

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRAD BOLEN a/k/a BRADLEY
CAROL BOLEN,

Plaintiff-Petitioner

v.

No. S-1-SC-40427

NEW MEXICO RACING
COMMISSION; and FABIAN
LOPEZ, Records Custodian for
New Mexico Racing Commission,

Defendants-Respondents.

**The American Civil Liberties Union of New Mexico's
Amicus Curiae Brief in Support of Petitioner Brad Bolen**

Kristin Greer Love
María Martínez Sánchez
AMERICAN CIVIL LIBERTIES
FOUNDATION OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103-0566
(505) 460-0513
kglove@aclu-nm.org
msanchez@aclu-nm.org
Counsel for Amicus Curiae

Statement of Compliance

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1. This Amicus brief was prepared using Century typeface set at a 14-point font size.
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Kristin Greer Love

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Introduction¹

The New Mexico Court of Appeals (Court of Appeals) extended quasi-judicial immunity beyond the judicial branch, enabling the New Mexico Horse Racing Commission (Respondent)—a public body of the executive branch—to evade judicial review under the New Mexico Civil Rights Act, NMSA 1978, §§ 41-4A-1 to -13 (2021), for due process violations. In doing so, the Court of Appeals has cloaked boards, commissions, and offices in the executive branch in absolute quasi-judicial immunity, shielding them from judicial review and liability for unconstitutional acts. This Court should reverse the Court of Appeals' extension of judicial immunity to the executive branch because it is not supported by the plain language of the New Mexico Constitution or the New Mexico Civil Rights Act and would inappropriately and widely shield this state's executive branch from accountability for violating the Bill of Rights, N.M. Const. art. II, §§ 1 to 24.

¹ Under Rule 12-320(C) NMRA, Amicus ACLU of New Mexico discloses that no party or party's counsel wrote this brief in whole or in part. Also, no one other than the ACLU of New Mexico contributed money to fund the preparation or submission of this brief.

The New Mexico Civil Rights Act (Civil Rights Act) does not provide absolute quasi-judicial immunity to public bodies in the state's executive branch. The Court of Appeals' Opinion is misguided and undermines the essential purpose and underlying intent that led the Legislature to pass the Civil Rights Act in the first place. This Court should reverse the Court of Appeals for three reasons. First, the New Mexico Constitution does not support absolute quasi-judicial immunity for the New Mexico Racing Commission. *See* Part I, *infra*. Second, the Court of Appeals' interpretation of the Civil Rights Act provides an absolute immunity for public bodies under the executive branch that displaces the remedy created by the Legislature as a check on unconstitutional executive power. *See* Part I, *infra*. Finally, the Court of Appeals failed to address the negative policy ramifications of its decision, potentially implicating a wide range of unconstitutional conduct. *See* Part II, *infra*. For these reasons, this Court should reverse the Court of Appeals.

Proper Notice Under Rule 12-320(D) NMRA

Under Rule 12-320(D)(1) NMRA, on August 19, 2024, the ACLU of New Mexico timely notified all parties of its intent to file a motion

seeking leave to file this *Amicus Curiae* brief. The ACLU of New Mexico timely moved and submitted this *Amicus Curiae* brief.

Argument

I. The New Mexico Constitution does not support the Court of Appeals’ grant of absolute quasi-judicial immunity for the New Mexico Racing Commission.

This Court’s “principal goal in interpreting statutes is to give effect to the Legislature’s intent.”² While the Civil Rights Act preserves “judicial immunity,”³ it does not extend that immunity to non-judicial branches. In construing the Civil Rights Act’s meaning, this Court “look[s] not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied.”⁴ The Court also “presumes that the Legislature is aware of existing case law and acts with knowledge of it.”⁵ Nothing in the plain language of the Civil Rights

² *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865.

³ NMSA 1978, § 41-4A-10 (2021).

⁴ *Jolley v. Associated Elec. & Gas Ins. Servs., Ltd.*, 2010-NMSC-029, ¶ 8, 148 N.M. 436, 237 P.3d 738 (internal quotation marks and citation omitted).

⁵ *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205 (citations omitted); *Gandydancer, LLC v. Rockhouse CGM, LLC*, 2019-NMSC-021, ¶ 21, 453 P.3d 434.

Act statute, this Court’s precedents, or the New Mexico Constitution authorizes extending judicial immunity to non-judicial public bodies.

- a. **The New Mexico Civil Rights Act only preserves judicial immunity within the judicial branch, but does not authorize judicial or quasi-judicial immunity to extend beyond their constitutional limits to the executive branch.**

The Civil Rights Act waives sovereign immunity⁶ and prohibits public bodies, or people acting on their behalf, from asserting the defense of qualified immunity.⁷ These two provisions of the Civil Rights Act do “not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity.”⁸ The Court of Appeals correctly understood that “[t]he plain language of Section 41-4A-10, read alone, functions as an affirmation of judicial immunity.”⁹

But the fact that the Civil Rights Act preserves common-law immunity defenses does not mean that every public body can assert every immunity. The Court of Appeals went beyond the common law of immunities—and beyond what this Court has ever done and the state

⁶ NMSA 1978, § 41-4A-9 (2021).

⁷ NMSA 1978, § 41-4A-4 (2021).

⁸ NMSA 1978, § 41-4A-10 (2021).

⁹ *Bolen v. New Mexico Racing Comm’n*, 2024-NMCA-056, ¶ 12, 553 P.3d 492, 496, *cert. granted sub nom. Bolen v. NM Racing Comm’n*, 2024-NMCERT-007.

Constitution permits—in extending absolute quasi-judicial immunity to a non-judicial, political body of the executive branch. In doing so, it immunized that non-judicial body from any judicial review—a power vested solely in the judicial branch. This extension of judicial immunity to the executive branch runs contrary to our state’s established separation of powers. Because New Mexico’s separation of powers does not support extending quasi-judicial immunity to non-judicial entities, this Court should reverse the Court of Appeals.

The Court of Appeals wrongly extended judicial immunity to the Racing Commission, an executive branch body, relying on inapposite case law involving the judicial branch. First, *Hunnicut v. Sewell*, one of the cases the Court of Appeals relied on, concerned a district court’s dismissal of a case against judicial bodies and judicial functionaries—the Administrative Office of the Courts, the Twelfth Judicial District Court, and John Does 11 and 12.¹⁰ The claims in *Hunnicut* arose from a children’s court proceeding.¹¹ The *Hunnicut* court correctly found that “the **court** bears the statutory responsibility in children’s court

¹⁰ 2009-NMCA-121, 147 N.M. 272.

¹¹ *Id.* at ¶ 2.

proceedings for appointing counsel, ensuring the competence of counsel, and for permitting counsel to withdraw.”¹² There, the court applied judicial immunity to the defendants because they were acting within the scope of their duties *and* within the judicial branch.¹³ But the New Mexico Racing Commission, part of the executive branch, does not operate within the judicial branch. Extending the *Hunnicut* holding—which applied judicial immunity to judicial branch bodies and judicial branch functionaries—to the Racing Commission, a public body in the executive branch, would violate the separation of powers. Moreover, *Hunnicut*’s holding would still apply to the judicial branch under the plain language of the New Mexico Civil Rights Act, which does not abrogate judicial immunity.

Second, the two other New Mexico cases the Court of Appeals relied on—*Collins ex rel. Collins v. Tabet*¹⁴ and *Kimbrell v. Kimbrell*¹⁵—involved court-appointed guardians ad litem. Because these two cases also address functionaries of the judicial branch, not the executive

¹² *Id.* at ¶ 10 (emphasis added).

¹³ *Id.* at ¶¶ 10-13.

¹⁴ 1991-NMSC-013, 111 N.M. 391, *abrogated on other grounds by State v. Mares*, 2024-NMSC-002, ¶ 17, 543 P.3d 1198 .

¹⁵ 2014-NMSC-0127, 331 P.3d 915.

branch, they are also inapposite. New Mexico courts appoint attorneys to be guardians ad litem for children as an arm of the judiciary for discrete, judicial purposes.¹⁶

New Mexico courts determine the role and purpose of the child's guardian ad litem based on the type of judicial proceeding and the related statutory and rule authority.¹⁷ And courts rely on guardians ad litem to bring facts and evidence about the child to the court. Court-appointed guardians ad litem have the “freedom ... to explore options available to the child and family,” “giv[ing] the court a wider view of the situation and provid[ing] tools to assist the judge in making a more informed decision without compromising the doctrine of judicial

¹⁶ Courts appoint guardians ad litem under the Children's Code, NMSA 1978, §§ 32A-4-1 to -34 and 32A-3B-1 to -22 (as amended through 2017), domestic relations cases, NMSA 1978, § 40-4-8 (1993), and under Rule 1-053.3 NMRA.

¹⁷ *See, e.g.*, Bruce Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 Fordham L. Rev. 1281, 1286 (1996) (observing that “[w]hen lawyers do represent children, the lawyers’ performance matters critically. Judges look to lawyers to develop options and to help select among them. The judges most likely rely on the child's representative – if the child has one – to explore and present options appropriate for the child”).

impartiality.”¹⁸ Courts appoint guardians ad litem as officers of the court to develop independent recommendations as a full party to the proceeding while representing the child’s best interests.¹⁹ As an arm of the judicial branch, guardians ad litem are granted judicial immunity because they are working in the best interests of the child *for the Court*.²⁰ *Collins* and *Kimbrell* should not be extended beyond their facts to provide absolute judicial immunity to public bodies of the executive branch that do not fall under the judicial branch.

b. The New Mexico Constitution’s separation of powers requires this Court to preserve its power of judicial review.

This Court has repeatedly held that “under separation of powers principles,” this Court has the “responsibility” to conduct judicial review of alleged violations of the New Mexico Bill of Rights.²¹ This power of judicial review “of executive and legislative acts is implicit and inherent in the common law and in the division of powers between the three

¹⁸ Tara Lea Muhlhauser, *From “Best” to “Better”: The Interests of Children and the Role of A Guardian Ad Litem*, 66 N.D. L. Rev. 633, 639 (1990).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 36, 539 P.3d 272, 285.

branches of government.”²² The New Mexico Constitution—unlike the U.S. Constitution and many other state constitutions—explicitly “mandates” the separation of powers.²³ Article III, section 1 provides,

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.²⁴

Through the separation of powers, the New Mexico Constitution vests the “judicial power” of review in this Court.²⁵

This Court has long recognized that its judicial power encompasses the review of executive and legislative acts.²⁶ New Mexico’s judicial branch has “the primary responsibility for enforcing the Constitution’s limits on government.”²⁷ “When government is

²² *Id.* (quoting *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 15, 119 N.M. 150, 889 P.2d 185).

²³ See Michael B. Browde & Ted Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. Rev. 407, 408 (1985), available at <https://digitalrepository.unm.edu/nmlr/vol15/iss3/2/>.

²⁴ N.M. Const. Art. III, § 1.

²⁵ N.M. Const. Art. VI, § 1.

²⁶ See *State ex rel. Vill. of Los Ranchos de Albuquerque*, 1994-NMSC-126, ¶ 15.

²⁷ *State v. Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431.

alleged to have threatened *any* of [the] rights [guaranteed by the New Mexico Bill of Rights or the broader state Constitution], it is the responsibility of the *courts* to interpret and apply the protections of the Constitution.”²⁸

Against this jurisprudence, the Court of Appeals’ holding would expose the New Mexico Bill of Rights to “political controversy” and make its meaning in administrative proceedings “depend on the outcome of elections.”²⁹ With each election, the composition of public bodies in the executive branch will change. And under the Court of Appeals’ ruling, politically driven decision-making by those bodies would be shielded from judicial review. The New Mexico Constitution’s separation of powers requires this Court to preserve its power of judicial review so that New Mexicans retain their right to redress if public bodies violate inalienable state constitutional rights. The Court must reverse the Court of Appeals’ holding to protect judicial review.

c. Judicial review requires the judiciary’s impartiality and independence.

²⁸ *Griego*, 2014-NMSC-003, ¶ 1 (emphasis added).

²⁹ *Van Soelen*, 2023-NMSC-027, ¶ 59 (internal citations and quotations omitted).

As a part of the power of judicial review, the New Mexico Constitution also mandates judicial impartiality and independence. It prohibits justices, judges, and magistrates from “sit[ting] in any cause” in which they have any ground for disqualification—unless “all parties” “consent” otherwise.³⁰ Having “an interest” in a “cause,” for example, is grounds for a judge or a justice to be disqualified.³¹ And for good reason. As this Court has long recognized, “a prejudiced or biased judge who tries a case would deprive the party adversely affected of due process of law”³²—another constitutional guarantee.³³

These constitutional mandates—preserving the independence and impartiality of the judiciary and ensuring due process—distinguish the judicial branch from the political branches. These mandates have also historically justified absolute judicial immunity for individual judges.³⁴ Within the constitutional separation of powers, judicial and quasi-

³⁰ N.M. Const. Art. VI, § 18.

³¹ *Id.*

³² *Beall v. Reidy*, 1969-NMSC-092, ¶ 9, 80 N.M. 444, 446, 457 P.2d 376, 378.

³³ N.M. Const. Art. II, § 18 (guaranteeing due process).

³⁴ See Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 90 (Yale 1983) (absolute judicial immunity enables judges to “free[ly] [] act upon [their] own conviction[s]” without the threat of “personal consequence”).

judicial immunity operate to preserve the independence and impartiality of the judiciary. While the Court of Appeals recognized that absolute judicial immunity serves a constitutional purpose,³⁵ it extended quasi-judicial immunity beyond the bounds of that purpose.

Absolute judicial immunity shields individual judges from personal civil liability for performing judicial acts within the scope of their constitutional duties³⁶ and for “any judicial act done within their jurisdiction.”³⁷ Put another way, absolute judicial immunity is a “[p]ersonal immunit[y]” that protects judges from being sued for their judicial rulings. Without this protection, they would be “inhibited from

³⁵ The Court of Appeals recognized, “Judicial immunity was developed to preserve the autonomy and integrity of the judiciary so that persons who are integral to the judicial process are able to perform their functions without the intimidating effect of potential lawsuits.” *Bolen*, 2024-NMCA-056, ¶ 1 (internal citation omitted).

³⁶ Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 Touro L. Rev. 473, 485 (2008) (“Judges performing judicial tasks also receive absolute immunity” but not for “administrative tasks.”) (citing *Mireles v. Waco*, 502 U.S. 9, 12-13 n.4 (1991) (“[T]his Court’s precedents acknowledge[d] ... a judge is immune from a suit for money damages.”) and *Forrester v. White*, 484 U.S. 219 (1988) (state-court judge does not have absolute immunity for non-judicial acts, such as discriminatorily firing an employee-probation officer)).

³⁷ *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535 (1868).

proper performance of their duties.”³⁸ Crucially, absolute judicial immunity—which promotes the New Mexico Constitution’s mandate for an independent, impartial judiciary—is a *personal*, official immunity that protects *individual* judges.³⁹

Absolute judicial immunity’s “cousin” is quasi-judicial immunity.⁴⁰

This Court has recognized absolute quasi-judicial immunity in narrow

³⁸ Mark D. Standridge, *Qualified Immunity-Who Needs It? Exploring the Other Constitutional, Statutory, and Common Law Immunities Available Under the New Mexico Civil Rights Act*, 54 N.M. L. Rev. 551, 560 (2024) (internal quotations and citation omitted); *see also Forrester v. White*, 792 F.2d 647, 659–60 (7th Cir. 1986) (Posner, J., dissenting) (urging that “[t]he case for granting judges absolute immunity for their judicial rulings is [] a powerful one” because “[p]eople who are scared of being sued cannot be forced to serve as judges. Nor will taxpayers raise judicial salaries high enough to compensate judges for running the grave litigation risks they would run in having to judge without immunity from liability for their rulings”), *rev’d*, 484 U.S. 219 (1988).

³⁹ *See Collins*, 1991-NMSC-013, ¶ 17 (describing the “absolute immunity enjoyed by various government officials and others in discharging their official duties”) (emphasis added); *Section 1983 Actions—Defenses: Official Immunity and Res Judicata*, 13D Fed. Prac. & Proc. Juris. § 3573.3 (3d ed.) (“Courts in the United States long recognized some form of common law immunity for government officials, particularly judges. These protections from litigation have been referred to variously as ‘official’ or ‘personal’ immunity. The policy underpinnings are clear: immunity is accorded a government actor to protect them from fearing litigation as a result of some official act. This protection enables the official to act with appropriate boldness.”).

⁴⁰ William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 116 (2022).

circumstances. It has shielded only individual guardians ad litem “acting as an arm of the court” from liability for “actions taken within the scope of [their] appointment.”⁴¹ There, the Court explained that

[t]he rationale for granting absolute immunity [was] to prevent the guardian ad litem’s work from being compromised by the threat of liability, which in turn could impair the judge’s own performance.⁴²

But this Court has also affirmed that guardians ad litem acting “outside the scope of [their] appointment” “[do] not” “enjoy[] absolute quasi-judicial immunity.”⁴³ In other words, the scope of absolute quasi-judicial immunity must not exceed the bounds of its constitutional purpose—ensuring the independence and impartiality of our state’s judiciary.⁴⁴

d. The Court of Appeals’ decision runs contrary to the established separation of powers and unconstitutionally limits judicial review.

⁴¹ *Kimbrell*, 2014-NMSC-027, ¶ 11 (cleaned up) (citing *Collins*, 1991-NMSC-013, ¶ 14).

⁴² *Id.*

⁴³ *Id.* at 12.

⁴⁴ *See, e.g.*, Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online at 122 (noting that at common law, “[e]ven as to quasi-judicial acts, immunity was further limited. It applied only to cases within the jurisdiction of the officer” and while “it is not clear how to translate this concept of jurisdiction or authority to modern-day officers[,] [] one natural possibility is to say that an official who violates the Constitution acts without authority.”)

The Court of Appeals went beyond what this Court has ever allowed for quasi-judicial immunity. This Court has never extended absolute judicial or quasi-judicial immunity to shield the executive branch and its numerous boards, commissions, committees, and other public bodies from accountability for constitutional violations. Nor should it. Absolute judicial and quasi-judicial immunity are “justified only when the danger” “is very great” that an individual person will be “deflected from the effective performance of their [judicial or quasi-judicial] duties.”⁴⁵ These narrow justifications exist only for judges or arms of the judiciary.⁴⁶ Absolute judicial and quasi-judicial immunity

⁴⁵ *Forrester*, 792 F.2d at 660 (7th Cir. 1986) (Posner, J., dissenting), *rev’d*, 484 U.S. 219 (1988).

⁴⁶ As the Court of Appeals noted below, the U.S. Supreme Court has also extended absolute immunity to agency officials “presiding at an agency hearing” and “agency officials performing certain functions analogous to those of a prosecutor”—if they operate within significant constraints imposed by the Administrative Procedure Act. *Butz v. Economou*, 438 U.S. 478, 514 (1978). The U.S. Supreme Court justified absolute immunity in that context because “the discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.” *Id.* at 515. But crucially, the Supreme Court’s extension of immunity was to *individuals*, not to governmental bodies.

“must be confined to situations where such immunity is not merely convenient but essential.”⁴⁷

Extending judicial or quasi-judicial immunity to shield a public body from judicial review and suit when it is alleged to have violated the Bill of Rights violates the New Mexico Constitution. State sovereign immunity—not absolute quasi-judicial or judicial immunity—shields state governmental bodies (as opposed to the people who work for those bodies) from suit.⁴⁸ And “a state may be sued when it consents to suit.”⁴⁹ Through the New Mexico Civil Rights Act, the state has explicitly consented to suit. It has waived sovereign immunity “for itself *or any public body* within the state.”⁵⁰

The Court of Appeals ignored the Civil Rights Act’s waiver of sovereign immunity by granting absolute quasi-judicial immunity to the New Mexico Racing Commission. This Court should not affirm a decision cloaking the Commission—and numerous boards, commissions,

⁴⁷ *Forrester*, 792 F.2d at 660 (7th Cir. 1986) (Posner, J., dissenting), *rev’d*, 484 U.S. 219 (1988).

⁴⁸ *Gill v. Pub. Emps. Ret. Bd. of Pub. Emps. Ret. Ass’n of New Mexico*, 2004-NMSC-016, ¶ 9, 135 N.M. 472, 476, 90 P.3d 491, 495.

⁴⁹ *Id.*

⁵⁰ NMSA 1978, § 41-4A-9 (2021) (emphasis added).

committees, and other public bodies in the executive branch—with an immunity reserved for people who are bound by the Code of Judicial Conduct and those they supervise.⁵¹

e. The Court of Appeals’ decision runs contrary to this Court’s judicial review precedents and undermines the judiciary’s role in interpreting and applying the New Mexico Bill of Rights.

The Court of Appeals’ decision also undermines this Court’s judicial review of administrative adjudications, contrary to this Court’s precedents. The Court of Appeals believed that the Respondent’s process had “sufficient procedural safeguards [] to control unconstitutional conduct” based on the text of the regulations governing Respondent’s process.⁵² But this Court has held that administrative adjudications require “a full, fair, and impartial hearing which conforms to the fundamental principles of due process and which includes the right to confront and cross-examine witnesses.”⁵³ Assessing the constitutionality of administrative hearings requires courts to look beyond the text of regulations and statutes and scrutinize practices.

⁵¹ Rules 21-001 through 21-406 NMRA.

⁵² *Bolen*, 2024-NMCA-056, ¶ 27.

⁵³ *See New Mexico Dep’t of Workforce Sols. v. Garduño*, 2016-NMSC-002, ¶ 39, 363 P.3d 1176, 1186.

This Court has recognized that the separation of powers permits the judiciary to delegate some of its power to public bodies in the executive branch. But it has never delegated its core functions of judicial review or constitutional interpretation. Indeed, this Court has held that “administrative adjudications must be subjected to judicial scrutiny for purposes of separation of powers to prevent unchecked power” in the non-judicial branch of government.⁵⁴ This well-settled law on the separation of powers requires this Court to reverse the Court of Appeals.

II. The Court of Appeals’ decision would unconstitutionally and absolutely immunize numerous boards, commissions, and offices in the executive branch from judicial review and civil liability for violating the New Mexico Bill of Rights.

Respondent’s statutory powers to discipline through administrative proceedings are not unique.⁵⁵ Similar powers are exercised by many other boards, commissions, and offices in the

⁵⁴ *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶ 47, 118 N.M. 470 (quoting *David v. Vesta Co.*, 45 N.M. 301, 359, 212 A.2d 345 (1965), as an example for the well-recognized requirement for “principle of check” by the judicial branch in quasi-judicial arbitration tribunals).

⁵⁵ *See* NMSA 1978, § 60-1A-11 (authorizing the Racing Commission to “grant[],” “den[y],” “revo[ke],” and “susp[en]d[]” licenses and impose fines).

executive branch.⁵⁶ A rule insulating the New Mexico Racing Commission with absolute quasi-judicial immunity from liability for violating the Bill of Rights would lead to an insulation of many other boards such as the New Mexico Medical Board,⁵⁷ the Board of Nursing Home Administrators,⁵⁸ the Board of Dental Health Care,⁵⁹ the Nursing

⁵⁶ In recent decades, boards and commissions have “proliferat[ed]” New Mexico’s executive branch. *See* N.M. Leg. Council Serv., *Inventory of Statutory Boards and Commissions* i (2021) (“This publication was first created in response to Senate Joint Memorial 46 of the 1995 legislative session, which expressed the legislature’s concern over the proliferation of boards and commissions in the executive branch.”), https://www.nmlegis.gov/publications/New_Mexico_State_Government/inventory_of_statutory_executive_boards_and_commissions_2021.pdf.

⁵⁷ *See* NMSA 1978, § 61-6-5(H), (J) (“The [Medical] [B]oard shall ... discipline licensees or deny, review, suspend and revoke licenses to practice medicine and censure, reprimand, fine and place on probation and stipulation licensees and applicants in accordance with the Uniform Licensing Act for any cause stated in the law that the board is charged with enforcing” and “shall ... have the authority to hire or contract with investigators to investigate possible violations of the Medical Practice Act.”); NMSA 1978, § 61-6-15 (authorizing Board to “refuse[], revoke[], or suspend[]” medical providers’ licenses); NMSA 1978, § 61-6-15.1 (authorizing Board to “summarily suspend or restrict a license”); NMSA 1978, § 61-6-23 (authorizing Board to “issue investigative subpoenas” before “issu[ing] [] a notice of contemplated action”).

⁵⁸ *See* NMSA 1978, § 61-13-6(C) (“The [Nursing Home Administrators] [B]oard shall ... cause the prosecution or enjoinder of all persons violating the Nursing Home Administrators Act and deny, suspend or revoke licenses in accordance with the provisions of the Uniform Licensing Act.”).

⁵⁹ *See* NMSA 1978, § 61-5A-10(F) (“The [B]oard [of Dental Health Care] and [the Dental Hygienists] [C]ommittee ... shall ... grant, deny,

Board,⁶⁰ and the Real Estate Commission.⁶¹ Even the Bicycle Racing Commission.⁶² The list goes on.

Far from having the impartiality and independence of the judiciary, many boards, commissions, and offices in the executive branch are centers of commercial, professional, and political power.⁶³ And board members and commissioners often have commercial,

review, suspend and revoke licenses and certificates to practice dentistry, dental therapy, dental assisting and, through the committee, dental hygiene and censure, reprimand, fine and place on probation and stipulation dentists, dental therapists, dental assistants and, through the committee, dental hygienists, in accordance with the Uniform Licensing Act for any cause stated in the Dental Health Care Act and the Dental Amalgam Waste Reduction Act.”).

⁶⁰ *See* NMSA 1978, § 61-3-10(G) –(H) (“The [Nursing] [B]oard ... shall ... conduct hearings upon charges related to an applicant or discipline of a licensee or the denial, suspension or revocation of a license in accordance with the procedures of the Uniform Licensing Act” and “shall cause the prosecution of persons violating the Nursing Practice Act and have the power to incur such expense as is necessary for the prosecution.”).

⁶¹ *See* NMSA 1978, § 61-29-12(A) (“[T]he [Real Estate] [C]ommission may refuse to issue a license or may suspend, revoke, limit or condition a license ...”).

⁶² *See* NMSA 1978, § 60-2D-5(D) (“The [Bicycle Racing] [C]ommission shall ... suspend or revoke licenses for violation of the law or rules and regulations of the commission.”).

⁶³ *See, e.g.,* Noah Raess & Joshua Bowling, “Racehorses, slot machines and election campaigns,” Searchlight New Mexico (Sept. 11, 2024), <https://searchlightnm.org/racehorses-slot-machines-and-election-campaigns>.

professional, and political interests intertwined with those they govern.⁶⁴

Cloaking these public bodies in judicial or quasi-judicial immunity would remove a necessary check on their political power.

The following scenarios—the first three, hypothetical; the last one, drawn from a pending New Mexico Civil Rights Act lawsuit—illustrate why extending judicial or quasi-judicial immunities to bodies in the executive branch undermines the constitutional separation of powers and New Mexicans’ state constitutional rights.

a. Hypothetical A: The Nursing Home Whistleblower

Consider New Mexico’s Nursing Home Board. The Board’s members have significant financial ties with the nursing home industry. The Board’s statute requires that three of its seven members “be nursing home administrators licensed and practicing under the Nursing Home Administrators Act for a minimum of five years and who have never been disciplined by the board.”⁶⁵ Among other duties, the Nursing Home Board is charged with receiving and investigating

⁶⁴ *Id.*; compare N.M. Const. Art. VI, § 18 (providing that “[n]o justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which ... [they] ha[ve] an interest”).

⁶⁵ *See* NMSA 1978, § 61-13-4.

complaints about nursing homes, imposing penalties for discipline, and suspending and revoking licenses.⁶⁶

Suppose a licensed nursing home owner is concerned that the Nursing Home Board is not investigating sworn complaints about her competitors' nursing homes. The nursing home owner—who prides herself on her nursing home's high standards of care—goes to a newspaper to complain about the Board's failure to investigate the complaints against her competitors. She also mentions that some of the competitors with uninvestigated complaints have commercial ties to the Nursing Home Board members—which may raise a conflict of interest.

After the newspaper publishes an article on the backlog of complaints, quoting the nursing home owner, the Nursing Home Board members are offended. One decides to retaliate. The Board member files a complaint against the nursing home owner, alleging that she has

⁶⁶ See 16.13.17.8 NMAC (authorizing the Nursing Home Board to receive sworn complaints); 16.13.17.9 NMAC (mandating that the Board “cause an investigation to be made into the subject complaint by the board’s standards of practice committee” “[u]pon receipt of the sworn complaint against a board-licensee”); 16.13.17.12 NMAC (authorizing Board to “impose penalties in disciplinary matters); and NMSA 1978, § 61-13-6(C) (authoring Board to suspend or revoke licenses).

committed an act of “gross incompetence”⁶⁷ The Nursing Home Board launches an investigation. Although the investigation shows the complaint is unsupported, the Nursing Home issues a Formal Letter of Reprimand.⁶⁸ The Formal Letter is public record and harms the nursing home owner’s business.⁶⁹

The nursing home owner wishes to bring a claim in New Mexico state court to vindicate her free speech rights and hold the Nursing Home Board accountable under Section 17 of the state Bill of Rights and the New Mexico Civil Rights Act.⁷⁰ Under the Court of Appeals’ decision, the Nursing Home Board asserts absolute quasi-judicial immunity as a defense to the owner’s claim.

b. Hypothetical B: The Anti-Competitive Realtor

Real estate commission rules recently changed.⁷¹ A licensed New Mexico real estate broker decides to cut his rates to drum up more

⁶⁷ *See* 16.13.18.9 NMAC (describing gross incompetence as grounds for disciplinary action by the Nursing Home Board).

⁶⁸ *See* 16.13.18.12 NMAC (authorizing Board to issue formal letters of reprimand subject to the provisions of the Uniform Licensing Act).

⁶⁹ *See id.*

⁷⁰ *See* N.M. Const. Art. II, § 17; NMSA 1978, § 41-4A-3 (authorizing a claim for a violation of rights secured by the state Bill of Rights).

⁷¹ *See* Debra Kamin, “Buying or Selling a Home? The Rules Have Changed,” N.Y. Times (Aug. 16, 2024),

business. A competitor is not happy with the broker's rate cut. The competitor files a complaint with the Real Estate Commission, wrongly claiming that the real estate broker "made false promises" to his clients.⁷²

The Real Estate Commission has deep ties to the real estate industry. By New Mexico statute, five of the six Real Estate Commission members must "have been associate brokers or qualifying brokers licensed in New Mexico."⁷³ Three of the Real Estate Commission members are close friends with the competitor who filed the false complaint. The Real Estate Commission investigates the complaint, but does not allow the accused real estate agent to exercise his right to answer it or to provide "relevant documentary evidence."⁷⁴ Instead, the Real Estate Commission gives him a choice: he can accept

https://www.nytimes.com/2024/08/16/realestate/home-buyers-sellers-rules.html?unlocked_article_code=1.KE4.Uz47.FiZTqY3CihzN&smid=url-share.

⁷² See NMSA 1978, § 61-6-12(A)(2) (providing that a licensee who has "made false promises through agents, salespeople, advertising, or otherwise" is subject to the suspension or revocation of their license by the Real Estate Commission).

⁷³ See NMSA 1978, § 61-29-4 (creating the New Mexico Real Estate Commission).

⁷⁴ See 16.61.36.9 NMAC.

an undesirable settlement of the baseless complaint or the Commission will refer him to the New Mexico Attorney General's office for a notice of contemplated action. That contemplated action could result in the revocation of his license.

Two years pass. After he finally resolves the baseless complaint, he sues the Real Estate Commission for its many due process violations.⁷⁵ But the Real Estate Commission blocks his New Mexico Civil Rights Act suit, asserting quasi-judicial immunity.

c. Hypothetical C: The Anti-Abortion Medical Board

A future governor and attorney general want to attack reproductive health care in New Mexico. Following the playbook of anti-abortion governors and attorneys general in other states, they target New Mexico health care providers.⁷⁶ Their targets are providers who

⁷⁵ See N.M. Const. Art. II, § 18.

⁷⁶ See, e.g., Ava Sasani & Sheryl Gay Stolberg, "Indiana Attorney General Asks Medical Board to Discipline Abortion Doctor," N.Y. Times (Nov. 30, 2022), https://www.nytimes.com/2022/11/30/us/indiana-attorney-general-abortion-doctor.html?unlocked_article_code=1.KE4.gyLv.UmLbL5_lIDo1&smid=url-share; Brendan Pierson, "Texas AG threatens to prosecute doctors in emergency abortion," Reuters (Dec. 7, 2023), <https://www.reuters.com/legal/texas-judge-allows-woman-get-emergency-abortion-despite-state-ban-2023-12-07>; ACLU of Idaho, "Idaho Attorney General Prohibits Out-of-State Referrals for Abortion;

provide services including in vitro fertilization and other assisted reproduction, contraception, and abortion care. With absolute quasi-judicial immunity insulating the Racing Commission—and, by extension, the Medical Board—they would have a pathway to do it. After appointing one or more anti-abortion Medical Board members,⁷⁷ our future governor calls on anti-abortion activists to lodge complaints against reproductive health care providers in the state.⁷⁸ And the attorney general calls on the Medical Board to investigate the complaints.

One of the anti-abortion activists sends an anonymous complaint to the Medical Board, targeting an abortion-care provider.⁷⁹ The

Health Care Providers Sue” (April 5, 2023), <https://www.acluidaho.org/en/press-releases/idaho-attorney-general-prohibits-out-state-referrals-abortion-health-care-providers>.

⁷⁷ See NMSA 1978, § 61-6-2(B) –(D) (authorizing governor to appoint Medical Board members); *see also* Madison Pauly, “Medical Boards That Can Strip Abortion Providers of Licenses Are Stacked With Republican Donors,” Mother Jones (Aug. 11, 2022), <https://www.motherjones.com/politics/2022/08/medical-boards-that-can-strip-abortion-providers-of-licenses-are-stacked-with-republican-donors>.

⁷⁸ See 16.10.6.8 NMAC (“A complaint may be filed against a physician, physician assistant, anesthesiologist assistant, genetic counselor, or polysomnographic technologist. All complaints must be in writing.”).

⁷⁹ See New Mexico Medical Board, “Complaint Instructions,” <https://nmrldpi.my.site.com/nmmb/s/public-complaint>. (“The Board DOES accept complaints from persons wishing to remain

complainant alleges that the provider is being treated for generalized anxiety disorder. The anonymous complaint sets in motion a Kafkaesque investigation and disciplinary proceeding—with the Medical Board serving as police, prosecutor, judge, and jury.

During the investigation, the Medical Board demands the provider’s personal medical and therapy records, claiming that the provider may be “mentally incompetent” and unable to safely practice medicine.⁸⁰ The Medical Board threatens that if the provider does not comply, it will summarily suspend her license.⁸¹

The provider publicly speaks out against the governor, attorney general, and Medical Board. She says that the investigation is baseless and is an attack on reproductive health care in New Mexico. The Medical Board informs the provider that her public comments during an ongoing investigation amounted to “conduct unbecoming in a person

anonymous, but they will be reviewed prior to any initiation of an investigation to determine merit.”) (bolded and all-caps font appear in the original text).

⁸⁰ See 16.10.6.12 NMAC (authorizing the board to issue investigative subpoenas); NMSA 1978, § 61-6-15(D)(25).

⁸¹ NMSA 1978, § 61-6-15.1 (authorizing the board to summarily suspend or restrict licenses).

licensed to practice or detrimental to the best interests of the public.”⁸² Based on these comments, the Medical Board determines that the provider “poses a clear and immediate danger to the public health and safety” if she “continues to practice.”⁸³ The Medical Board suspends her license.

Years later, the provider’s license is restored. But when she sues the Medical Board for violations of her rights under the New Mexico Bill of Rights, the Medical Board asserts absolute quasi-judicial immunity.

d. Pavelock v. Medical Board⁸⁴

The following alleged facts are drawn from Dr. Pavelock’s First Amended Complaint, which alleges a Medical Board disciplinary ordeal riddled with due-process and equal protection violations.⁸⁵ Within days of receiving an anonymous complaint about Dr. Pavelock, the Medical Board launched an investigation based on her alleged excessive alcohol

⁸² NMSA 1978, § 61-6-15(D)(25).

⁸³ NMSA 1978, § 61-6-15.1.

⁸⁴ The facts in this scenario are alleged by Dr. Natalie Pavelock in her pending New Mexico Civil Rights Act lawsuit in the First Judicial District. *See* First Amend. Compl., *Pavelock v. New Mexico Medical Board*, D-101-CV-2022-00979 (1st Jud. Dist. Ct., Sept. 3, 2024).

⁸⁵ *Id.*

use. Despite its investigation showing she was fit for duty, the Medical Board referred Dr. Pavelock for a Medical Board prosecution. The prosecution had few effective procedural guardrails, despite Medical Board statutes and regulations requiring them.⁸⁶ For example, the Medical Board appointed a hearing officer who had served as its counsel and failed to disclose this fact to Dr. Pavelock. Dr. Pavelock unknowingly faced a prejudiced hearing officer.⁸⁷

Months later, Dr. Pavelock endured a multi-day evidentiary hearing where the Medical Board failed to prove the allegations in the anonymous complaint. During the evidentiary hearing, a previously

⁸⁶ *See, e.g.*, NMSA 1978, § 61-6-15 (requiring the Medical Board to conduct license suspension proceedings “as required by the Uniform Licensing Act or the Impaired Health Care Provider Act”); §§ 61-7-3 through -4 (requiring the Medical Board to “appoint an examining committee” if it “has reasonable cause to believe that a health care provider ... is unable to practice with reasonable skill and safety to patients” because of a “mental illness,” “physical illness,” or “habitual or excessive use of drugs”); 16.10.5.1–16.10.5.16 NMAC (“disciplinary powers”); and 16.10.6.1–16.10.6.30 NMAC (“complaint procedure and institution of disciplinary action”).

⁸⁷ What’s more, a hearing officer “may be a member or employee of the board or any other person designated by the board in its discretion.” NMSA 1978, § 61-1-7 (2023). When hearing officers are paid employees of professional licensing boards—as Medical Board hearing officers are—they may have perverse incentives. If they rule against the board that pays them, they may not be invited back to serve as a hearing officer again.

undisclosed expert witness testified that excessive alcohol use depends on a person's sex. Women, the expert testified, "are sort of allowed one drink per day or seven drinks per week." But they cannot "have three drinks in a day or [more than] seven alcoholic drinks in a week." That would be excessive, the expert opined. Men, on the other hand, the expert claimed, cannot have more than "two drinks per day or 14 drinks per week." The expert did not know Dr. Pavelock's height, weight, or metabolism, but used a discriminatory standard to opine that she drank excessively because she had admitted to drinking two bottles of wine per week—about 1.4 drinks per day. When the provider's counsel tried to ~~cross~~-examine the expert about this discriminatory standard, the hearing officer ordered the counsel to move on.

Following the hearing, the hearing officer issued a report exonerating Dr. Pavelock.⁸⁸ Nevertheless, the Medical Board issued a Decision and Order finding that she violated the Medical Practice Act

⁸⁸ The hearing officer found no evidence that Dr. Pavelock had ever consumed alcohol while working. Nor had she ever been impaired by alcohol on the job. The provider had never harmed a patient—nor had she ever done anything to undermine a patient's safety. *See* First Amend. Compl., *Pavelock v. New Mexico Medical Board*, D-101-CV-2022-00979 (1st Jud. Dist. Ct., Sept. 3, 2024).

and was subject to discipline. The Medical Board's decision relied on the expert's testimony about the discriminatory standard for excessive alcohol use. The Medical Board eventually suspended her license to practice.

Dr. Pavelock successfully challenged the Medical Board's suspension in state district court. In a declaratory judgment, the district court found that the Medical Board exceeded its statutory authority and voided the Medical Board's order that had suspended Dr. Pavelock's license. Then the Medical Board imposed a new suspension on Dr. Pavelock. The state district court again found that the suspension was not in accordance with the law. But these favorable decisions did not make Dr. Pavelock whole. So Dr. Pavelock is pursuing the pending New Mexico Civil Rights Act suit. Her ability to seek injunctive relief or to "recover actual damages" for the many "deprivation[s]" of her rights would be imperiled if the Medical Board could assert quasi-judicial immunity—leaving her without a meaningful remedy.⁸⁹

⁸⁹ See NMSA 1978, § 41-4A-3 (providing for "an action to establish liability and recover actual damages and equitable or injunctive relief"

These scenarios illustrate just some of the dangers of immunizing public bodies in the executive branch with absolute judicial or quasi-judicial immunity. These personal immunities should be limited by the bounds of their constitutional purpose—to preserve the independence and impartiality of the judiciary—not to shield public bodies in the executive branch from accountability through judicial review.

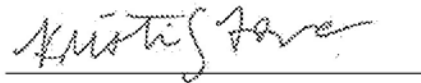
Conclusion

The New Mexico Racing Commission—and all public bodies—must operate within the bounds of the New Mexico Bill of Rights and the broader Constitution. When public bodies—or the people working for them—violate the Bill of Rights, New Mexicans must have a remedy against the public bodies. The New Mexico Civil Rights Act supplies it. But the Court of Appeals extended absolute quasi-judicial immunity—an immunity rooted in the judicial branch—to shield political bodies in the executive branch from liability and judicial review for violating the Bill of Rights. The decision is unsupported by the New Mexico Constitution and would wrongly immunize boards, commissions, and

from “[a] public body” that has deprived them of rights under the Bill of Rights).

offices in this state's executive branch for constitutional violations. For these reasons, the ACLU of New Mexico urges this Court to reverse the Court of Appeals and remand this case to the District Court for further proceedings.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kristin Greer Love", is written over a horizontal line.

Kristin Greer Love
María Martínez Sánchez
AMERICAN CIVIL LIBERTIES
FOUNDATION OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103-0566
(505) 460-0513
kglove@aclu-nm.org
msanchez@aclu-nm.org
Counsel for Amicus Curiae