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Brief for Washington Legal Foundation as Amici Curiae, Arguedas v. Seawright

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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ARTHUR ARGUEDAS, BARBARA ARGUEDAS, and HELEN BRANSFORD,

Plaintiffs/Appellants,

v. Ct. App. No. 35,699

GARRET SEAWRIGHT,

Defendant/Appellee.

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE

On Appeal from the First Judicial District Court, County of Santa Fe
No. D-0101-CV-2013-10293, Hon. Sarah M. Singleton

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

INTERESTS OF *AMICUS CURIAE*

Founded in 1977, Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all 50 states, including New Mexico. WLF devotes a large share of its resources to promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears in state and federal courts to oppose excessive, unwieldy, and otherwise improper class-action lawsuits. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Thornell v. Seattle Service Bureau, Inc.*, 363 P.3d 587 (Was. 2015) (en banc).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles analyzing various legal and policy issues related to class-action litigation. *See, e.g.*, Christopher Roach, *After* Campbell-Ewald v. Gomez, *Can a Complete Settlement Offer Moot a Potential Class Action?*, WLF Legal Backgrounder (April 15, 2016); Theodore B. Olson, *Supreme Court Should Use Trio of Cases to Reaffirm that Uninjured Plaintiffs Have No Place in Class Actions*, WLF Legal Backgrounder (September 25, 2015).

WLF does not condone unfair or deceptive business practices, and it supports sensible legislative efforts to protect consumers from actual harm. At the same time, WLF has long opposed efforts to transform the class action from a

procedural device designed to avoid the inefficiencies of deciding the same claims repeatedly into a means of altering the parties' substantive rights. Although the statutory basis for Plaintiffs' class claim below expressly limits class-wide recovery to *actual* damages, Plaintiffs seek to effectively rewrite the law to allow for class-wide recovery of *statutory* damages. WLF believes that granting Plaintiffs the extra-statutory relief they seek would not only sweep aside the New Mexico Legislature's carefully calibrated public-policy goals—with disastrous unintended consequences—but it would also effectuate the kind of substantive change in the law that the New Mexico Constitution reserves exclusively to the Legislature.

STATEMENT OF THE CASE

The facts of this case are set out in greater detail in the parties' briefs. WLF wishes to highlight several facts of relevance to the issues on which this brief focuses.

Plaintiffs are State Farm auto policyholders who allege that Mr. Seawright,[1] a State Farm insurance agent, failed to provide them with adequate information to make informed decisions about whether (and in what amount) they should purchase uninsured or unknown motorist ("UM") coverage. Although no Plaintiff

[1] Although Plaintiffs' operative complaint names as defendants 479 State Farm insurance agents in New Mexico, Mr. Seawright was the only defendant to be served with the complaint in this litigation. Accordingly, Mr. Seawright is the only Defendant/Appellee on appeal.

(or class member) suffered any actual damages because of their UM coverage,[2] Plaintiffs brought a putative class action alleging that Mr. Seawright violated New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-1-1 to -19 ("the UPA"), which entitles anyone harmed by an unfair business practice to "bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater." § 57-12-10(B).

Because § 57-12-10(B) of the UPA requires a "loss of money or property" to sue and § 57-12-10(E) expressly limits class-wide recovery to "actual damages," Mr. Seawright moved to dismiss Plaintiffs' individual and class claims. In partially granting Mr. Seawright's motion to dismiss, the trial court held that although Plaintiffs had pleaded viable individual claims for statutory damages under the UPA, Plaintiffs' claim for class-wide statutory damages failed as a matter of law under § 57-12-10(E) because the alleged class excluded anyone who suffered actual damages. Rather than pursue their individual claims to final judgment, however, Plaintiffs invited dismissal with prejudice of all claims. The trial court obliged, dismissing Plaintiffs' operative complaint, with prejudice.

On appeal, Plaintiffs ask this Court to construe § 57-12-10(E) to permit class-wide recovery of statutory damages. In the alternative, Plaintiffs contend that

[2] Because no Plaintiff or putative class member alleges any auto accident with an uninsured or unknown motorist, the selection of UM coverage did not affect the amount of insurance available for any claim.

§ 57-12-10(E)'s express limitation of class-wide recovery to "actual damages" lacks any "rational basis" in violation of the Equal Protection Clause of the New Mexico Constitution, N.M. Const. art. II, § 18.

INTRODUCTION

Although Plaintiffs never presented an Equal Protection claim to the district court (nor notified the Attorney General of their constitutional challenge as required by NMSA 1978, § 44-6-12), Plaintiffs argue on appeal that the UPA's perfectly sensible distinction—between those who have actually suffered "a loss of money or property" and those who have not—lacks any "rational basis." *See* Pl's Br. at 4, 36-39. That argument ignores the deliberate balance of competing public-policy interests that the New Mexico Legislature struck when it crafted the UPA's private remedy in § 57-12-10. That commonsense balance seeks to protect New Mexico consumers by incentivizing private litigation to deter unfair and deceptive practices, while at the same time protecting New Mexico's courts and business owners from being overwhelmed with abusive class-action lawsuits that seek to impose massive liability unrelated to any actual harm.

Far from being "irrational," as Plaintiffs contend, § 57-12-10(E) reflects the widespread consensus that the aggregation of statutory damages in a single class action creates an intolerable risk of over-deterrence. For this very reason, New Mexico is hardly alone in barring the minimum recovery of statutory damages in a

class action. Indeed, a plethora of state and federal consumer-protection laws contain identical class-action remedy provisions. Yet under Plaintiffs' sui generis view of equal protection, all of those laws presumably lack any "rational basis."

Unsatisfied with the consumer-protection regime the Legislature actually enacted, Plaintiffs argue in favor of a judicially created liability regime that would over-incentivize the filing of unmeritorious class-action suits and subject companies to tremendous liability for bare violations of the law. But upsetting § 57-12-10's statutory balance, as Plaintiffs now urge on appeal, would completely upend the Legislature's carefully calibrated policy goals. Apart from the harm that would befall New Mexico's business community, such an approach to "consumer protection" would also undercut the UPA's remedial purpose to the detriment of consumers themselves. They, too, would undoubtedly bear the burden of such tremendous liability in the form of lower wages and increased prices for goods and services.

Notwithstanding the delicate balance of competing interests that the UPA has long sustained, Plaintiffs seek to rewrite the statute for their own purposes. To accomplish that end, Plaintiffs invite this court to wrest control of public policy away from the state legislature, to which the New Mexico Constitution exclusively assigns that role, and to hand it over to plaintiffs' attorneys seeking to accomplish in court what they have failed thus far to achieve via the democratic process. In

doing so, Plaintiffs endeavor to override the bedrock constitutional principle that "it is the particular domain of the legislature, as the voice of the people, to make public policy." *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609. As shown below, this Court should reject Plaintiffs' call to undertake the kind of substantive change in statutory law that the New Mexico Constitution reserves exclusively for the Legislature.

ARGUMENT

I. THIS COURT SHOULD HONOR THE CAREFUL STATUTORY BALANCE THE NEW MEXICO LEGISLATURE STRUCK IN CRAFTING THE UPA

A. The Private Remedy in § 57-12-10 Reflects the Legislature's Desire to Incentivize Suits to Deter Unfair Practices While Also Protecting New Mexico Courts and Businesses from Abusive Class Actions

Entitled "Private remedies," § 57-12-10 of the UPA "encourages consumers to initiate, and attorneys to handle, claims where the amounts recoverable are small." *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 631 (D.N.M. 2007) (citing *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 25, 124 N.M. 606). Although the UPA's legislative history is scant,[3] New Mexico's Uniform State and Rule Construction Act, NMSA 1978, §§ 12-2a-1 to -20, makes clear that "[t]he text of a

[3] Originally enacted in 1967 and modeled on the Uniform Deceptive Trade Practices Act, the UPA was amended in 1987 before taking its current form in 2005. According to the 2005 Senate bill, none of the 2005 amendments altered any of the previous language contained in § 57-12-10(E), which governs class actions. *See* S.B. 118, 47th Leg., 1st Sess. (N.M. 2005).

statute … is the primary, essential source of its meaning." NMSA 1978, § 12-2A-19.

Section 57-12-10(B) of the UPA provides that "[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater." NMSA 1978, § 57-12-10(B). If the trier of fact determines that the defendant "willfully engaged in the [unfair] trade practice," the court "may award up to three times actual damages or three hundred dollars ($300), whichever is greater." § 57-12-10(B).

To further incentivize the bringing of individual claims in cases where the potential recovery is modest, § 57-12-10(C) requires courts to "award attorney fees and costs to the party complaining of an unfair or deceptive trade practice … if the party prevails." § 57-12-10(C). By providing for attorneys' fees, the UPA makes individual litigation economically feasible. *See, e.g., Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 45, 136 N.M. 599 ("Plaintiffs' argument concerning the prohibitive cost of bringing individual suits is belied by the fact that the UPA awards attorney fees and costs to a successful litigant."); *Jones*, 1998-NMCA, ¶ 25 ("[T]he attorneys' fees awarded in this case are not nominal; they … reflect the full

amount of fees fairly and reasonably incurred by Plaintiff in securing an award under the UPA.").

Although the New Mexico Legislature authorized class actions under § 57-12-10(E), it did not embrace the aggregation of claims at all costs. Rather, it expressly limited the scope of available class-wide recovery to "actual damages":

> In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section [*i.e.*, statutory damages] and may award members of the class such *actual damages* as were suffered by each member of the class as a result of the unlawful method, act or practice.

NMSA 1978, § 57-12-10(E) (emphasis added). Thus, the UPA explicitly precludes class-wide recovery of *statutory* damages in class actions. *See Brooks*, 2004-NMCA-134, ¶ 45 ("[A]ny relief realized by class members is limited to actual damages; they are barred from collecting statutory or treble damages."). Moreover, to deter frivolous suits, § 57-12-10(C) provides that the "court shall award attorney fees and costs to the party charged with an unfair or deceptive trade practice … if it finds that the party complaining of such trade practice brought an action that was groundless." § 57-12-10(C).

By permitting defendants to obtain attorneys' fees for successfully defending "groundless" suits, the Legislature set out to protect New Mexico businesses from unmeritorious litigation. Similarly, by limiting class-wide recovery to actual damages, the Legislature sought to cabin the financial incentive for frivolous or

vexatious class actions. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (recognizing "the financial incentive that class actions offer to the legal profession"); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 960 (9th Cir. 2009) (noting "considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement") (internal quotations omitted).

Because § 57-12-10(E) already allows for class-wide recovery of "actual damages," the Legislature simply had no need to further "incentivize" litigation by aggregating statutory damages in a class action. "This damage limitation is consistent with a policy determination that while treble or statutory damages … are available in actions under consumer-protection statutes to encourage customers with smaller amounts of damages to bring their claims, … statutory damages are not awarded in class actions because class-action lawsuits deter violations of the law by permitting the aggregation of claims." *Felix v. Ganley Chevrolet, Inc.*, 49 N.E.3d 1224, 1231 (Ohio 2015) (construing Ohio's statutory analog to the UPA) (internal citations omitted).

After all, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.

1997)). Because the UPA's class-action mechanism already incentivizes small recoveries by allowing the aggregation of claims for actual damages, allowing the minimum recovery of class-wide *statutory* damages in class actions (as Plaintiffs urge here) would serve no legitimate purpose. As one scholarly analysis of state consumer-protection acts has explained:

> Statutory damages in class actions serve little purpose. Statutory damages were meant to provide an individual plaintiff with the ability to bring a lawsuit when the anticipated damages are otherwise too low to provide an attorney with adequate incentive to take a case. Similarly, class actions were meant to provide incentive to sue through the aggregation of claims when individual damages are otherwise too low. Thus, the incentive-creating effect of statutory damages is rendered duplicative when statutory damages are available in a class action.

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 61 (2005).

At the same time, the UPA provides a variety of means to protect the public from unfair business practices. Section 57-12-10's minimum statutory damages of $100 (which may be trebled upon a showing of "willfulness"), combined with an award of attorneys' fees and costs to any prevailing plaintiff, provide ample economic incentive for aggrieved persons (and their attorney(s)) to pursue individual claims. As the New Mexico Supreme Court has observed, "[t]his award to parties who successfully press their claims, and uphold them on appeal, makes the private remedy an effective one, especially in view of the sometimes minor

nature of the damage claim that the statute specifically contemplates, $100 to $300." *Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 27, 110 N.M. 314.

Nor does § 57-12-10 exist in a vacuum. Beyond the private remedy, the UPA provides an elaborate scheme of *public* enforcement to deter and punish unfair business practices that harm consumers. The UPA authorizes the New Mexico Attorney General to issue regulations necessary to enforce any provision of the statute. *See* NMSA 1978, § 57-12-13. The Attorney General may also bring suit to enforce the UPA and may petition the court for "temporary or permanent injunctive relief and restitution" to stop any unlawful practice. § 57-12-8(A), (B). In enforcement actions brought by the Attorney General, the UPA makes each and every violation punishable by a civil penalty of up to $5,000. *See* § 57-12-11. In lieu of bringing suit, the Attorney General is further authorized to enter into binding settlements with violators who agree not only to cease all unlawful conduct but also to "make restitution to all persons of money, property, or other things received from them in any transaction related to the unlawful practice." § 57-12-9(A).

In providing a private action, then, § 57-12-10 constitutes merely one thread of an intricate tapestry of public *and* private incentives, deterrents, and remedies—all calculated to protect New Mexico consumers from actual harm while simultaneously protecting New Mexico's courts and business owners from being

overwhelmed by abusive litigation. As explained in more detail below, the UPA's carefully calibrated balance of incentives and deterrents reflects the New Mexico Legislature's considered policy judgments and, contrary to Plaintiffs' urging, should not be so casually discarded.

B. Allowing Class-Wide Recovery of Statutory Damages Would Upset § 57-12-10's Delicate Statutory Balance and Invite Disastrous Consequences

Reversing the trial court's sound construction of § 57-12-10(E), as Plaintiffs urge here, would sweep aside the UPA's careful statutory balance by permitting class-wide recovery wholly unrelated to any actual damages suffered by a plaintiff. Under such a judicially created liability scheme, New Mexico courts would be inundated by class actions seeking to impose massive liability on New Mexico businesses for technical violations of the law that caused *de minimis* damages or—in many cases, such as this one—*none* at all.

Indeed, permitting plaintiffs to use § 57-12-10(E)'s class-action mechanism to recover class-wide statutory damages would over-incentivize the filing of unmeritorious suits and expose companies to tremendous liability for bare violations of the law. *See, e.g.*, William B. Rubenstein, *Newberg on Class Actions* 4:83 (5th ed. 2012) ("When statutory damages are aggregated in a class action … the total amount of damages that is theoretically available in such a case could be astronomical, leading some courts to express concern about the combination of

such statutory damages and class action aggregation."); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 10, 111 (2009) ("When combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.").

These concerns are magnified exponentially in the context of a suit like this one, which seeks to impose liability on the basis of a purely inchoate injury resulting in no actual loss. Such a class action, completely unmoored from actual damages, would result in a "horrendous and annihilating punishment." *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972); *see Stillmock v. Weis Mkts., Inc.*, 385 F. Appx. 267, 279 (4th Cir. 2010) (Wilkinson, J., concurring specially) ("It staggers the imagination to believe that Congress intended to impose annihilating damages on an entire company and the people who work for it for lapses of a somewhat technical nature and in a case where not a single class member suffered actual harm.").

The resulting over-deterrence—in the form of massive liability—would not only harm the business community, but it would radically distort the UPA's remedial purpose. *See, e.g.*, *Stillmock*, 385 F. Appx. at 276 (Wilkinson, J., concurring specially) (noting that the "two independent provisions," if combined,

would "create commercial wreckage far greater than either could alone"); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purposes of both statutory damages and class actions."); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1887 (2006) ("[C]lass certification layered on top of per-violation damages … would distort, rather than facilitate, the remedial scheme of the statute."); Schwartz & Silverman, *supra*, at 44 ("Unless judges interpret state [U]PAs with caution, plaintiffs' lawyers will continue to exploit [U]PAs to attack unpopular companies for hypothetical injuries without providing any real benefit to society.").

Plaintiffs' challenge to § 57-12-10(E) thus fails to appreciate something the UPA's drafters seem to have understood quite well: "that more litigation does not necessarily mean more consumer protection." Joanna M. Shepherd-Bailey, *Consumer Protection Acts or Consumer Litigation Acts?: A Historical and Empirical Examination of State CPAs* 16 (2013). Indeed, New Mexico's consumers would bear the cost of such over-deterrence "through increased prices and lower wages." *Id.* at 25; *see also,* Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 84 (2010) ("[T]he consumer class action by itself solves

one of the fundamental economic problems that [U]PAs were intended to correct …. Once a putative class has been formed, all the other provisions of [U]PAs [*i.e.*, minimum statutory damages] are unnecessary and, indeed, potentially harmful to consumers.").

Far from being "irrational" then, as Plaintiffs contend, § 57-12-10(E) reflects the widespread consensus that the aggregation of statutory damages in a single class action creates an intolerable risk of over-deterrence. "Particularly acute problems of distortion are likely to arise where class actions are brought to enforce causes of action imposing a penalty for statutory violations." *Developments in the Law—Class Action*, 89 Harv. L. Rev. 1329, 1361 (1976) ("The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counter-productive to statutory policies.").

In light of that consensus, New Mexico is hardly an outlier among states in barring the minimum recovery of statutory damages in a class action.[4] *See*, *e.g.*, Cal. Civ. Code § 2988.5(a)(2) ("[A]s to each member of the class no minimum recovery shall be applicable."); Colo. Rev. Stat. § 5-19-235(d) ("In a class action …, the minimum damages … do not apply."); Haw. Rev. Stat. § 489-7.5(b)(1)

[4] Nor is § 57-12-10(E) the only New Mexico statute that limits class-action relief in this way. The Remote Financial Service Units Act, NMSA 1978, § 58-16-15(B), similarly provides that "[i]n the case of a class action, no minimum recovery for each member of the class shall be applicable and the total recovery in any such action is limited to the actual damages sustained by members of the class." NMSA 1978, § 58-16-15(B) (2017).

("The minimum $1,000 recovery … shall not apply in a class action."); Ind. Code § 24-4.5-5-203(a)(2) ("[A]s to each member of the class no minimum recovery is applicable."); Ky. Rev. Stat. 367.983(1)(c) ("In the case of a class action," the court may award "no minimum recovery as to each member."); Mass. Gen. Laws ch. 167B § 20(a)(2)(B) ("[A]s to each member of the class no minimum recovery shall be applicable."); Mich. Comp. Laws § 493.112(3)(c) ("Recovery in class actions shall be limited to actual damages"); N.Y. C.P.L.R. § 901(b) ("[A]n action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."); Ohio Rev. Code § 1351.08(A)(2)(b)(ii) ("[A]s to each member of the class no minimum recovery is applicable."); Okla. Stat. Tit. 14A, § 5-203(1)(b)(ii) ("[A]s to each member of the class no minimum recovery shall be applicable" and recovery is limited to "actual damages"); Wyo. Stat. § 40-19-119(a)(iii) ("In the case of a class action," there shall be "no minimum recovery as to each member"). Yet under Plaintiffs' peculiar theory on appeal, each of these statutes lacks a "rational basis."[5]

[5] The United States Congress similarly has cabined class-wide recovery of statutory damages under federal consumer protection laws. *See, e.g.*, 15 U.S.C. § 1640(a)(2)(B) (Truth in Lending Act) ("[I]n the case of a class action … no minimum recovery shall be applicable."); 15 U.S.C. § 1692k(a)(2)(B) (Fair Debt Collection Practices Act) ("[I]n the case of a class action … [recovery shall be] without regard to a minimum individual recovery."); 15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfer Act) ("[I]n the case of a class action … no minimum recovery shall be applicable.").

It is no mystery why plaintiffs' attorneys desire to refashion § 57-12-10(E) to their liking. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum [$300] award) by the number of individuals in a nationwide or statewide class." Scheuerman, *supra,* at 114. As a result, "plaintiffs' lawyers, not plaintiffs, receive a windfall because they receive a percentage of the statutory fees multiplied by potentially thousands or millions of class members, even though statutory damages were unnecessary to create incentive to bring the suit." Schwartz & Silverman, *supra*, at 61. But Plaintiffs' attorneys' own pecuniary interest is no basis for this Court to rewrite the Legislature's duly enacted statute. The decision below should be affirmed.

II. IT IS FOR THE NEW MEXICO LEGISLATURE, *NOT* THE COURTS, TO CREATE SUBSTANTIVE LAW

This Court should reject Plaintiffs' call to impermissibly alter the careful statutory balance that the New Mexico Legislature has watchfully maintained for many decades. Unlike the U.S. Constitution, which merely implies that the three branches of government are separate, Article III, Section 1 of the New Mexico Constitution expressly prohibits any branch of state government from usurping the power of another branch. N.M. Const. art. III, § 1 ("The powers of the government of this state are divided into three distinct departments … and no person or collection of persons charged with the exercise of powers properly belonging to

one of these departments, shall exercise any powers properly belonging to either of the others."). Such usurpation occurs "when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 23, 125 N.M. 343. The New Mexico Supreme Court has recognized this constitutional provision as "one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty." *Id.* ¶ 20.

In New Mexico—as in every other state (and the federal system)—the "[l]egislature makes, the executive executes, and the judiciary construes the laws." *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, ¶ 9, 36 N.M. 151. Consistent with this tripartite separation of powers, "only the legislative branch is constitutionally established to create substantive law." *Johnson*, 1998-NMSC-015, ¶ 21; *see State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶ 42, 41 N.M. 219 ("The legislative branch, and it alone within the limits of the Constitution, can create substantive law."); *State v. Armstrong*, 1924-NMSC-089, ¶ 106, 31 N.M. 220 ("The Legislature possess[es] the sole power of enacting law.").

Likewise, the New Mexico Supreme Court has consistently "recognized the unique position of the Legislature in creating and developing public policy." *Johnson*, 1998-NMSC-015, ¶ 21; *see Hartford Ins. v. Cline*, 2006-NMSC-033, ¶ 8, 140 N.M. 16 ("The predominant voice behind the declaration of public policy of

the state must come from the legislature."); *Torres*, 1995-NMSC-025, ¶ 10 ("[I]t is the particular domain of the legislature, as the voice of the people, to make public policy."). As these authorities make clear, "[t]he power to make law is reserved exclusively to the Legislature." *State v. Roy*, 1936-NMSC-048, ¶ 73, 40 N.M. 397.

Indeed, "the courts are without power to encroach upon the legislative prerogatives by judicial fiat or, even, by applying constitutional exceptions to statutes specifically denying such exemptions." *State v. Steele*, 1979-NMCA-113, ¶ 9, 93 N.M. 470. Absent these venerable constraints,

> judges are nothing more than politicians in robes, free to tackle the social problems of the day based on avant-garde constitutional theory or, worse yet, their own personal preferences. While such jurists may often be well meaning, their approach is inconsistent with our government's history, structure, and framework, and it threatens the ideal of self-rule that we should so dearly cherish.

The Hon. Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 Va. L. Rev. Online 31, 33 (2015). Simply put, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legitimate policy determinations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Apart from New Mexico's explicit constitutional prohibition against judicial legislating, this Court is just not a proper forum for achieving desired public-policy outcomes that lost out in the democratic process. Because the judicial branch "is not as directly and politically responsible to the people as are the legislative and

executive branches of government," courts should act "only when the body politic has not spoken." *Torres*, 1995-NMSC-025, ¶ 10. Here, rather than having to persuade a majority of New Mexico's bicameral legislature, the Governor, and the public constituencies they represent to rewrite the UPA, Plaintiffs and their counsel naturally would prefer to have to persuade only two out of three judges on an appeals court panel. But "the function of the courts in scrutinizing acts of the Legislature is not to raise possible doubt nor listen to captious criticism." *Armstrong*, 1924-NMSC-089, ¶ 106.

In any event, the Judiciary simply does not possess the institutional resources necessary to decide broad questions of public policy. Unlike the Legislature, which represents varied and divergent interests, New Mexico courts sitting in adversary proceedings are confined to rendering opinions on the basis of the parties' limited evidentiary record before them. Courts cannot commission independent studies, hire policy experts, or conduct public hearings to gather information from relevant constituencies. Nor can they balance the competing interests of stakeholders by making compromises with the benefit of comprehensive, legislative fact-finding. Because crafting public policy requires striking a difficult balance between many competing interests and stakeholders, this court should resist the temptation to second-guess the nuanced balance the Legislature has struck.

The corollary to the rule that courts should not rewrite existing law to create remedies out of whole cloth is that the political branches can do so when necessary. As always, the New Mexico Legislature retains the authority to change the remedies available under § 57-12-10(E), if it so desires. The Judiciary, however, is ill-suited to address complex policy concerns that are best left to the political branches. Accordingly, any change in the UPA to address Plaintiffs' criticisms of § 57-12-10(E) must be undertaken by the Legislature, not this Court.

New Mexico has "already witnessed legislative attempts to curb the power of the court[s] because the legislature perceived that the courts improperly expanded the scope of [their] own power." Michael B. Browde, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. Rev. 407, 469 (1985). Consistent with Article III, Section 1 of the New Mexico Constitution, this Court must decline Plaintiffs' invitation to legislate and should instead construe the plain words of the statute as written.

CONCLUSION

For the foregoing reasons, *amicus curiae* WLF respectfully requests that the Court affirm the judgment below.

Dated: August 2, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2017, a true and correct copy of the foregoing *Brief of Washington Legal Foundation as Amicus Curiae in Support of Defendant-Appellee* was served via first-class mail, prepaid and addressed to:

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STATEMENT OF COMPLIANCE

In accordance with Rules 12-210(F)(3) and (G) NMRA, the undersigned hereby certifies that the body of the *Brief of Washington Legal Foundation as Amicus Curiae in Support of Defendant-Appellee* was prepared in Times New Roman, 14-Point font and contains **4,952** words, which excludes the Cover Page, Table of Contents, Table of Authorities, Signature Blocks, Certificate of Service, and this Statement of Compliance. The word count was performed using Microsoft Word 2010.

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Veronica C. Gonzales-Zamora