

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

October 26, 2016 • Volume 55, No. 43



Lady On Motorcycle, by Don Johnson, Jr. (see page 3)

3rd Street Arts Gallery

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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Meetings

October

- 27**
Natural Resources, Energy and Environmental Law Section BOD,
 Noon, teleconference
- 27**
Alternative Methods of Dispute Resolution Committee,
 1 p.m., Second Judicial District Court, Third Floor Conference Room, Albuquerque
- 28**
Immigration Law Section BOD,
 Noon, teleconference

November

- 1**
Health Law Section BOD
 Noon, teleconference
- 1**
Bankruptcy Law Section BOD
 Noon, U.S. Bankruptcy Court
- 2**
Employment and Labor Law Section BOD
 Noon, State Bar Center
- 3**
Indian Law Section BOD
 1 p.m., State Bar Center

Workshops and Legal Clinics

November

- 2**
Divorce Options Workshop
 6–8 p.m., State Bar Center, Albuquerque, 505-797-6003
- 2**
Civil Legal Clinic
 10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861
- 2**
Sandoval County Free Legal Clinic
 10 a.m.–2 p.m., 13th Judicial District Court, Bernalillo, 505-867-2376
- 10**
Valencia County Free Legal Clinic
 10 a.m.–2 p.m., 13th Judicial District Court, Los Lunas, 505-865-4639
- 14**
Common Legal Issues for Senior Citizens Workshop
 10–11:15 a.m., Betty Ehart Senior Center, Los Alamos, 1-800-876-6657
- 15**
Cibola County Free Legal Clinic
 10 a.m.–2 p.m., 13th Judicial District Court, Grants, 505-287-8831

Cover Artist: Lt. Cmdr. Don Johnson Jr. is an attorney at Johnson Family Law PC in Albuquerque where he focuses on cases in family law and criminal defense. His artwork has focused on New Mexico cultural events and his law practice. His work has focused on New Mexico cultural events and his law practice. "Lady On Motorcycle" is inspired by the Marigold Parade that occurs every year on Isleta Boulevard in Albuquerque on Dia de los Muertos. It was shown in the Fine Arts Gallery at the 2016 New Mexico State Fair. For more of his work, contact 3rd Street Arts in Albuquerque.

Notices

COURT NEWS

New Mexico Supreme Court Commission on Access to Justice

The next meeting of the Commission on Access to Justice is noon–4 p.m., Nov. 4, at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. The Commission's goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness through communication and message development, encouraging more pro bono work by attorneys, and improving training and technology. More information about the Commission is available at www.nmcourts.gov/access-to-justice-commission.aspx (currently under reconstruction).

Judicial Performance Evaluation Commission 2016 Election Recommendations

The New Mexico Judicial Performance Evaluation Commission, the nonpartisan volunteer commission established by the New Mexico Supreme Court to make recommendations to voters on judges standing for retention, has published its voter's guide online at www.nmjpec.org. In addition to its recommendations, the website contains information on how the commission reached its recommendation on each justice or judge, along with their educational background and experience. NMJPEC is made up of 15 volunteer members from throughout New Mexico, including seven lawyers and eight non-lawyers, who spend hundreds of hours conducting evaluations. Judges standing for retention are rated on legal ability, fairness, communication skills, preparation, attentiveness, temperament and control over proceedings.

New Mexico Court of Appeals Notice of Vacancy

A vacancy on the Court of Appeals will exist as of Nov. 1 due to the retirement of Hon. Michael D. Bustamante effective Oct. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Alfred Mathewson, chair of the Appellate Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:
I will make all reasonable efforts to decide cases promptly.

Article VI, Section 28 of the New Mexico Constitution. Download applications at <http://lawschool.unm.edu/judsel/application.php> or request an application by email by contacting the Judicial Selection Office at 505-277-4700. The deadline for applications is 5 p.m., Nov. 17. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Appellate Court Judicial Nominating Commission will meet beginning at 9 a.m., Dec. 1, at the Supreme Court Building, 237 Don Gaspar Ave. in Santa Fe, to interview applicants for the position. The Commission meeting is open to the public and those who have comments about the candidates will have an opportunity to be heard.

Administrative Hearings Office New Office Location

On Nov. 1, the Albuquerque Office of the State of New Mexico Administrative Hearings Office will be relocating to the Compass Bank Building, 505 Marquette NW, Suite 1150, Albuquerque, N.M. 87102. All Albuquerque Implied Consent Act administrative hearings scheduled to occur after Nov. 1 will take place at this new office location, as will be noted on the notices of hearing and subpoenas in the relevant cases. This only impacts cases scheduled to be heard in Albuquerque and no other hearing locations across the state are affected by this move.

First Judicial District Court New Tierra Amarilla Phone Numbers

Effective Oct. 3, the Rio Arriba County Court in Tierra Amarilla will have new phone numbers as shown below:

Judge Jennifer L. Attrep, Division V:
phone: 505-455-8325,
fax: 575-588-0329

Rio Arriba County Court Clerk's Office
phone: 505-455-8335,
fax: 575-588-9898

Second Judicial District Court Notice of Exhibit Destruction

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court: the domestic matters/relations and domestic violence cases for 2003–2006, including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Nov. 16. Those who have cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.–5 p.m., Monday–Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety, exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

13th Judicial District Court Exhibit Destruction

The 13th Judicial District Court in Cibola County will destroy exhibits from the following cases listed below on Dec. 15. Parties involved in the cases listed below may retrieve the exhibits before the destruction date by appearing in person at the district court clerk's office in Grants. Call Court Manager Kathy Gallegos at 505-287-8831 ext. 3110 for more information. Below are the cases that will have exhibits destroyed: CR-1333-1985-00053 through CR-1333-2015-00233; JR-1333-1993-00021 through JR-1333-2015-00034; AP-1333-1991-00005 through AP-1333-2002-10; LR-1333-2003-1 through LR-1333-2015-00010; CV-1333-1982-00276 through CV-1333-2014-00228; DM-1333-1984-00150 through DM-1333-2015-00240; DV-1333-1999-00088 through DV-1333-2015-00128; PB-1333-1996-00022 through PB-1333-2015-00011; JQ-1333-1996-00015 through JQ-1333-2015-00001; PQ-1333-2004-00006 through PQ-1333-2015-00003; SA-1333-2004-00003 through SA-1333-015-00008; SQ-1333-1987-00006 through SQ-1333-2015-00011.

U.S. District Court, District of New Mexico Reappointment of Incumbent United States Magistrate Judge

The current term of office of U.S. Magistrate Judge Gregory B. Wormuth is due to expire on May 17, 2017. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this Court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the Court and should be addressed as follows: U.S. District Court, CONFIDENTIAL—ATTN: Magistrate Judge Merit Selection Panel, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by Oct. 28.

Office of the Attorney General New Phone Numbers

Effective Oct. 7, the New Mexico Office of the Attorney General and all employees have new phone numbers. The main line for each office location is as follows:

Albuquerque: 505- 717-3500

Las Cruces: 575-339-1120

Santa Fe: 505 490-4060

Toll free (all locations): 844-255-9210

Contact any number for assistance in reaching individual employees.

STATE BAR NEWS

Attorney Support Groups

- Nov. 7, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Nov. 14, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Nov. 21, 7:30 a.m.

First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Alternative Methods of Dispute Resolution Committee APD/Community Relations Presentation

The City of Albuquerque ADR Office has been tasked with multiple roles in the ongoing effort to improve relations between APD and the community. The ADR Committee and ADR Coordinator and Assistant City Attorney Tyson Hummell invite members of the legal community to attend the presentation from noon-1 p.m., Oct. 27, at the Second Judicial District Court 3rd Floor Conference Room. The presentation will explore two fundamental aspects of this effort: the previous year-long Albuquerque Collaborative on Police Community Relations and the ongoing Officer/Civilian Mediation Program. There will be ample time for questions and discussion. Attendees should expect an interactive session. R.S.V.P. with Breanna Henley at bhenley@nmbar.org in order to bring electronic devices into the Court. Lunch is provided. The ADR Committee will meet following the presentation from 1-1:30 p.m.

Animal Law Section Monthly Animal Talk: The Link

Over the ages, companion animals have come to be viewed as family members in many cases. Unfortunately, this sometimes places them directly in the path of family violence. Scholars suggest that an individual's mistreatment of an animal parallels unhealthy, and sometimes violent, relationships with other humans. Tammy Fiebelkorn will explore the history of The Link and discuss ways to spot violence in any form, intervene and provide treatment for both abusers and the abused from noon-1 p.m., Oct. 28, at the State Bar Center. R.S.V.P. with Breanna Henley at bhenley@nmbar.org.

Board of Bar Commissioners Appointments to Boards and Commissions

The Board of Bar Commissioners will make appointments to the following boards and commissions: Client Protection Com-

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mission (one appointment, three-year term); Commission on Professionalism (one lawyer position, one non-lawyer position, two year terms); and the New Mexico Legal Aid Board (one appointment, three year term). Members who want to serve should send a letter of interest and brief résumé by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or email to jcont@nmbar.org.

Board of Editors Seeking Applications for Open Positions

The State Bar Board of Editors has open positions beginning Jan. 1, 2017. Both lawyer and non-lawyer positions are open. The Board of Editors meets at least four times a year (in person and by teleconference), reviewing articles submitted to the

Bar Bulletin and the quarterly *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board's primary responsibility is for the *New Mexico Lawyer*, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The Board of Editors should represent a diversity of backgrounds, ages, geographic regions of the state, ethnicity, gender, and areas of legal practice and preferably have some experience in journalism or legal publications. Applicants outside of Albuquerque are especially needed. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Communications Coordinator/Editor Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Dec. 1.

Natural Resources, Energy and Environmental Law Section Nominations Open for 2016 Lawyer of the Year Award

The Natural Resources, Energy and Environmental Law Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 16. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at www.nmbar.org/NREEL. Nominations should be submitted by Oct. 28 to Breanna Henley, bhenley@nmbar.org.

Practice Sections 2016 Elections

Nominating Committee reports containing the slate of candidates for each section board of directors are located at www.nmbar.org/sections. Should no other candidates come forth to contest the positions, the candidates will be elected by acclamation. Those wanting to contest the positions should obtain signatures of 10 members on the election petition found at www.nmbar.org/sections and submit it to bhenley@nmbar.org by 5 p.m., Oct. 31.

UNM Law Library Hours Through Dec. 18

Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Holiday Closures

Nov. 24–25 (Thanksgiving)

OTHER BARS Albuquerque Bar Association November Membership Luncheon

Join the Albuquerque Bar Association for a membership luncheon on Nov. 1 at the Embassy Suites Hotel. Dr. Cheryl Willman, University of New Mexico Cancer Research and Treatment Center Director and Chief Executive Officer, will provide a keynote address from noon–1 p.m. (arrive for networking at 11:30 a.m.) After the luncheon, David Johnson, Stefan Chacon and Deborah Mann, Montgomery & Andrews PA, will present “Health Care Fraud & Abuse” (2.0 G) from 1:15–3:15 p.m. To register, visit www.abqbar.org.

Albuquerque Lawyers Club Journalism and the Law

Karen Moses, managing editor of the *Albuquerque Journal*, will present “The Unique and Crucial Relationship between Journalism and the Law” at a lunch meeting at noon, Nov. 2, at Seasons Restaurant, 2031 Mountain Road, NW, Albuquerque. The cost is \$30 in advance; \$35 at the door. Non-members are also welcome to attend. Visit www.albuquerquelawyersclub.com.

New Mexico Black Lawyers Association Immigration Law CLE

The New Mexico Black Lawyers Association invites members of the legal community to attend its “Immigration and Deportation” CLE (5.0 G, 1 EP) from 8 a.m.–4:30 p.m., on Nov. 18, at the State Bar Center in Albuquerque. Registration is \$225 and lunch is included. For more information or to register, visit www.newmexicoblacklawyersassociation.org. The deadline to request a refund is Nov. 11.

New Mexico Criminal Defense Lawyers Association ‘DWI 2016: The Dark Side of the Moon’

Colorado's best DUI attorney for the fourth consecutive year in 2016, Jay Tiftickjian, is the special guest speaker for the New Mexico Criminal Defense Lawyers Association's “DWI 2016: Dark Side of the Moon” CLE (6.5 G) on Nov. 4 at the Greater Albuquerque Association of Realtors. Tiftickjian will present on the effects of marijuana and driving and DWIs involving marijuana. Also in store for this CLE are National Highway Traffic Safety Administration field sobriety testing, the MVD and the Implied Consent Act and challenging breath tests. To join NMCDLA and register today, visit www.nmcdla.org.

New Mexico Hispanic Bar Association Fifth Annual Las Cruces CLE and Meet and Greet

Join the New Mexico Hispanic Bar Association for the “Fifth Annual Las Cruces CLE and Meet and Greet” (2.0 G, 1.0 EP) at 1:30 p.m., Oct. 28, at the Hotel Encanto de Las Cruces, 705 S. Telshor Blvd., Las Cruces. Topics include pointers for preserving the record for appeal, making the most out of mediation and ethics y Español: representing Spanish-speaking clients. A meet and greet event, co-hosted by the UNM School of Law, will follow the CLE. For more information and to register, visit www.nmhba.net.

New Mexico Women's Bar Association Open Board Positions

Elections for two year terms, beginning Jan. 2017, for the New Mexico Women's Bar Association will be held on Nov. 18, 2016. The Board invites interested members of the association to apply with a short letter of interest and a resume. Send the letter and resume to the secretary at wbanominations@hotmail.com by noon on Nov. 10.

Board members are expected to attend an overnight retreat Jan. 21–22, 2017; attend bi-monthly meetings in person or by phone; to actively participate on one or more committees; and to support the events sponsored by the Women's Bar Association. The New Mexico Women's

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WALKING IN THE FOOTSTEPS OF GIANTS— Fall Swearing-in Ceremony

Photos and Story by Evann Kleinschmidt

Chief Justice Charles W. Daniels of the New Mexico Supreme Court told the newly sworn-in attorneys that they are “walking in the footsteps of giants” and they will make their own paths filled with opportunities, wonder and so much more. More than 120 new lawyers were sworn in on Sept. 20 at the Kiva Auditorium in Albuquerque surrounded by family, friends and colleagues.

The swearing-in ceremony is just as special in 2016 as it has been every other time in the 130 years the State Bar of New Mexico has existed. Because the legal community is so small, all of the new admittees are invited to attend the ceremony to have their names read before the Supreme Court. State Bar President J. Brent Moore recalled 1998 when his own swearing-in took place. His mother, also an attorney, moved on his behalf. In August, Justice Ruth Bader Ginsburg was the keynote speaker at the Annual Meeting. She mentioned a quote from the late Justice Antonin Scalia “I attack ideas, I don’t attack people. Some very good people have some very bad ideas.” Moore hopes that this quote will guide the new attorneys as they make their way through their legal careers.



Board of Bar Examiners Chair Howard Thomas, Young Lawyers Division Chair Spencer Edelman and Lawyers and Judges Assistance Program Committee Member Briggs Cheney educated the audience about services provided by and ways to get involved with the State Bar. Mary T. Torres spoke about the benefits of membership in the American Bar Association. She is a New Mexico attorney that currently serves as the ABA secretary.

After the roll of new admittees for admission was read, Joey D. Moya, chief clerk of the Supreme Court, administered the oath. As is tradition, the members of



the Supreme Court imparted a bit of wisdom to the new attorneys. Saying she was “simply delighted” to be there, Justice Judith K. Nakamura asked the new lawyers to consider the reputation they want to build in the small legal community of New Mexico. In the words of Dr. Woodie Flowers, Justice Barbara J. Vigil encouraged them to always strive for gracious professionalism. Justice Edward L. Chávez stressed that it is important to treat every assignment as though it is significant. Justice Petra Jimenez Maes spoke of the need for pro bono in the state. Her advice was to “do good, do justice and do pro bono.”



All around awesome • He has an unfailing commitment to public service • Overachiever • Cousin • On top of being an associate and friend, he is a killer guitar player • She reminds me to follow the golden rule • He is not afraid of hard work • She leaves me speechless with her compassion for others • I can't wait to see what she does in the years to come • Father • He has common sense • She is a beautiful example of what happens with hard work • She is forthright and candid • Mentor • She always has an innate sense of good

New Faces of the Legal Profession

The new admittees were able to celebrate with their guests including spouses, siblings, parents, special movants, peers and friends.



For more photos of the Swearing-in Ceremony, visit www.nmbar.org/Photos.

Bar does not discriminate on the basis of sex or gender and encourages all licensed attorneys to become members and apply to be on the Board. For more information about the Women's Bar Association or to become a member, visit www.nmwba.org.

OTHER NEWS

Center for Civic Values

Gene Franchini High School Mock Trial Competition Needs Judges

The Gene Franchini High School Mock Trial Competition needs judges. Registration is now open for judges and administration volunteers for the qualifier competition (Feb. 17–18, 2017) and state competition (March 17–18, 2017). Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Sign up at www.civicvalues.org.

For more information, contact Kristen Leeds at the Center for Civic Values at 505-764-9417 or kristen@civicvalues.org.

Christian Legal Aid

New Volunteer Training Seminar

Christian Legal Aid of New Mexico invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. Christian Legal Aid will be hosting a New Volunteer Training Seminar from 11 a.m.–5 p.m., Oct. 28, in the State Bar Board Room. Join them for free lunch, free CLE credits, and training as they learn the basics on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800 or christianlegalaids@hotmail.com.

New Mexico Association of Drug Court Professionals 2016 Training Conference

Join the New Mexico Association of Drug Court Professionals for the 2016 Training Conference on Nov. 2–3 at the

Sheraton Uptown in Albuquerque. The conference will offer up to 12.0 CLE credits (including a possible 1.5 EP). Topics include drug court standards and the statewide self-assessment report, the DWI offender as opposed to the drug offender. Register online at www.regonline.com/nmadcp2016fallconference.

Santa Fe Neighborhood Law Center

Law and Policy for Neighborhoods CLE

Join the Santa Fe Neighborhood Law Center for its annual CLE “Law and Policy for Neighborhoods” (10.0 G, 2.0 EP), Dec. 8–9 at the Santa Fe Convention Center. Featured speakers include Chief Justice Charles W. Daniels and recently retired Justice Richard C. Bosson. A discounted rate for early registration is available through Nov. 25. A free continental breakfast and box lunch will be provided both days on site for CLE attendees and faculty. For more information or to register, visit www.sfnlc.com/.

Third Annual Senior Lawyers Division ATTORNEY MEMORIAL SCHOLARSHIP PRESENTATION AND RECEPTION

Tuesday, Nov. 15 • 5–7 p.m.
State Bar Center



Two UNM School of Law third-year students will be awarded a \$2,500 scholarship in memory of New Mexico attorneys who have passed away over the last year. The deceased attorneys and their families will be recognized during the presentation. The Senior Lawyers Division invites all State Bar members and UNM School of law faculty, staff, and students to attend.

R.S.V.P. to Breanna Henley, bhenley@nmbar.org.



Legal Education

October

- | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>26 Damages in Personal Injury
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>27 2015 Federal Practice Tips and Advice From U.S. Magistrate Judges
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 2016 Appellate Bench and Bar Conference
5.0 G
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>27 Spring Elder Law Institute (2016)
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Everything Old is New Again – How the Disciplinary Board Works (Ethicspalooza Redux—Winter 2015 Edition)
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 5th Annual Las Cruces CLE and Meet and Greet
2.0 G, 1.0 EP
Live Seminar, Las Cruces
New Mexico Hispanic Bar Association
www.nmhba.net</p> |
| <p>27 More Reasons to be Skeptical of Expert Witnesses (2015)
5.0 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

November

- | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 Journalism, Law and Ethics (2016 Annual Meeting)
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>2 Estate Planning for Religious and Philosophical Beliefs of Clients
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>4 ADR Institute: Mindful Mediation Skills for the Lawyer (and Non-Lawyer) Handling Conflict Resolution
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>1 Law Practice Succession – A Little Thought Now, a Lot Less Panic Later (2015)
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>2 Top 8 Title Defects—Cured
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>4 DWI 2016: Dark Side of the Moon
6.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org</p> |
| <p>1 The Rise of 3-D Technology: What Happened to IP? (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>2–3 New Mexico Association of Drug Court Professionals Training Conference
12.0 CLE credits (including a possible 1.5 EP)
Live Seminar, Albuquerque
New Mexico Association of Drug Court Professionals
www.regonline.com/nmadcp2016fallconference</p> | <p>10 Acquisitions of Subsidiaries and Divisions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>1 Animal Law: Wildlife and Endangered Species on Public and Private Lands—The Tipping Point
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>3 Indian Law in 2016: What Indian Law Practitioners Need to Know
1.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>10 Charter School Law in New Mexico
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> |

November

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| <p>10 Estate Planning and Retirement Benefits
4.0 G
Live Seminar
Santa Fe Estate Planning Council
www.sfestateplanning.com</p> | <p>17 2016 Attorney-Client Privilege Update
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>11 Ethics and Identifying Your Client: It's Not Always 20/20
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 2016 Business Law Institute
5.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 CLE at Sea Trip, Western Caribbean Cruise (Nov. 28–Dec. 4)
10.0 G, 2.0 EP
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>14 Top Estate Planning Techniques
6.6 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com</p> | <p>18 Ethics and Dishonest Clients
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Navigating the Amenability Process in Youthful Offender Cases (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 The Art of Effective Speaking for Lawyers
4.5 G, 1.2 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Immigration and Deportation
5.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Black Lawyers Association
www.newmexicoblacklawyersassociation.org</p> | <p>30 Environmental Regulations of the Oil and Gas Industry (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 Sophisticated Deposition Strategies
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>22 Effective Use of Trial Technology (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Building Your Civil Litigation Skills
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> |
| <p>17 2016 Probate Institute
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

December

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 Piercing the Entity Veil: Individual Liability for Business Acts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>2 Personal Injury Evidence: Social Media, Smartphones, Experts and Medical Records
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>5 Justice with Compassion—Courthouse Facility Dogs Improving the Legal System
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>2 As Judges See It: Best (and Worst) Practices in Civil Litigation
6.0 G
Live Seminar, Las Cruces
NBI Inc.
www.nbi-sems.com</p> | <p>2 Third Annual Wage Theft CLE
3.0 G, 1.0 EP
Live Seminar, Gallup
New Mexico Hispanic Bar Association
www.nmhba.net</p> | <p>5–9 Forensic Evidence
24.9 G, 1.2 EP
Live Seminar, Santa Fe
National District Attorneys Association
www.ndaa.org</p> |

December

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>6 Transgender Law and Advocacy
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>9 Medical Marijuana Law in New Mexico
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com</p> | <p>16 Lawyers and Email: Ethical Issues in Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 Medical Marijuana Law in New Mexico
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>13 Trials of the Century II
5.0 G, 1. EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 New Mexico DWI Cases: From the Initial Stop to Sentencing—Evaluating Your Case
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 HR Legal Compliance: Advanced Practice
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>13 How to Get Your Social Media, Email and Text Evidence Admitted (and Keep Theirs Out)
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com</p> | <p>20 Escrow Agreements in Real Estate
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 2016 Real Property Institute
4.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>13 Collection Law from Start to Finish
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>21 The Fear Factor: How Good Lawyers Get Into (and Avoid) Ethical Trouble
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Structuring Minority Interests in Businesses
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 2016 Intellectual Property Law Institute—Copy That! Copyright Topics Across Diverse Fields
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>21 Drafting Preferred Stock/Preferred Returns
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8–9 Law and Policy for Neighborhoods Conference
10.0 G, 2.0 EP
Live Program, Santa Fe
Santa Fe Neighborhood Law Center
www.sfnlc.com</p> | <p>15 Divorce Litigation from Start to Finish
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>22 Personal Injury Cases
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 The Ethics of Bad Facts: The Duty to Disclose to the Tribunal
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>15 Business Law Bootcamp
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com</p> | <p>23 Ethics and Confidentiality: What You Can Disclose, What You Must Disclose
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Water Rights in New Mexico
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>16 Living with Turmoil in the Oil Patch: What it Means for New Mexico
5.8 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 How to Become Your Own Cybersleuth: Conducting Effective Internet Investigative & Background Research
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 As Judges See It: Top Mistakes Attorneys Make in Civil Litigation
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com</p> | | |

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective October 14, 2016

PUBLISHED OPINIONS

No. 32936	1st Jud Dist Santa Fe CV-06-30, G COBB v J GAMMON (affirm in part and remand)	10/14/2016
No. 32945	1st Jud Dist Santa Fe CV-06-30, G COBB v J GAMMON (affirm in part and remand)	10/14/2016
No. 32953	1st Jud Dist Santa Fe CV-06-30, J GAMMON v C SIMMONS (affirm in part and remand)	10/14/2016

UNPUBLISHED OPINIONS

No. 35430	2nd Jud Dist Bernalillo JQ-12-115, CYFD v MEGHAN M (affirm)	10/11/2016
No. 34423	12th Jud Dist Otero CR-12-633, STATE v M HERNANDEZ (reverse and remand)	10/12/2016
No. 35373	2nd Jud Dist Bernalillo CR-01-2019, STATE v E ORTEGA (affirm)	10/13/2016
No. 35617	9th Jud Dist Curry CR-14-311, STATE v J CASTILLO (reverse and remand)	10/13/2016
No. 34987	11th Jud Dist San Juan JQ-12-35, CYFD v SHERYL J (affirm)	10/13/2016

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective October 26, 2016

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

*There are no proposed rule changes
currently open for comment.*

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2016 NMRA:

Effective Date

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

Rule 1-079 Public inspection and sealing
of court records 05/18/16

Rule 1-131 Notice of federal restriction on
right to possess or receive a
firearm or ammunition 05/18/16

CIVIL FORMS

Form 4-940 Notice of federal restriction on
right to possess or receive a
firearm or ammunition 05/18/16

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

Rule 5-123 Public inspection and sealing
of court records 05/18/16

Rule 5-615 Notice of federal restriction on
right to receive or possess a
firearm or ammunition 05/18/16

RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS

Rule 6-506 Time of commencement of trial 05/24/16

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

Rule 7-506 Time of commencement of trial 05/24/16

RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

Rule 8-506 Time of commencement of trial 05/24/16

CRIMINAL FORMS

Form 9-515 Notice of federal restriction on
right to possess or receive a
firearm or ammunition 05/18/16

CHILDREN'S COURT RULES AND FORMS

Rule 10-166 Public inspection and sealing
of court records 05/18/16

Rule 10-171 Notice of federal restriction on
right to receive or possess a
firearm or ammunition 05/18/16

Form 10-604 Notice of federal restriction on
right to possess or receive a
firearm or ammunition 05/18/16

SECOND JUDICIAL DISTRICT COURT LOCAL RULES

LR2-400 Case management pilot
program for criminal cases 02/02/16

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us>.

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

No. S-1-SC-32554 (filed September 22, 2016)

IN THE MATTER OF MICHELLE RENEE MLADEK, ESQUIRE

An attorney suspended from the practice of law before the
Courts of the State of New Mexico

PUBLIC CENSURE

Christine E. Long
Albuquerque, NM
for Disciplinary Board

The Bezpalko Law Firm
Ian Bezpalko
Albuquerque, NM
for Respondent

Public Censure

{1} Attorney Michelle Renee Mladek was directed to appear before this Court under Rule 17-206(G) NMRA and show cause why she should not be held in contempt for violating two separate orders directing that she cooperate with attorneys successively appointed to supervise her. We required supervision because Mladek's practice did not meet the standards demanded by our Rules of Professional Conduct. Several complaints were filed against Mladek with the New Mexico Disciplinary Board by individuals Mladek represented. One of those complaints alleged that Mladek was incompetent and made basic and indefensible errors during the course of the representation. We determined that Mladek was in contempt and violated this Court's orders by failing to cooperate with her supervisory attorneys. We indefinitely suspended Mladek and entered the additional sanctions described below. We elected to publicly censure Mladek under Rule 17-206(A)(4) and Rule 17-206(D), in part, to illuminate for members of the New Mexico bar how futile and perilous it is to forfeit opportunities—extended in good faith—to learn and grow from past mistakes. Mladek refused guidance, resisted change, and we rescinded the leniency extended to her.

I. BACKGROUND

{2} To fully apprehend Mladek's transgressions requires examination of six years of attorney malfeasance. In the summer of 2010, a complaint was filed with the Disciplinary Board by Ralph Maldonado, an individual who had retained Mladek to assist with an immigration matter. Maldo-

nado alleged that he had paid Mladek for her services but that she had not worked on his case. The Disciplinary Board sent Mladek a letter requesting information about her representation of Maldonado, and later filed a motion with this Court requesting that Mladek be held in contempt for failing to cooperate with the Disciplinary Board's investigation. Submissions Mladek filed with this Court persuaded us that entry of an order of contempt was not appropriate, but the disciplinary proceedings surrounding Mladek's representation of Maldonado illuminated the troubled nature of Mladek's legal practice. A letter addressed to Mladek from the Disciplinary Board regarding Maldonado's complaint and dated July 2010 notes that

since your admission to practice in New Mexico in 2007 [Ms. Mladek], five complaints have been filed against you, one of which resulted in the issuance of an informal admonition. This is an unusually high number of complaints given the time period involved. We suggest that you take this opportunity to examine what it is in your practice that is generating these complaints and that you take whatever corrective measures that may be indicated.

{3} In June 2012, another complaint against Mladek was filed with the Disciplinary Board by Kelly Brown. Like Maldonado, Brown had retained Mladek to assist her with an immigration issue. Brown also sought Mladek's assistance with a related civil matter. In a letter accompanying Brown's complaint, she

described in detail the many basic errors Mladek made in handling her legal issues. {4} In November 2013, Counsel for the Disciplinary Board filed charges against Mladek asserting that Mladek engaged in professional misconduct in her representation of Brown. Mladek denied those allegations.

{5} Hearings on the charges stemming from the Brown complaint were conducted before a Disciplinary Board Hearing Committee in March and April 2014. At the conclusion of those hearings, Disciplinary Counsel and Mladek both submitted proposed findings of facts and conclusions of law to the Hearing Committee. In July 2014, the Hearing Committee found that Mladek's representation of Brown had been substandard and that Mladek had committed basic errors in representing Brown. The Committee concluded that Mladek had violated Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104(B) NMRA, by failing to explain a matter to a client sufficiently to permit the client to make informed decisions regarding the representation; and Rule 16-105(A) NMRA, by charging an unreasonable fee. The Committee recommended that Mladek be publicly censured, that she be placed on probation for a period of one year, that she make restitution to Brown, that she attend (at her own expense) the 38th Annual Conference on Immigration and Nationality Law at the University of Texas at Austin, and that she be assessed costs and fees.

{6} Disciplinary Counsel sought reconsideration of the sanctions imposed by the Committee. Disciplinary Counsel believed that Mladek's conduct warranted suspension, not merely public censure and probation. A Disciplinary Board Panel was convened to hear Disciplinary Counsel's motion. In its order on the motion, the Panel noted that Mladek's competency to practice law was in doubt, that Mladek did not appear to recognize and appreciate her shortcomings or misconduct, and that Mladek misstated facts in her briefing and argument to the Panel "to the point of misrepresentation." Yet the Panel still did not recommend suspension and determined instead to increase Mladek's period of probation from one to two years, and further concluded that Mladek should practice under a supervising attorney during her

two year probationary period. The Panel specified that Mladek would meet with the supervising attorney once per week for the first year to review the status of any pending and new cases. After that one year period, Mladek would meet with the supervising attorney as often as the supervising attorney deemed necessary, but not less than once per month. The supervising attorney would submit a monthly report to Disciplinary Counsel. The Panel also concluded that Mladek would be responsible for the costs of the supervision and was ordered to pay any invoices within fifteen days of receipt. {7} On February 18, 2015, this Court held a hearing upon the recommendation of the Disciplinary Board and at Disciplinary Counsel's request. Disciplinary Counsel continued to argue that the sanctions imposed against Mladek were inadequate and that Mladek's conduct warranted suspension. At the conclusion of that hearing, this Court indefinitely suspended Mladek for a period of no less than two years; however, her suspension was deferred and she was placed on conditional supervised probation pursuant to Rule 17-206(B)(1). {8} As a condition of probation, Mladek was required to submit the names of at least two licensed New Mexico attorneys to Disciplinary Counsel who were willing to serve as a supervising attorney. Upon Disciplinary Counsel's approval of a supervising attorney, Mladek would be required to meet weekly with that attorney for the first year of Mladek's probation to discuss the status of her practice and to certify that she was not taking on any new clients that she could not competently represent. The supervising attorney would submit monthly reports to Disciplinary Counsel. Mladek would be responsible for all costs and fees associated with supervision. Mladek was also required to make restitution to Brown; attend intense and concentrated continuing legal education in the field of immigration law; and pay \$7,086.82, which was the amount of the costs associated with the disciplinary proceedings, by March 23, 2015.

{9} Mladek proposed that Rebecca Bustamante, an attorney based out of El Paso, Texas, be assigned to supervise her immigration cases, and Disciplinary Counsel agreed. Initially, Bustamante and Mladek's relationship seemed positive. They met weekly during April and May, and met weekly three out of the four weeks in June. But then the relationship deteriorated. Bustamante met with Mladek only once during July and did not meet with Mladek

at all in August. By September 2015, Bustamante asked to resign as Mladek's supervisor. Bustamante explained to Disciplinary Counsel that

[e]very time I tried to schedule a weekly meeting, [Mladek] was either too busy or going out of town on business. I found myself admonishing her because I felt she wasn't making the effort. This has caused a lot of stress between us and [Mladek] suggested that due to this tension she would prefer a local attorney be assigned to continue the supervision.

{10} Following a hearing on November 12, 2015, this Court approved a new supervising attorney. Rebecca Kitson, an immigration law specialist located in Albuquerque, New Mexico, was identified by Disciplinary Counsel as a suitable replacement for Bustamante. Disciplinary Counsel requested that Mladek be required to meet with Kitson weekly until July, 2016, and then continue to meet with Kitson monthly for the remainder of Mladek's probationary period. We agreed.

{11} During the hearing, Kitson noted that she would prefer to have Mladek use a Microsoft Excel spreadsheet so that Mladek could identify all of her pending immigration cases and clearly outline the status of those cases and her strategy for resolving them. Kitson explained that a spreadsheet of this kind (or something similar) is essential in immigration practice because immigration cases often take a considerable amount of time to bring to conclusion, and it is necessary to have some type of organizing system to track the status, progress, and actions required for each case. The Court agreed that this was reasonable and ordered Mladek to use the case-management spreadsheet created by Kitson. Also during the hearing, this Court made it abundantly clear to Mladek that the onus was on her to ensure that she attended all scheduled supervisory meetings and took supervision seriously.

{12} In Kitson's first supervisory report, dated December 4, 2015, she indicated that Mladek failed to provide information about all of her active immigration cases on the Excel spreadsheet. Kitson also noted that she had asked Mladek to share her log-in information to the Executive Office for Immigration Review's (EOIR) online attorney portal so that Kitson could verify all cases where Mladek was listed as counsel of record. Kitson explained that, when she raised this issue, Mladek stated that she

was unaware that EOIR had such an online portal. Matters only got worse from there.

{13} By the time of Kitson's second report, dated December 23, 2015, Kitson noted that Mladek failed to call at the time agreed upon for their first meeting. Mladek appeared in person, as agreed, for their second meeting. Their third meeting, which occurred at the end of December, was conducted via telephone and Mladek was available when Kitson called her. Mladek had created "case strategy forms," but Kitson felt that the forms did not provide adequate information to permit her to assess the posture, complexity, or demands of Mladek's cases. Critically, Kitson relayed to Disciplinary Counsel that Mladek had—after only one month of supervision—already begun to complain about Kitson's supervision. Kitson explained that Mladek informed her that she had difficulties using the EOIR online portal, objected to Kitson's fees, and claimed that Kitson was interfering with Mladek's ability to practice law.

{14} Over the next two months, January and February of 2016, Kitson and Mladek's relations deteriorated further, and on March 13, 2016, Kitson asked to resign as Mladek's supervisor. In an e-mail dated March 13, 2016, sent to both Mladek and Disciplinary Counsel, Kitson informed Mladek that she lacked "essential information" regarding Mladek's cases despite numerous requests that Mladek provide this information. Kitson further noted that Mladek was "not familiar with the most basic information and strategy regarding [her] cases . . ." Kitson illustrated Mladek's failings by discussing one specific case Mladek was handling. It appeared to Kitson that Mladek's lack of preparation and inability to provide the Immigration Court certain documents potentially precluded Mladek's client from seeking relief from deportation. Correctly concerned, Kitson made inquiries at the Immigration Court. She spoke with the Immigration Judge presiding over the proceedings in which Mladek's client was involved, and Kitson learned that Mladek had misled her. Representations Mladek had made about steps she had allegedly taken to serve the client were untrue. Lastly, Kitson noted that Mladek had failed to remit payment for the bills Kitson submitted. In sum, Kitson concluded that Mladek was not amenable to supervision, questioned her ability to practice immigration law, and expressed concern that Mladek was putting her clients at risk. Accordingly, she too concluded that she could no longer serve as Mladek's supervisor.

{15} On March 15, 2016, Mladek submitted a response to the Disciplinary Board regarding Kitson's resignation. Mladek contended that Kitson's concerns about Mladek's competency were unfounded. Rather, Mladek claimed that Kitson was an incapable supervisor and mismanaged her supervisory duties to Mladek's detriment.

{16} On March 23, 2016, Disciplinary Counsel filed a motion for order to show cause with this Court requesting that we order Mladek to appear before us and show cause why she should not be held in contempt for violating this Court's February 18, 2015, and November 12, 2015, orders for failing to cooperate fully with her supervising attorney. We granted the motion and held a hearing on May 9, 2016.

{17} At the hearing, Disciplinary Counsel argued that Mladek should be held in contempt and that she be suspended for the remainder of her probationary period, until February of 2017. Disciplinary counsel noted that Mladek had been given ample opportunity to change her ways, but refused help and resisted change. Disciplinary Counsel further noted that Mladek was routinely defensive when given supervisory instruction and did not appear willing to work with her supervisors. Worse still, Disciplinary Counsel pointed out that Mladek insisted that the source of the problem was her supervisors and the supervision, not her conduct. Accordingly, Disciplinary Counsel contended that suspension was essential as this was the only way to ensure that Mladek's clients and the public were not harmed.

{18} Mladek was represented by counsel at the hearing. Mladek's counsel insisted that Mladek had complied with her supervisors, and, in any event, had transferred all of her immigration cases to another attorney and, therefore, no longer required supervision. Mladek's counsel confirmed, however, that Mladek was still handling several civil cases. In a somewhat puzzling turn of events, Mladek submitted a sworn affidavit at the hearing addressing the specific immigration case about which Kitson expressed concern. Mladek's affidavit asserts that Kitson and/or Disciplinary Counsel communicated with the Immigration Judge about the case. The import of this assertion is not entirely clear, but it seems that Mladek believes that Kitson and Disciplinary Counsel conspired to undermine her and give the appearance that she was unprepared at an immigration proceeding and, thus, incompetent.

{19} This Court was unpersuaded by Mladek's arguments and agreed with

Disciplinary Counsel that Mladek was in contempt of the Court's orders for failing to cooperate with her supervising attorney. We revoked Mladek's deferred suspension and supervised probation and indefinitely suspended Mladek for a minimum of twelve months, effective immediately. Mladek was ordered to comply with Rule 17-212 NMRA and promptly notify all clients of her suspension and consequent inability to act as an attorney. As to the possibility for reinstatement, the Court determined that Mladek would be considered for reinstatement provided that she satisfied the following conditions: (1) she must comply with all of the requirements imposed by this Court in its order of indefinite suspension; (2) she must participate in and complete a specified ethics seminar and receive training in law office management; and (3) in her application for reinstatement, she must propose a plan for supervision by a mentoring attorney, preferably one who would also be her employer. Lastly, the Court ordered Mladek to pay, within ninety days of the entry of the order, all of Kitson's supervisory fees and all costs associated with the disciplinary proceedings, with Kitson having first priority to payment.

II. DISCUSSION

{20} The facts of this case speak for themselves, and a lengthy analysis is unnecessary. As we explained a decade ago, "the objective of a period of supervised probation is not merely to insure that an attorney comports himself or herself in accordance with the Rules of Professional Conduct and other rules of law and procedure *during the period of probation*." *In re Tapia*, 1996NMSC025, ¶ 6, 121 N.M. 707, 917 P.2d 1379 (per curiam) (emphasis added). If the attorney under probationary supervision believes that he or she is "free to return with impunity" at the conclusion of the probationary period "to whatever aberrant behavior brought about the sanction in the first place," *id.*, then probationary supervision is futile. Rather, the purpose of probationary supervision is to permit the "attorney on probation . . . to utilize the assistance and guidance of the supervisor to modify the practices or habits which led to the initial finding of misconduct." *Id.* We have also made clear that, to retain the benefit of probation rather than being suspended from the practice of law, an attorney on probation must demonstrate strict compliance with the conditions of probation. *In re Ruybalid*, 1995NMSC042, ¶ 8, 120 N.M. 27, 897 P.2d 214 (per curiam). Mladek failed

to comply with these principles.

{21} Both of Mladek's supervisors concluded that she did not take supervision seriously and there is scant evidence in the record before us to refute their conclusions. The evidence shows that Mladek never truly accepted her shortcomings and failures nor accepted the fact that she was in desperate need of structured guidance. This conduct is most troubling. *See In re Richards*, 1999NMSC030, ¶ 20, 127 N.M. 716, 986 P.2d 1117 (per curiam) (noting that a respondent attorney's refusal to acknowledge the wrongful nature of his or her conduct is a factor that may justify an increase in the degree of discipline to be imposed). For instance, in her answer to Disciplinary Counsel's motion for the order to show cause why Mladek should not be held in contempt of this Court's orders, Mladek accused Kitson of poor supervision and accused Kitson of making it nearly impossible for her to continue to practice law. What Mladek fails to realize is that Kitson prevented Mladek from practicing law *poorly* and in a fashion detrimental to her clients and the public at large.

{22} It gives us no pleasure to see an attorney fail. But that is undoubtedly what happened here. The outcome of this case would be quite different, we are certain, had Mladek simply accepted her shortcomings and viewed supervision as an opportunity for growth. But that was not her approach. Mladek forfeited the opportunity extended to her, and now she must accept the consequences. As we have previously explained, "[a]n attorney who fails to strictly comply with the terms of probation designed to correct past deficiencies in his or her conduct should not be surprised that the result of this noncompliance is the loss, at least temporarily, of the privilege to practice law." *Tapia*, 1996NMSC025, ¶ 6.

III. CONCLUSION

{23} **For the foregoing reasons, we publicly censure Mladek for her misconduct and confirm our previous orders imposing the disciplinary sanctions summarized above. This non-precedential opinion shall be published in the Bar Bulletin of the State Bar of New Mexico.**

{24} **IT IS SO ORDERED.**

JUDITH K. NAKAMURA, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-029

No. S-1-SC-35426 (filed June 30, 2016)

NOE RODRIGUEZ,
Worker-Respondent,
v.
BRAND WEST DAIRY, Uninsured Employer,
Employer-Respondent,
and
NEW MEXICO UNINSURED EMPLOYERS' FUND,
Insurer-Petitioner,

Consolidated With:

MARIA ANGELICA AGUIRRE,
Worker-Respondent,
v.
M.A. AND SONS, INC.
Employer-Respondent,
and
FOOD INDUSTRY SELF INSURANCE FUND OF NEW MEXICO,
Insurer-Respondent.

And

Docket No. S-1-SC-35438

NOE RODRIGUEZ,
Worker-Respondent,
v.
BRAND WEST DAIRY, Uninsured Employer,
Employer-Petitioner,

and
NEW MEXICO UNINSURED EMPLOYERS' FUND,
Insurer,

Consolidated With:

MARIA ANGELICA AGUIRRE,
Worker-Respondent,
v.
M.A. AND SONS, INC.
Employer-Petitioner,
and
FOOD INDUSTRY SELF INSURANCE FUND OF NEW MEXICO,
Insurer-Petitioner.

ORIGINAL PROCEEDINGS ON CERTIORARI

Victor S. Lopez and David L. Skinner, Workers' Compensation Judges

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Opinion

Edward L. Chávez, Justice

{1} The New Mexico Workers' Compensation Act (Act), NMSA 1978, §§ 52-1-1 to -70 (1917, as amended through 2015), has never required employers to provide workers' compensation coverage to farm and ranch laborers. These consolidated appeals require us to resolve whether this exclusion violates the rights of those workers under the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution in light of the fact that other agricultural workers are not singled out for exclusion. The Equal Protection Clause mandates that, "in order to be legal," ostensibly discriminatory classifications in social and economic legislation "must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule" for the class that suffers the discrimination. *Burch v. Foy*, 1957-NMSC-017, ¶ 10, 62 N.M. 219, 308 P.2d 199.

{2} When litigants allege that the government has unconstitutionally discriminated against them, courts must decide the merits of the allegation because if proven, courts must resist shrinking from their responsibilities as an independent branch of government, and refuse to perpetuate the discrimination—regardless of how long it has persisted—by safeguarding constitutional rights. Such is the constitutional responsibility of the courts. *Griego v. Oliver*, 2014-NMSC-003, ¶ 1, 316 P.3d 865. We conclude that there is nothing to distinguish farm and ranch laborers from other agricultural employees and that purported government interests such as cost savings, administrative convenience, and other justifications related to unique features of agribusiness bear no rational relationship to the Act's distinction between these groups. This is nothing more than arbitrary discrimination and, as such, it is forbidden by our Constitution. Accordingly, we hold that the farm and ranch laborer exclusion contained in Section 52-1-6(A) of the Act is unconstitutional, and we remand these cases for further proceedings. The Legislature is at liberty to offer economic advantages to the agricultural industry, but it may not do so at the sole expense of the farm and ranch laborer while protecting all other

agricultural workers. We also determine that our holding should be given modified prospective application to the cases of Ms. Aguirre and Mr. Rodriguez and to all cases involving an injury that manifests, as defined under the Act, after the date that our mandate issues in this case pursuant to Rule 12-402(B) NMRA.

I. BACKGROUND

{3} In 2012, Maria Angelica Aguirre worked as a chile picker in Doña Ana County for M.A. and Sons, Inc. (M.A. & Sons) for a weekly wage of approximately \$300.¹ Ms. Aguirre claims that she slipped in a field and broke her wrist while picking chiles. Ms. Aguirre claims that her injury required surgery and rehabilitative therapy, she still has trouble with her wrist, and she is limited in her ability to do farm work. M.A. & Sons had workers' compensation insurance at the time of the alleged injury.

{4} In March 2013, Ms. Aguirre filed a workers' compensation complaint seeking compensation for temporary total disability, permanent partial disability, medical benefits, and attorney fees. M.A. & Sons and its insurer, the Food Industry Self Insurance Fund of New Mexico (Self Insurance Fund), raised several defenses to Ms. Aguirre's complaint, including the contention that her claims were barred by the farm and ranch laborer exclusion in Section 52-1-6(A), which provides that the Act "shall not apply to employers of . . . farm and ranch laborers." In January 2014, Ms. Aguirre filed a motion for partial summary judgment, asking the workers' compensation judge (WCJ) to conclude that the farm and ranch laborer exclusion had been declared unconstitutional; therefore, it did not bar her case. To support her argument, Ms. Aguirre attached materials related to the 2012 judgment in *Griego v. New Mexico Workers' Compensation Administration*, No. CV 2009-10130, a case that was brought by New Mexico farm laborers in the Second Judicial District Court. In *Griego*, the district court declared that the farm and ranch laborer exclusion violated the constitutional equal protection rights of the claimants in that case and entered an order against the Workers' Compensation Administration (the Administration). The Administration then appealed the district court's ruling on jurisdictional grounds and, in an unpublished memorandum opinion, the Court of Appeals dismissed the claim as moot, and further stated that

because the Administration had not sought review of the constitutional issue, the Court would not "examine [] or draw any conclusions about it," other than to say that the Administration "cannot now escape the effect of unchallenged parts of the district court's decision." *Griego v. N.M. Workers' Comp. Admin.*, No. 32,120, mem. op. ¶¶ 1, 11 (N.M. Ct. App. Nov. 25, 2013) (non-precedential). The WCJ took judicial notice of the materials from *Griego* and admitted them for purposes of Ms. Aguirre's motion for partial summary judgment. The WCJ then denied her motion and dismissed her claim with prejudice on the basis of the farm and ranch laborer exclusion.

{5} In 2012, Noe Rodriguez worked as a dairy worker and herdsman at Brand West Dairy, earning just under \$1000 every two weeks for working six days a week for eight hours per day. Mr. Rodriguez alleges that he was pushed up against a door by a cow and then head-butted by the cow, which caused him to fall face first onto a cement floor. He alleges that he suffered a traumatic brain injury, a neck injury, and facial disfigurement and that he was in a coma for two days. According to Mr. Rodriguez, as of July 2013, he had still not been cleared by a doctor to return to work. He alleges that his employer, which did not have workers' compensation insurance, provided him with two checks for \$600 after the accident.

{6} In February 2013, Mr. Rodriguez filed a workers' compensation complaint seeking compensation for temporary total disability, permanent partial disability, disfigurement, medical benefits, and attorney fees. In July 2013, the New Mexico Uninsured Employers' Fund (the UEF), which acts as the insurer for businesses without workers' compensation insurance, see § 52-1-9.1, moved to dismiss Mr. Rodriguez's claims because of the farm and ranch laborer exclusion. Mr. Rodriguez responded by arguing that the WCJ was obligated to follow the district court's ruling in *Griego* and that the exclusion was unconstitutional. He attached a large quantity of materials from *Griego* to his motion, some of which were admitted by the WCJ. The WCJ granted the UEF's motion and dismissed Mr. Rodriguez's case based on the exclusion.

{7} Pursuant to NMSA 1978, Section 52-5-8(A) (1989), Ms. Aguirre and Mr. Rodriguez (collectively "Workers") appealed

¹M.A. & Sons disputes that Ms. Aguirre was its "employee" under the Act. However, for the purposes of this appeal, they agree that we should treat Ms. Aguirre as though she would otherwise be eligible for workers' compensation benefits except for the Section 52-1-6(A) exclusion.

directly to the Court of Appeals, where their appeals were consolidated. *Rodriguez v. Brand W. Dairy*, 2015-NMCA-097, ¶ 1, 356 P.3d 546, cert. granted, 2015-NM-CERT-008. Applying rational basis review, the Court of Appeals struck down the farm and ranch laborer exclusion as a violation of Workers' equal protection rights under Article II, Section 18 of the New Mexico Constitution. *Rodriguez*, 2015-NMCA-097, ¶¶ 11, 31. The Court then applied its holding on a modified prospective basis to any workers whose claims were pending as of March 30, 2012, and any claims filed after the date of the district court's final judgment in *Griego*. *Rodriguez*, 2015-NMCA-097, ¶ 37.

{8} The UEF appealed to this Court only on the issue of the Court of Appeals' modified prospective application of its holding. Brand West Dairy, M.A. & Sons, and the Self Insurance Fund (collectively "Employers") appealed to this Court to seek review of both the constitutional issue and the modified prospective application of the holding. We granted both petitions.

II. THE FARM AND RANCH LABORER EXCLUSION VIOLATES ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION

{9} Workers contend that the farm and ranch laborer exclusion contained in Section 52-1-6(A) violates their equal protection rights under the New Mexico Constitution and does not survive under any level of scrutiny. Article II, Section 18 of the New Mexico Constitution provides that no person "shall . . . be denied equal protection of the laws." "Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050. Under our equal protection analysis, we must first determine "whether the legislation creates a class of similarly situated individuals and treats them differently." *Griego*, 2014-NMSC-003, ¶ 27. If so, "we then determine the level of scrutiny that applies to the challenged legislation and conclude the analysis by applying the appropriate level of scrutiny to determine whether the legislative classification is constitutional." *Id.* {10} We review the constitutionality of legislation de novo. See *Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, ¶ 8, 143 N.M. 726, 181 P.3d 718. During that review, we will not "question the wisdom,

policy, or justness of legislation enacted by our Legislature," and will presume that the legislation is constitutional. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250. The party challenging the legislation therefore bears the burden of demonstrating that the law is unconstitutional. *Id.* To that end, "[a] statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation." *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265 (internal quotation marks and citation omitted).

A. The farm and ranch laborer exclusion results in dissimilar treatment of similarly situated individuals

{11} To determine whether the farm and ranch laborer exclusion in Section 52-1-6(A) violates Workers' equal protection rights, we must first decide "whether the legislation at issue results in dissimilar treatment of similarly-situated individuals." *Madrid*, 1996-NMSC-064, ¶ 35. This inquiry requires us to "look beyond the classification to the purpose of the law." *Oliver*, 2014-NMSC-003, ¶ 30 (internal quotation marks and citations omitted); see also *Stanton v. Stanton*, 421 U.S. 7, 13-14 (1975) ("The [Federal Equal Protection] Clause . . . denies to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." (internal quotation marks and citation omitted)). For example, in *Oliver*, this Court determined that same-gender couples seeking to marry in New Mexico were similarly situated to opposite-gender couples seeking to marry because both groups shared common purposes that were essential to New Mexico's marriage laws. 2014-NMSC-003, ¶¶ 36-38. Similarly, in *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 44, 126 N.M. 788, 975 P.2d 841, we held that men and women who qualified for Medicaid were similarly situated for the purposes of both state and federal Medicaid laws because those laws were intended to provide qualifying individuals with access to necessary medical care. Therefore, a rule prohibiting the use of state funds to pay for medically necessary abortions improperly treated men and women differently. *Id.* ¶¶ 45-47. By contrast, in *City of Albuquerque v. Sachs*, 2004-NMCA-065, ¶¶ 11-16, 135

N.M. 578, 92 P.3d 24, the Court of Appeals determined that men and women were not similarly situated under a local ordinance prohibiting public nudity because men and women possess different physical characteristics which make the exposure of a woman's breast "nudity," but not the exposure of a man's breast. The law's classification that distinguished men from women was therefore "properly based on a unique characteristic" of women. *Id.* ¶ 11. In other words, the reliance on differences in classifying men and women under the ordinance was essential to accomplishing the law's purpose: "to prohibit any person from knowingly or intentionally being nude in a public place." *Id.* ¶ 14.

{12} In this case, we will first examine the Act's text to ascertain its purposes. NMSA 1978, Section 52-5-1 (1990) states the Legislature's intent that the Act "assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to . . . employers . . ." We have previously interpreted this provision to encompass three of the Act's objectives: "(1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system." *Wagner*, 2005-NMSC-016, ¶ 25. The Act also instructs that it is "not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand." Section 52-5-1. This provision requires us to "balance equally the interests of the worker and the employer without showing bias or favoritism toward either." *Salazar v. Torres*, 2007-NMSC-019, ¶ 10, 141 N.M. 559, 158 P.3d 449.

{13} With these general principles in mind, we will also examine the structure and operation of the entire Act as an indicator of its purposes. See *Oliver*, 2014-NMSC-003, ¶¶ 34-35 (examining New Mexico's marriage laws together to ascertain their collective underlying purposes). For workers subject to the Act, the statute provides the exclusive remedy for injuries or death "caused by accident" and which arise out of the course of the worker's employment, § 52-1-9, including accidents caused by an employer's negligence, *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 12, 131 N.M. 272, 34 P.3d 1148. The exclusivity of workers'

compensation remedies for accidents and negligence is advantageous to employers because it limits their potential liability for workplace injuries by preventing workers from pursuing “the unpredictable damages available outside [the Act’s] boundaries.” *Id.* ¶ 12. Instead, workers receive a predictable recovery amount because it is highly regulated by statute. *See, e.g.*, §§ 52-1-26 to -26.4 (establishing detailed guidelines for determining award amounts for a partial disability covered under the Act). In exchange, “[t]he injured worker receives compensation quickly, without having to endure the rigors of litigation or prove [an employer’s] fault[.]” *Delgado*, 2001-NMSC-034, ¶ 12. Additionally, the workers’ compensation system eliminates employer defenses that frequently prevented injured workers from recovering for workplace injuries under the common law. *See* § 52-5-1; *see also Hisel v. Cty. of Los Angeles*, 238 Cal. Rptr. 678, 682 (Ct. App. 1987) (“From the beginning, it was a principal purpose of workers’ compensation laws to eliminate . . . common law defenses that had prevented recovery for injuries received on the job . . .”). We have also previously recognized the Act’s “design[] to . . . protect[] society by shifting the burden of caring for injured workers away from society and toward industry[.]” and thus “to prevent the worker from becoming a public charge and to assist the worker in returning to work . . .” *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 36, 138 N.M. 331, 120 P.3d 413 (internal quotation marks and citation omitted).

{14} We must also consider the history of New Mexico’s workers’ compensation laws to fully understand their current exclusion of farm and ranch laborers. *See Oliver*, 2014-NMSC-003, ¶¶ 30-31 (examining the history of New Mexico marriage laws for clues regarding the purposes of those laws). Farm and ranch laborers have never been included in New Mexico’s workers’ compensation system. The Act’s initial version, passed in 1917, only applied to “extra-hazardous occupations or pursuits” which were specifically enumerated by the Legislature and did not include any kind of agricultural labor. *See* 1917 N.M. Laws, ch. 83, §§ 2, 10. In 1937, the Legislature added an explicit exclusion of “farm and ranch laborers.” 1937 N.M. Laws, ch. 92, § 2. Because the Act still only applied to certain “extra-hazardous occupations or pursuits[.]” *id.* § 1, farm and ranch laborers were therefore doubly excluded from the workers’ compensation system. In

1975, the Legislature repealed the workers’ compensation system’s limitation to extra-hazardous pursuits or occupations, *see* 1975 N.M. Laws, ch. 284, § 14, and instead applied the Act more broadly to include private employers employing four or more workers, *see id.* § 3. Employers of farm and ranch laborers were still explicitly excluded from the Act. *Id.* Today the Act is generally mandatory for private employers with three or more employees, except for employers of private domestic servants and farm and ranch laborers. *See* § 52-1-6(A). Employers of farm and ranch laborers can instead affirmatively elect to provide workers’ compensation coverage for those workers. Section 52-1-6(B).

{15} The exclusion now provides that “[t]he provisions of the Workers’ Compensation Act shall not apply to employers of . . . farm and ranch laborers.” Section 52-1-6(A). Because a “literal interpretation” of this language would lead to “absurd results[.]” the provision has long been applied only to workers employed as farm and ranch laborers and not to every individual employee working for an employer of farm and ranch laborers. *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, ¶ 6, 94 N.M. 223, 608 P.2d 535; *see also Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, ¶ 19, 110 N.M. 287, 795 P.2d 92 (“[T]he determination of whether a particular worker is a farm laborer is based on the nature of the employee’s primary job responsibilities, not the nature of the employer’s business.”). Otherwise, employers could “exempt their entire work force from the act by employing a few farm and ranch laborers[.]” which would thwart the Legislature’s intent to “exempt agricultural labor” from the workers’ compensation system. *Cueto*, 1980-NMCA-036, ¶ 6. In other words, a worker who occasionally performs the tasks of a farm or ranch laborer is not necessarily classified as such if he or she is primarily employed for a different purpose, and likewise, a worker working as a farm or ranch laborer, is still classified as a farm or ranch laborer even when he or she is performing a work-related duty that would normally be performed by a non-excluded worker, such as driving a truck or packaging the product. *See Holguin*, 1990-NMCA-073, ¶ 9 (“[T]he general character of the employment is controlling, even though the worker may in fact have been injured while performing a service that is not farm labor.”).

{16} A worker is classified as a farm or ranch laborer for purposes of the Act

when “the worker’s primary responsibility is performed on the farming premises and is an essential part of the cultivation of the crop[.]” *Id.* For instance, in *Holguin*, the Court of Appeals determined that a worker who primarily filled and stacked sacks of onions in an onion shed was not a farm laborer under Section 52-1-6(A). 1990-NMCA-073, ¶¶ 3-5, 20. Several years later, the Court of Appeals held that a beekeeper’s assistant, whose primary duties involved harvesting honey by helping to extract it from bee hives, was a farm laborer under Section 52-1-6(A). *Tanner v. Bosque Honey Farm, Inc.*, 1995-NMCA-053, ¶¶ 2-3, 12, 119 N.M. 760, 895 P.2d 282; *see also Cueto*, 1980-NMCA-036, ¶¶ 1, 3, 9 (holding that a worker whose primary duty was manufacturing fertilizer by maintaining a compost heap, a process that was “an essential part of the cultivation of pecans[.]” was a farm laborer under Section 52-1-6(A)). Therefore, under the exclusion, the same agricultural employer could be exempt from providing mandatory workers’ compensation coverage for a worker who harvests an agricultural product in the field, but still be required to provide workers’ compensation to workers who process and package that same product because that task is merely “incidental” to farming. *See Tanner*, 1995-NMCA-053, ¶¶ 7, 11.

{17} We hold that the farm and ranch laborers who are excluded by Section 52-1-6(A) are similarly situated to other employees of agricultural employers with respect to the purposes of the Act. In light of the purposes of the Act discussed above, we conclude that there is no unique characteristic that distinguishes injured farm and ranch laborers from other employees of agricultural employers, and such a distinction is not essential to accomplishing the Act’s purposes. *Cf. Sachs*, 2004-NMCA-065, ¶¶ 13-16 (distinguishing men from women to accomplish the objective of a city ordinance). Rather, the same mutually beneficial trade-off in rights between employers and employees apply equally to farm and ranch laborers and their employers. *See Oliver*, 2014-NMSC-003, ¶¶ 36-38 (determining that same-gender and opposite-gender couples were similarly situated with respect to the benefits associated with marriage in New Mexico); *see also Stanton*, 421 U.S. at 15 (holding that boys and girls were similarly situated for the purposes of a statute specifying the age of majority for child support payments because “[i]f a specified age of minority is required for the boy in order

to assure him parental support while he attains his education and training, so, too, is it for the girl"). Indeed, the classification resulting from the exclusion is contrary to the Act's goal of balancing the rights of employees and employers because it allows the employers of only this excluded class of workers to unilaterally opt into or out of the workers' compensation system—a choice that the same employers do not have with respect to any other employees. See § 52-1-6(A), (B). Workers also have shown that it does not further the Act's purposes defined in Section 52-5-1 to impose a negligence standard on accidental workplace injuries suffered by employees who work primarily as farm and ranch laborers, while applying a no-fault system to all other workplace accidents suffered by employees of agricultural employers, including those who occasionally perform the tasks of farm and ranch laborers. See *Holguin*, 1990-NMCA-073, ¶¶ 9-10.

{18} Employers argue that the Act's classification of farm and ranch laborers is a "distinction . . . [which] does not come directly from the challenged legislation, but, instead, comes from the [Court of Appeals'] interpretation and application" of the exclusion. Employers further contend that to define the classification in this manner would be inappropriate and contrary to our prior case law, "where the challenged distinction came directly from the provisions of the Act." Employers' argument does not convince us that the distinction between farm and ranch laborers exempt from the Act and other employees of agricultural employers in New Mexico was "created by" the Court of Appeals rather than the Act.

{19} Contrary to Employers' contention, our equal protection jurisprudence requires us to consider how courts have interpreted legislative language to define classifications created by a statute. For example, in *Oliver* we had to determine whether, when read as a whole, New Mexico's marriage laws authorized or prohibited same-gender marriage, "despite the lack of

an express legislative prohibition against same-gender marriage . . ." 2014-NMSC-003, ¶ 24. Even though New Mexico's marriage statutes contained a mixture of gender-neutral and gender-specific language, we interpreted the statutory scheme to reflect a legislative intent to prohibit same-gender marriages. *Id.* ¶ 23. We then considered whether same-gender couples seeking to marry were similarly situated to opposite-gender couples seeking to marry based on the distinction between those two groups created by the interpretation of prohibition. See *id.* ¶¶ 28-38. Similarly, courts have interpreted the farm and ranch laborer exclusion to create a distinction between employees whose work is essential to cultivating crops or who work directly with livestock and other employees whose work is not essential to those goals by reasoning that any other interpretation would be absurd to the extent that it would not be in accord with the Legislature's wishes. See *Cueto*, 1980-NMCA-036, ¶ 6.

{20} The Legislature's failure to change or clarify judicial interpretations of the exclusion indicates its intent that the exclusion should be applied to a distinct *subset* of employees as defined by case law. In the context of the Act and its predecessors, this Court has long interpreted agricultural labor to include only workers whose primary responsibilities were directly related, not incidental, to agricultural pursuits.² See *Koger v. A. T. Woods, Inc.*, 1934-NMSC-020, ¶¶ 17-20, 38 N.M. 241, 31 P.2d 255. *Cueto* further clarified that a worker's primary responsibilities had to be essential to cultivating crops for his or her work to be directly related to agriculture. 1980-NMCA-036, ¶ 9. Because the Legislature has not taken any steps in the interim to correct or change these longstanding interpretations related to the exclusion, their inactivity is an endorsement of the case law, absent any evidence to the contrary. See *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 ("The Legislature's continuing silence on the issue we confront herein is further

evidence that it was both aware of and approved of the existing case law If the Legislature had intended to modify or clarify those rules, it would have done so expressly"). Further, the only recent amendment related to the exclusion, see 1984 N.M. Laws, ch. 127, § 988.3, also acknowledged that certain employees should be classified as farm and ranch laborers based on whether they directly work with crops or animals in an agricultural setting. See § 52-1-6.1.

{21} Employers next argue that New Mexico courts have already determined that farm and ranch laborers are not similarly situated to New Mexico workers in *Holguin* and *Tanner* who are not exempt from the Act. In other words, according to Employers, the Court of Appeals' determination in those cases that some workers were farm and ranch laborers for purposes of Section 52-1-6(A) while others were not was tantamount to holding that workers who harvest crops or directly participate in farming activities are "not similarly situated" for equal protection purposes to workers who perform tasks such as processing and packaging crops. This definition of "similarly situated" based on assigned tasks would eviscerate equal protection rights. Indeed, the logical extension of Employers' argument is that no class defined by legislation can ever be similarly situated to individuals outside that class because those outside the class do not possess the trait that defines the class. "[S]imilarly situated cannot mean simply similar in the possession of the classifying trait. All members of any class are similarly situated *in this respect* and consequently, any classification whatsoever would be reasonable by this test." *N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 39 (emphasis added) (internal quotation marks and citation omitted). Thus, there is no merit to Employers' argument that prior cases determining the scope of Section 52-1-6(A) are dispositive of whether injured farm and ranch laborers are similarly situated to other injured workers of agricultural employers.

²The dissent places substantial emphasis on *Williams v. Cooper*, 1953-NMSC-050, 57 N.M. 373, 258 P.2d 1139. See diss. op. ¶¶ 73-74, 76, 81. *Williams* interpreted the since-repealed provision that applied workers' compensation only to those employers engaged in extra-hazardous occupations or pursuits under NMSA 1941, Section 57-910 (1941). See 1953-NMSC-050, ¶ 12. Significantly, the phrase "occupations or pursuits" was given further context by NMSA 1941, Section 57-902 (1941), which limited the Act's application to private businesses "engaged in carrying on for the purpose of business, trade or gain . . . either or any of the extra-hazardous occupations or pursuits named or described" by the Act and to injuries suffered "by accident arising out of and in the course of [a worker's] employment in any such occupation or pursuit." Yet, as we have already described, see *supra*, maj. op. ¶ 14, the extra-hazardous occupations limitation was excised from the Act more than four decades ago, and the modern version of the Act does not broadly restrict its application based on the occupations or pursuits of the employer. See § 52-1-2. In any event, workers whose primary responsibilities were directly related, not incidental, to agricultural pursuits have always been a part of the test.

{22} Having decided that the exclusion creates differential treatment among similarly situated employees, we will now determine the appropriate level of scrutiny to apply. *See Breen*, 2005-NMSC-028, ¶ 11.

B. Rational basis review is appropriate

{23} “There are three levels of equal protection review based on the New Mexico Constitution: rational basis, intermediate scrutiny and strict scrutiny.” *Id.* “In analyzing which level of scrutiny should apply in an equal protection challenge, a court should look at all three levels to determine which is most appropriate based on the facts of the particular case.” *Id.* ¶ 15. “What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute.” *Wagner*, 2005-NMSC-016, ¶ 12. “Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class.” *Breen*, 2005-NMSC-028, ¶ 11. Under rational basis review, the challenger must demonstrate that the legislation is not rationally related to a legitimate government purpose. *Id.* However, legislation can trigger a review under intermediate scrutiny where it “either (1) restrict[s] the ability to exercise an important right or (2) treat[s] the person or persons challenging the constitutionality of the legislation differently because they belong to a sensitive class.” *Id.* ¶ 17. Under intermediate scrutiny, the party supporting the legislation must show that it is substantially related to an important government interest. *Id.* ¶ 13. Finally, strict scrutiny applies when “a law draws suspect classifications or impacts fundamental rights.” *Wagner*, 2005-NMSC-016, ¶ 12. In that instance, the party supporting the legislation must demonstrate that “that the provision at issue is closely tailored to a compelling government purpose.” *Id.*

{24} The Act is general social and economic legislation, and the benefits that it confers do not rise to the level of important or fundamental rights. *See Breen*, 2005-NMSC-028, ¶ 17. Further, Workers have not provided any argument for classifying farm or ranch laborers as a sensitive or suspect class before this Court. Therefore, we will apply rational basis review in this case. *See State ex rel. Human Servs. Dep’t v. Staples (In re Doe)*, 1982-NMSC-099, ¶ 3, 98 N.M. 540, 650 P.2d 824 (courts should strive to avoid deciding legal arguments not raised by the parties).

C. The exclusion fails rational basis review

{25} In *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305, we adopted a rational basis test different than the federal rational basis test. We rejected a fourth tier of “heightened” rational basis analysis and instead adopted a “modern articulation” of the rational basis test that “subsum[ed] that fourth tier” of review and “address[ed] the concerns” of heightened rational basis analysis. *Id.* (internal quotation marks and citations omitted). In *Wagner*, we clarified that the rational basis test adopted by *Trujillo* requires the challenger to “demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record.” *Wagner*, 2005-NMSC-016, ¶ 24 (internal quotation marks and citation omitted). The New Mexico rational basis test is therefore similar to the federal heightened rational basis test. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

{26} However, for claims under the United States Constitution, we still follow the federal rational basis test, which only requires a reviewing court to divine “the existence of a conceivable rational basis” to uphold legislation against a constitutional challenge. *Kane v. City of Albuquerque*, 2015-NMSC-027, ¶ 17, 358 P.3d 249 (internal quotation marks and citation omitted). Under the federal test, “those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (internal quotation marks and citation omitted). Accordingly, a law “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* at 313. Legislation can therefore survive a constitutional challenge under the federal test based solely on a judge’s “rational speculation [that is] unsupported by evidence or empirical data.” *Id.* at 315.

{27} In *Trujillo*, we rejected this version of the rational basis test and noted that critics had fairly characterized it as “toothless” and “a virtual rubber-stamp[.]” 1998-NMSC-031, ¶ 30 (internal quotation marks and citations omitted). Our opinion in *Trujillo* implicitly addressed Justice Stevens’ concern in *Beach Communications* that the federal test “sweeps too broadly, for it is difficult to imagine a legislative classification that could *not* be supported by a ‘reasonably

conceivable state of facts[.]’” and his statement that judicial review under this test is therefore “tantamount to no review at all.” 508 U.S. at 323 n.3 (Stevens, J., concurring); *see also Clark Neily, No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 905-913 (2005) (arguing that the federal rational basis test invites dishonest and entirely speculative defenses of legislation; “[s]add[es] . . . plaintiffs with a technically unattainable burden of proof and requir[es] them to construct a trial court record sufficient to rebut arguments that have not even been made yet”; and is particularly subject to inconsistent, result-based interpretations). Thus, while we remain highly deferential to the Legislature by presuming the constitutionality of social and economic legislation, our approach is also cognizant of our constitutional duty to protect discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests. *See Steven M. Simpson, Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 174, 188-204 (2003) (arguing that discriminatory “special interest legislation flourishes when courts refuse to play their proper role of policing the political branches of government”); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 Va. L. Rev. 1065, 1093-1101 (2013) (arguing that federal rational basis review is insufficient to protect discrete groups with little chance to influence changes in the law from certain “vested interests” that have “powerful economic incentives” to discriminate against those discrete groups in the pursuit of “inflated profits”). To that end, our more robust standard establishes rational basis review in arguments and evidence offered by the challengers or proponents of a law rather than requiring the challengers to anticipate and address every stray speculation that may pop into a judge’s head at any point in the case. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., separate opinion) (concluding that “[t]he State’s rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis[.]” and rejecting a proffered basis for legislation where it had “so speculative and attenuated a connection to its goal as to amount to arbitrary action”).

{28} Returning to the case before us, the classification of farm and ranch laborers must be upheld unless Workers prove it

is “not rationally related to a legitimate government purpose.” *Wagner*, 2005-NMSC-016, ¶ 12. To prove the lack of a rational relationship, they “must demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record.” *Id.* ¶ 24 (internal quotation marks and citation omitted). In practical terms, our rational basis standard requires the challenger to bring forward record evidence, legislative facts, judicially noticeable materials, case law, or legal argument to prove that the differential treatment of similarly situated classes is arbitrary, and thus not rationally related to the articulated legitimate government purposes. Proponents of the classification are, of course, free to draw a court’s attention to similar evidence to rebut the challengers’ arguments or to set forth additional government purposes that the challengers must then prove are not supported by a firm legal rationale or evidence in the record.

{29} For example, one approach available for challengers to prove the lack of a rational relationship under our test is by demonstrating that the classification is grossly over- or under-inclusive with respect to an articulated government purpose, such that the relationship between the classification and its purpose is too attenuated to be rational, and instead amounts to arbitrary discrimination. For example, in *City of Cleburne*, the United States Supreme Court applied a heightened rational basis standard similar to our test and struck down a zoning ordinance imposing special administrative hurdles on group homes for the intellectually and developmentally disabled. *See* 473 U.S. at 449-50. The Court rejected several purported rational bases offered by the law’s proponents because the law did not provide a close enough fit with those bases. *See id.* Proponents of the zoning law argued that there was a legitimate government interest in requiring a permit for the facility in that case because it would be located on a flood plain. *Id.* at 449. The Court determined that the ordinance was not rationally related to the government interest in protecting people from floods because that concern would apply equally to a variety of other group facilities housing vulnerable populations, none of which would have been required to obtain a permit, and therefore could “hardly be based on a distinction between [a home for the intellectually and developmentally disabled] and, for example, nursing homes, homes for convalescents or the aged, or

sanitariums or hospitals . . .” *Id.* The Court also rejected an argument that “the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets[,]” since those concerns would apply equally to other group housing such as “apartment houses, fraternity and sorority houses, hospitals and the like,” none of which were singled out in the same manner by the zoning law. *Id.* at 450. In other words, despite the existence of legitimate government interests in protecting people from floods and preventing overpopulation and congestion, and despite the fact that there was likely *some* relationship between requiring special permits for group homes for the intellectually and developmentally disabled and those interests, singling out one particular group among other similarly-situated groups was grossly under-inclusive with respect to these interests, and therefore the challengers had proved the absence of a rational relationship.

{30} The United States Supreme Court similarly has not found a rational relationship when a law is grossly over-inclusive in addressing a purported government interest. *See U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 536-38 (1973) (striking down related-household limitations on food stamp eligibility under the Food Stamp Act as not rationally related to the purpose of preventing fraud because the provision appeared to largely exclude from the food stamp program individuals who were not committing fraud, but rather were too poor to alter their living arrangements); *see also Barletta v. Rilling*, 973 F. Supp. 2d 132, 138 (D. Conn. 2013) (“The statute, in other words, is both grossly over-inclusive and grossly under-inclusive as a proxy for serving the State’s stated goals. To survive even rational basis review, the defendants and the State must do more than suggest that *some* felons would be unsuitable for licensure. Most irrational classifications, for example, left-handed people, obese people, people with tattoos, people born on the first day of the month, divorced people and college dropouts, will include *some* persons properly excluded from licensure. Such occasional coincidence between membership in the excluded class and the purpose of the licensing requirement is not sufficient to advance a legitimate government interest.” (internal quotation marks and citation omitted)). Therefore, inclusiveness can be a valuable rubric for evaluating the relationship between a classification and a government

purpose under our rational basis test.

{31} We will now apply our rational basis test to this case. The following rationales have been articulated for the Section 52-1-6(A) classification of farm and ranch laborers: (1) cost savings for agricultural employers; (2) administrative convenience; (3) unique economic aspects of agriculture; (4) protection of New Mexico’s farming and ranching traditions; and (5) the application of tort law to workplace injuries suffered by farm and ranch laborers. We hold that Workers have demonstrated that there is neither evidence in the record nor firm legal rationale sufficient to establish a rational relationship between the exclusion and any of these purposes.

{32} First, Workers have demonstrated that there is neither evidence in the record nor firm legal rationale showing a rational relationship between the exclusion’s classification of farm and ranch laborers and a purported interest in reducing overhead costs to the New Mexico agricultural industry. According to Employers, the exclusion is intended to reduce costs to farmers and consumers by saving the cost of providing workers’ compensation insurance to farm and ranch laborers. On appeal, amicus curiae New Mexico Farm and Livestock Bureau (the Bureau) introduced Fiscal Impact Reports (FIRs) to support the argument that the exclusion saves overhead costs for farm and ranch employers. *See* FIR for H.B. 80 (Jan. 19, 2007) (2007 FIR), available at <http://www.nmlegis.gov/Sessions/07%20Regular/firs/HB0080.pdf> (last viewed June 1, 2016); FIR for H.B. 62 (Feb. 5, 2009) (2009 FIR), available at <http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0062.pdf> (last viewed June 1, 2016). Employers also contend that this Court’s analysis in *Wagner* requires us to consider lowering costs to employers as a legitimate government purpose to effectuate the Legislature’s intent that the Act be interpreted to balance the rights of employers and employees. *See* § 52-5-1. However, the statement in *Wagner* that reducing employer costs is a purpose of the Act referred to reducing employer costs *within* the workers’ compensation system; it did not stand for the self-contradictory proposition that one of the Act’s purposes is to reduce costs for employers by exempting them from the Act entirely. *See* 2005-NMSC-016, ¶ 25.

{33} As to the more general cost savings argument, Workers have met their burden by demonstrating that there is neither firm legal rationale nor evidence in the record

to establish a rational relationship between this purpose and the differential treatment of farm and ranch laborers under the Act. This Court has previously recognized that while “lowering employer costs” is a “valid legislative goal” of the Act, rational basis review, at a minimum, still requires that a cost-saving classification “be based upon some substantial or real distinction, and not artificial or irrelevant differences.” *Schirmer v. Homestake Mining Co.*, 1994-NMSC-095, ¶ 9, 118 N.M. 420, 882 P.2d 11. In *Schirmer*, we upheld a challenge to a statute barring claims for compensation based on injuries resulting from occupational exposure to radioactive or fissionable materials that was brought more than ten years after the employee’s last day of work. *Id.* ¶¶ 3-4, 10. In striking down the law as a violation of substantive due process under rational basis review, we determined that while the provision’s bar on certain claims “probably reduce[d] costs to employers by eliminating claims[,]” it did so by “arbitrarily discriminat[ing]” against a discrete group of claimants. *Id.* ¶¶ 9-10. {34} Similarly, other jurisdictions have agreed that while cost savings are a legitimate government interest, they cannot be achieved through arbitrary means because if they were the “sole reason for disparate treatment[,] . . . cost containment alone could justify nearly every legislative enactment without regard for . . . equal protection.” *Caldwell v. MACo Workers’ Comp. Tr.*, 2011 MT 162, ¶ 34, 256 P.3d 923 (internal quotation marks and citations omitted); see also *Harris v. Millenium Hotel*, 330 P.3d 330, 337 (Alaska 2014) (rejecting cost savings justification under rational basis review of workers’ compensation provision that excluded same-gender couples from receiving death benefits); *Caldwell*, 2011 MT 162, ¶ 35 (“We must scrutinize attempts to disguise violations of equal protection as legislative attempts to ‘contain the costs’ or ‘improve the viability’ of the worker’s compensation system. *Cost alone does not justify the disparate treat-*

ment of similar classes.” (emphasis added) (citation omitted)); *Arneson v. State ex rel. Dep’t of Admin., Teachers’ Ret. Div.*, 864 P.2d 1245, 1248 (Mont. 1993) (“[E]ven if the governmental purpose is to save money, it cannot be done on a wholly arbitrary basis. The classification must have some rational relationship to the purpose of the legislation.”); *State ex rel. Patterson v. Indus. Comm’n*, 672 N.E.2d 1008, 1012-13 (Ohio 1996) (holding that conserving funds cannot be the sole reason for a classification denying workers’ compensation benefits to a particular group of workers). {35} Likewise, in this case, even assuming that agricultural operations would face additional costs without the exclusion, these cost savings are only achieved through arbitrary discrimination against farm and ranch laborers. The exclusion does not apply to farm and ranch employers, but rather to employees whose primary job responsibilities fit the definition of “farm and ranch laborers” under Section 52-1-6(A). See *Holguin*, 1990-NMCA-073, ¶ 19 (stating that despite the Act’s plain language, “the determination of whether a particular worker is a farm laborer is based on the nature of the employee’s primary job responsibilities, not the nature of the employer’s business” (emphasis added)). Therefore, agricultural employers are not fully exempted from the Act because they are still required to cover any employees whose primary responsibilities are not essential to cultivating crops, such as employees who sort or package crops. See *id.* ¶ 20. As a result, the exclusion saves overhead costs for agricultural employers by arbitrarily excluding only farm and ranch laborers, a discrete subset of their potential employees, from coverage. Here we again reject the argument that achieving cost savings for employers by arbitrarily discriminating against a particular group of employees is a legitimate government purpose. See *Schirmer*, 1994-NMSC-095, ¶¶ 9-10.

{36} Second, Workers have met their burden by demonstrating that there is neither evidence in the record nor firm legal rationale showing that the classification of farm and ranch laborers is rationally related to unique administrative challenges created by workers’ compensation claims from those workers. According to Employers, farm and ranch laborers are “often seasonal and, as such, are inherently transient.” Employers argue that the transience of these workers creates unique difficulties for insurers, including not knowing where to send benefit checks and not knowing where to provide the worker with medical care. Additionally, Employers contend that “some farm and ranch workers . . . are undocumented,” which makes them “difficult to locate” and prone to “avoid[ing] contact with governmental authorities,” and administering their claims would therefore present a challenge. In support of this argument, the Bureau cites the FIRs from 2007 and 2009. The 2007 FIR repeated the Administration’s belief at that time that removing the exclusion would significantly increase the Administration’s caseload, require additional staffing, and present logistical challenges due to the transitory nature of some seasonal farm and ranch laborers. *Id.* at 2. Similarly, in the 2009 FIR, the Administration asserted that it would need three more full-time employees to handle an estimated 475 additional claims and estimated that it would need to pay the UEF an additional \$24,000 per year due to the increased claims. *Id.* at 2-3. {37} However, the Administration later contradicted its earlier positions through stipulations entered in *Griego*.³ In *Griego*, the Administration agreed that “[i]t would be administratively feasible to administer the workers’ compensation system with the addition of farm and ranch laborers,” including temporary or seasonal workers. The Administration also agreed that coverage of these workers would likely lead to a 1.4% increase in covered workers and a less than 1% increase in caseload. Further, the

³Employers do not directly argue that the *Griego* stipulation should be rejected, but do refer to the “lack of a developed factual record that contains findings that were truly litigated between the parties and made by an independent fact finder.” We agree, and therefore do not treat these facts as if Employers have stipulated to them. However, we have considered this stipulation with respect to the administrative convenience rationale because the Administration’s statements in *Griego* regarding the feasibility of administering these claims for farm and ranch laborers directly relate to earlier statements attributed to the Administration in the FIRs. These are legislative facts that “do not concern individual parties” in this case, but are rather a “non-evidentiary source[.]” of universally-applicable information to help us “determine the content of law and policy.” *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶¶ 25-26, 147 N.M. 583, 227 P.3d 73 (internal quotation marks and citations omitted). Notably, Employers could have also entered competing general factual evidence into the record for purposes of appeal, such as the FIRs, or argued that the stipulation was irrelevant or outdated. See *Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 305 F.R.D. 256, 290 (D.N.M. 2015) (concluding that it is appropriate to consider legislative facts contained in a report authored by the U.S. Forest Service, but the U.S. Forest Service was still free to argue that the facts were inapposite or being misused by plaintiffs).

Administration agreed that “[i]t is no more difficult to administer workers’ compensation to farm and ranch laborers than it is to administer the program to other covered workers, some of whom are migrant and seasonal, work for multiple employers or are employed by farm labor contractors.” The Administration additionally conceded that farm and ranch laborers whose employers already provided voluntary coverage under the Act “do not pose any special difficulties for the . . . Administration.” Finally, the Administration agreed that the additional administrative costs associated with covering more workers “would be covered by fees collected from workers and employers” pursuant to the Act. Therefore, the Administration’s most recent statements regarding the exclusion severely undermine earlier statements in the record regarding the administrative convenience rationale for the exclusion.

{38} Workers have demonstrated that the exclusion does not rationally relate to administrative convenience in the workers’ compensation system. The Section 52-1-6(A) exclusion is grossly under- and over-inclusive with respect to the purported government interest of avoiding administrative difficulties in the workers’ compensation system so that it is not rationally related to the goal of ensuring the Act’s quick and efficient administration. *See Wagner*, 2005-NMSC-016, ¶ 25 (emphasizing the particularly important goal of maximizing workers’ recovery among the Act’s goals that also include “ensuring a quick and efficient system”); § 52-5-1 (articulating the goal of “quick and efficient” administration). As Workers observe, “the [Administration] and private insurance companies already administer claims in the construction, service and roofing industries, which, like agriculture, sometimes involve sub-contractors, part-time employees, multiple employers, seasonality and frequent changes in employers,” and presumably undocumented employees as well. Indeed, the Act does not exclude *any* other employees who work in industries that rely on substantial seasonal or temporary labor. It is arbitrary to exclude a subset of workers from just one industry based on concerns regarding administrative convenience that are not even remotely unique to that industry. The exclusion is thus so grossly under-inclusive in addressing any purported problems with administering claims that it is not rationally related to that interest. *See Vision Mining, Inc. v. Gardner*, 364

S.W.3d 455, 472 (Ky. 2011) (“Nor can the disparate treatment of coal workers be justified as a[n administrative] cost-saving measure, as it is axiomatic that, if the enhanced procedure saves money, the state would save more money by subjecting *all* occupational pneumoconiosis claimants to the more exacting procedure and higher rebuttable standard.”); *Walters v. Blair*, 462 S.E.2d 232, 234 (N.C. Ct. App. 1995), *aff’d*, 476 S.E.2d 105 (N.C. 1996) (per curiam) (striking down a statute regarding disability and death benefits for silicosis or asbestosis under workers’ compensation because it was “grossly underinclusive” since similar government interests would presumably be equally served by the same treatment of any number of other serious diseases).

{39} Additionally, it is unclear why concerns regarding administrative difficulties raised by seasonal or temporary laborers should bar all farm and ranch laborers from the Act when some of those employees work year-round for the same employer. The exclusion is, in this sense, so grossly over-inclusive as to undermine any rational relationship between the exclusion and administrative convenience. In this case, for example, Mr. Rodriguez asserts that he worked full-time for Brand West Dairy for four years prior to his injury. The proponents of the exclusion do not explain why his claim, or other similar claims brought by full-time farm and ranch laborers, would be more difficult to administer than a claim brought by a full-time employee in any other industry. {40} In conclusion, the combined under- and over-exclusiveness of the farm and ranch laborer exclusion renders it so attenuated from the purported government interest of administrative convenience as to be arbitrary discrimination.

{41} **Third**, Workers have demonstrated that there is neither evidence in the record nor firm legal rationale to support a rational relationship between federal regulations of agricultural prices and differential treatment of farm and ranch laborers under the Act. To support this rationale, the Bureau cites 7 U.S.C. § 608c (2012), which sets certain minimum prices for milk and other dairy products, and 7 U.S.C. § 1421 (2012), under which the United States Secretary of Agriculture may sometimes set price supports for agricultural commodities. Notably, the provisions set *minimum prices* or price supports in excess of *minimum prices* for agricultural products. This belies any implication that

federal regulations hold down the prices of agricultural commodities, because the price regulations cited by the Bureau are designed to provide special *assistance* to farmers by stabilizing markets for agricultural commodities. The Bureau also asserts that farmers are generally “price-takers,” which means that they have little ability to increase prices and must generally accept prevailing market rates, and that without the exclusion, New Mexico farmers would be at a competitive disadvantage.

{42} However, only a small minority of states still allow the complete exemption of farm workers from workers’ compensation. For instance, just among states bordering New Mexico, neither Arizona nor Colorado treats farm and ranch laborers differently than any other workers for purposes of workers’ compensation, *see* Ariz. Rev. Stat. Ann. §§ 23-901 to -1104 (1964, as amended through 2015); Colo. Rev. Stat. §§ 8-40-101 to -55-104 (West 1990, as amended through 2014), and Oklahoma and Utah both require limited mandatory coverage that is designed to exclude only small farms and family farms, *see* Okla. Stat. tit. 85A, § 2(18)(b) (2013) (excluding farms with an annual payroll of less than \$100,000); Utah Code Ann. § 34A-2-103(5) (2016) (excluding farms with an annual payroll of less than \$50,000, which does not include payroll payments to members of the families owning the small farms). However, farmers and ranchers from these neighboring states, as well as a significant minority of New Mexico farmers and ranchers who have elected to provide coverage to their workers under Section 52-1-6(B), are subject to the same price regulations and compete in the same markets as New Mexico farmers who elect not to provide coverage. Thus, Workers have met their burden.

{43} **Fourth**, Workers have also met their burden in demonstrating that there is neither firm legal rationale nor evidence in the record to support a rational relationship between the differential classification of farm and ranch laborers under the Act and the government purpose of helping New Mexico’s small, rural farms and protecting their traditions. To support this purported justification, the Bureau cites statistics which show that a great majority of New Mexico’s farms are small, family-run operations, and demonstrate that the average New Mexico farm carries a thin or negative profit margin. However, the Act is only mandatory for private employers of three or more

workers, *see* § 52-1-2, and therefore the exclusion only benefits farms and ranches that employ three or more employees. According to the 2012 Census of Agriculture created by the United States Department of Agriculture, 1,864 of the 24,721 “farms” in New Mexico employ three or more workers, which means that only approximately the largest 7.5% of farms in New Mexico benefit from the exclusion. U.S. Dep’t of Agriculture, 2012 Census of Agriculture: United States Summary and State Data, Vol. 1 at Tables 1 & 7 (May 2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf (last reviewed June 1, 2016). Therefore, the exclusion does not even apply to approximately 92.5% of the farms in the state because they have fewer than three employees. Furthermore, the additional costs to the remaining 7.5% would be proportional to the number of employees and would not fall disproportionately on smaller operations because workers’ compensation is payroll-based. Finally, the Bureau contends that the exclusion protects “the culture of ‘neighboring’—in which farmers and ranchers help perform work on their neighbors’ farms and ranches,” which it claims “is a critical part of the culture of rural communities,” and preserves the tradition of children or other family members performing “farm and ranch duties as chores.” However, volunteer or unpaid workers are generally not entitled to workers’ compensation benefits, *see Jelso v. World Balloon Corp.*, 1981-NMCA-138, ¶ 31, 97 N.M. 164, 637 P.2d 846, so the practices of “neighboring” and children performing chores are not affected by the exclusion. Therefore, Workers have met their burden by demonstrating that there is no rational relationship between this government interest and the exclusion of farm and ranch laborers from the Act.

{44} Fifth and finally, Workers have proved that there is no legitimate government interest in subjecting only workplace injuries suffered by farm and ranch laborers to the common law tort system, while any other workplace injury suffered by an employee of an agricultural employer goes through the workers’ compensation system. Because all workers subject to the Act lose any common law negligence claims that they may have had otherwise, *see* § 52-1-6(D), (E), the Bureau argues that the Legislature merely intended to preserve the availability of tort remedies for workplace injuries suffered by farm and

ranch laborers. The Bureau also claims that the exclusion of farm and ranch laborers from the workers’ compensation system and their employers’ ability to voluntarily elect into or out of the system is beneficial to both parties. However, contrary to these assertions, the trade-off between common law negligence claims and no-fault remedies under the Act, *see Salazar*, 2007-NMSC-019, ¶ 11, does not create equality between tort claims and workers’ compensation claims or provide any reason for drawing a distinction between workplace injuries suffered by farm and ranch laborers and those suffered by any other employee of an agricultural employer. Further, it does not explain why this is a legitimate government purpose. This distinction imposes a negligence standard of fault on agricultural employers for a particular class of their employees while establishing a no-fault standard for all others. Additionally, as the parties observed at oral argument, farm and ranch laborers are engaged in a risky profession where workplace accidents frequently result from inherently unpredictable working conditions. For example, in this case, Ms. Aguirre slipped and fell in a field and Mr. Rodriguez suffered a devastating injury when he was “head-butted” by a cow. It is extremely unlikely that either of these injuries could be the basis for a common law claim since both apparently resulted from unpredictable working conditions. Workers have rightly indicated that there is neither any articulated reason for this policy nor a government interest in it.

III. OUR HOLDING IN THIS CASE WILL APPLY ON A MODIFIED PROSPECTIVE BASIS

{45} The UEF, Employers, and various amici urge this Court to enter a prospective or modified prospective holding in this case that the exclusion is unconstitutional. Under our prospectivity analysis, we first presume that a new civil rule operates retroactively, but that presumption may then be overcome by “a sufficiently weighty combination” of the three factors described by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), *overruled by Harper v. Va. Dep’t of Taxation*, 509 U.S. 86 (1993). *Beavers v. Johnson Controls World Servs., Inc.*, 1994-NMSC-094, ¶¶ 20-22, 118 N.M. 391, 881 P.2d 1376.

{46} Under the first *Chevron* factor, we consider the degree to which our decision in this case “establish[es] a new principle of law, either by overruling clear past

precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.” *Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 31, 147 N.M. 678, 228 P.3d 462 (internal quotation marks and citations omitted). Farm and ranch laborers have been explicitly excluded from the Act since 1937. *See* 1937 N.M. Laws, ch. 92, § 2. This long-standing exclusion has been consistently enforced by New Mexico appellate courts, *see Tanner*, 1995-NMCA-053, ¶ 12; *Cueto*, 1980-NMCA-036, ¶¶ 9-10; *Varela v. Mounho*, 1978-NMCA-086, ¶ 9, 92 N.M. 147, 584 P.2d 194, and our holding in this case was not clearly foreshadowed by case law or otherwise.

{47} Further, substantial reliance interests would be upset by retroactive application of our holding here. The farm and ranch laborer exclusion primarily affects contracts between employers and employees in the workplace. *See Beavers*, 1994-NMSC-094, ¶ 28 (“The reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction.”). Also, some employers acted in reliance on the exclusion and did not purchase workers’ compensation insurance; however, the ruling in this case will require them to do so and to assume various other new duties related to providing workers’ compensation coverage to farm and ranch laborers. *See Lopez v. Maez*, 1982-NMSC-103, ¶ 17, 98 N.M. 625, 651 P.2d 1269 (applying new rule prospectively because it imposed a new duty and “the imposition of this new liability on tavernowners may subject [them] to liability when they are not properly insured”).

{48} Additionally, we do not agree with Workers’ argument that it was unreasonable and a risk for employers to continue to rely on the exclusion rather than purchasing insurance that would cover farm and ranch laborers after the district court’s final judgment in *Griego* in 2012. By following this reasoning, we would effectively bind all farm and ranch employers to a single district court decision to which they were not parties. *See* Rule 12-405(A)-(C) NMRA (unpublished opinions are non-precedential); NMSA 1978, § 44-6-12 (1975) (No declaratory judgment “shall prejudice the rights of persons not parties to the proceeding.”). Accordingly, we hold that the first *Chevron* factor weighs heavily

in favor of prospective application of our holding in this case.

{49} Under the second *Chevron* factor, we must “weigh the merits and demerits” of retroactive application “by looking to the prior history of the rule in question, its purpose and effect, and whether retro-spective operation will further or retard its operation.” *Marckstadt*, 2010-NMSC-001, ¶ 31 (internal quotation marks and citations omitted). Despite the equal protection interests weighing in favor of retroactivity, we weigh this factor in favor of prospective application. The numerous impracticalities a retroactive holding could create within the New Mexico workers’ compensation scheme may significantly hinder the Act’s purpose of creating “a quick and efficient system” of workers’ compensation. See *Wagner*, 2005-NMSC-016, ¶ 25. For example, the Administration and the UEF convincingly argue that a retroactive holding would create a number of disputes regarding whether employers and workers should have complied with various mandatory provisions of the Act and as to the scope of the UEF’s duties to uninsured employers. Additionally, it would be contrary to the purposes of the Act to impose “quasi-criminal sanctions” on previously uninsured employers, *Wegner v. Hair Prods. of Tex.*, 2005-NMCA-043, ¶ 10, 137 N.M. 328, 110 P.3d 544, based on an obligation to provide workers’ compensation insurance that originated with this case. See § 52-1-9.1(G)(2) (outlining a mandatory minimum 15% penalty against uninsured employers).

{50} Under the third *Chevron* factor, we must “weigh[] the inequity imposed by retroactive application” to determine whether the “decision . . . could produce substantial inequitable results if applied retroactively . . .” *Marckstadt*, 2010-NMSC-001, ¶ 31 (internal quotation marks and citations omitted). This Court has previously recognized that “[t]he greater the extent a potential defendant can be said to have relied on the law as it stood at the time he or she acted, the more inequitable it would be to apply the new rule retroactively.” *Beavers*, 1994-NMSC-094, ¶ 38. We therefore weigh the third *Chevron* factor in favor of prospective application due to the long-standing, substantial, and reasonable reliance of employers on the exclusion’s validity and the inequities that would arise from the practical difficulties of retroactive application.

{51} Weighing the *Chevron* factors together, we conclude that the reliance

interests of employers combined with the practical difficulties that would result from retroactive application are sufficient to overcome our presumption of retroactivity in this case. Accordingly, we hold that the Act’s farm and ranch laborer exclusion is unconstitutional and direct that our holding be prospectively applied to any injury that manifests after the date that our mandate issues in this case pursuant to Rule 12-402(B). See *Montell v. Orndorff*, 1960-NMSC-063, ¶ 9, 67 N.M. 156, 353 P.2d 680 (concluding that the “occurrence of injury” refers to “when disability appears—in other words, when the injury . . . becomes manifest.” (internal quotation marks and citation omitted)); *De La Torre v. Kennecott Copper Corp.*, 1976-NMCA-108, ¶¶ 18-19, 89 N.M. 683, 556 P.2d 839 (clarifying that the version of workers’ compensation law applicable to a claim is the law as of the date when the compensable disability should have been reasonably apparent to the worker). Further, we modify our prospective holding by applying it to the litigants in this case, Ms. Aguirre and Mr. Rodriguez, “for having afforded us the opportunity to change an outmoded and unjust rule of law.” *Lopez*, 1982-NMSC-103, ¶ 18.

IV. CONCLUSION

{52} We remand these consolidated cases to their respective WCJs for resolution without reliance on the farm and ranch laborer exclusion in Section 52-1-6(A). We also order that the Court of Appeals’ opinion in *Rodriguez v. Brand West Dairy*, 2015-NMCA-097 be republished. Because of our disposition and its prospective application, Respondents’ motion for leave to file a reply dated April 13, 2016 and any other outstanding motions in the two consolidated cases before this Court are denied.

{53} **IT IS SO ORDERED.**

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

BARBARA J. VIGIL, Justice

**JUDITH K. NAKAMURA, Justice,
dissenting**

Nakamura, J. (dissenting).

{54} Since 1917, when the Workers’ Compensation Act (WCA), NMSA 1978, §§ 52-1-1 to -70 (1917, as amended through 2015), was originally enacted, the Legislature has allowed employers

of farm and ranch laborers to decide for themselves whether to participate in the workers’ compensation scheme. See NMSA 1978, § 52-1-6(A)-(B) (1990); Laws 1917, ch. 83 §§ 2, 10. For nearly 100 years, the Legislature has maintained its view that the best policy for New Mexico is that each farm and ranch employing more than three workers decides for itself whether to incur the costs of workers’ compensation or to face the costs of potential tort liability. To that end, Section 52-1-6(A) excludes employers of farm and ranch laborers from the Legislature’s requirement subjecting employers of three or more workers to the provisions of the WCA.

{55} Today, the majority opinion exercises this Court’s power of judicial review and holds that this 99-year-old statutory scheme violates the New Mexico Constitution. By invalidating Section 52-1-6(A)’s exclusion of farms and ranches from mandatory participation in the state workers’ compensation scheme, the majority opinion has supplanted the Legislature’s view of what, all things considered, is best for New Mexico. But this Court has neither the necessary facts nor the institutional mission to substitute our judgment for that of the Legislature regarding what is best for any particular industry within the State’s economy.

{56} The farm-and-ranch exclusion may be perceived as unfair, unwise, or improvident in its treatment of laborers who work for farms and ranches electing exemption from the WCA, but this Court may exercise its greatest power to invalidate a statute only if the statute contravenes the federal Constitution or the New Mexico Constitution. This case raises no federal claim, and, under well-established law, the Legislature’s decision to allow employers of farm and ranch laborers to decide for themselves whether to be subject to the WCA or to face tort liability does not violate any right guaranteed by the New Mexico Constitution. Because Section 52-1-6 is socioeconomic legislation, the Worker-Respondents have a right against the disparate treatment allowed by this statute only if the statute does not rationally further a legitimate legislative purpose. The Worker-Respondents simply cannot make that showing. By enacting Section 52-1-6, the Legislature designed a statutory scheme that rationally controls costs for New Mexico farms and ranches. The statute creates a choice which allows these employers to elect the option that entails the lowest expected costs, and 29%

of New Mexico farms and ranches (including many of the largest agricultural firms in the State) have elected to provide workers' compensation. This statute survives an equal protection challenge. Additionally, by nullifying the Legislature's statutory scheme, the majority opinion threatens to detrimentally impact small, economically fragile farms in New Mexico. Therefore, I respectfully dissent.

I. SECTION 52-1-6(A) IS CONSTITUTIONAL

{57} This is not a complex case. Noe Rodriguez and Maria Aguirre were injured on the job. Rodriguez and Aguirre were employed by a ranch and a farm, respectively, that had elected not to provide workers' compensation benefits and which, under Section 52-1-6(A), were not required to do so. Rodriguez and Aguirre claim that the Legislature's exclusion of employers of farm and ranch laborers from mandatory participation in the workers' compensation scheme violates their rights to equal protection under Article II, Section 18 of the New Mexico Constitution.

{58} Equal protection doctrine requires that Rodriguez and Aguirre "first prove that they are similarly situated to another group but are treated dissimilarly." *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413. That showing is easily met. Rodriguez and Aguirre are similar to all other workers in New Mexico who suffer work-related injuries and are in need of benefits. But Aguirre's and Rodriguez's employers elected exemption from the WCA, and, therefore, Aguirre and Rodriguez are treated dissimilarly from other workers whose employers participate in the workers' compensation scheme. Whereas injured workers in the latter group receive workers' compensation benefits, injured workers in the former group do not, even though they may seek other forms of recovery such as damages in tort. Thus, Section 52-1-6(A) results in dissimilar treatment of workers injured on the job.

{59} Upon a showing of dissimilar treatment, this Court determines what level of scrutiny applies to the challenged legislation. *Breen*, 2005-NMSC-028, ¶ 8. Section 52-1-6(A) is economic legislation that does not subject a suspect or sensitive class to different treatment, and, therefore, rational basis review applies. See *Griego v. Oliver*, 2014-NMSC-003, ¶ 39, 316 P.3d 865; *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050 ("Ordinarily we defer

to the Legislature's judgment in enacting social and economic legislation such as the WCA."). Rational basis review is the most deferential standard that a court applies when reviewing the constitutionality of legislation, "and the burden is on the party challenging the legislation to prove that it 'is not rationally related to a legitimate government[al] purpose.'" *Breen*, 2005-NMSC-028, ¶ 11 (alteration in original) (quoting *Wagner*, 2005-NMSC-016, ¶¶ 12, 24). Under rational basis review, our task is to decide, first, whether the Legislature enacted a statute to further a permissible legislative purpose and, second, whether the challenged statutory provision is rationally related to that purpose. *Kane v. City of Albuquerque*, 2015-NMSC-027, ¶¶ 17-22, 358 P.3d 249.

{60} In considering the Legislature's purpose when enacting and maintaining Section 52-1-6(A)'s farm-and-ranch exclusion, the record evidence and legislative history indicate that the Legislature was motivated to contain regulatory costs incurred by economically precarious farms and ranches in New Mexico. For instance, in 2009, the Legislature considered bills that would have removed the WCA's exclusion for employers of farm and ranch laborers. See H.B. 62, 49th Leg., Reg. Sess. (N.M. 2009); S.B. 9, 49th Leg., Reg. Sess. (N.M. 2009). In considering these bills, the Legislature had available the Fiscal Impact Report (FIR) for House Bill 62. Members of the House Business and Industry Committee relied on the FIR in rejecting House Bill 62 by a vote of 10-2.

{61} According to the FIR for House Bill 62, the "N.M. Department of Agriculture stated the proposed legislation would introduce a significant financial strain on the farming and ranching part of the industry." FIR for H.B. 62, at 3 (Feb. 05, 2009) (2009 FIR). The FIR also included cost projections to farm and ranch employers submitted by the Workers' Compensation Administration, the National Council of Compensation Insurance (NCCI), and New Mexico State University agricultural economists. See *id.* The Workers' Compensation Administration had projected the annual cost of the bill "to farm and ranch employers to be an additional \$10.5 million annually. . . [which] represents a cost increase of approximately 1.5 percent." *Id.* The NCCI had similarly estimated that House Bill 62 "would increase New Mexico payroll costs by 0.4 percent and increase premiums up to 1.1 percent." *Id.* The FIR additionally indicated that, according to

Workers' Compensation Administration data, the average cost per claim was approximately \$16,876. *Id.* In contrast, the FIR reported that the average net income per farm in the 2002 census of agriculture was \$19,373—only slightly more than the average cost per workers' compensation claim. *Id.* Indeed, in 2012, the average net cash income from farming operations in New Mexico was only \$9,501. See United States Department of Agriculture, National Agricultural Statistics Service, 2015 State Agricultural Overview New Mexico, <http://tinyurl.com/jjpx7ch> (last viewed June 28, 2016). Therefore, legislative facts demonstrate a legislative concern to maintain Section 52-1-6(A) in order to contain costs incurred by fiscally vulnerable farms and ranches. See *Oliver*, 2014-NMSC-003, ¶ 47 n. 7 ("[T]his Court . . . may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts." (alteration in original) (internal quotation marks and citation omitted)).

{62} Under rational basis review, the Legislature's purpose to safeguard farms and ranches in New Mexico from the imposition of additional overhead costs is permissible. There can be no dispute that the Legislature may pursue the legitimate purpose to protect certain industries from additional costs or to lower overhead costs. See, e.g., *Garcia v. La Farge*, 1995-NMSC-019, ¶ 24, 119 N.M. 532, 893 P.2d 428 (finding under rational basis review that lowering the costs of malpractice insurance for health care providers was a legitimate legislative purpose); *Schirmer v. Homestake Min. Co.*, 1994-NMSC-095, ¶ 8, 118 N.M. 420, 882 P.2d 11 ("[T]he legislative goal of maintaining reasonable costs to employers is a legitimate legislative goal . . ."); *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 23, 118 N.M. 753, 887 P.2d 747 (finding under rational basis review that the reduction of costs to local governments is a valid legislative goal); *Terry v. N.M. State Highway Comm'n*, 1982-NMSC-047, ¶ 8, 98 N.M. 119, 645 P.2d 1377 (citing *Howell v. Burk*, 1977-NMCA-077, ¶ 8, 90 N.M. 688, 568 P.2d 214 (upholding a statute as rationally related to the permissible legislative goal of guarding against the imposition of costs on firms in the construction industry)). The majority opinion does not suggest otherwise.

{63} The only remaining question, then, is whether Section 52-1-6(A) is rationally

related to the legitimate purpose of insulating New Mexico farms and ranches from additional costs. It is. Section 52-1-6(A), in conjunction with Subsection (B), creates an architecture by which employers in the agricultural industry choose which costs they incur. There are costs involved with being subject to the WCA. Those costs include insurance premiums and fees collected pursuant to NMSA 1978, § 52-5-19 (2004). Yet, despite these costs, there are good reasons why a farm or ranch would voluntarily elect to be subject to the WCA, as permitted by Section 52-1-6(B). The WCA provides a predictable schedule of benefits and makes those benefits the exclusive remedy for an injured worker. As the record in this case reflects, “[t]here is a benefit to having insurance in place to take care of the injured worker and it might be an incentive to get a higher quality worker if they are aware of the benefits. Employers are no longer exposed to possible tort lawsuits.” *Griego v. N.M. Workers’ Comp. Admin.*, No. CV 2009-10130, 20, ¶ 141 (N.M. 2nd Jud. D., Oct. 17, 2011) (final pretrial order).⁴ Likewise, there are risks associated with a farm or ranch’s decision to forego WCA participation: such employers risk the possibility of unpredictable tort judgments and other costs associated with employee injury.

{64} In other words, Subsections (A) and (B) allocate to each farm and ranch the choice whether to pay the costs of being subject to the WCA or to face potential tort liability. The Legislature’s allocation of this choice to each farm and ranch is rationally related to its goal to contain the costs for the farming and ranching industry because each farm and ranch is in the best position to know whether it would be more cost-effective to participate in the workers’ compensation scheme or to incur the risk of tort liability and associated litigation costs. New Mexico farms and ranches that employ

more than three employees vary greatly in the number of employees hired, the positions hired for, other fixed and marginal costs, products produced, annual sales, and profitability. See, e.g., United States Department of Agriculture, National Agricultural Statistics Service, 2015 State Agricultural Overview New Mexico, <http://tinyurl.com/jjpx7ch> (last viewed June 28, 2016); see also 2014 New Mexico Agricultural Statistics Bulletin, 18, <http://tinyurl.com/zaheuw> (last viewed June 28, 2016). Because of that variety, it is far from arbitrary for the Legislature to allow each farm and ranch to decide for itself whether to pay the costs of the WCA or to risk tort liability. Each farm and ranch will very likely elect the option that entails the lowest expected costs, thereby furthering the Legislature’s legitimate goal to support New Mexico’s economically precarious farms and ranches.

{65} In fact, the record demonstrates that 29% of farms and ranches that employ more than three workers have voluntarily elected to be subject to the WCA. This Court heard at oral argument that, of the farms and ranches who have elected to participate in the WCA, the majority are the largest agribusinesses who hire the largest number and largest variety of workers. It comes as no surprise that larger firms in New Mexico’s farming and ranching industry have decided that it is best for their businesses to be subject to the WCA. By doing so, these businesses fix costs and eliminate exposure to unpredictable tort liability. Conversely, the smaller farms and ranches have decided that, given their smaller economies of scale and smaller profit margins, it is best for their businesses to avoid the costs (and forgo the benefits) of the WCA and to risk tort liability instead. So, while the majority opinion may purport to correct a power disparity between workers and the largest firms in the agricultural industry,

its decision will likely have the effect of raising costs for the most economically precarious, smaller New Mexico farms and ranches. By protecting against such circumstance, Section 52-1-6(A) rationally furthers the legitimate legislative purpose.

II. THE MAJORITY OPINION ERRS IN CONCLUDING THAT SECTION 52-1-6(A) IS UNCONSTITUTIONAL

{66} The majority opinion asserts that it “remain[s] highly deferential to the Legislature by presuming the constitutionality of social and economic legislation.” Maj. Op. ¶ 27. But it is difficult to see how. Instead of interpreting Section 52-1-6 according to its plain language and then employing the traditional doctrine of rational basis review, the majority opinion does something quite different. First, the majority opinion misinterprets Section 52-1-6 to create a distinction that the Legislature neither drew nor intended. Maj. Op. ¶¶ 15-20. The majority opinion then misapplies rational basis scrutiny to hold Section 52-1-6(A) unconstitutional and relies on inapposite case law to support that holding. Maj. Op. ¶¶ 28-33. Such analysis is neither deferential to the Legislature nor willing to presume the constitutionality of social and economic legislation. And the majority opinion departs from the reasoning and the traditional equal protection analysis employed by myriad other state appellate courts and the United States Supreme Court to uphold analogous farm-and-ranch exceptions to mandatory workers’ compensation statutes against identical state and federal constitutional challenges.⁵

A. The majority opinion misinterprets Section 52-1-6 in concluding that the statute is unconstitutional

{67} This Court may not interpret a statute in ways that render it constitutionally infirm. See, e.g., *State v. Flores*, 2004-

⁴As the majority opinion notes, materials related to *Griego v. New Mexico Workers’ Compensation Administration* were attached by Aguirre before the Workers’ Compensation Judge and accordingly form a part of the record in this case. See Maj. Op., ¶ 4.

⁵See, e.g., *Collins v. Day*, 644 N.E.2d 72, 82 (Ind. 1994) (holding that exemption for agricultural employers and employees from mandatory workers’ compensation coverage did not violate the equal privileges and immunities guarantee of the state constitution); *Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 202 (N.D. 1994) (holding that statutory provision excluding agricultural employees from mandatory workers’ compensation coverage did not violate state equal protection guarantee); *Baskin v. State ex rel. Worker’s Comp. Div.*, 722 P.2d 151, 156 (Wyo. 1986) (holding “exception of ‘ranching and agriculture’ from extra-hazardous occupations of teaming and truck driving and motor delivery” subject to mandatory workers compensation’ coverage did not violate state or federal equal protection guarantees); *Eastway v. Eisenga*, 362 N.W.2d 684, 689 (Mich. 1984) (holding that exemption for some agricultural employers from mandatory participation in workers’ compensation scheme did not violate either federal or state equal protection guarantees); *Ross v. Ross*, 308 N.W.2d 50, 53 (Iowa 1981) (rejecting federal equal protection challenge to statute exempting employers of familial farmworkers from compulsory participation in workers’ compensation scheme); *Otto v. Hahn*, 306 N.W.2d 587, 592 (Neb. 1981) (rejecting federal equal protection challenge to statute excluding employers of farmworkers from mandatory participation in workers’ compensation scheme); *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44, 45 (Ky. App. 1978) (holding that exemption for employers “engaged solely in agriculture” from mandatory participation in workers’ compensation scheme did not

NMSC-021, ¶ 16, 135 N.M. 759, 93 P.3d 1264 (“When construing a statute we are to construe it, if possible, so that it will be constitutional.” (internal quotation marks and citation omitted)); *accord Huey v. Lente*, 1973-NMSC-098, ¶ 6, 85 N.M. 597, 514 P.2d 1093 (“[I]f a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality.”). Yet, that is what the majority opinion has done.

{68} According to the majority opinion, Section 52-1-6(A) draws a line between, on the one hand, “farm and ranch laborers,” and, on the other hand, all other employees of farms and ranches. Maj. Op. ¶¶ 15-20. Not every employee of a farm or ranch is a “farm and ranch laborer.” Some larger farms and ranches also hire, for example, staff who work primarily in the packaging of crops, sales, and administration. The majority opinion interprets Section 52-1-6(A) to allow farms and ranches to exclude “farm and ranch laborers” from workers’ compensation, but not other employees, such as administrative or sales staff. Maj. Op. ¶¶ 15-20. The majority opinion concludes that distinction is irrational and, therefore, holds that Section 52-1-6(A) violates the New Mexico Constitution. Maj. Op. ¶¶ 28-33.

{69} Irrespective of whether it would be irrational for the Legislature to allow farms and ranches to exclude “farm and ranch laborers” from workers’ compensation while not permitting farms and ranches to exclude other employees, this is *not* a distinction that the Legislature drew. The distinction that the majority opinion focuses on is simply not in the statute. “The text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997). And the text of Section 52-1-6(A) does not remotely suggest that the Legislature intended to permit farms

and ranches to exclude laborers who primarily work with the crops and livestock, but not other employees.

{70} Rather, Section 52-1-6(A) indicates that the Legislature permits farms and ranches to exclude *themselves* from mandatory participation in the workers’ compensation scheme. The statute unambiguously provides an exemption for *employers*, not certain subsets of their employees. Section 52-1-6 plainly states that “[t]he provision of the [WCA] . . . shall not apply to *employers* of . . . farm and ranch laborers.” § 52-1-6(A). The statute also says “*employers* of . . . farm and ranch laborers” can make “[a]n election to be subject to the [WCA].” § 52-1-6(B). Accordingly, the statute’s exclusion from mandatory participation in the workers’ compensation scheme applies to *employers*, and the choice to participate also resides with *employers*. See § 52-1-6(A)-(B).

{71} Instead of following the plain text of the statute, the majority opinion adopts an erroneous reading offered by the Court of Appeals in *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535, and *Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, 100 N.M. 287, 795 P.2d 92. See Maj. Op. ¶¶ 15-18. *Cueto* and *Holguin* read Section 52-1-6(A)’s exclusion to turn, not on the business of the employer, but rather on the primary job duties of the employee. See *Holguin*, 1990-NMCA-073, ¶ 19; *Cueto*, 1980-NMCA-036, ¶ 6. The majority opinion reasons that Section 52-1-6(A) must mean something other than what it says because a “literal interpretation” of the statute would lead to “absurd results.” Maj. Op. ¶ 15 (quoting *Cueto*, 1980-NMCA-036, ¶ 6). According to the majority opinion, a literal reading of the text would allow any employer—despite the industry in which it operates—to exclude its entire workforce from workers’ compensation coverage simply by hiring a

couple of farm or ranch laborers. Maj. Op. ¶ 15. Imagine, for example, a semiconductor chip manufacturing facility planting an adjacent pecan orchard. No court in New Mexico could reasonably interpret Section 52-1-6(A) to provide that such a factory could exclude itself from the provisions of the WCA. But a court need not interpret the statute as the majority opinion does in order to deny the hypothetical factory the benefit of the farm-and-ranch exclusion.

{72} Contrary to the majority opinion’s suggestion, its interpretation of Section 52-1-6(A) is not the only interpretation that avoids the absurd result. Section 52-1-6(A) should be read not as allowing the exclusion of only farm and ranch laborers from the mandatory provisions of the WCA, but rather as allowing the exclusion of *employers* whose workforce is *mainly comprised* of farm and ranch laborers. In other words, if an *employer* mainly employs farm and ranch laborers (i.e., if an employer *is* a farm or a ranch), then under Subsections (A) and (B), that *employer* is not required to participate in the workers’ compensation scheme, although it may voluntarily elect to do so.

{73} Not only is this interpretation available to avoid the absurd result the majority opinion envisions, it also reflects this Court’s precedent. This Court has previously determined that the farm-and-ranch exclusion protects a farmer or rancher against workers’ compensation claims brought by employees who are not farm and ranch laborers. See *Williams v. Cooper*, 1953-NMSC-050, ¶¶ 10-13, 57 N.M. 373, 258 P.2d 1139. In *Williams*, this Court reversed an award of workers’ compensation because the statute excluded the workers’ compensation claim of an employee who was injured while constructing an addition to a dance hall that a rancher operated. 1953-NMSC-050, ¶¶ 10-13. This Court emphasized “the fact that it

violate state or federal equal protection guarantees); *Anaya v. Indus. Comm’n*, 512 P.2d 625, 626 (Colo. 1973) (holding that the “exclusion of farm and ranch labor” from mandatory workers’ compensation benefits did not violate equal protection (citing *Romero v. Hodgeson*, 319 F. Supp. 1201, 1203 (N.D. Cal. 1970) (per curiam, three-judge court), *aff’d* 403 U.S. 901 (1971) (holding that exclusion of agricultural labor from the definition of employment in both California and federal unemployment compensation statutes did not violate the federal equal protection guarantee)); *State ex rel. Hammond v. Hager*, 563 P.2d 52, 57 (Mont. 1972) (holding that exclusion for “employers engaged in farming and stock raising” from workers’ compensation scheme did not violate the federal equal protection guarantee); *Sayles v. Foley*, 96 A. 340, 344 (R.I. 1916) (holding that exclusion for farm laborers and other laborers involved in agricultural pursuits from state workers’ compensation scheme did not violate state or federal constitutions); *Hunter v. Colfax Consol. Coal Co.*, 154 N.W. 1037, 1052-53 (Iowa 1915) (same); *In re Opinion of Justices*, 96 N.E. 308, 315 (Mass. 1911) (concluding that exclusion of farm laborers from provision of workers’ compensation act provision modifying common law defenses to common law negligence claims did not violate the federal constitution); see also *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 162 (1918) (concluding that Texas Employer’s Liability Act’s exclusion from mandatory insurance coverage for injuries sustained by, inter alia, farm laborers did not violate the federal equal protection guarantee); *New York Central R.R. Co. v. White*, 243 U.S. 188, 208 (1916) (concluding that the exclusion of farm laborers from New York workers’ compensation scheme did not violate the federal equal protection guarantee).

is not the nature of the particular work in which the employee is engaged at the time of his injury *but rather the character of his employer's occupation which controls . . .*” *Id.* ¶ 7 (emphasis added) (quoting *Rumley v. Middle Rio Grande Conservancy Dist.*, 1936-NMSC-023, ¶ 16, 40 N.M. 183, 57 P.2d 283). Accordingly, this Court held that “the occupation or pursuit of the defendant [which was ranching] did not subject him to liability under the act, even if at the moment the [non-ranching] work being done by the [non-ranch-laborer] plaintiff with a different factual background would have rendered his injury compensable [i.e. had the plaintiff worked for a non-rancher].” *Id.* ¶ 10. *Williams* is guiding precedent regarding the interpretation of the farm-and-ranch exclusion, yet the majority opinion avoids it.

{74} Based on the text of the statute and our own precedent, this Court is compelled to read Section 52-1-6(A) as allowing the exclusion, not of farm and ranch laborers themselves, but of *employers* whose workforce is mainly comprised of farm and ranch laborers. This interpretation faithfully adheres to the text of Section 52-1-6(A). It effectuates the Legislature’s purpose to contain costs incurred by New Mexico’s farms and ranches. It avoids the absurd result of permitting any employer from excluding itself from the provisions of the WCA by hiring a few farm or ranch laborers. It follows this Court’s previous readings of the statute. *See Williams*, 1953-NMSC-050, ¶ 10. And, most importantly, it does not create a constitutionally infirm distinction. *See Huey*, 1973-NMSC-098, ¶ 6 (“[I]f a statute is susceptible to two constructions, . . . a court should adopt the construction which will uphold its constitutionality.”).

{75} Yet, for unconvincing reasons, the majority opinion adopts an alternative reading. First, the majority opinion relies on *Griego v. Oliver* to support its view that, contrary to the plain text of the statute, it may nevertheless adopt *Cueto*’s dubious interpretation in order to hold the statute unconstitutional. *Maj. Op.* ¶ 19 (citing *Oliver*, 2014-NMSC-003, ¶ 24). But *Oliver* is inapposite. The marriage statutes under review in *Oliver* could not be interpreted to authorize marriage between same-gender couples, which would have saved the statutes from constitutional challenge. *See Oliver*, 2014-NMSC-003, ¶¶ 19-24. By contrast, the plain text of Section 52-1-6(A) and this Court’s precedents support an interpretation that not only materially differs from the interpretation reached by

Cueto and adopted by the majority opinion but which also saves Section 52-1-6(A) from the constitutional challenge at issue. {76} Second, the majority opinion’s reliance on *Koger v. A.T. Woods, Inc.* is misplaced. *See Maj. Op.* ¶ 20 (citing 1934-NMSC-020, ¶¶ 17-20, 38 N.M. 241, 31 P.2d 255). While *Koger* seemed to apply the exclusion based upon “the general nature of the object of employment [of the employee],” 1934-NMSC-020, ¶ 17, after *Koger* was decided, the Legislature amended the WCA to create an explicit exclusion for “employers . . . of farm and ranch laborers.” Laws 1937, ch. 92, § 2 (emphasis added). Looking to *that* statute, this Court in *Williams* focused not on the employee’s primary job duties, nor on the particular work the employee was engaged in when injured, but rather expressly said that it is “the character of his employer’s occupation which controls . . .” 1953-NMSC-050, ¶ 7 (emphasis added) (internal quotation marks and citation omitted). On that basis, this Court reversed an award of workers’ compensation benefits. *Id.* ¶ 13.

{77} Third, the majority opinion erroneously grounds its interpretation on legislative silence. *See Maj. Op.* ¶ 20. Notwithstanding this Court’s own precedent, the majority opinion notes that the *Cueto* Court of Appeals interpreted Section 52-1-6(A) to allow the exclusion of only farm and ranch laborers from workers’ compensation coverage. The majority opinion then reasons that, because the Legislature did not subsequently amend the statute, the Legislature therefore intended a meaning different than what the text of the statute expressly provides. *Maj. Op.* ¶ 20 (citing *Cueto*, 1980-NMCA-036, ¶¶ 6-7). This reasoning is unpersuasive.

{78} Inferences based on the Legislature’s silence subsequent to a court’s decision are an exceptionally weak method of statutory interpretation. *See Zuber v. Allen*, 396 U.S. 168, 185 (1969) (“Legislative silence is a poor beacon to follow in discerning the proper statutory route.”); Norman J. Singer and J.D. Shambie Singer, 2B Sutherland Statutory Construction § 49.9, at 124 (7th ed. 2012) (noting that legislative silence is “a weak reed upon which to lean” (internal quotation marks omitted)). Legislative silence is consistent with any number of judicial interpretations, no matter how erroneous. Further, the use of legislative silence as a method of statutory interpretation in this case is inappropriate. When the text of a statute is clear and unambiguous, as here, this Court gives effect to the text and

refrains from further statutory interpretation. *See, e.g., State v. Rivera*, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939.

{79} Even if it were sound to interpret Section 52-1-6(A) by drawing conclusions from the Legislature’s silence following *Cueto*, this is not a case where silence speaks volumes. In *Cueto*, the Court of Appeals enforced Section 52-1-6(A)’s exclusion, denying that a farmworker had a cause of action for workers’ compensation. *Cueto*, 1980-NMCA-036, ¶ 9. The Court of Appeals also summarily rejected the claim that the exclusion violated equal protection. *Cueto*, 1980-NMCA-036, ¶ 8 (citing *Espanola Hous. Auth. v. Atencio*, 1977-NMSC-074, 90 N.M. 787, 568 P.2d 1233). Given that the Court of Appeals not only properly rejected a workers’ compensation claim but also upheld the statute from an equal protection challenge, it is uncertain why the Legislature would have felt pressed to clarify its already unambiguous exclusion for *employers* of farm and ranch laborers.

B. The majority opinion relies on inapposite if not questionable case law to conclude that the Legislature acted arbitrarily

{80} Based on its interpretation of Section 52-1-6(A), the majority opinion concludes that the Legislature cannot allow farms and ranches to exclude farm and ranch laborers from workers’ compensation coverage while at the same time requiring farms and ranches to provide coverage for those employees who are not farm and ranch laborers (such as administrative staff). *Maj. Op.* ¶¶ 31-35. The majority opinion reasons that such an instance of line drawing, which it incorrectly imputes to the Legislature, would *arbitrarily* further the permissible legislative goal of containing costs for New Mexico farms and ranches. *Maj. Op.* ¶¶ 32-35. And the majority opinion reasons that such arbitrariness in serving the goal of cost containment renders Section 52-1-6(A) unconstitutional. *Maj. Op.* ¶¶ 32-35.

{81} Assuming *arguendo* that Section 52-1-6(A) means what the majority opinion reads it to mean and that the Legislature allocated a choice to farms and ranches *only* with respect to their laborers, the statute is still not unconstitutional. This Court has already deferred to similar instances of legislative line-drawing with respect to the farm-and-ranch exclusion. In *Williams*, which rejected the workers’ compensation claim of a non-ranch laborer injured while performing non-ranch work for a rancher, this Court recognized that it was bound to

defer to the Legislature's policy, even as we perceived that the line drawing was harsh. 1953-NMSC-050, ¶ 7.

{82} What legal basis does the majority opinion have for taking the opposite approach? The majority opinion cites a single New Mexico case to support its view that the Legislature could not draw the line which the majority imputes to it: *Schirmer v. Homestake Mining Co.* See Maj. Op. ¶ 33 (citing *Schirmer*, 1994-NMSC-095, ¶¶ 9-10). *Schirmer* held that a ten-year statute of repose that extinguished employees' claims for injuries resulting from occupational exposure to radioactive materials violated equal protection because the statute was arbitrarily related to "the valid legislative goal of lowering employer costs." 1994-NMSC-095, ¶ 9. Some injuries caused by the occupational exposure to radiation, the *Schirmer* Court reasoned, were equally deserving of recovery even though they develop and accrue after the ten-year repose date. *Id.* Because of *Schirmer*, the majority opinion concludes that the Legislature, to lower costs to farms and ranches, could not allow farms and ranches to exclude the claims of only farm and ranch laborers. Maj. Op. ¶ 33.

{83} But *Schirmer* was almost certainly incorrect when decided. See *Coleman v. United Eng'rs & Constructors, Inc.*, 1994-NMSC-074, ¶ 10, 118 N.M. 47, 878 P.2d 996 (upholding a 10-year statute of repose from an equal-protection challenge); *Terry*, 1982-NMSC-047, ¶ 8 (same). Even if *Schirmer* were not incorrectly decided, the persuasiveness of its holding is wholly eroded by *Garcia*, 1995-NMSC-019, ¶¶ 17-18 (upholding the Medical Malpractice Act's three-year statute of repose from an equal protection challenge).

{84} In any event, *Schirmer* is distinguishable. Even if the Legislature drew a line between farm and ranch laborers who may be excluded from mandatory workers' compensation and other agribusiness employees for whom coverage is required, that distinction would not be arbitrary in the same way that the 10-year repose statute in *Schirmer* is arbitrary. Section 52-1-6(A), unlike any statute of repose, does not itself necessarily bar some set of claims. In fact, Section 52-1-6(A) does not necessarily bar any claim. Rather, the statute allows, and has always allowed, each farm and ranch in New Mexico to decide for itself whether to provide workers' compensation coverage for its employees who are farm and ranch laborers.

{85} Further, the distinction that the majority opinion imputes to the Legislature

is not arbitrarily related to the permissible legislative goal of containing costs for farms and ranches. Unlike the largest firms in agribusiness, not every farm or ranch in New Mexico employs a variety of workers. Many smaller farms and ranches in our State may only employ workers who could only be classified as "farm or ranch laborers." To contain costs for those smaller operations, the Legislature may permissibly allow each farm and ranch to choose whether to participate in the workers' compensation scheme. Again, because of the great diversity of farms and ranches operating in New Mexico's agricultural industry, and because each is best positioned to know its cost structure and its tolerance for the risk of tort liability, the Legislature's putative allocation of the choice to each farm and ranch to provide workers' compensation coverage only for its farm and ranch laborers would advance its goal to aid New Mexico farms and ranches in a rational and efficient way. I repeat: 29% of New Mexico's farms and ranches have elected to be subject to the WCA; 71% have not. As this Court heard at oral argument, the majority of the 29% of farms that have elected to be subject to the WCA are large operations. The Legislature's decision to allocate a choice to farms to be subject to the WCA reflects "substantial and real distinction[s]" between the farms and ranches who choose to provide workers' compensation coverage and those that do not. *Schirmer*, 1994-NMSC-095, ¶ 9. Those real and substantial distinctions track whether the farm is relatively large or small.

{86} Therefore, *Schirmer*, even if it were not bad law, is so distinguishable as to provide no support for the majority opinion's conclusion. The majority opinion treats Section 52-1-6(A) as though it furthered cost savings for farms and ranches by, for example, necessarily excluding workers' compensation claims of left-handed farm and ranch laborers. But the legislation under review is nothing like that. The arbitrariness that the majority opinion perceives is simply not present either in the interpretation that the majority opinion imputes to the Legislature or in the statutory scheme that the Legislature actually enacted.

C. The majority opinion's application of a more stringent version of rational basis review confuses equal protection doctrine

{87} Lastly, I disagree with the majority opinion's application of the so-called

"modern articulation" of the rational basis test that this Court first referenced in *Trujillo v. City of Albuquerque*. See 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (overruling, yet "subsuming" a heightened, less deferential form of rational basis analysis applied in *Alvarez v. Chavez*, 1994-NMCA-133, ¶¶ 16-23, 118 N.M. 732, 886 P.2d 461, and *Corn v. N.M. Educators Fed. Credit Union*, 1994-NMCA-161, ¶¶ 9-14, 119 N.M. 199, 889 P.2d 234). In *Wagner*, this Court explained that under the heightened form of rational basis review the party challenging a statute must show that it is not rationally related to a legitimate governmental purpose by "demonstrat[ing] that the classification created by the legislation is not supported by a 'firm legal rationale' or evidence in the record." 2005-NMSC-016, ¶ 24 (quoting *Corn*, 1994-NMCA-161, ¶ 14). *Wagner* did not apply the heightened standard to invalidate legislation; instead, *Wagner* upheld the WCA's attorney fee limitation from an equal protection challenge. 2005-NMSC-016, ¶ 32. Nevertheless, *Wagner's* dicta regarding the emergence of a heightened form of rational basis review prompted a member of this Court to write separately. See 2005-NMSC-016, ¶¶ 37-40 (Bosson, C.J., concurring in part and dissenting in part). Justice Bosson noted that the *Wagner* majority failed to explain this "modern articulation" and, moreover, that the *Wagner* majority's departure from traditional rational basis review was neither desirable nor appropriate. *Id.*

{88} After *Wagner*, the "modern articulation" of rational basis review was buried for some years. Since that decision, this Court has employed rational basis review without reference to this heightened standard both in analyzing federal and state constitutional claims. See *Kane*, 2015-NMSC-027, ¶¶ 17-22 (analyzing a First Amendment challenge and concluding that the City of Albuquerque's regulations prohibiting city employees from holding elective office "are rationally related to legitimate government purposes"); *State v. Tafoya*, 2010-NMSC-019, ¶ 26, 148 N.M. 391, 237 P.3d 693 (analyzing state and federal equal protection challenges and holding that a sentencing court's discretion to award good time credit eligibility "is rationally related to the goals of punishment as well as rehabilitation"). This Court even explained New Mexico's equal protection doctrine in detail and described rational basis review in its traditional form without so much as mentioning the so-called "modern articulation." See

Oliver, 2014-NMSC-003, ¶ 39. Also, in *Morris v. Brandenburg*, 2016-NMSC-____, ¶ 56, __ P.3d __, this Court determined that NMSA 1978, Section 30-2-4, which makes it a crime to deliberately aid another in the taking of his or her own life, satisfied rational basis review because the statute rationally served legitimate state interests that this Court deemed to be “firm legal rationale[s];” however, the *Morris* Court merely repeated this talisman, again without explaining when a statute is, in fact, supported by a “firm legal rationale” (as opposed to any conceivable basis). And, now, for the first time, the majority opinion exercises the “modern articulation” to invalidate longstanding legislation.

{89} As best as I can discern, the difference between the traditional and the “modern” versions of rational basis review lies in what is required to demonstrate that a legislative classification is rationally related to a legitimate governmental purpose. See *Corn*, 1994-NMCA-161, ¶ 14. Under traditional rational basis review, for a statute to serve a legitimate government purpose, the proponent of constitutionality “need only establish the existence of a conceivable rational basis” for the statute. *Kane*, 2015-NMSC-027, ¶ 17 (second emphasis added) (internal quotation marks and citation omitted); see also *State v. Cawley*, 1990-NMSC-088, ¶ 9, 110 N.M. 705, 799 P.2d 574 (“The party objecting to the legislative classification has the burden to demonstrate that the classification bears no rational relationship to a conceivable legislative purpose.”); accord *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” (internal quotation marks and citations omitted)); *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (“This sort of statutory distinction does not violate the Equal Protection Clause ‘if any state of facts reasonably may be conceived to justify it.’” (internal quotation marks and citation omitted)). Accordingly, “a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data.” *Heller*, 509 U.S. at 320 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1970)); see also *Wagner*, 2005-NMSC-016, ¶ 39 (Bosson, C.J., concurring in part and dissenting in part).

{90} By contrast, the majority opinion states that a statutory classification must be supported either by a “firm legal rationale”

or “evidence in the record.” Maj. Op. ¶ 28. The majority opinion reasons that this standard separates New Mexico’s form of rational basis review for state equal protection claims from rational basis review for federal constitutional claims. See Maj. Op. ¶¶ 25-27. But it is not clear why the equal protection guarantee of the New Mexico Constitution should grant this Court more discretion to invalidate socioeconomic legislation than the federal constitutional analogue. Under New Mexico’s interstitial approach to determining state constitutional claims that have federal analogues (such as equal protection), this Court departs from the federal constitutional analysis *only* if the federal analysis is flawed or undeveloped or if there are characteristics distinctive to New Mexico that warrant a different constitutional analysis. *State v. Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 1777, 932 P.2d 1. There is nothing distinctive or structurally different about New Mexico such that our judiciary should have a greater power to invalidate socioeconomic legislation. And I do not agree with the implicit premise that the traditional form of rational basis review used by every federal and state court—including this Court when considering federal constitutional challenges—is flawed. See, e.g., *Kane*, 2015-NMSC-027, ¶¶ 17-22 (applying traditional rational basis review). The majority opinion’s analysis overlooks that when a court, in employing traditional rational basis review, perceives that governmental regulation harbors an *animus* toward a particular group, rational basis review suddenly has a “bite.” Thus, rational basis review is a constitutionally discerning form of scrutiny, and not a flawed “rubber stamp.” Therefore, our interstitial approach does not permit the majority opinion’s departure from traditional rational basis review in this case.

{91} There are additional problems with the majority opinion’s use of the “modern articulation” of rational basis review. To repeat Justice Bosson’s observation in *Wagner*, the majority opinion does not explain what differentiates a “firm legal rationale” from any conceivable basis in the traditional form of rational basis review, as the bench and bar know it. The majority opinion even seemingly retreats from its own “evidence in the record” condition, as the majority opinion allows a justification for a statutory classification to be supported by outside-of-the-record, legislative facts of which a court can take judicial notice. See Maj. Op. ¶ 28. So, we are left with “firm

legal rationale” as the only condition in the heightened standard that separates the “modern articulation” of rational basis review from its traditional counterpart. And there is simply no indication of what would constitute a “firm legal rationale” or how a “firm legal rationale” differs from any conceivable basis justifying a legislative choice. By requiring a “firm legal rationale,” the majority opinion overlooks that when the Legislature enacts socioeconomic legislation, the classifications and distinctions it creates may simply be the result of compromise and “are often impossible of explanation in strictly legal terms.” *Romero*, 319 F. Supp. at 1203. Accordingly, under traditional rational basis review, any conceivable basis justifying a legislative classification simply *is* a firm legal rationale to uphold a statute against an equal protection challenge. See, e.g., *Heller*, 509 U.S. at 320; *Beach Commc’ns*, 508 U.S. at 313.

{92} Further, the majority opinion’s explanation of the “evidence in the record” condition is in tension with its requirement for a “firm legal rationale.” By permitting a court to consider *sua sponte* legislative facts outside of the record, the so-called heightened standard suggests that a court may, in fact, attempt to conceive of any permissible legislative purpose that the statute under review rationally serves. Hence, there is nothing to the “modern articulation” that should separate it from traditional rational basis review, and because Section 52-1-6(A) conceivably serves the legislative purpose of cost containment, it survives rational basis review.

{93} Instead of explaining the “modern articulation,” the majority opinion simply uses the words “firm legal rationale” as a license to determine that Section 52-1-6(A) is unconstitutional because it is “underinclusive” with respect to its putative purpose. Maj. Op. ¶¶ 29-35. According to the majority opinion, because Section 52-1-6(A) allows for the exclusion of farm and ranch laborers (but not other farm and ranch employees) from workers’ compensation coverage, it is underinclusive with respect to the permissible legislative purpose of cost containment. See Maj. Op. ¶¶ 32-35. The majority opinion implies that if the Legislature *really* had wanted to control costs for New Mexico’s farms and ranches, it would have allowed farms and ranches to exclude *all* of their employees, not just their farm and ranch laborers. See *id.* The irony, of course, is that this is

exactly what the Legislature did. But, again assuming the majority opinion's statutory interpretation *arguendo*, such underinclusiveness does not call into question the constitutionality of the statute.

{94} It is the longstanding law of rational basis scrutiny—both in the federal and state constitutional context—that a legislative body, when enacting socioeconomic legislation, can solve a problem piecemeal and that such underinclusiveness with respect to that purpose poses no constitutional flaw.⁶ By contrast, when applying intermediate scrutiny and strict scrutiny, courts check to determine if a statutory classification is narrowly tailored to a legislative purpose—i.e., whether the statutory classification is under- or overinclusive with respect to its putative purpose. *See, e.g., In re Vincent*, 2007-NMSC-056, ¶ 15, 143 N.M. 56, 172 P.3d 605 (“[F]or a challenged provision to be narrowly tailored to serve a compelling state interest under a strict scrutiny analysis, it must not be under-inclusive.”).

{95} To be sure, a tailoring analysis can be useful to discern whether the Legislature created a discriminatory classification with animus toward a particular, discrete group and disguised that animus with a socioeconomic rationale. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[The] sheer breadth [of Colorado’s Amendment 2 prohibiting governmental action designed to protect gay and lesbian persons from discrimination] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”); *City of Cleburne v. Cleburne*

Living Ctr., Inc., 473 U.S. 432, 449-50 (1985) (holding that a city’s requirement of a special use permit for the operation of a home for the mentally disabled was underinclusive with respect to the city’s putative purposes and, therefore, rested “on an irrational prejudice against the mentally [disabled]”). If a statutory classification is highly under- or overinclusive with respect to an ostensible legislative goal, then there exists good reason to believe that the legislative body had an ulterior, impermissible motive. *See, e.g., Romer*, 517 U.S. at 632; *City of Cleburne*, 473 U.S. at 449-50. Because rational basis review demands and searches for a permissible governmental purpose, it is not a rubber stamp for state action. But apart from determining a statute’s legislative purpose (and thus whether that purpose is permissible), an inspection for underinclusiveness has no place in rational basis review. Otherwise, our doctrinal categories provide no guarantee of the separation of powers, and a court may apply a more stringent standard of review simply because it disagrees with the policy of the statute under review. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (finding that if the degree of judicial scrutiny of legislation fluctuated depending solely on a court’s preference for a statute’s purpose and effect, then the court would assume “a legislative role” for which it lacks “both authority and competence”).

{96} The majority opinion’s inspection for underinclusiveness does not even justify its holding. Here, the majority opinion’s tailoring analysis simply does not result in a conclusion that the Legislature, since 1917, has acted with *animus* toward farm

and ranch laborers. A statutory scheme that permits 29% of farms and ranches—most of which are large firms, likely employing hundreds of farm and ranch laborers—to voluntarily provide workers’ compensation coverage to their employees is not a statute that harbors an ulterior motive to discriminate against farm and ranch workers. Neither the statutory scheme nor the record indicates that for 99 years the Legislature has acted with an impermissible, discriminatory *animus* against farmworkers. Rather, the Legislature has rationally acted to contain costs for New Mexico’s economically precarious farms and ranches so that they may continue to operate.

III. CONCLUSION

{97} The law of statutory interpretation and the law governing judicial review of legislation safeguard the separation of powers. This Court may not contort these areas of law to nullify validly-enacted legislation simply because we happen to believe that a statute is unfair or that its unfairness outweighs any other consideration that bears on the Legislature’s decision. While I understand the unfairness that may be perceived in the treatment of laborers who work for farms and ranches electing exemption from the WCA, I also understand the burden that may fall upon small New Mexico farms and ranches in having to incur regulatory costs more easily borne by their large competitors in the agricultural industry. The Legislature enacted a statutory scheme that encompasses both employer and employee concerns and is eminently constitutional. I respectfully dissent.

JUDITH K. NAKAMURA, Justice

⁶*See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (rejecting an equal protection challenge because “a legislature need not ‘strike at all evils at the same time or in the same way’” (quoting *Semler v. Or. State Bd. of Dental Exams*, 294 U.S. 608, 610 (1935))); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (rejecting an equal protection challenge because “[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this ‘perfection is by no means required’” (internal citation omitted)); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (“Legislatures may implement their program step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.” (internal citations omitted)); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (“This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it.” (internal citations omitted)); *Williamson v. Lee Optical of Okl.*, 348 U.S. 483, 489 (1955) (“[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.” (internal citations omitted)); *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (“It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”); *see also, e.g., Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 32, as corrected (Mar. 4, 2016) (“A mere overinclusiveness or underinclusiveness in statutory classification will not necessarily show a failure to satisfy a rational-basis review.”); *Lonaconing Trap Club, Inc. v. Md. Dep’t of Env’t*, 978 A.2d 702, 713 (Md. 2009) (“Underinclusiveness does not create an equal protection violation under the rational basis test.”).

Certiorari Denied, July 20, 2016, No. S-1-SC-35903

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-068

No. 33,836 (filed April 21, 2016)

SAMANTHA MIKESKA,
Plaintiff-Appellant,
v.

LAS CRUCES REGIONAL MEDICAL
CENTER, LLC d/b/a MOUNTAIN VIEW
REGIONAL MEDICAL CENTER,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF DONA AÑA COUNTY
DOUGLAS R. DRIGGERS, District Judge

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for Appellee

Opinion

M. Monica Zamora, Judge

{1} Plaintiff Samantha Mikeska (Plaintiff) appeals a judgment entered in favor of Las Cruces Regional Medical Center, d/b/a Mountain View Medical Center (Defendant) after a jury trial on Plaintiff's claim under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2011) (EMTALA). Plaintiff argues that the district court erred in allowing expert witness testimony concerning the purpose and scope of the EMTALA, and the corresponding jury instructions. Plaintiff also argues that the district court erred in instructing the jury to disregard certain evidence, particularly evidence that Plaintiff was misdiagnosed. We hold that the district court erred in allowing an expert witness to testify concerning questions of law. We further hold that the district court erred in allowing testimony and giving instructions that misstated the law and interjected a false issue into the trial. Last, we hold that the district court erred in instructing the jury to disregard evidence that Plaintiff was misdiagnosed. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Plaintiff initially visited Defendant's emergency room twice on the same day, and was discharged on both occasions after being misdiagnosed with a ruptured ovarian cyst. Four days later she once again returned to Defendant's emergency room at which point she was accurately diagnosed with a bowel obstruction. Emergency surgery to remove a portion of her bowel was ultimately required.

{3} Plaintiff filed suit against Defendant alleging that Defendant provided inadequate screening and inappropriately discharged her in an unstable condition after each of her first two visits to the emergency room, in violation of EMTALA. Plaintiff's EMTALA claim proceeded to trial. In anticipation of Dr. Paul Bronston's testifying on behalf of Defendant, Plaintiff filed a motion to exclude his testimony, but later withdrew it. Plaintiff subsequently filed a motion in limine to exclude as irrelevant, any evidence or argument concerning the purpose of the EMTALA. The district court heard the parties' arguments on the motion during a pre-trial hearing.

{4} At the pre-trial hearing, Plaintiff's counsel argued that the initial purpose of

the EMTALA is not relevant in determining whether a violation has occurred, because under the statute all patients must be appropriately screened and discharged in a stable condition regardless of the patients' ability to pay. Defendant's counsel argued that the statute's purpose was relevant to its theory that Plaintiff did not receive disparate screening or treatment. The following exchange took place between the district court and Plaintiff's counsel:

Court: [T]he [c]ourt's ruling is that the statute stands for itself, and any interpretation of it, the meaning, goes to the evidence to be presented by the parties or the experts as to how they interpret the statute.

Counsel for Plaintiff: And why would the [c]ourt allow an expert to come in and interpret the law? Isn't that the position and function of the [j]udge? I've never been in a trial, ever, in which someone came in and said, [t]his is what the law is, and explained to the jury what the law is. The jury is there to answer questions. Court: Right.

....
Court: I like my ruling. All right. Next.

Counsel for Plaintiff: Judge, the fourth point is that [D]efendant[] listed two witnesses, expert witnesses, who we believe will come in and discuss [the] EMTALA and what [the] EMTALA requires[.]

Court: I thought your co-counsel said that wasn't the responsibility of the experts; it was the responsibility of the [c]ourt.

Counsel for Plaintiff: Well, I think that's true.

Court: Are you changing your tune?

Counsel for Plaintiff: No.

Ultimately, Plaintiff's motion in limine was denied. The district court informed counsel that Dr. Bronston would be allowed to testify. Defendant presented the expert testimony of Dr. Paul Bronston concerning the purpose and scope of the EMTALA.

{5} In the course of trial, Plaintiff's counsel reiterated her objection to any evidence of the patient's ability to pay or the prohibition of discrimination and questioned the relevancy of this information in an EMTALA claim. Specifically, at Defendant's request and over Plaintiff's objection, the

district court instructed the proposed jury, as well as the empaneled jury, on the issue of discrimination based on Plaintiff's ability to pay. The district court also instructed the jury, over Plaintiff's objection, that medical negligence was not an issue in this case, stating "[y]ou are not to concern yourselves with [evidence that Plaintiff was misdiagnosed], nor should it have any bearing on your verdict in this case." The jury found that Defendant did not violate the EMTALA in screening or treating Plaintiff during her first two visits to its emergency room. Plaintiff filed a motion for new trial contending that Dr. Bronston's testimony on the history and purpose of EMTALA regarding the ability to pay was irrelevant. She also argued that Dr. Bronston misled the jury when he testified that the emergency room doctors' medical negligence was not to be relied upon in determining an EMTALA claim. The motion was denied. This appeal followed.

II. DISCUSSION

{6} On appeal, Plaintiff argues that the district court erred in allowing Dr. Bronston to express his legal opinions to the jury about the purpose and scope of the EMTALA, and the legal significance of insurance coverage under the EMTALA. Defendant argues that Plaintiff either failed to object to Dr. Bronston's testimony or waived any objection to the evidence of payment or ability to pay, thereby failing to preserve this first issue on appeal. While it may have been best practices to raise her objection again during Dr. Bronston's testimony, we find that Plaintiff properly preserved this issue on appeal and invoked a ruling by the trial court by filing her second motion in limine to exclude any evidence of the purpose of the EMTALA; objecting to Defendant's contentions in the statement of the case instruction about ability to pay; objecting to Defendant's proposed instruction on the purpose of EMTALA; and by filing a motion for new trial. See *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." (internal quotation marks and citation omitted)). Plaintiff also contends that the district court erred in instructing the jury on the elements of an EMTALA claim and by giving erroneous and misleading instructions on the significance of evidence that was admitted at trial. We discuss the purpose and scope of

the EMTALA, and then each of Plaintiffs' contentions in turn.

A. The EMTALA

{7} The EMTALA was enacted to prevent hospitals from patient "dumping," that is "refusing to treat patients who do not have health insurance or are otherwise unable to pay for services." *Godwin v. Mem'l Med. Ctr.*, 2001-NMCA-033, ¶ 17, 130 N.M. 434, 25 P.3d 273. It applies to hospitals receiving federal funding from Medicare and that operate an emergency care department. See § 1395dd(e)(2) and 42 U.S.C. § 1395cc (2015). Under the EMTALA, participating hospitals have two primary obligations. See *Ingram v. Muskogee Reg'l Med. Ctr.*, 235 F.3d 550, 551 (10th Cir. 2000). The hospital must first conduct a medical screening examination "to determine whether the patient is suffering from an emergency medical condition." *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001); see § 1395dd(a). When an emergency medical condition exists, the hospital must "stabilize the patient before transporting him or her elsewhere." *Phillips*, 244 F.3d at 796; see § 1395dd(b) (1)(A), (B). "[A t]ransfer includes [a] discharge." See *Godwin*, 2001-NMCA-033, ¶ 20 (internal quotation marks and citation omitted); see also § 1395dd(e)(4).

{8} The EMTALA's private right of action permits recovery in damages where hospitals fail to comply with these obligations. See § 1395dd(d)(2)(A). Although the EMTALA was "originally intended to cure the evil of dumping patients who could not pay for services, the rights guaranteed under EMTALA apply equally to all individuals whether or not they are insured." *Phillips*, 244 F.3d at 796; see *Collins v. DePaul Hosp.*, 963 F.2d 303, 308 (10th Cir. 1992) (stating that the plaintiff's ability to pay did not preclude his action under the EMTALA); see also *Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1137 (8th Cir. 1996) (en banc) ("The [EMTALA] clearly applies to 'any individual,' whether insured or not, and, therefore, the fact that [the defendant's] motivation in this particular case was obviously not to dump an uninsured or indigent patient does not defeat the plaintiff's action." (citation omitted)).

{9} The goal of the medical screening examination required by § 1395dd(a) "is to determine whether a patient with acute or severe symptoms has a life threatening or serious medical condition." *Godwin*, 2001-NMCA-033, ¶ 47 (internal quotation marks and citation omitted). "[T]he hospi-

tal must develop a screening procedure designed to identify such critical conditions that exist in symptomatic patients and to apply that screening procedure uniformly to all patients with similar complaints." *Id.* (internal quotation marks and citation omitted). In *Godwin*, this Court rejected the defendant's argument that in order to prove a § 1395dd(a) violation, a plaintiff must present evidence that the hospital treated him differently in its screening process from other patients with similar conditions. *Godwin*, 2001-NMCA-033, ¶¶ 59-60. We held that "a plaintiff's proof of the existence of a standard screening procedure for a person presenting a medical condition, and of a deviation from that standard screening procedure with respect to that person, is a prima facie showing of inappropriate screening." *Id.* ¶ 59. A plaintiff is not required to prove that he received disparate treatment. See *Gatewood v. Wash. Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C. Cir. 1991) ("[A] hospital fulfills the appropriate medical screening requirement when it conforms in its treatment of a particular patient to its standard screening procedures." (internal quotation marks omitted)).

{10} If a hospital determines that a patient has an emergency medical condition, the hospital must provide either:

- (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
- (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

§ 1395dd(b)(1)(A), (B). The United States Supreme Court has held that under § 1395dd(b)(1), a plaintiff is not required to show improper motive on the part of the hospital in order to establish that the hospital failed to provide the necessary stabilizing treatment for his emergency medical condition. See *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam) (reversing a decision by the Court of Appeals for the Sixth Circuit, which held that proof of improper motive was necessary for recovery under § 1395dd(b)'s stabilization requirement). In sum, neither proof of disparate treatment, nor proof of a hospital's improper motive is required to show a violation of § 1395dd of the EMTALA.

B. Bronston Testimony

{11} Plaintiff argues that the district court erred in allowing Bronston to “misinform” the jury that the EMTALA is only about providing access to emergency medical care for patients who cannot afford it, and to prevent discrimination. Plaintiff also contends that Bronston interjected a false issue by improperly referencing her health insurance coverage. “We review the admission or exclusion of evidence for abuse of discretion.” *Progressive Cas. Ins. Co. v. Vigil*, 2015-NMCA-031, ¶ 13, 345 P.3d 1096 (internal quotation marks and citation omitted), *cert. granted*, 2015-NMCERT-003, 346 P.3d 1163. “An abuse of discretion will be found when the trial court’s decision is clearly untenable or contrary to logic and reason.” *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 28, 329 P.3d 658 (internal quotation marks and citation omitted). “Such discretion . . . is a legal discretion to be exercised in conformity with the law.” *Id.* (internal quotation marks and citation omitted). When a district court exercises its discretion in admitting evidence based on a misapprehension of the law, it abuses its discretion, *see State v. Jaramillo*, 2012-NMCA-029, ¶ 17, 272 P.3d 682, and our review is de novo. *See State v. Duran*, 2015-NMCA-015, ¶ 11, 343 P.3d 207.

1. Bronston Testimony Concerning Questions of Law Is Inadmissible

{12} Rule 11-702 NMRA provides that an expert witness “who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” An expert witness “may give his opinion on matters pertaining to his field[,] which concern questions of fact.” *Beal v. S. Union Gas Co.*, 1960-NMSC-019, ¶ 29, 66 N.M. 424, 349 P.2d 337. “Testimony of expert witnesses is, in general, confined to matters of fact, as distinguished from matters of law.” *Id.* ¶ 30 (internal quotation marks and citation omitted).

{13} In the present case, Bronston was accepted, without objection, as an expert in emergency medicine and medical quality management. The focus of his testimony was on EMTALA and the interpretive guidelines for that federal statute. He gave appropriate expert testimony interwoven with impermissible legal conclusions. Bronston testified concerning the history

of the EMTALA as an anti-dumping statute. He explained that EMTALA advances fair and equal treatment for patients, and requires the hospitals’ screening procedures to be the same for all patients with the same symptoms. He also discussed how medical practitioners define and apply EMTALA related terms such as “emergency medical condition” and “reasonable clinical confidence.”

{14} Bronston also testified that the purpose of the EMTALA is to prevent hospitals from denying emergency medical care to patients without health insurance. According to Bronston, the EMTALA was enacted to address access to emergency care, not to address medical malpractice or negligence because there are “other laws and regulations that were already in place to deal with that.” Bronston repeatedly asserted that the EMTALA is geared toward providing access to care and does not apply to negligence or malpractice.

{15} Bronston also testified that the EMTALA “is . . . about” access to emergency medical treatment for patients without health insurance and requires uniform screening for patients with similar symptoms, “regardless of the individual’s ability to pay.” He repeatedly emphasized that the EMTALA requires physicians not to screen patients differently based on whether or not they have health insurance. At one point Bronston commented, “[i]n this case, the patient had insurance anyway[.]” On cross examination, Bronston admitted that the EMTALA protects “any individual” seeking emergency medical treatment and that the statute does not include any language concerning the patients’ ability to pay.

{16} Concerning his involvement in the present case, Bronston testified that he was hired to determine if there had been EMTALA violations, and whether Plaintiff had access to medical care such that she could be evaluated for an emergency condition. Regarding the deviation in procedure from Plaintiff’s first visit to Defendant’s emergency room to her second visit, Bronston stated that it was not necessary to perform the same level of screening on the second visit. Bronston did not testify regarding Defendant’s medical screening policies or procedures. Nor did Bronston testify as to whether Defendant deviated from its screening policies and procedures in treating Plaintiff. In fact, Bronston was not familiar with Defendant’s EMTALA policy at all. Bronston testified that there was no evidence to suggest that Plaintiff

did not receive fair and equal access to medical care. Nevertheless, he concluded that there was no violation of EMTALA.

{17} Plaintiff argues that Bronston’s interpretation of the EMTALA is inaccurate and misleading to the jury. Plaintiff’s argument illustrates the difficulty with allowing witnesses to testify to their own interpretation of the law. It has been long established that opinion testimony seeking to set forth a legal conclusion is inadmissible. *See Beal*, 1960-NMSC-019, ¶¶ 30, 32 (“Testimony of expert witnesses is, in general, confined to matters of fact, as distinguished from matters of law . . . [f]rom a number of given facts an expert witness may give his opinion as to what may or could have caused a certain result. For example, a medical expert may state as an opinion that a certain wound or cut could have been inflicted by a knife or by a rock, but he cannot, even as an expert, state that a certain individual or group is [or is not] responsible for what happened.” (internal quotation marks and citation omitted)); *see also State v. Clifford*, 1994-NMSC-048, ¶ 20, 117 N.M. 508, 873 P.2d 254 (noting that the district court has the exclusive province and responsibility of telling the jury whether conduct is or is not legal); *Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 22, 356 P.3d 1102 (holding that an affidavit in which the affiant made legal conclusions was properly excluded); *State v. Elliott*, 2001-NMCA-108, ¶ 22, 131 N.M. 390, 37 P.3d 107 (recognizing that opinion testimony is inadmissible when it seeks to state a legal conclusion); *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 46, 128 N.M. 434, 993 P.2d 751 (holding that testimony concerning insurance law in general, offered by the insurer’s expert witness, who was an attorney, was properly excluded because that testimony would have violated rule prohibiting opinion testimony that states legal conclusion). An expert witness permitted to testify to the meaning and application of a statute conveys what may be an erroneous legal standard to the jury and invades the court’s province in determining and instructing the jury on the applicable law. *See Beal*, 1960-NMSC-019, ¶ 33 (“Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court . . . by drawing conclusions of law[.]” (internal quotation marks and citation omitted)). Accordingly, we conclude that the district court abused its discretion in allowing Bronston to give his expert

opinion on the purpose and scope of the EMTALA.

2. Bronston's Testimony on the Purpose and Scope of the EMTALA Conveyed an Erroneous Legal Standard to the Jury

{18} Plaintiff argues that by repeatedly testifying that the purpose of the EMTALA is to provide access to care for uninsured or indigent patients, and that the EMTALA is not applicable to claims of negligence or malpractice, Bronston conveyed an erroneous and irrelevant legal standard to the jury. We agree.

{19} In *Godwin*, this Court recognized that, "in regard to screening, liability must be based on more than a mere misdiagnosis." 2001-NMCA-033, ¶ 64 (internal quotation marks and citation omitted). However, we also recognized that "[a] failure to examine or test pursuant to a standard screening procedure might support a medical malpractice claim under [s]tate law and at the same time also constitute evidence [sufficient] to support a claim for failure to give an 'appropriate medical screening' under [the EMTALA]." *Id.* (internal quotation marks and citation omitted). "The spheres of medical malpractice and failure to provide an appropriate medical screening may overlap." *Id.* ¶ 66. Following the logic of *Godwin*, evidence of negligence or medical malpractice may also constitute evidence of a failure to stabilize an emergency condition, under § 1395dd(b)(1). Thus, evidence of negligence or malpractice may also be evidence of an EMTALA violation under § 1395dd(a) and (b), and such evidence cannot be entirely disregarded as irrelevant to an EMTALA claim. *See, e.g., Godwin*, 2001-NMCA-033, ¶ 65 (noting that "if a hospital acts consistently with its standard screening procedures it is not liable even if those procedures are deficient under state medical malpractice law" (alteration, internal quotation marks, and citation omitted)).

{20} Bronston testified that the EMTALA is only applicable to patients that have been denied access to care, that negligence and medical malpractice are completely separate from EMTALA claims, and are addressed by separate statutes and regulations. Bronston's expert testimony as to his interpretation of the statute potentially confused and misled the jury about the applicable legal standard and what evidence was relevant to Plaintiff's EMTALA claim.

3. Bronston Improperly Raised the Issue of Plaintiff's Insurance Coverage

{21} Plaintiff argues that Bronston improperly raised the issue of her insurance coverage. Bronston testified concerning appropriate medical screening for an emergency medical condition under the EMTALA, explaining that the determination as to whether an emergency medical condition exists is within the discretion of the physician, and that the EMTALA requires that the determination be made "in a nondiscriminatory way. In other words, not to judge it differently because people have insurance or don't have insurance." As noted earlier, Bronston then commented, "[i]n this case, the patient had insurance anyway[.]"

{22} As previously discussed, in order to make a prima facie showing of inappropriate screening, the plaintiff must show "the existence of a standard screening procedure for a person presenting a medical condition, and of a deviation from that standard screening procedure with respect to that person." *Godwin*, 2001-NMCA-033 ¶ 59. "The question is not whether a plaintiff has insurance, or whether he was refused screening because of lack of insurance, but, rather, whether he was afforded an appropriate medical screening examination." *Summers*, 91 F.3d at 1137 (internal quotation marks omitted). Thus, a patient's ability to pay for emergency medical care and the question of whether Mikeska did or did not have health insurance was of no consequence to her EMTALA claim. Bronston's testimony regarding patients' ability to pay and regarding Plaintiff's health insurance coverage was irrelevant to Plaintiff's EMTALA claim and interjected a false issue into the trial.

C. Jury Instructions

{23} Plaintiff challenges three of the district court's instructions to the jury. We review the district court's instructions to the jury de novo. *See Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 ("We review jury instructions de novo to determine whether they correctly state the law and are supported by the evidence introduced at trial." (internal quotation marks and citation omitted)). We review jury instructions to determine whether a reasonable juror would have been confused or misdirected by the instruction. *See Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, ¶¶ 15-16, 130 N.M. 532, 27 P.3d 1019.

1. Instruction 19

{24} Instruction 19 reads: "This is a claim of a violation of the [EMTALA], which is a federal law that prevents participating hospitals from declining treatment to patients based on an inability to pay or based upon race, gender[,] or national origin." Defendant argues that the instruction misstates the law and interjects the false issue of a patient's ability to pay into the trial. We agree.

{25} The EMTALA is a federal law that requires a hospital emergency department to provide an appropriate medical screening examination to any individual seeking emergency medical treatment. *See* § 1395dd(a). It also requires that any individual suffering from an emergency medical condition be stabilized before being discharged or transferred from the emergency department. *See* § 1395dd(b). The initial purpose of the EMTALA, the hospitals' motivation for any improper screening, and the patients' ability to pay are not reflected in the language of the statute and as we previously discussed, are not relevant to the determination of whether an EMTALA violation has occurred. Therefore, an instruction to the jury that the function of the EMTALA is to prevent the denial of care based on the ability to pay, among other things, is neither justified by evidence nor by theory and led to "the interjection of a false issue into the trial." *See Torres v. El Paso Elec. Co.*, 1999-NMSC-029, ¶ 22, 127 N.M. 729, 987 P.2d 386 (internal quotation marks and citation omitted), *overruled on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *Archibeque v. Homrich*, 1975-NMSC-066, ¶ 9, 88 N.M. 527, 543 P.2d 820 ("We have held that it is error to instruct on issues which are unsupported by the evidence or which present a false issue."); *State ex rel. State Highway Comm'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 1966-NMSC-146, ¶ 4, 76 N.M. 587, 417 P.2d 68 ("It is well established that it is error to instruct on a proposition of law not supported by the evidence, or which presents a false issue."). We conclude that Instruction 19 misstates the law and is not relevant to the determination of whether an EMTALA violation occurred. Accordingly, we conclude that its usefulness is outweighed by its potential to confuse and misdirect the jury. *See Chamberland*, 2001-NMCA-045, ¶¶ 15-16.

2. Instructions 21 and 22

{26} Plaintiff contends that Instructions 21 and 22 served to mislead the jury about

which evidence they could consider in determining whether an EMTALA violation occurred. Instruction 21 states:

This case is related solely to [P] laintiff's claims of EMTALA violations. The medical negligence case against the physicians was a separate case that was decided by another jury. This is not a medical malpractice action or a claim for medical negligence against the physicians. Defendant . . . , denies *these claims* and contends that [Plaintiff] was appropriately screened under EMTALA on December 28, 2006[,] and treated by emergency department physicians who did not diagnose an emergency medical condition and thereafter appropriately discharged [Plaintiff] home in a stable condition. (Emphasis added.)

{27} The first part of Instruction 21 appropriately instructs the jury that their attention should be directed at whether there were violations of EMTALA, not whether there was medical malpractice or medical negligence. However, our concern lies with the indistinct denial of "these claims." This ambiguity not only opens the door for potentially conflicting considerations, but also sends conflicting messages to the jury.

{28} Throughout the trial, the jury was discouraged from considering evidence of medical negligence. Prior to jury selection, over Plaintiff's objection, the jury panel was instructed that "this is not a medical negligence case against the physicians[, t]he medical negligence case against the physicians was a separate case that was decided by a different jury[, and t]he sole

issue for [the] jury to decide in this case is whether the hospital is in violation of the [EMTALA]." Bronston was permitted to testify numerous times that the EMTALA is not applicable to medical negligence or medical malpractice.

{29} As previously discussed, evidence of medical negligence or medical malpractice may overlap with evidence of inappropriate screening or failure to stabilize an emergency medical condition under § 1395dd(a) and (b). However, the distinction between evidence of negligence or malpractice and evidence of EMTALA violations was misstated and overemphasized throughout the trial, creating the potential for the jury to be confused and misled concerning the evidence that they could properly consider.

{30} Instruction 22 is also misleading and misdirects the jury. It states:

You have heard evidence that [Plaintiff] was misdiagnosed[.] You are not to concern yourselves with this information nor should it have any bearing on your verdict in this case. If [Plaintiff] was appropriately screened but misdiagnosed in the context of an [EMTALA] claim, it does not mean a violation occurred.

Beginning with the second sentence, the instruction is in direct conflict with *Godwin*. See *Godwin*, 2001-NMCA-033, ¶ 64 ("[F]ailure to examine or test pursuant to a standard screening procedure might support a medical malpractice claim under [s]tate law and at the same time also constitute evidence of differential treatment sufficient to support a claim for failure to give an appropriate medical screening under the [EMTALA]." (alteration, internal

quotation marks, and citation omitted)). The jury is allowed to consider evidence of the misdiagnosis, but only to the extent, if any, that it applies to the issues of whether Plaintiff received the appropriate medical screening examination, or whether Defendant failed to stabilize Plaintiff before her discharge.

{31} We conclude that Instruction 21 with Instruction 22 should not have been given. See *Atchison, Topeka & Santa Fe Ry. Co.*, 1966-NMSC-146, ¶ 6 ("Instructions[,] which are repetitious[,] or which unduly emphasize certain portions of the case should not be given."); see also *Dunleavy v. Miller*, 1993-NMSC-059, ¶ 22, 116 N.M. 353, 862 P.2d 1212 (holding that an instruction that was "unnecessary and potentially confusing and serves to over-emphasize one portion of the case" was improperly given).

III. CONCLUSION

{32} In conclusion, we hold that the district court erred in allowing an expert witness to testify concerning questions of law. We further hold that the district court erred in allowing testimony and instructing the jury concerning the EMTALA's initial purpose and patients' ability to pay, and by allowing testimony and instructing the jury to disregard evidence of medical malpractice or medical negligence on Plaintiff's misdiagnosis. For these reasons, we reverse and remand for further proceedings.

{33} **IT IS SO ORDERED.**

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge
J. MILES HANISEE, Judge



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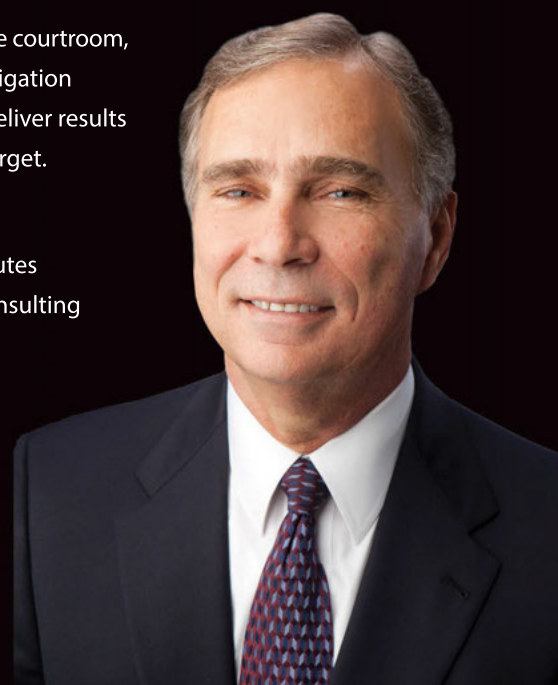
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The Law Office of Robert F. Turner is receiving applications for an associate attorney position to practice in the areas of Criminal matters, some civil and domestic matters. Strong academic credential, and research and writing skills are required. We offer a great work environment and opportunities for future growth. Office is located in Deming, NM. Telephone Number 575-544-4306. Please send your cover letter and resume to smvturnerlaw@qwestoffice.net

Assistant District Attorney

The Second Judicial District Attorney's office in Bernalillo County is looking for both entry-level and experienced prosecutors. Qualified applicants will be considered for all divisions in the office. Salary and job assignments will be based upon experience and the District Attorney Personnel and Compensation Plan. If interested please mail/fax/e-mail a resume and letter of interest to Jeff Peters, Human Resources Director, District Attorney's Office, 520 Lomas Blvd., N.W., Albuquerque, NM 87102. Fax: 505-241-1306. E-mail: Jobs@da2nd.state.nm.us or go to www.2nd.nmdas.com. Resumes must be received no later than 5:00 pm on Friday November 4, 2016 to be considered.

Classified

Positions

Staff Attorney

Albuquerque-based Senior Citizens' Law Office, Inc. seeks a staff attorney. A full description of the position and application process is posted on SCLO's home page under "News" at www.sclonm.org

Attorney

The Fifth Judicial District Attorney's office has an immediate position open to a new or experienced attorney. Salary will be based upon the District Attorney Personnel and Compensation Plan with starting salary range of an Associate Trial Attorney to a Senior Trial Attorney (\$41,685.00 to \$72,575.00). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to DLuce@da.state.nm.us.

Attorney(s)

Walsh Gallegos Treviño Russo & Kyle PC is a law firm devoted to serving public education. We have been working in partnership with leaders in public education since 1983 and strive to make a difference in the board room, the courtroom and, most importantly, the classroom. Our Albuquerque office is currently seeking an attorney(s) licensed in New Mexico to help us continue our work. The position involves the representation of public school districts and other educational institutions in areas of employment, governance, and student issues, including civil rights/constitutional law. Attention to detail and excellent research and writing skills are required. Public speaking experience, strong interpersonal skills, and experience with school districts or governmental entities are preferred. In addition to fulltime positions, the firm will consider candidates seeking contract or short term assignments with the possibility of developing into a full time position. Please send resume and writing sample to jobs@wabsa.com. Because we sometimes have openings in multiple offices, please indicate the city in the subject line of your email.

Attorney

O'Brien & Padilla, P.C., an AV-rated insurance defense firm, is seeking an attorney with more than 3 years of civil litigation experience. The firm's area of practice include insurance coverage, bad faith defense, personal injury defense, Worker's Compensation defense and general civil defense. Competitive salary and benefits offered. Send resume and references to: rpadilla@obrienlawoffice.com

Request for Proposals to Provide Legal Services

The New Mexico Medical Insurance Pool (NMMIP) is seeking proposals to provide legal services and representation as General Counsel. NMMIP is a non-profit entity legislatively created in 1986 to provide access to health insurance coverage to all residents of New Mexico who are denied adequate health insurance. With the implementation of the Affordable Care Act, current activities also include transitioning existing members to other coverage. The selected Offeror will be responsible for interpretation of federal and state statutes and appropriate representation in administrative and judicial proceedings regarding NMMIP program and operations. Required services include: attendance at all Board and relevant Committee meetings; representing NMMIP's interest in federal and state lawsuits, audits and evaluations; procurement and contract negotiations; and any other legal matters regarding NMMIP operations. Minimum of five years experience is required and experience in health insurance is strongly desired. Proposal information can be accessed at www.nmmip.org.

Senior Trial Attorney

The 13th Judicial District Attorney's Office is accepting resumes for an experienced Attorney to fill the position of Senior Trial Attorney in the Valencia (Belen), Office. This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. Admission to the New Mexico State Bar and a minimum of seven years as a practicing attorney are also required. Salary commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, P.O. Box 1750, Bernalillo, NM 87004 or via E-mail to RAragon@da.state.nm.us Deadline for submission: Open until filled.

Attorney - Advanced Position Office of Superintendent of Insurance State of New Mexico

The Office of Superintendent of Insurance (OSI) is seeking an attorney to fill a Lawyer-A position in the Office of Staff Counsel. Staff Counsel represents client bureaus including Financial Audit, Property & Casualty, Title, Workers' Compensation, Company Licensing, Producer Licensing, Examinations, Consumer Assistance, Investigations, Life & Health, and Managed Health Care. In addition, Staff Counsel initiates rulemakings required by OSI and prepares bulletins interpreting insurance statutes and rules. Staff Counsel may provide legal advice and services directly to the Superintendent of Insurance in matters not involving adjudicatory proceedings. The position requires a J.D. degree, at least five (5) years experience practicing law, and a valid New Mexico law license. Experience in insurance law, administrative law, and/or litigation is desirable. Any interested persons must apply through the State Personnel Office at <http://www.spo.state.nm.us/> by clicking on "View Job Opportunities & Apply" and submitting an application for Lawyer-Advanced, OSI #10108638 (Job Number 2016-03816). The closing date for this listing is October 27, 2016. The agency contact is Margaret Caffey-Moquin, Chief Staff Counsel. The salary range is \$44,782.40 to \$77,916.80.

Associate Attorney

Gorence & Oliveros, P.C. is seeking an associate attorney to join the firm. Must have impeccable research and writing skills and excellent credentials. Three (3) years of experience is required. This is not a litigation position. Competitive salary and benefits. Please submit a cover letter, resume, references and at least one writing sample directed to the Hiring Partner via email only to al@golaw.us.

Senior Trial Attorney

The 13th Judicial District Attorney's Office is accepting resumes for an experienced Attorney to fill the position of Senior Trial Attorney in the Valencia (Belen), Office. This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. Admission to the New Mexico State Bar and a minimum of seven years as a practicing attorney are also required. Salary commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, P.O. Box 1750, Bernalillo, NM 87004 or via E-mail to RAragon@da.state.nm.us Deadline for submission: Open until filled.

Entry-Level and Mid-Level Prosecutors

Let's face it, not all legal jobs matter. Some jobs are just about money. And if that's what you're looking for, that's ok, but this is not the job for you. But if you want a job where you can truly make a difference in your community, where you seek truth and justice, try cases, and hold criminal offenders responsible for their actions, come join our team. The Twelfth Judicial District Attorney's Office (Otero and Lincoln Counties) has vacancies for entry-level and mid-level prosecutors. We try more cases per capita than nearly every other judicial district in the state. If you're interested in learning more about the position or want to apply, email your resume and a cover letter to John Sugg at 12thDA@da.state.nm.us or mail to 12th Judicial District Attorney's Office, 1000 New York Ave., Room 101, Alamogordo, NM 88310

Attorney

The Law Office of J. Douglas Compton is seeking an attorney with a minimum of 0-3 years' experience in personal injury litigation or 3 years' litigation experience, to work in a busy insurance defense practice. Job requirements include: A license to practice law in good standing in New Mexico and current on all CLE requirements; Experience with auto, truck accidents, and uninsured, underinsured motorists' cases; Demonstrated trial ability in the State of New Mexico is needed with experience in Bernalillo County Courts preferred; Must be able to travel to attend trials, arbitration, mediations and hearings; Attorney will defend lawsuits against GEICO insureds and represent GEICO in UM/UIM suits in all courts in New Mexico; Must be computer proficient and be able to use a keyboard. Position is commensurate with experience. Please submit your application to Careers-geico.com

Sixth Judicial District Court Request For Proposals – No. 236-17-001

The Sixth Judicial District Court is requesting proposals for a six-month contract that, pursuant to NMSA 1978, §13-1-150, may be extended up to three (3) one-year optional renewals and one six (6) month renewal option. The term of the initial contract will be from January 1, 2017 through June 30, 2017. As required by NMSA 1978, §13-1-191.1 the successful contractor will be required to complete and file with the Court, a Campaign Contribution form disclosing contributions, if any, to any of the four District Judges in this judicial district. Only attorneys licensed to practice law in New Mexico will be considered for the following contract: Pro-Se Officer, Grant County; The Contractor shall provide guidance (not legal advice) to Self-Represented Litigants for cases filed in Grant County of the Sixth Judicial District Court in which at least one party is not represented by counsel, as directed by the Court. The Contractor will be paid a fixed rate each month for services provided. Each applicant will be evaluated on his or her experience as a trial attorney with a focus on family law and domestic violence. Applicants must be available to spend at least eighteen (18 hours) each month, in addition to two (2) hours each month for administrative matters, subject to change, meeting with and assisting pro se litigants. The Contractor shall offer to conduct a lecture of not longer than one (1) hour twice each month for persons who plan, but have not yet filed, a domestic case in Grant County. The participants should be encouraged to purchase from the District Court Clerk and bring the appropriate form package to the lecture. The purpose of the lecture is to inform prospective litigants in a domestic case how to complete the form package properly. The time spent conducting this lecture is time that is part of the twenty (20) hour maximum. Time and Place for Submitting a Proposal: All interested attorneys should submit a proposal and a Resume not later than 4:00 pm on Wednesday, December 7, 2016. All proposals shall be sealed and clearly marked "Proposal for Grant County Pro – Se Officer" on the envelope. All requests shall specify the contract the applicant is applying for and the proposed amount. Proposals that are not timely received or which do not comply with the proposal procedure, may be rejected at the Court's discretion. Submit all proposals to: Melissa Frost, Court Executive Officer/CFO Sixth Judicial District Court – Administration Department, 201 N. Cooper Street, 1st Floor, Silver City, NM 88061 (if hand-delivered), P.O. Box 2339, Silver City, NM 88062 (if mailed). If you have questions concerning this Request for Proposals you may contact: Marah deMeule, Staff Attorney, Sixth Judicial District Court, P. O. Box 2339, Silver City, NM 88062, (575) 574-4024.

Attorney

Allen, Shepherd, Lewis & Syra, P.A. is seeking a New Mexico licensed attorney with 0-5 years of litigation experience. Experience in worker's compensation, construction defects, professional malpractice or personal injury preferred. Candidates considered for a position must have excellent oral and written communication skills. Available position is considered regular and full time. Please send resume with cover letter, unofficial transcript, and writing sample to HR@allenlawnm.org or Allen, Shepherd, Lewis & Syra, P.A. Attn: Human Resources, PO Box 94750, Albuquerque, NM 87199-4750. All replies will be kept confidential. EEO.

Receptionist: Bilingual

Civil litigation firm in search of a self-motivated individual interested in employment as a receptionist. The right candidate must be skilled in using Microsoft applications including Word, Excel, Outlook and Exchange. Must be bilingual. Please email resumes to: debbieprimmer@newmexicocounsel.com. All resumes are kept confidential.

Paralegal

Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Services

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Experienced Paralegal

Experienced paralegal available for civil litigation cases, working from my own office. Excellent references. civilparanm@gmail.com.

Nurse Paralegal

Specialist in medical chronologies, related case analysis/research. Accurate, knowledgeable work product. For resume, work samples, references: maryj.daniels@yahoo.com.

Office Space

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620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of \$550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

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Miscellaneous

Will for Joe A. Branch Jr

Searching Will and Trust for Joe A. Branch Jr. deceased 8/13/16 in Espanola. Please call Joseph Branch (505) 440-3651.

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

SUBMISSION DEADLINES

All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

For more advertising information, contact:
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