IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MCKENZIE JOHNSON,

Plaintiff-Appellee,

v.

S. Ct. No. S-1-SC-39961
Ct. App. No. A-1-CA-39732
Dist. Ct. No. D-202-CV-2020-00121

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

Defendants-Appellants.

BRIEF OF AMICI CURIAE NATIVE AMERICAN BUDGET AND POLICY INSTITUTE, NATIVE AMERICAN DISABILITY LAW CENTER, AND UNIVERSITY OF NEW MEXICO LAW PROFESSORS

Court of Appeals Decision: May 23, 2023
Second Judicial District Court Decision: April 9, 2021
Hon. Benjamin Chavez

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INTRODUCTION AND STATEMENT OF PROCEEDINGS[1]

On October 31, 2018, at Cibola High School, a public school in Albuquerque, New Mexico, Defendant-Appellant Mary Jane Eastin (Eastin), an employee of Defendant-Appellant Board of Education for Albuquerque Public Schools (APS), enacted and expressed egregious anti-Indian animus. **[RP 1 - 10]** First, she menaced a Native American student with a box cutter during an 11th-grade Advanced Placement (AP) English class. **[RP 5]** Then, after exchanging the box cutter for a pair of scissors, she cut off approximately three inches of the student's braided hair. **[RP 5]** Soon thereafter, she asked Plaintiff-Appellee McKenzie Johnson, who is also Native American, "What are you supposed to be, a bloody Indian?" **[RP 5]** Finally, in response to her students' collective gasps, Defendant-Appellant Eastin doubled down and stated, "What? She is bloody, and she is an . . ." not repeating the last word of her prior epithet but rather allowing her ugly comment to linger. **[RP 5–6]**

Consequently, Plaintiff-Appellee Johnson filed her Complaint in the district court on January 8, 2020, alleging racial discrimination pursuant to the public accommodations

[1] Pursuant to Rule 12-320(C) NMRA, no counsel for party in this matter authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 12-320(D)(1) NMRA, prospective *amici curiae* have the duty to ensure 14-day notice. On November 21, 2023, after finalizing the list of prospective *amici*, counsel for *amici* notified counsel for the parties via electronic mail of the intent to file such a brief, with less than the requisite notice. On the same day, counsel for Plaintiff-Appellee replied and said they did not object. On November 29, 2023, counsel for Defendant-Appellant APS answered via electronic mail with a general objection replying, "Albuquerque Public Schools objects to the filing of amicus briefs."

provision of the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007). **[RP 1–11]** Defendant-Appellant APS filed its Motion to Dismiss NMHRA Claims on February 13, 2020, **[RP 30–36]** and Defendant-Appellant Eastin filed her Motion to Dismiss for Failure to State a Claim on February 24, 2020. **[RP 48–54]** The district court entered its Order Granting Motions to Dismiss on April 9, 2021. **[RP 159–74]** Plaintiff-Appellee Johnson filed her Notice of Appeal to the New Mexico Court of Appeals on May 7, 2021. **[RP 178–95]** The New Mexico Court of Appeals issued its Opinion on May 23, 2023, reversing the district court order and holding that Cibola High School, a New Mexico public secondary school, is a public accommodation under the NMHRA. *Johnson v. Board of Education for Albuquerque Public Schools*, 2023-NMCA-069, ¶¶ 2, 13, 18, 535 P.3d 687. Defendant-Appellant APS then applied to this Court for review of the Court of Appeals opinion on June 12, 2023, and this Court issued the writ of certiorari in this matter on September 12, 2023. *Johnson*, S. Ct. Writ of Certiorari 1:16-19, 2:5-8.

ARGUMENT

This Court should affirm the May 23, 2023 Court of Appeals opinion that Cibola High School, a New Mexico public secondary school, is a public accommodation under the NMHRA, *Johnson*, 2023-NMCA-069, ¶¶ 2, 13, 18, and thus affirm its reversal of the district court's contrary determination in its Order Granting Motions to Dismiss. Three principal reasons justify this interpretation of the NMHRA.

First, the rules of statutory construction clearly support the Court of Appeals opinion because a plain reading of the NMHRA uncontrovertibly shows that it does not expressly exclude public schools but only excludes "a bona fide private club or other place or establishment that is by its nature and use distinctly private." NMSA § 28-1-2(H).

Second, if this Court finds that the NMHRA definition of public accommodation requires construction of its legislative purpose and meaning, the history of twentieth century civil rights struggles in the land now known as the State of New Mexico, including predecessor state statutes, and prior relevant federal civil rights law, shows that the NMHRA is but one of the legislature's several attempts to remediate various forms of discrimination, including anti-Indian animus, in the twentieth century. In light of that background and context, it would be against the spirit and purpose of the NMHRA to conclude that the legislature intended to exclude public schools from the NMHRA definition of public accommodation where it did not expressly do so.

Third, contrary to Defendant-Appellant APS's arguments, Appellant's Brief in Chief, at 14-23, the Court of Appeals correctly followed and faithfully applied the relevant precedents, *Human Rights Comm'n of New Mexico v. Bd. of Regents of Univ. of New Mexico College of Nursing* (*Regents*), 1981-NMSC-026, 95 N.M. 576, 624 P.2d 518, and *Elane Photography, LLC v. Willock* (*Elane Photography*), 2012-NMCA-086, 284 P.3d 428. Outside of a story by Franz Kafka, a novel by George Orwell, or some other dystopia, is it inconceivable that Defendant-Appellant Eastin's conduct or comment were within the "manner and method of administering [an] academic program" in twenty-first century New Mexican society. *Regents*, 1981-NMSC-026, ¶ 16. Rather, menacing, battering, and assaulting Native American high school students during their AP English class is actionable discrimination and remediable under the NMHRA.

I. A plain reading of the NMHRA uncontrovertibly shows that it does not exclude public schools but only expressly excludes "a bona fide private club or other place or establishment that is by its nature and use distinctly private."

As the Court of Appeals correctly noted below, under the plain meaning rule of statutory construction, a court must first determine if a statute's language is clear and unambiguous. *Johnson*, 2023-NMCA-069, ¶ 7 (quoting *Tucson Elec. Power Co. v. N.M. Tax'n & Revenue Dep't* (*Tucson*), 2020-NMCA-011, ¶ 8, 456 P.3d 1085). If the statutory language is clear and unambiguous, then the court must give effect to that language, as the primary indicator of legislative intent, and refrain from further

statutory interpretation. *Johnson*, 2023-NMCA-069, ¶ 7 (quoting *Tucson*, 2020-NMCA-011, ¶ 8, and *Baker v. Hedstrom*, 2013-15 NMSC-043, ¶ 11, 309 P.3d 1047). *Accord* 3C Sutherland Statutory Construction (Sutherland) § 76:6 (8th ed.) ("The key to interpreting a 'places of public accommodation' statute is to ascertain and effectuate legislative intent as expressed in the statute. The statute's language is the best and most reliable index of the statute's meaning and must be consulted first.") (citations omitted). Thus, only if a statute's "plain meaning . . . is doubtful, ambiguous, or if an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, [would a court] construe the statute according to its obvious spirit or reason." *Johnson*, 2023-NMCA-069, ¶ 7 (quoting *Baker*, 2013-15 NMSC-043, ¶ 11).

On Halloween 2018, when Defendant-Appellant Eastin called Plaintiff-Appellee Johnson a "bloody Indian," the NMHRA defined "public accommodation" to mean "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private" NMSA § 28-1-2(H). The Court of Appeals found that this definition "exhibits two points of potential ambiguity when applied to public secondary schools: the term 'establishment' and the phrase 'provides or offers its services . . . to the public.' " *Johnson*, 2023-NMCA-069, ¶ 8. This Court, however, could find that the NMHRA definition of public accommodation is clear and unambiguous, for it defines "public

accommodation" expansively as "*any* establishment that provides or offers its services, facilities, accommodations or goods to the public" and expressly "does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private[.]" NMSA § 28-1-2(H) (emphasis added). If this Court so found, it would be justified in doing so, for, as a leading treatise notes, "In the most generic sense, 'places of public accommodation' ordinarily are facilities, both public and private, used by the public." Sutherland § 76:6. Under this analysis, because Defendant-Appellant Eastin called Plaintiff-Appellee Johnson a "bloody Indian" during an AP English class in a public high school, the NMHRA provides her with a legal remedy against her teacher's anti-Indian epithet and related animus, for a public high school classroom is not "a bona fide private club or other place or establishment that is by its nature and use distinctly private." NMSA § 28-1-2(H).

Also, it is worth noting that some states expressly exclude public educational institutions from the meaning of public accommodation. For example, New York's Human Rights Law provides:

> Such term [place of public accommodation, resort, or amusement] *shall not include kindergartens, primary and secondary schools, high schools, academies, colleges and universities*, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private.

N.Y. Exec. Law § 292 (McKinney, effective Jun. 25, 2023) (emphasis added). In contrast, the NMHRA does not expressly exclude public schools from its definition of "public accommodation." Section 28-1-2(H).

If, however, this Court agrees with the Court of Appeals that the NMHRA's "plain meaning . . . is doubtful, ambiguous, or if an adherence to the literal use of the words would lead to injustice, absurdity or contradiction," then this Court should "construe the statute according to its obvious spirit or reason." *Johnson*, 2023-NMCA-069, ¶ 7 (quoting *Baker*, 2013-15 NMSC-043, ¶ 11). Also, this Court should "consider the practical implications and the legislative purpose of [the] statute, and [if] the literal meaning of a statute would be absurd, unreasonable, or otherwise inappropriate in application, [then this Court should] go beyond the mere text of the statute." *Bishop v. Evangelical Good Samaritan Soc'y* (*Bishop*), 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361 (citation omitted).

II. Given the history of twentieth century civil rights struggles in the land now known as the State of New Mexico, it is reasonable to conclude that the legislature intended the NMHRA to be broadly construed.

"In interpreting statutes, [courts] seek to give effect to the Legislature's intent, and in determining intent [courts] look to the language used and consider the statute's history and background." *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350 (citation omitted).

Enacted in 1969, the NMHRA is an important statute in the history of New Mexico's civil rights movement. 1969 N.M. Laws, ch. 196. However, the NMHRA is

but one of the legislature's several attempts to remediate various forms of discrimination, including anti-Indian animus, in the twentieth century. These laws, as well as relevant developments in federal law that preceded the NMHRA, should be cognized by this Court as part of the statute's history and background.

A. A Brief History of Civil Rights Law in New Mexico

"We shall overcome because the arc of the moral universe is long, but it bends toward justice." Dr. Martin Luther King Jr., "Remaining Awake Through a Great Revolution" (speech given at the National Cathedral, March 31, 1968). In New Mexico, the "arc of the moral universe" bent toward justice long before the enactment of the NMHRA. While the NMHRA created the New Mexico Human Rights Commission in 1969, its mission was shaped by more than this one single piece of legislation. Understanding New Mexico's relevant prior law to the NMHRA, one discerns the broadening application and inclusiveness, not exclusion, over time, of New Mexico civil rights law.

Consider, first, that the State of New Mexico recognized the fundamental nature of equal rights and equal protections at its inception in its Constitution of 1911. "No person shall be deprived of life, liberty, or property without due process of law; nor shall any person be denied the equal protection of the laws." N.M. Const. Art. II, § 18 (1911). The state constitution also provided, "A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. Const. Art. XII, § 1. (1911). In particular,

it protected "children of Spanish descent." N.M. Const. Art. XII, § 10. (1911) ("Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section." *Cf.* David V. Holtby, *Forty-Seventh Star* (University of Okla. Press 2012), 243-44 ("The constitution also ensured the civil rights of *Nuevomexicanos* in politics and education, which made it unique among such documents and an early promoter of equality.... [T]he constitution afforded strong protections for *Nuevomexicanos* in the use of their language, including in public affairs, in voting, and in schools.").

Consider to relevant state laws, including "the NMHRA's predecessor, the New Mexico Public Accommodations Act, 1955 N.M. Laws, ch. 192, §§ 1-7 (signed into law as H.B. 52, Mar. 24, 1955)," *Johnson*, 2023-NMCA-069, ¶ 15, as well as the New Mexico Equal Employment Opportunity Act, 1949 N.M. Laws, ch. 161, passed March 17, 1949. Among others, relevant federal law includes historic judicial opinions like *Brown v. Board of Education*, 347 U.S. 483 (1954), and Congressional enactments like the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (enacted July 2, 1964).

In 1949, under the next iteration of anti-discrimination laws, the state recognized that the "practice or policy of discrimination against individuals by reason of their race,

color, religion, national origin or ancestry is a matter of state concern." 1949 N.M. Laws, ch. 161, § 1(a). Enacted fifteen years before the famous federal Civil Rights Act of 1964 and twenty years before the NMHRA, New Mexico's first anti-discrimination statute described the problem thusly, "Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the State and undermines the foundations of a free democratic state." 1949 N.M. Laws, ch. 161, § 1(a). Critically, for this case, this early law recognized the need to eliminate racial and other forms of prejudice in public schools and explicitly provided for a comprehensive educational program designed for public school students. Specifically, the statute provided:

> EDUCATIONAL PROGRAM. (a) In order to eliminate prejudice among the various racial, religious and ethnic groups in this State and to further good-will among such groups, the Commission in cooperation with other departments of Government is directed to prepare a comprehensive educational program, designed for the students of the public schools of this State and for all other residents thereof, designed to emphasize the origin of prejudice against such minority groups, its harmful effects, and its incompatibility with American principles of equality and fair play. *Id.* § 9.

While the original act, known as the Equal Employment Opportunities Act, addressed discrimination in employment, the statute established the state's power and authority to address discrimination as a police power. "It shall he deemed an exercise of the police power of the State for the protection of the public welfare, prosperity, health and peace of the people of the State." *Id.* § 1(c).

Five years later, whether and how New Mexico needed to explicitly identify public elementary and secondary high schools in civil rights protections was obviated

by the United States Supreme Court's ruling in *Brown v. Board of Education*, 344 U.S. 1 (1954), decided a year before the state's new public accommodations law. In this landmark decision, the Court held that the intentional segregation of students on the basis of race in public schools violates the Fourteenth Amendment to the U. S. Constitution.

Then, in 1955, New Mexico advanced the policy and purpose of anti-discrimination that it had recognized and adopted for itself by extending their application to businesses, prohibiting discrimination based on " race, color, religion, ancestry or national origin." 1955 N.M. Laws, ch. 192. Section 5 of the act listed over fifty places that were to be covered under the act, including "public libraries." *Id.* § 5. While the act was directed outwardly, the message was clear—New Mexico sought to prohibit exclusion, segregation, and discrimination in all places the public could enter. "All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation." *Id.* § 2.

Nine years later, the Civil Rights Act of 1964 mandated that school officials must not discriminate against students on the basis of color, sex, national origin, language barrier, religion, or disability. 42 U.S.C. § 2000d (2018).

Given the New Mexico legislature's several twentieth century efforts to expand civil rights, along with its knowledge of the long history of discrimination, including anti-Indian animus, in the state, the historic national school desegregation decreed by *Brown v. Board of Education*, and the following decade's federal civil rights statutes,

it is reasonable to conclude that the legislature intended to broaden the application of civil rights protections, not restrict them, when it enacted the NMHRA in 1969.

In other words, the struggles of the twentieth century Civil Rights Movement are part of the NMHRA's "history and background," animate its "obvious spirit or reason," and inform its "practical implications and legislative purpose." Understanding this history provides the critical knowledge to interpret the NMHRA correctly and conclude that the New Mexico legislature did not intend to exclude public schools from the broad remedial purposes of the NMHRA, for public schools clearly do not fit within the sole express exemption from the statute's public accommodations definition, *viz.*, "a bona fide private club or other place or establishment that is by its nature and use distinctly private." NMSA § 28-1-2(H).

The NMHRA was the culmination of a long arc of New Mexican law that bent toward justice for all. By enacting it, the legislature intended "to eliminate and prevent discrimination on the basis of race, age, religion, color, national origin, ancestry or sex, and to promote good will." *Keller v. City of Albuquerque* (*Keller*), 1973-NMSC-048, ¶ 23, 85 N.M. 134, 509 P.2d 1329, *overruled on other grounds by Green v. Kase*, 1992-NMSC-004, ¶ 2, 113 N.M. 76, 823 P.2d 318. The legislature meant the NMHRA to encompass more than the listed places in the 1955 Public Accommodations Act, and its plain language did not expressly exclude schools. Rather, the spirit of the law was expansive.

B. A Brief History of Native Americans and Public Education

The history of discrimination against Native Americans, including school children, within the territory and State of New Mexico is centurial. For example, whether Native American Indians living on the reservation had a right to public education was not affirmed until decades after the enactment of the NMHRA. Lawrence Baca, the former head of the U.S. Civil Rights Division described it this way:

> The U.S. Supreme Court announced the constitutional promise of an equal, unified education for African American students by deciding *Brown v. Board of Education* in 1954, but it would take another forty years before a federal court even addressed the basic question of whether American Indians share a similar right to equal educational opportunities. *Meyers v. Board of Education*, decided in 1994, is the seminal case addressing the civil rights of American Indians in public education. It is "the *Brown v. Board* of Indian Country." Lawrence R. Baca, Meyers v. Board of Education*: The* Brown v. Board *of Indian Country*, 2004 U. Ill. L. Rev. 1155, 1156-57 (citation omitted).

Thankfully, a recent law review article, authored amidst New Mexico's landmark educational adequacy litigation, *Martinez v. State* (*Yazzie Martinez*), No. D-101-CV-2014-00793, 2019 WL 4120213 (1st Jud. Dist. Ct. Feb. 14, 2019) (Final Judgment and Order), popularly known as "Yazzie/Martínez," provides an efficient summary. Preston Sanchez & Rebecca Blum Martinez, *A Watershed Moment in the Education of American Indians: A Judicial Strategy to Mandate the State of New Mexico to Meet the Unique Cultural and Linguistic Needs of American Indians in New Mexico Public Schools*, 27 AM. U. J. GENDER SOC. POL'Y & L. 183 (2019). *See also*

Martinez, No. D-101-CV-2014-00793, ¶¶ 4–6, 2019 WL 4120213, at *1 (declaring that the defendants violated the Education, Due Process, and Equal Protection Clauses of the New Mexico Constitution by failing to provide "at-risk" students with a uniform statewide system of free public schools sufficient for their education).

As Sanchez and Blum Martinez explain, "Authorized by Congress [in the post-Civil-War Indian Allotment period], the Secretary of Interior would deny food and subsistence to families that resisted submitting their children to federal schooling." Sanchez & Blum Martinez, at 196 (citing Comm. on Lab. & Pub. Welfare, *Indian Education: A National Tragedy*, S. Rep. No. 91-501, at 12 (1969) (*Indian Education*). After several decades of "inhumane practices occurring in the name of Indian Education[,]" Congress commissioned a report that "condemned the separation of Native children from their tribal lands and their permanent placement in off-reservation boarding schools." Sanchez & Blum Martinez, at 196–97 (citing *Indian Education*, *supra*, at 13); *see also* Lewis Meriam et al., *The Problem of Indian Administration*, Inst. for Gov't Research (1928). Consequently, a few years later, "Congress passed the Johnson O'Malley Act, which . . . was a key piece of legislation that allowed the Federal Government, through contractual agreements with States to delegate certain responsibilities of Indian Education to public schools." Sanchez & Blum Martinez, at 198 (citing *Indian Education*, *supra*, at 32). Unfortunately, this nascent effort to begin redressing the profound harms of Indian boarding schools ended abruptly in 1944, when the federal government resumed its prior practice to "forcefully

remove Native children from their reservation and place them in boarding schools[.]" Sanchez & Blum Martinez, at 199. "By 1950, the primary goals of the Termination Era were in full effect—to repeal tribes' federal recognition status and eliminate them and their federal trust land." *Id.* (citation omitted).

Locally, "children from the twenty-two tribal nations of New Mexico underwent long-term, detrimental experiences with education systems similar to those associated with federal schools nationwide, which included forced- assimilation practices and the intentional neglect of their unique cultural and linguistic needs." *Id.* at 200 (citation omitted). "By the mid-1950s, new federal legislation[,] such as "Public Law 280, for example, transferred federal jurisdiction over legal matters arising on Indian lands to state governments." *Id.* (citation omitted). Consequently, "[b]y 1966, New Mexico's public schools enrolled 61 percent of the entire population of New Mexico's Native students." *Id.* (citation omitted). Finally, "in 1975, when forced-assimilation practices were abandoned, New Mexico began grappling with the question of how best to include and educate Native students in its public schools." *Id.*

Unfortunately, notwithstanding New Mexico's creation of the Indian Education Division and related initiatives, "public education services, educational practices, and student outcomes among New Mexico's Native students would not fare much better . . . than the school systems of the preceding decades." *Id.* at 201. Since 1975, New Mexico has begun multiple efforts to improve public education for Native American students. *See id.* at 201–05. Nevertheless, "[t]he lack of cultural understanding among

non-Indian teachers and administrators coupled with insensitivity to the cultural and linguistic backgrounds of native students led to students experiencing racial prejudice." *Id.* at 203 (citing New Mexico Indian Education Center for Excellence, *NMIECE Strategic Plan 1991–1996* (1991), at 17). Indeed, despite the enactment of the Indian Education Act, NMSA 1978, §§ 22-23A- 1 to -11 (2003, as amended through 2019), and related initiatives, public education for Native American students in New Mexico has been insufficient, in part because of "the ongoing failures by the State to enforce the laws and policies meant to redress" the harms inflicted on Native American school children. Sanchez & Blum Martinez, at 205. *Accord Yazzie Martinez*, CV-2014-00793, ¶ 6 ("Defendants have violated the rights of at-risk students by failing to provide them with a uniform statewide system of free public schools sufficient for their education.").

Returning to the instant matter, despite the travails of Native American children to obtain a sufficient education in New Mexico, Plaintiff-Appellant—and her peer whose braided hair Eastin menaced and sheared—were enrolled in Defendants-Appellants' AP English class. Notwithstanding their exceptional accomplishments, Eastin brazenly subjected them to invidious discrimination. Thankfully, Eastin's conduct (i.e., assault, battery, and an anti-Indian epithet) was less severe than the terrible violence of Indian boarding schools. *See, e.g.*, Felicia Fonseca, *Haaland: Report on Indigenous Boarding Schools Expected Soon*, U.S. News (Mar. 16, 2022) ("Discoveries of the remains of more than 1,000 children in Canada renewed a

spotlight in the U.S. and stirred strong emotions among tribal communities that included grief, anger, reflection and a deep desire for healing."). Nevertheless, in a New Mexico AP English classroom in 2018, Plaintiff-Appellee was subjected to invidious, anti-Indian animus. The NMHRA must provide a remedy for this egregious discrimination.

III. Contrary to Defendant-Appellant APS's arguments, the Court of Appeals correctly followed and faithfully applied the relevant precedents.

In *Regents*, this Court instructed subsequent courts to narrowly construe and limit its holding "to the University's manner and method of administering its academic program." 1981-NMSC-026, ¶ 16. In *Elane Photography*, the Court of Appeals dutifully followed *Regents* and then remarked, "this Court should independently evaluate the applicability of the NMHRA in all future cases." *Elane Photography*, 2012-NMCA-086, ¶ 12. Below, the Court of Appeals dutifully followed these precedents, carefully evaluated the applicability of the NMHRA to the facts of this case, and distinguished them from what was at issue in *Regents*—the manner and method of administering an academic program. *Johnson*, 2023-NMCA-069, ¶ 2 (quoting *Regents*, 1981-NMSC-026, ¶ 16).

Despite the careful reasoning of the Court of Appeals, Defendant-Appellant APS erroneously claims, "The Court of Appeals *rejected* this Court's precedential holding in *Regents*," Appellant's Brief in Chief, at 14 (emphasis added). *Cf. id.* at 17-18 (accusing the Court of Appeals of ignoring or rejecting this Court's holding in

Regents). This section of the brief explains four reasons why Defendant-Appellant APS is wrong.

First, Defendant-Appellant APS misapplies the *ejusdem generis* maxim of statutory construction. Second, the arguments of Defendant-Appellant APS—that the NMHRA excludes public schools from its definition of public accommodation—lead to the absurd conclusion that a *private* high school might constitute a public accommodation while a public high school does not. Third, if this Court agrees with Defendant-Appellant that the NMHRA does not protect public school students from invidious discrimination, like that suffered by Plaintiff-Appellee, it seems that no legal remedy is available to them under state law. Fourth, outside of a story by Franz Kafka, a novel by George Orwell, or some other dystopia, it is inconceivable that Defendant-Appellant Eastin's conduct and comment were within the manner and method of administering an academic program in twenty-first century New Mexican society.

A. Defendant-Appellant APS misapplies the *ejusdem generis* maxim of statutory construction.

Defendant-Appellant APS correctly quotes the *ejusdem generis* maxim of statutory construction, as articulated by this Court, but then misapplies it to the NMHRA. Appellant's Brief in Chief, at 10 (quoting *In re Gabriel M.*, 2002-NMCA-047, ¶ 16, 132 N.M. 124). As *In re Gabriel M.* explains, "The rule of *ejusdem generis* states that where general words in a statute *follow* a designation or enumeration of particular subjects, objects, things, or classes of the same general character, or kind, to

the exclusion of all others, such general words are not to be construed in their widest extent, but are to be held as applying only to those things of the same general kind or class as those specifically mentioned." 2002-NMCA-047, ¶ 16 (emphasis added). *Accord* Sutherland § 76:6 (discussing "when a civil rights statute includes it [the phrase, places of public accommodation] as a general catch-all *following* an enumeration of specific businesses, institutions, and facilities.") (emphasis added). While Defendant-Appellant APS's misapplication of the maxim may be understandable, it is critical for this Court not to commit the same error. *Cf. id.* (noting "courts' disproportionate analytic reliance on the *ejusdem generis* maxim").

In contrast to a statute where *ejusdem generis* properly applies, the NMHRA does not designate or enumerate specific businesses, institutions, or facilities and then follow such a list with a general phrase like places of public accommodation. Instead, the NMHRA expansively defines the general phrase, "public accommodation" as "*any* establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private." NMSA § 28-1-2(H) (emphasis added). *Ejusdem generis* simply does not apply.

Neither does the maxim apply to the NMHRA's predecessor statute, the New Mexico Public Accommodations Act, N.M. Laws 1955, ch. 192, § 5. [**RP 36**] While the earlier statute did enumerate specific businesses, institutions, or facilities, that list follows, not precedes, a general phrase, which ends with an important term of art, "A

place of public accommodation, resort or amusement within the meaning of this act shall *include* . . ." *Id.* (emphasis added). As a leading treatise on statutory construction notes, "When a statutory definition declares what a term 'means,' any meaning not stated is excluded, because the term 'means' denotes an exhaustive definition. Conversely, the word 'include' ordinarily is a term of enlargement rather than limitation." Sutherland § 76:6. In other words, the Public Accommodations Act's enumeration of "places of public accommodation, resort or amusement" is illustrative, not exhaustive. N.M. Laws 1955, ch. 192, § 5. [**RP 36**] Further, the illustrative list includes places that are "private" (e.g., inns, taverns, roadhouses, and hotels) and those that are "public" (e.g., swimming pools and public libraries) as those terms are conventionally understood (i.e., privately owned but open to the public, and publicly owned and open to the public, respectively). *See id.* Again, *ejusdem generis* does not apply.

B. The arguments of Defendant-Appellant APS—that the NMHRA excludes public schools from its definition of public accommodation—lead to the absurd conclusion that a private high school might constitute a public accommodation while a public high school does not.

As explained in *Bishop*, New Mexico courts should "consider the practical implications and the legislative purpose of a statute, and [if] the literal meaning of a statute would be absurd, unreasonable, or otherwise inappropriate in application, . . . go beyond the mere text of the statute." 2009-NMSC-036, ¶ 11 (citation omitted). *Cf.* Sutherland, § 76:6 ("Courts avoid any construction of statutory language which leads to an absurd result."). Yet, if this Court reverses the Court of Appeals opinion and

reinstates the district court's finding and order that the NMHRA does not protect Plaintiff-Appellee, and other public high school students subjected to similar invidious discrimination, it will lead precisely to a result that is "absurd, unreasonable, or otherwise inappropriate in application," *Bishop*, 2009-NMSC-036, ¶ 11, for under the district court's interpretation of the NMHRA, *Regents*, and *Elane Photography*, discrimination by a *public* high school teacher against a student in their classroom has no remedy under the NMHRA, but discrimination by a *private* high school teacher against a student in their classroom ostensibly would—because, according to the district court, "the constitutional mandate to provide children in this state a public education, makes public school districts unique, and by definition, *not* a commercial enterprise." Order Granting Motions to Dismiss, at 15 (emphasis in original). **[RP 173]** In contrast, under the district court's analysis, the private school would be "a place of public accommodation as an establishment that operates a business in public commerce[.]" *Id.* at 14-15 **[RP 172-73]**

To assess this absurdity, consider the following hypothetical: on that same day, Halloween 2018, at a *private* high school across town, a different AP English teacher demanded that students who incorrectly answer reading comprehension questions must eat dog food, sheared several inches of braided hair from an indigenous student, and then asked another indigenous student if she was dressed up as "a bloody Indian." Public and private schools differ in multiple ways, and some of those differences have legal significance, but by itself the public–private, or noncommercial–commercial,

distinction should not exempt public schools from the NMHRA.

Indeed, to the contrary, if "the constitutional mandate to provide children in this state a public education, makes public school districts unique" **[RP 173]**, then common sense—and the purpose of the NMHRA—suggest that this uniqueness should weigh in favor of finding that public schools are a public accommodation under the NMHRA. *Cf. Keller*, 1973-NMSC-048, ¶ 23 ("In enacting the Human Rights Act, it was the intent and purpose of the legislature to eliminate and prevent discrimination on the basis of race, age, religion, color, national origin, ancestry or sex, and to promote good will."), *overruled on other grounds by Green v. Kase*, 1992-NMSC-004, ¶ 2. If the district court is correct that public schools and their employees are exempt from the NMHRA, how is the statute consistent with the legislature's intent and purpose to eliminate and prevent unlawful discrimination and promote good will?

In the alternative, under the district court's interpretation of the NMHRA, perhaps neither the Plaintiff-Appellee, nor the hypothetical indigenous student at a private high school has a remedy under the NMHRA? As *Elane Photography* noted, the statute's "broadly worded definition includes only one exception." 2012-NMCA-086, ¶ 14, namely whether an establishment is "a bona fide private club *or other place or establishment that is by its nature and use distinctly private*[.]" Section 28- 1-2(H) (emphasis added). If the hypothetical private school teacher and private school employer can avoid liability under the NMHRA, however, that result can at least be justified by reference to the text of Section 28-1-2(H): while private schools are plainly

not "a bona fide private club," a court *might* find them to constitute "another kind of distinctly private place or establishment." *Id.*

Either way, the district court's interpretation of the NMHRA is fatally flawed. If the first hypothetical leads to an absurd result (where a hypothetical indigenous student at a private school has a remedy under the NMHRA but Plaintiff-Appellee has none), then the second hypothetical is downright Kafkaesque: despite the state legislature's enactment of the NMHRA, in 1969, after decades of civil rights struggle, and despite multiple amendments to the NMHRA after its enactment up through Halloween 2018, New Mexican students who were subjected to invidious discrimination lack its protection—so long as the person who discriminates against them are employees of a school system who act with animus on school grounds. Happily, this Court can prevent such an "absurd, unreasonable, or otherwise inappropriate" result, *Bishop*, 2009-NMSC-036, ¶ 11, by affirming the Court of Appeals and holding that public schools, under the facts of this case, are included in the NMHRA definition of public accommodation.

C. If this Court agrees with the Defendant-Appellant that the NMHRA does not protect public school students from invidious discrimination, like that suffered by Plaintiff-Appellee, it seems that no legal remedy is available to them under state law.

Defendant-Appellant APS asserts that Plaintiff-Appellee can "seek relief under one of several viable and available legal avenues[.]" Appellant's Brief in Chief, at 3. To the contrary, if this Court agrees with the district court and the Defendant-Appellant

that the NMHRA does not protect public school students from invidious discrimination, like that suffered by Plaintiff-Appellee, it seems that no legal remedy is available to them under state law. *Accord* Todd Heisey, Note, Human Rights Commission v. Board of Regents*: Should a University Be Considered a Public Accommodation under the New Mexico Human Rights Act?*, 12 N.M. L. REV. 541, 547–48 (1982) ("Finding that educational institutions are public accommodations under the Human Rights Act would be the most logical way to provide a remedy for discrimination by educational institutions because no remedy is otherwise expressly provided in New Mexico."). As Heisey explains, "Even if a federal cause of action would have been feasible and desirable, the fact remains that it would not be a *state* cause of action. It is important that the state take a strong stand against discrimination by providing a statutory cause of action to deter discrimination and to alleviate its effects." *Id.* at 553 (emphasis in original).

In her complaint, Plaintiff-Appellee alleged violations of the NMHRA and the New Mexico Tort Claims Act (TCA), NMSA 1978, § 41-4-6 (1976, as amended through 2019). **[RP 1, 8–10]** In its Order Granting Motions to Dismiss, the district court held that the TCA requires Plaintiff-Appellee to allege bodily injury to avoid dismissal of her claim against APS for negligent operation of a public school. **[RP 164** ("In light of the guidance provided in *Gonzales* and *Parrish*, the Court concludes as a matter of law, Plaintiff has not alleged bodily injury in support of her claim under the TCA, and thus the claim must be dismissed.") (citations omitted)**]** Thus, if the NMHRA is

unavailing, because public schools are not a public accommodation, then public-school students subjected to invidious discrimination like that suffered by Plaintiff-Appellee have no legal protection under state law—unless the student suffers "damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties"? **[RP 161** (quoting the TCA)**]**

Given the history of civil rights struggle in New Mexico, discussed above in Part II of this brief, it would be absurd to conclude that the legislature intended to immunize from liability a public-school teacher, and her school district employer, where the teacher utters a racist epithet against a minor student in their classroom—so long as the teacher does not cause bodily injury, wrongful death, or property damage. Yet, this is the situation that would result under the district court's interpretation of the NMHRA, and the manifest absurdity of this result provides one more reason for this Court to affirm the Court of Appeals opinion, particularly considering that, "In enacting the Human Rights Act, it was the intent and purpose of the legislature to eliminate and prevent discrimination on the basis of race, age, religion, color, national origin, ancestry or sex, and to promote good will." *Keller*, 1973-NMSC-048, ¶ 23.

D. It is inconceivable that Defendant-Appellant Eastin's conduct and comment were within the manner and method of administering an academic program in twenty-first century New Mexican society.

In *Regents*, this Court contemplated a finding by the New Mexico Human Rights Commission (Commission) that the University of New Mexico College of Nursing

(University) unlawfully discriminated against a Black American student because of her race by giving her a failing grade in a clinical nursing course and then refusing to provide an opportunity for her to immediately retake the course. 1981-NMSC-026, ¶ 1. On appeal, the University argued that it was not a "public accommodation" within the meaning of the NMHRA, 1981-NMSC-026, ¶ 5, but this Court refined the issue presented to "whether the University of New Mexico, *in administering its academic program*, is a 'public accommodation' within the definition of the" NMHRA. 1981-NMSC-026, ¶ 6 (emphasis added). In affirming the district court, the *Regents* Court concluded, "This opinion should be construed narrowly and is limited to the University's manner and method of administering its academic program. We reserve the question of whether in a different set of circumstances the University would be a "public accommodation" and subject to the jurisdiction of the Human Rights Commission." 1981-NMSC-026, ¶ 16.

Regents is clear: university decisions like giving a failing grade to a student and refusing to provide an opportunity for her to immediately retake the course are part of the manner and method of administering a university's academic program and hence not a public accommodation under the NMHRA. Indeed, assessing student performance and issuing a failing grade are matters of academic freedom, obligation, and administration. They are academic and administrative decisions—not a place of public accommodation.

If instead, the *Regents* Court had adjudicated a different set of circumstances,

say a Commission finding of racial discrimination wherein a clinical nursing professor had cut some hair off a Black American nursing student *in a university classroom* and then expressed anti-Black animus / white supremacist racism at a second Black American student, it is easy to imagine that the hypothetical *Regents* Court would have held differently, *viz.*, that the university classroom *was* a public accommodation under the NMHRA. *Cf. Regents*, 1981-NMSC-026, ¶ 16.

Similarly, in the case at bar, Defendant-Appellant Eastin's conduct, and comment, were not remotely within the manner and method of administering an academic program. Outside of a story by Franz Kafka, a novel by George Orwell, or some other dystopia, is it inconceivable that the manner and method of administering an academic program in twenty-first century New Mexican society should include menacing, battering, and assaulting Native American high school students during their AP English class. Rather, the facts of *Regents* are clearly distinguishable from the facts of this case, and the Court of Appeals was correct in doing so. Defendant-Appellant Eastin's conduct and comment against Plaintiff-Appellee during their AP English class constitute actionable and remediable discrimination under the NMHRA.

Respectfully submitted this 30th day of November 2023, by:

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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that this brief complies with the form requirements of Rule 12-320(A)(3) NMRA. Specifically, this brief complies with the type-volume limitation of Rule 12-318(F) NMRA because the brief contains 6906 words and is thirty-five (35) pages long, and this brief complies with the typeface requirements of Rule 12-305(D) NMRA because the brief has been prepared in a proportional-spaced typeface using Microsoft Word for Mac in 14-point Times New Roman font.

I also certify that the foregoing brief was filed through the Odyssey File- and-Serve electronic filing system, which caused a copy of the brief to be served automatically on all counsel of record this 30th day of November 2023.

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