; rather, they aim at securing substantial justice when the strict rule of common law might work hardship." Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. Pitt. L. Rev. 839, 890 (1999) (internal quotation marks and citation omitted). Although there is not a specific statute specifying a limit on acceptable interest rates for the types of signature loans in this case, in addition to our caselaw addressing unconscionability, the Legislature has empowered courts to adjudicate cases involving claims of unconscionable trade practices under the UPA.

{34} In determining the public policy behind the UPA, we must first examine the statute's plain language. The statute expressly prohibits extensions of credit that take advantage of borrowers' weaknesses "to a grossly unfair degree" or that result in "a gross disparity" between the value and the price. Section 57-12-2(E). The UPA is a law that prohibits the economic exploitation of

others. The language of the UPA evinces a legislative recognition that, under certain conditions, the market is truly not free, leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits.

{35} The district court determined that the signature loans do not result in a gross disparity between the value and the price because borrowers could pay off the loans early, and they "obtained a value beyond the face value, or even the time value, of the money borrowed—the ability to buy groceries for [their] children now, the ability to buy gas to get to a new job, [and] the ability to pay off a cell phone." In adopting this view, the district court was following a subjective theory of value, under which the more desperate a person is for money, the more "value" that person receives from a loan. Thus, hypothetically a high-cost loan could violate the statute if a person borrows money for betting on blackjack, because the "value" that person receives would be low compared to the price of the loan, whereas the same high-cost loan sold to a single mother who needs to feed her children could not violate the statute, because the "value" that mother receives would be high compared to the price of the loan. Under that erroneous reading of the statute, consumer exploitation would be legal in direct proportion to the extent of the consumer's desperation: the poorer the person, the more acceptable the exploitation. Such a result cannot be consonant with the consumer-protective legislative intent behind the UPA. It is not the use to which the loan is put that makes its value low or high, but the terms of the loan itself.

{36} Under an objective, not a subjective, reading of the UPA, Defendants' signature loans are low-value products. First, these loans are extremely expensive. The least expensive signature loan carries a 1,147.14 APR, meaning a loan of $100 carries a finance charge of $999.71. Second, Defendants do not report positive repayments to credit reporting agencies. Thus, borrowers who succeed in bearing the exorbitant costs associated with these loans and who make good-faith efforts to repay them can never improve their credit scores. Borrowers who fail to pay, however, can have their credit scores negatively impacted. They can be sued and have their wages garnished. They will also be liable for Defendants' costs of collecting on the debt, including attorney fees. Third, there is a $25 bounced check or automatic clearinghouse fee that can be added to the cost of the loan each time a check is returned for insufficient funds, and there is a 5 percent penalty fee for each late payment, each of which potentially increase the cost of these loans. Fourth, there is an acceleration-upon-default clause which provides that if a borrower falls behind on his or her payments over the year, then the full amount of the debt—principal and interest–comes due immediately. All of these loan features, in combination with the quadruple-digit interest rates, make it a low-value product regardless of how the borrower uses the principal. Defendants point out that people who take out mortgages will, like borrowers here, pay several times the principal in interest payments over the life of their loan. However, unlike a mortgage loan, borrowers are not gaining an asset when taking out a signature loan; rather, they are taking on liability. The value the borrower receives from a signature loan consists of a small amount of principal—never more than $300—and an enormous amount of risk. Therefore, these loans are objectively low-value products and are grossly disproportionate to their price.

{37} Defendants further contend it is not the public policy of this state to prohibit usurious interest rates because the Legislature removed the interest rate cap in 1981. In this argument lies the implicit assertion that by removing the interest rate cap, the Legislature was stating that there is *no* interest rate that would violate public policy. Indeed, Defendants' expert testified that interest rates of 11,000 percent or even 11,000,000 percent would be acceptable under our statutory scheme.[4] If we were to ac-

[4] In an example of the unlimited nature of this argument, Defendants' expert, Professor Thomas Lehman, also posited that it would be acceptable for a borrower to agree to harvest a

cept Defendants' argument, we would have to hold that the doctrine of unconscionability as it exists at common law and in the UPA does not apply to the extension of credit. We decline to do so because to do so would thwart New Mexico public policy as expressed in the UPA and other legislation.

{38} Public policy is not set by a single statute, or the repeal of a single statute. Instead, we look to "other statutes *in pari materia* under the presumption that the legislature acted with full knowledge of relevant statutory and common law . . . [and] did not intend to enact a law inconsistent with existing law." *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573, 855 P.2d 562. We also look to the common law and to equity in determining public policy.

{39} Other relevant statutes include the Small Loan Act, Sections 58-15-31 to -39, which regulates the small loan industry; the unconscionability clause of the Uniform Commercial Code (UCC), Section 55-2-302; and the Money, Interest and Usury Act (Money Act), NMSA 1978, Sections 56-8-1 to -21 (1851, as amended through 2004), which sets a default interest rate of 15 percent for contracts where no interest rate is stated. Section 56-8-3. Because these statutes were enacted prior to the UPA, we can infer that the Legislature enacted the UPA with full knowledge of and in harmony with the public policy expressed by those statutes. *See Schnedar*, 1993-NMSC-033, ¶ 4 (holding that similar statutes "should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals." (internal citation omitted)).

{40} The Legislature enacted the Small Loan Act in 1955 to, among other factors, "insure more rigid public regulation and supervision of those engaging in the business of making small loans, and . . . to facilitate the elimination of abuse of borrowers." Section 58-15-1(D). The Legislature was concerned with the exploitation of borrowers, declaring "experience has proven . . . that without regulations, borrowers of small sums are often exploited by charges generally exorbitant in relation to those necessary to conduct a small loan business." Section 58-15-1(C). This statutory language about exploitation and abuse evinces a consumer-protective public policy goal. At the time the Small Loan Act was enacted, New Mexico had an interest rate cap of 12 percent for unsecured debts such as small installment loans, which Defendants now offer at between 1,147.14 and 1,500 percent interest. NMSA 1978, § 56-8-11 (1957), *repealed by* 1981 N.M. Laws, ch. 263, § 4 (July 1, 1981).

{41} The UCC also addresses substantive unconscionability. The New Mexico Legislature adopted the UCC's unconscionability doctrine in 1961, which codifies the courts' broad remedial power to refuse to enforce an unconscionable contract, strike the offending clause, or limit the application of the offending clause to avoid an unconscionable result. Section 55-2-302. The official comment to Section 55-2-302 directly discusses legislative intent: "This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable." *Id.* cmt. 1. It goes on to state:

> *This section is intended to allow the court to pass directly on the unconscionability of the contract* or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . *The principle is one of the prevention of oppression* and unfair surprise.

Id. (emphasis added). Although Section 55-2-302 pertains to the sale of goods, it was enacted prior to the UPA sections dealing with

kidney in exchange for $100. However, he stopped short of endorsing freedom to contract for one's own involuntary servitude, stating that although one could enter such a contract, one could "break that bond at any time they want."

unconscionability.[5] Therefore, we can infer that when it enacted the unconscionability clause of the UPA, the Legislature intended to allow the courts the same flexibility in determining whether a contract extending credit is unconscionable.

{42} The Money Act also evinces a legislative intent to establish a consumer-protective public policy. Although the Legislature abolished the interest rate cap in 1981, Defendants' argument that in so doing the Legislature intended to permit any interest rate is without merit. The Money Act sets the default interest rate at 15 percent for contracts that do not specify an interest rate. *See* § 56-8-3 ("The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent. . . ."). Thus, when the Legislature repealed the absolute cap of 12 percent interest for unsecured debts but left the default rate in place, it contemplated that a reasonable interest rate would be 15 percent. The Money Act sets the default interest rate for court judgments at 8.75 percent, unless the judgment is based on tortious conduct or bad faith, for which the default interest rate is 15 percent. Section 56-8-4(A)(2). Fifteen percent interest was the high end of the Legislature's contemplation. Additionally, the Money Act still prohibits excessive charges. Section 56-8-9(A) ("[N]o person, corporation or association, directly or indirectly, shall take, reserve, receive or charge any interest . . . or other advantage for the loan of money or credit . . . except at the rates permitted in Sections 56-8-1 through 56-98-21 NMSA 1978."). Lenders who violate the Money Act are required to disgorge all profits from the usury, not offset by their operating costs. *See* § 56-8-13 (imposing a penalty of forfeiture of the entire amount of interest for "[t]he taking, receiving, reserving or charging of a rate of interest greater than allowed by this act").

{43} In 2007, the Legislature amended the Small Loan Act to try to address the payday loan crisis in New Mexico. *See* §§ 58-15-31 to -39; *see also* Martin, *supra*, 52 Ariz. L. Rev. at 577–87 (discussing the legislative history of payday loan regulation in New Mexico). The amendments cap the effective interest rate on payday loans at about 400 percent by limiting fees and interest on payday loans to $15.50 per $100 borrowed, plus an additional $0.50 per loan for fees charged by the consumer-information database provider. Section 58-15-33(B), (C). Payday lenders are required to take into account the borrower's financial position, and they cannot extend loans exceeding 25 percent of the borrower's gross monthly income. Section 58-15-32(A). However, the effective fee cap and other consumer protections built into the Small Loan Act only apply to payday loans, defined as loans with a duration of fourteen to thirty-five days, for which the consumer receives the loan principal and in exchange gives the lender a personal check or debit authorization for the amount of the loan plus interest and fees. Section 58-15-2(H).

{44} Defendants could not lawfully charge 1,147.14 APR on a year-long loan under the payday loan provisions of the Small Loan Act. Defendants were payday lenders until 2006, the year before the New Mexico Legislature enacted these statutory limitations on payday lending. Defendants admit that they substituted signature loans for payday loans in Illinois when the Illinois legislature began to regulate payday lending. In addition, Defendants admit that their signature loans could be considered substitute products for payday loans in New Mexico. The reasonable inference is that Defendants' signature loan products were specifically designed to make an end run around the consumer protections of the Small Loan Act, which the Legislature tried to prevent by stating that "licensee[s] shall not . . . use a device or agreement that would have the effect of charging or collecting more fees, charges or interest than that allowed by law by entering into a different type of transaction with the consumer that has that effect." Section 58-15-34(D). Their success in evading application of the Small Loan Act does not immunize Defendants from other laws that prohibit unconscionable loan practices.

[5] The UCC provision on unconscionability, Section 55-2-302, was enacted by 1961 New Mexico Laws, Chapter 96, Section 2-302, six years prior to the enactment of UPA Sections 57-12-2 (defining unconscionable trade practices) and 57-12-3 (prohibiting unconscionable trade practices).

{45} The Legislature did not repeal all statutes protecting consumers from usurious practices: far from it, the Legislature empowered the Attorney General and private citizens to fight unconscionable practices through the UPA; it ratified the court's inherent equitable power to invalidate a contract on unconscionability grounds under the UCC; it maintained a prohibition on excessive charges and set a reasonable default interest rate of 15 percent under the Money Act; and it set a de facto interest rate cap on substantively identical types of loans with the 2007 amendments to the Small Loan Act. Contrary to Defendants' contention that the repeal of the interest rate cap demonstrates a public policy in favor of unlimited interest rates, the statutes when viewed as a whole demonstrate a public policy that is consumer-protective and anti-usurious as it always has been. A contrary public policy that permitted excessive charges, usurious interest rates, or exploitation of naive borrowers would be inequitable, particularly in New Mexico where a greater percentage of people are struggling in poverty, and where more households are unbanked and underbanked than almost anywhere in the nation.[6] Professor Peterson testified that "Defendants' signature loan product is among the most expensive loan products offered in the recorded history of human civilization." For comparison, interest rates that were considered high in the mid-twentieth century—rates used for high-risk borrowers on unsecured loans—were between 18 and 42 percent. Mafia loan sharks in New York City at the height of mafia power charged 250 percent interest. It is contrary to our public policy, and therefore unconscionable as a matter of law, for these historically anomalous interest rates to be charged in our state. We next address the appropriate remedy or remedies for the substantively unconscionable loans.

D. Restitution is the appropriate remedy for the procedural and substantive unconscionability of the signature loans in this case

{46} During the remedies phase of trial, the State requested that the district court invalidate all of the loans as the fruit of unconscionable lending practices and return the parties to their precontract status. Thus, the State sought restitution in the form of a full refund for borrowers of all money paid in excess of the principal on their loans. The district court denied restitution by any measure, reasoning that: (1) complete avoidance of the loans was improper because it would result in borrowers paying no interest; (2) the State's proposed remedy ignored the subjective value borrowers received, and would be a windfall to borrowers; (3) any refunds to borrowers would have to be offset by the subjective value they received; and (4) full refund restitution would be inequitable because it would put Defendants out of business. The final question is whether the district court abused its discretion in failing to grant restitution.

{47} An abuse of discretion occurs "when the trial court's decision is clearly untenable or contrary to logic and reason." *Cont'l Potash*, 1993-NMSC-039, ¶ 26 (internal quotation marks and citation omitted). In this case, the district court was correct in determining that Defendants violated Section 57-12-2(E)(1), and the loans were procedurally unconscionable. On that basis alone, the district court could have voided the contracts entirely. Loans need not be both procedurally and substantively unconscionable to be invalidated by a court. *Cordova*, 2009-NMSC-021, ¶ 24 ("[T]here is no absolute requirement in our law that both [substantive and procedural

[6] Nineteen and a half percent of New Mexicans live below the poverty level, compared to 14.9 percent of people nationwide. *See* United States Census Bureau, State and County QuickFacts, New Mexico, Persons below poverty level, percent, 2008–2012, http://quickfacts.census.gov/qfd/states/35000.html. Thirty-five percent of New Mexico households are unbanked or underbanked, compared to 28.3 percent of households nationwide. Federal Deposit Insurance Corporation, 2011 FDIC National Survey of Unbanked and Underbanked Households, Appendices A-G, Table C-1, 2011 Household Banking Status by State at 126, www.fdic.gov/householdsurvey/. More New Mexico households are unbanked and underbanked than anywhere in the Northeast, Midwest, or West. *Id.* Only six states have a higher or the same percentage of underbanked households: Alabama, Arkansas, Georgia, Louisiana, Mississippi, and Texas. *Id.* Only three states have a higher percentage of unbanked households: Arkansas, Mississippi, and Texas. *Id.*

unconscionability] must be present to the same degree or that they both be present at all" in order to invalidate a contract.). Thus, where, as in this case, there is overwhelming evidence that the loans were procedurally unconscionable, no evidence of substantive unconscionability is needed in order to invalidate the contract. However, in this case, we hold that the interest rate terms were substantively unconscionable. Given the fact that these loans were both substantively and procedurally unconscionable, it would not have been an abuse of discretion to invalidate the entirety of the contracts. *See, e.g.*, *Rivera*, 2011-NMSC-033, ¶ 56 (invalidating the entire arbitration scheme on substantive unconscionability grounds); *Cordova*, 2009-NMSC-021, ¶ 40 (same).

{48} Moreover, "[i]n the UPA, the Legislature has provided for damages and other remedial relief for persons damaged by unfair, deceptive, and unconscionable trade practices. Since the UPA constitutes remedial legislation, we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent." *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 30, 147 N.M. 583, 227 P.3d 73 (internal quotation marks and citations omitted). It is the task of the courts to "ensure that the Unfair Practices Act lends the protection of its broad application to innocent consumers." *Ashlock v. Sunwest Bank of Roswell, N.A.*, 1988-NMSC-026, ¶ 7, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 16, 120 N.M. 133, 899 P.2d 576. In order to facilitate the consumer-protective legislative purpose of the UPA, there was ample reason to grant restitution to borrowers for Defendants' unconscionable trade practices. It would not further the purpose of the UPA under these circumstances to allow Defendants to retain the full profits of their unconscionable trade practices. Thus, the district court abused its discretion in failing to grant any form of restitution. Nevertheless, we agree with the district court that it would be inequitable to allow borrowers to pay no interest at all.

{49} When a contract term is unconscionable, like the 1,147.14 to 1,500 percent interest rates in this case, the court "may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 15, 133 N.M. 661, 68 P.3d 901 (internal quotation marks and citations omitted). We decline to grant a windfall to all borrowers by allowing them to completely avoid the contracts. We hold instead that the quadruple-digit interest rate, a substantively unconscionable term, shall be stricken from the contracts of all borrowers. We then enforce the remainder of the contract without the unconscionable term. *Id.*

{50} The district court avoided calculating restitution, calling the task "arbitrary and unjustified" without precise figures to draw upon. However, the New Mexico statutes provide a default interest rate that allows "private lenders to charge interest on money debts at the legal rate where the contract is silent on the issue." *Martinez v. Albuquerque Collection Servs., Inc.*, 867 F. Supp. 1495, 1508 (D.N.M. 1994) (citing 47 C.J.S. *Interest & Usury* § 11 (2014) "(promise to pay interest at the legal rate implied at law)"). Fifteen percent is the maximum allowable default interest rate. Section 56-8-3(A) ("The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually . . . on money due by contract."); *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 1994-NMSC-027, ¶ 24, 117 N.M. 373, 872 P.2d 346 (holding that Section 56-8-3 "fixes the *maximum* rate" that can be awarded by the district court). The default rate under Section 56-8-3 is calculated as simple interest. *See Consol. Oil & Gas, Inc., v. S. Union Co.*, 1987-NMSC-055, ¶ 42, 106 N.M. 719, 749 P.2d 1098 (holding that Section 56-8-3 must be calculated as simple interest); *c.f. Peters Corp. v. N.M. Banquest Investors Corp.*, 2008-NMSC-039, ¶¶ 51–52, 144 N.M. 434, 188 P.3d 1185 (distinguishing Section 56-8-3 from another statutory section whose express language allows for compound interest). Because the unconscionable interest rates in Defendants' loans are invalid terms, these contracts are silent with respect to rates. We apply the statutory

default interest rate of 15 percent simple annual interest to these loans.

{51} Defendants must refund all money collected by Defendants on their signature loans in excess of 15 percent of the loan principal as restitution for their unconscionable trade practices. We recognize that the district court could have fashioned a remedy whereby the borrowers would pay less for these loans by either setting a default interest rate lower than the statutory maximum of 15 percent, or by imposing an amortization schedule on the loans under which the total finance charge on the 15 percent simple interest loans would amount to less than 15 percent of the whole principal. We decline to do so here for the sake of equity and to prevent delay. Instead, Defendants will keep the maximum allowable interest of 15 percent under Section 56-8-3 and refund the remainder of the monies that the borrowers paid on their loans that is over 15 percent of the principal. For example, Oscar Wellito's $100 loan with 1,147.14 APR is now rewritten as a $100 loan with 15 APR. With simple interest, he therefore owes $115 on the contract. He paid Defendants a total of $160.64. Defendants must refund $45.64 to Mr. Wellito, which is the difference between the monies he paid on their unconscionable contract, $160.64, and the monies he owes under the reformed contract, $115. Because these contracts are unconscionable, Defendants must also refund any penalties or fees they collected from borrowers that were associated with missed, late, or partial payments.

IV. CONCLUSION

{52} We hold that loans bearing interest rates of 1,147.14 to 1,500 percent contravene the public policy of the State of New Mexico, and the interest rate term in Defendants' signature loans is substantively unconscionable and invalid. We therefore reverse the district court's ruling on substantive unconscionability. We affirm the district court's ruling that Defendants engaged in procedurally unconscionable trade practices, and uphold the permanent injunction granted against Defendants. Accordingly, we affirm in part, reverse in part, and remand to the district court for a determination of damages in accordance with this opinion.

{53} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

BARBARA J. VIGIL,
Chief Justice

PETRA JIMENEZ MAES,
Senior Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-018

Filing Date: May 28, 2015

Docket No. 34,516

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

AIDE ZAMORA SANCHEZ,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Fernando R. Macias, District Judge

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OPINION

CHÁVEZ, Justice.

{1} Defendant-Respondent Aide Sanchez (Sanchez) was at the Santa Teresa, New Mexico port of entry, an international border crossing, attempting to enter the United States from Mexico, when Border Patrol agents seized marijuana from her van. In *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 1, 130 N.M. 386, 25 P.3d 225, we held that "the New Mexico Constitution and laws apply to evidence seized by federal agents at a border patrol checkpoint [located] sixty miles within the State of New Mexico [(an interior fixed checkpoint)] when that evidence is proffered in state court." We also held that Article II, Section 10 of the New Mexico Constitution "demands that after a Border Patrol agent has asked about a motorist's citizenship and immigration status, and has reviewed the motorist's documents, any further detention requires reasonable suspicion of criminal activity." *Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 12, 20.

{2} Sanchez successfully moved to suppress the evidence seized from her van, arguing that (1) *Cardenas-Alvarez* applies at the international border, and (2) seizure of the marijuana violated the New Mexico Constitution because the Border Patrol agents did not have a reasonable suspicion of criminal activity to continue to detain her once they had established her citizenship and immigration status. We hold that Article II, Section 10 does not afford greater protections at an international border checkpoint because unlike motorists who are stopped at interior border checkpoints, all motorists stopped at international fixed checkpoints are known to be international travelers who are not entitled to the heightened privacy expectations enjoyed by domestic travelers. We therefore reverse the district court's order suppressing the evidence in this case.

BACKGROUND

{3} On January 2, 2012, United States Customs and Border Protection Officer Erica Pedroza (Pedroza) was working as the primary officer at the Santa Teresa Port of Entry, an international border checkpoint. Primary officers are the first customs agents to speak with a motorist seeking to cross an international border. They check motorists' citizenship documentation and inspect their vehicles for contraband. Primary officers usually have, at most, 30 seconds to decide between releasing a motorist or referring the motorist to a secondary area for further inspection of the vehicle. Further inspections arise for various reasons, including documentation deficiencies such as the lack of a passport, the presence of agricultural products, and evidence that vehicles have been tampered with.

{4} Pedroza testified that while she was working, she encountered Sanchez driving a van. According to Pedroza, Sanchez claimed that she had spent the weekend in Ciudad Juárez, Mexico and was driving back to Denver, Colorado. Pedroza also stated that Sanchez produced valid documentation of her legal status as a permanent resident. However, Pedroza was unable to inspect the van to her satisfaction because of the presence of a large dog within the van. Consequently, Pedroza referred Sanchez to a secondary area to have the vehicle inspected, even though Pedroza did not suspect any criminal activity.

{5} Customs and Border Protection Officer Monica Pantoja (Pantoja) testified that she performed a seven-point inspection of Sanchez's van, which is an inspection of the whole vehicle. As part of this inspection, a drug-sniffing canine located marijuana within Sanchez's van.

{6} Sanchez was indicted for distribution of marijuana in violation of NMSA 1978, Section 30-31-22(A)(1)(a) (2011) and conspiracy to commit distribution of marijuana in violation of NMSA 1978, Section 30-28-2 (1979). Sanchez filed a motion to suppress the evidence, arguing that under *Cardenas-Alvarez*, Pedroza lacked the reasonable suspicion of criminal activity required by the New Mexico Constitution to prolong her detention. In *Cardenas-Alvarez* we held that Article II, Section 10 applies to evidence seized at an interior fixed checkpoint "sixty miles within the State of New Mexico when that evidence is proffered in state court." 2001-NMSC-017, ¶ 1. Under *Cardenas-Alvarez*, in the context of an interior fixed checkpoint, Article II, Section 10 "demands that after a Border Patrol agent has asked about a motorist's citizenship and immigration status, and has reviewed the motorist's documents, any further detention requires reasonable suspicion of criminal activity." 2001-NMSC-017, ¶ 20. The district court granted Sanchez's motion to suppress, finding that Pedroza's referral of Sanchez for a secondary inspection of the van was not supported by reasonable suspicion of criminal activity. The district court excluded "all evidence obtained and seized from [Sanchez] and her vehicle, following the referral of [Sanchez] for a secondary inspection."

{7} The Court of Appeals affirmed the district court, holding that *Cardenas-Alvarez* applies, irrespective of the location of the checkpoint. *State v. Sanchez*, No. 32,994, mem. op. ¶¶ 1–3, 8 (N.M. Ct. App. Nov. 6, 2013) (non-precedential). The Court of Appeals then concluded that "the facts relied upon by the State neither establish that issues of residence or citizenship were unresolved when [Sanchez] was sent to the secondary inspection area nor that there was any basis for a reasonable suspicion of wrongdoing at that time." *Id.* ¶ 6.

{8} We granted the State's petition for writ of certiorari, *State v. Sanchez*, 2014-NMCERT-002, to address two issues:

> 1) Whether the protections of Article II, Section 10 of the New Mexico Constitution extend to the international border, and, if so, whether referral of [Sanchez] to a secondary area for continuation of routine questioning requires individualized suspicion[, and]
>
> 2) Whether the application of the interstitial approach in *Cardenas-Alvarez* should be revisited.

We decline to interpret Article II, Section 10 as requiring individualized reasonable suspicion of criminal activity for prolonging detentions at an international border checkpoint. We also decline to revisit the approach taken in *Cardenas-Alvarez*, because *Cardenas-Alvarez* is not implicated in this case.

DISCUSSION

{9} All of the issues presented in this case are reviewed de novo. "Whether the exclusionary rule under Article II, Section 10 . . . applies to the use of evidence in a New Mexico state court proceeding when that evidence resulted from a search conducted by federal border-patrol agents is a threshold constitutional issue that is subject to de novo review." *State v. Snyder*, 1998-NMCA-166, ¶ 6, 126 N.M. 168, 967 P.2d 843. If a constitutional provision applies, claims arising under it are also reviewed de novo. *State v. Brown*, 2006-NMSC-023, ¶ 8, 139 N.M. 466, 134 P.3d 753; *see also Cardenas-Alvarez*, 2001-NMSC-017, ¶ 6 ("The constitutionality of a search or seizure is a mixed question of law and fact and demands de novo review.").

{10} In *Cardenas-Alvarez*, we held that the New Mexico Constitution applies to evidence seized by federal agents at an interior fixed checkpoint when the State seeks to introduce the evidence in state court criminal proceedings. 2001-NMSC-017, ¶ 20. The question remains whether the greater protections that exist at an interior fixed checkpoint also exist at the international border checkpoint. To answer this question, we apply the interstitial approach announced in *State v. Gomez*, 1997-NMSC-006, ¶¶ 19–22, 122 N.M. 777, 932 P.2d 1.

{11} Under the interstitial approach,

> the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

Id. ¶ 19 (citations omitted).

{12} The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." (Emphasis added.) Article II, Section 10 of the New Mexico Constitution provides that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures. . . ." Article II, Section 10 parallels the federal Fourth Amendment and embodies "the fundamental notion that *every person in this state* is entitled to be free from unwarranted governmental intrusions." *State v. Gutierrez*, 1993-NMSC-062, ¶ 46, 116 N.M. 431, 863 P.2d 1052 (emphasis added).

I. The United States Constitution was not violated

{13} The events in this case occurred at an international border checkpoint, not at an interior fixed checkpoint. "This is an important distinction as a citizen's Fourth Amendment rights at a checkpoint located on the border . . . are significantly less than inside the border." *United States v. Rascon-Ortiz*, 994 F.2d 749, 752 n.4 (10th Cir. 1993). The federal government's "interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). Therefore, "the Fourth Amendment's *balance of reasonableness is qualitatively different* at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (emphasis added).

{14} Customs officers are afforded "great latitude in conducting a search at an international

border crossing," *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973), and "may conduct routine searches of persons and effects crossing the border even in the absence of individualized suspicion." *United States v. Ezeiruaku*, 936 F.2d 136, 140 (3d Cir. 1991); *see also Montoya de Hernandez*, 473 U.S. at 538 ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. . . ."). During these routine searches, "[t]he primary inspector's job is to make a preliminary determination [of] whether an entrant . . . should be allowed beyond the customs line." *United States v. Salas-Camacho*, 859 F.2d 788, 791 (9th Cir. 1988). "The secondary inspector is called upon to act when a vehicle is referred for additional inspection" and is responsible for "conduct[ing] a more searching examination." *Id.* "Referral to a secondary checkpoint . . . is considered to be routine border inspection procedure." *United States v. Ledezma-Hernandez*, 729 F.2d 310, 313 (5th Cir. 1984). Thus, suspicion of illicit activities is not required to refer a motorist from a primary to a secondary area. *See id.* Routine searches include "patdowns, frisks, luggage searches, and automobile searches." *United States v. Whitted*, 541 F.3d 480, 485 (3d Cir. 2008). These types of searches conducted at an international border checkpoint "have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

{15} "The border search doctrine is also applicable to stops and searches conducted at the 'functional equivalent' of the border, i.e., the first point at which an entrant may practically be detained." *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). Searches at the functional equivalents of borders are "those searches that, although not conducted at the actual physical border, take place after a border crossing at the first practicable detention point." *United States v. Garcia*, 672 F.2d 1349, 1365 (11th Cir. 1982). "Such searches are truly border searches because their sole justification is the fact that the border has been crossed." *Id.* For example, "a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." *Almeida-Sanchez*, 413 U.S. at 273.

{16} However, there is another federal doctrine concerning "the constitutionality of vehicle stops conducted *within* U.S. borders." *Garcia*, 672 F.2d at 1359 (emphasis added); *see United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). These cases "did not apply the functional-equivalent theory," *Garcia*, 672 F.2d at 1359, because "the distance of the Border Patrol checkpoints from the Mexican border . . . dissuaded the [United States Supreme] Court from applying the border-search rationale." *Id*. at 1360 n.14. This doctrine permits "brief warrantless stops of vehicles at permanent checkpoints absent any suspicion" of illicit activity. *Id.* at 1359. We will refer to the line of cases supporting stops within the United States border as the federal "interior fixed-checkpoint doctrine."

{17} The interior fixed-checkpoint doctrine considers "the formidable law enforcement problems of the Border Patrol in attempting to control the flow of illegal aliens into this country, and balance[s] this governmental interest against the degree of interference with individuals' fourth amendment rights caused by the stop or search procedure at issue in each case." *Garcia*, 672 F.2d at 1359–60 (internal quotation marks and citation omitted).

{18} Under the interior fixed-checkpoint doctrine,

> [a] detention at a border checkpoint is a seizure under the Fourth Amendment. However, because the public has a substantial interest in protecting the integrity of our national borders, and the intrusion upon one's right to privacy and personal security by a routine border inspection is minimal, a border patrol agent may briefly detain and question an individual without any individualized suspicion. . . . The Fourth

> Amendment protects an individual's liberty at a border checkpoint by limiting the scope of the detention.

Rascon-Ortiz, 994 F.2d at 752 (footnote and citations omitted). As part of a routine interior fixed-checkpoint stop, "border patrol agents may direct motorists from the primary inspection area to secondary without individualized suspicion and have wide discretion in selecting the motorists to be diverted." *Id.* (internal quotation marks and citation omitted). "Any further detention must be based on consent or probable cause." *Martinez-Fuerte*, 428 U.S. at 567 (alterations and internal quotation marks omitted) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)).

{19} Routine interior fixed-checkpoint stops generally involve "questions concerning the motorist's citizenship or immigration status, and a request for documentation." *Rascon-Ortiz*, 994 F.2d at 752. "A cursory visual inspection of the vehicle is also routine, and a few brief questions concerning such things as vehicle ownership, cargo, destination, and travel plans may be appropriate if reasonably related to the agent's duty to prevent" illegal immigration and the smuggling of contraband. *Id.* (citation omitted). However, "neither the vehicle nor its occupants" can be searched as part of a "routine inquiry," and the "visual inspection of the vehicle is limited to what can be seen without a search." *United States v. Ludlow*, 992 F.2d 260, 264 (10th Cir. 1993). Thus, the routine stops permitted under the interior fixed-checkpoint doctrine are less intrusive upon travelers' privacy than the routine searches permitted at an international border checkpoint under the border search doctrine. *Compare Whitted*, 541 F.3d at 484–85 (discussing the scope of routine searches allowed under the border search doctrine), *with Ludlow*, 992 F.2d at 263–64 (discussing the scope of routine inquiries allowed under the interior fixed-checkpoint doctrine); *see also Rascon-Ortiz*, 994 F.2d at 752 n.4 ("[A] citizen's Fourth Amendment rights at a checkpoint located on the border, or its functional equivalent, are significantly less than inside the border.").

{20} Because the search in this case occurred at an international border checkpoint, we analyze the constitutionality of the search under the border search doctrine and conclude that Sanchez's referral to a secondary area was a permissible part of a routine border search. *See Klein*, 472 F.2d at 849. Because the canine drug-sniff was performed during the course of this routine search, the drug-sniff was also permissible under federal law. *See United States v. Kelly*, 302 F.3d 291, 294–95 (5th Cir. 2002) (holding that the use of a trained canine to sniff a pedestrian entering the United States is a permissible part of a routine border search, even without a showing of individualized suspicion of illicit activity).

{21} The parties agree that the federal constitution does not confer upon Sanchez the right to be free of prolonged detention, even if the detaining officer lacked reasonable suspicion of illicit activities. Because there was no federal constitutional violation, we proceed to the state constitutional claim. *See Gomez*, 1997-NMSC-006, ¶ 19.

II. There are no reasons to diverge from the federal border search doctrine

{22} Under New Mexico law, we "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics"; this is also known as the interstitial approach. *See id.* We do not detect a flaw in the federal analysis concerning the border search doctrine. A rule that more robustly curbs the ability of law enforcement to conduct border searches "would frustrate the customary examinations conducted by customs officials as normal incidents of the meeting of their responsibilities." *Blefare v. United States*, 362 F.2d 870, 884 (9th Cir. 1966). The border search doctrine thus acknowledges the "exigencies present and the vital national interest demanding the regulation of who and what traverse our borders." *Blefare*, 362 F.2d at 884.

{23} As in *Cardenas-Alvarez*, we also conclude that there are no structural differences between state and federal governments so as to require a departure from federal precedent. 2001-NMSC-017, ¶ 14. Moreover, Sanchez does not argue that structural differences should warrant a departure. She contends instead that "New Mexico law provides several distinctive characteristics that require departure."

{24} Sanchez contends that New Mexico has distinctively provided heightened protections from searches and seizures "in both the automobile context and in the border context." She urges us to extend *Cardenas-Alvarez* to hold that Pedroza violated Article II, Section 10 when she referred Sanchez to a secondary area of an international border checkpoint to complete the inspection of Sanchez's van. *Cardenas-Alvarez* relied upon "the extra layer of protection that New Mexico offers its motorists" to justify heightened search and seizure protections at *interior fixed checkpoints*. *Id.* ¶¶ 1, 16. Thus, Sanchez would have us hold that the scope of travelers' rights at international border checkpoints are identical to the scope of rights at interior fixed checkpoints.

{25} *Cardenas-Alvarez* concerned stops at interior fixed checkpoints, and it accordingly analyzed the facts of the case under the *interior fixed-checkpoint doctrine*. *Id.* ¶¶ 1–2, 16. New Mexico has rejected the "notion that an individual lowers his [or her] expectation of privacy when he [or she] enters an automobile, and elected instead to provide motorists with a 'layer of protection' from unreasonable searches and seizures that is unavailable at the federal level." *Id.* ¶ 15 (citation omitted). "Therefore, in New Mexico, we . . . proscribe the prolongation of [an interior fixed-]checkpoint stop once questions regarding citizenship and immigration status have been answered, unless the officer conducting the stop reasonably suspects the defendant of criminal activity." *Id.* ¶ 16. In contrast, under the federal interior fixed-checkpoint doctrine, "questions regarding travel plans and the referral of a defendant from primary to secondary part of a routine border checkpoint stop . . . require[] no suspicion of criminal activity. . . ." *Id.*

{26} While *Cardenas-Alvarez* departed from the federal interior fixed-checkpoint doctrine, it did not analyze the federal border search doctrine. *See generally id.* "The general rule is that cases are not authority for propositions not considered." *Fernandez v. Farmers Ins. Co. of Arizona*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (internal quotation marks and citations omitted). Consequently, *Cardenas-Alvarez* cannot be read as modifying the federal border search doctrine, which is implicated by the facts of this case. We therefore determine whether the extra layer of protection afforded to New Mexico motorists mandates departure from the federal *border search doctrine*.

{27} Determining the permissibility of a search or seizure involves balancing governmental interests with the individual's right to privacy. *See Montoya de Hernandez*, 473 U.S. at 539–40. When individuals engage in certain courses of action, their privacy interests may be diminished within the context of a permissible search or seizure. *See Almeida-Sanchez*, 413 U.S. at 271. For example, when a gun dealer "chooses to engage in [a] pervasively regulated business and to accept a federal license, he [or she] does so with the knowledge that his [or her] business records, firearms and ammunition will be subject to effective inspection." *Id.* Likewise, an individual who presents himself or herself at an international border checkpoint for admission to the United States has a lesser expectation of privacy than he or she would have at an interior fixed checkpoint. *See Montoya de Hernandez*, 473 U.S. at 539.

{28} We conclude that the extra layer of protection for motorists that New Mexico law provides is not a distinctive state characteristic that increases the individual's expectation of privacy at an international border checkpoint. *Cardenas-Alvarez* was premised on the fact that motorists in New Mexico have a greater expectation of privacy than that which is protected by federal law at interior fixed checkpoints.

2001-NMSC-017, ¶¶ 15–16. "Since not all individuals that are required to stop at a permanent checkpoint have been outside the United States but are New Mexico motorists lawfully traveling on New Mexico's highways, New Mexico has an interest in providing some protection to individuals who are compelled to pass through a checkpoint." *Id.* ¶ 53 (Baca, J., concurring in the result); *see also Carroll v. United States*, 267 U.S. 132, 154 (1925) ("[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."). However, traffic passing through an international border checkpoint is international in nature, not domestic. *See United States v. Jackson*, 807 F.2d 1185, 1192 (5th Cir. 1986) (Reavley, J., specially concurring) ("[S]earches conducted at locations functionally equivalent to a border interdict the same kind of traffic stopped at our nation's borders: international traffic."), *aff'd on reh'g*, 825 F.2d 853 (5th Cir. 1987). Thus, traffic passing through international border checkpoints do not contain domestic travelers who have heightened expectations of privacy that are idiosyncratic to the state in which they are traveling; all international travelers have a lessened expectation of privacy because they present themselves at the border for entry into the United States. *See Montoya de Hernandez*, 473 U.S. at 539–40 ("[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." (citations omitted)). Thus, the extra layer of protection that vindicates the privacy interests of domestic travelers is not implicated at international border checkpoints. We therefore decline to depart from the federal border search doctrine.

{29} We also note that fighting illegal immigration and smuggling present significant problems for federal law enforcement. *See, e.g.*, *Montoya de Hernandez*, 473 U.S. at 538 ("These cases reflect longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling . . . illegal narcotics. . . ."); *Martinez-Fuerte*, 428 U.S. at 552 ("Interdicting the flow of illegal entrants . . . poses formidable law enforcement problems."). Differences between state and federal search and seizure rules create "very serious and, in some cases, seemingly insoluble problems for law enforcement officials." James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 Md. L. Rev. 223, 263 (1996). Such problems include the generation of choice of law issues and the prospect of increasing litigation. *See id.* at 250–55. Therefore, we conclude that departing from the federal border search doctrine would exacerbate law enforcement issues at the international border.

{30} The United States Supreme Court has stated that "[t]here is no war between the [United States] Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), *limited on other grounds by United States v. Leon*, 486 U.S. 897, 906, 928 (1984). Likewise, there is no need for the New Mexico Constitution to conflict with common sense. "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their . . . mutual obligation to respect the same fundamental criteria in their approaches." *Id.* at 658. Our refusal to depart from the federal border search doctrine acknowledges the significant law enforcement problems at an international border checkpoint where it is known that a motorist is entering from outside the country, thereby vindicating common sense and furthering federal-state cooperation.

CONCLUSION

{31} We reverse the decision of the Court of Appeals in *Sanchez*, Ct. App. No. 32,994, and

also reverse the district court's suppression of the evidence.

{32} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

WE CONCUR:

BARBARA J. VIGIL,
Chief Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2016-NMSC-013

Filing Date: March 3, 2016

Docket No. S-1-SC-34726

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL 1 INC. TRUST 2006-NC4,

Plaintiff-Petitioner,

v.

JOHNNY LANCE JOHNSTON,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Manuel I. Arrieta, District Judge

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OPINION

CHÁVEZ, Justice.

{1} This case requires us once again to examine traditional rules of jurisdiction and standing in the context of modern mortgage foreclosure actions. In *Bank of New York v. Romero*, 2014-NMSC-007, ¶¶ 19–38, 320 P.3d 1, we concluded that the plaintiff did not establish standing to foreclose on the defendant's home when it could not prove that it had the right to enforce the promissory note on the mortgage at the time it filed suit. *See* NMSA 1978, § 55-3-301 (1992) (defining "'[p]erson entitled to enforce' [a negotiable] instrument"). In the present case, Petitioner Deutsche Bank National Trust Company, acting as trustee for Morgan Stanley ABS Capital 1 Inc. Trust 2006-NC4 (Deutsche Bank), filed a complaint seeking foreclosure on the home of Respondent Johnny Lance Johnston (Homeowner) and attached to its complaint an unindorsed note, mortgage, and land recording, both naming a third party as the mortgagee. Deutsche Bank later provided documentation and testimony showing that (1) a document assigning the mortgage to Deutsche Bank was dated *prior* to the filing of the complaint but recorded *after* the complaint was filed; (2) Deutsche Bank possessed a version of the note indorsed in blank at the time

of trial; and (3) a servicing company began servicing the loan to Homeowner on behalf of Deutsche Bank prior to the filing of the complaint. After receiving this evidence, the district court found that Deutsche Bank had standing to foreclose on Homeowner's property. The Court of Appeals disagreed, opining that "standing is a jurisdictional prerequisite for a cause of action," and concluded that the evidence provided by Deutsche Bank did not establish its standing as of the time it filed its complaint. *Deutsche Bank Nat'l Tr. Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶¶ 8, 13–15, 335 P.3d 217, *cert. granted*, 2014-NMCERT-008. Although we hold that standing is not a jurisdictional prerequisite in this case, we nonetheless affirm the Court of Appeals's ultimate conclusion that the evidence provided by Deutsche Bank did not establish standing.

I. BACKGROUND

{2} On January 31, 2006, Homeowner refinanced his home by executing a promissory note made payable to New Century Mortgage Corporation (New Century). The note was secured by a mortgage on Homeowner's property in Las Cruces. Homeowner defaulted on his loan payments beginning in August 2008, and received a letter notifying him of his default dated October 12, 2008 from American Servicing Company (ASC), a loan servicing company.

{3} On February 24, 2009, Deutsche Bank filed a complaint for foreclosure. Deutsche Bank attached two exhibits to its complaint: (1) a January 31, 2006 promissory note made payable to New Century which did not contain an indorsement; and (2) a January 31, 2006 mortgage on Homeowner's property recorded in the Doña Ana County Office of the County Clerk on February 7, 2006 by New Century, which the County Clerk also names as the mortgagee. In its complaint, Deutsche Bank alleged that it owned the mortgage through assignment and was a holder in due course of the note. Homeowner "acknowledge[d]" this allegation in his pro se answer to Deutsche Bank's complaint.

{4} On August 11, 2010, Homeowner filed an amended motion to dismiss for lack of standing, contending that Deutsche Bank "did not show ownership of the note, nor a security interest," and that it provided no other evidence that it was the holder of the note as of the date that it filed its complaint. Deutsche Bank's response to Homeowner's motion to dismiss attached an assignment of mortgage document dated February 7, 2006 and recorded in Doña Ana County on December 9, 2009 as proof that Deutsche Bank held the note at the time it filed the complaint.[1]

{5} The district court set the hearing on Homeowner's motion to dismiss for the same day as trial. After concluding that Homeowner's arguments on the motion to dismiss would be similar to his arguments on the merits, the district court took Homeowner's motion under advisement and agreed to consider it during the bench trial on the merits.

{6} At trial, Deutsche Bank offered further evidence to prove that it owned the note. First, Deutsche Bank proffered a version of the January 31, 2006 note that was indorsed in blank by New Century. This new note was identical to the original note attached to Deutsche Bank's complaint except that the note attached to the complaint did not contain any indorsement. Second, Deutsche Bank offered the testimony of Erin Hirzel Roesch, a litigation specialist for the loan servicing company. Ms. Roesch was employed by Wells Fargo Bank, NA, which she testified is effectively the same company as ASC. Ms. Roesch testified based on her review of the file on Homeowner's mortgage. She testified that because the proffered note was indorsed in blank, Deutsche Bank, as holder of the note, could act as the lender of the note; that Deutsche Bank was assigned the mortgage on February 7, 2006; and that her company began servicing the loan in July 2006.

[1] Deutsche Bank's response to Homeowner's motion to dismiss claimed that the assignment of mortgage was recorded on January 9, 2009, which would have been prior to its February 24, 2009 complaint. However, Deutsche Bank did not provide any evidence establishing that the assignment was recorded on that date.

{7} The district court concluded that Deutsche Bank was "the current holder of the Note and Mortgage." The court also concluded that Homeowner was "in default in payment of the principal and interest on the Note and Mortgage described in [Deutsche Bank's] Complaint." Based on these findings, the district court then held that Deutsche Bank was entitled to a foreclosure judgment on Homeowner's property.

{8} The Court of Appeals reversed and remanded to the district court "with instructions to vacate its judgment of foreclosure" because Deutsche Bank lacked standing to foreclose. *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶¶ 15, 18. The Court of Appeals reasoned that under *Bank of New York*, 2014-NMSC-007, ¶ 17, "standing is a jurisdictional prerequisite for a cause of action and must be established at the time the complaint is filed." *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 8. Accordingly, "to establish standing to foreclose, a lender must show that, *at the time it filed its complaint for foreclosure*, it had: (1) a right to enforce the note, which represents the debt, and (2) ownership of the mortgage lien upon the debtor's property." *Id.* (emphasis added). In practical terms, the Court of Appeals's decision requires a party seeking to establish its right to enforce a note to either produce an original or properly indorsed note with its complaint for foreclosure or to later introduce a dated indorsed note executed prior to the initiation of the foreclosure suit. *See id.* ¶ 12. The Court concluded that in this case, "neither the unindorsed copy of the note produced with the foreclosure complaint nor the indorsed note produced at trial were sufficient to show that [Deutsche Bank] held the note when it filed the complaint" and that the assignment of mortgage proffered by Deutsche Bank had "no bearing on the validity or the timing of the note's indorsement." *Id.* ¶¶ 13–14.

{9} We granted Deutsche Bank's petition for certiorari to review (1) whether standing is jurisdictional in mortgage foreclosure cases; (2) whether the Court of Appeals erred in interpreting *Bank of New York* to require a plaintiff who presents an original, indorsed-in-blank promissory note at trial to establish that it is the holder of the note by presenting an indorsement dated prior to the filing of the complaint or by attaching an indorsed copy of the note to the complaint; and (3) whether the Court of Appeals erred by concluding that an assignment of mortgage dated prior to the filing of the complaint cannot by itself establish standing. While we take this opportunity to clarify that standing is not a jurisdictional prerequisite in mortgage foreclosure cases in New Mexico, we otherwise affirm the result reached by the Court of Appeals based on principles of prudential standing.

II. DISCUSSION

A. The Doctrine of Standing in New Mexico

{10} Deutsche Bank challenges the Court of Appeals's statement that "standing is a jurisdictional prerequisite for a cause of action." *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 8 (citing *Bank of N.Y.*, 2014-NMSC-007, ¶ 17). Deutsche Bank accurately observes that our jurisprudence has previously recognized that standing is jurisdictional in the context of statutory causes of action rather than all causes of action. *Bank of N.Y.*, 2014-NMSC-007, ¶ 17. With that distinction in mind, Deutsche Bank then argues that the cause of action to enforce a promissory note existed at common law and was not created by statute. Deutsche Bank concludes that standing in this case therefore cannot be jurisdictional. We agree with Deutsche Bank that standing is not jurisdictional in this case because the cause of action to enforce a promissory note was not created by statute. Therefore, only prudential rules of standing apply to the claims in this case.

{11} As a general rule, "standing in our courts is not derived from the state constitution, and is not jurisdictional." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9, 144 N.M. 471, 188 P.3d 1222. However, "'[w]hen 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.* ¶ 9 n.1 (quoting *In re Adoption of W.C.K.*, 2000 PA Super 68, ¶ 6, 748 A.2d 223 (Pa. Super. Ct. 2000), *abrogated by In re Nomination Petition of deYoung*, 903 A.2d 1164, 1168, 1168 n.5 (Pa. 2006)). In light of the conclusions reached by the Court of Appeals in this case, *Deutsche Bank National Trust Co.*, 2014-NMCA-090, ¶ 8, we take this opportunity to clarify our statements in *Bank of New York*, 2014-NMSC-007, ¶ 17, and hold that mortgage foreclosure actions are not created by statute. Therefore, the issue of standing in those cases cannot be jurisdictional.

{12} The cause of action to enforce a promissory note originated at common law and already existed when New Mexico adopted the Uniform Commercial Code (UCC) in 1961. *See Kepler v. Slade*, 1995-NMSC-035, ¶ 14, 119 N.M. 802, 896 P.2d 482 ("Under the common law rule, an action to foreclose on real property is separate and distinct from an action to recover on an underlying promissory note."); *Edwards v. Mesch*, 1988-NMSC-085, ¶ 4, 107 N.M. 704, 763 P.2d 1169 ("The rights of a holder of a promissory note were discussed by this court as early as [1853]."). 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. *See Males v. W.E. Gates & Assocs.*, 504 N.E.2d 494, 495 (Ohio Misc. 2d 1985) ("[A]ctions on promissory notes are rooted in the common law of contracts. The Uniform Commercial Code represents the fifty states' effort toward achieving uniformity and certainty in commercial transactions. Thus, this action is not a representative of a right created by statute, such as a wrongful death action."). *See also* 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" (emphasis added) (footnotes omitted)). Indeed, the UCC recognizes the continuing vitality of common law "principles of law and equity" which supplement its provisions. Section 55-1-103(b). *See also Venaglia v. Kropinak*, 1998-NMCA-043, ¶¶ 11–12, 125 N.M. 25, 956 P.2d 824 ("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."). Thus, 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.

{13} When standing does not act as a jurisdictional threshold, as in this case, prudential considerations govern our analysis. *See ACLU of N.M.*, 2008-NMSC-045, ¶ 9. While New Mexico courts are not subject to the jurisdictional limitations imposed by Article III, Section 2 of the United States Constitution, the standing jurisprudence in our courts has "long been guided by the traditional federal standing analysis." *ACLU of N.M.*, 2008-NMSC-045, ¶ 10. "Thus, at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke the court's authority to decide the merits of a case." *Id.*; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling."). However, it is well settled that New Mexico courts are also not bound by the limitations on standing that are constitutionally imposed on federal courts and we have occasionally granted standing when it would not otherwise exist under the federal analysis, most notably in instances where a case presents a "question of fundamental importance to the people of New Mexico." *See, e.g.*, *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 4, 132 N.M. 282, 47 P.3d 441 (holding that validity of the Concealed Handgun Carry Act raised important constitutional question sufficient to ignore normal limitations on standing (internal quotation marks and citation omitted)); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶¶ 1–2, 15, 120 N.M. 562,

904 P.2d 11 (claim that the Governor lacked authority to enter into various compacts pursuant to the Indian Gaming Regulatory Act was of sufficient public importance to confer standing without examining the standing of individual litigants); *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 7, 86 N.M. 359, 524 P.2d 975 (conferring standing under this Court's discretionary power due to great public importance of constitutional challenge to partial vetoes); *State ex rel. Gomez v. Campbell*, 1965-NMSC-025, ¶¶ 15, 18, 75 N.M. 86, 400 P.2d 956 (concluding that the plaintiffs did not establish standing but proceeding to the merits of the constitutional question in that case due to its "great public interest").

{14} In *ACLU of New Mexico*, we reaffirmed our adherence to the federal three-pronged approach in cases that do not present issues of fundamental public importance; we also recognized that the injury in fact requirement in particular is "deeply ingrained in New Mexico jurisprudence." 2008-NMSC-045, ¶¶ 10–22. Even a slight injury establishes an injury in fact sufficient to confer standing. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 12, 126 N.M. 788, 975 P.2d 841. However, we have repeatedly emphasized that the injury in fact prong of our standing analysis "[r]equir[es] that the party bringing suit show that he [or she] is injured or threatened with injury in a direct and concrete way" as a matter of "sound judicial policy." *ACLU of N.M.*, 2008-NMSC-045, ¶ 19 (internal quotation marks and citation omitted); *see also N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 12 (litigant generally must show direct injury to establish standing). Although the UCC's definition of who may enforce a note does not create a jurisdictional prerequisite in this case, it nonetheless guides our determination of whether the plaintiff can articulate a direct injury that the cause of action is intended to address. *See Bank of N.Y.*, 2014-NMSC-007, ¶¶ 19–38 (analyzing whether foreclosure plaintiff had standing under provisions of Section 55-3-301 defining who is legally entitled to enforce a promissory note); *see also Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶¶ 10–11, 121 N.M. 764, 918 P.2d 350 (determining that the question of whether a party has standing to sue is not distinct from whether that party can assert a cause of action under a particular statute). The UCC provides that there are three scenarios in which a person is entitled to enforce a negotiable instrument such as a promissory note: (1) when that person is the holder of the instrument; (2) when that person is a nonholder in possession of the instrument who has the rights of a holder; and (3) when that person does not possess the instrument but is still entitled to enforce it subject to the lost-instrument provisions of UCC Article 3. Section 55-3-301. To show a "direct and concrete" injury, Deutsche Bank needed to establish that it fell into one of these three statutory categories that would establish both its right to enforce Homeowner's promissory note and its basis for claiming that it suffered a direct injury from Homeowner's alleged default on the note. *ACLU of N.M.*, 2008-NMSC-045, ¶ 19; *see also Bank of N.Y.*, 2014-NMSC-007, ¶ 19.

B. Homeowner Did Not Waive the Issue of Standing

{15} Deutsche Bank contends that because standing was not a jurisdictional prerequisite in this case, the issue "may be and was admitted and waived" because Homeowner "'acknowledge[d]'" Deutsche Bank's allegation within its complaint that Deutsche Bank owned both the note and the mortgage. We agree that our determination that standing is not jurisdictional in this case opens up the possibility that Homeowner could have waived the issue, but disagree that Homeowner waived it here.

{16} Arguments based on a lack of prudential standing are analogous to asserting that a litigant has failed to state a legal cause of action. As we have previously discussed, we generally require "injury in fact, causation, and redressability" to establish standing. *ACLU of N.M.*, 2008-NMSC-045, ¶ 10. If these elements are not met, as a logical matter, a plaintiff generally cannot show that he or she has

stated a cause of action entitling him or her to a remedy. *See Key*, 1996-NMSC-038, ¶¶ 10–11. Thus, while a plaintiff's failure to state a cognizable claim for relief and a plaintiff's lack of prudential standing are not strictly jurisdictional, both implicate the "properly limited . . . role of courts in a democratic society" and are relevant concerns throughout a litigation. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746 (internal quotation marks and citation omitted). Under Rule 1-012(H)(2) NMRA, "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered . . . or by motion for judgment on the pleadings, or at the trial on the merits." We hold that Rule 1-012(H)(2) applies to issues of prudential standing and precludes any waiver of standing prior to the completion of a trial on the merits. *Sundance Mech. & Util. Corp. v. Atlas*, 1990-NMSC-031, ¶ 25, 109 N.M. 683, 789 P.2d 1250.

{17} In this case, Homeowner did not waive standing because he raised the issue in a motion filed on August 11, 2010, over a month before the September 16, 2010 trial. In addition, the district court considered Homeowner's challenge to Deutsche Bank's standing during the trial on the merits. Homeowner therefore raised the issue of standing both by motion and at the trial on the merits, either of which would independently constitute a timely assertion of this defense. Rule 1-012(H)(2).

{18} Further, we are not convinced by Deutsche Bank's argument that Homeowner waived his right to challenge its standing because in his answer to Deutsche Bank's complaint, he "acknowledge[d]" Deutsche Bank's allegation that it owned Homeowner's note and mortgage through assignment. Even under the generous assumption that Homeowner's "acknowledge[ment]" that Deutsche Bank was entitled to enforce the note was an admission of that fact, we disagree with Deutsche Bank's premise that Homeowner could have waived this defense through his initial responsive pleading. When standing is a prudential consideration, it can be raised for the first time at any point in an active litigation, just like a defense of failure to state a claim, and unlike defenses relating to personal jurisdiction, venue, and insufficient service of process, all of which must be raised in an initial or amended responsive pleading. *Compare* Rule 1-012(H)(2) *with* Rule 1-012(H)(1).

{19} Moreover, it would be nonsensical to place any burden on a foreclosure defendant to know whether the party seeking foreclosure is actually entitled to do so. For example, in the present case, Homeowner signed his financing agreement with New Century; received correspondence regarding his defaults on his mortgage payments from ASC, the loan servicing company, which was apparently also the same company as Wells Fargo Bank, N.A.; and he was ultimately sued by Deutsche Bank. Under these circumstances, there is no indication that either Homeowner or any defendant being sued over a securitized mortgage, for that matter, would be in a position to have personal knowledge of who had the right to enforce his or her mortgage. In addition, as we will explain, allowing a foreclosure defendant to waive the issue of standing would not only vitiate that homeowner's rights, but could in fact cloud the title of the underlying property and lead to other problems to the detriment of New Mexico's property system as a whole. Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637, 662 (2013). The important societal interests in maintaining the integrity of the property system, protecting subsequent purchasers of the property, and the minimal probative value of the alternative, convince us that a foreclosure defendant cannot voluntarily waive a challenge to the plaintiff's standing during the course of the litigation.[2]

[2] As we will explain in Section II, Part E, a foreclosure defendant effectively waives his right to challenge the plaintiff's standing once a final judgment has been entered.

C. Standing Must Be Established as of the Date of Filing Suit in Mortgage Foreclosure Cases

{20} Before turning to a specific analysis of Deutsche Bank's standing in this case, we will clarify why standing must be established as of the time of filing suit in mortgage foreclosure cases, despite our determination that standing is not a jurisdictional issue in such cases. *Bank of New York*, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570–71, 570 n.5 (1992), states that "standing to bring a foreclosure action" must exist "at the time [a plaintiff] file[s] suit." 2014-NMSC-007, ¶ 17. Deutsche Bank asks this Court to revisit this requirement, contending that (1) unlike in federal courts, standing in New Mexico courts is not a jurisdictional issue such that standing does not necessarily have to exist at the time of filing; and (2) as a prudential matter, requiring foreclosure plaintiffs to establish that they had standing at the time of filing contravenes our interest in judicial economy. Neither argument advanced by Deutsche Bank convinces us to deviate from well-established principles of standing, which are solidly supported by several prudential and policy considerations that arise in the particular context of mortgage foreclosure actions.

{21} There are sound policy reasons for requiring strict compliance with the traditional procedural requirement that standing be established at the time of filing in mortgage foreclosure actions. This procedural safeguard is vital because the securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes, and more generally the recording of interests in property. *See* Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205, 1209–10 (2013) ("[T]he failure to deliver the original notes with proper indorsements [to assignees], the routine creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements . . . is widespread."). Under these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce. As Professor Levitin notes, Article 3 of the UCC and the land records recording system are each based upon the notion of strict "compliance with demonstrative legal formalities to achieve property rights," which admittedly carries "up-front costs," but also ensures "a high degree of security in the property rights, both vis-à-vis other competing claimants to the property rights and as to the ability to enforce the mortgage property rights." Levitin, *supra*, at 648. This regime is also desirable for its simplicity—"possession clarifies title because there can be only one possessor at a time," while "[i]ndorsement creates a chain of title that travels with the instrument and provides an easy, objective manner for establishing who has rights to the instrument." Levitin, *supra*, at 662. These formalities are strengthened by strict standing requirements. Otherwise, institutions could potentially cloud title by foreclosing on a property upon which they do not possess the right to foreclose.[3]

{22} Indeed, standing in foreclosure actions "is not a mere procedural detail"; it protects homeowners against double liability such as "when the wrong party sells the home and the note holder later appears seeking full payment on the note," or when a homeowner faces multiple lawsuits in different jurisdictions. Renuart, *supra*, at 1212. Reducing the potential for double liability is also beneficial to the property system at large because "[i]f a debtor fears multiple satisfaction of the same debt, the debtor will not borrow, thereby chilling economic activity," whereas strict compliance with UCC requirements "enables verification of the terms of the obligation[,] and hence greater ability to enforce[, and] provid[es]

[3] Professor Levitin illustrates this idea with the following example:

> If the seller is not the person entitled to foreclose, the foreclosure sale is no different from a sale of the Brooklyn Bridge. Accordingly, the foreclosure-sale purchaser has no ability to transfer title to the property, no matter [his or] her equities, because [he or] she lacks title, just like the hapless buyer of the Brooklyn Bridge.

Levitin, *supra*, at 646.

a mechanism for verifying the discharge of the obligation." Levitin, *supra*, at 664. In our view, the minor up-front compliance costs that foreclosure plaintiffs will incur by confirming that they have the proper documentation *before* filing suit are a small price to pay for protecting the rights of New Mexico homeowners and the integrity of the State's title system by requiring strict and timely compliance with long-standing property law requirements. To be clear, perhaps despite recent industry practices, this is *not* an additional requirement that we impose punitively; it is simply a symptom of compliance with long-standing rules. *See* Levitin, *supra*, at 650–51 ("A mortgage loan involves a bundle of rights, including procedural rights. These procedural rights are not merely notional; they are explicitly priced by the market. Mortgage finance availability and pricing is statistically correlated with variations in procedural protections for borrowers. Retroactively liberalizing the rules for mortgage enforcement creates an unearned windfall for mortgagees." (footnote omitted)). In other words, requiring that standing be established as of the time of filing provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has a right to do so.

{23} Further, although we are sympathetic to the additional burdens this may impose on an entity seeking to foreclose on a home, New Mexico is hardly alone among the states in requiring a foreclosure plaintiff to prove that it was entitled to enforce the note when it filed suit. *See* Levitin, *supra*, at 642–44 ("[T]here is broad agreement among courts that some sort of standing or similar status is necessary for both judicial and nonjudicial foreclosure. . . . There is also broad agreement that the party bringing the foreclosure action or sale *must have standing at the time the litigation . . . is commenced*." (emphasis added) (footnote omitted)). For example, in *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶¶ 24–25, 979 N.E.2d 1214, *overruling on other grounds recognized by Bank of New York Mellon v. Grund*, 2015-Ohio-466, ¶¶ 23–24, 27 N.E.3d 555, the Supreme Court of Ohio clarified that, under Ohio law, standing must be analyzed as of the commencement of an action in mortgage foreclosure cases. *See also U.S. Bank Nat'l Ass'n v. McConnell*, 305 P.3d 1, 8 (Kan. Ct. App. 2013) (concluding that the foreclosure plaintiff had standing because it was undisputed that the plaintiff held the note *prior* to the date that suit was filed). Therefore, "[p]ost-filing events that supply standing that did not exist on filing may be disregarded . . . despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress." *Fed. Home Loan Mortg. Corp.*, 2012-Ohio-5017, ¶ 26 (first alteration in original) (internal quotation marks and citation omitted). The Supreme Court of Oklahoma has similarly explained that if a foreclosure plaintiff "became a person entitled to enforce the note . . . after the foreclosure action was filed," the plaintiff's initial lack of standing could not be cured and the proper remedy was to dismiss the case without prejudice. *Deutsche Bank Nat'l Tr. v. Brumbaugh*, 2012 OK 3, ¶ 11, 270 P.3d 151; *see also McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. Dist. Ct. App. 2012) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed. Stated another way, the plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." (internal quotation marks and citation omitted)); *Deutsche Bank Nat'l Tr. Co. v. Mitchell*, 27 A.3d 1229, 1234–36 (N.J. Super. Ct. App. Div. 2011) (stating that a plaintiff must have standing at the time the foreclosure complaint is filed, and a lack of standing cannot be cured by showing that a plaintiff acquired standing after the complaint was filed); *Wells Fargo Bank, N.A. v. Marchione*, 887 N.Y.S.2d 615, 616–17 (N.Y. App. Div. 2009) (noting that a plaintiff-assignee lacked standing where the note and mortgage were assigned to the plaintiff after commencement of the foreclosure action); *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81, ¶¶ 12–20, 27 A.3d 1087 (stating that standing must be established at the time of filing suit, and it did not contravene the interest of judicial efficiency to dismiss the complaint

of a foreclosure plaintiff who acquired standing after the complaint had been filed). As a result, we conclude that it is not presumptuous to require, as do a substantial number of other states, that a company claiming to be a mortgage holder must produce proof that it was entitled to enforce the underlying promissory note prior to the commencement of the foreclosure action by, for example, attaching a note containing an undated indorsement to the initial complaint or producing a note dated before the filing of the complaint at some appropriate time in the litigation. We agree with the Vermont Supreme Court, which opined that "[i]t is neither irrational nor wasteful to expect a foreclosing party to actually be in possession of its claimed interest in the note, and have the proper supporting documentation in hand when filing suit." *Kimball*, 2011 VT 81, ¶ 20.

{24} Deutsche Bank also argues that our insistence that it demonstrate that a note indorsed in blank was indorsed prior to the time of filing improperly adds a new requirement that indorsements be dated, in contravention of the UCC. *See Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 12 (holding that "if [a] lender produces the indorsed note after filing the complaint, the indorsement must be dated to show that the indorsement was executed prior to the initiation of the foreclosure suit"). We agree with Deutsche Bank that the UCC does not require that instruments be dated. *See* NMSA 1978, § 55-3-113(b) (1992) ("If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder."). However, Deutsche Bank conflates the need to date a negotiable instrument, so as to create an enforceable promissory note, with the requirement that Deutsche Bank establish that it was entitled to enforce the instrument at the time of filing. Because the time of filing requirement does not affect the validity of an underlying negotiable instrument, *see Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 12, this rule does not add a new requirement under the UCC.

{25} Deutsche Bank additionally contends that "when a plaintiff presents the original note to the court with a blank indorsement, the plaintiff establishes it is then the holder of the note, and is entitled to enforce the note and foreclose the mortgage." Deutsche Bank is correct that the holder of a note indorsed in blank may, as a general matter, enforce the note. *See* § 55-3-301; NMSA 1978, § 55-3-205(b) (1992). However, Deutsche Bank again conflates two distinct concepts: whether it may, as the holder of a note indorsed in blank, enforce the note and whether it can establish that it owned the note at the time of filing. If Deutsche Bank had presented a note indorsed in blank with its initial complaint, it would be entitled to a presumption that it could enforce the note at the time of filing and thereby establish standing. However, Deutsche Bank did not produce a note indorsed in blank when it filed suit in this case, and the subsequent production of a blank note does not prove that Deutsche Bank possessed the blank note *when it filed suit*.

{26} We further disagree with Deutsche Bank's argument that the Court of Appeals's opinion in this case, *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶¶ 11–13, requires that a "plaintiff conclusively establish its standing upon first filing the complaint." Deutsche Bank contends that this requirement would contravene well-established notice pleading standards in New Mexico, which require a complaint to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 1-008(A)(2) NMRA. According to Deutsche Bank, it should satisfy minimum pleading requirements for a foreclosure plaintiff to merely allege that it is the holder of the note, and then later prove this fact through more detailed documentation, either at trial or in connection with a dispositive motion. We agree with Deutsche Bank that "it is only at trial or in a dispositive motion that plaintiffs are required to *prove* the necessary elements of their claims," including standing, and that a bare statement that the plaintiff holds the note may satisfy pleading standards. *See N.M. Pub. Sch. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342 ("In reviewing the district court's decision to dismiss for failure to state a claim, we accept as true all well-pleaded factual allegations in the

complaint and resolve all doubts in favor of the complaint's sufficiency.").

{27} However, this is an issue of proof rather than pleading standards. The elements of standing

> are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [and therefore] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Lujan, 504 U.S. at 561. For example, a foreclosure plaintiff may satisfy pleading requirements by simply alleging that it is the holder of the note without attaching any additional documentary evidence, but when a defendant subsequently raises the defense that the plaintiff lacks standing to foreclose, the plaintiff must then prove that it held the note *at the time of filing*. Attaching the note to the complaint is not the only means of proving that the plaintiff held the note at the time of filing because standing can also be proven through a dated indorsement establishing when the note was indorsed to the plaintiff. Therefore, neither *Bank of New York* nor the Court of Appeals's opinion in this case establish an additional pleading requirement, as Deutsche Bank argues, but rather set forth requirements that must be met to prove standing, should that issue be raised by the defendant or *sua sponte* by the Court.[4]

D. Deutsche Bank Did Not Establish Standing

{28} Deutsche Bank argues that substantial evidence supports the district court's determination that Deutsche Bank had standing to pursue its foreclosure complaint against Homeowner. We review the district court's determination that Deutsche Bank had standing under a substantial evidence standard of review. *Bank of N.Y.*, 2014-NMSC-007, ¶ 18. "'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion. This Court will resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings." *Id.* (internal quotation marks and citations omitted). However, "[w]hen the resolution of the issue depends upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to interpret the evidence." *Id.* (alteration in original) (internal quotation marks and citation omitted).

{29} Deutsche Bank contends that there was sufficient evidence to establish standing for two reasons. First, Deutsche Bank argues that "the Assignment of Mortgage in this case . . . evidence[d] the timing of the transfer of the note." Second, Deutsche Bank avers that other corroborating evidence presented at trial, in conjunction with the assignment of mortgage, established that it owned the note at the time of filing. Deutsche Bank's arguments do not persuade us that there is substantial evidence to support the district court's determination that Deutsche Bank had standing.

{30} In response to Homeowner's motion to dismiss for lack of standing, Deutsche Bank produced an assignment of mortgage dated February 7, 2006. Deutsche Bank's proffer of the February 7, 2006 assignment of mortgage in this case was insufficient to establish standing because (1) the assignment of mortgage does not establish that Deutsche Bank was injured for the purposes of standing; and (2) it does not prove if or when the note was transferred. As we have previously stated, to establish standing we require that a plaintiff show that he or she has actually suffered a direct and concrete injury. *ACLU of N.M.*, 2008-NMSC-045, ¶ 19 (citation omitted). "A party who only has the mortgage but no note has not suffered any injury given that bare possession of the mortgage does not endow its possessor with any enforceable right absent possession of the note." *BAC Home Loans Servicing, LP v. McFerren*, 2013-Ohio-3228, ¶ 12,

[4] In instances where a foreclosure plaintiff seeks a default judgment, courts should raise the standing issue *sua sponte* and carefully scrutinize the plaintiff's standing to safeguard the integrity of New Mexico's property system and protect subsequent bona fide purchasers.

6 N.E.3d 51 (citing Restatement (Third) of Prop.: Mortgages § 5.4(e), at 385 (1996) ("[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation.")). Consequently, "possession of the mortgage is of no import unless there is possession of the note." *BAC Home Loans Servicing, LP*, 2013-Ohio-3228, ¶ 12. Moreover, because an assignment of mortgage does not "effect an assignment of a note," an assignment of mortgage does not prove "transfer of [a] note." *Bank of Am., NA v. Kabba*, 2012 OK 23, ¶ 9, 276 P.3d 1006. As a result, the date that Homeowner's *mortgage* was assigned to Deutsche Bank does not establish a corresponding date indicating when the *note* was transferred to Deutsche Bank, or even *if* the note was transferred.

{31} Deutsche Bank's proffer of additional evidence to establish standing similarly fails to meet the threshold for substantial evidence. First, Deutsche Bank contends that because Ms. Roesch, an employee of a loan servicing company, "testified that the Assignment of Mortgage was dated February 7, 2006," Deutsche Bank established ownership of the note at the time of filing. Once again, this assertion fails because the date on the assignment of mortgage does not establish either when or whether Deutsche Bank obtained the right to enforce the note. *See id.* Second, Deutsche Bank argues that Ms. Roesch's testimony that her company began servicing the note in 2006 proves that Deutsche Bank owned the note prior to its February 2009 complaint. This testimony does not establish that Deutsche Bank had standing. Again, the assertion that an entity allegedly started servicing the loan on behalf of Deutsche Bank prior to the time of filing suit does not prove anything regarding the actual ownership of the note, and further, because "falsification of necessary indorsements" appears to be a "widespread" phenomenon, Renuart, *supra*, at 1210, there is reason to believe that creditors could potentially seek to enforce notes that they do not hold under the law. Thus, the additional evidence supplied by Deutsche Bank does not bear on whether Deutsche Bank actually owned the note at the time of filing, nor does it establish when the necessary indorsements were made, so that whether Deutsche Bank had the right to enforce the note as of February 24, 2009 remains unclear.

{32} Finally, the unindorsed note attached to Deutsche Bank's original complaint did not establish standing. "Possession of an unindorsed note made payable to a third party does not establish the right of enforcement, just as finding a lost check made payable to a particular party does not allow the finder to cash it." *Bank of N.Y.*, 2014-NMSC-007, ¶ 23. In addition, as we have discussed, the undated indorsed note that Deutsche Bank presented at trial did not prove that Deutsche Bank had standing when it filed its complaint. Because Deutsche Bank failed to provide evidence establishing its right to enforce the note on Homeowner's home, we hold that the district court's determination that Deutsche Bank established standing to foreclose was not supported by substantial evidence, and we accordingly reverse the district court's decision and affirm the result reached by the Court of Appeals.

E. Completed Foreclosure Judgments Should Not Be Voided for Lack of Standing

{33} We also take this opportunity to address Deutsche Bank's assertion that "several lower courts . . . have vacated long-completed foreclosure judgments under Rule 1-060(B) NMRA[,] holding they are 'void' for lack of subject matter jurisdiction." To avoid this issue in the future, we will clarify the practical implications of our holding that standing is not jurisdictional in mortgage foreclosure cases.

{34} "Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it." *Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 22 (internal quotation marks and citations omitted). Further, a party can raise subject matter jurisdiction at any time, even through a collateral attack alleging that a final judgment is void for lack of subject matter jurisdiction. *Chavez v. Cty. of Valencia*,

1974-NMSC-035, ¶ 15, 86 N.M. 205, 521 P.2d 1154; *see also* Rule 1-012(H)(3) ("*Whenever* it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added)). However, as we have previously discussed, a challenge to standing is in many ways analogous to a defense for failure to state a claim because it does not deprive the court of subject matter jurisdiction over the case, but instead bears on whether the plaintiff has stated a cognizable claim for relief. A failure to state a claim may only be raised "during the pendency of the action," including on appeal, *Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 25, but it cannot be the basis for a collateral attack on a final judgment. *See Palmer v. Palmer*, 2006-NMCA-112, ¶¶ 13–22, 140 N.M. 383, 142 P.3d 971 (considering whether a court which entered a settlement agreement between the parties had subject matter jurisdiction, but refusing to consider after the entry of the judgment whether one party had failed to state a claim). Therefore, a final judgment from a cause of action that may have lacked standing as a jurisdictional matter may be subject to a collateral attack, while a final judgment on any other cause of action, including an action to enforce a promissory note such as this case, is not voidable under Rule 1-060(B) due to a lack of prudential standing.

III. CONCLUSION

{35} For the foregoing reasons, we affirm the judgment of the Court of Appeals and remand this matter to the district court with instructions to vacate its judgment of foreclosure against Homeowner.

{36} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

BARBARA J. VIGIL,
Chief Justice

PETRA JIMENEZ MAES,
Justice

CHARLES W. DANIELS,
Justice

JUDITH K. NAKAMURA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2016-NMSC-027

Filing Date: June 30, 2016

Docket No. S-1-SC-35478

KATHERINE MORRIS, M.D., AROOP MANGALIK, M.D., and AJA RIGGS,

Plaintiffs-Petitioners,

v.

KARI BRANDENBURG, in her official capacity as District Attorney for Bernalillo County, New Mexico, and GARY KING, in his official capacity as Attorney General of the State of New Mexico,

Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Nan G. Nash, District Judge

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OPINION

CHÁVEZ, Justice.

{1} Since at least 1963 it has been a crime in New Mexico to deliberately aid another in the taking of his or her own life. *See* NMSA 1978, § 30-2-4 (1963). Yet a physician who withdraws life-sustaining treatment from a patient, at the patient's direction, and in compliance with the Uniform Health-Care Decisions Act (UHCDA), NMSA 1978, §§ 24-7A-1 to -18 (1995, as amended through 2015), is immune from criminal liability for such actions. Section 24-7A-9(A)(1). And a physician who administers pain medication to a patient in compliance with the New Mexico Pain Relief Act, NMSA 1978, §§ 24-2D-1 to -6 (1999, as amended through 2012), even if doing so hastens the patient's death, is also immune from criminal liability. *See* § 24-2D-3. The question in this case is whether a mentally competent, terminally ill patient has a constitutional right to have a willing physician, consistent with accepted medical practices, prescribe a safe medication that the patient may self-administer for the purpose of peacefully ending the patient's life. If we answer yes to the question, a willing physician may assist the patient and avoid criminal liability because Section 30-2-4 would be unconstitutional as applied to the physician. If we answer no to the question, the alternatives for the patient are to (1) endure the prolonged physical and psychological consequences of a terminal medical condition that the patient finds intolerable; or (2) take his or her own life, possibly by violent or dangerous means.

{2} It is not easy to define who would qualify to be a terminally ill patient, or what would be the criteria for assuring a patient is competent to make an end-of-life decision, or what medical practices are acceptable to aid a patient in dying, or what constitutes a safe medication. These concerns require robust debate in the legislative and the executive branches of government. Although the State does not have a legitimate interest in preserving a painful and debilitating life that will imminently come to an end, the State does have a legitimate interest in providing positive protections to ensure that a terminally ill patient's end-of-life decision is informed, independent, and procedurally safe. More specifically, the State has legitimate interests in (1) protecting the integrity and ethics of the medical profession; (2) protecting vulnerable groups—including the poor, the elderly, and disabled persons—from the risk of subtle coercion and undue influence in end-of-life situations, including pressures associated with the substantial financial burden of end-of-life health care costs; and (3) protecting against voluntary or involuntary euthanasia because if physician aid in dying is a constitutional right, it must be made available to everyone, even when a duly appointed surrogate makes the decision, and even when the patient is unable to self-administer the life-ending medication. Therefore, we decline to hold that there is an absolute and fundamental constitutional right to a physician's aid in dying and conclude that Section 30-2-4 is not unconstitutional on its face or as applied to Petitioners in this case.

I. BACKGROUND AND PROCEDURAL HISTORY

{3} Although her cancer is now in remission, Aja Riggs says that it would bring her "peace of mind" to have the option to end her suffering by choosing aid in dying if she eventually becomes terminally ill. Ms. Riggs was diagnosed with

uterine cancer in August 2011. After a surgery several months later, doctors informed her that her cancer was more extensive than they had initially thought and was "the most aggressive kind." At that point, she began chemotherapy. The chemotherapy caused Ms. Riggs to feel "extreme fatigue," sometimes to the point where "it was too much effort to even talk." She suffered serious adverse reactions to the cancer treatments, including several trips to the emergency room for an anaphylactic reaction, severe pain in her veins, and a nearly fatal infection. Several months into chemotherapy, her doctors discovered a cancerous tumor, and Ms. Riggs immediately began additional radiation therapy. She experienced many painful side effects from this treatment, including a burning sensation on her skin, constant nausea, and fatigue.

{4} During these excruciating treatments, Ms. Riggs says that she "began to think very seriously about what a death from cancer might be like," and she was not sure whether she wanted "to go all the way to the end of a death from cancer." She was afraid that eventually she would be "lying in bed in pain, or struggling not to be in pain, or mostly unconscious with everybody that cares about me around me and all of us just waiting for me to die." She considered the possibility of a "more peaceful death," but she still did not want to discuss it with her closest family and friends or her doctor because she "didn't want to implicate anybody else in what might be a crime." As a result, she thought that the choice to end her suffering would require her to "die alone and in isolation." By contrast, Ms. Riggs believed that a good death would involve

> having the presence of the people that I care about the most, who care about me the most; being at home, not being in the hospital; not having a lot of medical interventions that interfere with my ability to communicate or function as I would like to; to not have pain to the extent that it compromises my ability to connect with people or to be present in the moment; a sense of gentleness and peace to it.

{5} According to Petitioners in this case, under certain circumstances, physician aid in dying could afford Ms. Riggs precisely the peaceful death surrounded by family members for which she hopes, rather than the agonizing, unpleasant, and lonely death that she fears. Petitioners define aid in dying as "a recognized term of art for the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his [or her] dying process unbearable." This practice is explicitly permitted and regulated by statute in four states: Oregon, Washington, Vermont, and California. *See* Oregon Death with Dignity Act, Or. Rev. Stat. §§ 127.800 to .897 (1995, as amended through 2013); The Washington Death with Dignity Act, Wash. Rev. Code §§ 70.245.010 to .220 & 70.245.901 to .904 (2008); Vermont Patient Choice at the End of Life Act, Vt. Stat. Ann. tit. 18, §§ 5281 to 5293 (2013, as amended through 2015); California End of Life Option Act, Cal. Health & Safety Code §§ 443 to 443.22 (2016). Therefore, there is a minor but growing trend among states to recognize physician aid in dying through legislation. Further, in 2009, the Montana Supreme Court held that a terminally ill patient's choice of physician aid in dying can be a valid consent defense to a charge of homicide brought against a physician. *Baxter v. State*, 2009 MT 449, ¶ 50, 224 P.3d 1211. No appellate court has held that there is a constitutional right to physician aid in dying.

{6} Dr. Katherine Morris, a surgical oncologist at the University of New Mexico, and Dr. Aroop Mangalik, clinical director at the UNM Cancer and Research Treatment Center, want to provide the option of aid in dying for their terminally ill patients in New Mexico. Dr. Morris previously practiced medicine in Oregon, where she provided physician aid in dying to two patients pursuant to that state's Death with Dignity Act. She testified that when these patients received a lethal prescription they "expressed a feeling of peace that they had this option, and it seemed to relieve some of their suffering that was related directly to loss of control over their own bodies."

Dr. Morris detailed some of the physical ailments that these patients endured in the time immediately preceding death. One of Dr. Morris's patients had a recurring tumor on her chest wall, parts of which would continually die and "essentially [become] rotting meat;" the smell from the tumor was right under the patient's nose, which made it difficult for her to eat. Dr. Morris recalled that another patient, "a fireman, a really strong and vital guy," had skin cancer that metastasized to his spine:

> [H]e was in so much pain and we tried everything. We tried very aggressive pain management. We tried huge doses of narcotics, muscle relaxants, sedatives. We tried an implanted spinal pain pump. The best we could do for this poor man was make him unconscious. If he was awake, he was, literally, sobbing in pain.

Dr. Morris stated that terminal illness can also be psychologically challenging for patients due to a rapid loss of control over their bodily functions and a decline in their autonomy.

{7} Dr. Morris also testified about other end-of-life options that, unlike aid in dying, are explicitly permitted by statute in New Mexico. For example, the UHCDA permits patients to provide advance directives to withdraw or withhold life-sustaining treatment and withdraw or withhold artificial nutrition and hydration. Sections 24-7A-1(G)(3)-(4); *see* § 24-7A-2. Dr. Morris testified that sometimes doctors will remove a patient from devices that are effectively keeping that patient alive. For example, a doctor may remove a patient from a dialysis machine, which will cause the patient's kidneys to fail and the patient to die. A doctor may also remove a patient from a ventilator that assists the patient's breathing, which then causes the patient to suffocate and die. The decision to end the patient's life by withdrawing life-sustaining treatment is typically made by the patient, or through an advance directive from the patient if the patient is unconscious or incompetent, or in the absence of an advance directive, a family member or close friend must make the decision on the patient's behalf. *See* § 24-7A-2. Once the decision has been made, the medical professional then actively removes the patient from the life-sustaining device. *See* §§ 24-7A-1(A), -2.

{8} Similarly, the Pain Relief Act protects physicians who prescribe medication for purposes of pain relief under accepted standards of practice, even in situations where the patient's death may be hastened by the treatment. *See* § 24-2D-3. Accordingly, doctors may provide palliative sedation, also called "terminal sedation," a practice that can hasten the patient's death. For example, Dr. Morris stated that sometimes, when a patient is in severe pain, doctors will sedate that patient into an unconscious state, and that when people are sedated to that degree, "it suppresses their breathing and sometimes ends [a patient's] life." Similar to deciding to withdraw life-sustaining treatment, a patient, a patient through an advance directive, or a patient's family member on the patient's behalf may make the ultimate decision to submit to palliative sedation, a choice that could cause the patient to die soon thereafter.

{9} According to Petitioners, the statutory schemes that regulate aid in dying in other states, particularly Oregon, could guide the standard of care employed by physicians in New Mexico who would practice aid in dying. In support of this argument, Petitioners offered testimony from Dr. Eric Kress, who practices aid in dying in Montana, where the practice is legal but is not regulated by statute. Dr. Kress testified that he spent between thirty and forty hours studying the standard of care developed for physician aid in dying in Oregon and consulting with physicians who practiced there because those physicians have developed "a body of knowledge" and it would have been malpractice not to do so.

{10} In addition to stringent requirements regarding eligibility and informed consent, *see* Or. Rev. Stat. §§ 127.800, 127.805, 127.820, 127.825, 127.830, the Oregon statute imposes waiting periods to allow time for a patient to change his or her mind, *see id.* §§ 127.840, 127.850. The patient must request the lethal prescription at least twice orally and once in

writing. *Id.* § 127.840. The two oral requests must be at least fifteen days apart, and the patient must be given an opportunity to rescind his or her decision at the time of the second oral request. *Id.* The written request must be witnessed by two people, at least one of whom is a disinterested person, which means a person who is (a) not a relative by blood or marriage to the patient, (b) not aware that he or she is entitled to recover anything from the patient's estate, (c) not an employee of the health care facility where the patient resides, and (d) not the patient's physician. *Id.* § 127.897. The doctor can prescribe a lethal dose immediately following the three requests, subject to having met the two-day waiting period that follows the patient's written request. *Id.* § 127.850. The patient will then receive a lethal dose of barbiturates, such as Seconal or Pentobarbital, which the patient must then choose to self-administer. According to Dr. Nicholas Gideonse, a family practitioner in Oregon whose patients include those in need of aid of dying, these specific drugs are used "because of the high rate of certainty—not a hundred percent but 99.9 percent certainty—that [the] result of falling asleep and never waking up will occur" within minutes. Yet Dr. Kress noted that these various safeguards can also make aid in dying unavailable for those too close to death to satisfy the statutory requirements.

{11} Although the Oregon statute explicitly exempts from criminal and civil liability any doctor who provides aid in dying "in good faith compliance with" that statute, *id.* § 127.885(1), Dr. Gideonse explained that if physicians fall short of the standard of care and provide substandard or negligent care, they can still lose their licenses to practice medicine, face suits from a patient's family, and/or face prosecution.

{12} Based on the undisputed testimony, Petitioners sought declaratory and injunctive relief to the effect that either (a) Section 30-2-4, New Mexico's criminal statute prohibiting assisted suicide, did not apply to the conduct defined by Petitioners as physician aid in dying; or (b) even if the statute did apply to physician aid in dying, such an application would be unconstitutional under various provisions of the New Mexico Constitution. The district court found that Section 30-2-4 applied to physician aid in dying, but agreed with Petitioners that any prosecution of that conduct would violate the patient's "fundamental right to choose aid in dying pursuant to the New Mexico Constitution's guarantee to protect life, liberty, and seeking and obtaining happiness, N.M. Const., art. II, § 4, and its substantive due process protections, N.M. Const., art. II, § 18." Accordingly, the district court examined the application of Section 30-2-4 to physician aid in dying under strict scrutiny and held that the State had not proved that applying the statute in this manner furthered a compelling state interest. Because it had already invalidated Section 30-2-4's application to physician aid in dying on due process grounds, the district court did not address Petitioners' claims that applying Section 30-2-4 to that conduct would be "unconstitutionally vague or violate[] the guarantee of equal protection under the New Mexico Constitution."

{13} A divided Court of Appeals agreed with the district court that Section 30-2-4 applied to physician aid in dying. *Morris v. Brandenburg*, 2015-NMCA-100, ¶¶ 1, 54, 356 P.3d 564, *cert. granted*, 2015-NMCERT-008. A majority of the Court of Appeals determined that a patient's access to aid in dying did not implicate a fundamental liberty interest under Article II, Section 4 of the New Mexico Constitution and therefore reversed the district court's conclusion that strict scrutiny should apply. *Morris*, 2015-NMCA-100, ¶¶ 1, 29–47. Judge Timothy Garcia's majority opinion concluded that physician aid in dying might qualify as an important right subject to intermediate scrutiny, and Judge Garcia would have remanded the case to the district court with instructions to determine whether an intermediate scrutiny test or a rational basis test was warranted and to apply the appropriate level of scrutiny to Petitioners' claims. *Id.* ¶¶ 49–54. Judge Miles Hanisee concurred in part, clarifying that he would hold that aid in dying is neither a fundamental nor an important right, and that there is a rational basis to justify applying Section 30-2-4 to physician aid in dying. *Morris*,

2015-NMCA-100, ¶¶ 58–70 (Hanisee, J., concurring in part). Finally, Judge Linda Vanzi filed a dissenting opinion. Based on recent trends in federal due process jurisprudence, Judge Vanzi would "hold that Article II, Section 18 affords New Mexico citizens a fundamental, or at least important, liberty right to aid in dying from a willing physician," *Morris*, 2015-NMCA-100, ¶ 104 (Vanzi, J., dissenting), and the articulated government interests, while compelling or substantial in the abstract, do not justify infringing on the right, *id.* ¶ 121 (Vanzi, J., dissenting). Thus, the divided Court of Appeals opinion did not express a majority view as to which level of scrutiny should apply. We address Petitioners' due process claims under Article II, Sections 4 and 18 of the New Mexico Constitution.

II. SECTION 30-2-4 PROHIBITS PHYSICIAN AID IN DYING

{14} We must first determine whether Section 30-2-4 applies to the practice of physician aid in dying as described by Petitioners. If the statute does not apply, then it resolves the case, and we need not address Petitioners' constitutional claims. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so. We have repeatedly declined to decide constitutional questions unless necessary to the disposition of the case." (internal quotation marks and citation omitted)). "Our principal goal in interpreting statutes is to give effect to the Legislature's intent." *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865. We review issues of statutory interpretation de novo. *State ex rel. Children, Youth & Families Dep't v. Maurice H.* (*In re Grace H.*), 2014-NMSC-034, ¶ 34, 335 P.3d 746.

{15} Section 30-2-4 prohibits "assisting suicide," which is defined as "deliberately aiding another in the taking of his own life." Unless it would lead to an unreasonable result, we regard a statute's definition of a term as the Legislature's intended meaning. *Sw. Land Inv., Inc. v. Hubbart*, 1993-NMSC-072, ¶ 6, 116 N.M. 742, 867 P.2d 412. Because Section 30-2-4 explicitly defines "assisting suicide," we must examine whether the conduct that Petitioners refer to as physician aid in dying fits the statutory definition. Petitioners define physician aid in dying as "the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his [or her] dying process unbearable." As Petitioners' own witnesses admitted during trial, and as is self-evident in the very definition of aid in dying offered by Petitioners, the practice of aid in dying involves a physician deliberately prescribing a lethal dose of barbiturates with the understanding that the patient will self-administer the entire dose to end his or her life, should the patient choose to do so. In the context of Section 30-2-4, the wrongful act is "aiding," which consists of "providing the means to commit suicide," as distinct from "actively performing the act which results in death." *State v. Sexson*, 1994-NMCA-004, ¶ 15, 117 N.M. 113, 869 P.2d 301. For aid in dying, the lethal dose prescribed by a physician is intended to provide the means for a patient to end his or her own life, which is consistent with how "aiding" has been defined under Section 30-2-4. Therefore, when providing aid in dying, a doctor prescribes a lethal dose of barbiturates *for the patient's use* as a means to end his or her own life—conduct clearly encompassed by the plain language of Section 30-2-4.

{16} Petitioners raise several arguments as to why we should go beyond the plain language of Section 30-2-4 and conclude that the Legislature did not intend that the criminal prohibition on assisting suicide should apply to physician aid in dying. First, Petitioners elicited detailed expert testimony explaining that the medical and psychological professions do not consider a death from aid in dying to be a suicide[1] and that the

[1] For example, Dr. David Pollack, a licensed psychiatrist who teaches at the Center for Ethics and Healthcare at Oregon Health and Science University, opined that a death from aid in dying is not the same as a suicide. Suicide is typically brought on by a "psychiatric condition" such as depression

medical profession considers the underlying cause of death brought on by aid in dying to be the terminal illness itself. According to Petitioners, Section 30-2-4 was only intended to address acts of suicide, which are distinct from aid in dying. While Petitioners' contentions regarding evolving views on suicide and its distinctions from aid in dying are compelling, our analysis is bound by the statutory language, which broadly defines suicide under Section 30-2-4 as "the taking of [one's] own life" and does not track such clinical and emotional distinctions urged by Petitioners and recognized by professionals in the fields of medicine and psychology. *See* § 30-2-4. Second, Petitioners put forth related arguments that the Legislature could not have considered aid in dying in 1963 when it passed Section 30-2-4 because that practice did not arise in New Mexico until later, and that applying Section 30-2-4 to aid in dying would be contrary to New Mexico's well-established public policy of favoring patient autonomy in end-of-life decision-making, as exemplified by New Mexico's 1995 adoption of the UHCDA. Indeed, New Mexico was the first state to adopt the UHCDA after the National Conference of Commissioners on Uniform State Laws approved an almost identical model act in 1993. *Prot. & Advocacy Sys., Inc. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, ¶ 6, 128 N.M. 73, 989 P.2d 890. However, the UHCDA explicitly "does not authorize mercy killing, *assisted suicide*, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state." Section 24-7A-13(C) (emphasis added). Contrary to Petitioners' claims, the UHCDA not only distinguishes between "assisted suicide" and other end-of-life decision-making, but also assumes that the practice is "prohibited by other statutes." Importantly, the UHCDA was adopted *after* the practice of aid in dying entered the public debate, yet the Legislature persisted in refusing to authorize "assisted suicide" to the extent statutorily prohibited elsewhere, which further belies Petitioner's argument that the Legislature did not intend Section 30-2-4 to apply to physician aid in dying. Third, Petitioners contend that in *Baxter*, the Montana Supreme Court relied on that state's public policy protecting patient autonomy in medical decision-making to conclude that aid in dying was not prohibited by Montana's statutory prohibition on assisted suicide, and they urge this Court to do the same. 2009 MT 449, ¶¶ 25–28. However, *Baxter* has little persuasive value in this case because the *Baxter* court merely determined that Montana's statutory consent defense, Mont. Code Ann. § 45-2-211 (1977, amended 2015), constituted a complete defense to a charge of homicide for a physician who practiced aid in dying, so long as none of the exceptions to the consent statute applied.[2] 2009 MT 449, ¶ 50. By contrast, our inquiry in this case is different: we must determine whether physician aid in dying could be prosecuted under our state's homicide statutes, a premise which the *Baxter* court apparently assumed. *See id.* ¶ 13. Thus, *Baxter* also does not persuade us to diverge from a plain language interpretation of Section 30-2-4. We therefore conclude that physician aid in dying falls within the proscription of Section 30-2-4.

and is characteristically an "impulsive" and "solitary act." Accordingly, the family of a suicide victim will usually experience "surprise, . . . shock and disbelief or anger, a whole set of emotional reactions . . . reflecting a lack of connection between the person who committed suicide" and those closest to that person. By contrast, aid in dying is characterized by a "deliberative process," which "almost always involves the person discussing [aid in dying] with [his or her] family and friends." According to Dr. Pollack, patients choose aid in dying "to alleviate symptoms, to spare others from the burden of watching them dwindle away or be a shell of their former self [sic] or to feel like they are in control, have some autonomy and some control over the way that they die." As a result, family members of patients who choose aid in dying and ultimately end their lives in that manner "go through this process" with the patient, and are therefore "more prepared for the person's death and more at peace in relationship to it," as compared with the family of a suicide victim.

[2] Petitioners have not raised the issue of whether a physician who provides aid in dying could have a valid common law consent defense to homicide in New Mexico; therefore, we do not address it here. *Cf. State v. Fransua*, 1973-NMCA-071, ¶ 4, 85 N.M. 173, 510 P.2d 106 (holding that New Mexico's common law consent defense was not available for a charge of aggravated battery because our state's battery laws were intended to protect the public from violent acts and to prevent a breach of the public peace).

III. THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT PROTECT THE RIGHT ASSERTED BY PETITIONERS

{17} Because we have determined that Section 30-2-4 could be applied to physician aid in dying, we must now examine Petitioners' constitutional claims. Petitioners contend that application of Section 30-2-4 to physician aid in dying violates the due process provision in Article II, Section 18 and the Inherent Rights Clause in Article II, Section 4 of the New Mexico Constitution. We further note that Petitioners do not assert an equal protection violation before us.[3]

{18} Our state constitution's due process guarantees are analogous to the due process guarantees provided under the United States Constitution. Article II, Section 18 of the New Mexico Constitution provides, in relevant part, that "[n]o person shall be deprived of life, liberty or property without due process of law. . . ." The Due Process Clause of the Fourteenth Amendment to the United States Constitution similarly provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ."

{19} When analyzing a state constitutional provision with a federal analogue, this Court employs the interstitial approach. *State v. Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 777, 932 P.2d 1. Under the interstitial approach, we must first examine whether an asserted right is protected under an equivalent provision of the United States Constitution. *Id.* ¶ 19. If the right is protected, then, under the New Mexico Constitution, the claim is not reached. *State v. Gomez*, 1997-NMSC-006, ¶ 19. If the right is not protected, then the Court must determine whether "flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics" require a divergence from established federal precedent in determining whether the New Mexico Constitution protects the right. *State v. Gomez*, 1997-NMSC-006, ¶ 19. Although we have the power to "provide *more* liberty than is mandated by the United States Constitution" when interpreting analogous provisions in our own constitution, *Gomez*, 1997-NMSC-006, ¶ 17, "[t]he burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent." *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 18, 139 N.M. 761, 137 P.3d 1215.

{20} In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court answered a similar question to that posed by Petitioners. In *Glucksberg*, three patients in the terminal phases of serious and painful illnesses; four doctors who practiced in Washington, occasionally treated terminally ill patients, and expressed a willingness to assist patients to end their lives if it were legal to do so; and an advocacy group sued, seeking a declaration that the Washington statute that made it a crime to "aid[] another person to attempt suicide," Wash. Rev. Code § 9A.36.060 (1994, amended 2011), was facially unconstitutional. 521 U.S. at 707–08. The *Glucksberg* Court held that, "either on its face or 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors,'" the Washington statute did not violate the Fourteenth Amendment. *Id.* at 735 (citation omitted).

{21} The *Glucksberg* Court began its analysis by examining the nation's history, legal traditions, and practices. *Id.* at 710. The Court concluded that assisted-suicide bans are deeply rooted in the nation's history and for the most part remain unchanged in the codified laws of the states. *Id.* at 715–16, 719. The Court acknowledged that at the time it was considering the issue, states were engaged in "serious, thoughtful examinations of physician-assisted suicide and other similar issues," *id.* at 719, noting that many states permitted "'living wills,' surrogate health-care decisionmaking, and the withdrawal

[3] Petitioners raised an equal protection claim before the district court, but the district court did not address Petitioners' equal protection claim and issued its decision solely on due process grounds. Therefore, an equal protection claim is not properly before us on appeal.

or refusal of life-sustaining medical treatment," *id.* at 716 (citation omitted).

{22} The *Glucksberg* Court next turned to the Due Process Clause, inventorying the fundamental rights and liberties not enumerated in the Bill of Rights that are still entitled to heightened protection against government interference:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, [*Planned Parenthood of Se. Pa. v.*] *Casey*[, 505 U.S. 833 (1992)]. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan* [*ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990)].

Id. at 720.

{23} To avoid transforming liberties protected by the Due Process Clause to the policy preferences of the Court, the *Glucksberg* Court emphasized the importance of requiring parties to give careful descriptions of the asserted fundamental liberty interests to protect the fundamental rights and liberties that objectively are deeply rooted in the nation's history, and are such that neither justice nor liberty would exist if the right were sacrificed. *Id.* at 720–21. This approach was later criticized by the Court in *Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2602 (2015) (stating that although the Court's analysis in *Glucksberg*, which defined the right in the "most circumscribed manner, with central reference to specific historical practices," may have been appropriate for the right in that case, it was inconsistent with the Court's approach in discussing "other fundamental rights"). Chief Justice Roberts, joined by Justices Scalia and Thomas, concluded that the *Obergefell* majority opinion jettisoned the careful substantive due process approach announced in *Glucksberg*, effectively overruling the approach. *Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2620–21 (Roberts, J., dissenting).

{24} The fact remains that the *Glucksberg* Court held that it was not unconstitutional to prohibit doctors from prescribing medication to competent, terminally ill adults who wish to hasten their deaths, 521 U.S. at 735, and this holding has never been expressly overruled. The Court reached its holding by defining the right as "a right to commit suicide with another's assistance." *Id.* at 724. The Court concluded that the "almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today" would require the Court "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State," *id.* at 723, something the Court was unwilling to do.

{25} The *Glucksberg* petitioners argued that the liberty interest they pursued was consistent with the general tradition of "self-sovereignty" which included the "basic and intimate exercises of personal autonomy," primarily citing *Cruzan* and *Casey* in support of their argument. *Glucksberg*, 521 U.S. at 724 (internal quotation marks and citation omitted). In *Cruzan*, the Court assumed that the United States Constitution granted a competent person a "constitutionally protected right to refuse lifesaving hydration and nutrition." 497 U.S. at 279. However, the right identified in *Cruzan* was based on the history

of the law of battery, which is the "touching of one person by another without consent," and the related common law concept of "informed consent [being] generally required for medical treatment." *Id.* at 269, 271–78. In *Casey*, the Court reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), and held that a woman has a right to have an abortion before her fetus is viable without undue government interference. *Casey*, 505 U.S. at 846. In so holding, the *Casey* Court stated, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 851.

{26} The *Glucksberg* Court acknowledged that "many rights and liberties protected by the Due Process Clause sound in personal autonomy," but emphasized that this does not mean that every important, intimate, and personal decision is so protected. 521 U.S. at 727. The Court concluded that the right to commit suicide with another's assistance "is not a fundamental liberty interest that is protected by the Due Process Clause" because the history of the law has banned and continues to ban assisted suicides. *Id.* at 728. Although the asserted right was not a fundamental liberty interest, the Washington law prohibiting assisted suicides still had to be rationally related to a legitimate government interest. *Id.*

{27} The *Glucksberg* Court articulated several government interests. The first interest is the "unqualified interest in the preservation of human life," regardless of the person's physical or mental condition. *Id.* at 728–29 (internal quotation marks and citation omitted). The second interest is the "interest in preventing suicide, and in studying, identifying, and treating its causes," particularly since research indicated that if the patient responded to treatment for depression and pain, many patients would withdraw the request for physician aid in dying. *Id.* at 730. The third interest is the "interest in protecting the integrity and ethics of the medical profession" since the American Medical Association and other medical groups at the time concluded that a physician's aid of a patient in dying was incompatible with the physician's role as a healer. *Id.* at 731. The fourth interest is the "interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes" since there was a "real risk of subtle coercion and undue influence in end-of-life situations" and there was a risk that some would resort to physician aid in dying "to spare their families the substantial financial burden of end-of-life health-care costs." *Id.* at 731–32. The fifth and final interest is the legitimate concern that recognizing a right to physician aid in dying will lead to "broader" interpretations allowing voluntary or involuntary euthanasia because if there is a right, it must be available to everyone, even when a duly appointed surrogate makes the decision, and even when the patient is unable to self-administer the life-ending medication. *Id.* at 732–33.

{28} The *Glucksberg* Court elected not to weigh the varying interests, concluding that each is "unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection." *Id.* at 735. The Court concluded that the "earnest and profound debate about the morality, legality, and practicality" of physician aid in dying should continue, *see id.*, presumably in the legislative and executive branches of government.

{29} Although the Court held that the Washington law prohibiting assisted suicide did not violate the Fourteenth Amendment "either on its face or as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors," *id.* at 735 (internal quotation marks and citation omitted), the Court did not "foreclose the possibility that an individual plaintiff seeking to hasten [his or] her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge," *id.* at 735 n.24 (internal quotation marks and citation omitted). What would constitute a "more particularized challenge" was not made clear by the Court, other than to suggest that "such a claim would have to be quite different from the ones advanced" in that case, *id.*,

leaving a degree of uncertainty as to the extent and steadfastness of its holding.

{30} Justice Stevens, whose special concurrence in *Glucksberg* provoked the majority's concession in footnote 24, offered some insight into why a particularized challenge might result in a different outcome. First, Justice Stevens noted that the three terminally ill patient-plaintiffs in *Glucksberg* died after the district court ruled in their favor, and therefore no individual plaintiff seeking to hasten her death or any doctor threatened with prosecution for assisting in the suicide of a particular patient was before the Court. *Id.* at 739 (Stevens, J., concurring). Accordingly, Justice Stevens agreed that history and tradition did not support "an open-ended constitutional right to commit suicide" or an absolute right to physician aid in dying. *See id.* at 740, 745. However, Justice Stevens noted that *Cruzan* made clear that "some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs." *Id.* at 745. Thus, a particularized showing might be made by a terminally ill patient who is "faced not with the choice of whether to live, only of how to die," and "who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying" after being adequately informed about patient care alternatives. *Id.* at 746–48.

{31} We conclude that *Glucksberg* controls, and therefore that the United States Constitution does not categorically protect Petitioners' asserted right, although an opening remains for a more particularized protection. Having determined that the right Petitioners assert is not protected under the United States Constitution, we now turn to Petitioners' claim that New Mexico's ban on physician aid in dying, as applied to them, violates the due process and inherent rights provisions of the New Mexico Constitution. We may diverge from the *Glucksberg* precedent if we determine that the federal analysis is flawed or that New Mexico has distinct characteristics in the relevant area or that structural differences between our government and the federal government exist. *Gomez*, 1997-NMSC-006, ¶ 19. For the reasons that follow, we choose not to deviate from either the ultimate holding in *Glucksberg* or the suggestion that a more particularized showing might prevail.

IV. THE FEDERAL ANALYSIS SET FORTH IN *GLUCKSBERG* IS NOT FLAWED

{32} The first reason we might depart from *Glucksberg* is if we conclude that the analysis is flawed. Petitioners contend that the *Glucksberg* analysis is flawed for three reasons. They argue that (1) the *Glucksberg* approach to substantive due process has since been abandoned; (2) *Glucksberg* reviewed a facial challenge that did not have the evidence we have today that demonstrates the safety of aid in dying; and (3) *Glucksberg* is in discord with New Mexico's distinct state characteristics.

{33} Petitioners are correct that the *Obergefell* majority took the *Glucksberg* Court to task for defining the right in the most circumscribed manner, referring to historical practices, because the analysis was inconsistent with how other fundamental rights had been defined by the Court. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2602. To exemplify its concern, the *Obergefell* majority stated:

> *Loving* did not ask about a right to interracial marriage; *Turner* [*v. Safley*, 482 U.S. 78 (1987)] did not ask about a right of inmates to marry; and *Zablocki* [*v. Redhail*, 434 U.S. 374 (1978)] did not ask about a right of fathers with unpaid child support duties to marry. Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

Id. (internal quotation marks omitted). Despite the Court's criticism of itself, we conclude that

the *Glucksberg* approach with respect to physician aid in dying is not flawed. It is much more difficult to define the interest before us—as it was for the *Glucksberg* Court—because unlike *Loving*, *Turner*, *Zablocki*, and *Obergefell*, which had as a tradition the fundamental right to marry with all of the rights, responsibilities, and divorce procedures carefully defined, we do not have such a tradition to fall back on regarding physician aid in dying. Similarly, the *Cruzan* Court interpreted informed consent alongside the statutory prohibition of battery to encompass the right of a competent adult patient to refuse medical treatment. *See* 497 U.S. at 269, 277–79. There is a marked difference between refusing medical treatment, even if doing so will hasten death, and seeking treatment which has for its exclusive purpose the taking of one's life. This was the dichotomy faced by the *Glucksberg* Court. *See* 521 U.S. at 725 ("The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.").

{34} Although this Court might quarrel with the emphasis placed on history and tradition by the *Glucksberg* Court in defining the right, we agree with its analysis concerning legitimate government interests, particularly the following three interests. First, we agree with the "interest in protecting the integrity and ethics of the medical profession," *Glucksberg*, 521 U.S. at 731, because the New Mexico Medical Board, for several stated reasons, as of November 2014 had declined to develop any guidelines or standards for aid in dying.[4] Second, we agree with the "interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes" since there is a "real risk of subtle coercion and undue influence in end-of-life situations," and there is a risk that some might resort to physician aid in dying "to spare their families the substantial financial burden of end-of-life health-care costs." 521 U.S. at 731–32. Third and perhaps most important, we agree with the legitimate concern that recognizing a right to physician aid in dying will lead to voluntary or involuntary euthanasia because if it is a right, it must be made available to everyone, even when a duly appointed surrogate makes the decision, and even when the patient is unable to self-administer the life-ending medication. *Id.* at 732–33. We therefore determine that the federal analysis set forth in *Glucksberg* is not flawed. This does not end our inquiry. We next determine whether there are distinctive state characteristics contained in Article II, Section 18 of the New Mexico Constitution that justify a departure from the federal analysis.

V. THERE ARE NO DISTINCTIVE STATE CHARACTERISTICS WITH RESPECT TO ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION THAT JUSTIFY OUR DEPARTURE FROM *GLUCKSBERG*

{35} Petitioners contend that New Mexico's "long, proud, extraordinary history of respecting patient autonomy and dignity at the end of life" is a distinctive characteristic requiring additional state constitutional protections of the practice of physician aid in dying. In support of this claim, Petitioners point to several New Mexico statutes

[4] In *Glucksberg*, the American Medical Association concluded that "'[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer.'" 521 U.S. at 731 (alteration in original) (quoting American Medical Association, Code of Ethics § 2.211 (1994)). We note that in New Mexico, as recently as November 2014, the New Mexico Medical Board refused to adopt a standard of care for aid in dying; because there was not a statute in place, some members were concerned that it would be premature to create a standard of care for aid in dying before the Board knew whether it was a legal practice. *See* New Mexico Medical Board, Regular Board Meeting, Nov. 13-14, 2014, Final Minutes at 10, available at their website, http://www.nmmb.state.nm.us (last visited June 29, 2016). The Board minutes further note that the Board was "forced to [establish guidelines] for chronic pain, but that was because there [was] a statute in place, and so unless a law is passed requiring the Medical Board to have oversight of all compassionate end of life assistance, then . . . this was bad for the practice of medicine." *Id.* We therefore appreciate that some members of the medical community understand this to be a legislative issue, and that the question of whether aid in dying is truly an accepted medical practice currently remains the subject of debate within the New Mexico medical community.

which they contend demonstrate the New Mexico Legislature's "assiduous respect for the decision-making autonomy of dying patients." First, Petitioners note that New Mexico was the first state to adopt the UHCDA. Pursuant to the UHCDA, patients may provide advance directives to health care providers, including directives to withdraw or withhold life-sustaining treatment and withdraw or withhold artificial nutrition and hydration. *See* §§ 24-7A-1(G), 24-7A-2. Second, Petitioners observe that New Mexico was one of the first three states to recognize advance directives in any form through its 1977 Right to Die Act, NMSA 1978, §§ 24-7-1 to -11 (1977, repealed 1997), which was replaced by the UHCDA. *See* 1997 N.M. Laws, ch. 168. Third, Petitioners point out that the Pain Relief Act protects a patient's right to obtain pain relief, even in situations where death could result. *See* §§ 24-2D-1 to -6.

{36} We agree that the UHCDA, the Right to Die Act, and the Pain Relief Act support the conclusion that New Mexico has historically placed great importance on patient autonomy and dignity in end-of-life decision-making. However, Section 24-7A-13(C) of the UHCDA expressly disavows *assisted suicide*, undercutting Petitioners' assertion that the interests of patient dignity and autonomy protected by the UHCDA also extend to physician aid in dying. Even practices specifically allowed under the UHCDA, such as withdrawal or withholding of life-sustaining treatment, must proceed in line with the UHCDA's safeguards, or else health care providers and individuals may be held liable. *See generally* § 24-7A-10. For example, the UHCDA provides safeguards pertaining to the appointment of an agent to carry out a patient's end-of-life directives, § 24-7A-2(A)-(E), end-of-life decisions for unemancipated minors, § 24-7A-6.1, the obligations of a health-care provider after receiving a health-care decision or directive from a patient or a patient's agent, § 24-7A-7, determinations of a patient's capacity with respect to such decisions, § 24-7A-11, and disputes relating to end-of-life decisions, § 24-7A-14. These safeguards illustrate that New Mexico also recognizes, as a companion to the core values of patient dignity and autonomy, that end-of-life decisions are inherently fraught with the potential for abuse and undue influence and that the law should provide positive protections to ensure that patients have made a decision that is both informed and independent. The UHCDA may well provide a road map for future legislators in determining the safeguards that are necessary to implement a form of physician aid in dying, but the statute itself does not support the inference that there is some special characteristic of New Mexico law that makes physician aid in dying a fundamental right in this state. Far from being a distinct characteristic of New Mexico law or a departure from federal law, the UHCDA codifies the right to refuse unwanted lifesaving medical treatment that the *Cruzan* Court assumed existed under the United States Constitution. *See* 497 U.S. at 279. Similar safeguards exist under the Pain Relief Act. *See* § 24-2D-3. Neither law provides a sufficient basis to depart from the established federal analysis.

{37} Petitioners next cite both *Protection and Advocacy System* and *State v. Roper*, 1996-NMCA-073, 122 N.M. 126, 921 P.2d 322, to support their contention that New Mexico case law uniquely "reflects distinctive commitment to medical autonomy and respect for human dignity in the provision of medical care." In *Protection and Advocacy System*, our Court of Appeals described the UHCDA as reflecting a policy that "different patients can make markedly different, but still reasonable, choices" regarding end-of-life issues "depending on their religious beliefs, their assessments of the joys of life, their tolerance for pain, their regard for others, and a multitude of other factors." 1999-NMCA-122, ¶ 16. In *Roper*, the Court of Appeals kept confidential a criminal defendant's blood test results, stating that doing so "gives the patient the power to reveal the private information to the persons the patient chooses, reinforcing the [physician-patient] privilege's policy of patient autonomy and privacy." 1996-NMCA-073, ¶ 13. Petitioners also allude to other implied, rather than explicit, fundamental rights recognized by this Court, including the rights of parents in the care, custody, and control of their children, *State ex rel. Children, Youth & Families Dep't v. Pamela R.D.G.* (*In re Pamela A.G.*), 2006-NMSC-019, ¶ 11, 139 N.M.

459, 134 P.3d 746; the right to freedom of personal choice in matters of family life, *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 20, 113 N.M. 57, 823 P.2d 299; and the right to familial integrity, *Oldfield v. Benavidez*, 1994-NMSC-006, ¶ 14, 116 N.M. 785, 867 P.2d 1167. According to Petitioners, a competent, terminally ill patient's decision to seek physician aid in dying "is rooted in these already recognized fundamental rights."

{38} The cases cited by Petitioners do not evoke any distinctive characteristics in New Mexico law that require physician aid in dying to be treated as a fundamental right. The language that Petitioners quote from *Protection and Advocacy System* describes the policy behind the UHCDA, which, as previously discussed, explicitly does *not* authorize any form of assisted suicide. Section 24-7A-13(C). *Roper* was decided based on physician-patient privilege and the policy interest in preserving the confidentiality of physician-patient interactions, not, as Petitioners suggest, any special state constitutional interest in patient autonomy and privacy. 1996-NMCA-073, ¶¶ 5–13. Finally, the portions of *Pamela A.G.*, *Jaramillo*, and *Oldfield* cited by Petitioners recognize fundamental liberty interests established by federal law and do not establish any distinct feature of New Mexico law describing an expanded right that might protect physician aid in dying. For these reasons, we conclude that there are no distinctive state characteristics with respect to the due process protections of Article II, Section 18 that warrant a departure from the federal analysis holding that physician aid in dying is not a fundamental right.

VI. PHYSICIAN AID IN DYING IS NOT A FUNDAMENTAL OR IMPORTANT RIGHT UNDER ARTICLE II, SECTION 4 OF THE NEW MEXICO CONSTITUTION

{39} Petitioners also argue that Article II, Section 4 of the New Mexico Constitution is an independent basis on which this Court could hold that there is a fundamental right to physician aid in dying. Article II, Section 4 provides that "[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." Petitioners contend that, despite being "seldom interpreted" by New Mexico courts, Article II, Section 4 protects "the right for a terminal patient to choose a peaceful, dignified death through aid in dying." Petitioners argue that several opinions of this Court have acknowledged that Article II, Section 4 provides some unique sets of rights, even if the substance of those rights has remained undefined. Petitioners also urge us to give effect to Article II, Section 4 and fulfill our duty to construe our state constitution so that "no part is rendered surplusage or superfluous." *Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392, 722 P.2d 643. Finally, Petitioners cite several cases from other states that interpret inherent rights provisions similar to Article II, Section 4 to guarantee rights to liberty in the home and familial protection. *See Stemple v. Herminghouser*, 3 Greene 408, 413 (Iowa 1852) (Greene, J., dissenting); *Hoff v. Berg*, 1999 ND 115, ¶ 10, 595 N.W.2d 285, 289 (N.D. 1999).

{40} To ascertain the meaning of Article II, Section 4, we first examine the historical "milieu" from which this provision emerged in an effort to shed light on how the framers of our state constitution may have viewed it. *See State v. Gutierrez*, 1993-NMSC-062, ¶¶ 33–35, 116 N.M. 431, 863 P.2d 1052 (reviewing the historical emergence of Article II, Section 10 of the New Mexico Constitution to determine its "scope, meaning, and effect"). The language in Article II, Section 4 most likely originated from the natural rights provision in the 1776 Virginia Declaration of Rights, codified in Article I, Section 1 of the Virginia Constitution. Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?*, 39 N.M. L. Rev. 375, 395 (2009). Similar guarantees of inherent or inalienable rights to life, liberty, property, and seeking or pursuing and obtaining happiness have since been incorporated into a variety of state constitutions,[5] and similar

[5] For example, provisions recognizing the inherent right to seek and obtain happiness and safety appear in the constitutions of

language most famously appears in the second paragraph of the Declaration of Independence. In recent years, scholars have puzzled over the intended meaning and scope of such "natural rights clauses" and divined a variety of possible influences, from Aristotle to John Locke, without coming to any definitive conclusions as to whether provisions such as Article II, Section 4 were originally intended to give rise to judicially enforceable rights, or were simply intended to set forth the general aspirations of government. *See* Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. Sch. J. Hum. Rts. 557, 564–78, 598–605 (2003); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1, 11–19 (1997).

{41} State court jurisprudence on natural rights clauses up until the New Mexico Constitution was drafted can be conceptualized under two broad "themes." *See* Ray, *supra*, at 390–94. First, most jurisdictions undertook a balancing test to weigh the exercise of the natural right against the State's inherent power to regulate public health, morals, and welfare. *Id.* at 391 n.111 (listing cases). Second, other jurisdictions viewed natural rights provisions as codifying the common law maxim, *"Sic utere tuo ut alienum non laedas*" (use your property in such a manner as not to injure that of another), which recognizes that "the natural rights clause would invalidate legislation adversely affecting personal liberty and happiness unless the[] exercise [of personal liberty or happiness] in some way harms or presents an actual and substantial risk of harm to another person." *Id.* at 391–94. However, historical interpretations of natural rights provisions provide "no conclusive evidence" as to the purpose and effect that those who drafted the New Mexico Constitution may have envisioned for Article II, Section 4. *See* Ray, *supra*, at 394.

{42} Adding to the ambiguous history of these provisions, some of the earliest cases interpreting state constitutional natural rights clauses assumed that they protected a wide variety of individual rights against state action. For example, at least five states relied on the guarantee of their natural rights provisions that all men are born equally free to declare slavery unconstitutional. *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1328–46 (2015) (describing cases). Similarly, the Maine Supreme Court relied on the natural rights provision contained in the Maine Constitution to hold that Native Americans living in Maine could enter into valid contracts, *Murch v. Tomer*, 21 Me. 535, 537 (1842), and that African-Americans could be citizens of Maine, *Op. of the Supreme Judicial Court*, 44 Me. 507, 515–16 (1857), and had a right to vote, *Op. of Judge Appleton*, 44 Me. 521, 522 (1857). Further, in one of the only cases to assume an affirmative right to pursue happiness, the Indiana Supreme Court held that a state prohibition law was unconstitutional because it violated "natural rights" preserved by the Indiana Constitution, including "life, liberty, and the pursuit of happiness." *Herman v. State*, 8 Ind. 545, 556, 567 (1855). The *Herman* court conceived of these rights in the context of economic liberty, including "pursuing trade and business for the acquisition of property, and . . . pursuing our happiness in using [our liberty]," and held that Indiana's legislature could not take away an individual's right to freely select what to eat or drink. *Id.* at 557–59; *cf. Sheppard v. Dowling*, 28 So. 791, 795 -96 (Ala. 1900) (upholding as constitutional a statute regulating dispensary of liquor and stating, "[p]ursuit of happiness is one of the citizen's

Iowa (Iowa Const. art. I, § 1); California (Cal. Const. art. I, § 1) (amended in 1972 to include a right to privacy); Colorado (Colo. Const. art. II, § 3); Idaho (Idaho Const. art. I, § 1) (recognizing the right to pursue happiness and seek safety); Massachusetts (Mass. Const. Pt. I, art. 1); Nevada (Nev. Const. art. I, § 1); New Hampshire (N.H. Const. Pt. 1, art. 2) (recognizing the right to seek and obtain happiness); New Jersey (N.J. Const. art. I, § 1); North Dakota (N.D. Const. art. I, § 1) (amended in 1984 to include right to bear arms); Ohio (Ohio Const. art. I, § 1); Vermont (Vt. Const. Ch. I, art. 1); and West Virginia (W. Va. Const. art. III, § 1). Other state constitutions similarly guarantee "the pursuit of happiness" as a natural or inherent right. *See* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1, 3-4 (1997) (citing examples).

inalienable rights. But the lines of such pursuit are not unlimited. A man's chief joy may be in the death of his enemy, yet the law does not allow him to pursue happiness in that direction.").

{43} Modern courts have arrived at differing conclusions as to whether these provisions create judicially enforceable rights and the meaning of those rights. For example, federal courts do not recognize any independent cause of action arising from the natural rights guarantee in the Declaration of Independence, which they instead regard as "a statement of ideals, not law." *Swepi, LP v. Mora Cty., N.M.*, 81 F. Supp. 3d 1075, 1172 (D.N.M. 2015) (internal quotation marks and citation omitted); *see also Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) ("The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts. . . ."); *Coffey v. United States*, 939 F. Supp. 185, 190–91 (E.D.N.Y. 1996) (concluding that the plaintiff had failed to state a legal cause of action when he claimed a violation of his right to pursue happiness because the Declaration of Independence does not create judicially enforceable rights). Although natural rights provisions in state constitutions are guarantees, unlike the rights announced by the Declaration of Independence, some state courts have followed the federal example and interpreted constitutional natural rights provisions as merely aspirational and not subject to judicial enforcement. *See, e.g.*, *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949) (confirming language in the Rhode Island Constitution's due process and equal protection provision stating that "[a]ll free governments are instituted for the protection, safety and happiness of the people" was merely advisory and did not give rise to a judicially enforceable right (internal quotation marks and citation omitted)).

{44} By contrast, some states, such as Iowa, treat their natural rights clauses as granting judicially enforceable rights. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) (stating that "the constitutional protection embodied in Iowa's Inalienable Rights Clause is not a mere glittering generality without substance or meaning," but is instead "intended to secure citizens' pre-existing common law rights (sometimes known as 'natural rights') from unwarranted government restrictions" (internal quotation marks and citation omitted)). However, those cases generally acknowledge that natural rights provisions do not codify absolute or fundamental rights, but instead recognize that natural rights are still subject to reasonable regulation by the state in the exercise of its police power. *See id.*; *see also Concerned Dog Owners of Cal. v. City of Los Angeles*, 123 Cal. Rptr. 3d 774, 789 (Cal. Ct. App. 2011) (liberties enumerated in the Natural Rights Clause in the California Constitution are circumscribed by the requirements of public health and safety and are generally subject to reasonable regulation). Other modern court decisions have interpreted constitutional natural rights provisions to protect privacy and personal liberty. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 494–99, 501–502 (Ky. 1992) (striking down a law prohibiting private sexual acts based on a right of privacy emanating from Kentucky's natural rights provision); *In re Quinlan*, 355 A.2d 647, 663–64 (N.J. 1976) (determining that New Jersey's natural rights provision guarantees a right of privacy); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 4, 13 (Tenn. 2000) (determining that a fundamental right of privacy arising from Tennessee's natural rights provision, among others, required strict scrutiny review of certain abortion restrictions); *but cf. Benning v. State*, 641 A.2d 757, 761 (Vt. 1994) (rejecting existence of a broad constitutional "right to be let alone" in Vermont's natural rights provision).

{45} Similar to the cases from Iowa and California discussed above, the earliest New Mexico cases analyzed Article II, Section 4 in the context of economic and property rights and balanced an individual's inherent rights against the state's general powers to regulate and to protect the public. In *State v. Brooken*, 1914-NMSC-075, ¶¶ 1, 12–14, 17, 19 N.M. 404, 143 P. 479, the first case to discuss Article II, Section 4, this Court upheld a law that prohibited, with limited exceptions, interfering with the freedom of unaccompanied cattle under the age of seven months. The challenger in that case claimed, in part, that enforcement of the

law violated his "constitutional right of acquiring, possessing, and protecting property" by preventing him from holding calves under herd. *Brooken*, 1914-NMSC-075, ¶ 8. We clarified that, under its police power, the Legislature could "provide reasonable regulations for the use and enjoyment of property" when such regulations were necessary "for the common good and the protection of others." *Id.* ¶¶ 9, 13; *see also Otero v. Zouhar*, 1984-NMCA-054, ¶ 43, 102 N.M. 493, 697 P.2d 493 (holding, without further explanation, that "inherent and inalienable rights to acquire property" under Article II, Section 4 "are not absolute, but subject to reasonable regulation"), *aff'd in part and rev'd in part on other grounds by Otero v. Zouhar*, 1985-NMSC-021, 102 N.M. 482, 697 P.2d 482, *overruled on other grounds by Grantland v. Lea Reg'l Hosp., Inc.*, 1990-NMSC-076, 110 N.M. 378, 796 P.2d 599.

{46} In recent years, New Mexico courts have invoked Article II, Section 4 as a prism through which we view due process and equal protection guarantees. For example, in *California First Bank v. State*, we recognized in dicta that Article II, Section 4 should not be given the same breadth as the Due Process Clause in the United States Constitution because of the specificity of the rights in Article II, Section 4. 1990-NMSC-106, ¶ 44, 111 N.M. 64, 801 P.2d 646. In that case, we reasoned that unlike the Fourteenth Amendment, "Article II, Section 4 expressly guarantees the right 'of seeking and obtaining safety,'" and thus, in "interpreting the more expansive language of Article II, Section 4," courts should be "mindful of the more intimate relationship existing between a state government and its people, as well as the more expansive role states traditionally have played in keeping and maintaining the peace within their borders." *Cal. First Bank*, 1990-NMSC-106, ¶ 44. Yet *California First Bank* expressly did not address which specific protections are provided by Article II, Section 4, and it expressly did not elaborate on whether a violation of this provision alone could ever give rise to a cause of action. *Cal. First Bank*, 1990-NMSC-106, ¶ 45.

{47} We took our dicta from *California First Bank* one step further by incorporating Article II, Section 4 as a central component of our due process analysis in *Reed v. State ex rel. Ortiz*. *See* 1997-NMSC-055, ¶¶ 101–05, 124 N.M. 129, 947 P.2d 86, *rev'd*, *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998). Reed was a criminal justice activist and former prisoner who fled Ohio and ended up in Taos, New Mexico. *Id.* ¶¶ 3–4, 9–10, 29–30. When the Governor of Ohio sought to extradite Reed and Reed was arrested by authorities in New Mexico, he filed a petition for writ of habeas corpus to challenge the constitutionality of his arrest. *Id.* ¶ 35. We affirmed the district court's grant of habeas corpus and held that Reed was not a "fugitive from justice," and thus did not qualify for extradition under the factors set forth in *Michigan v. Doran*, 439 U.S. 282 (1978). *Reed*, 1997-NMSC-055, ¶¶ 1, 40, 44, 126. The U.S. Supreme Court later issued a short per curiam opinion reversing our ruling, disavowing this Court's reliance on Reed's claims to determine that he was not a fugitive, and ordering that Reed be extradited because this Court's inquiry "went beyond the permissible inquiry in an extradition case, and permitted the litigation of issues not open in the asylum State." *New Mexico ex rel. Ortiz*, 524 U.S. at 155. However, our discussion of Article II, Section 4 remains instructive because the United States Supreme Court opinion did not affect our interpretation of that provision.

{48} Having determined that Reed was not a fugitive, we viewed his due process rights through the lens of his right to seek and obtain safety under Article II, Section 4. *Reed*, 1997-NMSC-055, ¶¶ 101–05. We observed that Article II, Section 4 guarantees the enjoyment of life and liberty as a natural, inherent, and inalienable right, and "accords the same value to the right 'of seeking and obtaining safety and happiness.'" *Reed*, 1997-NMSC-055, ¶ 102 (quoting N.M. Const., art. II, § 4). We explained that in the extraordinary circumstances of Reed's case—namely that there was undisputed evidence that Ohio officials would deprive Reed of his liberty, and possibly even his life, without due process—"the New Mexico Constitution requires the protection of [Reed's] life and safety." *Reed*, 1997-NMSC-055, ¶ 103 (citing N.M. Const., art. II,

§§ 4, 18). We acknowledged that New Mexico courts "have not fully defined the scope of [Article II, Section 4]," but reasoned that "it certainly applies to individuals like Reed who were threatened with death or great bodily harm by government officials of another state, and who had no recourse or remedy within that threatening state." *Reed*, 1997-NMSC-055, ¶ 105. We concluded that Article II, Section 4 created "a more expansive guarantee of obtaining safety" than the guarantee under the United States Constitution. *Reed*, 1997-NMSC-055, ¶ 105 (internal quotation marks omitted).

> Reed faced the deprivation of his life without due process of law if he had remained in Ohio. The New Mexico Constitution cannot tolerate such an outcome. NM Const. art. II, §§ 4 & 18. Moreover, Reed was precluded from seeking safety in Ohio. . . . He fled to New Mexico for the express purpose of finding safety. For this reason, Reed properly comes under the protection of Article II, Section 4 of the New Mexico Constitution which guarantees the right "of seeking and obtaining safety." Reed did not flee from justice. He sought refuge from injustice.

Reed, 1997-NMSC-055, ¶ 124.

{49} Recently in *Griego*, we quoted Article II, Section 4 before examining equal protection under its lens. *See* 2014-NMSC-003, ¶ 1; *cf. Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897) ("[I]t is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."). Without question, Article II, Section 4 informed our analysis in *Griego* because marriage, which is a deeply personal human relationship, can be important to the enjoyment of life, liberty, and the pursuit of happiness, and important to the protection of property interests. *See, e.g.*, 2014-NMSC-003, ¶¶ 1, 4. However, Article II, Section 4 did not create the marital relationship at issue in *Griego*; civil marriage was a historical right created by the Legislature. *See* 2014-NMSC-003, ¶¶ 20–23. We interpreted the existing marriage laws to have as their purpose bringing "stability and order to the legal relationship of committed couples by defining their rights and responsibilities as to one another, their children if they choose to raise children together, and their property." *Id.* ¶ 6. The question was whether the Legislature could constitutionally deprive committed same-gender couples from "entering into a purely secular civil marriage and securing the accompanying rights, protections, and responsibilities of New Mexico laws" granted to opposite-gender couples, *id.* ¶ 3, when the disparity in treatment of these groups was viewed in the context of Article II, Section 4, *id.* ¶ 1. However, as in *Reed*, *Griego* did not construe Article II, Section 4 as an enforceable independent source of individual rights, but rather as an overarching principle which informed the equal protection guarantee of our Constitution. *See generally* 2014-NMSC-003.

{50} We have also declined to interpret Article II, Section 4 as creating a right to full recovery in tort actions. *See, e.g.*, *Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶¶ 22–23, 110 N.M. 621, 798 P.2d 571 (stating that Article II, Section 4 does not afford more protection to victims of governmental torts than do the provisions of Article II, Section 18), *overruled by Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305; *Richardson v. Carnegie Library Restaurant, Inc.*, 1988-NMSC-084, ¶ 29, 107 N.M. 688, 763 P.2d 1133 (declining to interpret Article II Section 4 "as implicitly guaranteeing a fundamental right to full recovery in tort actions"), *overruled by Trujillo*, 1998-NMSC-031.

{51} No New Mexico case provides any meaningful support to Petitioners' claim that Article II, Section 4 establishes a fundamental right "for a terminal patient to choose a peaceful, dignified death through aid in dying." Although Article II, Section 4 should inform our understanding of New Mexico's equal protection guarantee, *see Griego*, 2014-NMSC-003, ¶ 1, and may also ultimately be a source of greater due process

protections than those provided under federal law, *see Cal. First Bank*, 1990-NMSC-106, ¶ 44, the Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation. Therefore, Petitioners have not established a fundamental or important right to aid in dying under Article II, Section 4.

VII. THERE IS A RATIONAL BASIS FOR THE SECTION 30-2-4 PROHIBITION OF PHYSICIAN AID IN DYING

{52} Although we do not recognize a fundamental or important right to physician aid in dying, Section 30-2-4 must still be rationally related to legitimate government interests to be constitutional as applied to physician aid in dying. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶¶ 24, 25, 29, 31, 137 N.M. 734, 114 P.3d 1050. We respectfully acknowledge the magnitude and importance of the very personal desire of a terminally ill patient to decide how to safely and peacefully exit a painful and debilitating life. The personal autonomy to make one's own medical decisions, even those that can hasten one's own death, are recognized in the UHCDA and the Pain Relief Act, which provide numerous safeguards to protect the integrity of those decisions. The State concedes that it does not have an interest in preserving a painful and debilitating life that will end imminently. However, the State does have a legitimate interest in providing positive protections to ensure that a terminally ill patient's end-of-life decision is informed, independent, and procedurally safe.

{53} Petitioners rely on the statutory schemes in other states to guide the discussion of who would qualify for physician aid in dying. Oregon's Death with Dignity Act, the basis for the standard of care guiding Dr. Kress's practice, sets forth detailed guidelines and procedural protections that doctors must follow to legally provide this option to their terminally ill patients. To be eligible for aid in dying, the patient must be an adult, be suffering from a terminal disease, be an in-state resident, and have "voluntarily expressed his or her wish to die." *See* Or. Rev. Stat. § 127.805(1). "Terminal disease" is defined as an incurable and irreversible disease that "will, within reasonable medical judgment, produce death within six months." *Id.* § 127.800(12). On behalf of Petitioners, Dr. Gideonse testified that doctors are accustomed to determining to a reasonable medical certainty whether a patient has less than six months to live because that prognosis is already required to place a patient into hospice care. In other words, a terminal diagnosis is not a feature unique to aid in dying. To be eligible, the patient must also have been judged "capable," which means that in the opinion of the patient's attending physician, a court, or the patient's psychiatrist, the patient "has the ability to make and communicate health care decisions . . . including communication through persons familiar with the patient's manner of communicating." *See id.* § 127.800(3). There is no legal requirement that doctors in Oregon provide aid in dying to a qualifying patient, and individual health care providers can explicitly prohibit the practice. *Id.* § 127.885(4)- (5).

{54} Further, under the Oregon statute, two physicians must separately determine the patient's eligibility for aid in dying. *See id.* § 127.820. Dr. Kress gave an example where he sought the opinion of five other physicians who had treated a patient—a gastroenterologist, an oncologist, a surgeon, a radiologist, and a family medicine physician—as to whether the patient was terminally ill. If any examining physician determines that the patient is suffering from impaired judgment due to depression or a psychological disorder, that physician must refer the patient to counseling, and no physician can prescribe a lethal dose to the patient. *See id.* § 127.825. Indeed, Dr. Kress testified that under the proper standard of care, he will not prescribe a lethal dose unless the patient is "clear and assertive" in requesting aid in dying. Additionally, Dr. Gideonse testified that doctors often make judgments regarding a patient's competency to make important medical decisions, and the aid in dying situation is not significantly different.

The patient must also be informed of (a) his or her medical diagnosis; (b) his or her prognosis; (c) the potential risks associated with the fatal dose of medication; (d) the probable result of taking the medication, which usually results in a loss of consciousness and death within minutes; and (e) feasible alternatives including hospice care, comfort care, and pain control. *See id.* §§ 127.800(7), 127.830. In sum, it is apparent that the right described by Petitioners and, by extension, the standard of care essential to that right, has been thoroughly defined through legislation in states such as Oregon, where physician aid in dying is legal.

{55} The *Obergefell* Court concluded that defining rights in their most comprehensive sense is the correct approach for the federal substantive due process analysis. ___ U.S. at ___, 135 S. Ct. at 2602–03. Far from defining the asserted right in this case, i.e., the right to a physician's aid in dying, in its comprehensive sense through judicial ruling, it is clear to us that such a right cannot be defined without comprehensive legislation.

{56} New Mexico, like the rest of the nation, has historically sought to deter suicides and to punish those who assist with suicide, with limited exceptions in the UHCDA and the Pain Relief Act. However, these exceptions occurred as a result of debates in the legislative and executive branches of government, and only because of carefully drafted definitions and safeguards, which incidentally are consistent with the safeguards urged by Petitioners. Numerous examples of such definitions and safeguards exist in the UHCDA. In addition to those previously identified in paragraph 35 of this opinion, the following reflect other safeguards relevant to our analysis. "Life-sustaining treatment" is specifically defined. Section 24-7A-1(K). An insurer is prohibited from conditioning the sale of insurance on the execution of an advance health care directive. Section 24-7A-2.1(B). A health care provider cannot condition the provision of health care to the patient on the patient signing or revoking a health care directive. Section 24-7A-7(H). A health care provider may decline to comply with a health care decision "for reasons of conscience," but must treat the patient and make reasonable efforts to transfer the patient to a provider who is willing to comply with the patient's directive. Section 24-7A-7(E), (G). The patient or his or her agent, surrogate, or guardian may petition a court to enjoin or authorize a health care directive. Section 24-7A-14. These and other provisions of the UHCDA further many of the government interests recognized by the *Glucksberg* Court as unquestionably legitimate, and which made Washington's ban on physician aid in dying reasonably related to their promotion and protection. *See Glucksberg*, 521 U.S. at 728–35. Indeed, if such exceptions and carve-outs to the historical national public policy of deterring suicide properly exist, they are certainly borne of the legislature and not the judiciary.

{57} In *Trujillo*, 1998-NMSC-031, ¶¶ 27, 30, 32, we adopted a rational basis test different than the federal rational basis test. This test requires the challenger to demonstrate that the legislation is not supported by a firm legal rationale or evidence in the record. *Wagner*, 2005-NMSC-016, ¶ 24. We are persuaded that end-of-life decisions are inherently fraught with the potential for abuse and undue influence as evidenced by the protections outlined in the UHCDA and the Pain Relief Act, and therefore the government interests we have identified, similar to those in *Glucksberg*, are supported by a firm legal rationale. Applying this to Petitioners' challenge, we conclude that there is a firm legal rationale behind (1) the interest in protecting the integrity and ethics of the medical profession; (2) the interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes due to the real risk of subtle coercion and undue influence in end-of-life situations or the desire of some to resort to physician aid in dying to spare their families the substantial financial burden of end-of-life health care costs; and (3) the legitimate concern that recognizing a right to physician aid in dying will lead to voluntary or involuntary euthanasia because if it is a right, it must be made available to everyone, even when a duly appointed surrogate makes the

decision, and even when the patient is unable to self-administer the life-ending medication. *See* 521 U.S. at 731–33; Part III, ¶ 27, *supra*. Petitioners nonetheless maintain that the *Glucksberg* Court either did not have the same evidence before it that we do today, including data from several states and established practices in those states, and therefore concerns addressed in *Glucksberg* are no longer valid, or never came to fruition. However, in New Mexico these very concerns are addressed in the UHCDA, which was most recently amended in 2015, indicating not only the desirability of legislation in areas such as aid in dying, but also reflecting legitimate and ongoing legal rationales that *Glucksberg* raised nearly twenty years ago which endure today. Although it is unlawful in New Mexico to assist someone in committing suicide, the exceptions contained within the UHCDA and the Pain Relief Act narrow the statute's application, provided that physicians comply with the rigorous requirements of each act. Therefore, when the relevant legislation is read as a whole, Section 30-2-4 is rationally related to the aforementioned legitimate government interests. If we were to recognize an absolute, fundamental right to physician aid in dying, constitutional questions would abound regarding legislation that defined terminal illness or provided for protective procedures to assure that a patient was making an informed and independent decision. Regulation in this area is essential, given that if a patient carries out his or her end-of-life decision it cannot be reversed, even if it turns out that the patient did not make the decision of his or her own free will.

VIII. CONCLUSION

{58} Pursuant to New Mexico's heightened rational basis analysis, and based on the record before us and the arguments of the parties, we conclude that although physician aid in dying falls within the proscription of Section 30-2-4, this statute is neither unconstitutional on its face nor as it is applied to Petitioners. For the foregoing reasons, we reverse the district court's contrary conclusion and remand to the district court for proceedings consistent with this opinion.

{59} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

BARBARA J. VIGIL,
Justice

JAMES M. HUDSON,
District Judge

Sitting by designation

Justice Edward L. Chávez

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2016-NMSC-029

Filing Date: June 30, 2016

Docket No. S-1-SC-35426

NOE RODRIGUEZ,

Worker-Respondent,

v.

BRAND WEST DAIRY, Uninsured Employer,

Employer-Respondent,

and

NEW MEXICO UNINSURED EMPLOYERS' FUND,

Insurer-Petitioner,

Consolidated with:

MARIA ANGELICA AGUIRRE,

Worker-Respondent,

v.

M.A. AND SONS, INC.

Employer-Respondent,

and

FOOD INDUSTRY SELF INSURANCE FUND OF NEW MEXICO,

Insurer-Respondent.

and

Docket No. S-1-SC-35438

NOE RODRIGUEZ,

Worker-Respondent,

v.

BRAND WEST DAIRY, Uninsured Employer,

Employer-Petitioner,

and

NEW MEXICO UNINSURED EMPLOYERS' FUND,

Insurer,

Consolidated with:

MARIA ANGELICA AGUIRRE,

Worker-Respondent,

v.

M.A. AND SONS, INC.

Employer-Petitioner,

and

FOOD INDUSTRY SELF INSURANCE FUND OF NEW MEXICO,

Insurer-Petitioner.

ORIGINAL PROCEEDINGS ON CERTIORARI
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OPINION

CHÁVEZ, Justice.

{1} The New Mexico Workers' Compensation Act (Act), NMSA 1978, §§ 52-1-1 to -70 (1917, as amended through 2015), has never required employers to provide workers' compensation coverage to farm and ranch laborers. These consolidated appeals require us to resolve whether this exclusion violates the rights of those workers under the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution in light of the fact that other agricultural workers are not singled out for exclusion. The Equal Protection Clause mandates that, "in order to be legal," ostensibly discriminatory classifications in social and economic legislation "must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule" for the class that suffers the discrimination. *Burch v. Foy*, 1957-NMSC-017, ¶ 10, 62 N.M. 219, 308 P.2d 199.

{2} When litigants allege that the government has unconstitutionally discriminated against them, courts must decide the merits of the allegation because if proven, courts must resist shrinking from their responsibilities as an independent branch of government, and refuse to perpetuate the discrimination–regardless of how long it has persisted–by safeguarding constitutional rights. Such is the constitutional responsibility of the courts. *Griego v. Oliver*, 2014-NMSC-003, ¶ 1, 316 P.3d 865. We conclude that there is nothing to distinguish farm and ranch laborers from other agricultural employees and that purported government interests such as cost savings, administrative convenience, and other justifications related to unique features of agribusiness bear no rational relationship to the Act's distinction between these groups. This is nothing more than arbitrary discrimination and, as such, it is forbidden by our Constitution. Accordingly, we hold that the farm and ranch laborer exclusion contained in Section 52-1-6(A) of the Act is unconstitutional, and we remand these cases for further proceedings. The Legislature is at liberty to offer economic advantages to the agricultural industry, but it may not do so at the sole expense of the farm and ranch laborer while protecting all other agricultural workers. We also determine that our holding should be given modified prospective application to the cases of Ms. Aguirre and Mr. Rodriguez and to all cases involving an injury that manifests, as defined under the Act,

after the date that our mandate issues in this case pursuant to Rule 12-402(B) NMRA.

I. BACKGROUND

{3} In 2012, Maria Angelica Aguirre worked as a chile picker in Doña Ana County for M.A. and Sons, Inc. (M.A. & Sons) for a weekly wage of approximately $300.[1] Ms. Aguirre claims that she slipped in a field and broke her wrist while picking chiles. Ms. Aguirre claims that her injury required surgery and rehabilitative therapy, she still has trouble with her wrist, and she is limited in her ability to do farm work. M.A. & Sons had workers' compensation insurance at the time of the alleged injury.

{4} In March 2013, Ms. Aguirre filed a workers' compensation complaint seeking compensation for temporary total disability, permanent partial disability, medical benefits, and attorney fees. M.A. & Sons and its insurer, the Food Industry Self Insurance Fund of New Mexico (Self Insurance Fund), raised several defenses to Ms. Aguirre's complaint, including the contention that her claims were barred by the farm and ranch laborer exclusion in Section 52-1-6(A), which provides that the Act "shall not apply to employers of . . . farm and ranch laborers." In January 2014, Ms. Aguirre filed a motion for partial summary judgment, asking the workers' compensation judge (WCJ) to conclude that the farm and ranch laborer exclusion had been declared unconstitutional; therefore, it did not bar her case. To support her argument, Ms. Aguirre attached materials related to the 2012 judgment in *Griego v. New Mexico Workers' Compensation Administration*, No. CV 2009-10130, a case that was brought by New Mexico farm laborers in the Second Judicial District Court. In *Griego*, the district court declared that the farm and ranch laborer exclusion violated the constitutional equal protection rights of the claimants in that case and entered an order against the Workers' Compensation Administration (the Administration). The Administration then appealed the district court's ruling on jurisdictional grounds and, in an unpublished memorandum opinion, the Court of Appeals dismissed the claim as moot, and further stated that because the Administration had not sought review of the constitutional issue, the Court would not "examine []or draw any conclusions about it," other than to say that the Administration "cannot now escape the effect of unchallenged parts of the district court's decision." *Griego v. N.M. Workers' Comp. Admin.*, No. 32,120, mem. op. ¶¶ 1, 11 (N.M. Ct. App. Nov. 25, 2013) (non-precedential). The WCJ took judicial notice of the materials from *Griego* and admitted them for purposes of Ms. Aguirre's motion for partial summary judgment. The WCJ then denied her motion and dismissed her claim with prejudice on the basis of the farm and ranch laborer exclusion.

{5} In 2012, Noe Rodriguez worked as a dairy worker and herdsman at Brand West Dairy, earning just under $1000 every two weeks for working six days a week for eight hours per day. Mr. Rodriguez alleges that he was pushed up against a door by a cow and then head-butted by the cow, which caused him to fall face first onto a cement floor. He alleges that he suffered a traumatic brain injury, a neck injury, and facial disfigurement and that he was in a coma for two days. According to Mr. Rodriguez, as of July 2013, he had still not been cleared by a doctor to return to work. He alleges that his employer, which did not have workers' compensation insurance, provided him with two checks for $600 after the accident.

{6} In February 2013, Mr. Rodriguez filed a workers' compensation complaint seeking compensation for temporary total disability, permanent partial disability, disfigurement, medical benefits, and attorney fees. In July 2013, the New Mexico Uninsured Employers' Fund (the UEF), which acts as the insurer for businesses without workers' compensation insurance, *see* § 52-1-9.1, moved to dismiss Mr. Rodriguez's claims because of the farm and ranch laborer

[1] M.A. & Sons disputes that Ms. Aguirre was its "employee" under the Act. However, for the purposes of this appeal, they agree that we should treat Ms. Aguirre as though she would otherwise be eligible for workers' compensation benefits except for the Section 52-1-6(A) exclusion.

exclusion. Mr. Rodriguez responded by arguing that the WCJ was obligated to follow the district court's ruling in *Griego* and that the exclusion was unconstitutional. He attached a large quantity of materials from *Griego* to his motion, some of which were admitted by the WCJ. The WCJ granted the UEF's motion and dismissed Mr. Rodriguez's case based on the exclusion.

{7} Pursuant to NMSA 1978, Section 52-5-8(A) (1989), Ms. Aguirre and Mr. Rodriguez (collectively "Workers") appealed directly to the Court of Appeals, where their appeals were consolidated. *Rodriguez v. Brand W. Dairy*, 2015-NMCA-097, ¶ 1, 356 P.3d 546, *cert. granted*, 2015-NMCERT-008. Applying rational basis review, the Court of Appeals struck down the farm and ranch laborer exclusion as a violation of Workers' equal protection rights under Article II, Section 18 of the New Mexico Constitution. *Rodriguez*, 2015-NMCA-097, ¶¶ 11, 31. The Court then applied its holding on a modified prospective basis to any workers whose claims were pending as of March 30, 2012, and any claims filed after the date of the district court's final judgment in *Griego*. *Rodriguez*, 2015-NMCA-097, ¶ 37.

{8} The UEF appealed to this Court only on the issue of the Court of Appeals' modified prospective application of its holding. Brand West Dairy, M.A. & Sons, and the Self Insurance Fund (collectively "Employers") appealed to this Court to seek review of both the constitutional issue and the modified prospective application of the holding. We granted both petitions.

II. THE FARM AND RANCH LABORER EXCLUSION VIOLATES ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION

{9} Workers contend that the farm and ranch laborer exclusion contained in Section 52-1-6(A) violates their equal protection rights under the New Mexico Constitution and does not survive under any level of scrutiny. Article II, Section 18 of the New Mexico Constitution provides that no person "shall . . . be denied equal protection of the laws." "Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050. Under our equal protection analysis, we must first determine "whether the legislation creates a class of similarly situated individuals and treats them differently." *Griego*, 2014-NMSC-003, ¶ 27. If so, "we then determine the level of scrutiny that applies to the challenged legislation and conclude the analysis by applying the appropriate level of scrutiny to determine whether the legislative classification is constitutional." *Id.*

{10} We review the constitutionality of legislation de novo. *See Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, ¶ 8, 143 N.M. 726, 181 P.3d 718. During that review, we will not "question the wisdom, policy, or justness of legislation enacted by our Legislature," and will presume that the legislation is constitutional. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250. The party challenging the legislation therefore bears the burden of demonstrating that the law is unconstitutional. *Id.* To that end, "[a] statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation." *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265 (internal quotation marks and citation omitted).

A. The farm and ranch laborer exclusion results in dissimilar treatment of similarly situated individuals

{11} To determine whether the farm and ranch laborer exclusion in Section 52-1-6(A) violates Workers' equal protection rights, we must first decide "whether the legislation at issue results in dissimilar treatment of similarly-situated individuals." *Madrid*, 1996-NMSC-064, ¶ 35. This inquiry requires us to "look beyond the classification to the purpose of the law."

Oliver, 2014-NMSC-003, ¶ 30 (internal quotation marks and citations omitted); *see also Stanton v. Stanton*, 421 U.S. 7, 13-14 (1975) ("The [Federal Equal Protection] Clause . . . denies to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." (internal quotation marks and citation omitted)). For example, in *Oliver*, this Court determined that same-gender couples seeking to marry in New Mexico were similarly situated to opposite-gender couples seeking to marry because both groups shared common purposes that were essential to New Mexico's marriage laws. 2014-NMSC-003, ¶¶ 36–38. Similarly, in *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 44, 126 N.M. 788, 975 P.2d 841, we held that men and women who qualified for Medicaid were similarly situated for the purposes of both state and federal Medicaid laws because those laws were intended to provide qualifying individuals with access to necessary medical care. Therefore, a rule prohibiting the use of state funds to pay for medically necessary abortions improperly treated men and women differently. *Id.* ¶¶ 45–47. By contrast, in *City of Albuquerque v. Sachs*, 2004-NMCA-065, ¶¶ 11–16, 135 N.M. 578, 92 P.3d 24, the Court of Appeals determined that men and women were not similarly situated under a local ordinance prohibiting public nudity because men and women possess different physical characteristics which make the exposure of a woman's breast "nudity," but not the exposure of a man's breast. The law's classification that distinguished men from women was therefore "properly based on a unique characteristic" of women. *Id.* ¶ 11. In other words, the reliance on differences in classifying men and women under the ordinance was essential to accomplishing the law's purpose: "to prohibit any person from knowingly or intentionally being nude in a public place." *Id.* ¶ 14.

{12} In this case, we will first examine the Act's text to ascertain its purposes. NMSA 1978, Section 52-5-1 (1990) states the Legislature's intent that the Act "assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to . . . employers. . . ." We have previously interpreted this provision to encompass three of the Act's objectives: "(1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system." *Wagner*, 2005-NMSC-016, ¶ 25. The Act also instructs that it is "not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand." Section 52-5-1. This provision requires us to "balance equally the interests of the worker and the employer without showing bias or favoritism toward either." *Salazar v. Torres*, 2007-NMSC-019, ¶ 10, 141 N.M. 559, 158 P.3d 449.

{13} With these general principles in mind, we will also examine the structure and operation of the entire Act as an indicator of its purposes. *See Oliver*, 2014-NMSC-003, ¶¶ 34–35 (examining New Mexico's marriage laws together to ascertain their collective underlying purposes). For workers subject to the Act, the statute provides the exclusive remedy for injuries or death "caused by accident" and which arise out of the course of the worker's employment, § 52-1-9, including accidents caused by an employer's negligence, *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 12, 131 N.M. 272, 34 P.3d 1148. The exclusivity of workers' compensation remedies for accidents and negligence is advantageous to employers because it limits their potential liability for workplace injuries by preventing workers from pursuing "the unpredictable damages available outside [the Act's] boundaries." *Id.* ¶ 12. Instead, workers receive a predictable recovery amount because it is highly regulated by statute. *See, e.g.*, §§ 52-1-26 to -26.4 (establishing detailed guidelines for determining award amounts for a partial disability covered under the Act). In exchange, "[t]he injured worker receives compensation quickly, without having to endure the rigors of litigation or prove [an employer's] fault[.]" *Delgado*, 2001-NMSC-034, ¶ 12. Additionally,

the workers' compensation system eliminates employer defenses that frequently prevented injured workers from recovering for workplace injuries under the common law. *See* § 52-5-1; *see also Hisel v. Cty. of Los Angeles*, 238 Cal. Rptr. 678, 682 (Ct. App. 1987) ("From the beginning, it was a principal purpose of workers' compensation laws to eliminate . . . common law defenses that had prevented recovery for injuries received on the job. . . ."). We have also previously recognized the Act's "design[] to . . . protect[] society by shifting the burden of caring for injured workers away from society and toward industry[,]" and thus "to prevent the worker from becoming a public charge and to assist the worker in returning to work. . . ." *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 36, 138 N.M. 331, 120 P.3d 413 (internal quotation marks and citation omitted).

{14} We must also consider the history of New Mexico's workers' compensation laws to fully understand their current exclusion of farm and ranch laborers. *See Oliver*, 2014-NMSC-003, ¶¶ 30–31 (examining the history of New Mexico marriage laws for clues regarding the purposes of those laws). Farm and ranch laborers have never been included in New Mexico's workers' compensation system. The Act's initial version, passed in 1917, only applied to "extra-hazardous occupations or pursuits" which were specifically enumerated by the Legislature and did not include any kind of agricultural labor. *See* 1917 N.M. Laws, ch. 83, §§ 2, 10. In 1937, the Legislature added an explicit exclusion of "farm and ranch laborers." 1937 N.M. Laws, ch. 92, § 2. Because the Act still only applied to certain "extra-hazardous occupations or pursuits[,]" *id.* § 1, farm and ranch laborers were therefore doubly excluded from the workers' compensation system. In 1975, the Legislature repealed the workers' compensation system's limitation to extra-hazardous pursuits or occupations, *see* 1975 N.M. Laws, ch. 284, § 14, and instead applied the Act more broadly to include private employers employing four or more workers, *see id.* § 3. Employers of farm and ranch laborers were still explicitly excluded from the Act. *Id.* Today the Act is generally mandatory for private employers with three or more employees, except for employers of private domestic servants and farm and ranch laborers. *See* § 52-1-6(A). Employers of farm and ranch laborers can instead affirmatively elect to provide workers' compensation coverage for those workers. Section 52-1-6(B).

{15} The exclusion now provides that "[t]he provisions of the Workers' Compensation Act shall not apply to employers of . . . farm and ranch laborers." Section 52-1-6(A). Because a "literal interpretation" of this language would lead to "absurd results[,]" the provision has long been applied only to workers employed as farm and ranch laborers and not to every individual employee working for an employer of farm and ranch laborers. *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, ¶ 6, 94 N.M. 223, 608 P.2d 535; *see also Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, ¶ 19, 110 N.M. 287, 795 P.2d 92 ("[T]he determination of whether a particular worker is a farm laborer is based on the nature of the employee's primary job responsibilities, not the nature of the employer's business."). Otherwise, employers could "exempt their entire work force from the act by employing a few farm and ranch laborers[,]" which would thwart the Legislature's intent to "exempt agricultural labor" from the workers' compensation system. *Cueto*, 1980-NMCA-036, ¶ 6. In other words, a worker who occasionally performs the tasks of a farm or ranch laborer is not necessarily classified as such if he or she is primarily employed for a different purpose, and likewise, a worker working as a farm or ranch laborer, is still classified as a farm or ranch laborer even when he or she is performing a work-related duty that would normally be performed by a non-excluded worker, such as driving a truck or packaging the product. *See Holguin*, 1990-NMCA-073, ¶ 9 ("[T]he general character of the employment is controlling, even though the worker may in fact have been injured while performing a service that is not farm labor.").

{16} A worker is classified as a farm or ranch laborer for purposes of the Act when "the worker's primary responsibility is performed on the farming premises and is an essential part of the cultivation of the crop[.]" *Id.* For instance, in

Holguin, the Court of Appeals determined that a worker who primarily filled and stacked sacks of onions in an onion shed was not a farm laborer under Section 52-1-6(A). 1990-NMCA-073, ¶¶ 3–5, 20. Several years later, the Court of Appeals held that a beekeeper's assistant, whose primary duties involved harvesting honey by helping to extract it from bee hives, was a farm laborer under Section 52-1-6(A). *Tanner v. Bosque Honey Farm, Inc.*, 1995-NMCA-053, ¶¶ 2–3, 12, 119 N.M. 760, 895 P.2d 282; *see also Cueto*, 1980-NMCA-036, ¶¶ 1, 3, 9 (holding that a worker whose primary duty was manufacturing fertilizer by maintaining a compost heap, a process that was "an essential part of the cultivation of pecans[,]" was a farm laborer under Section 52-1-6(A)). Therefore, under the exclusion, the same agricultural employer could be exempt from providing mandatory workers' compensation coverage for a worker who harvests an agricultural product in the field, but still be required to provide workers' compensation to workers who process and package that same product because that task is merely "incidental" to farming. *See Tanner*, 1995-NMCA-053, ¶¶ 7, 11.

{17} We hold that the farm and ranch laborers who are excluded by Section 52-1-6(A) are similarly situated to other employees of agricultural employers with respect to the purposes of the Act. In light of the purposes of the Act discussed above, we conclude that there is no unique characteristic that distinguishes injured farm and ranch laborers from other employees of agricultural employers, and such a distinction is not essential to accomplishing the Act's purposes. *Cf. Sachs*, 2004-NMCA-065, ¶¶ 13–16 (distinguishing men from women to accomplish the objective of a city ordinance). Rather, the same mutually beneficial trade-off in rights between employers and employees apply equally to farm and ranch laborers and their employers. *See Oliver*, 2014-NMSC-003, ¶¶ 36–38 (determining that same-gender and opposite-gender couples were similarly situated with respect to the benefits associated with marriage in New Mexico); *see also Stanton*, 421 U.S. at 15 (holding that boys and girls were similarly situated for the purposes of a statute specifying the age of majority for child support payments because "[i]f a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl"). Indeed, the classification resulting from the exclusion is contrary to the Act's goal of balancing the rights of employees and employers because it allows the employers of only this excluded class of workers to unilaterally opt into or out of the workers' compensation system—a choice that the same employers do not have with respect to any other employees. *See* § 52-1-6(A), (B). Workers also have shown that it does not further the Act's purposes defined in Section 52-5-1 to impose a negligence standard on accidental workplace injuries suffered by employees who work primarily as farm and ranch laborers, while applying a no-fault system to all other workplace accidents suffered by employees of agricultural employers, including those who occasionally perform the tasks of farm and ranch laborers. *See Holguin*, 1990-NMCA-073, ¶¶ 9–10.

{18} Employers argue that the Act's classification of farm and ranch laborers is a "distinction . . . [which] does not come directly from the challenged legislation, but, instead, comes from the [Court of Appeals'] interpretation and application" of the exclusion. Employers further contend that to define the classification in this manner would be inappropriate and contrary to our prior case law, "where the challenged distinction came directly from the provisions of the Act." Employers' argument does not convince us that the distinction between farm and ranch laborers exempt from the Act and other employees of agricultural employers in New Mexico was "created by" the Court of Appeals rather than the Act.

{19} Contrary to Employers' contention, our equal protection jurisprudence requires us to consider how courts have interpreted legislative language to define classifications created by a statute. For example, in *Oliver* we had to determine whether, when read as a whole, New Mexico's marriage laws authorized or prohibited same-gender marriage, "despite the lack of an express legislative prohibition against same-gender

marriage. . . .” 2014-NMSC-003, ¶ 24. Even though New Mexico’s marriage statutes contained a mixture of gender-neutral and gender-specific language, we interpreted the statutory scheme to reflect a legislative intent to prohibit same-gender marriages. *Id.* ¶ 23. We then considered whether same-gender couples seeking to marry were similarly situated to opposite-gender couples seeking to marry based on the distinction between those two groups created by the interpretation of prohibition. *See id.* ¶¶ 28–38. Similarly, courts have interpreted the farm and ranch laborer exclusion to create a distinction between employees whose work is essential to cultivating crops or who work directly with livestock and other employees whose work is not essential to those goals by reasoning that any other interpretation would be absurd to the extent that it would not be in accord with the Legislature’s wishes. *See Cueto*, 1980-NMCA-036, ¶ 6.

{20} The Legislature’s failure to change or clarify judicial interpretations of the exclusion indicates its intent that the exclusion should be applied to a distinct *subset* of employees as defined by case law. In the context of the Act and its predecessors, this Court has long interpreted agricultural labor to include only workers whose primary responsibilities were directly related, not incidental, to agricultural pursuits.[2] *See Koger v. A. T. Woods, Inc.*, 1934-NMSC-020, ¶¶ 17–20, 38 N.M. 241, 31 P.2d 255. *Cueto* further clarified that a worker’s primary responsibilities had to be essential to cultivating crops for his or her work to be directly related to agriculture. 1980-NMCA-036, ¶ 9. Because the Legislature has not taken any steps in the interim to correct or change these long-standing interpretations related to the exclusion, their inactivity is an endorsement of the case law, absent any evidence to the contrary. *See State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 (“The Legislature’s continuing silence on the issue we confront herein is further evidence that it was both aware of and approved of the existing case law. . . . If the Legislature had intended to modify or clarify those rules, it would have done so expressly. . . .”). Further, the only recent amendment related to the exclusion, *see* 1984 N.M. Laws, ch. 127, § 988.3, also acknowledged that certain employees should be classified as farm and ranch laborers based on whether they directly work with crops or animals in an agricultural setting. *See* § 52-1-6.1.

{21} Employers next argue that New Mexico courts have already determined that farm and ranch laborers are not similarly situated to New Mexico workers in *Holguin* and *Tanner* who are not exempt from the Act. In other words, according to Employers, the Court of Appeals’ determination in those cases that some workers were farm and ranch laborers for purposes of Section 52-1-6(A) while others were not was tantamount to holding that workers who harvest crops or directly participate in farming activities are “not similarly situated” for equal protection purposes to workers who perform tasks such as processing and packaging crops. This definition of “similarly situated” based on assigned tasks would eviscerate equal protection rights. Indeed, the logical extension of Employers’ argument is that no class defined by legislation can ever be similarly situated to individuals outside that class because those outside the class do not possess the trait that defines the class. “[S]imilarly situated cannot mean simply similar in the possession of the classifying trait. All members of

[2] The dissent places substantial emphasis on *Williams v. Cooper*, 1953-NMSC-050, 57 N.M. 373, 258 P.2d 1139. *See* diss. op. ¶¶ 73–74, 76, 81. *Williams* interpreted the since-repealed provision that applied workers’ compensation only to those employers engaged in extra-hazardous occupations or pursuits under NMSA 1941, Section 57-910 (1941). *See* 1953-NMSC-050, ¶ 12. Significantly, the phrase “occupations or pursuits” was given further context by NMSA 1941, Section 57-902 (1941), which limited the Act’s application to private businesses “engaged in carrying on for the purpose of business, trade or gain . . . either or any of the extra-hazardous occupations or pursuits named or described” by the Act and to injuries suffered “by accident arising out of and in the course of [a worker’s] employment in any such occupation or pursuit.” Yet, as we have already described, *see supra*, maj. op. ¶ 14, the extra-hazardous occupations limitation was excised from the Act more than four decades ago, and the modern version of the Act does not broadly restrict its application based on the occupations or pursuits of the employer. *See* § 52-1-2. In any event, workers whose primary responsibilities were directly related, not incidental, to agricultural pursuits have always been a part of the test.

any class are similarly situated *in this respect* and consequently, any classification whatsoever would be reasonable by this test." *N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 39 (emphasis added) (internal quotation marks and citation omitted). Thus, there is no merit to Employers' argument that prior cases determining the scope of Section 52-1-6(A) are dispositive of whether injured farm and ranch laborers are similarly situated to other injured workers of agricultural employers.

{22} Having decided that the exclusion creates differential treatment among similarly situated employees, we will now determine the appropriate level of scrutiny to apply. *See Breen*, 2005-NMSC-028, ¶ 11.

B. Rational basis review is appropriate

{23} "There are three levels of equal protection review based on the New Mexico Constitution: rational basis, intermediate scrutiny and strict scrutiny." *Id.* "In analyzing which level of scrutiny should apply in an equal protection challenge, a court should look at all three levels to determine which is most appropriate based on the facts of the particular case." *Id.* ¶ 15. "What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute." *Wagner*, 2005-NMSC-016, ¶ 12. "Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class." *Breen*, 2005-NMSC-028, ¶ 11. Under rational basis review, the challenger must demonstrate that the legislation is not rationally related to a legitimate government purpose. *Id.* However, legislation can trigger a review under intermediate scrutiny where it "either (1) restrict[s] the ability to exercise an important right or (2) treat[s] the person or persons challenging the constitutionality of the legislation differently because they belong to a sensitive class." *Id.* ¶ 17. Under intermediate scrutiny, the party supporting the legislation must show that it is substantially related to an important government interest. *Id.* ¶ 13. Finally, strict scrutiny applies when "a law draws suspect classifications or impacts fundamental rights." *Wagner*, 2005-NMSC-016, ¶ 12. In that instance, the party supporting the legislation must demonstrate that "that the provision at issue is closely tailored to a compelling government purpose." *Id.*

{24} The Act is general social and economic legislation, and the benefits that it confers do not rise to the level of important or fundamental rights. *See Breen*, 2005-NMSC-028, ¶ 17. Further, Workers have not provided any argument for classifying farm or ranch laborers as a sensitive or suspect class before this Court. Therefore, we will apply rational basis review in this case. *See State ex rel. Human Servs. Dep't v. Staples* (*In re Doe*), 1982-NMSC-099, ¶ 3, 98 N.M. 540, 650 P.2d 824 (courts should strive to avoid deciding legal arguments not raised by the parties).

C. The exclusion fails rational basis review

{25} In *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305, we adopted a rational basis test different than the federal rational basis test. We rejected a fourth tier of "heightened" rational basis analysis and instead adopted a "modern articulation" of the rational basis test that "subsum[ed] that fourth tier" of review and "address[ed] the concerns" of heightened rational basis analysis. *Id*. (internal quotation marks and citations omitted). In *Wagner*, we clarified that the rational basis test adopted by *Trujillo* requires the challenger to "demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record." *Wagner*, 2005-NMSC-016, ¶ 24 (internal quotation marks and citation omitted). The New Mexico rational basis test is therefore similar to the federal heightened rational basis test. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

{26} However, for claims under the United States Constitution, we still follow the federal rational basis test, which only requires a reviewing court to divine "the *existence* of a conceivable

rational basis" to uphold legislation against a constitutional challenge. *Kane v. City of Albuquerque*, 2015-NMSC-027, ¶ 17, 358 P.3d 249 (internal quotation marks and citation omitted). Under the federal test, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (internal quotation marks and citation omitted). Accordingly, a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313. Legislation can therefore survive a constitutional challenge under the federal test based solely on a judge's "rational speculation [that is] unsupported by evidence or empirical data." *Id.* at 315.

{27} In *Trujillo*, we rejected this version of the rational basis test and noted that critics had fairly characterized it as "toothless" and "a virtual rubber-stamp[.]" 1998-NMSC-031, ¶ 30 (internal quotation marks and citations omitted). Our opinion in *Trujillo* implicitly addressed Justice Stevens' concern in *Beach Communications* that the federal test "sweeps too broadly, for it is difficult to imagine a legislative classification that could *not* be supported by a 'reasonably conceivable state of facts[,]'" and his statement that judicial review under this test is therefore "tantamount to no review at all." 508 U.S. at 323 n.3 (Stevens, J., concurring); *see also* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 905–913 (2005) (arguing that the federal rational basis test invites dishonest and entirely speculative defenses of legislation; "[s]addl[es] . . . plaintiffs with a technically unattainable burden of proof and requir[es] them to construct a trial court record sufficient to rebut arguments that have not even been made yet"; and is particularly subject to inconsistent, result-based interpretations). Thus, while we remain highly deferential to the Legislature by presuming the constitutionality of social and economic legislation, our approach is also cognizant of our constitutional duty to protect discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests. *See* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 174, 188–204 (2003) (arguing that discriminatory "special interest legislation flourishes when courts refuse to play their proper role of policing the political branches of government"); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 Va. L. Rev. 1065, 1093–1101 (2013) (arguing that federal rational basis review is insufficient to protect discrete groups with little chance to influence changes in the law from certain "vested interests" that have "powerful economic incentives" to discriminate against those discrete groups in the pursuit of "inflated profits"). To that end, our more robust standard establishes rational basis review in arguments and evidence offered by the challengers or proponents of a law rather than requiring the challengers to anticipate and address every stray speculation that may pop into a judge's head at any point in the case. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., separate opinion) (concluding that "[t]he State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis[,]" and rejecting a proffered basis for legislation where it had "so speculative and attenuated a connection to its goal as to amount to arbitrary action").

{28} Returning to the case before us, the classification of farm and ranch laborers must be upheld unless Workers prove it is "not rationally related to a legitimate government purpose." *Wagner*, 2005-NMSC-016, ¶ 12. To prove the lack of a rational relationship, they "must demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record." *Id.* ¶ 24 (internal quotation marks and citation omitted). In practical terms, our rational basis standard requires the challenger to bring forward record evidence, legislative facts, judicially noticeable materials, case law, or legal argument to prove that the differential treatment of similarly situated classes is arbitrary, and thus not rationally related to the articulated legitimate government purposes. Proponents of the classification are, of course, free

to draw a court's attention to similar evidence to rebut the challengers' arguments or to set forth additional government purposes that the challengers must then prove are not supported by a firm legal rationale or evidence in the record.

{29} For example, one approach available for challengers to prove the lack of a rational relationship under our test is by demonstrating that the classification is grossly over- or under-inclusive with respect to an articulated government purpose, such that the relationship between the classification and its purpose is too attenuated to be rational, and instead amounts to arbitrary discrimination. For example, in *City of Cleburne*, the United States Supreme Court applied a heightened rational basis standard similar to our test and struck down a zoning ordinance imposing special administrative hurdles on group homes for the intellectually and developmentally disabled. *See* 473 U.S. at 449–50. The Court rejected several purported rational bases offered by the law's proponents because the law did not provide a close enough fit with those bases. *See id.* Proponents of the zoning law argued that there was a legitimate government interest in requiring a permit for the facility in that case because it would be located on a flood plain. *Id.* at 449. The Court determined that the ordinance was not rationally related to the government interest in protecting people from floods because that concern would apply equally to a variety of other group facilities housing vulnerable populations, none of which would have been required to obtain a permit, and therefore could "hardly be based on a distinction between [a home for the intellectually and developmentally disabled] and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals. . . ." *Id*. The Court also rejected an argument that "the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets[,]" since those concerns would apply equally to other group housing such as "apartment houses, fraternity and sorority houses, hospitals and the like," none of which were singled out in the same manner by the zoning law. *Id.* at 450. In other words, despite the existence of legitimate government interests in protecting people from floods and preventing overpopulation and congestion, and despite the fact that there was likely *some* relationship between requiring special permits for group homes for the intellectually and developmentally disabled and those interests, singling out one particular group among other similarly-situated groups was grossly under-inclusive with respect to these interests, and therefore the challengers had proved the absence of a rational relationship.

{30} The United States Supreme Court similarly has not found a rational relationship when a law is grossly over-inclusive in addressing a purported government interest. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536–38 (1973) (striking down related-household limitations on food stamp eligibility under the Food Stamp Act as not rationally related to the purpose of preventing fraud because the provision appeared to largely exclude from the food stamp program individuals who were not committing fraud, but rather were too poor to alter their living arrangements); *see also Barletta v. Rilling*, 973 F. Supp. 2d 132, 138 (D. Conn. 2013) ("The statute, in other words, is both grossly over-inclusive and grossly under-inclusive as a proxy for serving the State's stated goals. To survive even rational basis review, the defendants and the State must do more than suggest that *some* felons would be unsuitable for licensure. Most irrational classifications, for example, left-handed people, obese people, people with tattoos, people born on the first day of the month, divorced people and college dropouts, will include *some* persons properly excluded from licensure. Such occasional coincidence between membership in the excluded class and the purpose of the licensing requirement is not sufficient to advance a legitimate government interest." (internal quotation marks and citation omitted)). Therefore, inclusiveness can be a valuable rubric for evaluating the relationship between a classification and a government purpose under our rational basis test.

{31} We will now apply our rational basis test to this case. The following rationales have been articulated for the Section 52-1-6(A) classification of farm and ranch laborers: (1) cost savings

for agricultural employers; (2) administrative convenience; (3) unique economic aspects of agriculture; (4) protection of New Mexico's farming and ranching traditions; and (5) the application of tort law to workplace injuries suffered by farm and ranch laborers. We hold that Workers have demonstrated that there is neither evidence in the record nor firm legal rationale sufficient to establish a rational relationship between the exclusion and any of these purposes.

{32} **First,** Workers have demonstrated that there is neither evidence in the record nor firm legal rationale showing a rational relationship between the exclusion's classification of farm and ranch laborers and a purported interest in reducing overhead costs to the New Mexico agricultural industry. According to Employers, the exclusion is intended to reduce costs to farmers and consumers by saving the cost of providing workers' compensation insurance to farm and ranch laborers. On appeal, amicus curiae New Mexico Farm and Livestock Bureau (the Bureau) introduced Fiscal Impact Reports (FIRs) to support the argument that the exclusion saves overhead costs for farm and ranch employers. *See* FIR for H.B. 80 (Jan. 19, 2007) (2007 FIR), *available at* http://www.nmlegis.gov/Sessions/07%20Regular/firs/HB0080.pdf (last viewed June 1, 2016); FIR for H.B. 62 (Feb. 5, 2009) (2009 FIR), *available at* http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0062.pdf (last viewed June 1, 2016). Employers also contend that this Court's analysis in *Wagner* requires us to consider lowering costs to employers as a legitimate government purpose to effectuate the Legislature's intent that the Act be interpreted to balance the rights of employers and employees. *See* § 52-5-1. However, the statement in *Wagner* that reducing employer costs is a purpose of the Act referred to reducing employer costs *within* the workers' compensation system; it did not stand for the self-contradictory proposition that one of the Act's purposes is to reduce costs for employers by exempting them from the Act entirely. *See* 2005-NMSC-016, ¶ 25.

{33} As to the more general cost savings argument, Workers have met their burden by demonstrating that there is neither firm legal rationale nor evidence in the record to establish a rational relationship between this purpose and the differential treatment of farm and ranch laborers under the Act. This Court has previously recognized that while "lowering employer costs" is a "valid legislative goal" of the Act, rational basis review, at a minimum, still requires that a cost-saving classification "be based upon some substantial or real distinction, and not artificial or irrelevant differences." *Schirmer v. Homestake Mining Co.*, 1994-NMSC-095, ¶ 9, 118 N.M. 420, 882 P.2d 11. In *Schirmer*, we upheld a challenge to a statute barring claims for compensation based on injuries resulting from occupational exposure to radioactive or fissionable materials that was brought more than ten years after the employee's last day of work. *Id.* ¶¶ 3–4, 10. In striking down the law as a violation of substantive due process under rational basis review, we determined that while the provision's bar on certain claims "probably reduce[d] costs to employers by eliminating claims[,]" it did so by "arbitrarily discriminat[ing]" against a discrete group of claimants. *Id.* ¶¶ 9–10.

{34} Similarly, other jurisdictions have agreed that while cost savings are a legitimate government interest, they cannot be achieved through arbitrary means because if they were the "sole reason for disparate treatment[,] . . . cost containment alone could justify nearly every legislative enactment without regard for . . . equal protection." *Caldwell v. MACo Workers' Comp. Tr.*, 2011 MT 162, ¶ 34, 256 P.3d 923 (internal quotation marks and citations omitted); *see also Harris v. Millenium Hotel*, 330 P.3d 330, 337 (Alaska 2014) (rejecting cost savings justification under rational basis review of workers' compensation provision that excluded same-gender couples from receiving death benefits); *Caldwell*, 2011 MT 162, ¶ 35 ("We must scrutinize attempts to disguise violations of equal protection as legislative attempts to 'contain the costs' or 'improve the viability' of the worker's compensation system. *Cost alone does not justify the disparate treatment of similar classes*." (emphasis added) (citation omitted)); *Arneson v. State ex rel. Dep't of Admin., Teachers' Ret. Div.*, 864 P.2d 1245,

1248 (Mont. 1993) ("[E]ven if the governmental purpose is to save money, it cannot be done on a wholly arbitrary basis. The classification must have some rational relationship to the purpose of the legislation."); *State ex rel. Patterson v. Indus. Comm'n*, 672 N.E.2d 1008, 1012–13 (Ohio 1996) (holding that conserving funds cannot be the sole reason for a classification denying workers' compensation benefits to a particular group of workers).

{35} Likewise, in this case, even assuming that agricultural operations would face additional costs without the exclusion, these cost savings are only achieved through arbitrary discrimination against farm and ranch laborers. The exclusion does not apply to farm and ranch *employers*, but rather to employees whose primary job responsibilities fit the definition of "farm and ranch laborers" under Section 52-1-6(A). *See Holguin*, 1990-NMCA-073, ¶ 19 (stating that despite the Act's plain language, "the determination of whether a particular worker is a farm laborer is based on *the nature of the employee's primary job responsibilities, not the nature of the employer's business*" (emphasis added)). Therefore, agricultural employers are not fully exempted from the Act because they are still required to cover any employees whose primary responsibilities are not essential to cultivating crops, such as employees who sort or package crops. *See id.* ¶ 20. As a result, the exclusion saves overhead costs for agricultural employers by arbitrarily excluding only farm and ranch laborers, a discrete subset of their potential employees, from coverage. Here we again reject the argument that achieving cost savings for employers by arbitrarily discriminating against a particular group of employees is a legitimate government purpose. *See Schirmer*, 1994-NMSC-095, ¶¶ 9–10.

{36} **Second,** Workers have met their burden by demonstrating that there is neither evidence in the record nor firm legal rationale showing that the classification of farm and ranch laborers is rationally related to unique administrative challenges created by workers' compensation claims from those workers. According to Employers, farm and ranch laborers are "often seasonal and, as such, are inherently transient." Employers argue that the transience of these workers creates unique difficulties for insurers, including not knowing where to send benefit checks and not knowing where to provide the worker with medical care. Additionally, Employers contend that "some farm and ranch workers . . . are undocumented," which makes them "difficult to locate" and prone to "avoid[ing] contact with governmental authorities," and administering their claims would therefore present a challenge. In support of this argument, the Bureau cites the FIRs from 2007 and 2009. The 2007 FIR repeated the Administration's belief at that time that removing the exclusion would significantly increase the Administration's caseload, require additional staffing, and present logistical challenges due to the transitory nature of some seasonal farm and ranch laborers. *Id.* at 2. Similarly, in the 2009 FIR, the Administration asserted that it would need three more full-time employees to handle an estimated 475 additional claims and estimated that it would need to pay the UEF an additional $24,000 per year due to the increased claims. *Id.* at 2–3.

{37} However, the Administration later contradicted its earlier positions through stipulations entered in *Griego*.[3] In *Griego*, the Administration

[3] Employers do not directly argue that the *Griego* stipulation should be rejected, but do refer to the "lack of a developed factual record that contains findings that were truly litigated between the parties and made by an independent fact finder." We agree, and therefore do not treat these facts as if Employers have stipulated to them. However, we have considered this stipulation with respect to the administrative convenience rationale because the Administration's statements in *Griego* regarding the feasibility of administering these claims for farm and ranch laborers directly relate to earlier statements attributed to the Administration in the FIRs. These are legislative facts that "do not concern individual parties" in this case, but are rather a "non-evidentiary source[]" of universally- applicable information to help us "determine the content of law and policy." *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶¶ 25–26, 147 N.M. 583, 227 P.3d 73 (internal quotation marks and citations omitted). Notably, Employers could have also entered competing general factual evidence into the record for purposes of appeal, such as the FIRs, or argued that the stipulation was irrelevant or outdated. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 290 (D.N.M. 2015) (concluding that it is appropriate to consider legislative facts contained in a re-

agreed that "[i]t would be administratively feasible to administer the workers' compensation system with the addition of farm and ranch laborers," including temporary or seasonal workers. The Administration also agreed that coverage of these workers would likely lead to a 1.4% increase in covered workers and a less than 1% increase in caseload. Further, the Administration agreed that "[i]t is no more difficult to administer workers' compensation to farm and ranch laborers than it is to administer the program to other covered workers, some of whom are migrant and seasonal, work for multiple employers or are employed by farm labor contractors." The Administration additionally conceded that farm and ranch laborers whose employers already provided voluntary coverage under the Act "do not pose any special difficulties for the . . . Administration." Finally, the Administration agreed that the additional administrative costs associated with covering more workers "would be covered by fees collected from workers and employers" pursuant to the Act. Therefore, the Administration's most recent statements regarding the exclusion severely undermine earlier statements in the record regarding the administrative convenience rationale for the exclusion.

{38} Workers have demonstrated that the exclusion does not rationally relate to administrative convenience in the workers' compensation system. The Section 52-1-6(A) exclusion is grossly under- and over-inclusive with respect to the purported government interest of avoiding administrative difficulties in the workers' compensation system so that it is not rationally related to the goal of ensuring the Act's quick and efficient administration. *See Wagner*, 2005-NMSC-016, ¶ 25 (emphasizing the particularly important goal of maximizing workers' recovery among the Act's goals that also include "ensuring a quick and efficient system"); § 52-5-1 (articulating the goal of "quick and efficient" administration). As Workers observe, "the [Administration] and private insurance companies already administer claims in the construction, service and roofing industries, which, like agriculture, sometimes involve sub-contractors, part-time employees, multiple employers, seasonality and frequent changes in employers," and presumably undocumented employees as well. Indeed, the Act does not exclude *any* other employees who work in industries that rely on substantial seasonal or temporary labor. It is arbitrary to exclude a subset of workers from just one industry based on concerns regarding administrative convenience that are not even remotely unique to that industry. The exclusion is thus so grossly under-inclusive in addressing any purported problems with administering claims that it is not rationally related to that interest. *See Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 472 (Ky. 2011) ("Nor can the disparate treatment of coal workers be justified as a[n administrative] cost-saving measure, as it is axiomatic that, if the enhanced procedure saves money, the state would save more money by subjecting *all* occupational pneumoconiosis claimants to the more exacting procedure and higher rebuttable standard."); *Walters v. Blair*, 462 S.E.2d 232, 234 (N.C. Ct. App. 1995), *aff'd*, 476 S.E.2d 105 (N.C. 1996) (per curiam) (striking down a statute regarding disability and death benefits for silicosis or asbestosis under workers' compensation because it was "grossly underinclusive" since similar government interests would presumably be equally served by the same treatment of any number of other serious diseases).

{39} Additionally, it is unclear why concerns regarding administrative difficulties raised by seasonal or temporary laborers should bar all farm and ranch laborers from the Act when some of those employees work year-round for the same employer. The exclusion is, in this sense, so grossly over-inclusive as to undermine any rational relationship between the exclusion and administrative convenience. In this case, for example, Mr. Rodriguez asserts that he worked full-time for Brand West Dairy for four years prior to his injury. The proponents of the exclusion do not explain why his claim, or other similar claims brought by full-time farm and ranch laborers, would be more difficult to administer than a claim brought by a full-time employee in any other industry.

{40} In conclusion, the combined under- and over-exclusiveness of the farm and ranch laborer

port authored by the U.S. Forest Service, but the U.S. Forest Service was still free to argue that the facts were inapposite or being misused by plaintiffs).

exclusion renders it so attenuated from the purported government interest of administrative convenience as to be arbitrary discrimination.

{41} **Third,** Workers have demonstrated that there is neither evidence in the record nor firm legal rationale to support a rational relationship between federal regulations of agricultural prices and differential treatment of farm and ranch laborers under the Act. To support this rationale, the Bureau cites 7 U.S.C. § 608c (2012), which sets certain minimum prices for milk and other dairy products, and 7 U.S.C. § 1421 (2012), under which the United States Secretary of Agriculture may sometimes set price supports for agricultural commodities. Notably, the provisions set *minimum prices* or price supports in excess of *minimum prices* for agricultural products. This belies any implication that federal regulations hold down the prices of agricultural commodities, because the price regulations cited by the Bureau are designed to provide special *assistance* to farmers by stabilizing markets for agricultural commodities. The Bureau also asserts that farmers are generally "price-takers," which means that they have little ability to increase prices and must generally accept prevailing market rates, and that without the exclusion, New Mexico farmers would be at a competitive disadvantage.

{42} However, only a small minority of states still allow the complete exemption of farm workers from workers' compensation. For instance, just among states bordering New Mexico, neither Arizona nor Colorado treats farm and ranch laborers differently than any other workers for purposes of workers' compensation, *see* Ariz. Rev. Stat. Ann. §§ 23-901 to -1104 (1964, as amended through 2015); Colo. Rev. Stat. §§ 8-40-101 to -55-104 (West 1990, as amended through 2014), and Oklahoma and Utah both require limited mandatory coverage that is designed to exclude only small farms and family farms, *see* Okla. Stat. tit. 85A, § 2(18)(b) (2013) (excluding farms with an annual payroll of less than $100,000); Utah Code Ann. § 34A-2-103(5) (2016) (excluding farms with an annual payroll of less than $50,000, which does not include payroll payments to members of the families owning the small farms). However, farmers and ranchers from these neighboring states, as well as a significant minority of New Mexico farmers and ranchers who have elected to provide coverage to their workers under Section 52-1-6(B), are subject to the same price regulations and compete in the same markets as New Mexico farmers who elect not to provide coverage. Thus, Workers have met their burden.

{43} **Fourth,** Workers have also met their burden in demonstrating that there is neither firm legal rationale nor evidence in the record to support a rational relationship between the differential classification of farm and ranch laborers under the Act and the government purpose of helping New Mexico's small, rural farms and protecting their traditions. To support this purported justification, the Bureau cites statistics which show that a great majority of New Mexico's farms are small, family-run operations, and demonstrate that the average New Mexico farm carries a thin or negative profit margin. However, the Act is only mandatory for private employers of three or more workers, *see* § 52-1-2, and therefore the exclusion only benefits farms and ranches that employ three or more employees. According to the 2012 Census of Agriculture created by the United States Department of Agriculture, 1,864 of the 24,721 "farms" in New Mexico employ three or more workers, which means that only approximately the largest 7.5% of farms in New Mexico benefit from the exclusion. U.S. Dep't of Agriculture, 2012 Census of Agriculture: United States Summary and State Data, Vol. 1 at Tables 1 & 7 (May 2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf (last reviewed June 1, 2016). Therefore, the exclusion does not even apply to approximately 92.5% of the farms in the state because they have fewer than three employees. Furthermore, the additional costs to the remaining 7.5% would be proportional to the number of employees and would not fall disproportionately on smaller operations because workers' compensation is payroll-based. Finally, the Bureau contends that the exclusion protects "the culture of 'neighboring'—in which farmers and ranchers help perform work on their neighbors'

farms and ranches," which it claims "is a critical part of the culture of rural communities," and preserves the tradition of children or other family members performing "farm and ranch duties as chores." However, volunteer or unpaid workers are generally not entitled to workers' compensation benefits, *see Jelso v. World Balloon Corp.*, 1981-NMCA-138, ¶ 31, 97 N.M. 164, 637 P.2d 846, so the practices of "neighboring" and children performing chores are not affected by the exclusion. Therefore, Workers have met their burden by demonstrating that there is no rational relationship between this government interest and the exclusion of farm and ranch laborers from the Act.

{44} **Fifth** and finally, Workers have proved that there is no legitimate government interest in subjecting only workplace injuries suffered by farm and ranch laborers to the common law tort system, while any other workplace injury suffered by an employee of an agricultural employer goes through the workers' compensation system. Because all workers subject to the Act lose any common law negligence claims that they may have had otherwise, *see* § 52-1-6(D), (E), the Bureau argues that the Legislature merely intended to preserve the availability of tort remedies for workplace injuries suffered by farm and ranch laborers. The Bureau also claims that the exclusion of farm and ranch laborers from the workers' compensation system and their employers' ability to voluntarily elect into or out of the system is beneficial to both parties. However, contrary to these assertions, the trade-off between common law negligence claims and no-fault remedies under the Act, *see Salazar*, 2007-NMSC-019, ¶ 11, does not create equality between tort claims and workers' compensation claims or provide any reason for drawing a distinction between workplace injuries suffered by farm and ranch laborers and those suffered by any other employee of an agricultural employer. Further, it does not explain why this is a legitimate government purpose. This distinction imposes a negligence standard of fault on agricultural employers for a particular class of their employees while establishing a no-fault standard for all others. Additionally, as the parties observed at oral argument, farm and ranch laborers are engaged in a risky profession where workplace accidents frequently result from inherently unpredictable working conditions. For example, in this case, Ms. Aguirre slipped and fell in a field and Mr. Rodriguez suffered a devastating injury when he was "head-butted" by a cow. It is extremely unlikely that either of these injuries could be the basis for a common law claim since both apparently resulted from unpredictable working conditions. Workers have rightly indicated that there is neither any articulated reason for this policy nor a government interest in it.

III. OUR HOLDING IN THIS CASE WILL APPLY ON A MODIFIED PROSPECTIVE BASIS

{45} The UEF, Employers, and various amici urge this Court to enter a prospective or modified prospective holding in this case that the exclusion is unconstitutional. Under our prospectivity analysis, we first presume that a new civil rule operates retroactively, but that presumption may then be overcome by "a sufficiently weighty combination" of the three factors described by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971), *overruled by Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). *Beavers v. Johnson Controls World Servs., Inc.*, 1994-NMSC-094, ¶¶ 20–22, 118 N.M. 391, 881 P.2d 1376.

{46} Under the first *Chevron* factor, we consider the degree to which our decision in this case "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 31, 147 N.M. 678, 228 P.3d 462 (internal quotation marks and citations omitted). Farm and ranch laborers have been explicitly excluded from the Act since 1937. *See* 1937 N.M. Laws, ch. 92, § 2. This long-standing exclusion has been consistently enforced by New Mexico appellate courts, *see Tanner*, 1995-NMCA-053, ¶ 12; *Cueto*,

1980-NMCA-036, ¶¶ 9–10; *Varela v. Mounho*, 1978-NMCA-086, ¶ 9, 92 N.M. 147, 584 P.2d 194, and our holding in this case was not clearly foreshadowed by case law or otherwise.

{47} Further, substantial reliance interests would be upset by retroactive application of our holding here. The farm and ranch laborer exclusion primarily affects contracts between employers and employees in the workplace. *See Beavers*, 1994-NMSC-094, ¶ 28 ("The reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction."). Also, some employers acted in reliance on the exclusion and did not purchase workers' compensation insurance; however, the ruling in this case will require them to do so and to assume various other new duties related to providing workers' compensation coverage to farm and ranch laborers. *See Lopez v. Maez*, 1982-NMSC-103, ¶ 17, 98 N.M. 625, 651 P.2d 1269 (applying new rule prospectively because it imposed a new duty and "the imposition of this new liability on tavernowners may subject [them] to liability when they are not properly insured").

{48} Additionally, we do not agree with Workers' argument that it was unreasonable and a risk for employers to continue to rely on the exclusion rather than purchasing insurance that would cover farm and ranch laborers after the district court's final judgment in *Griego* in 2012. By following this reasoning, we would effectively bind all farm and ranch employers to a single district court decision to which they were not parties. *See* Rule 12-405(A)-(C) NMRA (unpublished opinions are non-precedential); NMSA 1978, § 44-6-12 (1975) (No declaratory judgment "shall prejudice the rights of persons not parties to the proceeding."). Accordingly, we hold that the first *Chevron* factor weighs heavily in favor of prospective application of our holding in this case.

{49} Under the second *Chevron* factor, we must "weigh the merits and demerits" of retroactive application "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Marckstadt*, 2010-NMSC-001, ¶ 31 (internal quotation marks and citations omitted). Despite the equal protection interests weighing in favor of retroactivity, we weigh this factor in favor of prospective application. The numerous impracticalities a retroactive holding could create within the New Mexico workers' compensation scheme may significantly hinder the Act's purpose of creating "a quick and efficient system" of workers' compensation. *See Wagner*, 2005-NMSC-016, ¶ 25. For example, the Administration and the UEF convincingly argue that a retroactive holding would create a number of disputes regarding whether employers and workers should have complied with various mandatory provisions of the Act and as to the scope of the UEF's duties to uninsured employers. Additionally, it would be contrary to the purposes of the Act to impose "quasi-criminal sanctions" on previously uninsured employers, *Wegner v. Hair Prods. of Tex.*, 2005-NMCA-043, ¶ 10, 137 N.M. 328, 110 P.3d 544, based on an obligation to provide workers' compensation insurance that originated with this case. *See* § 52-1-9.1(G)(2) (outlining a mandatory minimum 15% penalty against uninsured employers).

{50} Under the third *Chevron* factor, we must "weigh[] the inequity imposed by retroactive application" to determine whether the "decision . . . could produce substantial inequitable results if applied retroactively. . . ." *Marckstadt*, 2010-NMSC-001, ¶ 31 (internal quotation marks and citations omitted). This Court has previously recognized that "[t]he greater the extent a potential defendant can be said to have relied on the law as it stood at the time he or she acted, the more inequitable it would be to apply the new rule retroactively." *Beavers*, 1994-NMSC-094, ¶ 38. We therefore weigh the third *Chevron* factor in favor of prospective application due to the longstanding, substantial, and reasonable reliance of employers on the exclusion's validity and the inequities that would arise from the practical difficulties of retroactive application.

{51} Weighing the *Chevron* factors together, we conclude that the reliance interests of employers

combined with the practical difficulties that would result from retroactive application are sufficient to overcome our presumption of retroactivity in this case. Accordingly, we hold that the Act's farm and ranch laborer exclusion is unconstitutional and direct that our holding be prospectively applied to any injury that manifests after the date that our mandate issues in this case pursuant to Rule 12-402(B). *See Montell v. Orndorff*, 1960-NMSC-063, ¶ 9, 67 N.M. 156, 353 P.2d 680 (concluding that the "occurrence of injury" refers to "when disability appears—in other words, when the injury . . . becomes manifest." (internal quotation marks and citation omitted)); *De La Torre v. Kennecott Copper Corp.*, 1976-NMCA-108, ¶¶ 18–19, 89 N.M. 683, 556 P.2d 839 (clarifying that the version of workers' compensation law applicable to a claim is the law as of the date when the compensable disability should have been reasonably apparent to the worker). Further, we modify our prospective holding by applying it to the litigants in this case, Ms. Aguirre and Mr. Rodriguez, "for having afforded us the opportunity to change an outmoded and unjust rule of law." *Lopez*, 1982-NMSC-103, ¶ 18.

IV. CONCLUSION

{52} We remand these consolidated cases to their respective WCJs for resolution without reliance on the farm and ranch laborer exclusion in Section 52-1-6(A). We also order that the Court of Appeals' opinion in *Rodriguez v. Brand West Dairy*, 2015-NMCA-097 be republished. Because of our disposition and its prospective application, Respondents' motion for leave to file a reply dated April 13, 2016 and any other outstanding motions in the two consolidated cases before this Court are denied.

{53} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

BARBARA J. VIGIL,
Justice

JUDITH K. NAKAMURA,
Justice, dissenting

NAKAMURA,
Justice (dissenting).

{54} Since 1917, when the Workers' Compensation Act (WCA), NMSA 1978, §§ 52-1-1 to -70 (1917, as amended through 2015), was originally enacted, the Legislature has allowed employers of farm and ranch laborers to decide for themselves whether to participate in the workers' compensation scheme. *See* NMSA 1978, § 52-1-6(A)-(B) (1990); Laws 1917, ch. 83 §§ 2, 10. For nearly 100 years, the Legislature has maintained its view that the best policy for New Mexico is that each farm and ranch employing more than three workers decides for itself whether to incur the costs of workers' compensation or to face the costs of potential tort liability. To that end, Section 52-1-6(A) excludes *employers* of farm and ranch laborers from the Legislature's requirement subjecting employers of three or more workers to the provisions of the WCA.

{55} Today, the majority opinion exercises this Court's power of judicial review and holds that this 99-year-old statutory scheme violates the New Mexico Constitution. By invalidating Section 52-1-6(A)'s exclusion of farms and ranches from mandatory participation in the state workers' compensation scheme, the majority opinion has supplanted the Legislature's view of what, all things considered, is best for New Mexico. But this Court has neither the necessary facts nor the institutional mission to substitute our judgment for that of the Legislature regarding what is best for any particular industry within the State's economy.

{56} The farm-and-ranch exclusion may be perceived as unfair, unwise, or improvident in its treatment of laborers who work for farms and ranches electing exemption from the WCA, but this Court may exercise its greatest power to

invalidate a statute only if the statute contravenes the federal Constitution or the New Mexico Constitution. This case raises no federal claim, and, under well-established law, the Legislature's decision to allow employers of farm and ranch laborers to decide for themselves whether to be subject to the WCA or to face tort liability does not violate any right guaranteed by the New Mexico Constitution. Because Section 52-1-6 is socioeconomic legislation, the Worker-Respondents have a right against the disparate treatment allowed by this statute only if the statute does not rationally further a legitimate legislative purpose. The Worker-Respondents simply cannot make that showing. By enacting Section 52-1-6, the Legislature designed a statutory scheme that rationally controls costs for New Mexico farms and ranches. The statute creates a choice which allows these employers to elect the option that entails the lowest expected costs, and 29% of New Mexico farms and ranches (including many of the largest agricultural firms in the State) have elected to provide workers' compensation. This statute survives an equal protection challenge. Additionally, by nullifying the Legislature's statutory scheme, the majority opinion threatens to detrimentally impact small, economically fragile farms in New Mexico. Therefore, I respectfully dissent.

I. SECTION 52-1-6(A) IS CONSTITUTIONAL

{57} This is not a complex case. Noe Rodriguez and Maria Aguirre were injured on the job. Rodriguez and Aguirre were employed by a ranch and a farm, respectively, that had elected not to provide workers' compensation benefits and which, under Section 52-1-6(A), were not required to do so. Rodriguez and Aguirre claim that the Legislature's exclusion of employers of farm and ranch laborers from mandatory participation in the workers' compensation scheme violates their rights to equal protection under Article II, Section 18 of the New Mexico Constitution.

{58} Equal protection doctrine requires that Rodriguez and Aguirre "first prove that they are similarly situated to another group but are treated dissimilarly." *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413. That showing is easily met. Rodriguez and Aguirre are similar to all other workers in New Mexico who suffer work-related injuries and are in need of benefits. But Aguirre's and Rodriguez's employers elected exemption from the WCA, and, therefore, Aguirre and Rodriguez are treated dissimilarly from other workers whose employers participate in the workers' compensation scheme. Whereas injured workers in the latter group receive workers' compensation benefits, injured workers in the former group do not, even though they may seek other forms of recovery such as damages in tort. Thus, Section 52-1-6(A) results in dissimilar treatment of workers injured on the job.

{59} Upon a showing of dissimilar treatment, this Court determines what level of scrutiny applies to the challenged legislation. *Breen*, 2005-NMSC-028, ¶ 8. Section 52-1-6(A) is economic legislation that does not subject a suspect or sensitive class to different treatment, and, therefore, rational basis review applies. *See Griego v. Oliver*, 2014-NMSC-003, ¶ 39, 316 P.3d 865; *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050 ("Ordinarily we defer to the Legislature's judgment in enacting social and economic legislation such as the WCA."). Rational basis review is the most deferential standard that a court applies when reviewing the constitutionality of legislation, "and the burden is on the party challenging the legislation to prove that it 'is not rationally related to a legitimate government[al] purpose.'" *Breen*, 2005-NMSC-028, ¶ 11 (alteration in original) (quoting *Wagner*, 2005-NMSC-016, ¶¶ 12, 24). Under rational basis review, our task is to decide, first, whether the Legislature enacted a statute to further a permissible legislative purpose and, second, whether the challenged statutory provision is rationally related to that purpose. *Kane v. City of Albuquerque*, 2015-NMSC-027, ¶¶ 17–22, 358 P.3d 249.

{60} In considering the Legislature's purpose when enacting and maintaining Section 52-1-6(A)'s farm-and-ranch exclusion, the record

evidence and legislative history indicate that the Legislature was motivated to contain regulatory costs incurred by economically precarious farms and ranches in New Mexico. For instance, in 2009, the Legislature considered bills that would have removed the WCA's exclusion for employers of farm and ranch laborers. *See* H.B. 62, 49th Leg., Reg. Sess. (N.M. 2009); S.B. 9, 49th Leg., Reg. Sess. (N.M. 2009). In considering these bills, the Legislature had available the Fiscal Impact Report (FIR) for House Bill 62. Members of the House Business and Industry Committee relied on the FIR in rejecting House Bill 62 by a vote of 10-2.

{61} According to the FIR for House Bill 62, the "N.M. Department of Agriculture stated the proposed legislation would introduce a significant financial strain on the farming and ranching part of the industry." FIR for H.B. 62, at 3 (Feb. 05, 2009) (2009 FIR). The FIR also included cost projections to farm and ranch employers submitted by the Workers' Compensation Administration, the National Council of Compensation Insurance (NCCI), and New Mexico State University agricultural economists. *See id.* The Workers' Compensation Administration had projected the annual cost of the bill "to farm and ranch employers to be an additional $10.5 million annually . . . [which] represents a cost increase of approximately 1.5 percent." *Id.* The NCCI had similarly estimated that House Bill 62 "would increase New Mexico payroll costs by 0.4 percent and increase premiums up to 1.1 percent." *Id.* The FIR additionally indicated that, according to Workers' Compensation Administration data, the average cost per claim was approximately $16,876. *Id.* In contrast, the FIR reported that the average net income per farm in the 2002 census of agriculture was $19,373—only slightly more than the average cost per workers' compensation claim. *Id.* Indeed, in 2012, the average net cash income from farming operations in New Mexico was only $9,501. *See* United States Department of Agriculture, National Agricultural Statistics Service, 2015 State Agricultural Overview New Mexico, http://tinyurl.com/jjpx7ch (last viewed June 28, 2016). Therefore, legislative facts demonstrate a legislative concern to maintain Section 52-1-6(A) in order to contain costs incurred by fiscally vulnerable farms and ranches. *See Oliver*, 2014-NMSC-003, ¶ 47 n. 7 ("[T]his Court . . . may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts." (alteration in original) (internal quotation marks and citation omitted)).

{62} Under rational basis review, the Legislature's purpose to safeguard farms and ranches in New Mexico from the imposition of additional overhead costs is permissible. There can be no dispute that the Legislature may pursue the legitimate purpose to protect certain industries from additional costs or to lower overhead costs. *See*, *e.g.*, *Garcia v. La Farge*, 1995-NMSC-019, ¶ 24, 119 N.M. 532, 893 P.2d 428 (finding under rational basis review that lowering the costs of malpractice insurance for health care providers was a legitimate legislative purpose); *Schirmer v. Homestake Min. Co.*, 1994-NMSC-095, ¶ 8, 118 N.M. 420, 882 P.2d 11 ("[T]he legislative goal of maintaining reasonable costs to employers is a legitimate legislative goal. . . ."); *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 23, 118 N.M. 753, 887 P.2d 747 (finding under rational basis review that the reduction of costs to local governments is a valid legislative goal); *Terry v. N.M. State Highway Comm'n*, 1982-NMSC-047, ¶ 8, 98 N.M. 119, 645 P.2d 1377 (citing *Howell v. Burk*, 1977-NMCA-077, ¶ 8, 90 N.M. 688, 568 P.2d 214 (upholding a statute as rationally related to the permissible legislative goal of guarding against the imposition of costs on firms in the construction industry)). The majority opinion does not suggest otherwise.

{63} The only remaining question, then, is whether Section 52-1-6(A) is rationally related to the legitimate purpose of insulating New Mexico farms and ranches from additional costs. It is. Section 52-1-6(A), in conjunction with Subsection (B), creates an architecture by which employers in the agricultural industry choose which costs they incur. There are costs involved with being subject to the WCA. Those costs include insurance premiums and fees collected pursuant

to NMSA 1978, § 52-5-19 (2004). Yet, despite these costs, there are good reasons why a farm or ranch would voluntarily elect to be subject to the WCA, as permitted by Section 52-1-6(B). The WCA provides a predictable schedule of benefits and makes those benefits the exclusive remedy for an injured worker. As the record in this case reflects, "[t]here is a benefit to having insurance in place to take care of the injured worker and it might be an incentive to get a higher quality worker if they are aware of the benefits. Employers are no longer exposed to possible tort lawsuits." *Griego v. N.M. Workers' Comp. Admin.*, No. CV 2009-10130, 20, ¶ 141 (N.M. 2nd Jud. D., Oct. 17, 2011) (final pretrial order).[4] Likewise, there are risks associated with a farm or ranch's decision to forego WCA participation: such employers risk the possibility of unpredictable tort judgments and other costs associated with employee injury.

{64} In other words, Subsections (A) and (B) allocate to each farm and ranch the choice whether to pay the costs of being subject to the WCA *or* to face potential tort liability. The Legislature's allocation of this choice to each farm and ranch is rationally related to its goal to contain the costs for the farming and ranching industry because each farm and ranch is in the best position to know whether it would be more cost-effective to participate in the workers' compensation scheme or to incur the risk of tort liability and associated litigation costs. New Mexico farms and ranches that employ more than three employees vary greatly in the number of employees hired, the positions hired for, other fixed and marginal costs, products produced, annual sales, and profitability. *See, e.g.*, United States Department of Agriculture, National Agricultural Statistics Service, 2015 State Agricultural Overview New Mexico, http://tinyurl.com/jjpx7ch (last viewed June 28, 2016); *see also* 2014 New Mexico Agricultural Statistics Bulletin, 18, http://tinyurl.com/zahewua (last viewed June 28, 2016). Because of that variety, it is far from arbitrary for the Legislature to allow each farm and ranch to decide for itself whether to pay the costs of the WCA or to risk tort liability. Each farm and ranch will very likely elect the option that entails the lowest expected costs, thereby furthering the Legislature's legitimate goal to support New Mexico's economically precarious farms and ranches.

{65} In fact, the record demonstrates that 29% of farms and ranches that employ more than three workers have voluntarily elected to be subject to the WCA. This Court heard at oral argument that, of the farms and ranches who have elected to participate in the WCA, the majority are the largest agribusinesses who hire the largest number and largest variety of workers. It comes as no surprise that larger firms in New Mexico's farming and ranching industry have decided that it is best for their businesses to be subject to the WCA. By doing so, these businesses fix costs and eliminate exposure to unpredictable tort liability. Conversely, the smaller farms and ranches have decided that, given their smaller economies of scale and smaller profit margins, it is best for their businesses to avoid the costs (and forgo the benefits) of the WCA and to risk tort liability instead. So, while the majority opinion may purport to correct a power disparity between workers and the largest firms in the agricultural industry, its decision will likely have the effect of raising costs for the most economically precarious, smaller New Mexico farms and ranches. By protecting against such circumstance, Section 52-1-6(A) rationally furthers the legitimate legislative purpose.

II. THE MAJORITY OPINION ERRS IN CONCLUDING THAT SECTION 52-1-6(A) IS UNCONSTITUTIONAL

{66} The majority opinion asserts that it "remain[s] highly deferential to the Legislature by presuming the constitutionality of social and economic legislation." Maj. Op. ¶ 27. But it is difficult to see how. Instead of interpreting Section 52-1-6 according to its plain language and then employing the traditional doctrine of

[4] As the majority opinion notes, materials related to *Griego v. New Mexico Workers' Compensation Administration* were attached by Aguirre before the Workers' Compensation Judge and accordingly form a part of the record in this case. *See* Maj. Op., ¶ 4.

rational basis review, the majority opinion does something quite different. First, the majority opinion misinterprets Section 52-1-6 to create a distinction that the Legislature neither drew nor intended. Maj. Op. ¶¶ 15-20. The majority opinion then misapplies rational basis scrutiny to hold Section 52-1-6(A) unconstitutional and relies on inapposite case law to support that holding. Maj. Op. ¶¶ 28–33. Such analysis is neither deferential to the Legislature nor willing to presume the constitutionality of social and economic legislation. And the majority opinion departs from the reasoning and the traditional equal protection analysis employed by myriad other state appellate courts and the United States Supreme Court to uphold analogous farm-and-ranch exceptions to mandatory workers' compensation statutes against identical state and federal constitutional challenges.[5]

A. The majority opinion misinterprets Section 52-1-6 in concluding that the statute is unconstitutional

{67} This Court may not interpret a statute in ways that render it constitutionally infirm. *See, e.g.*, *State v. Flores*, 2004-NMSC-021, ¶ 16, 135 N.M. 759, 93 P.3d 1264 ("When construing a statute we are to construe it, if possible, so that it will be constitutional." (internal quotation marks and citation omitted)); *accord Huey v. Lente*, 1973-NMSC-098, ¶ 6, 85 N.M. 597, 514 P.2d 1093 ("[I]f a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality."). Yet, that is what the majority opinion has done.

{68} According to the majority opinion, Section 52-1-6(A) draws a line between, on the one hand, "farm and ranch laborers," and, on the other hand, all other employees of farms and ranches. Maj. Op. ¶¶ 15–20. Not every employee of a farm or ranch is a "farm and ranch laborer." Some larger farms and ranches also hire, for example, staff who work primarily in the packaging of crops, sales, and administration. The majority

[5] *See, e.g., Collins v. Day*, 644 N.E.2d 72, 82 (Ind. 1994) (holding that exemption for agricultural employers and employees from mandatory workers' compensation coverage did not violate the equal privileges and immunities guarantee of the state constitution); *Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 202 (N.D. 1994) (holding that statutory provision excluding agricultural employees from mandatory workers' compensation coverage did not violate state equal protection guarantee); *Baskin v. State ex rel. Worker's Comp. Div.*, 722 P.2d 151, 156 (Wyo. 1986) (holding "exception of 'ranching and agriculture' from extra-hazardous occupations of teaming and truck driving and motor delivery" subject to mandatory workers compensation' coverage did not violate state or federal equal protection guarantees); *Eastway v. Eisenga*, 362 N.W.2d 684, 689 (Mich. 1984) (holding that exemption for some agricultural employers from mandatory participation in workers' compensation scheme did not violate either federal or state equal protection guarantees); *Ross v. Ross*, 308 N.W.2d 50, 53 (Iowa 1981) (rejecting federal equal protection challenge to statute exempting employers of familial farmworkers from compulsory participation in workers' compensation scheme); *Otto v. Hahn*, 306 N.W.2d 587, 592 (Neb. 1981) (rejecting federal equal protection challenge to statute excluding employers of farmworkers from mandatory participation in workers' compensation scheme); *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44, 45 (Ky. App. 1978) (holding that exemption for employers "engaged solely in agriculture" from mandatory participation in workers' compensation scheme did not violate state or federal equal protection guarantees); *Anaya v. Indus. Comm'n*, 512 P.2d 625, 626 (Colo. 1973) (holding that the "exclusion of farm and ranch labor" from mandatory workers' compensation benefits did not violate equal protection (citing *Romero v. Hodgson*, 319 F. Supp. 1201, 1203 (N.D. Cal. 1970) (per curiam, three-judge court), *aff'd* 403 U.S. 901 (1971) (holding that exclusion of agricultural labor from the definition of employment in both California and federal unemployment compensation statutes did not violate the federal equal protection guarantee)); *State ex rel. Hammond v. Hager*, 563 P.2d 52, 57 (Mont. 1972) (holding that exclusion for "employers engaged in farming and stock raising" from workers' compensation scheme did not violate the federal equal protection guarantee); *Sayles v. Foley*, 96 A. 340, 344 (R.I. 1916) (holding that exclusion for farm laborers and other laborers involved in agricultural pursuits from state workers' compensation scheme did not violate state or federal constitutions); *Hunter v. Colfax Consol. Coal Co.*, 154 N.W. 1037, 1052–53 (Iowa 1915) (same); *In re Opinion of Justices*, 96 N.E. 308, 315 (Mass. 1911) (concluding that exclusion of farm laborers from provision of workers' compensation act provision modifying common law defenses to common law negligence claims did not violate the federal constitution); *see also Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 162 (1918) (concluding that Texas Employer's Liability Act's exclusion from mandatory insurance coverage for injuries sustained by, inter alia, farm laborers did not violate the federal equal protection guarantee); *New York Central R.R. Co. v. White*, 243 U.S. 188, 208 (1916) (concluding that the exclusion of farm laborers from New York workers' compensation scheme did not violate the federal equal protection guarantee).

opinion interprets Section 52-1-6(A) to allow farms and ranches to exclude "farm and ranch laborers" from workers' compensation, but not other employees, such as administrative or sales staff. Maj. Op. ¶¶ 15–20. The majority opinion concludes that distinction is irrational and, therefore, holds that Section 52-1-6(A) violates the New Mexico Constitution. Maj. Op. ¶¶ 28–33.

{69} Irrespective of whether it would be irrational for the Legislature to allow farms and ranches to exclude "farm and ranch laborers" from workers' compensation while not permitting farms and ranches to exclude other employees, this is *not* a distinction that the Legislature drew. The distinction that the majority opinion focuses on is simply not in the statute. "The text of a statute or rule is the primary, essential source of its meaning." NMSA 1978, § 12-2A-19 (1997). And the text of Section 52-1-6(A) does not remotely suggest that the Legislature intended to permit farms and ranches to exclude laborers who primarily work with the crops and livestock, but not other employees.

{70} Rather, Section 52-1-6(A) indicates that the Legislature permits farms and ranches to exclude *themselves* from mandatory participation in the workers' compensation scheme. The statute unambiguously provides an exemption for *employers*, not certain subsets of their employees. Section 52-1-6 plainly states that "[t]he provision of the [WCA] . . . shall not apply to *employers* of . . . farm and ranch laborers." § 52-1-6(A). The statute also says "*employers* of . . . farm and ranch laborers" can make "[a]n election to be subject to the [WCA]." § 52-1-6(B). Accordingly, the statute's exclusion from mandatory participation in the workers' compensation scheme applies to *employers*, and the choice to participate also resides with *employers*. *See* § 52-1-6(A)-(B).

{71} Instead of following the plain text of the statute, the majority opinion adopts an erroneous reading offered by the Court of Appeals in *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535, and *Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, 100 N.M. 287, 795 P.2d 92. *See* Maj. Op. ¶¶ 15–18. *Cueto* and *Holguin* read Section 52-1-6(A)'s exclusion to turn, not on the business of the employer, but rather on the primary job duties of the employee. *See Holguin*, 1990-NMCA-073, ¶ 19; *Cueto*, 1980-NMCA-036, ¶ 6. The majority opinion reasons that Section 52-1-6(A) must mean something other than what it says because a "'literal interpretation'" of the statute would lead to "'absurd results.'" Maj. Op. ¶ 15 (quoting *Cueto*, 1980-NMCA-036, ¶ 6). According to the majority opinion, a literal reading of the text would allow any employer—despite the industry in which it operates—to exclude its entire workforce from workers' compensation coverage simply by hiring a couple of farm or ranch laborers. Maj. Op. ¶ 15. Imagine, for example, a semiconductor chip manufacturing facility planting an adjacent pecan orchard. No court in New Mexico could reasonably interpret Section 52-1-6(A) to provide that such a factory could exclude itself from the provisions of the WCA. But a court need not interpret the statute as the majority opinion does in order to deny the hypothetical factory the benefit of the farm-and-ranch exclusion.

{72} Contrary to the majority opinion's suggestion, its interpretation of Section 52-1-6(A) is not the only interpretation that avoids the absurd result. Section 52-1-6(A) should be read not as allowing the exclusion of only farm and ranch laborers from the mandatory provisions of the WCA, but rather as allowing the exclusion of *employers* whose workforce is *mainly comprised* of farm and ranch laborers. In other words, if an *employer* mainly employs farm and ranch laborers (i.e., if an employer *is* a farm or a ranch), then under Subsections (A) and (B), that *employer* is not required to participate in the workers' compensation scheme, although it may voluntarily elect to do so.

{73} Not only is this interpretation available to avoid the absurd result the majority opinion envisions, it also reflects this Court's precedent. This Court has previously determined that the farm-and-ranch exclusion protects a farmer or rancher against workers' compensation claims

brought by employees who are not farm and ranch laborers. *See Williams v. Cooper*, 1953-NMSC-050, ¶¶ 10–13, 57 N.M. 373, 258 P.2d 1139. In *Williams*, this Court reversed an award of workers' compensation because the statute excluded the workers' compensation claim of an employee who was injured while constructing an addition to a dance hall that a rancher operated. 1953-NMSC-050, ¶¶ 10–13. This Court emphasized "'the fact that it is not the nature of the particular work in which the employee is engaged at the time of his injury *but rather the character of his employer's occupation which controls*. . . .'" *Id.* ¶ 7 (emphasis added) (quoting *Rumley v. Middle Rio Grande Conservancy Dist.*, 1936-NMSC-023, ¶ 16, 40 N.M. 183, 57 P.2d 283). Accordingly, this Court held that "the occupation or pursuit of the defendant [which was ranching] did not subject him to liability under the act, even if at the moment the [non-ranching] work being done by the [non-ranch-laborer] plaintiff with a different factual background would have rendered his injury compensable [i.e. had the plaintiff worked for a non-rancher]." *Id.* ¶ 10. *Williams* is guiding precedent regarding the interpretation of the farm-and-ranch exclusion, yet the majority opinion avoids it.

{74} Based on the text of the statute and our own precedent, this Court is compelled to read Section 52-1-6(A) as allowing the exclusion, not of farm and ranch laborers themselves, but of *employers* whose workforce is mainly comprised of farm and ranch laborers. This interpretation faithfully adheres to the text of Section 52-1-6(A). It effectuates the Legislature's purpose to contain costs incurred by New Mexico's farms and ranches. It avoids the absurd result of permitting any employer from excluding itself from the provisions of the WCA by hiring a few farm or ranch laborers. It follows this Court's previous readings of the statute. *See Williams*, 1953-NMSC-050, ¶ 10. And, most importantly, it does not create a constitutionally infirm distinction. *See Huey*, 1973-NMSC-098, ¶ 6 ("[I]f a statute is susceptible to two constructions, . . . a court should adopt the construction which will uphold its constitutionality.").

{75} Yet, for unconvincing reasons, the majority opinion adopts an alternative reading. First, the majority opinion relies on *Griego v. Oliver* to support its view that, contrary to the plain text of the statute, it may nevertheless adopt *Cueto*'s dubious interpretation in order to hold the statute unconstitutional. Maj. Op. ¶ 19 (citing *Oliver*, 2014-NMSC-003, ¶ 24). But *Oliver* is inapposite. The marriage statutes under review in *Oliver* could not be interpreted to authorize marriage between same-gender couples, which would have saved the statutes from constitutional challenge. *See Oliver*, 2014-NMSC-003, ¶¶ 19–24. By contrast, the plain text of Section 52-1-6(A) and this Court's precedents support an interpretation that not only materially differs from the interpretation reached by *Cueto* and adopted by the majority opinion but which also saves Section 52-1-6(A) from the constitutional challenge at issue.

{76} Second, the majority opinion's reliance on *Koger v. A.T. Woods, Inc.* is misplaced. *See* Maj. Op. ¶ 20 (citing 1934-NMSC-020, ¶¶ 17–20, 38 N.M. 241, 31 P.2d 255). While *Koger* seemed to apply the exclusion based upon "the general nature of the object of employment [of the employee]," 1934-NMSC-020, ¶ 17, after *Koger* was decided, the Legislature amended the WCA to create an explicit exclusion for "*employers* . . . of farm and ranch laborers." Laws 1937, ch. 92, § 2 (emphasis added). Looking to *that* statute, this Court in *Williams* focused not on the employee's primary job duties, nor on the particular work the employee was engaged in when injured, but rather expressly said that it is "*the character of his employer's occupation which controls*. . . ." 1953-NMSC-050, ¶ 7 (emphasis added) (internal quotation marks and citation omitted). On that basis, this Court reversed an award of workers' compensation benefits. *Id.* ¶ 13.

{77} Third, the majority opinion erroneously grounds its interpretation on legislative silence. *See* Maj. Op. ¶ 20. Notwithstanding this Court's own precedent, the majority opinion notes that the *Cueto* Court of Appeals interpreted Section 52-1-6(A) to allow the exclusion of only

farm and ranch laborers from workers' compensation coverage. The majority opinion then reasons that, because the Legislature did not subsequently amend the statute, the Legislature therefore intended a meaning different than what the text of the statute expressly provides. Maj. Op. ¶ 20 (citing *Cueto*, 1980-NMCA-036, ¶¶ 6–7). This reasoning is unpersuasive.

{78} Inferences based on the Legislature's silence subsequent to a court's decision are an exceptionally weak method of statutory interpretation. *See Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route."); Norman J. Singer and J.D. Shambie Singer, 2B Sutherland Statutory Construction § 49.9, at 124 (7th ed. 2012) (noting that legislative silence is "a weak reed upon which to lean" (internal quotation marks omitted)). Legislative silence is consistent with any number of judicial interpretations, no matter how erroneous. Further, the use of legislative silence as a method of statutory interpretation in this case is inappropriate. When the text of a statute is clear and unambiguous, as here, this Court gives effect to the text and refrains from further statutory interpretation. *See, e.g.*, *State v. Rivera*, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939.

{79} Even if it were sound to interpret Section 52-1-6(A) by drawing conclusions from the Legislature's silence following *Cueto*, this is not a case where silence speaks volumes. In *Cueto*, the Court of Appeals *enforced* Section 52-1-6(A)'s exclusion, denying that a farmworker had a cause of action for workers' compensation. *Cueto*, 1980-NMCA-036, ¶ 9. The Court of Appeals also summarily *rejected* the claim that the exclusion violated equal protection. *Cueto*, 1980-NMCA-036, ¶ 8 (citing *Espanola Hous. Auth. v. Atencio*, 1977-NMSC-074, 90 N.M. 787, 568 P.2d 1233). Given that the Court of Appeals not only properly rejected a workers' compensation claim but also upheld the statute from an equal protection challenge, it is uncertain why the Legislature would have felt pressed to clarify its already unambiguous exclusion for *employers* of farm and ranch laborers.

B. The majority opinion relies on inapposite if not questionable case law to conclude that the Legislature acted arbitrarily

{80} Based on its interpretation of Section 52-1-6(A), the majority opinion concludes that the Legislature cannot allow farms and ranches to exclude farm and ranch laborers from workers' compensation coverage while at the same time requiring farms and ranches to provide coverage for those employees who are not farm and ranch laborers (such as administrative staff). Maj. Op. ¶¶ 31–35. The majority opinion reasons that such an instance of line drawing, which it incorrectly imputes to the Legislature, would *arbitrarily* further the permissible legislative goal of containing costs for New Mexico farms and ranches. Maj. Op. ¶¶ 32–35. And the majority opinion reaons that such arbitrariness in serving the goal of cost containment renders Section 52-1-6(A) unconstitutional. Maj. Op. ¶¶ 32–35.

{81} Assuming *arguendo* that Section 52-1-6(A) means what the majority opinion reads it to mean and that the Legislature allocated a choice to farms and ranches *only* with respect to their laborers, the statute is still not unconstitutional. This Court has already deferred to similar instances of legislative line-drawing with respect to the farm-and-ranch exclusion. In *Williams*, which rejected the workers' compensation claim of a non-ranch laborer injured while performing non-ranch work for a rancher, this Court recognized that it was bound to defer to the Legislature's policy, even as we perceived that the line drawing was harsh. 1953-NMSC-050, ¶ 7.

{82} What legal basis does the majority opinion have for taking the opposite approach? The majority opinion cites a single New Mexico case to support its view that the Legislature could not draw the line which the majority imputes to it: *Schirmer v. Homestake Mining Co. See* Maj. Op. ¶ 33 (citing *Schirmer*, 1994-NMSC-095, ¶¶ 9–10). *Schirmer* held that a ten-year statute of repose that extinguished employees' claims for injuries resulting from occupational exposure to radioactive materials violated equal protection because the statute was arbitrarily related to

"the valid legislative goal of lowering employer costs." 1994-NMSC-095, ¶ 9. Some injuries caused by the occupational exposure to radiation, the *Schirmer* Court reasoned, were equally deserving of recovery even though they develop and accrue after the ten-year repose date. *Id.* Because of *Schirmer*, the majority opinion concludes that the Legislature, to lower costs to farms and ranches, could not allow farms and ranches to exclude the claims of only farm and ranch laborers. Maj. Op. ¶ 33.

{83} But *Schirmer* was almost certainly incorrect when decided. *See Coleman v. United Eng'rs & Constructors, Inc.*, 1994-NMSC-074, ¶ 10, 118 N.M. 47, 878 P.2d 996 (upholding a 10-year statute of repose from an equal-protection challenge); *Terry*, 1982-NMSC-047, ¶ 8 (same). Even if *Schirmer* were not incorrectly decided, the persuasiveness of its holding is wholly eroded by *Garcia*, 1995-NMSC-019, ¶¶ 17–18 (upholding the Medical Malpractice Act's *three-year* statute of repose from an equal protection challenge).

{84} In any event, *Schirmer* is distinguishable. Even if the Legislature drew a line between farm and ranch laborers who may be excluded from mandatory workers' compensation and other agribusiness employees for whom coverage is required, that distinction would not be arbitrary in the same way that the 10-year repose statute in *Schirmer* is arbitrary. Section 52-1-6(A), unlike any statute of repose, does not itself necessarily bar some set of claims. In fact, Section 52-1-6(A) does not necessarily bar any claim. Rather, the statute allows, and has always allowed, each farm and ranch in New Mexico to decide for itself whether to provide workers' compensation coverage for its employees who are farm and ranch laborers.

{85} Further, the distinction that the majority opinion imputes to the Legislature is not arbitrarily related to the permissible legislative goal of containing costs for farms and ranches. Unlike the largest firms in agribusiness, not every farm or ranch in New Mexico employs a variety of workers. Many smaller farms and ranches in our State may only employ workers who could only be classified as "farm or ranch laborers." To contain costs for those smaller operations, the Legislature may permissibly allow each farm and ranch to choose whether to participate in the workers' compensation scheme. Again, because of the great diversity of farms and ranches operating in New Mexico's agricultural industry, and because each is best positioned to know its cost structure and its tolerance for the risk of tort liability, the Legislature's putative allocation of the choice to each farm and ranch to provide workers' compensation coverage only for its farm and ranch laborers would advance its goal to aid New Mexico farms and ranches in a rational and efficient way. I repeat: 29% of New Mexico's farms and ranches have elected to be subject to the WCA; 71% have not. As this Court heard at oral argument, the majority of the 29% of farms that have elected to be subject to the WCA are large operations. The Legislature's decision to allocate a choice to farms to be subject to the WCA reflects "substantial and real distinction[s]" between the farms and ranches who choose to provide workers' compensation coverage and those that do not. *Schirmer*, 1994-NMSC-095, ¶ 9. Those real and substantial distinctions track whether the farm is relatively large or small.

{86} Therefore, *Schirmer*, even if it were not bad law, is so distinguishable as to provide no support for the majority opinion's conclusion. The majority opinion treats Section 52-1-6(A) as though it furthered cost savings for farms and ranches by, for example, necessarily excluding workers' compensation claims of left-handed farm and ranch laborers. But the legislation under review is nothing like that. The arbitrariness that the majority opinion perceives is simply not present either in the interpretation that the majority opinion imputes to the Legislature or in the statutory scheme that the Legislature actually enacted.

C. The majority opinion's application of a more stringent version of rational basis review confuses equal protection doctrine

{87} Lastly, I disagree with the majority opinion's application of the so-called "modern articulation" of the rational basis test that this Court first referenced in *Trujillo v. City of Albuquerque*. *See* 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (overruling, yet "subsuming" a heightened, less deferential form of rational basis analysis applied in *Alvarez v. Chavez*, 1994-NMCA-133, ¶¶ 16-23, 118 N.M. 732, 886 P.2d 461, and *Corn v. N.M. Educators Fed. Credit Union*, 1994-NMCA-161, ¶¶ 9–14, 119 N.M. 199, 889 P.2d 234). In *Wagner*, this Court explained that under the heightened form of rational basis review the party challenging a statute must show that it is not rationally related to a legitimate governmental purpose by "demonstrat[ing] that the classification created by the legislation is not supported by a 'firm legal rationale' or evidence in the record.'" 2005-NMSC-016, ¶ 24 (quoting *Corn*, 1994-NMCA-161, ¶ 14). *Wagner* did not apply the heightened standard to invalidate legislation; instead, *Wagner* upheld the WCA's attorney fee limitation from an equal protection challenge. 2005-NMSC-016, ¶ 32. Nevertheless, *Wagner*'s dicta regarding the emergence of a heightened form of rational basis review prompted a member of this Court to write separately. *See* 2005-NMSC-016, ¶¶ 37–40 (Bosson, C.J., concurring in part and dissenting in part). Justice Bosson noted that the *Wagner* majority failed to explain this "modern articulation" and, moreover, that the *Wagner* majority's departure from traditional rational basis review was neither desirable nor appropriate. *Id.*

{88} After *Wagner*, the "modern articulation" of rational basis review was buried for some years. Since that decision, this Court has employed rational basis review without reference to this heightened standard both in analyzing federal *and* state constitutional claims. *See Kane*, 2015-NMSC-027, ¶¶ 17–22 (analyzing a First Amendment challenge and concluding that the City of Albuquerque's regulations prohibiting city employees from holding elective office "are rationally related to legitimate government purposes"); *State v. Tafoya*, 2010-NMSC-019, ¶ 26, 148 N.M. 391, 237 P.3d 693 (analyzing state and federal equal protection challenges and holding that a sentencing court's discretion to award good time credit eligibility "is rationally related to the goals of punishment as well as rehabilitation"). This Court even explained New Mexico's equal protection doctrine in detail and described rational basis review in its traditional form without so much as mentioning the so-called "modern articulation." *See Oliver*, 2014-NMSC-003, ¶ 39. Also, in *Morris v. Brandenburg*, 2016-NMSC-___, ¶ 56, __ P.3d ___, this Court determined that NMSA 1978, Section 30-2-4, which makes it a crime to deliberately aid another in the taking of his or her own life, satisfied rational basis review because the statute rationally served legitimate state interests that this Court deemed to be "firm legal rationale[s];" however, the *Morris* Court merely repeated this talisman, again without explaining when a statute is, in fact, supported by a "firm legal rationale" (as opposed to any conceivable basis). And, now, for the first time, the majority opinion exercises the "modern articulation" to invalidate longstanding legislation.

{89} As best as I can discern, the difference between the traditional and the "modern" versions of rational basis review lies in what is required to demonstrate that a legislative classification is rationally related to a legitimate governmental purpose. *See Corn*, 1994-NMCA-161, ¶ 14. Under traditional rational basis review, for a statute to serve a legitimate government purpose, the proponent of constitutionality "need only establish the *existence* of a *conceivable* rational basis" for the statute. *Kane*, 2015-NMSC-027, ¶ 17 (second emphasis added) (internal quotation marks and citation omitted); *see also State v. Cawley*, 1990-NMSC-088, ¶ 9, 110 N.M. 705, 799 P.2d 574 ("The party objecting to the legislative classification has the burden to demonstrate that the classification bears no rational relationship to a conceivable legislative purpose."); *accord Heller v. Doe*, 509 U.S. 312, 320 (1993) ("[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (internal quotation marks and citations omitted)); *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) ("This sort of statutory

distinction does not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it." (internal quotation marks and citation omitted)). Accordingly, "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Heller*, 509 U.S. at 320 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1970)); *see also Wagner*, 2005-NMSC-016, ¶ 39 (Bosson, C.J., concurring in part and dissenting in part).

{90} By contrast, the majority opinion states that a statutory classification must be supported either by a "firm legal rationale" or "evidence in the record." Maj. Op. ¶ 28. The majority opinion reasons that this standard separates New Mexico's form of rational basis review for state equal protection claims from rational basis review for federal constitutional claims. *See* Maj. Op. ¶¶ 25–27. But it is not clear why the equal protection guarantee of the New Mexico Constitution should grant this Court more discretion to invalidate socioeconomic legislation than the federal constitutional analogue. Under New Mexico's interstitial approach to determining state constitutional claims that have federal analogues (such as equal protection), this Court departs from the federal constitutional analysis *only* if the federal analysis is flawed or undeveloped or if there are characteristics distinctive to New Mexico that warrant a different constitutional analysis. *State v. Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 1777, 932 P.2d 1. There is nothing distinctive or structurally different about New Mexico such that our judiciary should have a greater power to invalidate socioeconomic legislation. And I do not agree with the implicit premise that the traditional form of rational basis review used by every federal and state court—including this Court when considering federal constitutional challenges—is flawed. *See, e.g.*, *Kane*, 2015-NMSC-027, ¶¶ 17–22 (applying traditional rational basis review). The majority opinion's analysis overlooks that when a court, in employing traditional rational basis review, perceives that governmental regulation harbors an *animus* toward a particular group, rational basis review suddenly has a "bite." Thus, rational basis review is a constitutionally discerning form of scrutiny, and not a flawed "rubber stamp." Therefore, our interstitial approach does not permit the majority opinion's departure from traditional rational basis review in this case.

{91} There are additional problems with the majority opinion's use of the "modern articulation" of rational basis review. To repeat Justice Bosson's observation in *Wagner*, the majority opinion does not explain what differentiates a "firm legal rationale" from any conceivable basis in the traditional form of rational basis review, as the bench and bar know it. The majority opinion even seemingly retreats from its own "evidence in the record" condition, as the majority opinion allows a justification for a statutory classification to be supported by outside-of-the-record, legislative facts of which a court can take judicial notice. *See* Maj. Op. ¶ 28. So, we are left with "firm legal rationale" as the only condition in the heightened standard that separates the "modern articulation" of rational basis review from its traditional counterpart. And there is simply no indication of what would constitute a "firm legal rationale" or how a "firm legal rationale" differs from any conceivable basis justifying a legislative choice. By requiring a "firm legal rationale," the majority opinion overlooks that when the Legislature enacts socioeconomic legislation, the classifications and distinctions it creates may simply be the result of compromise and "are often impossible of explanation in strictly legal terms." *Romero*, 319 F. Supp. at 1203. Accordingly, under traditional rational basis review, any conceivable basis justifying a legislative classification simply *is* a firm legal rationale to uphold a statute against an equal protection challenge. *See, e.g.*, *Heller*, 509 U.S. at 320; *Beach Commc'ns*, 508 U.S. at 313.

{92} Further, the majority opinion's explanation of the "evidence in the record" condition is in tension with its requirement for a "firm legal rationale." By permitting a court to consider *sua sponte* legislative facts outside of the record, the so-called heightened standard suggests that a court may, in fact, attempt to conceive of any permissible legislative purpose that the statute under review rationally serves. Hence, there is

nothing to the "modern articulation" that should separate it from traditional rational basis review, and because Section 52-1-6(A) conceivably serves the legislative purpose of cost containment, it survives rational basis review.

{93} Instead of explaining the "modern articulation," the majority opinion simply uses the words "firm legal rationale" as a license to determine that Section 52-1-6(A) is unconstitutional because it is "underinclusive" with respect to its putative purpose. Maj. Op. ¶¶ 29–35. According to the majority opinion, because Section 52-1-6(A) allows for the exclusion of farm and ranch laborers (but not other farm and ranch employees) from workers' compensation coverage, it is underinclusive with respect to the permissible legislative purpose of cost containment. *See* Maj. Op. ¶¶ 32–35. The majority opinion implies that if the Legislature *really* had wanted to control costs for New Mexico's farms and ranches, it would have allowed farms and ranches to exclude *all* of their employees, not just their farm and ranch laborers. *See id.* The irony, of course, is that this is exactly what the Legislature did. But, again assuming the majority opinion's statutory interpretation *arguendo*, such underinclusiveness does not call into question the constitutionality of the statute.

{94} It is the longstanding law of rational basis scrutiny—both in the federal and state constitutional context—that a legislative body, when enacting socioeconomic legislation, can solve a problem piecemeal and that such underinclusiveness with respect to that purpose poses no constitutional flaw.[6] By contrast, when applying intermediate scrutiny and strict scrutiny, courts check to determine if a statutory classification is narrowly tailored to a legislative purpose—i.e., whether the statutory classification is under- or overinclusive with respect to its putative purpose. *See, e.g.*, *In re Vincent*, 2007-NMSC-056, ¶ 15, 143 N.M. 56, 172 P.3d 605 ("[F]or a challenged provision to be narrowly tailored to serve a compelling state interest under a strict scrutiny analysis, it must not be under-inclusive.").

{95} To be sure, a tailoring analysis can be useful to discern whether the Legislature created a discriminatory classification with animus toward a particular, discrete group and disguised that animus with a socioeconomic rationale. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[The] sheer breadth [of Colorado's Amendment 2 prohibiting governmental action designed to protect gay and lesbian persons from discrimination] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449–50 (1985) (holding that a city's requirement of a special use permit for the operation of a home for the mentally

[6] *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466 (1981) (rejecting an equal protection challenge because "a legislature need not 'strike at all evils at the same time or in the same way'" (quoting *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935)); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (rejecting an equal protection challenge because "[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required'" (internal citation omitted)); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Legislatures may implement their program step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." (internal citations omitted)); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) ("This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it." (internal citations omitted)); *Williamson v. Lee Optical of Okl.*, 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (internal citations omitted)); *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."); *see also, e.g.*, *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 32, as corrected (Mar. 4, 2016) ("A *mere* overinclusiveness or underinclusiveness in statutory classification will not necessarily show a failure to satisfy a rational-basis review."); *Lonaconing Trap Club, Inc. v. Md. Dep't of Env't*, 978 A.2d 702, 713 (Md. 2009) ("Underinclusiveness does not create an equal protection violation under the rational basis test.").

disabled was under-inclusive with respect to the city's putative purposes and, therefore, rested "on an irrational prejudice against the mentally [disabled]"). If a statutory classification is highly under- or overinclusive with respect to an ostensible legislative goal, then there exists good reason to believe that the legislative body had an ulterior, impermissible motive. *See, e.g.*, *Romer*, 517 U.S. at 632; *City of Cleburne*, 473 U.S. at 449–50. Because rational basis review demands and searches for a permissible governmental purpose, it is not a rubber stamp for state action. But apart from determining a statute's legislative purpose (and thus whether that purpose is permissible), an inspection for underinclusiveness has no place in rational basis review. Otherwise, our doctrinal categories provide no guarantee of the separation of powers, and a court may apply a more stringent standard of review simply because it disagrees with the policy of the statute under review. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (finding that if the degree of judicial scrutiny of legislation fluctuated depending solely on a court's preference for a statute's purpose and effect, then the court would assume "a legislative role" for which it lacks "both authority and competence").

{96} The majority opinion's inspection for underinclusiveness does not even justify its holding. Here, the majority opinion's tailoring analysis simply does not result in a conclusion that the Legislature, since 1917, has acted with *animus* toward farm and ranch laborers. A statutory scheme that permits 29% of farms and ranches—most of which are large firms, likely employing hundreds of farm and ranch laborers—to voluntarily provide workers' compensation coverage to their employees is not a statute that harbors an ulterior motive to discriminate against farm and ranch workers. Neither the statutory scheme nor the record indicates that for 99 years the Legislature has acted with an impermissible, discriminatory *animus* against farmworkers. Rather, the Legislature has rationally acted to contain costs for New Mexico's economically precarious farms and ranches so that they may continue to operate.

III. CONCLUSION

{97} The law of statutory interpretation and the law governing judicial review of legislation safeguard the separation of powers. This Court may not contort these areas of law to nullify validly-enacted legislation simply because we happen to believe that a statute is unfair or that its unfairness outweighs any other consideration that bears on the Legislature's decision. While I understand the unfairness that may be perceived in the treatment of laborers who work for farms and ranches electing exemption from the WCA, I also understand the burden that may fall upon small New Mexico farms and ranches in having to incur regulatory costs more easily borne by their large competitors in the agricultural industry. The Legislature enacted a statutory scheme that encompasses both employer and employee concerns and is eminently constitutional. I respectfully dissent.

JUDITH K. NAKAMURA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2017-NMSC-002

Filing Date: September 26, 2016

Docket No. S-1-SC-35035

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

JENNIFER STEPHENSON,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Michael E. Vigil, District Judge

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OPINION

CHÁVEZ, Justice.

{1} Defendant Jennifer Stephenson placed her two-year-old son Isaiah in his room at bedtime and locked the door for the night. Isaiah's father heard Isaiah whimpering the next morning and found him with his legs pinned between a dresser and a crossbar on Isaiah's bed. Isaiah developed a painful condition described as compartment syndrome, which required an aggressive surgery to correct. A jury convicted Defendant of one count of abandonment of a child resulting in great bodily harm, a second-degree felony, contrary to NMSA 1978, Section 30-6-1(B) (2009), after being unable to find that Defendant committed child abuse by failing to act for Isaiah's welfare and safety, contrary to Section 30-6-1(D). The Court of Appeals reversed Defendant's conviction, holding that her conduct did not fall within the meaning of "leaving or abandoning" because she did not leave Isaiah with the intent not to return. *State v. Stephenson*, 2015-NMCA-038, ¶¶ 23, 25, 346 P.3d 409. We granted the State's petition for writ of certiorari to determine whether the Court of Appeals' definition of "leaving or abandoning" was correct and whether the evidence was sufficient as a matter of law to support the conviction. 2015-NMCERT-001.

{2} We conclude that the Legislature intended the crime of abandonment of a child under Section 30-6-1(B) to include the situations (1) where a parent intentionally leaves a child with the intent not to return, whereby the child may or does suffer neglect, which would constitute "abandoning"; and (2) where a parent or other caregiver intentionally departs from a child, leaving the child under circumstances whereby the child may or does suffer neglect, which would constitute "leaving." Thus, we interpret Section 30-6-1(B) differently than the Court of Appeals. The dissent offers a third interpretation of Section 30-6-1(B)—as causing a child to remain in some specified condition—which we interpret to be consistent only with the crime of permitting child abuse by failing to act for the child's safety, a crime that the jury rejected. Perhaps the most important lesson from this case is that the Legislature must clarify its intent with respect to the crime of child abandonment. Nevertheless, we agree with the Court of Appeals that Defendant could not be found guilty of abandoning Isaiah because there is no evidence that Defendant intentionally left Isaiah with the intent not to return. We also conclude that there was not sufficient evidence to support the finding that Defendant intentionally departed from

Isaiah, leaving him under circumstances where Isaiah might have or did suffer neglect—where his well-being was at risk of harm. We therefore reverse Defendant's conviction and remand for an entry of a judgment of acquittal.

BACKGROUND

{3} Anthony Apodaca, Isaiah's father, worked the late night shift until 1:30 a.m. the morning of January 28, 2010. Anthony arrived at Defendant's apartment at approximately 2:00 a.m., and because the door was locked, he knocked to awaken Defendant to let him into the apartment. Anthony was hungry, so he asked Defendant to go to McDonald's to get him some food. Meanwhile Anthony went into his daughter Neveah's room and found her awake on the floor outside her crib, so he picked her up to feed her a bottle of milk. He did not check on Isaiah, his son, because he assumed that Isaiah was asleep and Anthony did not want to disturb him. Isaiah had been locked in his room for the night.

{4} After Defendant returned with food from McDonald's, Anthony shared his food with Neveah before putting her back to sleep in her crib. Anthony asked Defendant to check on Isaiah. Defendant told Anthony that Isaiah was fine, but it is not clear whether she actually checked on him, although in her statement to the police, Defendant said that Isaiah was asleep when she checked on him at 2:30 a.m. Anthony did not check on Isaiah that night. Both parents went to sleep and did not leave the apartment after Defendant returned from McDonald's. There is no evidence that the parents heard Isaiah crying or screaming when they went to bed or in the middle of the night. Anthony testified that he woke up in the middle of the night and did not hear Isaiah crying or screaming.

{5} Anthony woke up the next morning around 7:00 a.m. and heard Isaiah whimpering, so he unlocked Isaiah's bedroom door and saw Isaiah pinned between a dresser and a crossbar from his toddler bed. Anthony could tell that Isaiah's legs were swollen and reddish purple and that he was in pain. Defendant took Isaiah to the hospital after picking up her father, Calvin Stephenson, on the way to the hospital. Calvin testified that Isaiah whimpered but did not cry on the way to the hospital.

{6} Dr. Meher Best was the first doctor to see Isaiah at the hospital and he could immediately tell that Isaiah was in pain. Isaiah's lower extremities were unusually hard with strange marks and lesions that later proved to be pressure lesions from being pinned for a prolonged time. Isaiah did not have bruises or broken bones which Dr. Best would have expected to see if a toddler suffered a crush injury from a dresser. By the time Isaiah was in the emergency room, he was "inconsolable."

{7} Isaiah was diagnosed with compartment syndrome of both legs as a result of being pinned between the dresser and the crossbar on his toddler bed. There is no evidence as to how the dresser actually fell on Isaiah, although Anthony testified that Isaiah liked to climb on furniture.

{8} Compartment syndrome usually results from a crush injury that can be limb- or even life-threatening. Several medical doctors testified that compartment syndrome takes hours to develop. The orthopedic surgeon who treated Isaiah testified that he thought Isaiah would have had to have been trapped for at least "eight to twelve hours and, more likely, twenty-four hours." The pediatric intensive care doctor testified that she thought Isaiah would have been trapped for "a minimum of six to twelve hours." The doctors agreed that it was extremely rare to see compartment syndrome in a child.

{9} Isaiah underwent a fasciotomy, which is a surgery performed by slicing open the legs, removing the dead muscle tissue, and leaving the swollen muscles exposed outside of the skin until the muscles recede back into their respective compartments. Once the muscles recede, skin grafts are required to replace the skin that was removed during the fasciotomy. Isaiah needed a walker to help him walk for some time and his lower legs will be disfigured for the rest of his life.

{10} Dr. Best reported Defendant to the authorities for potential child abuse because although Defendant was polite, Dr. Best thought Defendant's reaction to her child being in such serious condition was too casual. Defendant was indicted for negligently causing, or in the alternative, negligently permitting Isaiah to be placed in a situation which endangered his life or health, when Defendant knew or should have known of the danger involved and acted with reckless disregard for Isaiah's safety, in violation of Section 30-6-1(D).

{11} At trial the State abandoned the count for negligently *causing* child abuse and pursued the count for negligently *permitting* child abuse. The district court instructed the jury that if it had a reasonable doubt as to whether Defendant committed the crime of negligently permitting child abuse resulting in great bodily harm, then the jury should consider the crime of abandonment resulting in great bodily harm. The jury returned a verdict finding Defendant guilty of abandonment.

DISCUSSION

{12} The question we must address is whether the evidence was sufficient to convict Defendant of abandonment resulting in great bodily harm. The answer to this question depends on the scope intended by the Legislature for the crime of abandonment. *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M. 111, 908 P.2d 1379 ("The main goal of statutory construction is to give effect to the intent of the legislature."). "Questions of statutory interpretation are reviewed de novo. . . ." *State v. Tafoya*, 2012-NMSC-030, ¶ 11, 285 P.3d 604. A criminal statute must be strictly construed and "may not be applied beyond its intended scope [for] it is a fundamental rule of constitutional law that crimes must be defined with appropriate definiteness." *State v. Chavez*, 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891 (internal quotation marks and citation omitted). Therefore, we will not read a criminal statute to apply to particular conduct "unless the legislative proscription is plain." *State v. Bybee*, 1989-NMCA-071, ¶ 12, 109 N.M. 44, 781 P.2d 316 (citing *United States v. Scharton*, 285 U.S. 518 (1932)). "We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous." *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939.

{13} Section 30-6-1(B) defines "abandonment" as a "parent, guardian or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect." Neglect means that a child is without proper parental care and control necessary for the child's well-being, including the child's health, education, or subsistence. Section 30-6-1(A)(2). The statute does not define "leaving or abandoning." *See* § 30-6-1. Thus, to determine whether Defendant's conviction was supported by sufficient evidence, we must first examine the scope of Section 30-6-1(B), and in particular, must for the first time ascertain the definitions of "leaving" and "abandoning" as they are used in Section 30-6-1(B).

{14} The Court of Appeals referred to *Black's Law Dictionary* for the definitions of "leave" and "abandonment" because what constitutes leaving or abandoning under Section 30-6-1 is a matter of first impression in New Mexico. *Stephenson*, 2015-NMCA-038, ¶ 15. *Black's Law Dictionary* (9th ed. 2009) defines "leave" as "[t]o depart; voluntarily go away" or "[t]o depart willfully with *the intent not to return*," *id.* at 973 (emphasis added), and "abandonment" as "[t]he relinquishing of a right or interest with *the intention of never reclaiming it*," or "[t]he act of leaving a spouse or child willfully and *without an intent to return*," *id.* at 2 (emphasis added). *See Stephenson*, 2015-NMCA-038, ¶ 15. The Court of Appeals also compared the dictionary definitions of "abandonment" with definitions provided by legal encyclopedias and concluded that all definitions of "abandonment" require deserting the child with the intent to never return. *See Stephenson*, 2015-NMCA-038, ¶ 16. The Court of Appeals did not discuss the definition of "leaving" at length, nor did it address the disjunctive nature of "leaving or abandoning" in Section 30-6-1(B). *See Stephenson*, 2015-NMCA-038, ¶¶ 15-16. We conclude that a principled distinction

exists between "leaving" and "abandoning," and therefore, to avoid rendering either word superfluous, each word must be construed consistent with the Legislature's intent, which was to create independent theories of criminal culpability for both "leaving" and "abandoning."

The Legislature intended "leaving" in Section 30-6-1(B) to create an independent theory of criminal culpability distinct from "abandoning".

{15} We must interpret criminal statutes consistent with the purpose of the legislation and the evils sought to be addressed by giving legislative language a reasonable and common-sense construction. *State v. Morales*, 2010-NMSC-026, ¶ 13, 148 N.M. 305, 236 P.3d 24. The purpose of Section 30-6-1 is to protect children from harm. *See State v. Lujan*, 1985-NMCA-111, ¶ 16, 103 N.M. 667, 712 P.2d 13.

{16} To ascertain the common-sense meaning of the terms "leave" and "abandon" in Section 30-6-1, we turn to the dictionary for guidance. *See State v. Segotta*, 1983-NMSC-092, ¶ 8, 100 N.M. 498, 672 P.2d 1129 ("We, as other courts, often make reference to dictionaries and to the case law to determine the probable legislative intent in using a particular word." (internal quotation marks and citation omitted)). The definitions of "leave" that are consistent with the intent of the legislation are "to take leave of or withdraw oneself from *whether temporarily or permanently*: go away or depart from" and "to cause to be or remain in some specified condition." *Webster's Third New International Dictionary of the English Language Unabridged* 1287 (1971) (emphasis added). The definition of "abandon" that is consistent with the intent of the legislation is "to forsake or desert [especially] in spite of an allegiance, duty, or responsibility: withdraw one's protection, support, or help from." *Webster's Third New International Dictionary of the English Language Unabridged* 2 (1971). A juror relying on the ordinary meaning of the word "abandon" could reasonably conclude that for a parent to abandon a child, he or she must have left the child with the intent of never returning. The State argues that adding an intent never to return even to the word "abandon" does not make sense because the statute also applies to someone who is temporarily responsible for the care and protection of the child. We agree that if the purpose of the statute is the protection of children, *Lujan*, 1985-NMCA-111, ¶ 16, it should not matter whether the defendant was permanently or temporarily responsible for the custody and control of the child. However, the Legislature addressed this concern by eliminating any ambiguity with respect to the purpose of its legislation and the evil it sought to address—exposing the well-being of a child to harm—by making it a crime for a person who has custody and control of the child to either temporarily or permanently leave the child without the control and protection necessary to prevent harm to the child. Section 30-6-1(B) criminalizes either intentionally "*leaving*"—even temporarily—or intentionally "*abandoning*" a child, but only under circumstances where doing so exposes the child to a risk of harm, whether to the child's health, education, or subsistence. *See id.* (emphasis added). We hold that a parent, guardian, or custodian who simply departs from the child does not violate the statute unless at the time the parent, guardian, or custodian departs from the child, the circumstances are such that the child's well-being is at risk of harm.

The evidence was not sufficient to find Defendant guilty of leaving or abandoning her child

{17} The Court of Appeals concluded that the evidence did not support the guilty verdict of abandonment because although Defendant locked Isaiah in his bedroom, she remained in the apartment, and therefore the State did not prove that Defendant left Isaiah without an intent to return. *Stephenson*, 2015-NMCA-038, ¶ 23. We have already held that the State does not have to prove that Defendant left Isaiah with the intent not to return. The question is whether there was sufficient evidence for a reasonable juror to find that Defendant intentionally left Isaiah at a time and under circumstances when Isaiah's well-being was at risk of harm. We must view the evidence in the light most favorable to the verdict, indulging all permissible inferences in favor of the

verdict and disregarding all evidence and inferences opposed to the verdict. *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. We will not "weigh the evidence or substitute [our] judgment for that of the fact finder as long as there is sufficient evidence to support the verdict." *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

{18} We preface our discussion of the sufficiency of the evidence by revisiting the relevant procedural history of this case. Defendant was indicted for negligently causing, or in the alternative, negligently permitting Isaiah to be placed in a situation which endangered his life or health, when Defendant knew or should have known of the danger involved and acted with reckless disregard for Isaiah's safety, both in violation of Section 30-6-1(D). Causing and permitting child abuse are two distinct legal concepts. *State v. Leal*, 1986-NMCA-075, ¶ 14, 104 N.M. 506, 723 P.2d 977. "'[P]ermit' refers to the proscribed act, the passive act of allowing the abuse to occur." *Id.* ¶ 19. "[*C*]*ausing* child abuse is synonymous with inflicting the abuse." *State v. Nichols*, 2016-NMSC-001, ¶ 33, 363 P.3d 1187. When the endangerment is allegedly based on medical neglect, the appropriate theory is *causing* the child's life or health to be endangered by medical neglect. *Id.* ¶ 35.

{19} During trial the State abandoned the count for negligently *causing* child abuse and pursued the count for negligently *permitting* child abuse. The district court also instructed the jury on abandonment. The district court gave this instruction, despite the fact that neither party believed that abandonment is a true lesser-included offense of permitting child abuse. The district court considered the instruction because Defendant argued that pursuant to *State v. Darkis*, she was entitled to a step-down instruction on the lesser offense of abandonment because the evidence and the State's theory fit that crime. *See* 2000-NMCA-085, ¶¶ 14–20, 129 N.M. 547, 10 P.3d 871 (recognizing that *State v. Meadors*, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731 provides the test for determining when a court should grant the State's request for an instruction on a lesser-included offense, and concluding that "a defendant's right to a lesser-included offense instruction is effectively greater than the State's"). The district court agreed with Defendant and granted her request to give the jury a step-down instruction from permitting child abuse to child abandonment. Because neither party challenges the district court's ruling that Defendant was entitled to the abandonment instruction, we do not decide that issue here.

{20} The district court instructed the jury that to find Defendant guilty of negligently permitting child abuse resulting in great bodily harm, the State had to prove beyond a reasonable doubt that:

1. The Defendant permitted Isaiah Apodaca to be placed in a situation which endangered the life or health of Isaiah Apodaca;
2. The Defendant acted with reckless disregard. To find that the Defendant acted with reckless disregard, you must find that the Defendant knew or should have known that her failure to act created a substantial and foreseeable risk, that she disregarded that risk and that she was wholly indifferent to the consequences of her failure to act, and to the welfare and safety of Isaiah Apodaca;
3. The Defendant was a parent, guardian or custodian of the child, or the Defendant had accepted responsibility for the child's welfare;
4. The Defendant's failure to act resulted in great bodily harm to Isaiah Apodaca;
5. Isaiah Apodaca was under the age of 18; and
6. This happened in New Mexico on or between the 27th day of January 2010 and the 28th day of January 2010.

{21} The State's ultimate theory of the case was that although the dresser falling on Isaiah was an accident, Defendant's failure to respond to the cries and screams the doctors would have expected from Isaiah is what permitted Isaiah

to be placed in a situation that endangered his life or health. According to the State, Defendant's failure to act was with reckless disregard because she knew or should have known that her failure to act created a substantial and foreseeable risk to Isaiah. We note that this instruction tracked UJI 14-603 NMRA (2010, withdrawn effective April 3, 2015). In *State v. Consaul* we recently called into question the legal accuracy of the uniform jury instructions for crimes under Section 30-6-1, *see* 2014-NMSC-030, ¶ 35, 332 P.3d 850, and the instruction has since been modified by UJI 14-615 NMRA. However, we need not address this concern because the jury did not find Defendant guilty under the State's theory that she negligently permitted child abuse.

{22} The district court instructed the jury that if it had a reasonable doubt as to whether Defendant committed the crime of negligently permitting child abuse resulting in great bodily harm, then the jury should consider the crime of abandonment resulting in great bodily harm. We presume that the jury followed this instruction, *see Britton v. Bouldon*, 1975-NMSC-029, ¶ 6, 87 N.M. 474, 535 P.2d 1325, and because the jury proceeded to find Defendant guilty of abandonment, the jury had a reasonable doubt as to whether Defendant negligently permitted child abuse.[1]

{23} The district court instructed the jury that to find Defendant guilty of abandonment of a child resulting in great bodily harm, the State had to prove beyond a reasonable doubt that:

1. Jennifer Stephenson was a parent of Isaiah Apodaca;
2. Jennifer Stephenson intentionally *left or abandoned* Isaiah Apodaca;
3. As a result of Jennifer Stephenson's *leaving or abandoning* Isaiah Apodaca, Isaiah Apodaca was without proper parental care and control necessary for Isaiah Apodaca's well-being;
4. Jennifer Stephenson had the ability to provide proper parental care and control necessary for Isaiah Apodaca's well-being;
5. Jennifer Stephenson's failure to provide proper parental car[e] and control necessary for Isaiah Apodaca's well-being resulted in great bodily harm to Isaiah Apodaca;
6. Isaiah Apodaca was under the age of 18;
7. This happened in New Mexico on or between the 27th and 28th days of January 2010.

(Emphasis added.)

{24} The State contends that the "most reasonable inference from the evidence is that Defendant left the apartment, leaving Isaiah alone, for the first part of the evening and night, including the time period when the dresser fell on Isaiah's legs." The State asserts that Defendant did not testify, and therefore her whereabouts are not accounted for until Anthony arrived at 2:00 a.m. The State further explains that the reasonable inference that Defendant left Isaiah alone in the apartment is supported by the testimony of multiple doctors who would have expected Isaiah to scream, and therefore Isaiah must have screamed, only quieting through exhaustion and despair once he realized that his screams were futile. Because Defendant did not hear screams, the State argues that the reasonable inference is that she was not in the apartment. The State also contends that even if Defendant did not leave the apartment, she still left Isaiah unattended while he was screaming.

{25} Defendant cites *State v. Vigil*, 1975-NMSC-013, ¶ 12, 87 N.M. 345, 533 P.2d 578 for the proposition that mere speculation cannot support a guilty verdict, and contends that it is pure speculation that she left Isaiah alone in the apartment. Defendant also notes that the jury was instructed not to draw any inferences from the fact

[1] If child abandonment is a lesser-included offense of negligently permitting child abuse, an issue we do not decide, the jury's verdict is an implicit acquittal of negligently permitting child abuse. *See State v. Medina*, 1975-NMCA-033, ¶ 8, 87 N.M. 394, 534 P.2d 486 (citing *State v. Goodson*, 1950-NMSC-023, ¶ 9, 54 N.M. 184, 217 P.2d 262 (stating that it is well settled in New Mexico that a conviction of a lesser-included offense is an implicit acquittal of a greater offense)).

that she did not testify, and the jury is presumed to follow jury instructions. Defendant emphasizes that Anthony did not hear Isaiah scream, and argues that Isaiah likely did not scream during the night because compartment syndrome takes a considerable amount of time to become painful.

{26} We conclude that there was not sufficient evidence for a reasonable juror to find that at the time Defendant put Isaiah in his bedroom, intentionally departing from him, the circumstances were such that Isaiah's well-being was at risk of harm. The State's contention that the evidence supports a reasonable inference that Defendant left the apartment is not tied to the facts in the case, and is therefore speculative. "'[E]vidence from which a proposition can be derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition.'" *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (quoting *Baca v. Bueno Foods*, 1988-NMCA-112, ¶ 15, 108 N.M. 98, 766 P.2d 1332), *cert. granted*, 2014-NMCERT-008, *cert. quashed*, 2015-NMCERT-001. The evidence before the jury was that Defendant put Isaiah to bed for the night and locked his bedroom door. According to Anthony, he and Defendant exchanged numerous text messages throughout the night, and Defendant eventually invited him to spend the night with her once he got off work. In Defendant's statement to the police, she stated that she did not hear any screaming or crying from Isaiah that night. Anthony also testified that he did not hear any screaming or crying.

{27} Defendant departed from Isaiah the moment she put him in his room. There is no evidence that the dresser that had been in Isaiah's room for months was wobbly or unsteady, or that he had climbed on the dresser in the past. There is no evidence that Isaiah's well-being was in jeopardy if he was left alone in his room to go to sleep. During closing arguments, the State emphasized that Isaiah had to have been screaming and Defendant ignored him. However, this evidence is relevant only to the question of whether Defendant permitted Isaiah to be in a situation that endangered his health or life, which the jury determined she did not. It is not relevant to Defendant placing Isaiah in his room for the night.

{28} Our review of the sufficiency of the evidence takes into account "both the jury's fundamental role as factfinder" and our independent responsibility to ensure that a jury's conviction of a defendant is supported "by evidence in the record, rather than mere guess or conjecture." *State v. Flores*, 2010-NMSC-002, ¶ 2, 147 N.M. 542, 226 P.3d 641. In this case, we conclude that there was not sufficient evidence to support the conviction for child abandonment. Because the crime of leaving or abandoning a child is at a minimum a misdemeanor, and possibly a felony if the child suffers great bodily harm or death, and we have noted that by creating criminal liability under Section 30-6-1, "the Legislature did not intend to criminalize conduct creating 'a mere possibility, however remote, that harm may result' to a child," *State v. Graham*, 2005-NMSC-004, ¶ 9, 137 N.M. 197, 109 P.3d 285 (citation omitted), we cannot affirm Defendant's conviction. Indeed, to uphold Defendant's conviction could potentially criminalize parents' actions every single time they tuck their children into bed and harm befalls their children at night through some unfortunate accident, which we refuse to do.

CONCLUSION

{29} We affirm the result reached by the Court of Appeals and remand to the district court for entry of a judgment of acquittal.

{30} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

BARBARA J. VIGIL,
Justice

JUDITH K. NAKAMURA,
Justice, concurring in part and dissenting in part

PETRA JIMENEZ MAES, Justice, joining in special concurrence and dissent

NAKAMURA, JUSTICE (concurring in part and dissenting in part).

{31} An appellate court's review of whether sufficient evidence supports a jury's verdict is settled: We draw every reasonable inference in favor of the verdict and then evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt. *E.g.*, *State v. Cantrell*, 2008-NMSC-016, ¶ 26, 143 N.M. 606, 179 P.3d 1214. Under this standard of review, a rational jury could have found beyond a reasonable doubt that Stephenson violated NMSA 1978, Section 30-6-1(B) (2009) by intentionally leaving Isaiah under circumstances whereby Isaiah suffered neglect. Accordingly, I respectfully dissent.

{32} The Legislature intended "leaving" and "abandoning" to create independent theories of criminal culpability under Section 30-6-1(B). The majority concludes that, when enacting Section 30-6-1(B), the Legislature intended "leaving" to reflect its ordinary, dictionary definitions—i.e., first, "'to take leave of or withdraw oneself from whether temporarily or permanently: go away or depart from'" and, second, "'to cause to be or remain in some specified condition.'" Maj. Op., ¶ 16 (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 1287 (1971) (emphasis omitted)). I agree that the Legislature intended "leaving" to denote these dictionary definitions. I also agree that there was insufficient evidence for the jury to convict under the first definition of "leaving": *At the time* Stephenson put Isaiah to bed and locked the door, there was not sufficient evidence for a reasonable jury to conclude that she left Isaiah under circumstances in which he may have suffered or did in fact suffer neglect.

{33} Yet, I disagree with the majority's ultimate conclusion that there was insufficient evidence to support the jury's finding that Stephenson intentionally left Isaiah under circumstances whereby he suffered neglect. At some point during the night, the dresser fell upon Isaiah and pinned his legs to the crossbar of his toddler bed. Sufficient evidence was presented at trial for a reasonable jury to find that Stephenson both apprehended that Isaiah was injured and intentionally left him in that condition. In other words, Stephenson "caused" Isaiah "to remain in some specified condition"—i.e., pinned underneath the dresser, expressing his pain, for many, many hours. *Leave*, *Webster's Third New International Dictionary of the English Language Unabridged* 1287 (1971)). In light of this second dictionary definition of "leave," the Legislature could not have intended the statute to focus exclusively on the moment a parent or guardian initially departs from a child. The statute is also implicated where a parent or guardian knows that a child is in peril (even if in the next room) and intentionally *leaves* that child in peril.

{34} Under the second dictionary definition of "leaving" that the Legislature intended in Section 30-6-1(B), sufficient evidence supports the jury's verdict. The jury heard testimony regarding the grave and abnormal extent of Isaiah's injuries. As a result of being trapped underneath the dresser, Isaiah suffered compartment syndrome. The jury heard testimony from Dr. Dale Hoekstra, M.D., an orthopedic surgeon with University of New Mexico's Children's Hospital (UNMH) and medical director of Carrie Tingley Hospital in Albuquerque. Dr. Hoekstra testified that compartment syndrome "is a condition that arises as a result of an injury to an extremity, almost invariably between the knee and the ankle, in which the pressures in the leg build up to the point that the blood can no longer supply the muscles in the leg, and they start to die or necrose." Elevated creatine kinase ["CK"] levels in Isaiah's blood indicated that Isaiah suffered from compartment syndrome. Dr. Hoekstra testified that the normal range for CK is between 72 to 367 units, and at 9:57 a.m., shortly after his arrival, Isaiah's CK level was 36,605 units, which indicated extensive trauma that threatened the loss of Isaiah's legs and the failure of Isaiah's

kidneys. Because Isaiah urgently needed the care of a pediatric nephrologist, pediatric surgeons, and pediatric intensive care doctors, Isaiah was airlifted from Christus St. Vincent Hospital in Santa Fe to UNMH in Albuquerque. Once Isaiah arrived at UNMH, his CK peaked at 123,000 units. At UNMH, Dr. Hoekstra performed an emergency fasciotomy on both of Isaiah's legs and found extensive damage, including some tissue death, in Isaiah's leg muscles.

{35} The jury was also presented with evidence establishing that, in order for Isaiah to have developed such an extraordinarily high CK level, Isaiah had to have been trapped under the dresser for eight to twelve hours. Dr. Hoekstra opined that the extent of Isaiah's injuries indicated that Isaiah had been pinned under the dresser for "at least twelve hours." Dr. Denise Coleman, M.D., a pediatric critical care physician at UNMH, who observed Isaiah immediately before his surgery, conservatively estimated that Isaiah was pinned under the dresser for "a minimum of six to twelve hours."

{36} The jury also heard testimony from *Stephenson's* expert witness, Dr. Steven Gabaeff, M.D., who is board certified in emergency medicine and operates a clinical forensic medical practice. Even Dr. Gabaeff testified that Isaiah's CK levels were the highest he had ever seen and estimated that Isaiah's "muscles had no oxygen for a very long time to get that condition." Dr. Gabaeff estimated that Isaiah had been pinned under the dresser for four-and-a-half to eight hours, that "[i]t could have been a little longer even," and that "[b]ased on the [CK levels] going so high, [he] tended to really believe that it was on the longer side." Dr. Gabaeff further opined that "if something happen[ed], say, at 10:30 or 11:00 or 11:30, you know, we're talking about eight hours, and that seems to me to be about what I'd expect . . . we already have numbers that, you know, lead us in a direction." Therefore, from the expert testimony presented by the State and by Stephenson, the jury was permitted to find that Isaiah was underneath the dresser for eight to twelve hours. Consequently, the jury was permitted to infer that the dresser fell on Isaiah between 10:30 p.m. and 11:00 p.m. and remained on top of him until 7:00 a.m. the next morning.

{37} Critically, the jury was presented with additional evidence from which it was permitted to infer the following two findings: First, Isaiah would have expressed audible and sustained indications of pain. Second, Stephenson was both home and awake throughout the night and into the morning, during the time that Isaiah was pinned and expressing pain. Dr. Coleman testified that Isaiah would have been able to scream and that "he would have been in pain for a very long time." Dr. Coleman further testified that the impairment of blood flow in Isaiah's legs would have caused him extreme pain and compared Isaiah's pain to the pain of having an arterial blood clot. Dr. Coleman referenced her training in critical care in Seattle, where she cared for children who had been pinned under fallen trees during the course of lumbering accidents, and testified, "[I]t's painful. Oftentimes, the pain never goes away. . . . I can tell you it hurt until they could get I.V. pain meds."

{38} Apodaca, Isaiah's father, testified that he worked that night from 6:00 p.m. until 1:25 a.m. or 1:30 a.m. and that he received text messages from Stephenson during the "whole time [he] was working" in which Stephenson invited Apodaca to come spend the night with her at her apartment. Apodaca went to Stephenson's apartment after he left work and arrived at approximately 2:00 a.m. She was home. Upon Apodaca's request, Stephenson went to McDonald's to buy some food. Stephenson returned home at approximately 2:45 a.m. Apodaca asked Stephenson to check on Isaiah at about 3:00 a.m. Stephenson and Apodaca then ate, had sex, and went to sleep at approximately 4:00 a.m. or 4:15 a.m.

{39} From this evidence, the jury was permitted to draw reasonable inferences to reach its verdict. The jury was permitted to rely on the medical expert testimony—and on its common sense and experience—to infer from the severity of Isaiah's injuries, coupled with the shock and pain that a falling dresser would cause to a toddler, that Isaiah cried and screamed loudly, for a prolonged

duration. The jury was permitted to infer—based on the estimations of Doctors Hoekstra, Coleman, and Gabaeff—that during the entire time from Apodaca's arrival to the time of their going to sleep, Isaiah was pinned underneath a dresser, enduring and expressing his pain. Based on those same estimations, the jury was entirely free to reject Stephenson's affidavit testimony that she checked on Isaiah at 2:00 a.m., and that he was fine. The jury was rather permitted to infer that, given the severity of Isaiah's injuries and the copious medical expert testimony as to the cause of those injuries, at 2:00 a.m. Isaiah was pinned under the dresser. The jury was also permitted to rely on its common sense to infer that the type of crying and screaming that Isaiah expressed as the dresser fell upon him and as his muscle tissue was dying was abnormal—different in both kind and duration from the type of crying that a follower of Dr. Ferber's method of parenting may recognize as normal. And the jury was permitted to find that if Isaiah had expressed his pain, Stephenson would have heard it. Detective Van Etten testified that Stephenson's apartment was small, such that "anybody would be able to hear anybody from one end of the apartment to the other." In sum, the jury was permitted to find that Stephenson intentionally left Isaiah under circumstances whereby he suffered neglect.

{40} The majority worries that a decision which upholds the jury's verdict "could potentially criminalize parents' actions every single time they tuck their children into bed and harm befalls their children at night through some unfortunate accident." Maj. Op., ¶ 28. While I understand this concern, I do not share it. Two bulwarks prevent a decision upholding the jury's verdict from threatening well-meaning parents with criminal liability. First, to establish a violation of Section 30-6-1(B), the State must prove that the child is exposed to *neglect*, which is specifically defined by Section 30-6-1(A)(2), and which clearly excludes criminal liability for accidental injuries that befall children unbeknownst to well-meaning parents. Second, and more fundamentally, it is the hard and jagged facts of cases which prevent legal conclusions from tumbling down the slippery slope. For example, in this case, the jury had much more to consider than just the scenario of a parent putting a child down to sleep for the night, only to wake up in the morning to discover that the child had experienced some injury as a result of an accident unbeknownst to the parent. Here, the jury was permitted to infer that Stephenson knew Isaiah was suffering an abnormal degree of pain but, nevertheless, intentionally *left* him in that condition. Drawing every reasonable inference in favor of the verdict, as we are required to do, the jury had sufficient evidence to make that finding.

{41} Accordingly, I respectfully dissent.

JUDITH K. NAKAMURA,
Justice

I CONCUR:

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2017-NMSC-013

Filing Date: February 6, 2017

Docket No. S-1-SC-36030

DAVID G. CRUM,

Plaintiff-Appellant,

v.

DIANNA J. DURAN, New Mexico Secretary of State, MAGGIE TOULOUSE OLIVER, Bernalillo County Clerk, REPUBLICAN PARTY OF NEW MEXICO, and DEMOCRATIC PARTY OF NEW MEXICO,

Defendants-Appellees,

and

STATE OF NEW MEXICO, ex rel. HECTOR BALDERAS, Attorney General,

Intervenor-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Denise Barela-Shepherd, District Judge

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OPINION

CHÁVEZ, Justice.

{1} Petitioner David Crum is a resident of Albuquerque, Bernalillo County, New Mexico and is registered to vote in New Mexico as a qualified voter who declines to designate or state his political party affiliation (DTS). He sought to vote during the 2014 primary election by selecting either a Democratic or a Republican ballot without having to amend his voter registration. Crum was not permitted to vote during the June 3, 2014 primary election because he was not registered as either a Democrat or a Republican[1] on or before May 6, 2014. *See* NMSA 1978, § 1-4-5.1(F) (2007) (requiring voters to register at least twenty-eight days before an election to be eligible to vote during that election). Under New Mexico's closed primary election system, a voter who wants to vote during the primary election must be affiliated with a major political party, *see* NMSA 1978, § 1-12-7(B) (2003), and can only vote for candidates of a party which is designated on the voter's current voter registration certificate, *see* NMSA 1978, §1-12-7(C) (2003).

{2} Crum contends that the Free and Open Clause of Article II, Section 8 of the New Mexico Constitution entitles him to vote during primary elections without registering with a major political party because he is a qualified voter under Article VII, Section 1. We disagree. Although the Free and Open Clause is intended to promote voter participation during elections, the Legislature has the constitutional power to enact laws that "secure the secrecy of the ballot and the purity of elections and guard against the abuse of [the] elective franchise." N.M. Const. art. VII,

[1] The Democratic and Republican Parties were the only major political parties in New Mexico for the 2014 election. *See* NMSA 1978, § 1-7-7(A) (2011) (defining "major political party" under the Election Code); www.sos.state.nm.us /Elections_Data/NM_Political _Parties.aspx (last accessed January 30, 2017).

§ 1(B) (2014). Requiring voters to designate their affiliation with a major political party at least twenty-eight days before the primary election, and only allowing voters to vote for candidates of a party which is designated on their voter registration, are reasonably modest burdens which further the State's interests in securing the purity of and efficiently administering primary elections. We therefore affirm the district court's grant of the motion to dismiss Crum's complaint for failing to state a claim upon which relief could be granted.

I. DISCUSSION

{3} Crum sued the Secretary of State and the Bernalillo County Clerk (Defendants), seeking an injunction to enjoin them from prohibiting DTS voters from voting during the primary election. The New Mexico Attorney General intervened on behalf of the State. The district court ordered that the Democratic Party of New Mexico (DPNM) and the Republican Party of New Mexico (RPNM), New Mexico's two major political parties, should be joined as party defendants under Rule 1-019 NMRA. Only RPNM entered an appearance. RPNM filed a motion to dismiss Crum's lawsuit for failure to state a claim under Rule 1-012(B)(6) NMRA, based on the contention that allowing DTS voters to vote in the primary election without designating a major political party would unconstitutionally infringe on RPNM's freedom of association.

{4} The district court granted RPNM's motion to dismiss, concluding that the Legislature had the authority to enact Section 1-12-7(B) and (C) under its manner, time, and place of voting power in the second paragraph of Article VII, Section 1 of the New Mexico Constitution. The district court also found that the requirement to affiliate protects political parties' freedom of association. Crum timely appealed the district court's decision to the Court of Appeals, which then certified the case to this Court pursuant to Rule 12-606 NMRA and NMSA 1978, Section 34-5-14(C) (1972). *Crum v. Duran*, No. 34,586, order of certification at 1-5 (N.M. Ct. App. Aug. 8, 2016) (non-precedential).

{5} Whether New Mexico's closed primary system violates Article II, Section 8 and Article VII, Section 1 is a question of statutory and constitutional interpretation which we review de novo. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. An appeal of an order dismissing a case under Rule 1-012(B)(6) is also reviewed de novo with the reviewing court accepting "all well-pleaded factual allegations as true and determin[ing] whether the plaintiff might prevail under any state[ment] of facts provable under the claim." *Sambrano v. Savage Arms, Inc.*, 2014-NMCA-113, ¶ 4, 338 P.3d 103 (internal quotation marks and citation omitted).

A. The Free and Open Clause Provides a Broad Protection of the Right to Vote; However, the Legislature May Constitutionally Impose Safeguards to Protect the Integrity of Elections

{6} Article II, Section 8 of the New Mexico Constitution provides that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Crum contends that the Free and Open Clause requires all elections, including primary elections, to be free and open to all voters who meet the age, residency, and competency qualifications in the first paragraph of Article VII, Section 1.[2]

{7} The Free and Open Clause is intended to promote—not restrict—citizen participation in New Mexico elections. *State ex rel. Walker v. Bridges*, 1921-NMSC-041, ¶ 8, 27 N.M. 169, 199 P. 370 (clarifying that a citizen's supreme right is

[2] The 2008, 2010, and 2014 amendments to Article VII, Section 1 were compiled in 2016 following our decision in *State ex rel. League of Women Voters of New Mexico v. Advisory Committee to the New Mexico Compilation Commission*, No. S-1-SC-35524, order at 1–2 (N.M. Sup. Ct. Sept. 21, 2016) (non-precedential); N.M. Const., art. VII, § 1 (2014) (Compiler's Note).

to vote in public elections, and therefore election regulations should be construed in favor of a citizen's right to vote). Whether the Free and Open Clause of Article II, Section 8 was intended to apply to primary elections is unclear because at the time of the adoption of the New Mexico Constitution on January 21, 1911, primary elections did not exist in New Mexico. *See State ex rel. Palmer v. Miller*, 1964-NMSC-072, ¶¶ 9–10, 74 N.M. 129, 391 P.2d 416 (per curiam) (explaining that New Mexico's first Primary Election Code was adopted in 1938 to take political party nominations away from conventions and give the power directly to qualified voters of those parties).

{8} What existed even before the adoption of the Free and Open Clause is the requirement that voters officially document their qualifications to vote either by registration or affidavit. *See Bridges*, 1921-NMSC-041, ¶¶ 9–11 (citing registration requirements that existed before the New Mexico Constitution's enactment, which required qualified voters to either register or demonstrate by affidavit, and corroborate by two qualified voters, that the affiant was a qualified voter). At the adoption of Article VII, Section 1, the Legislature's authority to require qualified voters to register to vote became a constitutional power.[3] Article VII, Section 1 also empowers the Legislature to "enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of [the] elective franchise." N.M. Const. art. VII, § 1(B) (2014).

{9} In *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. 1951) (en banc), the Missouri Supreme Court interpreted a substantively identical Free and Open Clause to that of New Mexico to mean that "every qualified voter may freely exercise the right to . . . vote without restraint or coercion of any kind and that his [or her] vote, when cast, shall have the same influence as that of any other voter." (internal quotation marks and citation omitted). However, in an earlier case, the Missouri Supreme Court had also acknowledged "[t]hat all elections shall be 'free and open' does not mean that there cannot be reasonable regulations of elections in the interest of good citizenship and honest government." *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 958 (Mo. 1914) (in banc). The United States Supreme Court has also held that the constitutional rights to vote in any manner and to associate for political purposes are not absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Although state legislatures cannot unduly infringe on a voter's right to vote, *Richardson v. State Board of Elections*, 697 F. Supp. 295, 297 (W.D. Ky. 1988), legislatures may reasonably regulate elections and impose voter qualifications. *Carrington v. Rash*, 380 U.S. 89, 91 (1965) ("There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, (t)he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." (alteration in original) (internal quotation marks and citations omitted)).

{10} When a court reviews a challenge to a state election law, it must weigh the asserted injury the plaintiff seeks to vindicate against "the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (internal quotation marks and citations omitted). "If a statute imposes only modest burdens, . . . then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (internal quotation marks and citation omitted). "'[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

[3] The Legislature's power appeared in the second paragraph of Article VII, Section 1. In a recent amendment, New Mexico voters reiterated the Legislature's power to require voter registration by stating that qualified voters are "subject to residency and registration requirements provided by law." N.M. Const. art. VII, § 1(A) (2014).

{11} In this case, the Legislature requires a voter who wants to vote during the primary election to be affiliated with a major political party, Section 1-12-7(B), and prohibits the voter from voting for any candidate of a party who is not designated on the voter's current voter registration, Section 1-12-7(C). During the 2014 primary election, there were only two major parties: Democratic and Republican. Registered Democrats could only vote for democratic candidates, registered Republicans could only vote for republican candidates, and no other registered voters could vote in the primary election. A qualified voter who wishes to vote in a primary election may register with a major political party by delivering or mailing a certificate of registration twenty-eight days before the election. Section 1-4-5.1(F). With respect to the 2014 primary election, an unregistered qualified voter could have registered as either a Democrat or a Republican no later than May 6, 2014, which would have been twenty-eight days before the June 3, 2014 primary election. *See* NMSA 1978, § 1-4-8(A) (2008). Similarly, a registered qualified voter—regardless of political party affiliation or DTS status—could have changed his or her certificate of registration to register as either a Democrat or a Republican as late as May 6, 2014. *Id.* The qualified voter could then file a new certificate of registration as early as the Monday following the primary election. Section 1-4-8(B).

{12} The stated purpose of the Election Code, and thus the preelection registration requirement, includes securing the purity of elections and providing for their efficient administration. NMSA 1978, § 1-1-1.1 (1979). The controlling question before us is whether requiring qualified voters to register with a political party that is participating in the primary election, at least twenty-eight days before the primary election, is a reasonably modest burden that furthers the State's interest in securing the purity of elections and efficiently administering them. For the following reasons, we conclude that it is.

{13} Generally, "registering as a member of a political party is not particularly burdensome, and it is a minimal demonstration by the voter that he [or she] has some commitment to the party in whose primary he [or she] wishes to participate." *Ziskis v. Symington*, 47 F.3d 1004, 1006 (9th Cir. 1995) (internal quotation marks and citation omitted). Not only is this burden minimal, but "[s]tates have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds." *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (emphasis added). "The registration laws are designed to settle beforehand the question as to who is eligible to vote at any given election [so that] the turmoil and inconvenience of controversies about the qualifications of voters at the polls on election day are eliminated." *Bridges*, 1921-NMSC-041, ¶ 8.

{14} In *Rosario v. Rockefeller*, the United States Supreme Court analyzed a registration requirement that voters claimed abridged their right to vote in a primary election. 410 U.S. 752, 756 (1973). At issue in *Rosario* was the constitutionality of a New York state election law that required voters to register with a political party at least thirty days before the previous general election to be able to participate in the state's subsequent closed primary election. *Id.* at 760. Under the New York scheme, voters had to be registered approximately eight months before a presidential primary election and eleven months before a non-presidential primary election to participate in the primary. *Id.* at 760. The Court held that this registration requirement did not disenfranchise the voters because it merely provided a deadline for registering with which the voters could have complied to exercise their right to vote. *See id.* at 757–58. The *Rosario* Court noted that the voters could vote in a different political party primary election every year as long as they were properly registered. *Id.* at 759. The Court also held that the registration deadline was not too onerous because (1) states are "justified in imposing some reasonable cutoff point for registration or party enrollment," *id.* at 760, and (2) such a deadline reasonably deters political party raiding by opposing party members "whereby voters in sympathy with one party designate

themselves as voters of another party so as to influence or determine the results of the other party's primary," *id.* at 760–61. Therefore, the Court concluded that the registration requirement did not violate the petitioners' constitutional rights. *See id.* at 762.

{15} The *Rosario* petitioners sought to affirmatively associate with a political party, *id.* at 755–756, unlike the DTS voters in this case. We find *Rosario* persuasive insofar as the act of voting in a party's primary is, in itself, an act of affiliation. *Miller v. Cunningham*, 512 F.3d 98, 107 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of rehearing en banc). Like the registration requirement in *Rosario*, New Mexico's twenty-eight-day registration requirement does not unconstitutionally infringe on the right to vote because it does not "totally den[y] the electoral franchise to [any] particular class of residents." *Id.* at 757 (noting that courts which have held that a registration requirement was unconstitutional found that "there was no way in which the members of that class could have made themselves eligible to vote"). Crum and other DTS voters could have made themselves eligible to vote by timely registering with the political party that offered candidates and policies that more favorably addressed the issues with which they were immediately concerned. Unlike the *Rosario* Court, we cannot justify the New Mexico registration deadline as a deterrent to political party raiding because that deadline occurs after the candidates and their platforms are known. There is no evidence that political party raiding is a concern in New Mexico.

{16} New Mexico's registration deadline is also defensible because it is not too burdensome. The registration requirement permits qualified voters to vote in a different political party primary election each year because it does not require them to be locked into their party affiliation. *See Kusper v. Pontikes*, 414 U.S. 51, 52–53, 58, 60–61 (1973) (holding that the State's legitimate interest in preventing political party raiding was not sufficient to justify the substantial restraint of a statute prohibiting voters from voting in a party primary if they had voted in another party's primary within the preceding twenty-three months); *see also* § 1-4-8(A)(2) (requiring county clerks to reopen registration the Monday following an election). The twenty-eight-day registration requirement does not deprive voters of their right to change their political party registrations as often as they desire, as long as the reasonable statutory time limit for doing so is observed. Thus, voter participation in New Mexico is encouraged—not discouraged—and a voter's participation is not made so onerous that qualified voters would not be able to effectively participate in primary elections.

{17} It is also significant that New Mexico voters who desire to participate in the primary elections have a reasonable time to determine whether a political party offers candidates and platforms that comport with their beliefs and principles. If so, they may register with that particular party and vote in the primary election. Primary elections are held "on the first Tuesday after the first Monday in June of each even-numbered year." NMSA 1978, § 1-8-11 (2011). Political parties and their candidates announce their platforms and positions on issues well before the registration deadline. Candidacy declarations by preprimary convention designation are filed on the first Tuesday in February for statewide offices or United States representatives. NMSA 1978, §§ 1-8-21.1(A) (2013) & 1-8-26(A) (2014). State conventions are held no later than the second Sunday in March preceding the primary election. Section 1-8-21.1(B). Candidacy declarations for any other office who are nominated in the primary election are filed on the second Tuesday of March. *See* § 1-8-26(B).

{18} Candidates in New Mexico must declare a political party by January and file their declarations of candidacy by either February or March. Crum and other DTS voters are not required to register until May. Therefore, they have two to three months to decide which political party's candidates are more appealing to them before registering with that party. And, as previously stated, the very act of voting in a party's primary is itself the act of affiliating with that party. If during the next election cycle Crum or any other

DTS voter decides that his or her immediate interests are favorably addressed by a different political party, he or she may simply change his affiliation at any time up to twenty-eight days preceding the next election.

{19} The registration law incidentally furthers the interest in assuring that primary elections reflect the will of political party members. *Nader v. Schaffer*, 417 F. Supp. 837, 846–47 (D. Conn.), *aff'd*, 429 U.S. 989 (1976). In *Nader*, a federal district court upheld Connecticut's closed primary system and rejected the plaintiffs' arguments, including that the law forced them to enroll in a party in order to participate in the state's primary elections. 417 F. Supp. at 844–45. The *Nader* court reasoned that "a state has a more general, but equally legitimate, interest in protecting the overall integrity of the . . . electoral process [, which] includes preserving parties as viable and identifiable interest groups [, and] insuring that the results of primary elections . . . accurately reflect the voting of party members." *Id.* at 845. The same legitimate interests support the constitutionality of the modest burden on voters that was challenged in this case. We therefore hold that requiring voters to designate their affiliation with a major political party at least twenty-eight days before the primary election, and only allowing voters to vote for candidates of a party which is designated on their voter registration, are reasonably modest burdens which further the State's interests in securing the purity of and efficiently administering primary elections.

{20} Finally, we note that the instant case calls upon this Court to determine only whether New Mexico's current closed primary system is constitutional and *not* whether it is the only constitutional option available to the Legislature. Our holding in this case should in no way be interpreted as foreclosing the possibility that a different primary system adopted by the Legislature—an open primary, for example—could also be constitutional. *See Cunningham*, 512 F.3d at 106–12 (Wilkinson, J., dissenting from denial of rehearing en banc) (comparing the relative constitutional merits of open and closed primary systems).

II. CONCLUSION

{21} For the foregoing reasons, we conclude that Section 1-12-7(B)-(C), which establishes New Mexico's closed primary election system, is not unconstitutional. Accordingly, we affirm the district court's grant of RPNM's motion to dismiss.

{22} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

BARBARA J. VIGIL,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2017-NMSC-021

Filing Date: June 19, 2017

Docket No. S-1-SC-35974

BRUCE THOMPSON, as Guardian ad Litem for A.O., J.P., and G.G., Minor Children,

Plaintiff-Respondent,

v.

CITY OF ALBUQUERQUE, RAY SCHULTZ, former Chief of Police of the City of Albuquerque, and KEVIN SANCHEZ, City of Albuquerque Police Officer,

Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Denise Barela Shepherd, District Judge

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OPINION

CHÁVEZ, Justice.

{1} May the minor children of a parent whom they allege was wrongfully shot and killed by a law enforcement officer (1) sue for loss of consortium damages under the New Mexico Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015), and (2) bring their lawsuit even if the parent's estate did not sue for wrongful death damages? We answer "yes" to both questions for the following reasons. First, Section 41-4-12 of the TCA waives a law enforcement officer's sovereign immunity from liability for personal injury and bodily injury damages resulting from battery, and loss of consortium damages may be characterized as either personal or bodily injury damages. Second, loss of consortium damages result from the wrongful injury or death of someone who was in a sufficiently close relationship to the loss of consortium claimant, and such damages belong to the loss of consortium claimant and not to the injured person or the decedent's estate.

BACKGROUND

{2} The background to our analysis is comprised of the well-pled facts in Plaintiffs' complaint, which we accept as truthful for purposes of reviewing the district court's ruling on Defendants' motion to dismiss. *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 4, 139 N.M. 201, 131 P.3d 51.

{3} On March 29, 2010, Albuquerque Police Department officers received information regarding a suspected stolen vehicle located in a commercial parking lot. Several officers then arrived at the scene and surrounded the suspected stolen vehicle with their unmarked police vehicles. Mickey Owings parked next to the suspected stolen vehicle. A passenger exited Owings's vehicle and approached the suspected stolen vehicle.

{4} The APD officers then positioned one of the unmarked police vehicles behind Owings's vehicle as Officer Sanchez approached Owings's vehicle on foot. Owings backed his vehicle into the unmarked police vehicle that was preventing him from leaving. Officer Sanchez drew his gun

and pointed it at Owings as he continued to approach Owings's car. Owings drove away once Officer Sanchez began shooting at his car. Ultimately, Officer Sanchez shot and killed Owings during this encounter.

{5} Plaintiffs are Owings's surviving minor children who sued Defendants for loss of consortium damages under Section 41-4-12. Plaintiffs allege that Defendants' acts and omissions caused the wrongful death of their father, and as a result they will be "forced to grow up without the companionship, guidance, love, enjoyment, and support of their father. . . ." The district court granted Defendants' Rule 1-012(B)(6) NMRA motion to dismiss, concluding that the TCA did not waive law enforcement officers' sovereign immunity for a loss of consortium claim. The Court of Appeals reversed, *Thompson v. City of Albuquerque*, 2017-NMCA-002, ¶ 11, 386 P.3d 1015, and we affirm the Court of Appeals.

DISCUSSION

{6} "Generally, the Tort Claims Act provides governmental entities and public employees acting in their official capacities with immunity from tort suits unless the [TCA] sets out a specific waiver of that immunity." *Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't*, 1996-NMSC-021, ¶ 6, 121 N.M. 646, 916 P.2d 1313. Section 41-4-12 provides that law enforcement officers' immunity is waived for:

> liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

We review the dismissal of Plaintiffs' claim for loss of consortium damages under Rule 1-012(B)(6) de novo. *See Fitzjerrell v. City of Gallup ex rel. Gallup Police Dep't*, 2003-NMCA-125, ¶ 8, 134 N.M. 492, 79 P.3d 836 (noting that whether a motion to dismiss was properly granted is a question of law).

Loss of consortium is a claim for damages deriving from a tort upon another, but which may be brought as an independent claim for damages to a sufficiently close relationship

{7} Defendants argue that there is no waiver of sovereign immunity for loss of consortium under Section 41-4-12 because loss of consortium is not specifically enumerated in the statute, and therefore a waiver would be contrary to "the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [TCA] and in accordance with the principles established in that act." Section 41-4-2(A). The structure of Section 41-4-12 persuades us otherwise.

{8} The plain language of Section 41-4-12 first presents the types of injury for which a law enforcement officer's immunity may be waived. *Id.* The types of injury enumerated include personal and bodily injury. *Id.* Loss of consortium fits squarely within personal injury as an element of such damages. *See* UJI 13-1810A NMRA (listing loss of consortium within the category of personal injury damages). Loss of consortium is a type of personal injury damage because "[d]amages for consortium are damages for the plaintiff's emotional distress" due to the harm to a sufficiently close relationship. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, ¶ 26, 126 N.M. 263, 968 P.2d 774; *see also Weinstein*, 1996-NMSC-021, ¶ 26 (holding that emotional distress is a type of personal injury). Courts have recognized that "[d]amages for emotional distress . . . may be recoverable as damages for personal injury resulting from one of the enumerated acts." *Romero v. Otero*, 678 F. Supp. 1535, 1540 (D. N.M. 1987) (internal quotation marks omitted). Other courts have also found that loss of consortium is a damage resulting from bodily injury upon another. *Brenneman v. Bd. of Regents of the Univ. of N.M.*, 2004-NMCA-003,

¶ 19, 135 N.M. 68, 84 P.3d 685. Whether loss of consortium is labeled as personal or bodily injury, it is indisputably contemplated by the language of Section 41-4-12.

{9} Section 41-4-12 also delineates the torts for which a law enforcement officer's immunity may be waived. *Id.* The enumerated torts include battery, from which Plaintiffs allege their claim for loss of consortium damages arises in this case. In this regard, Plaintiffs' claim for loss of consortium damages derives from a tort enumerated under Section 41-4-12. *See Williams v. Bd. of Regents of the Univ. of N.M.*, No. CIV 13-0479 JB/WPL, 2014 WL 4351533, at *11 n.8 (D. N.M. Aug. 18, 2014) ("Loss of consortium can be asserted against New Mexico government actors, despite that it is not specifically mentioned in the [TCA], provided that the underlying tort—the one that caused direct physical injury—itself triggers an immunity waiver. . . ." (citation omitted)). Loss of consortium damages are derivative in nature because they arise from a physical injury upon another person. *See Romero v. Byers*, 1994-NMSC-031, ¶ 8, 117 N.M. 422, 872 P.2d 840 ("Loss of consortium is simply the emotional distress suffered by one spouse who loses the normal company of his or her mate when the mate is physically injured due to the tortious conduct of another."). Therefore, both the injury and the tort from which the children's claim for loss of consortium damages derive are specifically enumerated under Section 41-4-12.

{10} The Court of Appeals has correctly recognized that immunity may be waived for loss of consortium damages as a claim deriving from an enumerated tort under the TCA. In *Wachocki v. Bernalillo County Sheriff's Department* (*Wachocki I*), the Court of Appeals analyzed a wrongful death claim under Section 41-4-12 and a derivative claim for loss of consortium damages. 2010-NMCA-021, ¶¶ 1-2, 147 N.M. 720, 228 P.3d 504, *aff'd*, *Wachocki v. Bernalillo Cty. Sheriff's Dep't* (*Wachocki II*), 2011-NMSC-039, ¶¶ 1, 12–14, 150 N.M. 650, 265 P.3d 701. The Court of Appeals held that Section 41-4-12 waived immunity for the wrongful death claim, *Wachocki I*, 2010-NMCA-021, ¶ 1, but regarding the loss of consortium claim, the claimant, who was the decedent's sibling, could not recover because he had failed to prove the foreseeability of harm to a sufficiently close relationship with the decedent. *Id.* ¶¶ 54–57.

{11} Defendants argue that *Wachocki I* did not expressly hold that damages for loss of consortium may be recovered under Section 41-4-12. The fact that the *Wachocki I* Court analyzed the merits of the claim for loss of consortium damages *after* it determined there was a waiver for the tort claim from which the damages derived leads us to conclude otherwise. The Court of Appeals began its analysis on loss of consortium damages by stating that "damages for loss of consortium may be recovered under the Section 41-4-2(A) waiver of sovereign immunity." *Wachocki I*, 2010-NMCA-021, ¶ 50 (citing *Brenneman*, 2004-NMCA-003, ¶ 19). Section 41-4-2(A) is a general provision explaining the policy reasons behind the TCA. The same is true of Section 41-4-2(B), which states that "[l]iability . . . under the [TCA] shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." Due to its general applicability, Section 41-4-2 pertains to individual sections of the TCA, including Section 41-4-12. *See Torres ex rel. Estate of Torres v. State*, 1995-NMSC-025, ¶ 11, 119 N.M. 609, 894 P.2d 386 (observing that a waiver of immunity under Section 41-4-2(B) applied to an action for wrongful death by battery caused by law enforcement officers brought under Section 41-4-12). Therefore, the *Wachocki I* Court's statement that damages for loss of consortium may be recovered under the general provision, Section 41-4-2, applies to Section 41-4-12. Similarly, when construing *Wachocki I* on appeal, this Court analyzed the merits of the claim for loss of consortium damages when we could have simply declared that there was no waiver of immunity under Section 41-4-12. *Wachocki II*, 2011-NMSC-039, ¶ 4.

{12} *Brenneman*, to which *Wachocki I* cited, also supports our conclusion that immunity is waived for loss of consortium damages under Section 41-4-12. *See Brenneman*, 2004-NMCA-003,

¶ 1. The *Brenneman* Court concluded that immunity was waived for a claim for loss of consortium damages in the context of Sections 41-4-9 and -10, 2004-NMCA-003, ¶ 6, but it also made several statements regarding waiver of immunity for loss of consortium damages as they pertain to the TCA as a whole. *See id.* ¶ 1 ("We hold that loss of consortium damages are permissible under the [TCA]'s provisions for damages resulting from bodily injury."); ¶¶ 10, 19 ("[W]e believe that loss of consortium is exactly the type of damage based upon the traditional tort concepts of duty that the Legislature intended to include under the applicable waivers of sovereign immunity in the [TCA]." (internal quotation marks omitted)).

{13} Defendants seek to distinguish *Wachocki I* and *Brenneman* on the basis that in those cases, the Court of Appeals analyzed claims for loss of consortium damages arising from negligence and not an intentional tort. We are not persuaded because other courts have also recognized that loss of consortium damages may result from intentional torts. *See McGrath v. Nassau Health Care Corp.*, 217 F. Supp. 2d 319, 335 (E.D. N.Y. 2002) ("Assault and battery claims may sustain derivative loss of consortium claims."). In *McGrath*, a public employee brought a lawsuit against her governmental employer and supervisor alleging assault and battery, among other claims, while the employee's husband asserted a loss of consortium claim deriving from the physical injury upon his wife. *Id.* at 322, 335. The court declined to dismiss the underlying intentional tort claims because the plaintiffs had pled sufficient facts to support them, and the loss of consortium claim was also not dismissed because it was adequately supported by the intentional tort claims. *Id.* at 333–34; *see also Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 376 (E.D. Pa. 2002) (recognizing that an assault and battery on a husband by a police officer, if proven, indubitably forms the basis for a loss of consortium claim by the wife). Furthermore, waiving immunity for loss of consortium damages resulting from negligent conduct necessarily implies that there also is waiver of damages resulting from intentional conduct. It would be illogical to forego waiving immunity for intentional conduct when waiver for negligence is permitted, particularly since Section 41-4-12 waives immunity for a wider range of tortious conduct committed by law enforcement officers than any other classification of public employee. *Compare* §§ 41-4-5, 41-4-6, 41-4-7, 41-4-9, & 41-4-10 (waiving immunity for negligence of public employees) *with* § 41-4-12 (waiving immunity for conduct premised on negligence, according to *Wachocki I*, in addition to assault, battery, and false imprisonment, among other torts). Accordingly, we hold that immunity is waived for claims of loss of consortium damages deriving from an enumerated tort under Section 41-4-12.

{14} Defendants next contend that even if loss of consortium damages derive from the underlying battery, any lawsuit for such damages must be brought along with the underlying battery claim. We agree that a plaintiff who sues for loss of consortium damages must prove—as an element of loss of consortium damages—that the alleged tortfeasor caused the wrongful injury or death of someone who was in a sufficiently close relationship to the plaintiff, resulting in harm to the relationship. However, this does not mean that the loss of consortium claim must always be brought with the underlying tort claim, or that actual recovery for the underlying tort is a prerequisite for the recovery of loss of consortium damages. *See Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, ¶ 13, 122 N.M. 703, 930 P.2d 1155 (stating that while loss of consortium claimants may recover only if the physically injured person has a cause of action for his or her injuries, actual recovery for the underlying tort is not required in order to recover loss of consortium damages); *Turpie v. Sw. Cardiology Assocs., P.A.*, 1998-NMCA-042, ¶ 7, 124 N.M. 787, 955 P.2d 716 ("[T]he defendant must be at least potentially liable to the injured [person] before it can be liable to the [claimant] seeking loss of consortium damages.").

{15} For our purposes in reviewing whether Plaintiffs are entitled to bring their claim as a matter of law, and not whether they may actually recover on their claim (which we were not asked to decide), Plaintiffs need only have pled

sufficient facts to notify Defendants about the complaint's general premise. *See Petty v. Bank of N.M. Holding Co.*, 1990-NMSC-021, ¶ 7, 109 N.M. 524, 787 P.2d 443 ("Under our rules of notice pleading, it is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim; specific evidentiary detail is not required at this stage of the pleadings.") (internal quotation marks and citation omitted)). Plaintiffs sufficiently pled the underlying battery claim from which their claim for loss of consortium damages arose by alleging that Defendants caused the deadly shooting of Owings, which resulted in the minor children losing their relationship with their father.

{16} Defendants also argue that the minor children did not suffer a direct injury because it was only their father who suffered a deadly battery, not the children, and therefore their claim is merely a bystander claim for which there is no waiver under Section 41-4-12. *See Weinstein*, 1996-NMSC-021, ¶¶ 24–26 (concluding that the parents of a battery victim could not bring a separate cause of action for the tort of negligent infliction of emotional distress because "their claim [was] akin to a bystander claim" for which there is no waiver of immunity under Section 41-4-12). Although claims for loss of consortium damages derive from injury to another, the claimant has also suffered a direct injury for which he or she may seek recovery separately from the underlying tort. The *Weinstein* Court itself stated that there is a direct claim for personal injury for which there is an enumerated waiver under Section 41-4-12. *Weinstein*, 1996-NMSC-021, ¶ 26. The direct injury alleged by a loss of consortium claimant is one to a relational interest with another who was physically injured. *Lozoya v. Sanchez*, 2003-NMSC-009, ¶ 20, 133 N.M. 579, 66 P.3d 948, *abrogated on other grounds by Heath v. La Mariana Apartments*, 2008-NMSC-017, 143 N.M. 657, 180 P.3d 664; *Archer*, 1997-NMSC-003, ¶ 11. Plaintiffs' claim for loss of consortium damages alleges a direct injury to their relational interest with their father as a result of the battery upon him. In this regard, Plaintiffs are not merely "indirect or incidental victims." *Cf. Lucero v. Salazar*, 1994-NMCA-066, ¶ 12, 117 N.M. 803, 877 P.2d 1106 ("We thus construe the language of Section 41-4-2(A) as evincing a legislative intent not to waive immunity for injuries to indirect or incidental victims of tortious acts committed by government employees.").

{17} A derivative claim for loss of consortium damages need not be brought along with the underlying tort claim because loss of consortium claimants suffer a direct injury separate from the physical injury to another. *State Farm Mut. Auto. Ins. Co. v. Luebbers*, 2005-NMCA-112, ¶ 37, 138 N.M. 289, 119 P.3d 169. In *Luebbers*, the Court of Appeals explicitly held that a minor child could pursue a claim for loss of consortium damages separate from an underlying wrongful death claim. *Id.* Defendants assert that *Luebbers* cannot be applied here because that case analyzed a claim for loss of consortium damages against a private party, not a government entity, under Section 41-4-12 or any other section of the TCA. However, once there is a waiver of immunity under the TCA, the state is treated the same way as any other defendant for purposes of that claim. *See* § 41-4-2(B) ("Liability for acts or omissions under the [TCA] shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty."); *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 15, 310 P.3d 611 ("In enacting the TCA, the Legislature expressed an intent to waive the state's immunity in situations that would subject a private party to liability under our common law." (citing § 41-4-2(B))). Since we have concluded that there is waiver of immunity for Plaintiffs' claim of loss of consortium damages as deriving from the underlying battery upon Owings, the state may be treated like any private party, and therefore the *Luebbers* holding that claims for loss of consortium damages are independent is applicable here.

{18} Our recognition that claims for loss of consortium damages are independent is not unprecedented. As this area of law has expanded, this

Court has increasingly allowed plaintiffs with differing relationships to the physically injured person to bring independent claims for loss of consortium damages that are separate from the underlying tort claim. *See Fernandez*, 1998-NMSC-039, ¶ 32 (affirming dismissal of the plaintiff's underlying tort claim, but holding that the plaintiff could nevertheless pursue her claim for loss of consortium damages); *Byers*, 1994-NMSC-031, ¶ 10 (concluding that "[j]ust as a spouse's pain and suffering is separate property," so too the spouse's recovery for the "emotional suffering due to the loss of consortium is separate property" (citations omitted)). We hold that Plaintiffs in this case may bring the claim for loss of consortium damages independent of the underlying battery claim.

CONCLUSION

{19} Because Section 41-4-12 of the TCA waives immunity for claims of loss of consortium damages arising from a battery, we hold that Plaintiffs' claim is permissible. We therefore affirm the Court of Appeals's opinion and remand to the district court for proceedings consistent with this opinion.

{20} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

JUDITH K. NAKAMURA,
Chief Justice

PETRA JIMENEZ MAES,
Justice

CHARLES W. DANIELS,
Justice

BARBARA J. VIGIL,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2018-NMSC-027

Filing Date: March 9, 2018

Docket No. S-1-SC-35657

JOEL IRA,

Petitioner,

v.

JAMES JANECKA, Warden,
Lea County Correctional Facility,
Hobbs, New Mexico,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Jerry H. Ritter, Jr., District Judge

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OPINION

CHÁVEZ, Justice.

{1} During the last thirteen years the Supreme Court of the United States, relying on neuroscientific evidence of adolescent behavior, issued three opinions declaring that certain sentences imposed on juvenile offenders violate the Eighth Amendment prohibition of cruel and unusual punishment. *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the imposition of the death penalty for a crime committed by a juvenile); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that no juvenile could be sentenced to life without the possibility of parole for a nonhomicide offense); *Miller v. Alabama*, 567 U.S. 460 (2012) (striking down a statute that required courts to sentence a juvenile convicted of murder to life without parole). These cases created a special category under the Eighth Amendment for juvenile offenders whose culpability is mitigated by adolescence and immaturity. The cases recognize that a juvenile is more likely to be rehabilitated than an adult and therefore should receive a meaningful opportunity to obtain release by demonstrating maturity and rehabilitation. In *Montgomery v. Louisiana*, ___ U.S. ___, ___, 136 S.Ct. 718, 736–37 (2016), the Supreme Court endorsed the principles in *Roper*, *Graham*, and *Miller* and held that *Miller* applies retroactively because it announced a substantive rule of constitutional law.

{2} Nearly twenty years ago, Petitioner, Joel Ira, was sentenced as a juvenile to 91½ years in the New Mexico Department of Corrections after he pled no contest to several counts of criminal sexual penetration and intimidation of a witness—crimes which he committed when he was fourteen and fifteen years old. Under the relevant Earned Meritorious Deduction Act (EMDA), NMSA 1978, § 33-2-34(A) (1988, amended 2015),[1] Ira

[1] Under the EMDA that applied when Ira was sentenced in 1997, an inmate "confined in the penitentiary of New Mexico . . . may be awarded a meritorious deduction of thirty

can be eligible for parole when he has served one-half of his sentence—approximately 46 years—if he maintains good behavior while incarcerated. He will be approximately 62 years old when he can first be eligible for parole.

{3} Ira petitioned for a writ of habeas corpus to make the central argument that his sentence is equivalent to a life sentence without parole and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article II, Section 13 of the New Mexico Constitution. He relies on *Roper* and its progeny for his argument. Whether the rationale of these cases, and in particular *Graham*, should be applied to a term-of-years sentence for the commission of multiple crimes is the preliminary question we must answer. If *Graham* applies, we must next consider whether Ira's long consecutive sentence effectively deprives him of a meaningful opportunity to obtain release by demonstrating his maturity and rehabilitation, thereby violating the prohibition of cruel and unusual punishment.

{4} Other courts are split on whether to apply *Graham* when a juvenile receives a a multiple term-of-years sentence for the commission of multiple crimes. We conclude that *Graham* applies when a multiple term-of-years sentence will in all likelihood keep a juvenile in prison for the rest of his or her life because the juvenile is deprived of a meaningful opportunity to obtain release by demonstrating his or her maturity and rehabilitation. In this case, Ira can be eligible for a parole hearing when he is 62 years old if he demonstrates good behavior under the EMDA. Therefore, based on the record before us, we conclude that Ira has a meaningful opportunity to obtain release by demonstrating his maturity and rehabilitation before the Parole Board. We find the remaining issues raised in the petition to be without merit and therefore deny the petition.

days per month upon recommendation of the classification committee and approval of the warden. . . ." NMSA 1978, § 33-2-34(A) (1988). This statute effectively provides for a fifty percent reduction in an inmate's sentence if the inmate merits that reduction through good behavior while in confinement.

I. FACTUAL AND PROCEDURAL BACKGROUND

{5} The underlying conduct for which Ira pled no contest is discussed extensively in *State v. Ira*, 2002-NMCA-037, 132 N.M. 8, 43 P.3d 359. Ira pled no contest to ten counts of criminal sexual penetration, one count of aggravated battery (great bodily harm), one count of aggravated battery against a household member, and one count of intimidation of a witness. *Id.* ¶¶ 2, 4. Ira committed these crimes when he was fourteen and fifteen years old. *Id.* ¶ 2. The victim of Ira's criminal sexual penetration and intimidation of a witness offenses was his stepsister, who was six years younger than Ira. *Id.*

{6} The district court had the discretion to invoke an adult sentence or a juvenile disposition. NMSA 1978, § 32A-2-20(A) (1996, amended 2009). The district court invoked an adult sentence because the court found that Ira was "not amenable to treatment or rehabilitation as a child in available facilities," and Ira was "not eligible for commitment to an institution for the developmentally disabled or mentally disordered." Section 32A-2-20(B)(1)-(2). The district court made these findings persuaded by the seriousness of the crimes and the effect on the young victim. The district court also noted that although Ira's lifestyle "was not one to be envied," the experts testified that Ira was "devoid of conscience and devoid of empathy for other human beings." The district court ultimately sentenced Ira to 91½ years in the custody of the New Mexico Department of Corrections.

{7} The Court of Appeals affirmed, holding that his sentence was not cruel and unusual punishment. *Ira*, 2002-NMCA-037, ¶ 1. The Court compared the gravity of Ira's offense against the severity of his sentence to determine whether the punishment was grossly disproportionate to the offense. *Id.* ¶ 19. It considered the severity of Ira's conduct, the toll of that conduct on his victim, and his lack of remorse and likelihood of committing similar acts in the future. *Id.* In light of these facts, the Court of Appeals decided his sentence was not "grossly disproportionate as to

shock the general conscience or violate principles of fundamental fairness." *Id.* It acknowledged that "the decision to sentence a child as an adult is an extreme sanction that cannot be undertaken lightly." *Id.* ¶ 20. Yet, it emphasized that "the imposition of a lengthy, adult sentence on a juvenile does not, in itself, amount to cruel and unusual punishment." *Id.*

{8} In his special concurrence, Chief Judge Bosson expressed concern over the length of Ira's sentence. Since the earliest Ira can be eligible for a parole hearing is after serving 45 years of his sentence, Chief Judge Bosson noted, "[f]or one so young, this is effectively a life sentence. One who goes into prison a teenager and comes out a man at the age of retirement has forfeited most of his life." *Id.* ¶ 45 (Bosson, C.J., specially concurring).

{9} Chief Judge Bosson also observed the irony of the sentence when compared with the underlying offenses for which Ira pled no contest, explaining that

> [i]f [Ira] had eventually killed his victim, perhaps to protect himself from prosecution for his other crimes, he could have received a life sentence as an adult, but would have become eligible for parole after a "mere" thirty years. Thus, although [he] commits crimes which, however gruesome, are less than first degree murder, he receives a sentence that is effectively fifty percent longer.

Id. ¶ 46.

{10} Ira filed a writ of habeas corpus in the district court that sentenced him pursuant to Rule 5-802 NMRA. In it he argued that (1) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment and Article II, Section 13 of the New Mexico Constitution; (2) the trial court erred in failing to set aside his plea agreement; and (3) he was denied effective assistance of counsel. The district court denied his petition. We granted certiorari pursuant to Rule 12-501 NMRA.

II. DISCUSSION

A. The Eighth Amendment Forbids a Term-of-Years Sentence That Deprives a Juvenile of a Meaningful Opportunity to Obtain Release

{11} Ira's argument that his 91½-year sentence is cruel and unusual punishment in violation of the Eighth Amendment and Section II, Article 13 of the New Mexico Constitution is a question of constitutional law, which we review de novo. *See State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61. We do not address the prohibition of cruel and unusual punishment under Section II, Article 13 because we conclude that the Eighth Amendment affords the necessary protection in this case. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (holding that when an asserted right is protected under the United States Constitution, the claim under the New Mexico Constitution is not reached).

{12} The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court looks beyond a historical interpretation of cruel and unusual punishment and instead looks to "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). The Court emphasizes that "[e]mbodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham*, 560 U.S. at 59 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The Eighth Amendment "does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime." *Graham*, 560 U.S. at 59–60 (internal quotation marks and citation omitted). Some punishments are so grossly disproportionate that the Court has imposed "categorical bans on sentencing practices based on mismatches between

the culpability of a class of offenders and the severity of the penalty." *Miller*, 567 U.S. at 470.

{13} The Supreme Court has imposed several categorical bans on juvenile sentencing. In *Roper*, the Court held that the Eighth Amendment bars the death penalty for an offender who committed his or her offense before the age of eighteen. 543 U.S. at 568. In *Graham*,[2] the Court held that the Eighth Amendment prohibits juvenile offenders from being sentenced to life without the possibility of parole for a nonhomicide offense. 560 U.S. at 74. In *Miller*, the Court held that the Eighth Amendment prohibits a State from imposing a mandatory sentence of life without parole for juvenile offenders. 567 U.S. at 470.

{14} The first issue we address is whether the analysis of juvenile sentencing in *Roper*, *Graham*, and *Miller* should be applied to multiple term-of-years sentences. Some jurisdictions have held that these cases do not reach multiple term-of-years sentences for multiple non-homicide crimes. *See State v. Kasic*, 265 P.3d 410, 411, 415–16 (Ariz. Ct. App. 2011) (holding that "*Graham* does not categorically bar the sentence[] imposed" on a juvenile offender convicted of "thirty-two felonies arising from six arsons and one attempted arson committed over a one-year period beginning when he was seventeen years of age"); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (observing that *Graham* did not include any "analysis of sentences for multiple convictions and provide[d] no guidance on how to handle such sentences"); *Vasquez v. Commw.*, 781 S.E.2d 920, 925 (Va. 2016) (holding that *Graham* is not implicated for "multiple term-of-years sentences imposed on multiple crimes that, by virtue of the accumulation, exceed[] the criminal defendant's life expectancy"); *Lucero v. People*, 2017 CO 49, ¶ 19 ("Multiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration.").

{15} Other jurisdictions reject the narrow interpretation espoused by these aforementioned courts, largely concluding that such a narrow interpretation is inconsistent with *Graham*'s requirement that a juvenile be given a meaningful opportunity for release based on the juvenile's demonstrated maturity and rehabilitation. In *Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015), the Florida Supreme Court considered whether *Graham* governed a juvenile offender's challenge to his 90-year aggregate sentence for his convictions of sexual battery while possessing a weapon, robbery, kidnapping, carjacking, burglary, and possession of marijuana. The *Henry* court applied *Graham* to the sentence reasoning that "the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term 'life in prison.'" *Id.* at 680. The Court emphasized that the differences noted in *Graham* between a juvenile and an adult, which called into question the constitutionality of a life-without-parole sentence, provide an equally compelling reason to question the constitutionality of lengthy term-of-years sentences. *Id.* And just as the *Graham* Court held that life-without-parole sentences are not justified by penological theories, 560 U.S. at 71–75, the *Henry* court held that lengthy term-of-years sentences are not justified by the penological theory of rehabilitation, which provides the "only . . . valid constitutional basis for sentencing juvenile nonhomicide offenders." 175 So. 3d at 679, 680.

{16} Other jurisdictions applying *Graham* to term-of-years sentences offer different rationales for doing so. *See State v. Boston*, 363 P.3d 453, 457 (Nev. 2015) (permitting courts to sentence a juvenile non-homicide offender "undermine[s] the [Supreme] Court's goal of 'prohibit[ing] States from making the judgment at the outset that those offenders never will be fit to reenter society'") (third alteration in original) (quoting *Graham*, 560 U.S. at 75); *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017) (reasoning

[2] Graham was arrested and plead guilty to armed burglary with assault or battery and attempted armed robbery. *Id.* at 53–54. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. *Id.* at 54. While still on probation, Graham participated in a successful home invasion and robbery, an attempted robbery, and a high speed police chase. *Id.* at 54–55.

that there is no practical difference between a juvenile who receives life without parole and a juvenile who receives "multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life"); *Budder v. Addison*, 851 F.3d 1047, 1053 n.4 (10th Cir. 2017) (interpreting *Graham* to include "*any* sentence that would deny a juvenile nonhomicide offender a realistic opportunity to obtain release, regardless of the label a state places on that sentence").

{17} Some jurisdictions have applied *Graham* when the sentence may provide for release before the juvenile's death but forecloses the opportunity for the juvenile to have a meaningful life outside of prison. *See State v. Moore*, 2016-Ohio-8288, 76 N.E.3d 1127, *cert. denied*, *Ohio v. Moore*, ___ U.S. ___, ___, 138 S. Ct. 62 (2017) (determining that a sentence that allows juvenile offenders to "breathe their last breaths" outside the prison walls is not the "meaningful opportunity" envisioned by the *Graham* Court). The Supreme Court of Connecticut articulated the same concern:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects.
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> The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046, 1047 (Conn. 2015).

{18} Some courts have held that the Eighth Amendment only requires courts to consider the constitutionality of each individual sentence as opposed to the cumulative impact of consecutive sentences, *see e.g. Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001). Other courts disagree particularly when the consecutive sentences involve juvenile offenders. *See Moore*, 2016-Ohio-8288, ¶ 73 ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a juvenile who committed the one offense or several offenses and who has diminished moral culpability."); *Budder v. Addison*, 851 F.3d 1047, 1058 (10th Cir. 2017), *cert. denied sub nom*. *Byrd v. Budder*, ___ U.S. ___, ___, 138 S. Ct. 475 (2017) ("Just as [states] may not sentence juvenile nonhomicide offenders to 100 years instead of 'life,' they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole."). The United States Supreme Court has not endorsed either view. *See State v. Buchhold,* 2007 SD 15, ¶ 30, 727 N.W.2d 816 (2007) (stating that the Supreme Court has not "provided a clear answer to [the] question" of whether the Eight Amendment proportionality review should be "confined to the sentences imposed for each individual conviction or whether it extends to the consecutive sentencing scheme."). *O'Neil v. State of Vermont*, 144 U.S. 323, 331 (1892), does not indicate anything about the Supreme Court's view on the matter. The language quoted by the dissent in this case at paragraph 53 from *O'Neil* is not a holding of the Supreme Court but is only a quote from the lower court's opinion that the Supreme Court included for context. *O'Neil*, 144 U.S. at 331. We are persuaded by the Supreme Court's rationale in *Roper*, *Graham*, and *Miller* that the cumulative impact of consecutive

sentences on a juvenile is required by the Eighth Amendment.

{19} The dissent would also limit the scope of *Graham* on the grounds that there is a significant distinction between life without parole sentences and term-of-years sentences. Diss. Op. ¶ 44. The only difference our cases have recognized is that a life sentence, unlike a term of years, lacks a discernable maximum and minimum term of imprisonment. *State v. Juan*, 2010-NMSC-041, ¶ 40, 148 N.M. 747, 242 P.3d 314. Although there is a distinction, the distinction is immaterial to an Eighth Amendment analysis under *Graham*. The *Graham* Court explained what makes a life without parole sentence severe enough to warrant the imposition of additional safeguards is the fact that the sentence "alters the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69. Similarly, a term-of-years sentence that exceeds the juvenile's life expectancy "means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the juvenile], he will remain in prison for the rest of his days." *Id.* at 70 (internal quotation marks and citation omitted). The *Graham* Court recognized that in some cases "there will be negligible difference between life without parole and other sentences of imprisonment," citing the hypothetical of a 65-year-old who is sentenced to a lengthy term-of-years sentence without eligibility for parole as an example of a sentence that would be the functional equivalent of life without parole sentence. *Id.* at 70–71.

{20} We conclude that the analysis contained within *Roper* and its progeny should be applied to a multiple term-of-years sentence. Taken together, *Roper*, *Graham*, and *Miller* reveal the following three themes regarding the constitutionality of juvenile sentencing.

{21} First, juveniles' developmental immaturity makes them less culpable than adults because juveniles have an "underdeveloped sense of responsibility," and an inability "to appreciate risks and consequences," meaning juveniles' violations are likely to be a product of "transient rashness" rather than "evidence of irretrievabl[e] deprav[ity]." *Miller*, 567 U.S. at 471, 472, 477 (alterations in original) (internal quotation marks and citation omitted).

{22} Second, juveniles have a greater potential to reform than do adult criminals which makes it essential that they have a meaningful opportunity to obtain release based on demonstrated maturity and reform. *Graham*, 560 U.S. at 75. Although the Eighth Amendment does not require a state to release juveniles during their natural lives, it prohibits states from making the judgment at the outset that juveniles will never be fit to reenter society. *Id*. The *Miller* Court emphasized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." 567 U.S. at 473. The *Graham* Court underscored that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 560 U.S. at 73 (citing *Roper*, 543 U.S. at 572).

{23} Third, no penological theory—retribution, deterrence, incapacitation, and rehabilitation—justifies imposing a sentence of life without parole on a juvenile convicted of a non-homicide crime because juveniles are less culpable and more amenable to reformation. *Graham*, 560 U.S. at 71–75.

{24} With respect to retribution, the *Graham* Court explained that "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." 550 U.S. at 71. "The heart of the retribution rationale," the Court reassured, focuses on "a criminal sentence [that] must be directly related to the personal culpability of the criminal offender." *Id.* (internal quotation marks and citation omitted). But in the case of juvenile offenders, the "case for retribution is not as strong . . . as with an adult," and "becomes even weaker with respect to a juvenile who did

not commit homicide." *Id.* (internal quotation marks and citation omitted). Thus, retribution is not proportional if the state imposes life without parole on the less culpable juvenile nonhomicide offender. *Id.* at 71–72.

{25} Deterrence was similarly insufficient to justify a life without parole sentence on a juvenile. The *Graham* Court emphasized that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Id*. at 72. (internal quotation marks and citation omitted) (omission in original). A juvenile's "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (omission in original)). As a result, juveniles are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72. Although a life without parole sentence may deter some juvenile offenders, "any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id.*

{26} Incapacitation also does not justify a life-without-parole sentence because a sentencing court would have to decide that a "juvenile offender forever will be a danger to society." *Id.* However, a sentencing court is not equipped to make such a judgment because, as the *Graham* Court explained, even expert psychologists encounter difficulty distinguishing between a crime that reflects on a juvenile's transient immaturity and a crime that reflects on a juvenile's irreparable corruption. *See id.* at 73.

{27} Rehabilitation does not support a life-without-parole sentence because it "forswears altogether the rehabilitative ideal." *Id.* at 74. The sentence reflects "an irrevocable judgment about [the juvenile offender's] value and place in society," a judgment that is inconsistent with a juvenile nonhomicide offender's "capacity for change and limited moral culpability." *Id.*

{28} Just as the *Graham* Court found no penological theory that justified the imposition of a life without parole sentence on a juvenile nonhomicide offender, we find no penological theory that supports a term-of-years sentence that in all likelihood will keep the juvenile in prison for the rest of his or her life without a meaningful opportunity to obtain release.

{29} What the *Graham* Court explained in establishing a bright-line rule prohibiting life without parole for a nonhomicide juvenile offender is that although "[a s]tate is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. The Court made clear that "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Id.* At the same time, the Eighth Amendment "does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*

{30} In this case, the district court sentenced Ira to an adult prison, stating:

> Ordinarily, the young age of the defendant would tend to influence a judge toward leniency, based upon the inference that the crimes were motivated in part by youthful impulsiveness and immaturity, and that converting a large amount of incarceration to probation will allow the youth to show that the lesson has been learned and he can now benefit rather than attack society. That analysis does not apply here, first because of the inability to convert first degree felony incarceration to probation . . . and, second, because Joel Ira is not the typical young defendant. The evidence shows that he is almost certain to be the same threat to society upon his release as he is today because humanity has not developed a way to implant a conscience once the period for its natural growth has passed.
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> This Court would like to fashion a sentence that will guarantee, or even offer hope, that Joel Ira can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.
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> This Court would like to fashion a sentence that will assure Joel Ira's victims that he will not be a serious threat to them if released before he reaches an advanced age. There is not such sentence.
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> This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likelihood that he would attempt it. To assure that result, in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.

{31} The district court relied on "the most experienced and qualified experts in the field of juvenile corrections and psychotherapy" at the time. These experts informed the court that Ira "is a child devoid of conscience and devoid of empathy for other human beings. . . ." The court further explained that

> [t]he experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that Joel Ira could defy the odds and become rehabilitated, and they found none. . . . The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if Joel Ira were released from custody.

{32} The court's sentiment that no hope existed for Ira to be rehabilitated because personalities become fixed before teenage years is of questionable neuroscientific validity since *Roper* and its progeny. There is no evidence in the record to assist this Court in determining whether indeed the experts' opinions were invalid and unreliable. The *Miller* Court assumed that juveniles as a category are immature, impetuous, and generally have a diminished capacity to avoid negative environmental influences and peer pressures. 567 U.S. at 471, 476. It held that these characteristics weigh in favor of mitigation, making the need for life sentences without parole uncommon. *Id.* at 479.

{33} The *Miller* Court recognized that some youths, despite their status as adolescents, may be different from the norm, and therefore declined to consider whether the Eighth Amendment requires a categorical ban on life without parole for juveniles. *Id*. Stated differently, the Supreme Court recognizes the need for individualized sentencing. Thus, the juvenile's attorney will introduce mitigating evidence, perhaps through a forensic mental health expert, that the juvenile conforms to developmental norms, which should dissuade the district court from imposing a sentence that in all likelihood will condemn the juvenile to prison for the rest of his or her life without a meaningful opportunity to obtain release. The prosecution will introduce evidence that the juvenile is not the norm and therefore the crime was not the product of transient developmental influences, but instead the evidence makes the juvenile that rare juvenile whose crime reflects irreparable corruption. *See id.* at 479–80.

B. Ira's Term-of-Years Sentence is Constitutional Because it Does Not Deprive Him of a Meaningful Opportunity to Obtain Release

{34} Ira does not contest the evidence introduced against him during his sentencing or habeas corpus hearing. Instead he seeks a declaration that his sentence is categorically unconstitutional because it is the functional equivalent of a life sentence without the possibility of parole. Based on the record before us, we cannot agree with this contention.

{35} In this case the district court arguably found that Ira is that rare juvenile who is irreparably corrupt. Regardless, the sentence imposed on Ira does not deprive him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Presuming that he demonstrates his good behavior, he will be parole eligible when he is approximately 62 years old. Had Ira been sentenced to 91½ years without the opportunity to reduce his sentence with good behavior, our analysis would be different. But, with demonstrated good behavior, Ira will have the opportunity to make his case before a parole board.

{36} The New Mexico Legislature enacted the Parole Board Act "to create a professional parole board." NMSA 1978, § 31-21-23 (1999). This Act provides parole board members with extensive powers and duties in exercising their authority to grant or deny parole. *See* NMSA 1978, § 31-21-25(B)(1), (2), (3) (2001) (providing that the parole board has the power to "conduct . . . investigations, examinations, interviews, hearings, and other proceedings . . . ;" and to "summon witnesses, books, papers, reports, documents or tangible things and administer oaths as may be necessary for the effectual discharge of the duties of the board"). With respect to determining an inmate's eligibility for parole, NMSA 1978, Section 31-21-10(A)(2)(2009) requires the parole board to consider all pertinent information concerning the inmate, including:

> (a) the circumstances of the offense;
> (b) mitigating and aggravating circumstances;
> (c) whether a deadly weapon was used in the commission of the offense;
> (d) whether the inmate is a habitual offender;
> (e) the [presentence and prerelease] reports filed under [NMSA 1978, Section 31-21-9 (1972)]; and
> (f) the reports of such physical and mental examinations as have been made while in an institution[.]
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> Section 31-21-10(A)(2).

{37} The parole board will be tasked with performing these duties during Ira's hearing to determine whether parole is in the best interest of society and whether Ira is able and willing to fulfill the obligations of a law-abiding citizen. *See* NMSA 1978, § 31-21-10(A)(3), (4) (2007). If he is granted parole, he will remain under the supervision of the parole board, possibly for the remainder of his life. *See* § 31-21-10.1(A)(2) (providing that a person convicted of first-degree criminal sexual penetration shall serve a period of parole up to the person's natural life).

{38} Certainly the fact that Ira will serve almost 46 years before he is given an opportunity to obtain release is the outer limit of what is constitutionally acceptable. *See People v. Contreras*, 2018 WL 1042252, at *9-10, ___ P.3d ___ (Cal. 2018) (citing cases holding that 50-year-long sentences are the functional equivalent of life without parole, and citing legislation enacted in the wake of *Graham* requiring parole as soon as 15 years but no later than 40 years after the start of the juvenile's sentence). The New Mexico Legislature is at liberty to enact legislation providing juveniles sentenced to lengthy term-of-years sentences with a shorter period of time to become eligible for a parole eligibility hearing. At the time of Ira's sentencing, a defendant sentenced to life imprisonment in a New Mexico institution would have been eligible for parole after serving a thirty-year sentence. *See* § 31-21-10(A) (1997). Whether the time frame in Section 31-21-10(A) or a shorter time frame is required by the Eighth Amendment to give juveniles a meaningful opportunity to obtain release presents an important question that we cannot answer based on the evidentiary record before us. Some studies conclude that a juvenile's brain does not fully develop until early adult years. *See* Brief for the Am. Psychol. Ass'n, Am. Psychiatric Ass'n et al. as Amici Curiae Supporting Petitioners, at 27, *Graham*, 560 U.S. 48 (No. 08-7412) ("[T]he part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles."). Perhaps evaluating the juvenile's maturity and rehabilitation once the

juvenile's brain has presumably developed is the time frame required by the Eighth Amendment, but *Roper* and its progeny are of no assistance to us, nor is the record in this case.

{39} Other jurisdictions, in the wake of *Graham,* have amended their parole eligibility time frames for juveniles. Nevada enacted such a statute in 2015 providing a juvenile offender with a parole eligibility hearing after serving fifteen years of incarceration if the juvenile was convicted of an offense that did not result in the death of a victim. *See* Nev. A.B. 267 (codified as N.R.S. 213.12135) (2015); Remarks by James Dold, Minutes of Nev. Assemb. Comm. on Jud. 7 (Mar. 27, 2015) ("In response to [*Roper*, *Graham*, and *Miller*] and the emerging juvenile brain and behavioral developmental science, several states across the country have begun to eliminate life without parole sentences for kids and create more age-appropriate and fair sentencing standards that are in line with A.B. 267."). Washington requires juvenile offenders to serve twenty years in confinement before petitioning for parole eligibility. *See* Wash. Rev. Code § 9.94A.730(1) (2015); *see also* La. Rev. Stat. § 15:574.4(D)(1)(A) (2017) (requiring juvenile offenders serving life imprisonment to serve at least twenty-five years before parole eligibility). California provides for parole eligibility after a juvenile offender serves fifteen years if the juvenile was younger than twenty-five years old when the juvenile committed the offense for which the juvenile received the longest sentence. *See* Cal. Penal Code § 3051(b)(1) (2018). The California legislature enacted this statute after the California Supreme Court interpreted *Graham* to apply to a juvenile nonhomicide offender sentenced to a term of 110 years to life. *See People v. Caballero*, 145 Cal. Rptr. 3d 286, 288 (2012). Although we consider Ira's opportunity to obtain release when he is 62 years old constitutionally meaningful, albeit the outer limit, we do not intend to discourage the legislature from adopting a shorter time period as have many other jurisdictions.

C. Ira's Remaining Claims Lack Merit

{40} Ira alleges a number of procedural errors at the district court. First, he asserts that his waiver of a preliminary hearing should not have been honored because preliminary hearings for children should not be allowed to be waived. At the time of the proceedings against Ira, Rule 10-222 NMRA governed the circumstances under which an alleged youthful offender was afforded a preliminary hearing. When Ira entered his plea, Rule 10-222 was silent about whether a child could waive a preliminary hearing. *See* Rule 10-222 NMRA (1995); *but see* N.M. Const. art. II, § 14 (recognizing that a person being held on a criminal information for a "capital, felonious, or infamous crime" may waive the right to a preliminary examination). Rule 10-222 was amended while Ira's case was pending to explicitly permit such a waiver, and this right remains available today under Rule 10-213 NMRA. *See* Rule 10-222(B) (1999) ("[A] preliminary examination will be conducted unless the case is presented to a grand jury or the child waives the right to a preliminary hearing or grand jury."); Rule 10-213(B)(1) (2014). Accordingly, we find this argument to be without merit. Second, Ira contends that he did not have a separate amenability hearing. This issue is without merit because Ira did have both an amenability hearing and a separate sentencing hearing. Third, Ira contends that he did not receive a report from the Children, Youth and Families Department (CYFD) prior to the amenability hearing required by NMSA 1978, Section 32A-2-17(A)(3) (1995, amended 2009). This issue is without merit because the children's court attorney who prosecuted the case testified that a report was prepared, although it may not have been introduced into evidence. In addition, a CYFD juvenile probation officer testified during the amenability hearing and strongly urged the children's court judge to impose adult sanctions. Fourth, Ira asserts that once the court decided to impose an adult sanction he was entitled to a predisposition report from the adult probation and parole division of the Department of Corrections as required by Section 32A-2-17(A)(3)(b). The State concedes this point but contends that Ira was not prejudiced because expert witnesses testified that no rehabilitation programs in the adult prison system were available to treat Ira. We agree with the State that Ira has not shown prejudice. *See State v. Jose S.*, 2007-NMCA-146,

¶ 20, 142 N.M. 829, 171 P.3d 768 (holding that a child must show prejudice from the court's failure to follow the statutory requirements).

{41} The fifth issue raised by Ira requires more elaboration. Ira asserts that the district court erred in failing to set aside his plea agreement because neither he, his attorney, the prosecutor nor the judge understood the sentence that could be imposed on Ira and therefore the judge initially imposed an illegal sentence on Ira. Ira argued this issue before the district court and on appeal before the Court of Appeals. *See Ira*, 2002-NMCA-037, ¶¶ 11, 35, 36. In a memorandum opinion, the Court of Appeals reversed his sentence because the district court erred in imposing adult sanctions for the five counts of criminal sexual penetration Ira committed when he was fourteen years old. *See State v. Joel I.*, No. 18,915, mem. op. at 3, 5 (N.M. Ct. App. Oct. 1, 1998) (non-precedential). At the time Ira was fourteen years old, the New Mexico Children's Code provided that a child between fifteen and eighteen years old is a "youthful offender" subject to adult sanctions when the child is charged with at least one of ten enumerated offenses, including aggravated battery and criminal sexual penetration. *See* NMSA 1978, § 32A-2-3(I)(1)(d), (g) (1995, amended 1996). Because Ira was only fourteen years old when he committed five counts of criminal sexual penetration, the district court could not impose adult sanctions with respect to those five counts. After the Court of Appeals reversed Ira's sentence, the district court resentenced him as an adult for the remaining five counts of criminal sexual penetration committed when Ira was fifteen years old, which Ira is currently serving. The Court of Appeals also rejected the arguments that the district court should have allowed Ira to withdraw his plea because of the sentencing error and the alleged ineffective assistance of counsel. Ira has had a full and fair opportunity to argue the merits of these issues and we therefore exercise our discretion to give preclusive effect to these issues. *See Duncan v. Kerby*, 1993-NMSC-011, ¶ 6, 115 N.M. 344, 851 P.2d 466 (concluding that an appellate court may exercise discretion in giving preclusive effect to an ineffective assistance of counsel claim rejected on direct appeal and subsequently raised in a habeas corpus proceeding).

III. CONCLUSION

{42} For the foregoing reasons, we affirm the district court's denial of Ira's habeas corpus petition.

{43} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Justice

BARBARA J. VIGIL,
Justice

JUDITH K. NAKAMURA,
Chief Justice (dissent in part and concur in part)

PETRA JIMENEZ MAES,
Justice (joining in dissent and concurrence)

NAKAMURA,
Chief Justice (concurring in part, dissenting in part).

{44} The categorical rule announced in *Graham* precluding states from imposing a sentence of life without parole upon juveniles convicted of a nonhomicide offense does not extend to Joel Ira. Ira perpetrated multiple nonhomicide offenses over a lengthy period of time and was sentenced to multiple term-of-years sentences to be served consecutively. *Ira*, 2002-NMCA-037, ¶ 14. There is a meaningful distinction between juveniles sentenced to life without parole for the commission of a single offense and juveniles sentenced to multiple consecutive sentences for a series of offenses committed over a period of time. This is amply illustrated by comparing Ira's case to *Commonwealth v. Donovan*, 662 N.E.2d 692 (Mass. 1996), a Massachusetts case involving a defendant who was sentenced as a juvenile

to life without the possibility of parole for a single criminal act and who was paroled in the wake of *Graham* and *Miller*. Although Donovan was convicted of a homicide offense, the comparison is still apt: Donovan committed one offense, Ira committed multiple offenses. As will become clear, this critical difference between Donovan's and Ira's cases should inform our reading of *Graham*.

{45} Joseph Donovan was seventeen years old on the night of September 18, 1992. Joseph Donovan, The Commonwealth of Massachusetts Executive Office of Public Safety, Parole Board Decision (Aug. 7, 2014) at 1-2.[3] As Donovan and two companions walked down the street in Cambridge, Massachusetts, they encountered two men. *Donovan*, 662 N.E.2d at 694. The men were Norwegian citizens studying at the Massachusetts Institute of Technology, *id.*, a fact that assuredly contributed to the significant media attention dedicated to the events which unfolded during the chance encounter. One of the two men "bumped into" Donovan and Donovan demanded an apology. *Id.* at 695. No apology was given and Donovan punched one of the men in the face, knocking him to the ground. *Id.* One of Donovan's companions then stabbed and killed the man Donovan had punched. *Id.* Donovan testified that he did not know his companion had a knife, *id.* at 695 n.3, and did not see the stabbing. *Id.* at 695. Testimony was offered that Donovan stole the stabbed man's wallet and that one of Donovan's companions stole the other man's wallet before Donovan and his companions fled from the scene. *Id.* Donovan denied participating in the robbery, but was convicted of felony murder and sentenced to life imprisonment without parole. Parole Board Decision at 1-2.

{46} Donovan was one of the first juvenile offenders in Massachusetts considered for parole in the wake of the line of cases that include *Graham* and *Miller* and which recognize that juvenile offenders are constitutionally different from adults for purposes of sentencing. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 276–77 (Mass. 2013) (discussing *Roper*, *Graham*, and *Miller* and concluding that the Massachusetts statute imposing life without the possibility of parole on juvenile offenders who commit first-degree murder is unconstitutional and holding that these juvenile offenders must be considered for parole eligibility); Parole Board Decision at 3. The parole board determined that Donovan "did not commit, intend, encourage, or foresee the stabbing that caused the victim's death." Parole Board Decision at 7. A forensic psychologist testified at the parole hearing that "Donovan was impulsive, immature, and directionless as a young person but that did not result in an early onset of violence in childhood or early teenage years." Parole Board Decision at 6. The psychologist was persuaded that Donovan has "no history of major conduct problems" and attributed Donovan's conduct on the night of September 18, 1992 to a lack of impulse control and a vulnerability to peer pressure. Parole Board Decision at 6. Donovan's parole application was granted. Parole Board Decision at 1.

{47} When Ira was fourteen to fifteen years old, he repeatedly raped his younger stepsister. *Ira*, 2002-NMCA-037, ¶ 6. The rapes occurred over a two-year period when she was eight to nine years old. *Id.* ¶ 5. In the course of the many rapes, Ira penetrated her mouth, vagina, and anus. *Id.* ¶ 6. These penetrations caused her such pain that she would scream into a pillow. *Id.* After one forcible sodomy where she screamed from the pain, Ira's penis was covered in blood from an anal tear. At other times, she nearly vomited. *Id.* Ira urinated and ejaculated into her mouth and forced her to swallow. *Id.* He frequently threatened to kill her if she alerted anyone about the rapes and one time choked her to unconsciousness. *Id.* He used subtle hand gestures—drumming or tapping his fingers on the arm of his chair—to signal to her that she would soon be raped again. *Id.*

{48} Ira was charged with ten counts of first-degree criminal sexual penetration and various other counts. *Id.* ¶ 2. He pleaded no contest to

[3] The Commonwealth of Massachusetts Executive Office of Public Safety Parole Board's Decision, Joseph Donovan is available electronically at http://www.mass.gov/eopss/docs/pb/lifer-decisions/2014/donovan-joseph-8-7-14-paroled.pdf (last visited February 27, 2018).

all of the charges except one. *Id.* ¶ 4. At sentencing, the testimony indicated that Ira did not feel remorseful about his conduct, refused to take responsibility for his actions, and believed that "he did not do anything wrong." *Id.* ¶¶ 8, 10. A mental health expert testified that Ira has "a severe conduct disorder, with tendencies towards violent sexual behavior and domination, that would require intensive, secured, long-term treatment." *Id.* ¶ 10.

{49} I offer these contrasting cases to highlight the fact that there are meaningful and self-evident distinctions between a juvenile offender like Donovan and a juvenile offender like Ira. Most critically, Donovan did not engage in repeated, violent attacks against others. He committed one violent act, which experts attributed to impulsiveness and immaturity. Ira, on the other hand, perpetrated repeated, horrific crimes over two years which experts attributed to a significant conduct disorder that manifests as a propensity for sexually violent behavior. Our understanding of the rule articulated in *Graham* should acknowledge that there are significant differences between single act and multiple act juvenile offenders. There is an abundance of legal support for the conclusion that this difference is legally salient.

{50} First, the text of *Graham* itself compels the conclusion that the rule articulated in *Graham* does not extend to Ira. In *Graham*, the Supreme Court made clear that the categorical rule announced applies only to "juvenile offenders sentenced to *life without parole* solely for a nonhomicide offense." 560 U.S. at 63 (emphasis added); *id.* at 74 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*." (emphasis added)). The Court emphasized that a sentence of "life without parole" is unique. *See id.* at 69 ("[L]ife without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability, yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences." (internal quotation marks and citations omitted)). Ira was not sentenced to life without parole; he was sentenced to five consecutive adult sentences of CSP I and one consecutive adult sentence of intimidation of a witness. *Ira*, 2002-NMCA-037, ¶ 14. Because Ira was not sentenced to life without parole, the categorical rule in *Graham* is inapplicable to him. This conclusion is not based on a constrained or overly formalistic reading of *Graham*.

{51} Justice Alito made clear in his dissenting opinion in *Graham* that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." 560 U.S. at 124 (Alito, J., dissenting). Justice Thomas pointed out, in his dissenting opinion in *Graham*, that the majority did not count juveniles "sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment)[,]" when surveying the number of juvenile offenders serving life without parole sentences in the United States—that survey revealed that there were 123 juvenile offenders serving life without parole nationwide. *Id.* at 113 n.11 (Thomas, J., dissenting). The number of juveniles with multiple, lengthy, term-of-years sentences would likely number in the thousands, and Justice Thomas's observation that these offenders were not considered by the majority in their survey strongly suggests that the majority did not intend to bring this class of juvenile offenders within the ambit of the categorical rule articulated in *Graham*.

{52} Second, a lengthy, aggregate, consecutive, term-of-years sentence for multiple offenses is not the functional equivalent of life imprisonment for a single crime. An aggregate, consecutive, term-of-years sentence for multiple offenses is just that: it is an aggregate punishment for multiple offenses. Our case law already acknowledges this important distinction. *See State v. Juan*, 2010-NMSC-041, ¶ 40, 148 N.M. 747, 242 P.3d 314 ("Life sentences have always been understood to be different from a sentence for a term of years." (alteration, internal quotation marks and citation omitted)).

{53} Third, "it is wrong to treat stacked sanctions as a single sanction. To do so produces the

ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001). Moreover, and as the Supreme Court recognized long ago, "[i]t would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life." *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892). The preceding quoted passage from *O'Neil* is dictum, but the validity of the logic underpinning the quote is persuasive and this logic has indeed persuaded courts to reject "Eighth Amendment challenge[s] to consecutive sentences." *State v. Ali*, 895 N.W.2d 237, 245 (Minn. 2017).

{54} Fourth, "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) (en banc). "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." *Id.* "[A] separate [Eighth Amendment] proportionality review must be completed for each sentence imposed consecutively, rather than considering the cumulative total of such consecutive sentences. [This is b]ecause each sentence is a separate punishment for a separate offense[.]" *Lucero*, 2017 CO 49, ¶ 23 (second alteration in original); *accord Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) ("The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes.").

{55} Fifth, "it is constitutionally permissible to punish a person who commits two, three, four or even more crimes (including murder) more severely than a person who commits a single crime." *Ali*, 895 N.W.2d at 243. Under New Mexico law, "[a] sentencing judge has discretion in determining whether sentences are to run consecutively or concurrently." *State v. Deats*, 1971-NMCA-089, ¶ 24, 82 N.M. 711, 487 P.2d 139. The sentencing judge's "discretion in this area will not be interfered with unless he has violated one of the sentencing statutes." *Id.* This Court has observed that "the imposition of separate sentences to run consecutively is lawful and violates no federally protected right." *State v. Padilla*, 1973-NMSC-049, ¶ 14, 85 N.M. 140, 509 P.2d 1335. Moreover, this Court has recognized that "imposition of multiple valid sentences to run consecutively does not, as such, constitute cruel and unusual punishment as contemplated by the Eighth Amendment to the Constitution of the United States." *Id.* ¶ 15.

{56} Sixth and finally, there are strong penological rationales to justify application of consecutive sentencing upon juveniles who commit multiple nonhomicide offenses. *Contra Graham*, 560 U.S. at 71 ("With respect to *life without parole* for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate . . . provides an adequate justification." (emphasis added) (citation omitted)). "The offender who commits two armed robberies should, all other things being equal, serve more time than the offender who commits one robbery. Concurrent sentences frustrate this objective, and consecutive sentences thus should be the rule in a just deserts model." Harvey S. Perlman and Carol G. Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 Va. L. Rev. 1175, 1220 (1979). As to deterrence, commentators have observed that "consecutive sentences are appropriate where a defendant has committed a series of heinous crimes so as not to provide a multiple offense discount which would not reflect the seriousness of a defendant's conduct." Baldwin's Oh. Prac. Crim. L. § 118:16 *Consecutive sentences* (3d ed.) (internal quotation marks and citation omitted).

{57} *Graham* is the law; juveniles convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. 575 U.S. at 74. But this proposition does not answer the issue here: whether *Graham* extends to defendants

like Ira who have committed many crimes over a period of time and who have been sentenced to multiple, consecutive, lengthy, term-of-years sentences. Policy concerns that are all but self-evident from comparison of Donovan's and Ira's cases as well as abundant, established law convinces me that the categorical rule articulated in *Graham* does not extend to Ira. Because the majority reaches the opposite conclusion, Maj. op. ¶ 4, I dissent. I concur, however, with the majority's conclusion that Ira has a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation as he will be eligible for a parole hearing at age sixty-two. Maj. op. ¶ 35. I also concur with the majority's ultimate conclusion that Ira's petition for habeas corpus should be denied. Maj. op. ¶ 42.

JUDITH K. NAKAMURA,
Chief Justice

I CONCUR:

PETRA JIMENEZ MAES,
Justice