



**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,

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ORAL ARGUMENT IS REQUESTED.

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**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.

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## **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, supra*, 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.

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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.

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