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

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:

New Mexico Statutes and Rules:

Authority from Federal or Sister Jurisdictions:

Other Authority:

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." *Hunnicutt 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." *Hunnicutt*, 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[l" 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

IN THE NEW MEXICO SUPREME COURT

BRAD BOLEN,

Petitioner-Appellee,

v. **Case No. S-1-SC-40427**

NEW MEXICO RACING COMMISSION,
And FABIAN LOPEZ, records custodian
for NMRC,

Respondent-Appellant.

NEW MEXICO RACING COMMISSION'S ANSWER BRIEF

Appeal from the Second Judicial District Court
The Honorable Joshua Allison
District Court Cause No. D-202-CV-2021-06917
Court of Appeals No. A-1-CA-41120

Eric Loman
JACKSON LOMAN DOWNEY & STEVENS-BLOCK, P.C.
201 3RD St. NW #1500
Albuquerque, NM 87102
(505) 767-0577
eric@JacksonLomanLaw.com
Attorneys for Respondent-Appellant

Table of Contents

Table Of Authorities

Cases From Other Jurisdictions

Introduction

New Mexico Racing Commission ("NMRC") is the agency created by the Horse Racing Act ("Act") to regulate the sport and industry of racing. See N.M.S.A., § 60-1A-1 *et seq.* NMRC is required to adopt rules and regulations with respect to racing. N.M.S.A. 60-1A-4(B)(1). Pursuant to the Act, any person wishing to engage in horseracing may do so only if licensed by the New Mexico Racing Commission ("NMRC") and is subject to the applicable licensing regulations. Brad Bolen is one such licensee and works as a horse trainer. See Complaint, RP- 1. [1]

In July 2021, Mr. Bolen got into an argument with a racing steward[2] over whether Mr. Bolen's assistant's license would be reinstated after a lengthy suspension. See Memorandum Opinion and Order, RP-384. NMRC may take disciplinary measures where a licensee engages in "disruptive or intemperate behavior" or "interferes with the orderly conduct of a race meeting." See 16.47.1.8(L)(1)(i) (the "Rule"). [3]

---

[1] The Record Proper is cited herein as RP- ___.

[2] Racing stewards are employed by NMRC and serve as rules officials at the racetrack. They are similar to referees in other sports.

[3] New Mexico is not unique in regulating the behavior of its horse racing licensees. For example, California's racing regulations prohibit its licensees from engaging in "abusive or aggressive behavior..., any behavior that impedes others from performing their duties; and/or any other behavior that is detrimental to the public and racing." See 4 CCR § 1874. Kentucky prohibits its horse racing licensees from engaging in "any conduct of a disorderly nature," including failing to "obey the stewards' or judges' or other official's orders", "offensive and profane language" or disturbing the peace, which includes using "abusive or insulting language to or interfere with a commission member, employee or agent, or racing official." See 810 KAR 3:020(x)-(y).

Based on Mr. Bolen's behavior during that argument, NMRC initiated an administrative disciplinary proceeding against Mr. Bolen. See Defendant's Motion for Summary Judgment. RP 269.

The first level of administrative review is a hearing before a panel of three stewards. *Id.* RP-269. At the conclusion of that hearing the stewards issued an Initial Ruling finding Mr. Bolen had violated the Rule and issued a $500 fine, which was immediately waived and would be completely abated should he have no violations for a period of one year. *Id.* RP-270.

At the same time the administrative process was underway, Mr. Bolen filed this lawsuit. Compare, Compl., RP-1 (filed December 10, 2021) and NMRC Appeal Request, RP-278 (filed January 3, 2022).

As was his right, Mr. Bolen appealed the Initial Ruling and sought a hearing before an independent hearing officer. *Id.* RP-270. That hearing was scheduled, but on April 14, 2022- before the hearing occurred, and on advice of counsel- Mr. Bolen withdrew his appeal of the Initial Ruling, choosing only to pursue this litigation. *Id.* RP-270, 288.

Mr. Bolen sued NMRC under the Civil Rights Act claiming the administrative proceeding was a "malicious prosecution" in retaliation for his exercise of speech during his argument with the Steward and a violation of his liberty interests. See,

generally Complaint, RP-1-12. Mr. Bolen claims NMRC "initiat[ed] and continu[ed] a vindictive prosecution against Mr. Bolen..." *Id.*, RP-4.

NMRC moved the District Court for summary judgment on Mr. Bolen's claim as NMRC has absolute quasi-judicial immunity from suit for its decision to initiate and prosecute an administrative proceeding. See, generally, Motion for Summary Judgment, RP 268-296.[4] The District Court found both quasi-judicial and prosecutorial immunities could apply. *Id.*, RP-389. But the District Court denied these immunities to NMRC, finding they only apply to individual public officials and NMRC, as a public agency, cannot be immune. *Id.* The District Court summarized its ruling:

> "Plaintiff here has named only the [NMRC] as the Defendant and is not seeking any personal liability against any commissioner, employee, or agent of [NMRC]. Thus, the quasi-judicial/adjudicator and prosecutorial immunities that would otherwise shield individuals from being personally liable for damages under Section 1983 are inapplicable. The [NMRC] is therefore not immune from suit."

Id., RP 390.

---

[4] At footnote 1, the Brief-in-Chief states that immunity was not pled as an affirmative defense in NMRC's Answer to the Complaint. The Brief-in-Chief also correctly notes waiver was never raised or argued at the District Court or Court of Appeals, and is therefore not before this Court. However, NMRC notes that in *Hern v. Crist*, 1987-NMCA-019, ¶ 12, 105 N.M. 645, the Court held "while we deem it preferable practice for the immunity defense to be raised as an affirmative defense or by way of a motion to dismiss, a failure to affirmatively plead this defense does not amount to a waiver... The claim of immunity may also be raised for the first time even upon appeal."
To clarify, NMRC raised its immunity defense in a Motion for Summary Judgment in the early stages of the case. See RP- 268-296.

The Court of Appeals reversed the District Court and made two holdings: (1) that the immunities described in Section 10 of the CRA protect public bodies, and (2) that NMRC has quasi-judicial immunity under the particular facts of this case. See *Bolen v. N.M. Racing Comm'n*, 2024-NMCA-056, ¶¶ 8, 13. Mr. Bolen seeks review on only the first issue: whether, as a general proposition, "judicial immunity [is] a defense available to public bodies sued under the [CRA]." See Petition for Writ of Certiorari, p. 2, and Brief-in-Chief, p. 14.

Argument

Although it waives sovereign and qualified immunity, the CRA expressly preserves judicial immunity and any other immunity rooted in statute or common law. That immunity must apply to public bodies because individual public officials may not be sued pursuant to the CRA. As demonstrated below, any other interpretation of the CRA would lead to an absurd result, inconsistent with centuries of jurisprudence.

I. Quasi-Judicial Immunity Is Absolute and Well-Established in New Mexico.

The doctrine of judicial immunity has provided New Mexico's judges with absolute immunity from civil suit for a very long time. As this Court noted in 1962, "[i]t is not the policy of the law to subject courts of either limited or general jurisdiction to actions for damages, while acting within their jurisdiction, even though the judicial act be erroneous and not in good faith." *Edwards v. Wiley*, 1962-

NMSC-116, ¶ 7, 70 N.M. 400, 402, 374 P.2d 284, 285 (internal citation omitted). A "judge is simply not civilly responsible in damages for his errors or mistakes. As to this the law has been well settled." *Id.*, ¶ 8.

This Court noted "the following... expresses the almost unanimous opinion of the courts, not only of this country but of England, on the subject:

> "It is unquestionable, and has been from the earliest days of the common law, that a judicial officer cannot be called to account in a civil action for his determinations and acts in his judicial capacity, however erroneous or by whatever motives prompted. The rule of immunity extends to all classes of courts and applies to the highest judge of the nation and to the lowest officer who sits as a court and tries petty cases."

Id., ¶ 9 (internal citation omitted).

It is also well settled that judicial immunity extends to quasi-judicial bodies. In 1978, the U.S. Supreme Court declared administrative officials are absolutely immune from suit where they were performing quasi-judicial functions. *See, Butz v. Economou*, 438 U.S. 478 (1978). The plaintiff in *Butz* filed suit against various government officials "claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency." *Id.* at 480.

The Court held "agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment." *Id.* at 516.

The Court noted a respondent in an administrative proceeding has ample

safeguards against "agency zeal," including various levels of appeal and administrative review and the availability of an independent hearing officer. *Id.* at 514. The Court held, because of these safeguards, "the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women." *Id.*

The Court applied the same analysis to those agency officials who initiate and prosecute administrative actions. *Id.* at 515 ("We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts."). The Court then recognized the risk (and predicted what happened in the instant case) that an "individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts." *Id.*

The absolute immunity for administrative officials described in *Butz* has been consistently recognized through the decades, including by the Tenth Circuit. In *Horwitz v. State Bd. of Medical Examiners* 822 F.2d 1508 (10th Cir. 1987), the Tenth Circuit followed Butz and dismissed a physician's lawsuit who claimed the Board of Medical Examiners had initiated "unfounded complaints [and] summarily suspended from the practice of podiatry in violation of his Fourteenth Amendment due process rights..." *Id.* at 1510. The Tenth Circuit reiterated that administrative officials who initiate, prosecute and preside over administrative proceedings enjoy

absolute immunity, and further extended that absolute immunity to the members of the administrative body itself. *Id.* 1515-1516. The Tenth Circuit further noted Colorado law provided safeguards against administrative overreach, such as various levels of administrative review and appeal rights. *Id.*[5]

New Mexico Courts have adopted this federal jurisprudence, recognizing the immunity provided to administrative officials in *Butz* and its progeny. See *City of Albuquerque v. Chavez,* 123 N.M. 428, 1997-NMCA-054, ¶ 17 (citing *Butz* and *Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996)) (holding administrative hearing officers are "entitled to absolute immunity from damages under 42 U.S.C. § 1983").[6] Although the hearing officer is not the subject of Mr. Bolen's claim, our Courts have favorably cited and followed the holding of *Butz* and other cases, which provide immunity to all administrative officials acting in a quasi-judicial or administrative prosecutorial capacity.

In *Gregory Rockhouse Ranch, LLC v. Glenn's Water Well Serv.*, 2008-NMCA-101, 144 N.M. 690, the Court held absolute immunity protected administrative officials carrying out quasi-judicial proceedings. *Id.*, ¶ 18. A "quasi-judicial

---

[5] Licensees aggrieved by administrative actions before the NMRC have similar appeal rights, including the right to hearing before an independent hearing officer (*See generally,* 15.2.1.9 NMAC) and review by District Courts pursuant to Rule 1-075 NMRA.

[6] At page 23 of the Brief-in-Chief, Mr. Bolen suggests it is not clear NMRC would be entitled to quasi-judicial immunity in an action under 42 U.S.C. § 1983. Under the framework of § 1983 and the holdings of *Butz* and *Horwitz*, NMRC employees would indeed be absolutely immune from such a claim. NMRC itself would have Eleventh Amendment immunity from such a damages claim.

administrative action is one that possesses certain trappings required by due process, e.g., notice, hearing and opportunity to present witnesses." *Id.*, ¶ 21 (internal citations omitted). The administrative proceeding in this case had all these features: Mr. Bolen was provided a full hearing before the Board of Stewards, was represented by counsel, and was days away from an additional hearing before an administrative law judge when he withdrew his appeal. The actions taken by NMRC that form the basis of Mr. Bolen's Complaint were quasi-judicial and absolutely immune from suit.

Quasi-judicial immunity has been recognized by New Mexico courts in many contexts. For example, in *Collins on Behalf of Collins v. Tabet*, 1991-NMSC-013, 111 N.M. 391, this Court considered whether a guardian ad litem was protected by quasi-judicial immunity. In holding the guardian ad litem was absolutely immune from suit, the Court provided a history of absolute immunity and New Mexico's approach to it. *Id.*, ¶16. The Court cited federal jurisprudence favorably, noting the U.S. Supreme Court has "recognized that the judicial, prosecutorial, and legislative functions require absolute immunity." *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982)). The Court noted the "Supreme Court ... has extended absolute 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." *Id.*, ¶ 18. The Court then listed over a dozen examples of different persons who had been protected by absolute immunity, from administrative hearing officers, to prosecuting attorneys, to various arms of the courts. *Id.* ¶¶ 18-19.

Quasi-judicial immunity is well established and long-recognized in New Mexico, and is therefore preserved by the Section 10 of the CRA. The Court of Appeals should be affirmed.

II. The CRA Preserves Quasi-Judicial Immunity.

When it created a right of action, the CRA waived sovereign immunity and expressly excluded qualified immunity as a defense. See N.M.S.A. § 41-4A-3.

However, at N.M.S.A. § 41-4A-10, the CRA provides nothing in it "shall [] abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity." As demonstrated above, judicial, quasi-judicial, and prosecutorial immunity are well established in New Mexico, and are therefore preserved by the CRA.

If the immunities described in Section 10 of the CRA did not apply to public bodies, there would be no reason to include it in the statute. Indeed, if the Legislature only intended those immunities to apply to individual public officials, Section 10 would have been unnecessary because Section 3 of the CRA does not permit claims against public employees at all. See N.M.S.A. § 41-4A-3(C) (A claim under the CRA can only be made against a public body). Similarly, the CRA's prohibition

against qualified immunity would have also been unnecessary because a public body cannot claim qualified immunity. *See, e.g., Bertot v. Sch. Dist. No. 1, Albany Cnty., Wyo.*, 613 F.2d 245, 248 (10th Cir. 1979) (the common law does "not recognize the same qualified immunity in damages actions for public bodies that it [does] for public officials.")

Statutes must be interpreted such that "no part of the statue is rendered surplusage or superfluous." *Am. Fed'n of State, Cnty. & Mun. Emps. v. City of Albuquerque*, 2013-NMCA-063, ¶ 5, 304 P.3d 433 (internal citations omitted); *See also State v. Montano*, 2020-NMSC-009, ¶ 44, 468 P.3d 838, 851 (interpreting a statute in a way rendering the language "surplusage and meaningless [is] contrary to the canons of statutory construction).

This Court has held "[it] is our duty, wherever possible, to give meaning to a statute's provisions. Construing a statute in a way that renders one of its provisions entirely superfluous should be our last resort." *State v. Jackson*, 2010-NMSC-032, ¶ 28, 148 N.M. 452, 459, 237 P.3d 754, 761, (overruled on other grounds by *State v. Radosevich*, 2018-NMSC-028, ¶ 28, 419 P.3d 176.

The Court of Appeals must be affirmed, otherwise Sections 4 and 10 of the CRA are rendered meaningless and unnecessary.

III. Public Bodies Are Vicariously Immune For Immunized Acts Of Their Employees.

As noted above, the CRA requires claims be "brought exclusively against a public body." See N.M.S.A. § 41-4A-3(C). A public body sued under the CRA "shall be liable for conduct of individuals acting on behalf of... the public body." *Id.* Because NMRC can only be vicariously liable for the actions of its employees, the immunities that would protect those employees must also apply to NMRC.

Even if Mr. Bolen is correct that the immunities preserved by Section 10 of the CRA only apply to individual public employees, those immunities still extend to claims against the public body by operation of N.M.S.A. § 41-4A-3(C). Because NMRC's liability under the CRA can only flow from acts of its employees, then where a NMRC employee is protected by quasi-judicial immunity, then so must NMRC.

In an unpublished case, our Court of Appeals acknowledged that where constitutional claims against a police officer had been dismissed for qualified immunity, the public employer would be entitled to *res judicata* for any claim based in *respondeat superior. See J.V. on behalf of C.V. v. Brooks*, No. A-1-CA-36350, 2020 WL 2126792, at *7 (N.M. Ct. App. May 4, 2020) (noting that "Plaintiffs... correctly concede that any claims against the current Defendants that rely on vicarious liability are properly dismissed on *res judicata* grounds).

Other courts have made similar holdings. *See, e.g., Chaney v. McBride*, No. 3:13-CV-02246-AKK, 2014 WL 3566312, at *2 (N.D. Ala. July 18, 2014) (finding "a principal cannot be vicariously liable for the acts of its agent when the agent is immunized from liability for those acts"); *Thatcher v. Faleafine*, No. 17-CV-168-SWS, 2020 WL 13565179, at *4 (D. Wyo. June 26, 2020) (finding even if a principal "itself is not 'immune' from liability, upon a finding of immunity on the part of [its agent], Plaintiffs' vicarious liability claim will necessarily fail as a matter of law) (citing *Darrar v. Bourke*, 910 P.2d 572, 578 (Wyo. 1996) (holding a governmental entity cannot be held vicariously liable where a peace officer is entitled to qualified immunity). *Young v. City of Council Bluffs, Iowa,* 569 F. Supp. 3d 885, 903 (S.D. Iowa 2021) (finding "a municipality can be 'vicariously immune' from liability for its employees' constitutional torts when the employees would be immune from personal liability.") (citing *Baldwin v. City of Estherville (Baldwin V)*, 929 N.W.2d 691, 696 (Iowa 2019)).

Public entities are vicariously immune for acts of their employees that would be immune. The Court of Appeals should be affirmed.

IV. Mr. Bolen Seeks An Absurd Result.

The parties agree that statutes must not be interpreted in a way that leaves us with an absurd result. See Brief-in-Chief, p. 20 (citing *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 3, 117 N.M. 346).

If Mr. Bolen prevails here, hundreds of years of jurisprudence will be wiped away. If NMRC is not immune for the quasi-judicial acts of its employees, then courts in New Mexico can (and most certainly will) be sued by litigants aggrieved by judicial decisions. Our Legislature will be sued by anyone who believes a statute violates some constitutional right. Offices of District Attorneys and other public agencies will be sued for acts that have been protected by quasi-judicial immunity for decades. This could not have been the intent of the Legislature when enacting the CRA and would cause an absurd result.

A person aggrieved by a judicial or quasi-judicial body already has a remedy. Judges can be appealed, as can the results of administrative proceedings. In this case, Mr. Bolen availed himself of those appeal rights, but voluntarily withdrew his appeal just days before he was set to have a hearing before an independent hearing officer. Had he been unsatisfied with the result of that hearing, he could have appealed to the District Court pursuant to Rule 1-075 NMRA. Mr. Bolen's remedy was through that appeal process, not a claim for damages under to the CRA. The Court of Appeals correctly held quasi-judicial immunity applies to public bodies and should be affirmed.

Conclusion

Mr. Bolen suggests the Court of Appeals has "eviscerate[d] the CRA as a mechanism for obtaining relief... where alleged actionable activities by an agent

lead to any kind of public body fact finding or adjudicative process..." See Brief-in-Chief, p. 21. However, Mr. Bolen does not allege that some wrongful action by a NMRC agent led to an administrative process; he claims the administrative process itself is the wrongful action. The CRA does not immunize every action taken by a State agency, but it does preserve absolute immunity against claims for damages for the initiation and prosecution of an administrative licensing action, even where a plaintiff alleges that action was 'vindictive'.

The Court of Appeals should be affirmed because the immunities described in Section 10 of the CRA must necessarily apply to the public bodies permitted to be sued by the CRA. Public agencies are vicariously immune for the acts of their employees and, as such, if judicial immunity would protect the employee, then the agency is also immune.

WHEREFORE New Mexico Racing Commission requests the Court of Appeals be affirmed.

Respectfully submitted,

JACKSON LOMAN DOWNEY & STEVENS-BLOCK, P.C.

By:/s/ Eric Loman
Counsel for New Mexico Racing Comm'n
201 Third St. NW, Ste. 1500
Albuquerque, NM 87102
(505) 767-0577
eric@jacksonlomanlaw.com

Statement of Compliance

Pursuant to Rule 12-318(F) NMRA, NMRC states this brief was prepared in Times New Roman 14 pt. font. The body of this brief contains 3,331 words, as calculated by Microsoft Word's word count function.

Certificate of Service

I certify that on September 25, 2024, the foregoing was served electronically on all counsel of record.

By: /s/ Eric Loman
Eric Loman

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.

REPLY BRIEF 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 Bolen

ORAL ARGUMENT IS REQUESTED.

TABLE OF CONTENTS

STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This brief contains more than the 15 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 3,893 words total.

TABLE OF AUTHORITIES

New Mexico Case Authority:

New Mexico Statutes and Rules:

Authority from Federal or Sister Jurisdictions:

Other Authority:

SUMMARY OF ARGUMENT

The New Mexico Racing Commission insists that quasi-judicial immunity is absolute and well-established in New Mexico. **[AB 4]** That proposition is not disputed. It is also not in contention. Mr. Bolen sued the NMRC - not its employees and agents - for retaliatory actions that led to an unfounded disciplinary proceeding against him, after he engaged in non-threatening verbal advocacy seeking licensure for an assistant. The purpose of absolute or quasi-judicial immunity is to protect people, not entities. If people make mistakes and are sued in their individual capacity, 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 the agency's act of 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. As the court observed:

> 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]

Contrary to the NMRC's insistence that quasi-judicial immunity is absolute and well established in New Mexico **[AB 4-9]** the court of appeals acknowledged that it was treading new ground and interpreting 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, 553 P.3d 492. 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 NMRC insists that the CRA "preserves quasi-judicial immunity." **[AB 9]** Again, the NMRC misses the point. The court of appeals' decision expands the concept of judicial immunity by extending it to entities, not individuals. In expanding the concept of absolute and quasi-judicial immunity to include such immunity for public bodies - as distinct from individuals - the court of appeals decision defeats the intent of the Legislature and 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 the situs of the injury. The court of appeals' imposition of immunity principles was ill-considered and should be reversed.

REPLY ARGUMENT AND AUTHORITIES

A. Absolute or Quasi-Judicial Immunity is Unnecessary Under the CRA.

NMRC insists that quasi-judicial immunity is "absolute and well-established in New Mexico." [AB 4] NMRC further submits that the immunity is well-established. [AB 4] NMRC misses the point.

It is undisputed that quasi-judicial immunity is a legal doctrine and is well-established in New Mexico. NMRC cites a long line of cases for the proposition that "a judge or judicial officer "is simply not civilly responsible in damages for his errors or mistakes. As to this the law has been well settled." [**AB 4-5**, *citing Edwards v. Wiley*, 1962-NMSC-116, ¶ 7, 70 N.M. 400.] The *Edwards* caption

reveals that the action was brought against an individual person, a justice of the peace, for wrongful attachment. *Id.* at ¶ 1. The case turned on whether the justice of the peace was civilly liable for his actions in a case where he either had no jurisdiction or exceeded the jurisdiction. *Id.* at ¶ 2. It is undisputed that judicial immunity "extends to all classes of courts and applies to the highest judge of the nation and to the lowest officer who sits as a court and tries petty cases * * *." *Id.* at ¶ 9. What is disputed *sub judice* is whether that judicial immunity extends to a public entity sued under the CRA, not a judge or public official sued for acting on a matter admittedly within his jurisdiction. *Id.* at ¶ 8. *Edwards* is inapposite.

NMRC fares no better in the remainder of its argument on this point. It is undisputed that the United States Supreme Court in *Butz v. Economou,* 438 U.S. 478, 514 (1978), held "that persons . . . performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts." [AB 5-6] *Butz* made no extension of immunity to the agency at issue, and in the instant case Mr. Bolen did not sue a person or official in any capacity. He sued the NMRC, which is indisputably a public entity, for deprivation of his civil rights.

The quasi-judicial/adjudicatory and prosecutorial immunities that would otherwise shield individuals from being personally liable for damages under 42 U.S.C. Section 1983 are inapplicable in the case of a claim under the CRA 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. Judicial immunity or quasi-judicial immunity is not a defense available to a "public body" under the CRA because public bodies have no need for such a defense. Again, the CRA was enacted in significant part because of the recognition that litigation under 42 U.S.C. 1983 had been rendered largely ineffective due to judicially created requirements and immunities that subverted the clear intent of the enacting congress. *See* Vanzi, L. & Rutkowski, R., *The New Mexico Civil Rights Act: Look Before You Leap*, 54 N.M. L. Rev. 363 (2024) (*Vanzi & Rutkowski*). The New Mexico Legislature recognized that 42 U.S.C. 1983 no longer serves its plain purpose. It is in the context of the Legislature's desire to provide an expeditious and equitable way to obtain redress for constitutional grievances that the CRA must be viewed. *See Kaiser v. DeCarrera*, 1996-NMSC-050, ¶ 7, 122 N.M. 221 (holding a statute with a remedial purpose must be liberally construed to implement its purpose, and any exception must be strictly construed.).

B. 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 largely 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 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*, 822 F.2d at 1515 (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").

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.

It is undisputed that "agency officials must make a decision to move forward with an administrative proceeding free from intimidation and harassment." Id. at 516 [AB 5]. Agencies and institutional defendants are not subject to "intimidation and harassment," which is precisely why courts considering the issue have rejected the imposition of judicial immunity. **[AB 5-6]** *See 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."); *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000) (affirming 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); *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.").

C. The CRA Must be Interpreted in Light of Existing Law.

NMRC's second argument reduces to a proposition that the language of NMSA 1978, § 41-4A-10 of the CRA, providing that the waiver of sovereign immunity "shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity[,]" must be given meaning, so the doctrine of absolute or quasi-judicial immunity must be redefined to encompass the statutory language. **[AB 9-10]** The CRA contains no language limiting its purview to constitutional rights deprivations that occur outside a public body's adjudicative process. Mr. Bolen's action alleged vindictive prosecution, the bringing of a disciplinary action that threatened his livelihood and violated his

constitutional rights, without regard to whether the allegedly retaliatory action was pursued in a civil, criminal, or administrative proceeding.

Further, as noted by *Vanzi & Rutkowski, supra,* there are internal inconsistencies in the language of the CRA. For example, while NMSA 1978, § 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," NMSA 1978, § 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 & Rutkowski, supra,* at 375. NMSA 1978, § 41-4A-4 contemplates 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." *Vanzi & Rutkowski*, 54 N.M. L. Rev. at 375-376.

The fact that the CRA is perhaps not the model of legislative consistency does not require the Courts to expand established defenses to encompass entities when there is no policy rationale for such expansion. The court of appeals' creation of absolute or quasi-judicial immunity for entities sued under the CRA, as opposed to individuals sued in their official capacities, if permitted to stand, renders the entirety of the CRA as surplusage. *Contra Whitely v. New Mexico State*

Pers. Bd., 1993-NMSC-019, ¶ 5, 115 N.M. 308. The decision severely limits the scope and efficacy of the CRA and contravenes the clear Legislative intent that civil rights deprivations be allowed against public entities and be decided on their merits. The court of appeals erred in expanding and applying judicial immunity to a public entity in this case, and this Court should reverse the court of appeals' decision and remand to the district court for a determination on the merits of Mr. Bolen's claims.

D. Public Bodies Are Liable For the Actions of Employees and Agents

The NMRC insists that public entities must have the same defenses as would be available to individuals because the liability is vicarious. **[AB 11-12]** 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). A public entity can only act through its agents and employees, and therefore under the plain language of the statute, the liability of the public entity is primary, not vicarious.

It is undisputed that quasi-judicial and absolute judicial immunity derive from policy rationale that consider the unique position of public officials making decisions that the public might find objectionable and therefore actionable. *See,*

e.g., *Horwitz*, 822 F.2d at 1515 (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"). The same simply cannot be said for public entities.

E. Mr. Bolen Desires a Workable CRA.

It is the court of appeals' extension of immunity principles to public bodies that creates an absurdity in the structure of the CRA. **[AB 12-13]** 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 Legislature enacted the CRA because violation by public bodies of citizens' constitutional rights cannot be countenanced, must be actionable, and certainly cannot properly be immunized in a free society governed by the rule of law. An appeal of an erroneous or malicious agency decision is utterly insufficient given the limited scope and standard of review applicable to agency decisions, and where, as here, the constitutional violation is alleged to be the institution of and adjudicatory process in the first instance.

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*, and contrary to the clear 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 curtailed 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.

For the foregoing reasons, Petitioner Brad Bolen again 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 October 3, 2024, causing all counsel of record to receive an endorsed copy via electronic service.

s/ L. Helen Bennett

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRAD BOLEN a/k/a BRADLEY CARROL BOLEN,

Plaintiff/Petitioner,

v.

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

Defendants/Respondents.

No. S-1-SC-40427

Hon. Joshua A. Allison

BRIEF OF STATE ETHICS COMMISSION, PUBLIC REGULATION COMMISSION, AND ADMINISTRATIVE HEARINGS OFFICE AS AMICI CURIAE

Jeremy Farris
Walker Boyd

800 Bradbury Drive SE, Ste. 215
Albuquerque, NM 87106
(505) 827-7800

Counsel for State Ethics Commission

Erin Lecocq

P.O. Box 1269
Santa Fe, NM 87504-1269
(505) 795-1037

Counsel for Public Regulation Commission

Brian VanDenzen
David Buchanan

P.O. Box 6400
Santa Fe, NM 87502
(505) 827-9714

Counsel for Administrative Hearings Office

RULE 12-318(G) STATEMENT

The body of this brief contains 9,603 words. The word count was obtained using Microsoft Word for Office 365 MSO (Version 2409 Build 16.0.18025.20030) 64-bit.

CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal cases

Cases from other states

Constitutional provisions

Statutes

Rules and Regulations

Treatises and other authorities

INTEREST OF AMICI CURIAE

Amicus Curiae State Ethics Commission ("SEC") is a bipartisan, independent state agency established by Article V, Section 17 of the New Mexico Constitution, which authorizes the SEC to both adjudicate claims and enforce statutes, as provided by enabling legislation. *See* N.M. Const., art. V, § 17.[1] This enabling legislation, the State Ethics Commission Act, NMSA 1978, §§ 10-16G-1 to -16 (2019, as amended through 2023), authorizes the SEC to (i) investigate and adjudicate complaints alleging violations of New Mexico's governmental conduct, campaign finance, and procurement laws, and (ii) to enforce those same laws through civil actions in state district court. *See* NMSA 1978, § 10-16G-9(A), (F) (2021). In its quasi-judicial function, an SEC hearing officer holds a hearing, subject to the rules of evidence, to adjudicate claims that are within the SEC's jurisdiction and which have been found to be supported by probable cause. *See* NMSA 1978, §§ 10-16G-10 (2023), 12 (2019). A hearing officer's orders may be appealed to the seven-

[1] Undersigned counsel authored this brief in whole. Undersigned counsel and their clients did not receive any remuneration from any other person in exchange for the preparation of this brief.

member Commission, whose final orders are subject to judicial review in the district courts under Rule 1-075 NMRA. *See* § 10-16G-12.

Amicus Curiae Public Regulation Commission ("PRC") is a state agency established by Article XI, Sections 1 and 2 of the New Mexico Constitution, which authorize the PRC to regulate public utilities and other public service companies in New Mexico, as provided by enabling legislation. The PRC has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities[.]" NMSA 1978, § 62-6-4(A) (2003). In its quasi-judicial function, the PRC conducts adjudicatory proceedings involving utility rate-setting, renewable energy, and resource management. The PRC's final orders may be appealed directly to the Supreme Court. NMSA 1978, § 62-11-1 (1993).

Amicus Curiae Administrative Hearings Office ("AHO") is a state agency administratively attached to the Department of Finance and Administration, tasked with conducting fair and impartial administrative hearings for various state agencies. *See* Administrative Hearings Office Act, NMSA 1978, §§ 7-1B-1 through 10 (2015, as amended through 2019). The sole purpose of the AHO is to serve in a

quasi-judicial capacity, conducting and adjudicating fair administrative hearings independent of the supervision, direction, or control of the state agency that is a party of the administrative dispute. *See id.* The AHO is staffed with ten administrative law judges (all licensed attorneys) required to make independent fair and impartial decisions, all of whom are subject to a code of conduct modeled in part on the Code of Judicial Conduct and other model codes of conduct for administrative law judges. *See* NMSA 1978, § 7-1B-6 (2019); *see also* 22.600.2 NMAC. The AHO's decisions are subject to judicial appeal either in the relevant district court, or in the case of tax protest cases, the Court of Appeals. *See* NMSA 1978, § 7-1B-8 (I) (2019) (appeals of tax protests); *see also* NMSA 1978, § 7-1B-9(D) (2019) (appeals of cases under the Motor Vehicle Code).

Amici have a substantial interest in the outcome of this case. Just as judicial immunity protects the New Mexico courts, quasi-judicial immunity protects amici—including their staff, hearing officers, and commissioners—from retaliatory lawsuits and external efforts to compromise their independence. There is a strong public interest in protecting agencies with quasi-judicial functions from collateral or subsequent lawsuits that seek financial damages and tax the agencies'

respective capacities to decide the claims and issues the Legislature required the agencies to adjudicate.

ARGUMENT

The petition asks this Court to answer the following question: "Is judicial immunity a defense available to public bodies sued under the New Mexico Civil Rights Act?" **[Pet. 8, BIC 14]** The answer is "yes."

The Court previously explained that the common law fills in every gap not addressed by statute and "the common law must be expressly abrogated by a statute." *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618 (quoting *Beals v. Ares*, 1919-NMSC-067, ¶ 36, 25 N.M. 459). Because the common law makes judicial immunity an available defense to public bodies in certain cases, if the Legislature intended to depart from the common law, it must have done so unequivocally. But the New Mexico Civil Rights Act does the opposite: it preserves the judicial immunity available to public bodies at common law. *See* NMSA 1978, § 41-4A-10 (2021).

The ACLU's effort to frame the issue as whether the New Mexico Civil Rights Act "authorize[s] judicial or quasi-judicial immunity to extend beyond their constitutional limits to the executive branch" misapprehends the relationship between the common law and statutory law. **[ACLU AmB 4]** The proper inquiry is not whether the Act

"authorize[s]" any judicial immunity or quasi-judicial immunity available to public bodies. Rather, the proper inquiry is whether judicial immunity or quasi-judicial immunity is an available defense to public bodies at common law and, if so, whether the statute "expressly abrogated" those immunities in a departure from the common law. *Sims*, 1996-NMSC-078, ¶ 23. Amici submit this brief to provide the Court with an argument addressed to that inquiry.

New Mexico and other state court cases confirm that judicial immunity bars damages claims against public bodies, so long as the claim alleges the exercise of a judicial function. The New Mexico Civil Rights Act expressly preserves judicial immunity as an available defense, providing that the prohibition on the use of qualified immunity and the waiver of sovereign immunity "*shall not abrogate* judicial immunity." § 41-4A-10 (emphasis added). Hence, judicial immunity remains an available defense to public bodies, including from actions under the Civil Rights Act.

The statute also provides that it does not "abrogate . . . any other constitutional, statutory or common law immunity." *Id.* Quasi-judicial immunity is another common law immunity, and case law confirms that

this defense is available to public bodies against damages claims, again, so long as the claim challenges the exercise of a judicial function. Thus, quasi-judicial immunity also is preserved as an available defense to public bodies, including against Civil Rights Act claims.

The availability of quasi-judicial immunity as a defense to damages claims against public bodies in the executive branch does not infringe upon the separation of powers, nor upon the Court's ability to review and, if necessary, correct alleged violations of constitutional rights. Under the public rights doctrine, the Legislature may authorize executive branch agencies to adjudicate non-private-right claims without offending the separation of powers. Quasi-judicial immunity enables those agencies to make impartial adjudications without being subject to damages and attorneys' fees claims because of their decisions. This immunity from damages suits does not hamper orderly judicial review of agency decisions, presented to a court either by appeal, through an action for prospective injunctive relief, or by way of appropriate writ proceedings; rather, quasi-judicial immunity allows an executive agency the room to make an honest determination of a claim and build a record, so that the

courts may conduct an orderly review of the former with the benefit of the latter.

Judicial immunity and quasi-judicial immunity are longstanding in the common law, and the Court does not need to withdraw them as available defenses to public bodies to uphold the constitutional and orderly administration of justice. Rather, the amici respectfully request the Court affirm the Court of Appeals' decision and hold that judicial immunity and quasi-judicial immunity remain available defenses to public bodies, including from Civil Rights Act claims seeking damages and attorneys' fees, so that the judicial and executive branch agencies exercising delegated adjudicatory functions may conduct those adjudications "independently and freely, without favor and without fear." *Bradley v. Fisher*, 13 Wall. 335, 349 n.16, 20 L.Ed. 646 (1872).

I. Judicial immunity is an available defense to public bodies against claims under the New Mexico Civil Rights Act.

A public body may assert judicial immunity in response to a claim under the New Mexico Civil Rights Act. This is because: (i) New Mexico courts and other courts have held that a public body enjoys judicial immunity for judicial acts; (ii) this Court has held that an official-capacity claim is no different from a claim against a public body, and

judicial immunity applies to bar official-capacity claims against judicial officers; and (iii) the New Mexico Civil Rights Act preserves, and in no way abrogates, common law judicial immunity.

A. Common law judicial immunity bars claims against public bodies if the claim is grounded on the exercise of a judicial function.

New Mexico appellate courts have applied judicial immunity to dismiss damages claims against public bodies. *See Hunnicutt v. Sewell*, 2009-NMCA-121, ¶ 1, 147 N.M. 272 (affirming dismissal of breach of contract claim for money damages against public body on judicial immunity grounds). In *Hunnicutt*, the plaintiff filed a complaint against both individual state employees and public bodies, including the Administrative Office of the Courts ("AOC") and the Twelfth Judicial District Court, asserting claims related to an abuse and neglect proceeding. *See id.* ¶¶ 3–4. The plaintiff sought damages consequent to an alleged breach of contract between the public body defendants and her court-appointed attorney. *Id.* ¶ 3.

The Court of Appeals affirmed the district court's dismissal of the complaint, holding that absolute judicial immunity barred all claims, including claims for damages against the public-body defendants. *Id.*

¶¶ 17–18. "[T]o determine whether Defendants are entitled to absolute judicial immunity," the appellate court applied "a functional test to determine whether the acts alleged by Plaintiff were judicial functions." *Id.* ¶ 9 (citing *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, ¶ 16, 111 N.M. 391, *abrogated on other grounds by State v. Mares*, 2024-NMSC-002, ¶ 16). Because the alleged actions by the defendants, including the public-body defendants, "were inherently related to a specific judicial proceeding," the court held that judicial immunity barred the amended complaint. *Id.* ¶ 16.

In applying judicial immunity to dismiss damages claims against the public-body defendants, the Court of Appeals followed this Court's statement of the immunity's purpose: "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 effects of potential lawsuits.'" *Id.* ¶ 9 (alteration original) (citing *Collins*, 1991-NMSC-013, ¶ 24). This Court has expounded on that purpose, explaining that judicial immunity prevents "intimidation tactics" deployed to "obstruct the pathway to

ascertaining the truth and impair the judge's ability to perform his or her judicial duties." *Kimbrell v. Kimbrell*, 2014-NMSC-027, ¶¶ 12, 14.

As the Court explained in *Collins* and *Kimbrell*, the purpose of judicial immunity is to prevent "harassment, intimidation, or other interference" directed to persons whose involvement is integral to the judicial process. *Collins*, 1991-NMSC-013, ¶ 18; *see Kimbrell*, 2014-NMSC-027, ¶¶ 12, 14; *accord Pulliam v. Allen*, 466 U.S. 522, 532 (1984) ("'It is essential in all courts that judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear." (quoting *Bradley*, 13 Wall. at 349 n.16)). The purpose of judicial immunity supports the *Hunnicut* court's application of the immunity to dismiss claims against public bodies. Whether a claim runs against a defendant individually (as with 42 U.S.C. § 1983) or against the public body that employs them and, under agency law, assumes responsibility for their actions (as in *Hunnicut*), the concern that a lawsuit will harass or intimidate those who exercise judicial functions is the same. In either case, such lawsuits tax the public body's resources and influence the decision making of employees engaged in judicial functions. A decision

by the Court that public bodies may not raise judicial immunity "could subject state officers to burdensome and distracting litigation, which, as the Tenth Circuit has noted in other contexts, 'could lead to undesirable *ex ante* effects . . . [including] a general disaffection with public service, rooted in the calculation that its costs simply outweigh its benefits.'" *Flores v. Herrera*, 2016-NMSC-033, ¶ 18 (alterations original) (quoting *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013)).

Petitioner **[BIC 23–27]** and their supporting amicus **[ACLU AmB 12–14]** argue that the purpose of judicial immunity is to protect individuals, not institutions, and therefore there is no practical reason to extend judicial immunity to public bodies. As an initial matter, drawing a distinction between the government and the officers and employees who represent it ignores reality. As the United States Supreme Court long ago noted, "the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers." *The Floyd Acceptances*, 74 U.S. 666, 676, 19 L.Ed. 169 (1868). It follows that any suggestion that a judicial officer's impartiality and independence would be unaffected by a judgment for

money damages against the public body that employs him is implausible. Indeed, an individual judicial officer's personal liability is not judicial immunity's objective, as the protection of individual government officers and employees from personal liability for their official acts is already served by the indemnification provision of the New Mexico Civil Rights Act, the public liability fund, and the common law doctrine of respondeat superior. *See* NMSA 1978, § 41-4A-8 (2021) (indemnifying public employees for judgments, costs, and fees resulting from Civil Rights Act claims); NMSA 1978, § 41-4-23(B)(3) (2001) (availability of public liability fund to indemnify agencies and employees for claims within the certificate of coverage). Judicial immunity serves a separate purpose: namely, preventing the undue influence that would invariably follow if a public body could be found liable for damages allegedly caused by its judicial acts. As the Washington Supreme Court explained almost a century ago, "[t]he doctrine of exemption of judicial and quasi-judicial officers [from liability] . . . is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public, and to insure active and independent action . . . ." *Anderson v. Manley*, 43 P.2d 39, 40 (Wash. 1935).

Judicial immunity results in the "protection of the public" by ensuring not only impartial and independent decision-making but also the orderly administration of justice. *Id.* As this Court has explained, claims "seeking to have one district court order relief from another district court" violate the constitutional prohibition against a district court issuing writs "directed to judges or courts of equal or superior jurisdiction." *Pacheco v. Hudson*, 2018-NMSC-022, ¶¶ 59, 63 (quoting N.M. Const. art. IV, § 13). Judicial immunity complements these constitutional safeguards and protects the judicial process from being undermined by collateral actions for money damages. Absent judicial immunity, a frustrated litigant would not seek appellate review of judicial orders they disagreed with; instead, they would pursue a collateral action for damages in a court of their choice. As the Ninth Circuit observed when it invoked absolute judicial immunity to dismiss claims against federal judges of one judicial district brought in another, the absence of judicial immunity would create, "in effect, a 'horizontal appeal' from one district court to another or even a 'reverse review' of a ruling of the court of appeals by a district court." *Mullis v. United States Bankr. Court for the Dist. of Nev.*, 828 F.2d 1385, 1392-93 (9th Cir. 1987)

(footnote omitted). In sum, common law judicial immunity does not exist to protect a judge from potential personal liability from claims arising from his judicial actions; instead, it is a prophylactic against the poisonous effect these claims have on judicial independence and effective functioning of the judicial process as a whole.

B. Judicial immunity is an available defense to official-capacity claims asserted against judicial officers that seek money damages.

At common law, sovereign immunity precludes suits seeking money damages from the State. *Ramirez v. New Mexico Child. Youth and Fam. Dep't*, 2016-NMSC-016, ¶ 15 ("New Mexico's immunity to suit for damages is a fundamental aspect of its sovereignty[.]"); *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶ 29, 132 N.M. 156. Because a public body can traditionally assert sovereign immunity against damages claims, courts are not often called to decide whether a public body may also assert judicial immunity. But the issue has arisen in the context of claims made against government officials in their official capacity, which "are treated as suits against the State [itself]." *Pacheco*,

2018-NMSC-022, ¶ 62 (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)).[2] These cases typically arise when the plaintiff asserts an official-capacity claim against an individual government official and, because there is an arguable waiver of sovereign immunity, the defendant asserts judicial immunity. *See, e.g., Wynn v. Frederick*, 895 S.E.2d 371, 380–81 (N.C. 2023), *reh'g denied*, 896 S.E.2d 254 (N.C. 2024); *Roberts v. Cuthpert*, 893 S.E.2d 73, 80 & n.11 (Ga. 2023). When such official-capacity claims arise from the exercise of judicial acts, the Courts have found that judicial immunity applies. For example, this Court strongly suggested judicial immunity applies to official-capacity claims for damages and attorney's

---

[2] In *Flores*, the Court explained the difference between personal-capacity and official-capacity suits against government officials:

> Personal–capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official–capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. 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. . . .

2016-NMSC-033, ¶ 10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165–66, 166 n.11 (1985)) (citations and quotation marks omitted).

fees when it ordered the dismissal of such claims against Judge Wilson in *Pacheco*. *See* Order Granting Pet. for Writ of Mandamus, *Pacheco v. Hudson*, S-1-SC-35445 (Sept. 2, 2015). Other state supreme and intermediate appellate courts have reached the same conclusion. *See, e.g.*, *Wynn*, 895 S.E.2d at 380–81 (reversing court of appeals and holding judicial immunity barred official-capacity claim against magistrate); *Traylor v. Gerratana*, 88 A.3d 552, 558 (Conn. App. 2014) ("Absolute judicial immunity bars the plaintiff's state law claims against the judicial defendants in their official capacities."); *Tays v. Cnty. of Doña Ana*, No. 33,131, 2014 WL 4294501, at *1 (N.M. Ct. App. June 11, 2014) (non-precedential) (affirming dismissal of claims for money damages against State based on alleged wrongdoing of district judge on judicial immunity grounds).[3]

The North Carolina Supreme Court's opinion in *Wynn* is instructive. There, a magistrate failed to timely transmit an order to a local sheriff to involuntarily commit an unwell individual, leading to the

[3] *Cf. Roberts*, 893 S.E.2d at 80 & n.11 (observing that lower court dismissed sua sponte official-capacity claim for monetary relief against defendant probate judge on judicial immunity grounds, reversing because the judge had waived defense, and thus declining to decide whether judicial immunity bars official-capacity claims against judges).

plaintiff's injury at the hands of that individual. *See Wynn*, 895 S.E.2d at 374–75. The plaintiff filed a negligence claim against a magistrate, in his official capacity, seeking damages. *Id.* at 375. The magistrate moved to dismiss, invoking both sovereign immunity and judicial immunity. *Id.* The trial court denied the motion. *Id.* The North Carolina Court of Appeals affirmed, adopting the same reasoning that Petitioner and his supporting amicus argue in here: that judicial immunity is intended to protect individuals, not institutions, and therefore is an available defense only if a judicial officer is sued in their personal capacity. *Wynn v. Frederick*, 863 S.E.2d 790, 794–96 (N.C. App. 2021); *accord Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000).

The North Carolina Supreme Court reversed, "conclud[ing] that judicial immunity applies to official capacity and individual capacity claims." *Wynn*, 895 S.E.2d at 380. The court reasoned that the essential question "is whether the judicial officer acted in a judicial capacity, or in the discharge of his official duties," and *not* "whether the plaintiff decided to bring an official capacity or individual capacity claim against a judicial officer." *Id.* The court supported its conclusion with its precedent, which

"clearly establishes that judicial immunity protects judicial officers from liability when they perform judicial acts and presents a complete and absolute bar to recovery regardless of whether the plaintiff brings an official or individual capacity claim." *Id.* at 380–381 (citing *Town of Fuquay Springs v. Rowland*, 79 S.E.2d 774, 776 (N.C. 1954); *Hedgepeth v. Swanson*, 27 S.E.2d 122, 123 (N.C. 1943)).

Like the cases holding that a public body may invoke judicial immunity, these cases establish that judicial immunity does not turn on the defendant's identity or status as an individual or entity. Instead, the courts analyze whether the defendant's action, which is alleged to give rise to liability, is an exercise of a judicial function. *Hunnicutt*, 2009-NMCA-121, ¶ 9; *Wynn*, 895 S.E.2d at 380–381.

C. The text, structure and purpose of the Civil Rights Act establish that the Act preserves the judicial immunity traditionally available to public bodies.

The New Mexico Civil Rights Act creates a cause of action for violations of constitutional rights set forth in Article II of the New Mexico Constitution. NMSA 1978, § 41-4A-3(B) (2021). It also allows a prevailing plaintiff to recover costs and attorney's fees from the defendant. NMSA 1978, § 41-4A-5 (2021). The Act requires the plaintiff

to bring the action exclusively against a public body. § 41-4A-3(C). Further, a public body is liable for any judgment, costs, and fees arising from acts committed by any individual "acting on behalf of, under color of or within the course and scope of the authority of the public body," *i.e.*, acts undertaken in some official capacity. § 41-4A-8. To enable the right of action, the Act expressly waives the State's sovereign immunity to claims under the statute. NMSA 1978, § 41-4A-9 (2021). The Act also prohibits public bodies from asserting the defense of qualified immunity. NMSA 1978, § 41-4A-4 (2021). Yet, the Act provides that "[t]he prohibition on the use of the defense of qualified immunity . . . and the waiver of sovereign immunity . . . *shall not abrogate judicial immunity*, legislative immunity or any other constitutional, statutory or common law immunity." § 41-4A-10 (emphasis added).

Section 41-4A-10 is clear and unambiguous. The statute's waiver of sovereign immunity for claims alleging violations of state constitutional rights "shall not abrogate judicial immunity[.]" § 41-4A-10. Therefore, while public bodies may not assert the State's sovereign immunity, the New Mexico Civil Rights Act preserves whatever judicial immunity was available to them, at common law, before the statute's

enactment. As the New Mexico appellate courts and other state courts confirm, judicial immunity is an available defense to public bodies—for both claims against public bodies and for official-capacity claims asserted against the judicial officers that work for public bodies, so long as the claim targets the exercise of a judicial function. Section 41-4A-10 expressly preserves that judicial immunity against claims under the Civil Rights Act asserting violations of state constitutional rights.

The statute's structure reinforces its text. Reading Section 41-4A-10 alongside the Act's other provisions, Section 41-4A-10 presupposes that judicial immunity is available to public bodies for certain claims. Under Section 41-4A-3(C), only a public body may be named as a defendant. Thus, when Section 41-4A-10 preserves immunities, it presumes that those immunities are traditionally available to public bodies. That presupposition "give[s] effect to its entire text[.]" NMSA 1978, § 12-2A-18 (1997) (Uniform Statute and Rule Construction Act). Put differently, since the only proper defendant to a New Mexico Civil Rights Act cause of action is a "public body," § 41-4A-3(C), the only non-superfluous interpretation of Section 41-4A-10 is that it permits a public body to assert judicial or other common law immunities, unless expressly

abrogated by the statute. *See* § 41-4A-10; *see also State v. Farish*, 2021-NMSC-030, ¶ 11 ("'This Court must interpret a statute so as to avoid rendering the Legislature's language superfluous.'" (quoting *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 24)).

The Act's preservation of judicial immunity makes basic sense. Every day in the New Mexico courts, judicial officers and their staff take actions that a party might contend implicate "inalienable" constitutional rights. A judge enters an order striking a jury demand when a claim seems purely equitable. *But see* N.M. Const. art. II, § 12 (protecting "[t]he right of trial by jury as it has heretofore existed"). A court clerk certifies the defendant is in default when they do not appear and answer. *But see* N.M. Const. art. II, § 18 (protecting the right not to be deprived of "liberty or property without due process of law"). A judge holds a party in contempt for some unfortunate speech in open court. *But see* N.M. Const., art. II, § 17 (protecting the right to "freely speak"). In all these examples, the affected party may claim, however erroneously, that these judicial actions violated his or her constitutional rights.

The New Mexico Civil Rights Act permits a cause of action against public bodies, and the Act's definition of a public body includes the courts.

See NMSA 1978, § 41-4A-2 (2021). The statute waives sovereign immunity and prohibits qualified immunity (and, hence, the bar on discovery pending qualified immunity motions).[4] But those waivers of immunity do not mean that the Legislature intended to allow a plaintiff to file a claim against one court in another court of the plaintiff's choosing and, then, notice the deposition of a judicial officer or judicial staff member to inquire (continuing the above examples) into whether a judge had a malicious purpose or racial motivation in striking a jury demand, or if the judge issued a direct contempt sanction because the judge disapproved of the content or viewpoint of the contemnor's speech. To the contrary, the Legislature intended that plaintiffs *not* be able to file and pursue such civil rights actions against courts, targeting the judges and staff that work for them, because the Act unambiguously provides that the abrogation of qualified immunity and the waiver of sovereign immunity "shall not abrogate judicial immunity[.]" § 41-4A-10. Again, the purpose of judicial immunity is to prevent such collateral attacks on

---

[4] *See generally Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) ("[Q]ualified immunity is not only a defense to liability but also entitlement to immunity from suit and other demands of litigation. Discovery should not be allowed until the court resolves the threshold question whether the law was clearly established at the time the allegedly unlawful action occurred.") (citations omitted).

judicial decision-making, thereby allowing the courts (and ultimately this Court) to control the review of challenges to judicial actions and to enable the judiciary to take actions "independently and freely, without favor and without fear." *Pulliam*, 466 U.S. at 532 (quoting *Bradley*, 13 Wall. at 349 n.16).

Accordingly, the Civil Rights Act does not abrogate the judicial immunity that is available to public bodies.

II. The Civil Rights Act also preserves quasi-judicial immunity for claims against public bodies whose employees exercise judicial functions, even if the public body is not in the judicial branch.

The Court granted certiorari to decide a single question: "Is judicial immunity a defense available to public bodies sued under the New Mexico Civil Rights Act?" **[Pet. 8]** For the foregoing reasons, the answer is "yes." In their briefs, however, Petitioner and the ACLU modify the question presented. Petitioner suggests that the question presented is whether quasi-judicial immunity applies "when a claim is brought against a public body *like the NMRC* [and not a court]." **[BIC 24]** (emphasis added). Similarly, the ACLU says the question is whether judicial immunity "extend[s] . . . to non-judicial branches" of government. **[ACLU AmB 3-4]** This Court "will only consider the questions set forth in the petition."

Rule 12-502(C)(2)(b) NMRA; *see also Fikes v. Furst*, 2003-NMSC-033, ¶ 8, 134 N.M. 602 (same). Given that the question presented is straightforwardly whether public bodies may invoke judicial immunity under the New Mexico Civil Rights Act, the Court's grant of certiorari review does not require it to answer the separate question of whether public bodies in the executive branch may assert judicial, quasi-judicial, or other common law immunities.

Even assuming that the availability of quasi-judicial immunity to non-judicial-branch public bodies "is a foundational issue which is integral to a complete and thorough analysis of the specific question presented in the petition for writ of certiorari," *State v. Javier M.*, 2001-NMSC-030, ¶ 10, 131 N.M. 1, the same basic analysis applies. Quasi-judicial immunity is a recognized common law immunity that applies to state officers who exercise powers akin to those of a judge or which are integral to the judicial process. Like judicial immunity, quasi-judicial immunity is a defense available to not only the individual sued, but also the public body for which they serve. *See, e.g., State v. Mason*, 724 P.2d 1289, 1292 (Colo. 1986) (en banc). Turning to the statute, the New Mexico Civil Rights Act not only preserves judicial immunity; it also

preserves "*any other* constitutional, statutory or *common law immunity*." § 41-4A-10 (emphasis added). It follows that the New Mexico Civil Rights Act does not abrogate public bodies' quasi-judicial immunity.

A. Quasi-judicial immunity applies to claims that arise from the exercise of a lawful judicial function, including claims alleged against a public body outside of the judicial branch.

Guided by its underlying purposes, "[o]ver time, judicial immunity has been extended 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.'" *Hunnicutt*, 2009-NMCA-121, ¶ 9 (quoting *Collins*, 1991-NMSC-013, ¶ 18). This form of immunity is sometimes referred to as "quasi-judicial immunity," and it bars damages claims based on the exercise of a judicial function, even if not performed by a judge.

This Court has applied quasi-judicial immunity to individuals who are not themselves judges but who nonetheless exercise functions integral to court proceedings. *See, e.g.*, *Kimbrell*, 2014-NMSC-027, ¶ 2 (holding that absolute, quasi-judicial immunity bars a suit against a guardian ad litem in the performance of their duties); *Collins*, 1991-

NMSC-013, ¶ 16 (holding that quasi-judicial immunity bars suit against guardian ad litem "appointed in connection with court approval of a settlement involving a minor"). This application of quasi-judicial immunity is sound: if a judge is immune from liability for damages caused by a contempt citation, so too is the bailiff for taking actions "specifically ordered by the trial judge" to enforce the citation. *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997).

At common law, quasi-judicial immunity traditionally applies to bar claims against *executive* officials for exercising "powers very nearly akin to those of judges in the court" and "discretion [that is] in its nature judicial." Floyd R. Mechem, A Treatise on the Law of Public Offices and Officers § 636 (1890); *see, e.g., Downer v. Lent*, 6 Cal. 94, 95 (1856) ("It is beyond controversy, that the power of the Board of Pilot Commissioners is *quasi* judicial, and they are not civilly answerable. They are public officers to whom the law has entrusted certain duties, the performance of which requires the exercise of judgment."); *Reed v. Conway*, 20 Mo. 22, 38, 45 (1854) (holding that the surveyor general of Illinois and Missouri, a federal executive officer, "with judicial powers in some cases," was immune from claims against him in his actions "as a quasi judge"); *Neece*

v. Kantu, 1973-NMCA-020, ¶ 29, 84 N.M. 700, *cert. denied*, 84 N.M. 696 (recognizing absolute quasi-judicial immunity from defamation liability for statements by labor-grievance arbitrator). Indeed, in *Collins*, the Court recognized that quasi-judicial immunity encompasses "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," and approvingly cited cases holding that executive-branch officials such as hearing officers, administrative law judges, and prosecutors are immune for their quasi-judicial acts. 1991-NMSC-013, ¶ 18 (citing *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Butz v. Economou*, 438 U.S. 478, 512–14 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976)); *cf. Candelaria v. Robinson*, 1980-NMCA-003, ¶¶ 7, 28, 93 N.M. 786 (holding district attorney immune from defamation for letter sent to sheriff, because letter was incidental to "the duties of a law officer" and "[j]udicial immunity is involved because the office of district attorney is a quasi-judicial office.").

Quasi-judicial immunity, therefore, can arise in two contexts: first, if the defendant exercises authority granted by a court; or, second, if the defendant is taking actions that are functionally comparable to judicial actions. In either case, like judicial immunity, quasi-judicial immunity focuses on whether a claim is based on official functions that are judicial in nature. *Compare Collins*, 1991-NMSC-013, ¶ 16 (adopting functional test to apply quasi-judicial immunity to bar claims against a guardian ad litem), *with Hunnicut*, 2009-NMCA-121, ¶ 9 (applying functional test to apply judicial immunity to bar claims against public bodies); *see also Collins*, 1991-NMSC-013, ¶ 16 ("[T]his Court has long favored a 'functional' inquiry—immunity attaches to a particular official functions, not to particular offices." (alterations original) (quoting *Westfall v. Erwin*, 484 U.S. 292, 296 n.3 (1988)); *accord Lutheran Day Care v. Snohomish Cnty.*, 829 P.2d 746, 750 (Wash. 1992) (en banc) ("Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions." (citing *Butz*, 438 U.S. at 512–14).

This functional test reflects the two immunities' shared purpose: protecting a public officer or employee who performs a judicial function from the "fear that unsatisfied litigants may hound him with litigation charging malice or corruption"—regardless of whether they work inside the judicial branch of government. *Collins*, 1991-NMSC-013, ¶ 17 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Accordingly, another state supreme court has observed that the distinction between judicial and quasi-judicial immunity "is a distinction of name and not a distinction of immunity." *Praggastis v. Clackamas Cnty.*, 752 P.2d 302, 307 (Or. 1988) (en banc) (affirming dismissal of suit against political subdivision and its employee under Oregon's tort claims act on grounds of quasi-judicial immunity).

Like judicial immunity, quasi-judicial immunity bars any claim that is predicated on the exercise of judicial functions—irrespective of whether the claim is asserted against a public body, and irrespective of whether the named public body is outside of the judiciary, as other state supreme courts have concluded. *See, e.g.*, *Mason*, 724 P.2d at 1292 (holding that quasi-judicial immunity barred both the Colorado parole board and its members from negligent-release claim and explaining

"[t]he quasi-judicial immunity of the individual members of the parole board has little significance unless the parole board as an entity and the state of Colorado are also entitled to the benefit of quasi-judicial immunity"); *see also, e.g., State Bd. of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 969 (Colo. 1997) (en banc) ("As public officials engaging in quasi-judicial actions, the state Board [of Chiropractic Examiners], Board members and attorneys enjoy absolute immunity from suit or damages, state or federal."); *Tarter v. State*, 503 N.E.2d 84, 85, 87 (N.Y. 1986) (holding that New York State Board of Parole immune from negligence claims because "parole release decisions are quasi-judicial in character"); *Taggart v. State*, 822 P.2d 243, 248–49 (Wash. 1992) (en banc) (holding quasi-judicial immunity barred negligent-release claim against Washington's Indeterminate Sentence Review Board); *Jones-Clark v. Severe*, 846 P.2d 1197, 1201 (Or. Ct. App. 1993) (dismissing negligence claim against defendants parole officer and state corrections department on quasi-judicial immunity grounds because claim was predicated on defendant parole officer's actions within the

authority granted to him by a court).[5] Courts, including the Colorado Supreme Court, have relied on common law agency and tort principles to apply quasi-judicial immunity to bar claims against public-body defendants. *See, e.g. Mason*, 724 P.2d at 1292 (explaining that the State and "'its governmental agencies are immune for the liability for acts and omissions constituting (a) The exercise of a judicial function . . . .'" (quoting Restatement (Second) of Torts, § 895(B)(3), at 400 (1979)).

The holdings of several other state supreme courts are entirely consistent with New Mexico case law. Again, in *Hunnicut*, the Court of Appeals applied judicial immunity to bar breach-of-contract damages claims against the AOC and the Twelfth Judicial District Court. 2009-NMCA-121, ¶ 9. There, the AOC appointed an attorney to represent the plaintiff. *Id.* ¶ 2. The attorney was therefore under a duty to act *in the*

---

[5] While the cases involving the quasi-judicial of executive-agency parole boards provide the best examples of courts applying the immunity to public-body defendants, state courts have applied the immunity in many other contexts. See, e.g., *Foster v. Washoe Cnty.*, 964 P.2d 788, 793 (Nev. 1998) (applying quasi-judicial immunity to bar claims against a court appointed special advocate (CASA) public body); *Gross v. State*, 33 A.D.2d 868, 869 (N.Y. App. Div. 1969) (holding the State immune from suit because claim was based on alleged functions of the Secretary of State that were "in a quasi-judicial capacity which requires the exercise of judgment and discretion"); *cf. Venckus v. City of Iowa City*, 930 N.W.2d 792, 804 (Iowa 2019) (holding that judicial-process immunity barred state constitutional tort claims against county for decisions to prosecute criminal charge).

*plaintiff*s interests, either because the plaintiff was the attorney's client, or because the plaintiff was an intended third-party beneficiary of the contract between the attorney and the AOC. *Id.* ¶ 4. Nonetheless, looking to the AOC's functions (as opposed to its formal position in relation to the judicial branch of government), the court found that both the attorney and the AOC were immune from liability for the damages to the plaintiff allegedly caused by the attorney's breach of duty, because the contract was "integrally related" to an ongoing court proceeding and collateral tort litigation threatened that proceeding's integrity. *Id.* ¶ 16.

The *Hunnicutt* court's application of judicial immunity did not turn on whether the AOC, for example, was within the judicial branch; rather, the court focused on whether the public body's contract was integral to the courts' power to appoint counsel. *Id.* ¶¶ 9–13. And under that analysis, the New Mexico Racing Commission functions at issue in this appeal are more "judicial" than the functions performed by the AOC in *Hunnicutt*. If the AOC is entitled to judicial immunity for its alleged failure to "monitor[] the effectiveness" of an attorney it retained to represent the plaintiff's interests, *id.* ¶ 16, the New Mexico Racing Commission has a stronger claim to immunity from claims directly

attacking its exercise of an independent adjudicatory function. As the Colorado Supreme Court, sitting en banc, explained when it recognized the availability of quasi-judicial immunity against claims for damages by a state licensing board like the Racing Commission: "The rationale for both absolute judicial and prosecutorial immunity is equally pertinent to quasi-judicial functions performed by state boards, members of these state boards, and state attorneys: 'The importance of impartial decision making, the possibility of unfounded suits and the need for freedom from fear of litigation. . . .'" *Stjernholm*, 935 P.2d at 969 (quoting *Mason*, 724 P.2d at 1291).

Because New Mexico courts apply an identical, "functional" test to apply judicial and quasi-judicial immunity, New Mexico case law makes quasi-judicial immunity an available defense to public bodies outside of the judicial branch—just as other state supreme courts have concluded of their respective common law.

B. The New Mexico Civil Rights Act does not abrogate quasi-judicial immunity.

The New Mexico Civil Rights Act does not abrogate the immunities public bodies have against claims seeking money damages for exercise of judicial functions, including the quasi-judicial immunity that exists at

common law. The Legislature's reservation of common law immunities is unambiguous. "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*." § 41-4A-10 (emphasis added). Accordingly, quasi-judicial immunity remains an available defense for public bodies outside of the judicial branch to claims under the New Mexico Civil Rights Act, so long as the claim is predicated on the exercise of a judicial function.

C. Immunity for quasi-judicial actions by executive branch agencies neither offends the separation of powers nor jeopardizes judicial review of alleged violations of constitutional rights.

The availability of judicial and quasi-judicial immunity to public bodies accords with the law pertaining to the exercise and review of adjudicatory decisions by executive branch agencies. While the courts (and this Court) have final review of all exercises of the judicial power, the courts are not the only public bodies that are lawfully required to adjudicate non-private-right claims. Public bodies outside of the judicial branch are constitutionally and statutorily required to exercise judicial

functions and do so subject to many avenues of judicial review. The availability of quasi-judicial immunity for the exercise of their judicial functions nether threatens the Court's review and ability to remedy alleged violations of constitutional rights nor violates the separation of powers.

The New Mexico Constitution vests several public bodies outside of the judiciary with judicial or quasi-judicial power. *See, e.g.*, N.M. Const. art. VI, § 1 (authorizing the Senate with judicial power when sitting as a court of impeachment); N.M. Const. art. V, § 17(B) (authorizing the State Ethics Commission to "*adjudicate* complaints alleging violations of . . . standards of ethical conduct and other standards of conduct and reporting requirements, as may be provided by law") (emphasis added); *cf.* N.M. Const. art. III, § 1 (authorizing the legislature to create the Workers Compensation Administration, "a body with statewide *jurisdiction*" to determine rights and liabilities involving personal injury sustained in the course of employment) (emphasis added). These constitutional grants of judicial power to bodies outside of the judiciary do not offend the separation of powers, because the state Constitution "expressly directed or permitted" them. N.M. Const. art. III, § 1.

Next, statutory law contains scores of authorizations to adjudicate, at least in the first instance, non-private-right disputes.[6] The Court has

---

[6] The New Mexico Statutes Annotated is replete with statutes granting such authority. *See* NMSA 1978, § 62-19-9(C)(3)(d) (2023) (Public Regulation Commission); NMSA 1978, § 74-6-5(B), (G), (Q) (2009) (Water Quality Control Commission); NMSA 1978, § 70-2-12(A)(5) (2019), § 70-2-22 (1977) (Oil Conservation Division); NMSA 1978, § 75-3-10 (1965) (Interstate Stream Commission); NMSA 1978, § 69-36-17(A) (1993) (Mining and Minerals Division); NMSA 1978, § 50-9-9(D)–(F) (1975) (Occupational Health and Safety Review Commission); NMSA 1978, § 60-2D-14 (1991) (Bicycle Racing Commission); NMSA 1978, § 60-2E-7(B)–(C) (2009) (Gaming Control Board); NMSA 1978, §§ 60-3A-9 (2001), 60-3A-10 (2001) (Alcoholic Beverage Control Division); NMSA 1978, §§ 60-13-6(E) (2011), 60-13-23 (1993), 60-13-23.1(A) (1989) (Constructive Industries Commission); NMSA 1978, § 60-13A-11(A) (1993) (Regulation and Licensing Department); NMSA 1978, § 60-14-12 (1983) (Manufactured Housing Division and Manufactured Housing Commission); NMSA 1978, § 60-16-7 (2018) (New Mexico Department of Agriculture); NMSA 1978, § 61-2-6(E)(9) (2022) (Board of Optometry); NMSA 1978, § 61-3-10(G) (2022) (Board of Nursing); NMSA 1978, § 61-4-10(A) (2006) (Chiropractic Board); NMSA 1978, 61-5A-21(A) (2021) (Board of Dental Healthcare and the Dental Hygienists Committee); NMSA 1978, § 61-6-5(H) (2023) (Medical Board); NMSA 1978, § 61-7A-13(A) (1989) (Nutrition and Dietetics Practice Board); NMSA 1978, § 61-9-6(B)(3) (2022); NMSA 1978, § 61-9A-9(A)(4) (2021) (Counseling and Therapy Board); NMSA 1978, § 61-11-20(A) (2019) (Board of Pharmacy); NMSA 1978, § 61-12A-9(A)(4) (2022) (Board of Examiners for Occupational Therapy); NMSA 1978, § 61-12C-8(A) (2019) (Massage Therapy Board); NMSA 1978, § 61-12D-5(K) (2022) (Physical Therapy Board); NMSA 1978, § 61-13-6(C) (2022) (Board of Nursing Home Administrators); NMSA 1978, § 1-14-5(A) (2022) (Board of Veterinary Medicine); NMSA 1978 61-14A-8(G) (2022) (Board of Acupuncture and Oriental Medicine); NMSA 1978, § 61-14B-11(D) (2022) (Speech-Language Pathology, Audiology and Hearing Aid Dispensing Practices Board); NMSA 1978, § 61-14D-9(G), (H) (2005) (Athletic Trainer Practice Board); NMSA 1978, §§ 61-14F-6(B) (2009), 61-14F-7(B) (2009), 61-14F-17 (2009) (Secretary of State of New Mexico); 61-15-4(G), (H) (2022) (Board of Examiners for Architects); NMSA 1978, §§ 61-16-6 (1941), 61-16-11 (1941) (Local county boards); NMSA 1978, §§ 61-17A-7(A) (2022), 61-17A-21(A) (2022) (Board of Barbers and Cosmetologists); NMSA 1978, §§ 61-17B-4 (2007), 61-17B-5 (2022), 61-17B-16(A)(8) (2022) (Board of Body Art Practitioners); NMSA 1978, § 77-2-7(F), (I), (N) (1999) (Livestock Board); NMSA 1978, § 50-1-2 (1987); NMSA 1978, §§ 51-1-8 (2015), 51-1-28 (1979) (Unemployment Compensation Board of Review); NMSA 1978, § 69-25A-29(E) (2005) (Coal Surface Mining Commission); NMSA 1978, § 69-36-15(A) (1993) (Mining Commission); NMSA 1978, § 69-8-4.1(A) (2007) (Mining Safety Board); NMSA 1978,

recognized the Legislature's power to vest administrative agencies with quasi-judicial, adjudicatory functions. *See, e.g., Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 35 ("Nor is it improper for the Legislature to vest an agency with quasi-judicial functions." (citation omitted)); *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42 ("[W]e have recognized the Legislature's power to delegate both adjudicative and rule-making power to administrative agencies."). Under the public rights doctrine, those statutory authorizations do not offend the separation of powers. *See, e.g., Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 1994-NMSC-096, ¶¶ 38–39, 118 N.M. 470 (holding that where "a public right [is]

---

§ 17-1-14(B)(10) (2015) (State Game Commission); NMSA 1978, § 10-9-18(A) (2009) (State Personnel Board); NMSA 1978, §§ 10-7E-9(B), (C) (2020), 10-7E-12 (2005) (Public Employee Labor Relations Board); NMSA 1978, § 28-7-23 (1986) (Commission for the Blind); NMSA 1978, §§ 28-1-4 (1987), 28-1-11 (1995) (Human Rights Commission); NMSA 1978, §§ 61-23-10(A)–(D) (2022), 61-23-24(A) (2022) (State Board of Licensure for Professional Engineers and Professional Surveyors); NMSA 1978, § 61-32-6(A)(3) (2022); NMSA 1978, § 61-24D-11(B), (C) (2020) (New Mexico Home Inspectors Board); NMSA 1978, § 61-24C-10(F) (2023) (Interior Design Board); NMSA 1978, § 61-24B-7(E)–(G) (2022) (Board of Landscape Architects); NMSA 1978, § 61-28B-5(B)(3) (2022); NMSA 1978, § 61-30-7(M) (2022) (Real Estate Appraisers Board); NMSA 1978, §§ 61-29-9(A) (B) (2021), 61-23-17.2 2011); NMSA 1978, § 61-31-17(A) (2017) (Board of Social Work Examiners); NMSA 1978, § 61-34-12 (2007) (Signed Language Interpreting Practices Board); NMSA 1978, § 31-22-5(A) (1991) (Crime Victims Reparation Commission); NMSA 1978, § 29-9-5(C)(2) (1979) (Governor's Organized Crime Prevention Commission); NMSA 1978, §§ 31-21-10.1 (2007), 31-21-25 (2001) (State Parole Board).

created by statute, the legislature can constitutionally prescribe methods for adjudicating a dispute over termination of that right" and further "may assign disputes involving 'public rights' . . . a[n adjudicative body] that does not use a jury as a factfinder") (citing *Wylie Corp. v. Mowrer*, 1986-NMSC-075, ¶ 6, 104 N.M. 751 and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989)).

Every day in New Mexico, hundreds of state employees outside of the judicial branch lawfully exercise judicial functions committed to the public body that employs them. And like their counterparts in the judicial branch, a party may contend that these actions violate "inalienable" constitutional rights. For example, an Oil Conservation Division hearing examiner imposes a civil penalty for the sale of illegal oil or gas, *see* § 70-2-22, and the seller claims the penalty was imposed without due process of law. The Cannabis Control Division initiates disciplinary proceedings against a licensed cannabis retailer for advertising to minors, and the licensee claims this violates its right to free speech. *See* NMSA 1978, §§ 26-2C-8(B) (2021), 26-2C-20(B) (2024). These and all agency actions are subject to orderly review by way of

appeals or appropriate writ proceedings.[7] These mechanisms of review of agency adjudications by the state courts permit alleged violations of constitutional rights to be heard, and if found, remedied.[8] And, of course, the federal courts are always open to review claims that actions by state executive agencies violate federal rights. *See, e.g., Ex parte Young*, 209 U.S. 123, 128 (1908) (holding that the Eleventh Amendment does not bar

---

[7] *See, e.g.*, N.M. Const., art. III, § 3 (providing this Court with original jurisdiction in "mandamus against all state officers, boards and commissions"); N.M. Const., art. III, § 13 (providing the district courts with "the power to issue writs of habeas corpus, mandamus, injunction ... and all other writs, remedial or otherwise, in the exercise of their jurisdiction"); NMSA 1978, §§ 44-2-1 to 44-2-14 (1884, as amended through 1887) (regulating mandamus); Rule 12-601 NMRA (setting forth the procedure for direct appeals to the Supreme Court where there is a statutory right to direct appeal, e.g., from PRC final decisions); Rule 1-074 NMRA (setting forth the procedure for appeals from administrative agencies to the district courts where there is a statutory right of review to the district court); Rule 1-075 NMRA (setting forth the procedure for writs of certiorari to review final agency decisions where there is no statutory right of appeal); Rule 1-076 (setting forth the procedure governing appeals from orders of the Human Rights Commission).

[8] *See, e.g., Public Service Co. of New Mexico v. Public Regulation Comm'n*, 2019-NMSC-012, ¶¶ 1–2 (exercising appellate review of Public Regulation Commission adjudication alleged to have violated the appellant's due process rights); *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶¶ 5–6, 86 N.M. 359 (holding that mandamus statute gives courts authority to review constitutionality of Governor's actions as well as "the constitutionality of legislative enactments"); *Public Service Co. of New Mexico v. New Mexico Public Service Comm'n*, 1991-NMSC-083, ¶ 9, 112 N.M. 379 (alleged due process violation raised and resolved on direct appeal from final agency action); *Mountain States Telephone and Telegraph Co. v. New Mexico State Corp. Comm'n*, 1977-NMSC-032, ¶ 37, 90 N.M. 325 (alleged confiscation of property in violation of N.M. Const. art. II, § 20 reviewed on appeal from agency decision).

suits in federal court against state officials seeking prospective relief from violations of federal law).

It is simply not true that an executive agency's adjudicatory decisions were not subject to meaningful judicial review prior to the passage of the New Mexico Civil Rights Act. *See* § 41-4A-3(E) ("The remedies provided for in the New Mexico Civil Rights Act are not exclusive and shall be in addition to any other remedies prescribed by law or available pursuant to common law."). Of course, the courts must be able to review (and this Court conduct the final review of) the legality executive agency adjudications, including challenges for violations of state constitutional rights. To achieve that end, however, the Court need not (and respectfully should not) interpret the New Mexico Civil Rights Act to abrogate judicial immunity and quasi-judicial immunity as defenses available to public bodies against collateral actions for damages and attorneys' fees when the subject of the action is the exercise of a judicial or quasi-judicial function.

III. The Court of Appeals correctly held that the New Mexico Racing Commission enjoys quasi-judicial immunity from Petitioner's claims.

Two main principles can be derived from the caselaw: First, just as judicial immunity ensures that judges perform their judicial functions with independence, impartiality and subject to orderly review, quasi-judicial immunity ensures executive officials perform analogous adjudicatory functions with the same independence, impartiality, and availability of orderly review. *See, e.g. Collins,* 1991-NMSC-013, ¶ 18 (citations omitted). Second, as the Colorado Supreme Court has best explained, considering its purposes, quasi-judicial immunity as a defense to damages claims is available to not only executive officers but also the public bodies for which they serve. *Stjernholm,* 935 P.2d at 969 (state licensing board); *Mason,* 724 P.2d at 1291 (parole board). In view of these principles, the Court of Appeals correctly held that the New Mexico Racing Commission was entitled to immunity from Petitioner's claims.

A. Petitioner's claims are based on a judicial function.

Petitioner claims that the New Mexico Racing Commission violated his constitutional rights when its officers and employees "initiated an administrative prosecution" against him, made untrue statements "at [the] hearing on this matter," and expressed an intent "to continue the

vindictive prosecution in light of and despite the evidence presented" at the hearing. **[1 RP 3-4]** His claims for relief demonstrate that the New Mexico Racing Commission's actions were quasi-judicial in nature: Petitioner seeks "a preliminary injunction prohibiting administrative prosecution of [Petitioner]," attorney's fees and "actual damages associated" with the prosecution. **[1 RP 5]** The Court of Appeals correctly concluded that these claims implicate a judicial or quasi-judicial function, given that before the Racing Commission can "make binding determinations which directly affect the legal rights of individuals," i.e. revoke Petitioner's license, it must "use the procedures which have traditionally been associated with the judicial process[,]" including by ensuring that the trier of fact in the license revocation proceeding "be impartial and unconcerned in the result . . . ." *Reid v. New Mexico Bd. of Examiners of Optometry*, 1979-NMSC-005, ¶ 8, 92 N.M. 414. It follows that quasi-judicial immunity applies, because the availability of money damages (and attorneys' fees) would thwart the Racing Commission's ability to adjudicate license revocations with the required fairness and impartiality and free from harassing, collateral attacks.

B. Petitioner failed to develop any argument regarding the sufficiency of procedural safeguards in New Mexico Racing Commission disciplinary proceedings.

In applying quasi-judicial immunity to bar challenges to executive agency actions, courts examine whether "the same safeguards [apply to the quasi-judicial proceeding] as are available in the judicial process." *Compare Butz*, 438 U.S. at 513 (holding immunity applied), *with Cleavinger v. Saxner*, 474 U.S. 193, 203–04 (1985) (holding immunity did not apply). Many state agencies in New Mexico exercise a quasi-judicial function, and the specific procedural safeguards that apply to their proceedings vary. For instance, a State Ethics Commission hearing officer is required to be a retired judge or a lawyer, and must conduct the hearing in accordance with the rules of evidence, as well as being subject to similar protections that preserve the hearing officer's independent judgment as the protections described in *Butz*. *See* NMSA 1978, § 10-16G-12(C)–(D) (2019); 1.8.3.14(A) NMAC.[9] Similar guarantees of hearing officer independence apply to debarment proceedings under the

[9] State Ethics Commission hearing officers have included the Honorable Edward L. Chávez (retired Justice of the Court), the Honorable Alan C. Torgerson (retired U.S. Magistrate Judge for the United States District Court for the District of New Mexico), and the Honorable James Starzynski (retired U.S. Chief Bankruptcy Judge for the United States Bankruptcy Court for the District of New Mexico).

Procurement Code, *see* 1.4.1.88(J)(2)(g) NMAC, as well as in disciplinary proceedings governing District Attorneys, *see* 10.4.10.15 NMAC. Other quasi-judicial proceedings may have more or fewer such requirements.

The Court of Appeals analyzed whether the New Mexico Racing Commission's hearing process contains adequate procedural safeguards briefly. *See Bolen v. N.M. Racing Comm'n*, 2024-NMCA-056, ¶ 27. Petitioner argues in conclusory fashion that "[t]he court of appeals' assurance that there are sufficient procedural safeguards in the administrative code to control unconstitutional conduct is not reassuring." **[BIC 29]** For its part, the ACLU argues that the Court of Appeals should have "look[ed] beyond the text of regulations and statutes and scrutinize[d] practices." **[ACLU AmB 17]**

While there must be adequate procedural safeguards against unconstitutional conduct for quasi-judicial immunity to apply, the Court need not address that question because petitioner forfeited any challenge to the New Mexico Racing Commission's hearing process. As the Court of Appeals noted, Petitioner did nothing to raise or otherwise argue this point in their briefing. *See Bolen*, 2024-NMCA-056, ¶ 27 ("Bolen does not argue that there is a lack of such procedural safeguards . . . ."). Petitioner

not only forfeited this argument in the proceedings below, but again fails to develop the point in their brief to this Court. Accordingly, while an administrative agency's failure to accord litigants adequate procedural safeguards may preclude it from asserting quasi-judicial immunity, that issue is simply not before the Court and need not be resolved in the Court's analysis of whether a public-body defendant may invoke judicial or quasi-judicial immunity at all. *See Citizens for Fair Rates and the Environment v. New Mexico Public Regulation Comm'n*, 2022-NMSC-010, ¶ 29 (refusing to address issue when the appellant had failed to "adequately develop these arguments in its briefing on appeal").[10] The question presented is simply whether a public body may invoke judicial immunity in response to claims against a public body under the New Mexico Civil Rights Act, and the answer to that question is "yes."

CONCLUSION

The Court respectfully should affirm the decision below.

---

[10] Similarly, Petitioner forfeited any argument that he should be permitted to pursue a claim under the New Mexico Civil Rights Act alongside any action for appellate review of the Racing Commission's actions by abandoning his appeal of the Racing Commission's disciplinary decision. **[2 RP 270]** *See Barton v. New Mexico Racing Comm'n*, A-1-CA-39837, ¶ 7 (Aug. 28, 2023) (non-precedential) (holding that a party may bring a claim under 42 U.S.C. § 1983 alongside a petition for judicial review pursuant to Rule 1-075 NMRA).

OCTOBER 4, 2024

Respectfully submitted,

By: */s/ Walker Boyd*
Jeremy Farris
Walker Boyd

800 Bradbury Dr. SE, Suite 215
Albuquerque, NM 87106
Tel: (505) 827-7800
Email: jeremy.farris@sec.nm.gov
walker.boyd@sec.nm.gov

Counsel for State Ethics Commission

Erin Lecocq

P.O. Box 1269
Santa Fe, NM 87504-1269
Tel: (505) 795-1037
Email: erin.lecocq@prc.nm.gov

Counsel for Public Regulation Commission

Brian VanDenzen
David Buchanan

P.O. Box 6400
Santa Fe, NM 87502
Tel: (505) 827-9714
Email: brian.vandenzen@aho.nm.gov
david.buchanan@aho.nm.gov

Counsel for Administrative Hearings Office

CERTIFICATE OF SERVICE

I certify that on October 4, 2024, I filed the foregoing electronically, which caused the parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Walker Boyd
Walker Boyd

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

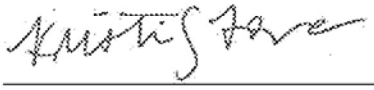
Pursuant to Rule 12-320(D)(3) NMRA, this Amicus brief complies with the limitations set forth under Rule 12-318(F), (G) NMRA:

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

2. This Amicus brief does not exceed the thirty-five-page limitation.

3. This Amicus brief contains a total of **6,742 words**.

4. The word count was obtained using Microsoft Word for Microsoft 365 MSO's word-count feature.



Kristin Greer Love

Table of Contents

Table of Authorities

New Mexico Cases

New Mexico Rules

New Mexico Statutes and Constitutional Provisions

New Mexico Code Provisions

Outside Jurisdiction Cases

New Mexico Cases

Introduction[1]

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 immunity[6] 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 duties[36] 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 "suspen[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 intwined 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_llDo1&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://nmrldlpi.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 Board[84]

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

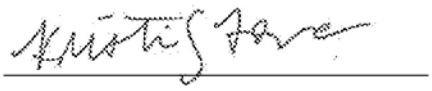
The New Mexico Racing Commission—and all public bodies—must operate within the bounds of the New Mexico Bill of Rights and the broader Constitution. When public bodies—or the people working for them—violate the Bill of Rights, New Mexicans must have a remedy against the public bodies. The New Mexico 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,



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