

IN THE NEW MEXICO SUPREME COURT
Supreme Court No. S-1-SC-40427

BRAD BOLEN, a/k/a Bradley
Carrol Bolen,

Petitioner-Appellee,

v.

NEW MEXICO RACING COMMISSION, and
Fabian Lopez, records custodian for New Mexico
Racing Commission,

Respondent-Appellant.

BRIEF IN CHIEF OF
PETITIONER BRAD BOLEN

Appeal from the Second Judicial District Court
The Hon. Joshua Allison
District Court No. D-202-CV-202106917
Court of Appeals No. A-1-CA-41120

Respectfully submitted,

L. Helen Bennett
Attorney at Law
P.O. Box 4305
Albuquerque, NM 87196-4305
(505) 321-1461
hbennett@swcp.com

Attorney for Petitioner Brad Bolen2

ORAL ARGUMENT IS REQUESTED.

TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities.....	4
Nature of the Case	6
Introduction and Summary of Argument.....	6
Material Facts	7
Disposition by District Court.....	11
Disposition by Court of Appeals	12
ARGUMENT AND AUTHORITIES	14
Question Presented: Is judicial immunity a defense available to public bodies sued under the New Mexico Civil Rights Act (CRA), NMSA 1978, §§41-4A-1 to -13?.....	14
Standard of Review	14
Preservation	15
Argument and Authority.....	15
The New Mexico Civil Rights Act.....	15
A. The Court of Appeals' Decision Unnecessarily Expands the Application of Judicial Immunity.....	20
B. Judicial immunity should not apply where the bringing of the judicial proceeding is itself alleged to be the constitutional violation.....	27
Conclusion	29
Oral Argument Request	30

Signatures 31
Certificate of Service 31

STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This brief contains fewer than the 35 pages permitted by Rule 12-318 NMRA. Counsel used Microsoft Word for iMac with a proportionally spaced Times New Roman typeface in 14 point font. The body of the document consists of 6,404 words total.

TABLE OF AUTHORITIES

New Mexico Case Authority:

<i>Baker v. Hedstrom</i> , 2013-NMSC-043, 309 P.3d 1047	20
<i>Bolen v. NMRC</i> , 2024-NMCA-056, ___ P.3d ___	13-14, 29, 30
<i>City of Albuquerque v. Chavez</i> , 1997-NMCA-054, 123 N.M. 428	11, 23
<i>Hovet v. Allstate Ins. Co.</i> , 2004-NMSC-010, 135 N.M. 397.....	15
<i>Hunnicuttt v. Sewell</i> , 2009-NMCA-121, 147 2 N.M. 272.....	10
<i>Johnson v. Laly</i> , 1994-NMCA-135, 118 N.M. 795.....	11, 23
<i>Kaiser v. DeCarrera</i> , 1996-NMSC-050, 122 N.M. 221.....	20
<i>Lowrey v. Castillo/Argueta</i> , 2024-NMCA-034, 545 P.3d 1208.....	10
<i>Marbob Energy Corp. v. NMOCC</i> , 2009-NMSC-013, 146 N.M. 24	15
<i>Roth v. Thompson</i> , 1992-NMSC-011, 113 N.M. 331.....	14
<i>State ex rel. Helman v. Gallegos</i> , 1994-NMSC-023, 117 N.M. 346.....	20
<i>State v. Moncayo</i> , 2022- NMCA-067, 521 P.3d 120.....	21
<i>United Rentals v. Yearout</i> , 2010-NMSC-030, 148 N.M. 426	19
<i>Valdez v. State</i> , 2002-NMSC-028, 132 N.M. 667	16
<i>Whitely v. NM State Pers. Bd.</i> , 1993-NMSC-019, 115 N.M. 308.....	20

New Mexico Statutes and Rules:

New Mexico Constitution Article II, Section 17	9
New Mexico Constitution Article II, Section 18	9
Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 through -12.....	10
NMSA 1978, § 39-3-4.....	12
New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30.....	16
NMSA 1978, § 41-4-12	16
New Mexico Civil Rights Act, NMSA 1978, §§ 41-4A-1 to -13.....	6, 14, 15
NMSA 1978, § 41-4A-1	9
NMSA 1978, § 41-4A-2	17
NMSA 1978, § 41-4A-3	16, 17, 21, 24
NMSA 1978, § 41-4A-4	17, 18
NMSA 1978, § 41-4A-8	18
NMSA 1978, § 41-4A-9	17
NMSA 1978, 41-4A-10	11, 14, 17, 18, 20, 22, 25
New Mexico Horse Racing Act, NMSA 1978, §§ 60-1A-1 to -30	7
§16.47.1.8(A) NMAC.....	7, 8

Authority from Federal or Sister Jurisdictions:

42 U.S.C. Section 1983 11, 15, 16, 27
Alkire v. Irving, 330 F.3d 802 (6th Cir.2003)..... 26
Boyd v. Carroll, 624 F.2d 730 (5th Cir. 1980)..... 9
Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108 (1983)..... 24
Burge v. Parish of St. Tammany, 187 F.3d 452 (5th Cir.1999)..... 27
Butz v. Economou, 438 U.S. 478, 514 (1978) 13, 25
Commonwealth v. ELM Med., 596 N.E.2d 376 (Mass. App. 1992)..... 20
Cooney v. Park Cnty., 792 P.2d 1287 (Wyo. 1990) 29
Cooney v. White, 501 U.S. 1201, 111 S. Ct. 2820 (1991)..... 29
Gallegos v. BernCo Comm's, 278 F. Supp. 3d 1245 (D.N.M.2017) 22, 23
Gerhardt v. Mares, 179 F. Supp. 3d 1006 (D.N.M. 2016)..... 13
Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991) 27
Horwitz v. CO Bd.Med.Exam., 822 F.2d 1508 (10th Cir. 1987) 11, 13, 23
Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976)..... 24
Johnson v. Kegans, 870 F.2d 992 (5th Cir.1989)..... 27
Kelsey v. Withers, 718 F. App'x 817 (11th Cir. 2017)..... 10
Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985) 26
Lee v. Oregon ex rel. OregonRC, 4 F. App'x 490 (9th Cir. 2001) 26
Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286 (1991) 22
Monell v. NYCDSS, 436 U.S. 658, 98 S.Ct. 2018 (1978))..... 26
Moss v. Kopp, 559 F.3d 1155 (10th Cir. 2009) 24
Roberts v. Cuthpert, 893 S.E.2d 73 (Ga. 2023)..... 9
Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990). 25
Turner v. Houma Mun. Fire & Police, 229 F.3d 478 (5th Cir. 2000)..... 25
Turney v. O'Toole, 898 F.2d 1470 (10th Cir. 1990) 24
Valdez v. City & Cnty. of Denver, 878 F.2d 1285 (10th Cir. 1989) 24
VanHorn v. Oelschlager, 502 F.3d 775 (8th Cir. 2007)..... 26

Other Authority:

Vanzi, L. & Rutkowski, R.,
The New Mexico Civil Rights Act: Look Before You Leap,
54 N.M. L. Rev. 363, 375 (2024) 18, 19

NATURE OF THE CASE

Proceedings in the district court considered Plaintiff-Appellee-Petitioner Brad Bolen's allegations against Defendant-Appellant-Respondent New Mexico Racing Commission (NMRC) for violations of Mr. Bolen's civil rights under the New Mexico Civil Rights Act (CRA), NMSA 1978, §§ 41-4A-1 to -13.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Bolen sued the NMRC for its employees' and agents' retaliatory actions that led the employees to bring an unfounded disciplinary proceeding against him, after he engaged in non-threatening verbal advocacy to obtain a license for one of his assistants. The purpose of absolute or quasi-judicial immunity is to protect people, not entities. An entity like the NMRC acts only through people. If those people make mistakes, they are entitled to immunity—either qualified or absolute, depending on the circumstances—but that immunity does not extend to the entities they serve. Where, as here, the actions complained of arose, not in the context of a judicial or quasi-judicial proceeding, but in bringing that proceeding in the first instance, quasi-judicial or absolute judicial immunity is unwarranted.

The district court correctly identified the policy rationale behind judicial immunity and rejected NMRC's demand that its liability be precluded by a doctrine meant to protect individuals sued in their individual capacity.

The court of appeals created a new absolute and quasi-judicial immunity for public bodies - as distinct from individuals - that renders the CRA ineffective to address the constitutional deprivations and violations alleged to have been committed by any "public body" in New Mexico that sits in a quasi-adjudicatory capacity, regardless of whether the adjudicatory functions were the situs of the injury. The court of appeals' effort to create immunity from a legislative enactment that was intended to provide claimants with a way to address constitutional violations was ill-considered and should be reversed.

MATERIAL FACTS

Mr. Bolen sued the NMRC alleging that the NMRC acted in violation of Mr. Bolen's free speech and due process rights when it commenced a disciplinary proceeding against Mr. Bolen after he advocated for an employee. **[RP 77-95]**

NMRC is an administrative agency created by the Horse Racing Act to regulate the sport and industry of horse racing. *See* NMSA 1978, §§ 60-1A-1 to -30. Pursuant to the Horse Racing Act, no person may engage in horse racing unless licensed by NMRC. *See* §16.47.1.8(A) NMAC (stating "[a] person as defined by 15.2.1.7 NMAC shall not participate in pari-mutuel racing under the jurisdiction of the commission or be employed by an association who is a gaming operator, without a valid license issued by the commission"). Mr. Bolen is a horse trainer in New Mexico, and as such he is required to be licensed by the NMRC. **[RP 77-78]**

The case arose following a verbal dispute between Mr. Belen and a chief steward over the reinstatement of the license of an assistant trainer that Mr. Bolen wished to employ. **[RP 77-95; 198; 207-208]** Upon learning that an assistant trainer's license would not be reinstated following a lengthy suspension **[RP 202]**, Mr. Bolen contacted the chief steward and advocated for the reinstatement of the assistant's license. **[RP 77-95]** While there was testimony that Mr. Bolen "was very demanding. He was rude. Very high voice. You know, sounded a bit agitated[,]" Mr. Bolen did not use foul language, and the conversation was telephonic. **[RP 198; 204-205; 207-210]** Mr. Bolen's verbal advocacy for his assistant to receive a trainer's license was characterized as "inappropriate." **[RP 198-199; 208-209]** It is undisputed that Mr. Bolen was critical of the chief steward's performance during their dispute. **[Id.; RP 308-309]**

Based on Mr. Bolen's actions in criticizing the steward, NMRC initiated administrative disciplinary proceedings against Mr. Bolen, alleging violations of §16.47.1.8(L)(1)(i) NMAC, which allow the NMRC to discipline licensees whose "conduct or reputation may adversely reflect on the honesty and integrity of horse racing or interfere with the orderly conduct of a race meeting." The board of stewards held a hearing on the matter **[RP 137]** and ruled that Mr. Bolen had violated §16.47.1.8(L)(1)(i) NMAC. **[RP 135]** The board issued a \$500 fine, which was immediately waived and would be completely abated so long as Mr.

Bolen had no subsequent violations for a year. **[*Id.*]** Mr. Bolen appealed, seeking an independent review by an independent hearing officer. **[RP 136]**

Mr. Bolen claimed that NMRC's act of instituting the administrative disciplinary proceedings was retaliatory and was meant to punish him both for the content of his speech to the steward and for his acts of petitioning the steward on behalf of his assistant. Therefore, Mr. Bolen filed suit in district court under the CRA, § 41-4A-3, alleging that the NMRC had retaliated against him by pursuing a vindictive prosecution against him, violating his rights under article II, § 17 (guaranteeing freedom of speech) and § 18 (protecting due process) of the New Mexico Constitution. **[RP 77-95]** Mr. Bolen subsequently dismissed his administrative appeal and pursued the instant matter in district court under the CRA. **[RP 257]** The district court denied Mr. Bolen's request for a preliminary injunction. **[RP 216-217]**

The NMRC's answer to Mr. Bolen's complaint asserted three affirmative defenses: 1. failure to state a claim, 2. lack of ripeness for adjudication, and 3. mootness.¹ **[RP 96-97]** NMRC filed a motion to dismiss, which was withdrawn without a decision. **[RP 126-138; 178]**

¹ Although not argued below, courts have held that failure to plead judicial immunity as an affirmative defense waives the defense. *See, e.g., Boyd v. Carroll*, 624 F.2d 730, 732–33 (5th Cir. 1980) (holding the failure to plead judicial immunity waived the affirmative defense citing Fed.R.Civ.P. 8(c)); *Roberts v. Cuthpert*, 893 S.E.2d 73, 80 (Ga. 2023) (defense of judicial immunity is an

Mr. Bolen filed a motion for summary judgment requesting judgment as a matter of law on his claims for violation of his rights secured by §17 and §18, and on his claims that the NMRC had violated the response mandates of the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 through -12. **[RP 180-213]** The NMRC responded, alleging, *inter alia*, that the NMRC was "absolutely immune from suit." **[RP 231]**

The NMRC filed a competing motion for summary judgment, asserting quasi-judicial immunity as a complete defense to the claims brought against it by Mr. Bolen. **[RP 268; 272-274]** Quasi-judicial immunity extends judicial immunity "to various persons whose adjudicatory functions or other involvement with the judicial process have been thought to warrant protection from harassment, intimidation, or other interference with their ability to engage in impartial decision-making." *Hunnicut v. Sewell*, 2009-NMCA-121, ¶ 8, 147 2 N.M. 272; *see also Lowrey v. Castillo/Argueta*, 2024-NMCA-034, ¶ 9, 545 P.3d 1208. Such persons are absolutely immune from liability for their actions taken in performance of their roles as integral parts of the judicial process." *Hunnicut*, 2009-NMCA-121, ¶ 9.

affirmative defense that can be waived); *Kelsey v. Withers*, 718 F. App'x 817, 821–22 (11th Cir. 2017) (stating that “judicial immunity can be waived entirely”).

Disposition by the District Court

The district court heard the matter of the competing summary judgment motions on August 16, 2022. [TR. 8/126/22] The court's memorandum opinion and order on competing motions for summary judgment was entered April 27, 2023. [RP 383-393] The court denied Mr. Bolen's motion concerning alleged IPRA violations. [RP 383; 391-392] Regarding NMRC's immunity claims, the district court stated:

The Commission points to Section 41-4A-10 of the CRA in support [for its immunity claim], which provides that the waiver of sovereign immunity "shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity."

The Commission argues that two types of immunity may be at issue here: (1) quasi-judicial; and (2) prosecutorial. This is because the Commission functions both as prosecutor in determining whether to bring a disciplinary proceeding against someone, and as the fact-finder and adjudicator of that person's guilt or innocence. In other words, the Commission is both the prosecutor and the court. Thus, two possible immunities could apply. *See, e.g., City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶ 17, 123 N.M. 428 (providing that the City's personnel hearing officers who hear grievances under the City's Merit System Ordinance are immune from damages under [42 U.S.C.] Section 1983 because they are effectively functioning as a court of law). *See also Johnson v. Laly*, 1994-NMCA-135, ¶ 1, 118 N.M. 795 (describing prosecutorial immunity from Section 1983 lawsuits for damages).

Here again, the Court finds significant differences between the claims for relief that are not allowed under Section 1983 and those that are allowed under our Civil Rights Act. The immunities available under Section 1983 are based in public policy that protects an individual defendant from personal liability for damages. *See, e.g., Horwitz v. State Bd. of Medical Examiners of the State of Colorado*, 822 F.2d 1508, 1515 (10th Cir. 1987) (holding that board members who performed statutory functions both adjudicatory and prosecutorial in nature are entitled to absolutely immunity "from damages liability" under Section 1983 because "[p]ublic policy requires that officials

service in such capacities be exempt from personal liability" (emphasis added)).

Under our Civil Rights Act, however, this public policy is not at issue. Claims under the CRA may only be brought against the public body, and "[a]ny public body named in an action filed pursuant to the [CRA] shall be held liable for conduct of individuals acting on behalf of, under color of[,] or within the course and scope of the authority of the public body." NMSA 1978, § 41-4A-3(C) (2021).

Individuals are simply not liable for damages under our CRA. Indeed, Plaintiff here has named only the Commission as the Defendant and is not seeking any personal liability against any commissioner, employee, or agent of the Commission. Thus, the quasi-judicial/adjudicatory and prosecutorial immunities that would otherwise shield individuals from being personally liable for damages under Section 1983 are inapplicable. The Commission is therefore not immune from suit.

[RP 389-390] The court granted Mr. Bolen's motion for summary judgment in part, and denied NMRC's motion for summary judgment, concluding that judicial immunity applies to individuals, not corporate bodies. **[RP 389-390]** Believing there to be a "substantial ground for a difference of opinion," the district court certified the "Civil Rights Act claim issue" for interlocutory appeal under NMSA 1978, § 39-3-4. **[RP 384; 392]** NMRC filed an application for interlocutory appeal and petition for writ of error to the court of appeals, which granted and consolidated both matters. **[RP 397]**

Disposition by the Court of Appeals

The court of appeals noted that the case "requires us to interpret, for the first time, whether judicial immunity is a defense available to a "public body" under the New Mexico Civil Rights Act (CRA), NMSA 1978, §§ 41-4A-1 to 1-3 (2021).

Bolen v. New Mexico Racing Commission, 2024-NMCA-056, ¶ 1, ___ P.3d ___, 2024 WL 1714975. The court stated “we have yet to develop a framework for determining when an administrative agency or official is entitled to quasi-judicial immunity[.]” [*id.* at ¶ 15] and identified “a gap in our case law concerning when an administrative official or agency is absolutely immune from suit on the basis of quasi-judicial immunity[.]” *Id.* at ¶ 16.

The court of appeals looked to federal law for guidance, *Bolen*, 2024-NMCA-056, ¶¶ 17-20, but the cases cited discuss the concept of quasi-judicial immunity applied to individual members of public bodies and agencies, not the agencies themselves. *Compare Butz v. Economou*, 438 U.S. 478, 514 (1978) (holding “that **persons** . . . performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts; making no extension of immunity to the agency) (emphasis added); *Horwitz v. Colorado State Bd. of Med. Examiners*, 822 F.2d 1508, 1515 (10th Cir. 1987) (applying *Butz* to “cases involving state administrative/executive **officials** serving in adjudicative, judicial, or prosecutorial capacities” (emphasis added)); *Gerhardt v. Mares*, 179 F. Supp. 3d 1006, 1058 (D.N.M. 2016) (holding the defendant racing commissioners - not the commission - had absolute quasi-judicial immunity from claims.).

Despite the substantive difference - recognized and articulated by the district court - between judicial immunity applied to individual defendants and agency defendants, the court of appeals held that the district court erred in denying NMRC's motion because judicial immunity is expressly preserved under § 41-4A-10 of the CRA and, under the facts of this case, the NMRC was entitled to quasi-judicial immunity. *Bolen*, 2024-NMCA-056, ¶¶ 11-12. The court of appeals insisted that the NMRC's actions in administering the administrative proceeding against Mr. Bolen “are functionally comparable to those involved in a judicial process” thereby entitling it to absolute or quasi-judicial immunity. *Id.* ¶ 21.

The court of appeals filed its formal opinion on April 16, 2024. [Court file] Mr. Bolen timely filed a petition for writ of certiorari under Rule 12-502(B) NMRA on May 16, 2024. After hearing from NMRC in opposition to the petition, this Court granted the writ and assigned the matter for briefing.

ARGUMENT AND AUTHORITIES

Is judicial immunity a defense available to public bodies sued under the New Mexico Civil Rights Act (CRA), NMSA 1978, §§41-4A-1 to -13?

Standard of Review

The NMRC's motion for summary judgment is reviewed *de novo*, with the facts viewed in the light most favorable to Mr. Bolen as the nonmoving party. *See Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331. Issues of statutory

interpretation and construction are also reviewed *de novo*. See *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397 (noting that statutory interpretation is a question of law and is reviewed *de novo*); *Marbob Energy Corp. v. New Mexico Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 5, 146 N.M. 24.

Preservation

Mr. Bolen raised, briefed, and preserved his arguments in his response to NMRC's motion for summary judgment, [RP 297-307] and in oral arguments to the district court on the parties' competing motions for summary judgment [TR 8/16/22]

Argument and Authorities

The New Mexico Civil Rights Act

This case requires the Court to determine whether judicial immunity is a defense available to a “public body” under the New Mexico Civil Rights Act, NMSA 1978, §§ 41-4A-1 to -13, enacted in 2021. See NMSA 1978, § 41-4A-12 (specifying prospective application). Prior to the CRA's enactment, New Mexico claimants could seek damages for constitutional violations under 42 U.S.C. § 1983 (“Section 1983”), which authorizes “an action at law, suit in equity, or other proper proceeding for redress” for parties injured as a result of a “deprivation of any rights, privileges, or immunities secured by” the federal Constitution and laws caused by a “person” acting “under color of any statute, ordinance, regulation,

custom, or usage, of any State or Territory or the District of Columbia.” 42 U.S.C. § 1983 (authorizing the civil action).

Claimants had limited options when seeking damages from state government actors for violations of state constitutional guarantees. The New Mexico Tort Claims Act (TCA) permits certain claims against governmental entities and public employees pursuant to enumerated exceptions to the TCA's general rule of immunity. *See generally* NMSA 1978, §§ 41-4-1 to -30. But claims for “deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico” were actionable only for alleged deprivations “caused by law enforcement officers while acting within the scope of their duties.” NMSA 1978, § 41-4-12; *see also Valdez v. State*, 2002-NMSC-028, ¶ 12, 132 N.M. 667 (“in order for a plaintiff to sue a governmental entity, the cause of action must fit within one of the exceptions under the TCA; “absent a waiver of immunity under the [TCA], a person may not sue the state for damages for violation of a state constitutional right.”).

Like Section 1983, the CRA is a vehicle for redress and not a source of civil rights; the CRA identifies “the bill of rights of the constitution of New Mexico” as the source of rights that may form the basis of a claim under the NMCRA. NMSA 1978, § 41-4A-3(B). The CRA provides:

As used in the New Mexico Civil Rights Act, “public body” means a state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education,

NMSA 1978, § 41-4A-2.

In any claim for damages or relief under the New Mexico Civil Rights Act, no public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall enjoy the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the bill of rights of the constitution of New Mexico.

NMSA 1978, § 41-4A-4.

The state shall not have sovereign immunity for itself or any public body within the state for claims brought pursuant to the New Mexico Civil Rights Act, and the public body or person acting on behalf of, under color of or within the course and scope of the authority of the public body provided pursuant to the New Mexico Civil Rights Act shall not assert sovereign immunity as a defense or bar to an action.

NMSA 1978, § 41-4A-9.

The prohibition on the use of the defense of qualified immunity pursuant to Section 4 of the New Mexico Civil Rights Act and the waiver of sovereign immunity pursuant to Section 9 of that act shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity.

N.M. Stat. Ann. § 41-4A-10.

Despite its relatively recent enactment, commentators have already noted ambiguities and internal contradictions in the CRA. While Section 41-4A-3(C) mandates that CRA claims “shall be brought exclusively against a public body” and that the “public body” named “shall be held liable for conduct of individuals”

acting for the “public body,” Section 41-4A-8 addresses indemnification of individuals, which necessarily contemplates litigation against “a person acting on behalf of, under color of or within the course and scope of the authority of the public body.” Vanzi, L. & Rutkowski, R., *The New Mexico Civil Rights Act: Look Before You Leap*, 54 N.M. L. Rev. 363, 375 (2024) (Vanzi & Rutkowski). Vanzi & Rutkowski also note that, “Section 41-4A-4 also appears to contemplate litigation against defendants other than a “public body,” as it prohibits use of the defense of qualified immunity by a “public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body.” 54 N.M. L. Rev. at 375-376.

An additional concern is presented by the case at bar. While § 41-4A-10 specifically eliminates qualified immunity as a defense, and § 41-4A-9 specifically eliminates sovereign immunity as a defense, § 41-4A-10 preserves judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity, notwithstanding the fact that qualified and sovereign immunity are or derive from common law principles:

The [U.S.] Supreme Court also has justified qualified immunity as a defense of good faith based on the common law. But the Court expanded and “completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.” Under that reformulation, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known.” In subsequent cases, the Court has further modified the test, holding that conduct “violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he is doing violates that right’” and that “existing precedent must have placed the statutory or constitutional question beyond debate.” The Court has also allowed lower courts discretion to decide whether the right asserted was “clearly established” at the time of the challenged conduct before addressing whether the conduct alleged constitutes a deprivation of a federal statutory or constitutional right, which means that courts may decide that qualified immunity applies to a given claim without reaching the question whether the conduct at issue violated the law. “The dispositive question is ‘whether the violative nature of particular conduct is clearly established.’”

Vanzi & Rutkowski, supra, at 372 (footnotes and citations omitted).

The CRA was enacted in no small part to address the complexities and pitfalls created Section 1983, including the creation in Section 1983 jurisprudence of immunities out of whole cloth. *Vanzi & Rutkowski, supra*, at 371-373. It is in the context of the desire to provide an expeditious and equitable way to provide redress for constitutional grievances that the CRA must be viewed.

When interpreting a statute, the Court's primary goal is to facilitate and promote the Legislature's purpose. *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 17, 148 N.M. 426. As set forth above, at least part of the challenge the Legislature faced in enacting the CRA was to remove the immunities that had functionally overtaken the rights articulated in Section 1983. While the plain meaning rule provides that “statutes are to be given effect as written and,

where they are free from ambiguity, there is no room for construction[.]” this rule must be applied with caution, as “a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning.” *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶¶ 2, 23, 117 N.M. 346. Consequently, the Court must reject the literal language of the statute if doing so is necessary to “conform to the obvious intent of the [L]egislature, or to prevent its being absurd.” *Id.* ¶ 3; *see also Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047 (indicating that the statute must be interpreted in context with an eye toward its purposes and consequences). No part of a statute should be construed so that it is rendered surplusage. *Whitely v. New Mexico State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308. Finally, a statute with a remedial purpose must be liberally construed to implement its purpose, and any exception must be strictly construed. *Kaiser v. DeCarrera*, 1996-NMSC-050, ¶ 7, 122 N.M. 221; *see also Commonwealth v. ELM Med. Labs, Inc.*, 596 N.E.2d 376, 380 (Mass. App. 1992) (holding that the state civil rights act, being remedial, is entitled to liberal construction of its terms).

A. The court of appeals' decision unnecessarily expands the application of judicial immunity.

The court of appeals' determination that § 41-4A-10 grants immunity to public bodies sued under the CRA renders the CRA ineffectual; any action by a public body complained of by a citizen that is followed by some adjudicative

process before the agency will be subject to an absolute or qualified-judicial immunity defense. The complained of conduct for which Mr. Bolen sought redress in the instant case was not tied to nor delimited by the decision making of the NMRC. The conduct Mr. Bolen challenged was the pre-hearing conduct of forcing him to submit to a disciplinary proceeding in the first place, which Mr. Bolen alleged was in retaliation for his engaging in protected speech and petitioning activities, in violation of his due process and free speech rights. The court of appeals' decision eviscerates the CRA as a mechanism for obtaining relief from constitutional deprivations as intended by the Legislature, where allegedly actionable activities by an agent lead to any kind of public body fact-finding or adjudicative process that can be characterized as quasi-judicial.

The CRA allows private actions against public bodies - not individuals - for the "deprivation of any rights, privileges or immunities secured pursuant to the bill of rights of the constitution of New Mexico." §41-4A-3(A). As the district court succinctly noted in its order:

"Any" means "any." *Cf. State v. Moncayo*, 2022- NMCA-067, ¶ 5, 521 P.3d 120 (reiterating the Court's prior holding that because the relevant statutory language prohibits the possession of "any amount of any controlled substance," the defendant's conviction for trace amounts of the controlled substance was supported by sufficient evidence).

[RP 387] The CRA contains no language limiting its purview to deprivations occurring outside a public body's adjudicative process and specifically excludes

individual actions. The district court concluded that the CRA permitted Mr. Bolen's action alleging vindictive prosecution, the bringing of which violated a citizen's constitutional rights, without regard to whether the allegedly retaliatory action was pursued in a civil, criminal, or administrative proceeding. **[RP 388]**

The district court then evaluated whether the NMRC should be immune from suit for the alleged violations of Mr. Bolen's constitutional rights, which indisputably arose prior to and in the context of an administrative proceeding. Absolute judicial immunity insulates judges from charges of erroneous acts or irregular action, even when it is alleged that such action was driven by malicious or corrupt motives ... or when the exercise of judicial authority is flawed by the commission of grave procedural errors. *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286 (1991) (per curiam). Quasi-judicial immunity's purpose is to protect the officials who execute court orders, as well as prosecutors, grand jurors, witnesses, and agency officials, "for acts intertwined with the judicial process." *Gallegos v. Bernalillo Cnty. Bd. of Cnty. Commissioners*, 278 F. Supp. 3d 1245, 1271 (D.N.M. 2017).

The NMRC insists that § 41-4A-10 of the CRA provide that the waiver of sovereign immunity "shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity." The NMRC argued that both quasi-judicial and prosecutorial immunity forestalled Mr. Bolen's suit

because the NMRC operates in a prosecutorial role when determining whether to bring a disciplinary proceeding against a licensee, and as the fact-finder and adjudicator of that proceeding, making the NMRC both prosecutor and judge. *See, e.g., City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶ 17, 123 N.M. 428 (providing that the City's personnel hearing officers who hear grievances under the City's Merit System Ordinance are immune from damages under Section 1983 because they are effectively functioning as a court of law); *see also Johnson v. Laly*, 1994-NMCA-135, ¶ 1, 18 N.M. 795 (describing prosecutorial immunity from Section 1983 lawsuits for damages).

As the district court noted, there are significant differences between the CRA and actions under Section 1983. **[RP 389-390]** The immunities available under Section 1983 are based on public policy considerations that protect an individual defendant from personal liability for damages. *See, e.g., Horwitz v. Colorado State Bd. of Medical Examiners*, 822 F.2d 1508, 1515 (10th Cir. 1987) (holding that board members who performed adjudicatory and prosecutorial statutory functions were entitled to absolute immunity "from damages liability" under Section 1983 because "[p]ublic policy requires that officials service in such capacities be exempt from personal liability").

Indeed, it is not clear that the NMRC would be entitled to absolute- or quasi-judicial immunity in a TCA, Section 1983, or tort action. In *Gallegos v. Bernalillo*

Cnty. Bd. of Cnty. Commissioners, a Section 1983 and TCA case, the court held that Bernalillo County did not enjoy quasi-judicial immunity, because the doctrine protects people and not entities. 278 F. Supp. 3d 1245, 1271 (D.N.M. 2017).

Gallegos cited the major Tenth Circuit cases regarding quasi-judicial immunity and noted that "all discuss the doctrine in the context of people and not of entities." See *Valdez v. City & Cnty. of Denver*, 878 F.2d 1285, 1286 (10th Cir. 1989) (applying quasi-judicial immunity to two individuals); *Moss v. Kopp*, 559 F.3d 1155, 1163 (10th Cir. 2009) (applying the doctrine to sheriff's deputies); *Turney v. O'Toole*, 898 F.2d 1470, 1472-74 (10th Cir. 1990) (applying the doctrine to a public hospital superintendent). The U.S. Supreme Court has also focused its application of the doctrine on individuals. See *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984 (1976) (applying the doctrine to prosecutors); *Briscoe v. LaHue*, 460 U.S. 325, 344, 103 S.Ct. 1108 (1983) (applying the doctrine to witnesses).

The policy rationale for either absolute or quasi-judicial immunity is absent when a claim is brought against a public body like the NMRC. Unlike federal Section 1983 civil rights claims, actions under the CRA may only be brought against the public body, and "[a]ny public body named in an action filed pursuant to the [CRA] shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body." NMSA 1978, § 41-4A-3(C). Unlike claims under Section 1983, individuals are not

and cannot be made liable for damages under the CRA. The district court noted that Mr. Bolen named only the NMRC as defendant in that court and sought no liability finding against any commissioner, employee, or agent of the NMRC. **[RP 390]** The quasi-judicial/adjudicatory and prosecutorial immunities that would otherwise shield individuals from being personally liable for damages under Section 1983 are inapplicable in the case of a CRA claim against a public body. It follows that there is no rationale for the application of judicial immunity principles, and no immunity can attach under § 41-4A-10.

The United States Supreme Court in *Butz, supra*, stated that individual "officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope" because of some "special function[]" that the officials serve. 438 U.S. at 506, 508. That functional test was repeated in *Snell v. Tunnell* to deny immunity to social workers when they were engaged in actions akin to law enforcement, stating "to this we might add that police officers engaged in the same conduct alleged in this case would not be entitled to absolute immunity." 920 F.2d 673, 691 (10th Cir. 1990).

The foregoing analysis is consistent with the conclusions made by courts in sister jurisdictions considering when judicial immunity should apply. In *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000), the

Fifth Circuit affirmed the district court's holding that the City of Houma Municipal Fire and Police Civil Service Board was not entitled to absolute quasi-judicial immunity. *See id.* The Fifth Circuit noted that the performance of official duties creates two potential liabilities, individual-capacity liability for the person and official-capacity liability for the municipality. Under *Turner*, when discussing immunity defenses, it is necessary to consider to whom and in which capacity those defenses apply. *See also VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007) (holding defense of absolute, quasi-judicial immunity is not available to state racing commission officials for veterinarians' § 1983 claims against them in their official capacities); *Alkire v. Irving*, 330 F.3d 802, 811 (6th Cir.2003) (judge and sheriff sued in their official capacities were not entitled to claim any personal immunities); *Lee v. Oregon ex rel. Oregon Racing Comm'n*, 4 F. App'x 490, 491 (9th Cir. 2001) ("Absolute quasi-judicial immunity is a limited exemption that applies only to the "judicial acts" of agency officials.").

"Official-capacity suits ... generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099 (1985) (quoting *Monell v. New York City Dep't. of Soc. Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018 (1978)). A CRA suit, like a Section 1983 action naming defendants only in their "official capacity," does not involve personal liability to an individual defendant. Defenses such as absolute

quasi-judicial immunity, which only protect defendants in their individual capacities, are unavailable in official-capacity suits. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358 (1991) (holding "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses."); *see also Johnson v. Kegans*, 870 F.2d 992, 998 n. 5 (5th Cir.1989) ("Immunity does not bar suits against defendants in their official capacities.");

The U.S. Supreme Court clarified this distinction in *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099 (1985), finding immunity to be inapplicable in Section 1983 suits against government officials in their "official capacity."

As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

473 U.S. at 166, 105 S.Ct. 3099 (citations omitted); *see also Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir.1999) ("Unlike government officials sued in their individual capacities, municipal entities and local governing bodies do not enjoy immunity from suit, either absolute or qualified, under § 1983.").

B. Judicial immunity should not apply where the bringing of the judicial proceeding is itself alleged to be the constitutional violation.

Mr. Bolen alleged that the decision to initiate and to prosecute a civil enforcement action in the name of the NMRC agency was in retaliation for the content and tone of Mr. Bolen's protected speech and petitioning activities vis-a-vis the steward. In compliance with the CRA, Mr. Bolen sought to hold the NMRC - not the stewards, administrative hearing officer, or other individuals - to account for the actions of its investigator and in-house attorney prior to the initiation and commencement of a quasi-judicial hearing. This is functionally distinct from the actions taken before the malicious prosecution was initiated. Proper application of *Butz and Snell*, and the limitation of immunity to individuals and not entities as argued above, requires a finding that the conduct culminating in an alleged malicious prosecution means that immunity does not attach and is unavailable as a defense.

Whether the stewards, employees and agents of the NMRC, abused their positions and authority by bringing a baseless disciplinary action against Mr. Bolen in retaliation for his petitioning and speech activities, which were directed to them in their capacity as public employees, requires consideration of the facts and circumstances. This is not a case wherein a prosecutor brought unfounded criminal charges which were considered by a judicial officer. In this case, NMRC, acting through its employee agents, allegedly investigated, initiated, and adjudicated

claims against a citizen that were in retaliation for that citizen's constitutionally protected activities. As such, the case falls squarely within the purview of the CRA and should proceed to a determination of the merits. NMRC's demand for absolute or quasi-judicial immunity, if permitted to stand, would severely limit the scope and efficacy of the CRA and would contravene the clear Legislative intent that civil rights deprivations be decided on their merits. The court of appeals erred in expanding and applying judicial immunity to a public body in this case. The court of appeals decision should be reversed.

CONCLUSION

The court of appeals' extension of immunity principles to public bodies creates an absurdity in the structure of the CRA. If absolute or quasi-judicial immunity are applicable to agencies and commissions as corporate bodies themselves, rather than to the individuals who act on behalf of the agency or commission, then the immunity provisions of the CRA swallow the CRA itself. The court of appeals' assurance that "there are sufficient procedural safeguards [in the administrative code] to control unconstitutional conduct" [*Bolen*, 2024-NMCA-056, at ¶ 27] is not reassuring. The Legislature enacted the CRA because violation by public bodies of citizens' constitutional rights cannot be countenanced, must be actionable, and certainly should not be immunized.

Society cannot be sustained in a democratic system if arbitrary, malicious conduct is not considered to be both reprehensible and punishable. *Cooney v. Park Cnty.*, 792 P.2d 1287, 1301 (Wyo. 1990), *cert. granted, judgment vacated sub nom. Cooney v. White*, 501 U.S. 1201, 111 S. Ct. 2820 (1991). Under the court of appeals' application of immunity principles in *Bolen*, contrary to the manifest intent of the Legislature the CRA has been nullified in essential part by the application of absolute or quasi-judicial immunity principles to a public body as distinct from individuals sued in their individual capacity. The court of appeals' decision starts the CRA down the same path that reduced Section 1983's efficacy in protecting civil rights at the federal level. This Court should reverse the court of appeals' decision and affirm the district court.

Oral Argument Request.

This case presents an issue of significant public interest. The Court may find that oral argument aids in the interpretation and construction of the legislative and judicial policies at issue.

For the foregoing reasons, Petitioner Brad Bolen asks this Court for a decision:

- A) Reversing the court of appeals' April 16, 2024 opinion;
- B) Affirming the district court and remanding for further proceedings consistent with the district court's decision; and

C) Granting such other and further relief as the Court deems proper.

Respectfully Submitted:

/s/ L. Helen Bennett

L. Helen Bennett

Attorney at Law

P.O. Box 4305

Albuquerque, NM 87196-4305

(505) 321-1461

hbennett@swcp.com

Attorney for Petitioner-Appellee

I certify a true copy of the foregoing was electronically filed and served on September 6, 2024, causing all counsel of record to receive an endorsed copy via electronic service.

/s/ L. Helen Bennett