**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

MCKENZIE JOHNSON,

Plaintiff-Appellant

v.

S-1-SC-39961
A-1-CA-39732
D-202-CV-2020-00121

BOARD OF EDUCATION FOR THE ALBUQUERQUE PUBLIC SCHOOLS AND MARY JANE EASTIN,

Defendant-Appellees

# PLAINTIFF-APPELLANT'S RESPONSE TO DEFENDANT-APPELLEES' PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## STATEMENT OF COMPLIANCE

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## A. Nature of the Case

Petitioner's Petition for a Writ of Certiorari (hereinafter Petition) addresses the applicability of the public accommodation provision of the New Mexico Human Rights Act in the public school setting when a Plaintiff-student alleges an overt act of discrimination, in this instance, Petitioners Board of Education for Albuquerque Public Schools (Petitioner or APS) and Mary Jane Eastin (Petitioner or Ms. Eastin), an employee of APS, (collectively referred to as Petitioners), referred to Respondent McKenzie Johnson (Respondent or Ms. Johnson), a Native American student, as a "bloody Indian" in front of her entire 11th grade Advanced Placement English class just moments after cutting another Native American student's hair against her will. This response is submitted pursuant to the Court's order, Order, 1:21-22, Jul. 19, 2023, and is intended to facilitate the Court's consideration of this petition given that the New Mexico Court of Appeals (Court of Appeals) appropriately overturned the decision of the District Court and remanded the matter for further proceedings.

## B. Facts

This case centers around an incident of discrimination and harm perpetrated against Ms. Johnson, a Native American student, by Ms. Eastin at Cibola High School, an APS public high school. On October 31, 2018, Ms. Eastin made derogatory comments, referring to Ms. Johnson as a "bloody Indian" in front of her

classmates and, in the same series of conduct, cut the braids of another Native American student without consent. This culturally insensitive conduct created a discriminatory and hostile environment for Native American students, including Ms. Johnson, leading her to transfer to another school for a safe and respectful learning environment.

**C. Questions Presented for Review**

The four grounds on which this Supreme Court may grant a petition for writ of certiorari to review the decision of the Court of Appeals are: (1) a conflict between the Court of Appeals' decision and a decision of the Supreme Court; (2) a conflict between the Court of Appeals' decision and another Court of Appeals' decision; (3) the involvement of a significant question of law under the state or federal constitution; and (4) the presence of an issue of substantial public interest that should be determined by the Supreme Court. Rule 12-502(C)(2)(d)(i)-(iv); *Paule v. Santa Fe County Bd. of County Com'rs*, 2005-NMSC- 021, 138 N.M. 82, 117 P.3d 240. From the face of the writ, it seems that Petitioners only argue a conflict between this Court and the Court of Appeals and that the issues presented are of substantial public interest. However, as demonstrated herein, Petitioners are mistaken in their claims regarding both assertions.

In their Petition for Writ of Certiorari, the Petitioners have presented two questions for consideration: 1) Did the Court of Appeals err when it interpreted the

Supreme Court's decision in Human Rights Commission of *New Mexico v. Board of Regents of University of New Mexico College of Nursing*, 1981-NMSC-026, as applicable only to state universities?; and 2) Did the Court of Appeals err when it determined that a public school in New Mexico can be classified as a public accommodation under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to 15 (1969, as amended through 2021), and therefore amenable to suit thereunder?

By their framing of Question 1, the petitioners suggest that the Court of Appeals' interpretation of the Supreme Court's precedent in *Regents* is in conflict with established New Mexico Supreme Court precedent despite *Regents* clear guidance. "This opinion should be construed narrowly and is limited to the University's manner and method of administering its academic program." *Regents*, 1981-NMSC-026 ¶ 16.

The petitioners have oversimplified the holding in *Regents*, engaged in an unwarranted expansion of its holding, and failed to acknowledge the starkly different and distinguishable facts presented in the instant matter from *Regents*. To pursue the path Petitioners' wish to take would lead to an improper extension of the intended scope of *Regents*.

In framing Question 2, the Petitioners seek to raise doubts about the Court of Appeals' determination that public schools in New Mexico *can be* considered

public accommodations under the New Mexico Human Rights Act (NMHRA). However, the Court of Appeals' decision reflects a prudent understanding of the plain language of the Act's public accommodation provisions and this Court's guidance to construe *Regents* narrowly and to analyze claims on a case-by-case basis. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 12, 284 P.3d 428. Furthermore, it is worth noting that the statement of public importance put forth by the petitioners regarding the classification of public schools as public accommodations has been significantly undermined by recent amendments to the NMHRA concerning public accommodations. Ct. of Appeals' Op., 1 n.1, May 23, 2023. The State Legislature, in its wisdom, passed amendments earlier this year explicitly clarifying that governmental entities, including public schools, are indeed subject to the provisions of the NMHRA. The legislature's intent in passing the recent amendments to the NMHRA's public accommodations sections was to provide unequivocal clarification to the courts and administrative bodies that arguments asserting governmental entities' exemption from the NMHRA's public accommodations provision should not be entertained or accepted. Therefore, the petitioners' argument on the supposed public importance of this issue appears to be exaggerated, as the legislature has already addressed and resolved this matter through the amendment process.

These questions, while presented by the Petitioners, do not accurately reflect the appropriateness of the Court of Appeals' decision. The Court of Appeals' reasoning and conclusions were well-founded, considering the narrow and specific circumstances presented in the instant matter, the stark differences between the factual scenario here and the limited holding of *Regents*, and the legislature's recent amendments to the NMHRA, which reinforce the applicability of public accommodations provisions to governmental entities.

### D. The Court of Appeals decision is congruent with *Regents*, the plain language of New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to 15 (1969, as amended through 2021), historical context, and legislative intent.

Petitioners' attempt to convince this court to grant certiorari by extending the essence of the holding in *Regents* to support its argument that a school district is not a "public accommodation" under the NMHRA is unfounded. *Regents* specifically focused on the defendant's manner and method of administering its academic program within a university setting and concluded that the university, in that particular context, was not considered a public accommodation, while explicitly leaving open the question as to whether universities could be public accommodations under a different set of circumstances. 1981-NMSC-026, ¶ 16. However, this Court's opinion in *Regents* was always meant to be construed narrowly and limited to the university's manner and method of administering its

academic program, *Id.* ¶ 16, without extending its application to the secondary public school system.

In the present case, Respondent's claim does not pertain to the administration of an academic program, but rather centers on the overt discriminatory conduct of Petitioner Eastin within a classroom on school grounds. Petitioners' attempt to stretch the interpretation of "academic program" to include the entire school district and anything that may occur within it is unsupported. Such an interpretation goes against the very logic put forth by this Court in creating the "academic program" language. In other words, the language employed by this Court in *Regents* appeared to create a limited exception specifically tailored to matters related to "administering an academic program" in a university setting, rather than a broad exemption encompassing any and all conduct occurring in a school classroom or campus, including secondary education. Respondent is part of a large and unselected category of students to whom APS is obligated to provide access—not a collegiate student admitted through a selective process. The issue raised in *Regents* was the inability to repeat a course, which the Court deemed a matter of the program's "manner and method," rather than a clear instance of overt discrimination as presented in this case. Consequently, *Regents* does not have any bearing on the facts or the outcome of the present case.

The Court of Appeals rightly relied on these arguments and used them as its justification for the decision. By narrowly construing the holding in *Regents* and limiting its application to the university's academic program, the Court of Appeals recognized the distinction between a university and the secondary public school system. This approach aligns with the facts of the present case, where the alleged discrimination occurred within a specific classroom setting, rather than as a result of the school district's overall administration of its academic programs.

Thus, the Court of Appeals appropriately applied the principles established in *Regents* and correctly concluded that Respondent's's claims regarding the discriminatory conduct of Petitioner Eastin fall outside the scope of *Regents*, which primarily addressed the administration of a university's academic program.

**1. Legislative Intent and Statutory Construction**

The Court of Appeals took the next step to analyze legislative intent by first looking to the plain meaning of the language of the statute and recognized that the primary indicator of legislative intent is the wording of the statute itself. By examining the definition of "public accommodation" as provided in Section 28-1-2(H), the Court concluded that the term "establishment" does encompass public schools like Cibola High School. The Court relied on common dictionary definitions, Op. 7:1-5, May 23, 2023, which consistently included public institutions within the scope of "establishments." This plain meaning interpretation

leads to the logical conclusion that the Legislature intended to broadly protect individuals from discriminatory treatment in places that provide services to the public, which undoubtedly includes public schools.

The Petitioners' reliance on one line from the Court of Appeals' initial opinion is illusory, and subsequent to the submission of their writ, the Court of Appeals issued an order correcting its opinion to clarify the Legislature's intent. Defs.' Pet. For Writ of Cert., 7:4-7. In the corrected opinion, the Court explicitly stated that the Legislature "did not intend" to exclude public secondary schools from the scope of the NMHRA public accommodation section. Op. 13:9-14, May 23, 2023. Therefore, the Petitioners' argument based on the erroneous language has been rendered moot and should not be entertained by this Court. The corrected opinion accurately reflects theCourt of Appeal's statutory construction, concluding that the Legislature's clear intention was *not* to exclude public secondary schools, and it is this corrected opinion that should guide the resolution of the present case.

The Petitioners have conspicuously omitted the crucial step of plain language interpretation, which the Court of Appeals thoroughly explored in its decision. Op. 6:8-11:17, May 23, 2023. This omission is telling, as it is evident that there is no ground for the Petitioners to argue against the plain language of the statute. The NMHRA's definition of "public accommodation" is unambiguous and all-encompassing, including any establishment that provides services, facilities,

accommodations, or goods to the public. The statute clearly does not exclude public schools from its scope.

Further, it would be inappropriate for the judiciary to add language to a statute that the Legislature clearly did not include. If the Legislature wished to exclude public secondary schools from the application of the NMHRA, they could have expressly included such an exception in the statute. But the language of the statute only carves out one exception, which is for bona fide private clubs or establishments that are inherently and exclusively private in nature and use. Public schools, being entities constitutionally mandated to serve the public and educate school-aged children, do not fall under this exception. Therefore, the plain language of the statute categorically includes public schools as public accommodations subject to the NMHRA.

In light of this unambiguous language, it becomes apparent that the Petitioners' attempt to argue against the inclusion of public schools as public accommodations is a weak one. By overlooking the plain language of the statute and neglecting to engage in a thorough analysis of its wording, the Petitioners have failed to establish a valid argument against the Court of Appeals' well-founded interpretation. As such, their contention that public schools are not covered by the NMHRA's public accommodation section lacks merit and should be disregarded by this Court.

Moreover, the Court of Appeals skillfully navigated through the historical meaning of "public accommodations." By tracing the historical context, the Court acknowledged that while *Regents* case concluded that a state university was not a public accommodation in the specific context of administering its academic program, the case did not exclude universities or public institutions categorically. Instead, the Court of Appeals appropriately recognized that the case applied narrowly to the specific circumstances of the university under review. *Regents*, 1981-NMSC-026 ¶ 16.

Furthermore, the Court astutely considered the legislative intent behind the NMHRA, recognizing that its overarching purpose is to promote equal rights and protect individuals from discrimination. By comparing the NMHRA to the 1955 Public Accommodations Act and federal civil rights jurisprudence, the Court aptly deduced that public institutions, such as public schools, were seemingly contemplated by the Legislature as part of the definition of public accommodations. Op. 15:1-3, May 23, 2023. By going through such a thorough analysis and considering the historical context of establishments and accommodations such as public libraries and public parks, Op. 12:16-13:14, May 23, 2023., the Court of Appeals decision reflects a deep understanding of the legislative context and the intent behind the statute.

Lastly, the Court of Appeals rightfully acknowledged recent legislative action, amending the NMHRA to explicitly include "any governmental entity" as a public accommodation. 2023 N.M Laws, ch. 29, § l(H)) (signed into law as H.B. 207, Mar. 24, 2023). This legislative amendment serves as further evidence of the Legislature's intent to include government entities, like public schools, within the scope of the NMHRA. By taking this recent legislative action into account, the Court solidified its conclusion that Cibola High School is indeed a public accommodation under the NMHRA.

In conclusion, the Court of Appeals' approach to statutory interpretation was meticulous, well-founded, and logical. By thoroughly examining the plain language of the statute, considering historical meanings, and focusing on legislative intent, the Court arrived at a well-reasoned argument supporting its conclusion that Cibola High School qualifies as a public accommodation under the NMHRA.

**E. The Petitioners' assertion of public importance is moot.**

The Petitioners assert that their appeal is of substantial public interest, highlighting the significant impact of the Court of Appeals' opinion on over 300,000 students in more than 80 school districts across the state. Defs.' Pet. For Writ of Cert., 8:21-9:1-2. Prior to 2023, the Respondent may have shared this sentiment, recognizing the impact of a faulty interpretation of the public

accommodation statute that would render over 300,000 students in our state without the protection of the NMHRA from overt discrimination in public secondary schools. However, the argument put forth by the Petitioners is now rendered moot by the legislature's recent amendment to the definition of "public accommodation." This legislative action was a clear and unambiguous response to the concerns raised by the Court of Appeals, seeking to put to rest any doubts or ambiguities surrounding the applicability of the NMHRA to government entities, including public schools.

With the 2023 amendment, the legislature took a decisive step to clarify the scope of the NMHRA's public accommodation section, expressly including "any governmental entity" within the definition. 2023 N.M Laws, ch. 29, § l(H)) (signed into law as H.B. 207, Mar. 24, 2023).

By doing so, the legislature confirmed that there are no blanket exceptions for government entities and that the applicability of the NMHRA to such entities must be determined on a case-by-case basis, as previously instructed by this Court in the landmark case of *Elane Photography, LLC v. Willock,* 2012-NMCA-086, ¶ 12.

The legislative amendment's clear and unequivocal language aligns with the Court of Appeals' thorough analysis of the NMHRA's plain language and historical context. The Court's in-depth understanding of the legislative intent behind the

statute, coupled with its examination of precedents such as *Regents*, contributed to a well-founded opinion that public schools, as government entities, can indeed be classified as public accommodations under certain circumstances.

In light of the legislative action, the Petitioners' argument that the Court of Appeals' decision creates an undue burden on public schools and infringes upon their educational functions becomes unfounded. The legislative clarification removes any doubts about the NMHRA's applicability to public schools, ensuring that discrimination in educational institutions is effectively addressed and that the rights of students are protected. As such, the Court of Appeals' decision should be upheld, as it aligns not only with the legislative intent but also with the legislature's recent actions in settling this matter of substantial public interest.

**Prayer for Relief**

Respondent respectfully prays for relief and requests that the New Mexico Supreme Court deny Certiorari in this case and remand this matter to the District Court for further proceedings consistent with the Court of Appeals' decision. The Court of Appeals' opinion demonstrated a thorough and thoughtful analysis of the legislative context and intent behind the NMHRA's public accommodation section. Its well-reasoned decision correctly determined that public secondary schools, including Cibola High School, fall within the definition of "public

accommodation" under the NMHRA when certain circumstances warrant such classification.

Respectfully Submitted,

***/s/ Leon Howard***
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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing was served upon all counsel of record via the Odyssey filing system on this 7th day of August 2023.

***/s/ Leon Howard***
Leon Howard