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ALL CASES GREAT AND SMALL: FULFILLING THE NMCRA'S PROMISE OF ATTORNEY FEES

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ABSTRACT

Section 5 of the New Mexico Civil Rights Act (NMCRA) permits a court to award "reasonable" attorney fees to a "prevailing plaintiff."[1] In this way Section 5 parallels its federal analog, 42 U.S.C. § 1988, which similarly allows a "prevailing party" to recover "reasonable" attorney fees in federal civil rights suits. But despite this language in the federal statute, a string of U.S. Supreme Court decisions have circumscribed the availability of attorney fees in suits brought under § 1983. This restriction on attorney fees has led to what Professor Joanna Schwartz calls the biggest obstacle to civil rights litigation in the federal system: "the lack of lawyers able and willing to represent people whose constitutional rights have been violated."[2]

The New Mexico Civil Rights Commission was aware of this concern when it recommended including a fee-shifting provision in the NMCRA. The Commission's report noted that "without an attorney's fees provision, the likelihood of an injured person finding an attorney to take their claim would be low for many cases involving constitutional violations because they are often unlikely to result in substantial recovery."[3] And the availability of representation is of particular concern in New Mexico, where we have fewer lawyers per capita than most other states and even fewer lawyers serving in our rural areas.

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Both authors grew up in Santa Fe. They aspire to represent New Mexicans who suffer violations of their constitutional civil rights. The authors are grateful to the many scholars, practitioners, and judges who inspired and improved this Article: Professor George Bach, Judge Matthew Garcia, Kristin Greer Love, María Martínez Sánchez, Scott Michelman, Professor Maureen Sanders, Professor Joanna Schwartz, Judge Margaret Strickland, and Judge Linda Vanzi. We are appreciative of the incredible editors of the NEW MEXICO LAW REVIEW, including Aaron Sharratt, Sophia Bunch, Jess Czajkowski, Shannel Daniels, Sophie Rane, Ibrahim Al-Gahmi, and Sundesh Khalsa. Finally, we are extremely grateful to our recent mentors—Judges David Barron, Alison Nathan, and Judith Herrera—although the views reflected in this Article are ours alone.

1. N.M. STAT. ANN. § 41-4A-5 (2021).

2. Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 641 (2023).

3. N.M. C.R. COMM'N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, at 32 app. V (2020).

We argue that three departures from the federal judiciary's interpretation of § 1988 are demanded by Section 5's text and its purpose of securing access to justice for New Mexicans who suffer violations of their state constitutional rights. First, if a court finds that a plaintiff's lawsuit was a proximate cause of a defendant's change in conduct, then the plaintiff should be considered to have "prevailed" regardless of whether the change in the defendant's conduct is judicially ordered. Failing to award attorney fees to lawyers who have catalyzed defendants' cessation of illegal conduct chills future litigation that seeks injunctive relief. Second, courts should hold settlement provisions that waive attorney fees or provide for only nominal attorney fees to be presumptively void and severable from the other provisions in a settlement agreement. This presumption, however, may be overcome if the party opposing a subsequent fee petition convinces the court that the amount of fees the plaintiff's lawyer received through the settlement would not disincentivize lawyers from taking similar cases in the future. Civil rights practice in the federal courts makes clear that allowing defendants to condition settlement offers on waivers of attorney fees limits civil rights representation to cases where the potential damages are substantial enough that a lawyer's expected contingency will cover the hours necessary to effectively litigate these cases. Yet the NMCRA was intended to provide a cause of action for remedying all constitutional violations, not just those that would support a large damages award. Finally, in determining what constitutes a reasonable attorney-fees award, courts should account for the complexity and contingent risk involved in bringing the particular civil rights case. Doing so guarantees that attorneys will be available to remedy constitutional harms and harness the public and expressive value of the courts recognizing the many "minor" constitutional violations that may not make headlines but collectively cause unquantifiable harm to marginalized individuals and communities in New Mexico.

INTRODUCTION

Section 5 of the New Mexico Civil Rights Act (NMCRA) permits a court "in its discretion" to award "reasonable attorney fees" to a "prevailing plaintiff" in any action brought under the Act.[4] Section 5 thus parallels its federal analog, 42 U.S.C. § 1988, which similarly provides that in actions arising under various federal civil rights statutes, a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." [5] But the sparse language of these provisions leads to a

4. N.M. STAT. ANN. § 41-4A-5 (2021). There are several possible spellings of the topic of this Article (e.g., attorney's fees, attorneys' fees, attorneys fees, attorney fee, etc.). Following the lead of the New Mexico Legislature in Section 5 of the NMCRA, we have opted for "attorney fees."

5. 42 U.S.C. § 1988(b).

host of questions in their application: What does it mean to prevail? What makes attorney fees "reasonable"? Who are the intended beneficiaries of these provisions? And what role do courts have in ensuring that those beneficiaries are getting their intended benefits? As the following hypothetical examples illustrate, the answers to these questions will have a significant impact on the availability of private enforcement of civil rights in New Mexico.

First, imagine that an Albuquerque police officer, without probable cause, arrests a young Hispanic man who "talked back" to her after she pulled him over for speeding. Enraged by the young man's insolence, the officer handcuffs him, roughs him up a bit, and places him in the back of a police car, where he is held for an hour and a half until a more senior officer arrives and instructs that he should be let go. The young man suffers no serious physical injuries. He is nonetheless the victim of an episode of police misconduct and violations of both the Fourth Amendment of the U.S. Constitution and Article II, Section 10 of the New Mexico Constitution. The question is, can he do anything about it? In theory he could sue under § 1983,[6] or Section 3 of the NMCRA,[7] both of which provide a cause of action when state government officials violate rights secured under federal law or the New Mexico Bill of Rights, respectively.[8]

Before the enactment of the NMCRA, the young man could have sued only under § 1983. Back then, however, he would not have been likely to find an attorney to help him bring his case because the potential damages at stake in a lawsuit against the officer probably would have been too small for a lawyer to take the case on a contingency basis. Every lawyer capable of helping the young man knows what will happen under § 1983: after putting in a couple months of work—interviewing the young man, drafting a complaint, opposing a motion to dismiss, and perhaps deposing witnesses—the defendant will offer a low settlement, say $10,000. The catch is that the defendants, as they are entitled to do under federal law, will demand the young man waive attorney fees as part of the settlement.[9] The attorney's work might be conservatively valued at $32,000—160 hours at $200 per hour—but she will get, if anything, a third of the settlement, which is only about 10 percent of what she put into the case. Given the common practice of settlement offers in § 1983 cases including waivers of attorney fees, few attorneys would be willing to take on the young man's case under the § 1983 regime.

Yet the injury this young man suffered is exactly the type of harm that the New Mexico Legislature sought to remedy when it enacted the NMCRA.[10] So perhaps there is hope for him under that statute. That, however, will depend entirely on whether the attorney-fees provision of the NMCRA is interpreted in a different way than § 1988 has been by the United States Supreme Court.

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6. *See* 42 U.S.C. § 1983.

7. *See* N.M. STAT. ANN. § 41-4A-3.

8. Two differences between Section 3 and § 1983 are worth highlighting. First, NMCRA plaintiffs may sue only public bodies—not individuals. *See id.* § 41-4A-3(C). Second, Section 3 provides redress for violations of Article II of the New Mexico Constitution (the Bill of Rights)—not for violations of other articles in the New Mexico Constitution, nor for violations of New Mexico statutes. *See id.* § 41-4A-3(A).

9. *See* Evans v. Jeff D., 475 U.S. 717, 731–32 (1986).

10. *See* Section II.C.1, *infra*.

Next imagine a queer high school student whose principal has ordered the removal of every book discussing LGBTQ+ issues from the school library. The student had found affirmation of their identity in those books, but they can no longer find them in the library. It is likely that the principal's actions are unconstitutional, at least if those actions were motivated by anti-gay animus or a desire to suppress ideas related to queerness and gender identity.[11] The student could sue under § 1983 or the NMCRA, but again, the student may be hard-pressed to find an attorney willing to take their case given the limitations to the recovery of attorney fees in actions pursuing injunctive relief under § 1983.

An attorney considering bringing the suit would know that he stands to make—at most—his typical hourly fee if he does prevail.[12] There will be no enhancement of the award to account for the financial risk an attorney takes of losing and not getting paid at all.[13] Thus attorneys considering taking the student's case are choosing between fee-paid work that pays them now and complex contingency work that *might* pay them the same amount they could make now, in the distant future.[14] What is more, even if the attorney brings a § 1983 suit that causes the district to return the books to the library, he still would not get attorney fees unless that relief came through a court order.[15] This means that, under the federal regime, if the school board voluntarily issued a formal policy reversing the principal's book ban, no attorney fees would be awarded even if the lawsuit catalyzed this change.[16] These doctrines together make it very unlikely that the student could find a private-practice lawyer. Whether a complaint is filed at all would depend on the uncertain prospect of finding a non-profit legal organization with the interest, expertise, and resources necessary to take the case. But here too, the NMCRA could be a game changer.

Legal scholars have long decried the way attorney fees operate in the federal system. Professor Joanna Schwartz, one of the country's foremost scholars who has undertaken extensive empirical research into civil rights enforcement,[17] has shown that the biggest obstacle to civil rights enforcement "is actually the lack of lawyers

11. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 871–75 (1982) (plurality opinion); *see generally* Jensen Rehn, Note, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405 (2023). The New Mexico Constitution's promise of free speech uses arguably broader language than its federal counterpart. *Compare* N.M. CONST. art. II, § 17 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."), *with* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

12. If the high school student wins injunctive relief through a court order, the court could award attorney fees. The court would award the attorney "the product of reasonable hours times a reasonable rate." City of Burlington v. Dague, 505 U.S. 557, 559 (1992) (citing Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986)).

13. *See id*.

14. To be sure, the choice for some attorneys will not be between fee-paid work and contingency work but rather between civil rights contingency work and non–civil rights contingency work. If the non–civil rights cases have a higher likelihood of success than the civil rights cases, and there is no enhancement of the award in the civil rights case to account for the financial risk of loss, then the attorney will be disincentivized from taking the civil rights case.

15. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum. Res., 532 U.S. 598, 600 (2001).

16. *See id*. at 610.

17. *See, e.g.*, Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020).

able and willing to represent people whose constitutional rights have been violated."[18] The New Mexico Civil Rights Commission was aware of this barrier to civil rights enforcement, writing in its final report, "without an attorney's fees provision, the likelihood of an injured person finding an attorney to take their claim would be low for many cases involving constitutional violations because they are often unlikely to result in substantial recovery."[19] And in New Mexico where access to attorneys is a pressing issue in many parts of the state, the availability of representation is of particular concern.[20] The New Mexico Legislature—like the United States Congress—has done its part to provide attorney fees under the new law. Now the responsibility shifts to the New Mexico Supreme Court to do what the United States Supreme Court did not and give full effect to that promise for *all* prevailing plaintiffs.

This Article proceeds in two parts. First, we summarize the genesis and operation of the federal attorney-fees regime and explain how judicially imposed limitations on the availability of attorney fees curb the types of cases that lawyers bring in federal court. If plaintiffs seeking compensation for meritorious but small-dollar constitutional violations in New Mexico are forced to proceed *pro se* because lawyers cannot afford to take their cases, the lack of representation will weaken the substance of the underlying rights. Second, we discuss how the NMCRA's attorney fees provision should be interpreted in light of the statute's text and history.

In the second Part of the Article, we advocate for three specific departures from the federal judiciary's interpretation of § 1988. First, if a court finds that a plaintiff's lawsuit was a proximate cause of a defendant's change in conduct, then the plaintiff should be considered to have "prevailed" regardless of whether the change in the defendant's conduct is judicially ordered. Failing to award attorney fees to lawyers who have catalyzed defendants' cessation of illegal conduct chills future litigation that seeks injunctive relief. Second, courts should hold settlement provisions that waive attorney fees or provide for only nominal attorney fees to be presumptively void and severable from the other provisions in a settlement agreement. This presumption, however, may be overcome if the party opposing a subsequent fee petition convinces the court that the amount of fees the plaintiff's lawyer received through the settlement would not disincentivize lawyers from taking similar cases in the future. Civil rights practice in the federal courts makes clear that allowing defendants to condition settlement offers on waivers of attorney fees confines civil rights representation to cases where the potential damages are substantial enough that a lawyer's expected contingency will cover the hours necessary to effectively litigate these cases. Yet the NMCRA was intended to provide a cause of action to remedy all constitutional violations, not just those that would support a large damages award. Finally, in determining what constitutes a reasonable attorney-fees award, courts should account for the complexity and contingent risk involved in bringing the particular civil rights case. Doing so increases the likelihood that attorneys will be available to remedy past constitutional harms, deter future ones,

18. Schwartz, *supra* note 2, at 641.

19. N.M. C.R. COMM'N, *supra* note 3, at 32 app. V.

20. *See* Hon. C. Shannon Bacon, C.J., N.M. Sup. Ct., State of the Judiciary, Address Before the New Mexico Legislature, at 9 (Jan. 24, 2023).

and harness the public and expressive value of the courts recognizing the many "minor" constitutional violations that may not make headlines but collectively cause unquantifiable harm, particularly to marginalized individuals and communities in New Mexico.

We conclude that, properly interpreted, the NMCRA will provide meaningfully incentivizing attorney fees whenever a plaintiff's lawsuit generates a favorable resolution of their claims, no matter if the relief comes by court judgement, settlement, or voluntary cessation of an unlawful practice. To be sure, this interpretation will increase the number of civil rights cases brought and may also raise the cost of defending these cases. Those are necessary consequences of the robust civil rights enforcement regime that the NMCRA was intended to create.

I. FEDERAL ATTORNEY FEES REGIME

A. The American Rule and § 1988

As far back as the thirteenth century, English courts awarded attorney fees to those who successfully brought civil claims.[21] But courts on this side of the Atlantic took a different approach. Under "the American Rule," "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."[22] American courts have consistently followed this approach and required each side in a civil action to pay its own attorneys, with only limited exceptions for class actions, and where claims are brought in bad faith or where litigants willfully disobey court orders.[23]

In the 1960s and early '70s, a larger exception began to emerge: federal courts began awarding attorney fees to successful plaintiffs based on the theory that the courts had the inherent equitable power to reward plaintiffs and their attorneys for acting as "private attorneys general" and bringing cases in the public interest.[24] This practice ended in 1975, however, when the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society* held that federal courts are not free "to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach."[25] Congress, not individual judges, the Court explained, must determine when attorney fees serve the public interest.[26]

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21. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). While fee awards were initially limited to successful plaintiffs, by the seventeenth century English courts also exercised discretion to award fees to those who successfully defended suits. *Id.*

22. *Id.*; *see also, e.g.*, Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (reversing award of $1,600 in attorney fees to plaintiffs because "[t]he general practice of the United States is in oposition (sic) to [such awards]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute").

23. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258–59 (1975).

24. *See id.* at 270 n.46; *see also* Armand Derfner, *Background and Origin of the Civil Rights Attorney's Fees Act of 1976*, 37 URB. L. 653, 653–56 (2005).

25. 421 U.S. at 269. The New Mexico Supreme Court agreed with *Alyeska* in *New Mexico Right to Choose / NARAL v. Johnson*, 1999-NMSC-028, ¶ 10, 127 N.M. 654, 986 P.2d 450.

26. *Alyeska*, 412 U.S. at 269.

Within a year, Congress responded to the *Alyeska* decision with the Civil Rights Attorney's Fees Awards Act of 1976 ("§ 1988").[27] Section 1988 states, in language that might sound familiar to anyone who has read Section 5 of the NMCRA, that in actions brought under various federal civil rights statutes, a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."[28]

Section 1988's legislative history teems with bipartisan agreement that the *Alyeska* decision "had a 'devastating' impact on civil rights litigation," and that the default American Rule was such a bad fit for this area that "corrective legislation" was necessary.[29] The purpose of § 1988 was to establish a "regime under which attorney's fees were awarded as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases."[30] Section 1988's legislative history shows this purpose with, as Justice Brennan put it, "monotonous clarity."[31]

B. The Early Promise of § 1988 in Federal Courts

The Supreme Court's first sallies into the interpretation of § 1988 were promising for civil rights plaintiffs and their lawyers. First, the Court held in *Hutto v. Finney* that Congress intended to abrogate states' Eleventh Amendment immunity with § 1988, meaning that states, the typical *de facto* defendant in federal civil rights lawsuits, may be liable for attorney fees.[32] And the Court's subsequent decisions held that "reasonable fees" under § 1988 should "be calculated according to the prevailing market rates in the relevant community, regardless of whether [a] plaintiff is represented by private or nonprofit counsel."[33] So too, the Court held that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."[34] Thus, even though § 1988 speaks in permissive rather than mandatory terms, stating only that a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee,"[35] federal courts will presumptively award fees to prevailing plaintiffs.[36]

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27. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988).

28. 42 U.S.C. § 1988(b).

29. Evans v. Jeff D., 475 U.S. 717, 748–49 (1986) (Brennan, J., dissenting) (quoting H.R. REP. NO. 94-1558, at 3 (1976)); *see also* Derfner, *supra* note 24, at 657–58 and accompanying notes; Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 309–15, 364 n.422 (1990) (identifying the purposes of § 1988 as (1) attracting lawyers for private enforcement of the civil rights laws by (2) paying competitive rates for lawyers bringing these cases, thereby (3) increasing the number of civil rights cases filed, and (4) ensuring judicial supervision over fee issues).

30. *Evans*, 475 U.S. at 748–49 (Brennan, J., dissenting) (quoting this legislative history at length).

31. *Id.* at 749; *see also* Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 9–10 nn.30–31 (2008).

32. 437 U.S. 678, 693–94 (1978).

33. Blum v. Stenson, 465 U.S. 886, 895 (1984).

34. *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983).

35. 42 U.S.C. § 1988(b).

36. *See* Jones v. Wilkinson, 800 F.2d 989, 991 (10th Cir. 1986) (noting that the Supreme Court has created a presumption that successful plaintiffs should be awarded attorneys' fees), *aff'd*, 480 U.S. 926 (1987).

Additionally, and crucially, the Court held that "fees in civil rights cases, unlike most private law cases, [should not] depend on obtaining substantial monetary relief."[37] The Court recognized Congress's clear intention "that the amount of fees awarded under [§ 1988] . . . *not be reduced because the rights involved may be nonpecuniary in nature*."[38] In reaching this conclusion, the Court rejected Justice Rehnquist's dissenting argument that it was inherently "unreasonable" for the district court to award an amount of attorney fees that was "approximately 15 times the amount of the underlying money judgment."[39] Instead, the Court concluded that "a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards" and that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff."[40]

Section 1988 and these early decisions giving effect to its purpose likely contributed to the doubling of civil rights cases filed annually in federal court from the late 1970s to the early 1980s.[41] While empirically robust causal analysis of this phenomenon may be impossible given the many factors that contribute to the filing of civil rights lawsuits, most observers agree that § 1988 and the Supreme Court's early decisions interpreting it contributed to this increase.[42] And scholarship confirms that the availability of attorney fees is critical to whether a plaintiff can find an attorney to take their case.[43]

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37. City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) (plurality opinion); *see also id.* at 586 (Powell, J., concurring) ("It is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases. I therefore find petitioners' asserted analogy to personal injury claims unpersuasive in this context.").

38. *Id.* (first alteration in original) (quoting S. REP. NO. 94-1011, at 6 (1976)).

39. *Id.* at 589, 595 (Rehnquist, J., dissenting) ("Nearly 2,000 attorney-hours spent on a case in which the total recovery was only $33,000, in which only $13,300 of that amount was recovered for the federal claims, and in which the District Court expressed the view that, in such cases, juries typically were reluctant to award substantial damages against police officers, is simply not a 'reasonable' expenditure of time"); *see also id.* at 587 (Burger, C.J., dissenting) ("[I]t would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages.").

40. *Id.* at 574 (plurality opinion) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part)); *see also id.* at 586 (Powell, J., concurring) ("[T]he vindication of the asserted Fourth Amendment right [at issue in the case] may well have served a public interest, supporting the amount of the fees awarded").

41. *See* Reingold, *supra* note 31, at 40–41, 46 (compiling and discussing dataset of civil rights cases filed in the federal courts between 1975 and 2006). From 1976 through 1985, the number of civil rights cases filed each year in federal court more than doubled. *Id.* at 41. The passage of § 1988 was almost certainly not the sole cause of the observed change: the overall number of civil suits initiated in federal court also substantially increased over the same period. *See id.* at 41 n.149.

42. *See id.*

43. *See generally* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory,* 48 HASTINGS L.J. 197 (1997); Joanna C. Schwartz, *supra* note 2.

C. Section 1988's Promise Fades

The run of pro-plaintiff decisions interpreting § 1988 was short lived. In a series of decisions beginning in 1986, the Supreme Court substantially narrowed the availability of attorney fees. The results for civil rights plaintiffs were disastrous.

1. Evans v. Jeff D.*: Waiver or Diminution of Attorney Fees in Settlements*

In 1986, the Supreme Court decided *Evans v. Jeff D.* and held that a defendant can condition a settlement agreement on a plaintiff's waiver of § 1988 attorney fees.[44] In *Evans*, a class of children challenged the medical and educational services provided by Idaho to disabled children living in the state.[45] An attorney with the Idaho Legal Aid Society named Charles Johnson represented the class and served as their "next friend" for the purpose of prosecuting the action.[46] This unusual relationship, coupled with a federal law that prohibited the Legal Aid Society from representing clients capable of paying their own fees, meant that no fee agreement was made between Johnson and his clients.[47]

After Johnson and his clients rejected a couple of inadequate settlement offers and survived a motion for summary judgment, they began preparing for a trial.[48] Then, two-and-a-half years into the case and one week before trial, the Idaho defendants approached the plaintiffs with a new settlement offer, which included "virtually all of the injunctive relief [the plaintiffs] had sought in their complaint," which was "more than the district court in earlier hearings had indicated it was willing to grant."[49] But there was a catch: the plaintiffs had to waive any claim to fees or costs.[50] While Johnson and the Legal Aid Society first objected to this proviso, Johnson "ultimately determined that his ethical obligation to his clients mandated acceptance of the proposal" and he therefore accepted the waiver, reserving the right to challenge it as unlawful.[51]

The district court approved the settlement with the waiver. The district court noted "that although petitioners were 'not willing to concede that they were obligated to [make the changes in their practices required by the stipulation], . . . they were willing to do them as long as their costs were outlined and they didn't face additional costs.'"[52] The district court concluded that the waiver did not breach any ethical constraints and that it was not contrary to § 1988 "for an attorney to give up his attorney fees in the interest of getting a better bargain for his client[s]."[53] Johnson appealed and the Ninth Circuit reversed, citing circuit precedent disapproving of

44. *See* 475 U.S. 717, 720 (1986).
45. *Id.* at 720–21.
46. *Id.* at 721.
47. *Id.* at 721 n.3 (citing 42 U.S.C. §§ 2996–2996*l*).
48. *Id.* at 722.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 723 (alterations in original).
53. *Id.*

"simultaneous negotiation of settlements and attorney's fees" absent "a showing of unusual circumstances."[54]

In a 6-3 decision authored by Justice Stevens, the Supreme Court reversed the Ninth Circuit and reinstated the judgment of the district court.[55] The question of whether to allow a merits settlement predicated on a waiver of fees presented, as the Court framed it, a choice between two arguably irreconcilable goals: on the one hand there was the laudable objective of promoting settlements in individual cases, because such settlements halt ongoing constitutional violations, begin to remedy past harms, and conserve legal and judicial resources; on the other hand, there was the aim of ensuring that future plaintiffs can find lawyers willing to bring their civil rights claims.

According to the majority and many commentators, the first goal militated in favor of allowing defendants to do what the *Evans* defendants did, because disposing with attorney fees at the same time as the merits provides defendants certainty as to their total financial exposure and minimizes the cost of stopping ongoing constitutional violations.[56] But the majority acknowledged that its decision might undercut the second goal: "the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases," such that "the pool of lawyers willing to represent plaintiffs in such cases might shrink."[57] Ultimately, the Court concluded that the possibility "that the 'tyranny of small decisions' may operate in this fashion is not to say that there is any reason or documentation to support such a concern at the present time" and "that as a practical matter the likelihood of this circumstance arising is remote."[58]

Justice Brennan, on the other hand, was confident that blessing the waiver of attorney fees would have far from a *de minimis* effect. "[O]nce fee waivers are permitted," he predicted, "defendants will seek them as a matter of course, since this is a logical way to minimize liability."[59] And Justice Brennan observed that, particularly in injunction-only cases, a "waiver of fees does not affect the plaintiff," meaning that "a settlement offer is not made less attractive to the plaintiff if it includes a demand that statutory fees be waived."[60] Thus, he predicted that the effect of *Evans* would be that defendants would routinely offer and plaintiffs would

54. Jeff D. v. Evans, 743 F.2d 648, 652 (9th Cir. 1984). The Ninth Circuit relied on a Third Circuit decision, *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). On the other hand, the First, Fifth, Tenth, and D.C. Circuits generally did allow simultaneous negotiations of fees and the merits, at least in certain circumstances. *See Evans*, 475 U.S. at 726 n.11 (collecting cases).

55. *See Evans*, 475 U.S. at 725–26.

56. *See id.* at 735 ("Undoubtedly there are many other civil rights actions in which potential liability for attorney's fees may overshadow the potential cost of relief on the merits and darken prospects for settlement if fees cannot be negotiated.").

57. *Id.* at 741 n.34.

58. *Id.*

59. *Id.* at 758 (Brennan, J., dissenting) (noting that "defense counsel would be remiss *not* to demand that the plaintiff waive statutory attorney's fees," because "[a] lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client").

60. *Id.*

routinely accept waivers of fees in exchange for settlements of the merits.[61] Not one to mince words, Justice Brennan called it "embarrassingly obvious" that the majority's holding would "seriously impair the ability of civil rights plaintiffs to obtain legal assistance . . . precisely the opposite of what Congress sought to achieve by enacting" § 1988.[62]

Nearly four decades after *Evans*, we know that Justice Brennan's "crystal ball was clearer."[63] There is "near unanimity within the plaintiffs' bar . . . that *Evans* killed [§] 1983 as a remedial statute for plaintiffs in need of private lawyers to litigate civil rights cases involving only modest damages or equitable relief."[64] And our interviews with New Mexico civil rights practitioners confirmed that many § 1983 settlements include either a complete waiver of attorney fees or a simultaneous settlement of fees and the merits that includes a substantial reduction from the fees that a court might award if the plaintiff petitioned.[65] The *Evans* regime also affects the budgets of nonprofit legal advocacy and aid organizations, which are often prohibited by law—or substantially restricted by organizational policy—from taking a contingency out of a plaintiffs' settlement but can take fees they win in a petition.[66]

2. City of Burlington v. Dague*: Inadequacy of Market-Rate Fees as Incentive*

A few years after *Evans* the Supreme Court decided *City of Burlington v. Dague*.[67] *Dague* held that courts may not account for the contingent risk involved in bringing a particular civil rights case in determining the size of attorney-fees awards.[68]

Before *Dague*, the Court fractured on the question of whether such contingency multipliers were ever acceptable.[69] In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, Justice White and three other justices would have held that such enhancements are never permitted.[70] Justice Blackmun and three other justices would have held that district courts must always take account of the risk of non-recovery when awarding fees to a prevailing plaintiff.[71] Justice O'Connor fell in the middle. She argued that a fee award should not be enhanced based on the risk

61. *See id.* at 758–59.

62. *Id.* at 759.

63. Reingold, *supra* note 31, at 11; *see also* Schwartz, *supra* note 2, at 655 (observing that "the contingency fee system that Congress intended to avoid by enacting § 1988 is basically back in place"); Davies, *supra* note 43, at 200, 261–67.

64. Reingold, *supra* note 31, at 11.

65. Notes from these conversations are on file with the authors and available upon request, with some anonymizing and redactions at the request of certain interviewees.

66. *See* Davies, *supra* note 43, at 217 & n.94; *see also* Rochelle Bobroff, *Legal Services Attorney Fees Are Obtainable in Pending Cases*, 44 CLEARINGHOUSE REV. 157, 157 (2019) (noting the funding rider prohibiting legal services corporation funded entities from receiving attorney fees under fee shifting statutes, which was adopted in 1996, was dropped from the 2010 appropriations bill); 45 C.F.R. § 1609.4 (1997) (outlining procedures for legal services corporation funding recipients to recover attorney fees).

67. 505 U.S. 557 (1992).

68. *Id.* at 562–63.

69. *See* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987).

70. *See id.* at 723–27 (White, J., plurality opinion, joined by Rehnquist, Powell, and Scalia, JJ.).

71. *See id.* at 735–55 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

taken by a lawyer "unless the applicant can establish that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market."[72]

The *Dague* district court followed Justice O'Connor's approach. The plaintiff, Ernest Dague, Sr., successfully sued Burlington for its operation of a landfill next to his land and then petitioned for fees.[73] After calculating the lodestar rate ("the product of reasonable hours times a reasonable rate"), the court added a 25 percent enhancement because it found "that Dague's 'risk of not prevailing was substantial' and that 'absent an opportunity for enhancement, Dague would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law.'"[74] This approach was blessed by the Second Circuit—out of which *Dague* arose—as well as every other circuit except the D.C. Circuit, which prohibited contingency multipliers.[75]

Nevertheless in *Dague*, Justice Scalia, writing for a majority of six that included Justices Kennedy, Souter, and Thomas, who had replaced Justices Marshall, Brennan, and Powell, adopted the rule advocated by Justice White's plurality opinion in *Delaware Valley*. In so doing, the Court held that almost all the lower courts were improperly granting contingency multipliers. The majority acknowledged that "enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought," but reasoned that it did so "only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well."[76] The majority also reasoned that Justice O'Connor's approach could "not . . . intelligently be applied" because it was inconsistent to forbid accounting for the "'riskiness' of any particular case," which the majority strongly opposed, while also determining whether a given plaintiff would have "faced substantial difficulties in finding counsel in the local or other relevant market."[77] After all, according to the majority, "the predominant reason that a contingent-fee claimant has difficulty finding counsel in any legal market where the winner's attorney's fees will be paid by the loser is that attorneys view his case as too risky."[78] What the majority did not want was to bless a regime in which losing defendants were essentially subsidizing other losing plaintiffs, which the majority noted would be inconsistent with Congress' decision to only award fees to "prevailing parties" in § 1988.[79]

Both Justice O'Connor and Justice Blackmun (joined by Justice Stevens) dissented, arguing that accounting for the risk of non-recovery was consistent with the language of fee shifting statutes and that the majority's holding would "seriously weaken the enforcement of those statutes for which Congress has authorized fee awards—notably, many of our Nation's civil rights laws and environmental laws."[80]

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72. *Id.* at 733 (O'Connor, J., concurring) (internal quotation marks omitted).

73. *Dague*, 505 U.S. at 559.

74. *Id.* at 560.

75. *See* Jack Vining Dell, Jr., Case Note, *The Demise of Fee-Shifting Statutes: Will Congress Respond?* 44 MERCER L. REV. 1375, 1376 n.12 (1993) (collecting and categorizing cases).

76. *Dague*, 505 U.S. at 563.

77. *Id.* at 561 (quoting *Del. Valley*, 483 U.S. at 731, 733 (O'Connor, J., concurring)).

78. *Id.* at 564.

79. *See id.* at 565–66.

80. *Id.* at 567–68 (Blackmun, J., dissenting); *see also id.* at 575–76 (O'Connor, J., dissenting).

Justice Blackmun observed that "many of the statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent-fee arrangement," and that without a multiplier when attorneys prevail in those types of cases, § 1988 and other fee shifting provisions would fail to fulfill their purpose of "strengthen[ing] the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel."[81]

Reframing the majority's concern that enhanced fees would over-incentivize lawyers to bring cases with little merit, Justice Blackmun pointed out that if attorneys are only paid their lodestar rate despite taking contingency cases, then all contingency cases except those with the prospect of a share in the recovery that might exceed the lodestar rate would be systematically under-incentivized:

> Even the *least* meritorious case in which the attorney is guaranteed compensation whether he wins or loses will be economically preferable to the *most* meritorious fee-bearing claim in which the attorney will be paid only if he prevails, so long as the cases require the same amount of time. Yet . . . this latter kind of case—in which potential plaintiffs can neither afford to hire attorneys on a straight hourly basis nor offer a percentage of a substantial damages recovery—is exactly the kind of case for which the fee-shifting statutes were designed.[82]

Unlike with *Evans*, civil rights attorneys are not as near-unanimously opposed to the outcome of *Dague*. While some attorneys do agree with Justice Blackmun that without the prospect of a multiplier, low- or no-damages cases are harder to justify taking on financially, others believe that courts implicitly account for contingency in other ways, like by allowing lawyers to claim a higher "reasonable" rate or number of hours than they otherwise might, or, in rare cases, by allowing multipliers to the lodestar for "exceptional success."[83] Other attorneys, however, have reported that without multipliers many types of cases—like low-dollar police misconduct cases with potentially unsympathetic plaintiffs, *Monell* claims against cities or counties, class actions, or other cases that may have substantial merit but carry higher risk given their novelty or complexity—are simply not economically viable.[84] Indeed, the more complicated, large-scale, or ambitious a claim, the greater the effect of *Dague* will be. These cases are so resource intensive

81. *Id.* at 568 (Blackmun, J., dissenting).

82. *Id.* at 574 (Blackmun, J., dissenting).

83. *See* Davies, *supra* note 43, at 227–29; *see also, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 435 (1983) ("[I]n some cases of exceptional success an enhanced award may be justified."); Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 553–56 (2010) (rejecting argument that "a fee determined by the lodestar method may not be enhanced in any situation" but stating that enhancements will be "rare" and "exceptional"; identifying possible "rare" and "exceptional" cases allowing enhancement when (1) hourly rate under lodestar method does not account for attorney's true market rate, (2) "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted," or (3) there is an "exceptional delay in the payment of fees").

84. *See* Davies, *supra* note 43, at 228–31.

that it is hard for nonprofit organizations to take them on, they are too big for firms to do pro-bono, and they are impossible for private attorneys to financially justify.[85]

Furthermore, *Dague* has a compounding effect with *Evans* on settlement negotiations, moving the balance of power further towards the defense side. The possibility of a fee multiplier obscures the defense's total liability and thus incentivizes settlements when a plaintiff has a good chance of prevailing. Without fee multipliers, and, per *Evans*, without the possibility of challenging settlement agreements that waive attorney fees, defendants are not incentivized to make earnest settlement offers early in litigation, and plaintiffs and their attorneys lack leverage to hold out for higher settlements and more fees.[86]

3. Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*: Demise of the Catalyst Theory*

The third major U.S. Supreme Court decision that undermined prospective civil rights plaintiffs' access to counsel is *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.[87] There the Court held that when a plaintiff files a lawsuit seeking injunctive relief and the defendant voluntarily stops the challenged action or policy, the plaintiff has not "prevailed" within the meaning of § 1988.[88] Prior to *Buckhannon* almost every circuit accepted "the 'catalyst theory,' which posit[ed] that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" even if the change did not come through a judicial order or enforceable settlement.[89] In *Buckhannon*, however, the district court had, consistent with the Fourth Circuit's outlying precedent, denied attorney fees to Buckhannon, a retirement-home operator in West Virginia, even though its lawsuit had provided the impetus for West Virginia to change a provision of the state's Code that the company asserted violated the Americans with Disabilities and Fair Housing Acts.[90] The Court affirmed, holding that a party only has prevailed, and therefore § 1988 only allows

85. *Id.*

86. *See id.* at 227–30 (noting that both defense- and plaintiff-side lawyers acknowledge this effect of *Dague*).

87. 532 U.S. 598 (2001).

88. *Id.* at 600.

89. *Id.* at 601–02, 602 n.3 (collecting cases from the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits granting fees under the catalyst theory); *see also id.* at 625–26, 626 n.4 (Ginsburg, J., dissenting) (collecting twelve cases from First through Eleventh and D.C. Circuits). The twelve circuits that considered the issue before 1994 all adopted this catalyst theory. *See, e.g.*, Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd., 919 F.2d 374, 378 (5th Cir. 1990) ("We have held that in the absence of a judgment, a party may be entitled to fees as a prevailing party 'if its ends are accomplished as a result of the litigation.'" (quoting Williams v. Leatherbury, 672 F.2d 549, 550 (5th Cir. 1982))). The Fourth Circuit then reversed its own prior precedent agreeing with this consensus in 1994 and held that "an enforceable judgment, consent decree, or settlement" was necessary to "prevail." S-1 & S-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51 (4th Cir. 1994) (en banc). But between 1994 and *Buckhannon*, nine circuits reaffirmed their previous holdings that a party prevails when the party's lawsuit is the catalyst for that party's desired change. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum. Res., 532 U.S. 598, 627, n.5 (2001) (Ginsburg, J., dissenting) (collecting cases).

90. *Buckhannon*, 532 U.S. at 601.

an attorney-fees award, where there has been a "judicially sanctioned change in the legal relationship of the parties."[91]

The reasoning in *Buckhannon* mirrors *Evans*'s in many ways. First, the majority invoked Black's Law Dictionary's definition of "prevailing party," which referenced a court judgment, and on this basis, the majority concluded that legislative history, circuit precedent, and the Court's own prior dicta were insufficient to overcome the clear meaning of Congress' decision to employ this "legal term of art."[92] Next, the majority dispatched the dissenters' and parties' arguments that without the catalyst theory, plaintiffs "with meritorious but expensive cases" would be deterred from bringing suit by the possibility of "defendants . . . unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees."[93] As in *Evans*, the majority characterized this concern as "entirely speculative and unsupported by any empirical evidence."[94] And, as in *Evans*, the majority invoked the concomitant

> disincentive that the "catalyst theory" may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal. "The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits," and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.[95]

The author of the *Evans* majority, Justice Stevens, was no longer persuaded by this reasoning, and instead joined Justice Ginsburg's dissent, which predicted that the *Buckhannon* decision would further disincentivize attorneys from taking low- or no-damage civil rights cases.[96] In a prior decision, the Court held that when a plaintiff "prevailed through a settlement rather than through litigation," she could still claim fees because "the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'"[97] But, according to Justice Ginsburg, the majority's reasoning would preclude fee awards not just in cases where defendants unilaterally gave plaintiffs the injunctive relief they sought but also in those that reached any out-of-court settlement, effectively overruling this prior precedent.[98]

Justice Ginsburg also questioned the majority's policy arguments for rejecting the catalyst rule.[99] "In opposition to the argument that defendants will resist change in order to stave off an award of fees," Justice Ginsburg pointed out that "the catalyst rule may lead defendants promptly to comply with the law's requirements:

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91. *Id.* at 605.
92. *Id.* at 603–05, 603 n.5.
93. *Id.* at 608.
94. *Id.*
95. *Id.* (citation omitted) (quoting Evans v. Jeff D., 475 U.S. 717, 734 (1986)).
96. *See id.* at 622–23 (Ginsburg, J., dissenting).
97. Maher v. Gagne, 448 U.S. 122, 129 (1980) (quoting S. REP. NO. 94-1011, at 5 (1976)).
98. *Buckhannon*, 532 U.S. at 636 (Ginsburg, J., dissenting).
99. *Id.* at 638–40.

the longer the litigation, the larger the fees."[100] Indeed, the Court's rejection of the rule might, in some circumstances, "drive a plaintiff prepared to accept adequate relief, though out-of-court and unrecorded, to litigate on and on," in order to get a judicial judgement only for the purposes of securing fees.[101]

The scholarly consensus regarding the impact of *Buckhannon* is that, as Justice Ginsburg predicted, the decision has "impede[d] access to court for the less well heeled, and shr[u]nk the incentive Congress created for the enforcement of federal law by private attorneys general."[102] Not only that, *Buckhannon* "creates perverse incentives" in the litigation of civil rights cases: "[i]t encourages plaintiffs to rush to summary judgment as quickly as possible, before the defendants can change their illegal conduct or policies sufficient to moot the case."[103] It also "encourages defendants to act in bad faith, litigating with vigor until the court signals in some way that they are likely to lose and then capitulating quickly and completely so as to avoid a fee award."[104] In sum, combined with *Evans*—and to a lesser extent *Dague—Buckhannon* has robbed litigants, the courts, and the public of:

> (1) the careful, deliberate, and thorough litigation of constitutional issues; (2) negotiated settlements designed to solve present and future problems; (3) early settlements that reduce dockets; (4) court supervision of settlements in some cases where supervision would be appropriate; and (5) "private attorneys general" willing to accept civil rights cases.[105]

* * * * *

Ultimately, while § 1988 held significant potential as a tool for ensuring prospective civil rights plaintiffs were able to find representation, that promise has been stymied by a run of Supreme Court decisions that undermined the actual availability of attorney fees. And it is by no means certain that this run has ended. In April 2024, the Supreme Court granted a petition for certiorari in *Lackey v. Stinnie*, a follow-on case to *Buckhannon* presenting the question of whether plaintiffs who obtain a favorable preliminary injunction ruling and then secure permanent relief outside of the legal process—for example, through settlement, or as happened in *Lackey*, through a change to state law—have "prevailed" within the meaning of § 1988.[106] The *en banc* Fourth Circuit ruled that the plaintiffs had prevailed, overturning its prior decision to the contrary, which it characterized as a "distinct

100. *Id.* at 639.

101. *Id.*

102. *Id.* at 623.

103. Reingold, *supra* note 31, at 33.

104. *Id.*

105. *Id.* at 33, 33 n.112. In the most recent contribution to this scholarly consensus, Professor Schwartz argued that Congress could and should override through legislation the decisions in *Evans*, *Buckhannon*, and *Dague* in order to actualize the civil rights enforcement that Congress originally envisioned. Schwartz, *supra* note 2, at 701–02.

106. *See* Petition for Writ of Certiorari, Lackey v. Stinnie, No. 23-621 (U.S. Nov. 20, 2023).

outlier" from the consensus of every other circuit to consider the question.[107] Nevertheless, when the defendants petitioned for certiorari, the Supreme Court agreed to hear the case.

Today, it is rarer and rarer for federal civil rights plaintiffs to successfully run the growing gauntlet the Court has created and end up with an attorney-fees award. With the enactment of the NMCRA, New Mexico's courts have a chance to learn from § 1988's interpretive course and to chart a different one for Section 5, the NMCRA's § 1988 analog. The next Part discusses how Section 5 could be interpreted to ensure that all those whose civil rights are violated, no matter the size of the violation, have a chance to find a qualified lawyer to take their case, and why, in light of the New Mexico Supreme Court's approach to statutory construction, doing so is the best way to interpret and operationalize Section 5.

II. ATTORNEY FEES UNDER THE NEW MEXICO CIVIL RIGHTS ACT

The New Mexico Civil Rights Commission made clear in its report that readily available attorney fees are "essential if the Legislature wants the New Mexico Civil Rights Act to play a meaningful role in remedying constitutional violations."[108] The New Mexico Supreme Court has already adopted—in the context of the New Mexico Human Rights Act's provision of attorney fees—the presumption that attorney fees should be granted under a fee-shifting statute whenever a party prevails.[109] That is a necessary but not sufficient step if the NMCRA is to provide a

107. Stinnie v. Holcomb, 77 F.4th 200, 209 (4th Cir. 2023), *cert. granted sub nom.*, Lackey. v. Stinnie, No. 23-621, 2024 WL 1706013 (U.S. Apr. 22, 2024).

108. N.M. C.R. COMM'N, *supra* note 3, at 32 app. V.

109. Lucero v. Aladdin Beauty Colls., Inc., 1994-NMSC-022, ¶ 5, 117 N.M. 269, 871 P.2d 365.

Section 5, like § 1988, uses permissive language for when a court may award attorney fees: "[T]he court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees . . . ." N.M. STAT. ANN. § 41-4A-5 (2021). An earlier draft of Section 5, however, used mandatory language: "The court shall award reasonable litigation expenses and attorney fees . . . ." H.B. 4, § 5, 55th Leg., 1st Sess. (N.M. 2021). This change from mandatory to permissive language does not mean that the Legislature anticipated attorney fees to be rare, such that trial courts should award attorney fees only if such an award furthers the policies embedded in the NMCRA.

One might argue (like the defendants in *Lucero*) that "if a complainant finds an attorney with relative ease then that attorney should not receive fees because the incentive of attorney's fees is not expressly shown to have been necessary and the policy embodied in the [NMCRA] is not satisfied." *Lucero*, 1994-NMSC-022, ¶ 5, 871 P.2d at 367. But this limitation on attorney fees in Section 5 is unlikely. After all, the Legislature is presumed to be "well informed and aware of existing statutory and common law," State v. Thompson, 2022-NMSC-023, ¶ 18, 521 P.3d 64, 68 (citing State v. Maestas, 2007-NMSC-001, ¶ 21, 140 N.M. 836, 149 P.3d 933, 939), and the New Mexico Supreme Court already rejected such a limitation on attorney-fees awards under the New Mexico Human Rights Act, *see Lucero*, 1994-NMSC-022, ¶ 5, 871 P.2d at 367 (citing New Mexico Human Rights Act, N.M. STAT. ANN., § 28-1-13(D) (2005)).

To the contrary, New Mexico courts have construed other permissive-attorney fees statutes and concluded that "the allowance of attorney fees is discretionary, but the exercise of that discretion must be reasonable when measured against objective standards and criteria." Lenz v. Chalamidas, 1989-NMSC-067, ¶ 19, 109 N.M. 113, 782 P.2d 85, 90 (construing Materialmen's Liens Statute, N.M. STAT. ANN. § 48-2-14 (1987), *modified to mandatory language*, Act of Apr. 2, 2007, ch. 212, § 5, 2007 N.M. Laws 2862, 2867); *see also* Smith v. FDC Corp., 1990-NMSC-020, ¶ 27, 109 N.M. 514, 787 P.2d 433, 441 (quoting *Lenz*, 1989-NMSC-067, ¶ 19, 782 P.2d at 90) (construing New Mexico Human Rights Act, N.M.

meaningful avenue for the redress of constitutional injuries, as the legislature intended. Specifically, New Mexico courts should not carry over the interpretations of § 1988 articulated in *Buckannon*, *Dague*, and *Evans* to Section 5. Instead, we argue that New Mexico courts should depart from the federal regime in three ways:

> *First*, if a court finds that a plaintiff's lawsuit was a proximate cause of a defendant's change in conduct, then the plaintiff should be considered to have "prevailed" regardless of whether the change in the defendant's conduct is judicially ordered;
>
> *Second*, courts should hold settlement provisions that waive attorney fees or provide for only nominal attorney fees to be presumptively void and severable from the other provisions in a settlement agreement; this presumption, however, may be overcome if the party opposing a subsequent fee petition convinces the court that the amount of fees the plaintiff's lawyer received through the settlement would not disincentivize lawyers from taking similar cases in the future; and
>
> *Third*, in determining what constitutes a reasonable attorney-fees award, courts should account for the complexity and contingent risk involved in bringing the particular civil rights case.

In this Part, we outline New Mexico courts' approach to statutory construction and then explain how this approach supports the three interventions described above.

A. Construction of Section 5

Section 5 reads, "In any action brought under the New Mexico Civil Rights Act, the court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant."[110] There are three primary interpretive questions: When does a plaintiff "prevail[]"?; Who is the beneficiary of the attorney-fees provision?; and What makes attorney fees "reasonable"?

STAT. ANN. § 28-1-13(D) (1987)). The following factors determine the reasonableness of an attorney-fees award:

> (1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services.

Smith, 1990-NMSC-020, ¶ 27, 787 P.2d at 441 (citing *Lenz*, 1989-NMSC-067, ¶ 19, 782 P.2d at 90).

In addition, the use of permissive language might simply do no more than ensure that a plaintiff's attorney will not receive an attorney-fees award if the attorney "engaged in bad faith conduct 'before the court or in direct defiance of the court's authority.'" N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 16, 127 N.M. 654, 986 P.2d 450 (quoting State *ex rel.* N.M. State Highway & Transp. Dep't v. Baca, 1995-NMSC-033, ¶ 17, 120 N.M. 1, 896 P.2d 1148, 1153 (adopting bad-faith exception to American rule)). All in all, the best interpretation of the drafting change from "shall" to "may" is that it indicates the Legislature's intent for Section 5 to follow the construction of other attorney-fees statutes—that is, a trial court has discretion to award fees, but an exercise of that discretion must be reasonable.

110. N.M. STAT. ANN. § 41-4A-5 (2021).

When the New Mexico Supreme Court interprets a statute, its "primary goal is to ascertain and give effect to the intent of the Legislature."[111] To reach this goal, the Court "examine[s] the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish."[112] The New Mexico Supreme Court is thus more willing than its federal counterpart to explicitly consider a statute's purpose in its construction.[113] Indeed, New Mexico courts are cautious before stopping their analysis at a statute's plain meaning. *State ex rel. Helman v. Gallegos*[114] synthesizes New Mexico's approach to statutory interpretation:

> [I]f the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written and not to second-guess the legislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective. . . .
>
> But courts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While . . . one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute.[115]

Following these principles, our interpretation of Section 5 must begin with its text. When that text is not "truly clear," as we argue it is not in its application to the questions before us, the courts will look to the legislative history and purpose of the NMCRA and Section 5. Additionally, we must consider how New Mexico cases

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111. Leger v. Leger, 2022-NMSC-007, ¶ 26, 503 P.3d 349, 356 (quoting State v. Nick R., 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868).

112. *Id.* (quoting Maes v. Audubon Indem. Ins. Grp., 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934).

113. *Cf., e.g.*, Bostock v. Clayton County, 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.").

114. 1994-NMSC-023, 117 N.M. 346, 871 P.2d 1352.

115. *Id.* ¶¶ 22–23. *Helman*'s prescribed method of statutory interpretation remains controlling. *See, e.g.*, *Leger*, 2022-NMSC-007, ¶¶ 29, 34, 503 P.3d at 356–57 (reaffirming *Helman*'s skepticism of reflexive reliance on plain language and considering legislative purpose, even after concluding that statute's plain language settles dispute).

treat other attorney-fees statutes and the federal cases interpreting § 1988. Finally, we canvas caselaw from other states, with an emphasis on states with civil rights statutes.

B. Prevailing Party

The first interpretive question New Mexico's courts must resolve in applying Section 5 is what "prevailing" means under the NMCRA. We argue that a plaintiff prevails, within the meaning of the statute, whenever the plaintiff's lawsuit was a proximate cause of a defendant's change in conduct that afforded the plaintiff some of the relief sought, even if the change happens voluntarily, as a result of a settlement, or without a court judgment. This Section first considers the NMCRA's text and concludes that Section 5's plain language does not resolve this issue. We then consider cannons of statutory interpretation as well as legislative history and relevant New Mexico precedent. We conclude that "prevail" should be interpreted broadly, to include the catalyst theory.

1. Plain Language

The text of Section 5 of the NMCRA gives courts authority to "allow a prevailing plaintiff or plaintiffs reasonable attorney fees," but it does not define what it means to prevail.[116] A common starting place for legal terms like "prevailing plaintiff" is Black's Law Dictionary, which defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>."[117] In providing this definition, Black's Law Dictionary cited to *Buckhannon*, which, as described in Part I, defined "prevailing party" as "one who has been awarded some relief by the court."[118] Recall that *Buckhannon* included within the definition of "prevailing party" plaintiffs who secure judgments on the merits and settlement agreements enforced through consent decrees but excluded plaintiffs who achieve their desired results because defendants voluntarily change their conduct.[119]

This exclusion is far from inevitable. Black's definition of "prevailing" is just a reflection of the Court's decision in *Buckhannon* and is not the "ordinary, contemporary, [or] common meaning" of prevail.[120] In New Mexico, courts "do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense."[121]

116. N.M. STAT. ANN. § 41-4A-5 (2021).

117. *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019).

118. *Id.* (citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 603 (2001)).

119. *See Buckhannon*, 532 U.S. at 603–05 (quoting *Party*, BLACK'S LAW DICTIONARY (7th ed. 1999)); *see also* discussion *supra* Section I.C.3.

120. *Buckhannon*, 532 U.S. at 633 (Ginsburg, J., dissenting) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993)).

121. Process Equip. & Serv. Co. v. New Mexico Tax'n Revenue Dep't, 2023-NMCA-060, ¶ 13, 534 P.3d 1043, 1049 (quoting Johnson v. United States, 559 U.S. 133, 139–41).

Indeed the New Mexico Supreme Court is usually looking for a term's common meaning when it reaches for a dictionary definition in statutory construction.[122] Two years ago, when the NMCRA was enacted, the popular understanding of "prevailing" was not limited to successes that come through judicial action. Non-legal dictionaries define "prevail" as "to gain ascendancy through strength or superiority: triumph."[123] This definition suggests that a plaintiff also "prevails" when "their suit act[s] as a 'catalyst' for the change they sought, even if they did not obtain a judgment or consent decree."[124] As Justice Ginsburg explained, because a plaintiff's "ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential."[125]

In short, there are two plausible definitions of "prevailing plaintiff" under Section 5: a technical one, based on *Buckhannon*, that excludes plaintiffs whose lawsuits catalyze a defendant's voluntary cessation of conduct and a more common one that includes such plaintiffs.

Of course, there is at least one argument that *Buckhannon*'s interpretation should control: perhaps the New Mexico legislature used the term "prevailing" with the expectation that it would be given its settled construction from federal law. In this vein, the prior-construction canon states that where "a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction."[126] Put more generally, New Mexico courts "presume that the Legislature is well informed and aware of existing statutory and common law."[127]

At first glance, the prior-construction canon would apply. After all, Section 5 and § 1988 use similar language.[128] So a careless application of this canon would suggest that the Legislature was aware of *Buckhannon* (and for that matter, *Evans* and *Dague*) when it enacted the NMCRA. One might therefore presume that the Legislature intended for courts to construe Section 5 just as *Buckhannon*

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122. *See, e.g.*, United Nuclear Corp. v. Allstate Ins. Co., 2012-NMSC-032, ¶ 19, 285 P.3d 644, 650 ("When a term is undefined . . . a reviewing court 'may look to that term's "usual, ordinary, and popular" meaning, such as found in a dictionary.'" (quoting Davis v. Farmers Ins. Co. of Ariz., 2006-NMCA-099, ¶ 7, 140 N.M. 249, 142 P.3d 17).

123. *Prevail*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prevail [https://perma.cc/D7WP-HAAF]. Justice Ginsburg relied on the everyday usage of "prevail" in her *Buckhannon* dissent. *See Buckhannon*, 532 U.S. at 633 (Ginsburg, J., dissenting) (quoting *Prevail*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1797 (1976)).

124. *Buckhannon*, 532 U.S. at 626 (Ginsburg, J., dissenting).

125. *Id.* at 633 (Ginsburg, J., dissenting).

126. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012); *accord* Shapiro v. United States, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (quoting Hecht v. Malley, 265 U.S. 144, 153 (1924))).

127. State v. Thompson, 2022-NMSC-023, ¶ 18, 521 P.3d 64, 68 (citing State v. Maestas, 2007-NMSC-001, ¶ 21, 149 P.3d 933, 939).

128. *Compare* N.M. STAT. ANN. § 41-4A-5 (2021) ("[T]he court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant."), *with* 42 U.S.C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

construed § 1988. As a result, a plaintiff would need a judgment on the merits or a judicially enforceable consent decree to "prevail."[129]

But New Mexico courts would be mistaken to graft the U.S. Supreme Court's constructions of § 1988 onto Section 5 based on the prior-construction canon. The canon only applies when the "jurisdiction's court of last resort" construes a statute.[130] Indeed, in their treatment of the prior-construction canon, Justice Antonin Scalia and Professor Bryan A. Garner considered a situation in which statutory language had been given a single construction by "state high courts in 15 jurisdictions other than the jurisdiction whose law governs."[131] They concluded that though the extra-jurisdictional views "might be persuasive," they "ha[ve] nothing to do with the present canon."[132] Because *Buckhannon* (and for that matter, *Evans* and *Dague*) come from a different sovereign's high court, these opinions are persuasive authority at most.

And for all that, persuasive authority from other jurisdictions points in the opposite direction. Out of the five other states the New Mexico Civil Rights Commission identified as having statutory analogues to § 1988, three (California, Massachusetts, and New Jersey) have judicially accepted the catalyst theory and rejected *Buckhannon*,[133] one (Colorado) adopted the catalyst theory via statutory language,[134] and one (Arkansas) does not appear to have resolved the question.

Moreover, as a textual matter, Section 5 and § 1988 are not identical. Importantly, the New Mexico Legislature decided to use "prevailing plaintiff" rather than copy Congress's use of "prevailing party." This change suggests that the Legislature anticipated that courts might *not* interpret Section 5 in lockstep with § 1988. If the Legislature foresaw a lockstep interpretation, then it could have stuck

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129. *See Buckhannon*, 532 U.S. at 604–05.

130. SCALIA & GARNER, *supra* note 126, at 322.

131. *Id.* at 325.

132. *Id.*

133. *See* Graham v. DaimlerChrysler Corp., 101 P.3d 140, 149 (Cal. 2004) (citations omitted) ("We continue to conclude that the catalyst theory, in concept, is sound. The principle upon which the theory is based—that we look to the 'impact of the action, not its manner of resolution'—is fully consistent with the purpose of [the fee-shifting statute at issue]: to financially reward attorneys who successfully prosecute cases in the public interest, and thereby 'prevent worthy claimants from being silenced or stifled because of a lack of legal resources.'"); Ferman v. Sturgis Cleaners, Inc., 116 N.E.3d 1196, 1200 (Mass. 2019) ("We begin with the 'two major purposes' of statutory fee-shifting provisions: 'First, they act as a powerful disincentive against unlawful conduct. Second, they often provide an incentive for attorneys to provide representation in cases that otherwise would not be financially prudent for them to take on, and in that sense they help to assure that claimants who might not be able to afford counsel, or whose claims are too small to warrant an expenditure of funds for counsel, will be represented' . . . The catalyst test promotes both purposes, and does so more vigorously than the *Buckhannon* test."); Mason v. City of Hoboken, 951 A.2d 1017, 1031 (N.J. 2008) (rejecting *Buckhannon* and tracing development of catalyst theory in New Jersey).

The list of five states with statutory analogues to § 1988 comes from N.M. C.R. COMM'N, *supra* note 3, at 15. The attorney-fees provisions of the statutes are ARK. CODE ANN. § 16-123-105 (West 2003); CAL. CIV. CODE § 52.1(i) (West 2022); COLO. REV. STAT. ANN. § 13-21-131(3) (West 2021); MASS. GEN. LAWS ch. 12, § 11I (West 2023); N.J. STAT. ANN. § 10:6-2(f) (West 2004).

134. *See* COLO. REV. STAT. § 13-21-131(3) (2021) ("In any action brought pursuant to this section, a court shall award reasonable attorney fees and costs to a prevailing plaintiff. In actions for injunctive relief, a court shall deem a plaintiff to have prevailed if the plaintiff's suit was a substantial factor or significant catalyst in obtaining the results sought by the litigation.").

with "prevailing party" and still anticipated that generally attorney fees would only be given to plaintiffs—after all, a prevailing *defendant* is entitled to attorney fees under § 1988 only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation."[135] Because New Mexico courts already have the inherent "judicial authority [to] compensate [any] prevailing party for expenses incurred as a result of frivolous or vexatious litigation"[136]—a power that the courts can presumably continue to exercise if plaintiffs file frivolous lawsuits under the NMCRA—the Legislature's switch to "prevailing plaintiff" reflects a guarantee that attorney fees will be available for defendants *only* when courts exercise that inherent judicial authority.

As a result, the Legislature's use of "prevailing plaintiff" shows that the Legislature: (1) anticipated that Section 5 might (or would, or even should) not be interpreted in lockstep with § 1988; and (2) wanted to eliminate the risk that New Mexico courts would award defendants attorney fees more readily than their federal counterparts. What is more, the Legislature's anticipation that Section 5 might not be interpreted in lockstep with § 1988 shows that federal constructions of § 1988 are not a ceiling on when attorney fees are available to plaintiffs under Section 5.

2. Changes to Bill Drafts

The evolution of Section 5's text offers more insight on the best construction of "prevail." The first draft of the NMCRA introduced to the Legislature read:

> The court shall award reasonable litigation expenses and attorney fees for all work reasonably necessary to obtain a successful result to any person who prevails in a court action to enforce the provisions of the New Mexico Civil Rights Act. When determining litigation expenses and reasonable attorney fees, the court shall not exclude work on other claims that were inextricably intertwined with work performed to obtain a successful result pursuant to the New Mexico Civil Rights Act.[137]

A senate amendment modified the bill to its current text:

> In any action brought under the New Mexico Civil Rights Act, the court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant.[138]

Consider the deletion of "for all work reasonably necessary to obtain a successful result to any person who prevails in a court action to enforce the provisions of the New Mexico Civil Rights Act."[139] At first blush, this deletion

135. Fox v. Vice, 563 U.S. 826, 833 (2011) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

136. State *ex rel.* N.M. State Highway & Transp. Dep't v. Baca, 1995-NMSC-033, ¶ 12, 120 N.M. 1, 896 P.2d 1148.

137. H.B. 4, § 5, 55th Leg., 1st Sess. (N.M. 2021). This text is nearly identical to the draft bill proposed by the New Mexico Civil Rights Commission. *See* N.M. C.R. COMM'N, *supra* note 3, at 7.

138. H.B. 4 (Senate Floor Amendment #1); N.M. STAT. ANN. § 41-4A-5 (2021).

139. H.B. 4, § 5.

suggests a rejection of catalyst theory. The deleted text notes that an attorney can receive fees for work done that was necessary to obtain a successful result; the inclusion of "result" suggests that fees should become available when the plaintiff gets what was sought in the lawsuit, whether through out-of-court settlement, a voluntary change in the defendant's conduct, consent decree, or a judicial decision on the merits. Thus, a careless reading of the legislative change might suggest that the removal of "successful result" means that fees should only be awarded when a party obtains victory with judicial involvement.

But a closer reading reveals the opposite. Notice the adverbial phrase that describes who is entitled to attorney fees in the bill's first draft: "to any person who prevails *in a court action*."[140] The adverbial phrase limits the definition of "prevail." Under the original draft, therefore, attorney fees might have only been available to those who prevailed in a court action—as opposed to those who prevailed by securing their desired results through out-of-court settlements or defendants' voluntary cessation of conduct. And by moving "[i]n any action" to become the prefatory clause in the statute's final draft, the phrase no longer presumptively modifies "prevails."[141] Rather, "[i]n any action brought under the New Mexico Civil Rights Act" merely describes the context in which a court may award fees.[142] Said otherwise, the final placement of "[i]n any action" shows that the statute governs attorney fees under the NMCRA and that filing an action under the NMCRA is a prerequisite to receiving an attorney-fees award under Section 5—but the final placement also frees the definition of "prevails" from the limitation of the earlier draft. In sum, the verb prevails is no longer limited by the adverbial phrase "in any court action," and therefore, the drafting changes suggest a shift toward a broader definition of "prevail."

3. Support from Other New Mexico Precedent

Accepting the catalyst theory and departing from *Buckhannon* would be a small step in New Mexico. Indeed, the New Mexico Court of Appeals has already recognized the catalyst theory, albeit in a different context. In *Helmerich & Payne International Drilling Co. v. New Mexico Taxation & Revenue Department*,[143] the New Mexico Taxation and Revenue Department assessed tax, penalty, and interest against a company. The company protested to the Administrative Hearings Office (AHO) and requested an award of fees and costs.[144] The Department requested a hearing, but before the hearing, the company moved for summary judgment.[145]

140. *Id.* (emphasis added).

141. *See Placement of Prepositional Phrases*, THE CHICAGO MANUAL OF STYLE ¶ 5.175 (16th ed. 2010) (explaining the placement of prepositional phrases with an adverbial or adjectival function).

142. *See* SCALIA & GARNER, *supra* note 126, at 152 (describing "nearest-reasonable-referent canon" as "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent"). Thus, "[i]n any action brought under the New Mexico Civil Rights Act" sets the context in which the nearest reasonable referent—"the court"—is operating. Unlike the earlier draft, the "in any action" modifier is not a limit on prevailing.

143. 2019-NMCA-054, 448 P.3d 1126.

144. *Id.* ¶ 2, 448 P.3d at 1128.

145. *Id.*

Rather than respond, the Department abated its assessment without explanation.[146] Still, the company continued its request of costs and fees.[147]

A statute provided that courts shall award attorney fees to taxpayers who prevail in administrative hearings.[148] The Department, citing *Buckhannon*, argued "that a judgment, court-ordered decree, administrative tribunal decision, or settlement in a party's favor is prerequisite to a party's designation of 'prevailing party' in the fee-award context."[149] The Court disagreed:

> First, as previously discussed, premising the fee shift on an AHO or court decision or party settlement would be incompatible with the statute's purpose of targeting Department unfairness. As this case demonstrates, not all tax protests end in one of those formal resolutions. But it is always possible that a given protest began because the Department abused its powers. That abuse is the statute's target, and we will not diminish the statute's force by reading into it the finality requirement proposed by the Department. Second, such a formalistic reading in this case's context would entail overlooking the apparent alteration in the legal relationship between [the company] and the Department. The facts here suggest something more than merely "voluntary change in conduct" by the Department. The Department does not argue that it reserves the right to revive the assessment at the core of [the company]'s protest. Without such a reservation, the element of finality—which the Department urges us to adopt as a requirement—is materially satisfied. Accordingly, in this instance, [the company] is a prevailing party under Section 7-1-29.1(C), even in the absence of an AHO decision on the matter central to [the company]'s protest.[150]

Helmerich, therefore, offers two lessons. First, New Mexico courts will look to the relevant statute's purpose in determining whether a fee award is appropriate. Second, New Mexico courts will consider whether there has been a material alteration of the parties' relationship to each other. And both of these considerations may call for an award of attorney fees even where there is no court judgment in favor of the prevailing party.[151]

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146. *Id.*

147. *Id.* ¶ 3, 448 P.3d at 1128.

148. *Id.* ¶ 18, 448 P.2d at 1130–31 (quoting N.M. STAT. ANN. § 7-1-29.1(C) (2015)).

149. *Id.* ¶ 20, 448 P.3d at 1131.

150. *Id.* ¶ 21, 448 P.3d at 1131 (citation omitted).

151. The New Mexico Court of Appeals followed the Supreme Court's interpretation of "prevailing party" in *Marquez v. Board of Trustees*, 2019-NMCA-075, 453 P.3d 476, an appeal where the only issue was entitlement to attorney fees *under § 1988*. That case, however, says nothing about the interpretation of "prevailing party" under the NMCRA. As the court recognized, the question was "one of law" on which it had no option but to follow *Buckhannon*'s holding that the absence of a consent decree or court-ordered change in the parties' legal relationship meant the plaintiffs were not "prevailing parties." *Id.* ¶¶ 8, 14–15, 453 P.3d at 478–80. It is worth noting that Judge Bogardus authored both *Marquez* and *Helmerich*. The obvious reconciliation of the two cases is that *Marquez* interpreted § 1988 and *Helmerich* articulated the view of New Mexico courts on the interpretation of state fee-shifting statutes.

All in all, the statutes' language, purpose, and history, along with supporting case law, should compel New Mexico courts to break from *Buckhannon*. Thus, if a court finds that a plaintiff's lawsuit was a proximate cause of a defendant's change in conduct, the court should conclude the plaintiff has "prevailed" for the purpose of attorney fees under Section 5 whether or not there is a judicial judgment proximate to their success. And as a result, plaintiffs may prevail when a defendant voluntarily ceases its conduct or when the parties settle without judicial involvement.

C. Void and Severable Settlement Provisions

The second major interpretive question facing New Mexico courts is whether to follow *Evans* and allow settlement provisions that waive attorney fees or include only nominal attorney fees. Here, the relevant question is who are the intended beneficiaries of Section 5 attorney fees: individual plaintiffs, individual attorneys, or the public as a whole? New Mexico's tenets of statutory interpretation again compel a break from federal precedent. These tools, as well as the policy underlying the NMCRA, support interpreting Section 5 in such a way that its provision of attorney fees benefits the public as a whole.

In an *Evans* regime, civil rights attorneys often structure their fee agreements to allow them to take the greater of either: (1) a share (say 30 percent) of a lump-sum settlement representing damages, costs, and attorney fees; or (2) a court-recognized attorney-fees award.[152] If plaintiffs act in their own interest and waive attorney fees, then the civil rights attorney will be left with a share of the award. Indeed, the majority in *Evans* expressly acknowledged that its holding made attorney fees a vested right of plaintiffs that they could negotiate away as they saw fit.[153] As described in Section I.C.1, civil rights attorneys operating under the *Evans* regime often decline cases if they anticipate settlements such that the share of the anticipated award is less than the amount they can make in a different case.

To fulfill the NMCRA's purpose, we conclude that settlement provisions that waive attorney fees or include only nominal attorney fees should be treated as presumptively void and severable in settlements of damages claims.[154] Defendants

152. *See* Evans v. Jeff D., 475 U.S. 717, 718 (1986); N.M. Bar Ass'n Ethics Comm., Formal Op. 1985-3 (1985); Reingold, *supra* note 31, at 28 & n. 93.

153. *See Evans*, 475 U.S. at 731–32 ("[W]hile it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney's fees." (footnote omitted)); *id.* at 752, 752 n.4 (Brennan, J., dissenting) (criticizing majority's "assertion that the Fees Act was intended to do nothing more than give individual victims of civil rights violations another remedy").

154. We do *not* necessarily recommend bifurcating settlement discussions into damages and attorney-fees portions. To avoid the deleterious consequences of attorney-fees waivers before *Evans*, the Third and Ninth Circuits barred simultaneous settlements of merits and attorney fees. *See* Jeff D. v. Evans, 743 F.2d 648, 652 (9th Cir. 1984); Prandini v. Nat'l Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). As Justice Brennan highlighted, however, prohibiting attorney-fees waivers does not require prohibiting the simultaneous discussion of damages and attorney fees. *Evans*, 475 U.S. at 753 (1986) (Brennan, J., dissenting).

can then rebut that presumption by raising the waiver as a defense in a subsequent motion for attorney fees, if they can show that the terms of the settlement, if used in all comparable suits, would not disincentivize lawyers from taking such cases in the future.

To be sure, Section 5's plain text neither blesses nor prohibits attorney-fees waivers. And given this silence, one might assume that parties can waive attorney fees under general freedom-of-contract principles. After all, New Mexico courts often view settlement agreements as an exercise of parties' freedom of contract, and they "look favorably when parties resolve their disputes, and, as a result, hold such agreements in high regard and require a compelling basis to set them aside."[155]

But although "[t]he right to contract is jealously guarded by [the New Mexico Supreme Court] . . . if a contractual clause clearly contravenes a positive rule of law, it cannot be enforced."[156] In *First Baptist Church of Roswell v. Yates Petroleum Corp.*, for example, the New Mexico Supreme Court held unenforceable contracts between a company and entities who were statutorily entitled to interest from oil-and-gas proceeds.[157] The entities signed an agreement under which they would receive delayed oil-and-gas proceeds from the petroleum company without interest.[158] However, an applicable statute mandated that a party entitled to such proceeds would also be entitled to interest upon a delay in payment.[159] The statute was silent on whether parties could contract around the entitlement to interest (not unlike Section 5's silence on attorney-fees waivers).[160] The petroleum company argued that it could contract around the interest payments.[161]

Chief Justice Barbara Vigil wrote for a unanimous court. In rejecting the company's argument, she explained that the petroleum company's invocation of the right to contract did not win it the case:

> The basis of [the petroleum company's] argument is that there is no clear policy statement in the language of the statute, therefore the parties should be free to contract around its mandate. We disagree. Every statute is a manifestation of some public policy. Just because the Legislature did not expressly include a statement of what the public policy is in the text of the statute does not mean

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We recognize that NMCRA defendants will not want to settle without knowing their total financial exposure. As a result, we have no issue with simultaneous settlement discussions for damages and attorney fees—so long as the attorney fees are not waived or nominal. Indeed, the New Jersey experience shows that banning attorney-fees waivers while allowing simultaneous settlement discussions is preferable to banning both the waivers and the simultaneous settlement discussions. *See infra* note 200 and accompanying text.

155. Builder Cont. Interiors, Inc. v. Hi-Lo Indus., Inc., 2006-NMCA-053, ¶ 7, 139 N.M. 508, 134 P.3d 795.

156. Acacia Mut. Life Ins. Co. v. Am. Gen. Life Ins. Co., 1990-NMSC-107, ¶ 1, 111 N.M. 106, 802 P.2d 11.

157. *See* 2015-NMSC-004, ¶ 26, 345 P.3d 310, 317.

158. *Id.* ¶ 2, 345 P.3d at 311.

159. *Id.* ¶ 10, 345 P.3d at 313 (citing N.M. STAT ANN. § 70-10-4 (1991)).

160. *See* N.M. STAT ANN. § 70-10-4 (1991).

161. *Yates*, 2015-NMSC-004, ¶ 12, 345 P.3d at 314.

> that it does not intend to further a strong public policy. In this case, the public policy is in favor of interest owners.[162]

So too, Chief Justice Vigil rejected the petroleum company's pleas that the ruling would yield uncertainty:

> This Court recognizes the need for certainty in business dealings. It is true that "[g]reat damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties." However, [the company] can hardly claim uncertainty when the Legislature made it clear in the Act nearly thirty years ago that compensatory interest shall be paid on suspended funds in New Mexico, nor is [the company] damaged by any alleged uncertainty.[163]

Yates is not anomalous. New Mexico courts have not flinched from "recogniz[ing] public policy violations where the terms of a contract have been contrary to statutory provisions."[164]

Applying this principle, any settlement agreements that address Section 5 attorney fees must comport with the public policy underlying Section 5. The following Subsections explain that attorney-fees waivers contravene the Legislature's purpose in enacting the NMCRA and state public policy as recognized by the Supreme Court.

1. New Mexico Civil Rights Commission and Section 5's Intended Beneficiary

Section 5's intended beneficiary was not individual plaintiffs but the public in general. The Legislature included Section 5 in the NMCRA to guarantee that lawyers would be available to remedy constitutional wrongs, not to enhance the damages that civil rights plaintiffs would individually receive after showing that they have been subject to a constitutional violation. In this sense attorney fees do not belong categorically to individual plaintiffs who—consistent with their freedom of contract—should be able to do with them as they see fit in the settlement

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162. *Id.* ¶ 12, 345 P.3d at 314.

163. *Id.* ¶ 20, 345 P.3d at 315–16 (quoting Berlangieri v. Running Elk Corp., 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098).

164. *See* State *ex rel*. Balderas v. ITT Educ. Servs., Inc., 2018-NMCA-044, ¶ 14, 421 P.3d 849, 854 (original parentheticals included) (citing *Yates*, 2015-NMSC-004, ¶ 15, 345 P.3d at 315; *Berlangieri*, 2003-NMSC-024, ¶ 53, 76 P.3d at 1113 (concluding that contract for liability release was contrary to the public policy established by the Equine Liability Act and therefore unenforceable); Acacia Mut. Life Ins. Co. v. Am. Gen. Life Ins. Co., 1990-NMSC-107, ¶ 1, 111 N.M. 106, 802 P.2d 11 (stating that a partnership agreement requiring indemnification of general partners by limited partner contravenes the Uniform Limited Partnership Act and is therefore unenforceable as against public policy); DiGesu v. Weingardt, 1978-NMSC-017, ¶ 7, 91 N.M. 441, 575 P.2d 950 (finding a contract for a partial lease of a liquor license to violate public policy where partial leasing was prohibited by applicable regulations and statute expressly limited the number of liquor licenses to be issued by the state)).

negotiations. This view of attorney fees is clear from the New Mexico Civil Rights Commission's report.[165]

The Commission concluded that an attorney-fees provision was "essential if the Legislature wants the New Mexico Civil Rights Act to play a meaningful role in remedying constitutional violations."[166] Three reasons supported the conclusion, two of which are discussed below.[167] A minority of commissioners dissented from the majority's conclusion; their views are also discussed.

First, the Commission asserted that public policy reasons supported awarding attorney fees. According to the Commission, "When a plaintiff succeeds in remedying a civil rights violation . . . he serves as a private attorney general, vindicating a policy that Congress [here, the Legislature] considered of the highest priority and therefore should ordinarily recover an attorney's fee from the defendant—the party whose misconduct created the need for legal action."[168] The Commission noted that attorney fees are awarded when statutes involve important issues and that Congress authorized attorney fees for violations of federal constitutional law.[169]

The Commission thus recognized that plaintiffs vindicate not just their own harms but also provide a public service by bringing a civil rights action. In that sense, attorney fees reimburse a plaintiff for work they paid for (or might have had to pay for) on the public's behalf. Thus, the attorney fees intertwine with the public and expressive value of courts recognizing constitutional violations.

Second—and most demonstrative of legislative intent—the Commission reasoned that "without an attorney's fees provision, the likelihood of an injured person finding an attorney to take their claim would be low for many cases involving constitutional violations because they are often unlikely to result in substantial recovery."[170] The Commission gave two examples. First, "a person whose state free speech rights are violated will not have damages in an amount that would be sufficient to entice an attorney to pursue claims if he or she will only be able to obtain a contingency fee from a low damages award."[171] Second, "in cases where a person is seeking injunctive relief for violations of their state constitutional rights, there is

165. N.M. C.R. COMM'N, *supra* note 3, at 1 (as required by statute, the Commission submitted a report in November 2020); *see also* H.B. 5, § 1, 54th Leg., 1st Spec. Sess., 2020 N.M. Laws, ch. 1 § 1 (the bill which Governor Michelle Lujan Grisham signed to create the Commission in June 2020).

166. N.M. C.R. COMM'N, *supra* note 3, at 32 app. V.

167. The Commission's third reason for including an attorney-fees provision was that other New Mexico statutes offer attorney fees to prevailing plaintiffs. *See id.* (citing New Mexico Human Rights Act, N.M. STAT ANN. § 28-1-11(E) (1995); New Mexico Whistleblower Protection Act, N.M. STAT ANN. § 10-16C-4(A) (2010); New Mexico Minimum Wage Act, N.M. STAT ANN. § 50-4-26(E) (2013); New Mexico Fair Pay for Women Act, N.M. STAT ANN. § 28-23-4(B) (2013); the Inspection of Public Records Act, N.M. STAT ANN. § 14-2-12(D) (1993); Open Meetings Act, N.M. STAT ANN. § 10-15-3(C) (1997)). According to the Commission, protecting state constitutional rights "is at least as important as these statutes"—thus, if attorney fees are available in other contexts, then they should be available under the NMCRA too. *Id.*

168. *Id.* (quoting Fox v. Vice, 563 U.S. 826, 833 (2011)).

169. *Id.* (citing 42 U.S.C. § 1988) (naming "anti-discrimination laws, environmental protection laws, and wage protection laws" as examples of statutes involving important issues).

170. *Id.*

171. *Id.*

no incentive for an attorney to take the case because there are no damages from which an attorney could be compensated."[172]

Thus, availability of attorney fees guarantees that (1) small-dollar harms are remedied, and (2) injunctive-relief cases would be brought to stop ongoing constitutional harms. In other words, the Commission designed the NMCRA to provide remedies for all constitutional harms—not just high-dollar harms that have already occurred. And by ensuring that small-dollar and ongoing constitutional harms have remedies, the Commission is advancing its goal that the NMCRA will play a meaningful role in remedying *all* constitutional violations. But if New Mexico courts recreate the federal *Evans* regime, the NMCRA will fail to provide any meaningful remedy for either of the Commission's hypothetical examples.

Dissenting Commissioners' Understandings. Not all members of the Commission agreed with the recommendation to enact a new civil rights law. Four of the nine commissioners dissented from the majority's recommendations and authored a minority report.[173] Their report is helpful for our purposes because it reveals how the dissenting commissioners understood the majority's intent.

The minority's primary thesis was that the NMCRA was superfluous; New Mexico law, the dissenting commissioners argued, already provided remedies for state constitutional violations.[174] But they highlighted one area in which the NMCRA effectuated a change from background law: under the act, "attorneys who bring claims, *even claims with minimal damages*, would be entitled to have their entire fee paid by the taxpayers."[175] So, even though the dissenting commissioners were unhappy with the recommendation for attorney fees, they understood what allowing attorney fees would mean: "[w]ith the provision of attorneys' fees, even trifling claims become appealing."[176] Commissioners thus disputed whether recognizing small-dollar constitutional violations was important or "trifling." But all agreed: the recommendation for attorney fees, if adopted by the Legislature, meant that small-dollar harms could be remedied.

* * * * *

After reviewing a similar legislative history to § 1988 in his *Evans* dissent, Justice Brennan concluded, "Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the civil rights statutes over and above the value of a civil rights remedy to a particular plaintiff."[177] He then explained in a footnote,

> The Court seems to view the options as limited to two: either the Fees Act confers a benefit on attorneys, a conclusion which is contrary to both the language and the legislative history of the Act; or the Fees Act confers a benefit on individual plaintiffs, who may freely exploit the statutory fee award to their own best advantage.

172. *Id.*
173. *Id.* at 46 app. XI.
174. *Id.* at 47–48.
175. *Id.* at 48 (emphasis added).
176. *Id.*
177. Evans v. Jeff D., 475 U.S. 717, 752 (1986) (Brennan, J., dissenting).

> It apparently has not occurred to the Court that Congress might have made a remedy available to individual plaintiffs primarily for the benefit of the public. However, Congress often takes advantage of individual incentives to advance public policy, relying upon "private attorneys general" to secure enforcement of public rights without the need to establish an independent enforcement bureaucracy. As long as the interests of individual plaintiffs coincide with those of the public, it does not matter whether Congress intended primarily to benefit the individual or primarily to benefit the public. *However, when individual and public interests diverge, as they may in particular situations, we must interpret the legislation so as not to frustrate Congress' intentions.*[178]

The focus on intended beneficiaries makes all the difference. A settlement agreement between a plaintiff and a defendant that waives attorney fees takes away an interest that the Legislature conferred on the public—the availability of counsel—without the public's input.[179] Courts must construe Section 5, therefore, to safeguard the public's interest in the availability of civil rights attorneys, even if that means limiting, to some extent, the bargaining chips available to individual plaintiffs in settlement negotiations.

2. Whole-Text Canon

The whole-text canon also shows why allowing waivers of attorney-fees would contravene the NMCRA's purpose.[180]

As stated by the New Mexico Supreme Court, "[s]tatutes are enacted as a whole, and consequently each section or part should be construed in connection with every other part or section, giving effect to each, and each provision is to be reconciled in a manner that is consistent and sensible so as to produce a harmonious whole."[181] As it happens, another section in the NMCRA provides insight on whether the Legislature intended Section 5 to receive the same construction as § 1988 did in *Evans*.

Section 4 prohibits the defense of qualified immunity.[182] This prohibition signals the Legislature's intention that civil rights claims brought under Section 3

178. *Id.* at 752 n.4 (emphasis added) (internal citations omitted).

179. Taking an unusual tack, the Supreme Court of California has held that the beneficiary of an attorney-fees provision is the attorney themselves. *See* Flannery v. Prentice, 28 P.3d 860, 865 (Cal. 2001) ("[O]nce the client's power to demand attorney fees is exercised, the attorney's right to receive them comes into being."). Given Section 5's clear purpose emanating from the New Mexico Civil Rights Commission's report, we conclude, as Justice Brennan did with regard to § 1988, that plaintiff's attorneys are not the intended beneficiaries of this provision. *See Evans*, 475 U.S. at 752 (Brennan, J., dissenting).

180. *See* SCALIA & GARNER, *supra* note 126, at 334 ("[T]he text must be construed as a whole."); *accord* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

181. State v. Thompson, 2022-NMSC-023, ¶ 17, 521 P.3d 64, 68 (quoting Lion's Gate Water v. D'Antonio, 2009-NMSC-057, ¶ 23, 226 P.3d 622, 631).

182. N.M. STAT. ANN. § 41-4A-4 (2021).

should proceed to the merits more readily than claims brought under § 1983.[183] Recall that *Evans* enables defense attorneys to offer less-appealing settlements that plaintiffs' lawyers are ethically obligated to accept, thus disincentivizing plaintiffs from litigating on toward the resolution of merits issues and trial.[184] Simply put, *Evans* disincentivizes civil rights claims from being resolved on the merits. So construing Section 5 in lockstep with § 1988 would clash with the Legislature's intention for the development and enforcement of constitutional civil rights through litigation. Thus, "to produce a harmonious whole" with Section 4, a correct construction of Section 5 should avoid *Evans*'s chilling effects that prevent cases from being resolved on the merits.[185]

3. No Choice but to Settle

When a defendant offers a civil rights plaintiff a settlement, the plaintiff's lawyer should and must communicate that offer to the plaintiff and follow the plaintiff's decision on whether to accept the settlement.[186] Returning to the second hypothetical in the Introduction, assume that after several months of litigation including briefing a motion for a preliminary injunction, the principal offers a settlement that would return all of the removed books to the library and pay the student-plaintiff damages in the amount of $5,000, conditioned on the waiver of $32,000 of attorney fees. The lawyer's ethical obligations compel the lawyer to communicate this offer and abide by the plaintiff's decision to accept this offer. As stated by the New Mexico Court of Appeals, "Counsel's first obligation is to the client, even at the expense of the attorneys' fee."[187]

It is ethical and proper for the attorney's interests to yield to the client's, and typically, for a court to enforce a settlement that is freely entered into by the plaintiff and the defendant. But the public is not a party to such an agreement, and the attorney's ethical obligations prevent the attorney from considering, or representing, the public interest when it comes to attorney fees. Only a court may consider the public's interest in access to counsel and the Legislature's intention of preserving that access. The procedure we suggest, which allows a plaintiff's attorney

183. N.M. C.R. COMM'N, *supra* note 3, at 24–25 app. III.

184. *See* Section I.C.1, *supra*; *see also* Section II.C.3, *infra*.

185. *Thompson*, 2022-NMSC-023, ¶ 17, 521 P.3d at 68 (quoting *Lion's Gate Wate*r, 2009-NMSC-057, ¶ 23, 226 P.3d at 631). It would be incorrect to argue that, because (1) Section 4 signals the Legislature's intention that qualified immunity will not bar recovery for claims brought under Section 3 in the way that it does for claims brought under § 1983, and (2) the NMCRA is silent on the federal doctrine for attorney fees under § 1988, then by negative implication, Section 5 should be construed in lockstep with § 1988. Put differently, one might try to argue that Section 4 is the Legislature's clear intention to break federal lockstep for one civil rights doctrine, and such intention is necessary before New Mexico courts should break federal lockstep for other civil rights doctrines. But as we explained in Section II.B.1, *supra*, Section 5's text indicates that the Legislature did not necessarily anticipate New Mexico courts to maintain federal lockstep as to the interpretation of Section 5 either.

186. Rule 16-102(A) NMRA ("A lawyer shall abide by a client's decision whether to settle a matter."); Rule 16-104(A)(1) NMRA, cmt. 2 ("[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.").

187. Pineda v. Grande Drilling Corp., 1991-NMCA-004, ¶ 24, 111 N.M. 536, 807 P.2d 234 (citing Evans v. Jeff D., 475 U.S. 717, 727–28 (1986)).

to both represent their client through settlement and seek attorney fees even if the settlement agreement purports to waive them, allows the court to exercise its necessary supervisory role.[188]

4. Public Policy of Access to Justice

The Commission's expressly stated policy of making counsel available follows New Mexico's interest in increasing access to justice.[189] What is more, New Mexico Rule of Professional Conduct 16-506(B) reflects this interest: "A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[190] This bar on settlement agreements that restrict the practice of law may be seen as another example of freedom of contract yielding to public policy. And the primary purpose underlying this rule is to "ensure that the public has the choice of counsel."[191] To be sure, waiving attorney-fees in a settlement is not a restriction on the particular attorney's right to practice. But if defendants are able to condition settlements on attorney-fees waivers, then over time, "the effect of those terms may be the same:

188. This Section has emphasized that a plaintiff's attorney is ethically barred from declining an otherwise favorable settlement that comes with an attorney-fees waiver. But is a defendant's attorney ethically able to make such a settlement offer?

Before *Evans*, the New York City Bar's Committee on Professional and Judicial Ethics issued an opinion concluding that "it is unethical for defense counsel to propose settlements conditioned on the waiver of fees authorized by statutes designed to encourage the enforcement of civil rights and civil liberties." N.Y. City Bar Ass'n Comm'n on Pro. & Jud. Ethics, Formal Op. 80–94 (1981), *reprinted in* 36 REC. ASS'N BAR CITY N.Y. 507, 511 (1981).

Four years later—and still before *Evans*—the New Mexico Bar's Ethics Committee considered a related issue: whether a defendant could offer a lump-sum settlement offer that included damages and attorney fees. In reaching an affirmative answer, the New Mexico Committee discussed and distinguished the New York City opinion—but still hinted that it might later adopt it: "The present inquiry . . . deals with settlements involving damage recovery. If the inquiry was also directed to injunctive relief or otherwise indicated a chilling effect on plaintiff's counsel, we would have a much more difficult situation and we might very well adopt the position of the NYC Bar." N. M. Bar Ass'n. Ethics Comm'n, Formal Op. 1985-3, at 2 (1985).

Since then (and since *Evans*), however, the New Mexico Supreme Court has recognized that "[a]n attorney has no duty however to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client." Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 1988-NMSC-014, ¶ 13,106 N.M. 757, 750 P.2d 118. Based on *Garcia*, NMCRA defendants would probably not breach an ethical duty by conditioning a settlement offer on the plaintiff waiving their right to seek attorney fees.

189. Bacon, *supra* note 20, at 9 ("New Mexico has large 'legal deserts,' where there are few to no options for legal representation in civil matters. For instance, Harding and DeBaca counties do not have a single practicing lawyer and Guadalupe County has a single lawyer for more than 3000 square miles. 21 percent of our counties have 5 or fewer lawyers and 33 percent have ten or fewer lawyers."); *New Mexico Access to Justice Commission*, STATE BAR N.M., https://www.sbnm.org/Leadership/Supreme-Court-Committees-and-Commissions/New-Mexico-Access-to-Justice-Commission/ [https://perma.cc/8QPK-HGCP] ("The resulting inability of people experiencing poverty to meaningfully access to the civil justice system is of concern to the Court, the judiciary, the legal profession, and the citizenry of the State.").

190. Rule 16-506(B) NMRA.

191. 6 WILLISTON ON CONTRACTS § 13:7 (4th ed.) (quoting Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989)).

successfully representing the client's interests in the settlement negotiations at issue necessarily entails yielding to a settlement demand that curbs the lawyer's ability to represent other clients."[192] The result will be that, contrary to the Legislature's intent, the public will lose its access to civil rights counsel.

5. The New Jersey Experience

New Mexico would not be the first state to prohibit settlements conditioned on attorney-fees waivers. In cases involving "public-interest law firms," New Jersey prohibits defendants from doing so.[193] In *Coleman v. Fiore Bros., Inc.*,[194] the New Jersey Supreme Court held that parties must bifurcate settlements of claims brought under the New Jersey Consumer Fraud Act, such that public-interest law firms and defendants must settle a case's merits before discussing fees.[195] The New Jersey Supreme Court emphasized in *Coleman* that "our ruling does not require that public-interest counsel demand fees in every consumer-fraud action that they have maintained, only that defense counsel not insist on waiver of fees as a condition for settlement."[196] The court, however, limited its holding to legal-aid lawyers who are generally prohibited from charging their clients fees and rely on court awarded fees and outside funding—as opposed to private plaintiffs' attorneys who have more flexibility in crafting fee arraignments with their clients.[197]

Twenty-one years of experience under *Coleman* led to *Pinto v. Spectrum Chemicals & Laboratory Products*.[198] There, the New Jersey Supreme Court withdrew *Coleman*'s ban on simultaneous negotiations of merits and fees but upheld *Coleman*'s "prohibition on a defendant conditioning settlement on the waiver of attorneys' fees."[199] As the *Pinto* court explained,

> When a plaintiff is seeking monetary damages in fee-shifting cases, a defendant has no legitimate interest in how the plaintiff and attorney divvy up the settlement. In such circumstances, a defendant's demand that a plaintiff's attorney waive her statutory fee as the price of a settlement is not only an unwarranted intrusion into the attorney-client relationship, but a thinly disguised ploy to put a plaintiff's attorney at war with her client. Plaintiffs' attorneys who are compelled to forfeit their hard-earned fees as a condition of settlement will be less inclined to take on the next case, and the

192. Comment, *Settlement Offers Conditioned upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. PA. L. REV. 793, 814–15 (1983).

193. *See* Pinto v. Spectrum Chems. & Lab'y Prods., 985 A.2d 1239, 1250 (N.J. 2010).

194. 552 A.2d 141 (N.J. 1989).

195. *See id.* at 146–47 ("We believe that the New Jersey Consumer Fraud Act's public policy of deterring fraudulent trade practices is best served by precluding public interest counsel from simultaneous negotiation of statutory claims for fees until the merits of the claim have been settled and by precluding defense counsel from attempting such simultaneous disposition.").

196. *Id.* at 147.

197. *Id.* at 145–46 ("In the ordinary non-class, consumer fraud action brought by private counsel, we see no need to alter the general rule that simultaneous negotiation of counsel fees and merits may be entertained.").

198. 985 A.2d 1239.

199. *Id.* at 1250.

> cascading effect of that mindset will make it difficult to attract competent counsel to enforce [New Jersey's] fee-shifting statutes.[200]

The court went on to cite Justice Brennan's *Evans* dissent and held that it would "bar defendants from demanding fee waivers as a condition of settlement in fee-shifting cases involving public-interest law firms."[201] The court expressly noted that its holding extended to cases involving equitable relief.[202] What is more, *Pinto* implied that its holding might also extend to private plaintiffs' attorneys, not just legal aid lawyers.[203] Finally, *Pinto* did not limit its holding to just the Consumer Fraud Act; rather, *Pinto*'s holding applies to all fee-shifting statutes.[204]

Following New Jersey's lead would realize the New Mexico Legislature's purpose in enacting the NMCRA. The New Jersey Supreme Court deserves special weight for two reasons. First, New Jersey courts are on the forefront of the growing movement to construing state law independently of federal law.[205] Second, New Jersey is one of five other states with a statutory analogue to § 1983 that provides for attorney fees,[206] and it appears to be the only state that has taken a definitive position on the *Evans* question.[207]

6. Void and Severable Settlement Provisions in Practice

The above analysis yields five key conclusions. First, the Legislature enacted Section 5 for the public's benefit so that attorneys would be available to remedy all civil rights violations—including in small-damages and injunctive-relief cases. Second, the NMCRA's full text and purpose show that the Legislature intended courts to apply the Act so that cases could reach their merits. Third, plaintiffs' attorneys are often ethically obligated to recommend that their clients accept settlements that waive attorney fees where such settlements are offered. Fourth, settlements like that restrict access to counsel, which is anathema to several salient aspects of the Supreme Court's jurisprudence. And fifth, the experience of

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200. *Id.* (footnote omitted).

201. *Id.*

202. *Id.* at 1250–51.

203. *Id.* at 1250 n.8 ("The same logic may apply to private-practice counsel and her client but the case before us involves only a public-interest law firm.").

204. *See id.* at 1250–51.

205. *See* Linda M. Vanzi & Mark T. Baker, *Independent Analysis and Interpretation of the New Mexico Constitution: If Not Now, When?*, 53 N.M. L. REV. 1, 5 (2023) (citing Jack L. Landau, *"First-Things-First" and Oregon State Constitutional Analysis*, 56 WILLAMETTE L. REV. 63, 68–71 (2020)).

206. *See* N.M. C.R. COMM'N, *supra* note 3, at 15.

207. We found nothing from Arkansas, Colorado, or Massachusetts that takes a position on attorney-fees waivers. The Supreme Court of California implicitly accepted the permissibility of attorney-fees waivers in how it phrased the question presented in *Flannery v. Prentice*: "[W]hether a party may receive or keep the proceeds of a fee award when she has neither agreed to pay her attorneys *nor obtained from them a waiver of payment*." 28 P.3d 860, 865 (Cal. 2001) (emphasis added). The *Flannery* court did not analyze the *Evans* issue, however. That said, a California Court of Appeals appeared to accept *Evans* in an unpublished case construing the California Consumers Legal Remedies Act, Cal. Civ. Code § 1780(e) (West 2010), rather than California's Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1 (West 2022). *See* Anderson v. Sullivan Motor Cars, LLC, B212091, 2010 WL 2114994, at *5 (Cal. Ct. App. May 27, 2010).

New Jersey shows that disallowing settlements conditioned on a waiver of attorney fees is workable.

Thus, we propose that a settlement provision that waives attorney fees or provides for only nominal attorney fees should be presumptively void and severable from other provisions in a settlement agreement. This presumption can be overcome if the party opposing a subsequent fee petition convinces the court that the amount of fees provided by the settlement would not disincentivize lawyers from taking similar cases in the futures.[208] If New Mexico courts adopt this proposal, then defendants who offer settlements with attorney-fees waivers—or that provide for recovery for attorneys that amount to fee waivers—will risk the plaintiff's lawyer later seeking to void the waiver in court, leaving the defense liable for the merits portion of the settlement and further litigation over attorney fees.

To be clear, we are not advocating for a judicially created procedure such that courts must approve *all* NMCRA settlements. Because we conclude that settlements with attorney-fees waivers are presumptively void, however, a plaintiff's attorney will have the power to bring a fee-award request to court even if there is a putative waiver in a settlement agreement. Courts may also review waivers in the context of approving a settlement under an already existing procedure; in these cases, the court will already be positioned to void and sever an attorney-fees waiver.[209] Such a holding would comport with other cases in which New Mexico courts have refused to enforce contracts that would undermine public policy embodied in positive law.[210]

One counterargument to this proposal, which animated the majority outcome in *Evans*, is the concern that defendants will not settle civil rights cases without certainty as to their total financial liability for the suit. Applied to our proposal, this counterargument suggests that defendants will prefer to extend litigation if their settlements of fees might be voided by a court. Settling the merits without settling attorney fees (with certainty), defendants might think, would leave their liability uncertain and subject them to a potential one-way ratchet that increases their liability based on a court's unpredictable evaluation of the fairness of a settlement.

While this counterargument has some force, there are several more forceful responses. First, this counterargument relies primarily on an empirical intuition about defendants' behavior. But we have not found empirical evidence supportive of the thesis that defendants will extend litigation when they cannot demand attorney-fees waivers, and we doubt any exists. After all, we are aware of no American court system beyond New Jersey that has adopted an anti-*Evans* approach since the advent of modern civil rights litigation. In many cases, defendants may prefer to settle sooner despite the possibility of plaintiff's attorneys challenging the fee portion of

208. One exception to our proposal is for damages-only settlements of $2,000,000 or more. The NMCRA includes a $2,000,000 limitation on recovery (which increases with the cost of living). N.M. STAT. ANN. § 41-4A-6 (2021). If the cap is reached, and the defendant pays $2,000,000, then the any attorney-fees provision in the settlement would no longer be void. But for claims of this size, a contingency fee agreement is usually a sufficient incentive to attract legal representation.

209. *See, e.g.*, Rule 1-023(E) NMRA ("A class action shall not be dismissed or compromised without the approval of the court . . . .").

210. *See*, *e.g.*, cases cited at *supra* note 164.

the settlement because defendants know that their attorney-fees liability will only increase the longer they hold out. Second, litigation reaching the merits and therefore developing New Mexico constitutional rights is consistent with the purpose of the NMCRA.[211] Finally, the risk of an attorney-fees settlement being voided would encourage defendants to make reasonable settlement offers with respect to fees. So, if New Mexico courts adopted this regime, a voided settlement is just the risk that defendants would run if they offered a settlement that unfairly induces a plaintiff to shortchange their attorney in a way that undermines the purpose of the NMCRA.[212]

A second counterargument is that making the empirical predictive judgment about when attorney fees are sufficiently incentivizing is not a job for courts. While it is no doubt true that courts are not likely capable of making such judgments with total certainty, that does not mean they are unable to make them at all. Indeed, courts are already tasked with making the analogous decision as to what is a "reasonable" fee award. And this sort of predictive judgment regarding incentives is exactly the sort of task Justice O'Connor assigned to district courts in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, where she instructed them to enhance fees above the lodestar to account for the risk of non-recovery taken on by a civil rights lawyer only where doing so was necessary to prevent the prevailing plaintiff from "fac[ing] substantial difficulties in finding counsel in the local or other relevant market."[213] In many ways, the question New Mexico courts would face when deciding whether to void an attorney fees settlement provision is a much simpler one than the one Justice O'Connor articulated: they need not calibrate exactly what number would adequately incentivize attorneys to take similar cases in the future, they need only decide whether the number the defendants offered is clearly too low.

Finally, it is worth remembering why a civil rights defendant is in a position to choose between settlement and trial. In the words of Matthew Segal, a senior staff attorney with the ACLU, "[V]alid civil rights lawsuits are typically a sign that something has gone wrong. They mitigate wrongdoing that never should have happened in the first place."[214] By enacting the NMCRA, the legislature decided that civil rights defendants should face liability for constitutional wrongs. The fees that defendants will pay to avoid a voided settlement are simply part of the cost of a robust civil rights enforcement regime.

D. Contingency Multipliers

Banning contingency multipliers can similarly restrict access to counsel. With the enactment of the NMCRA, attorneys who work on hourly fee arrangements may be considering adding civil rights to their practice. But some attorneys may do

211. *See* Section II.C.2, *supra*.

212. If New Mexico courts are unsatisfied with these responses to the counterargument, they could determine that settlements of fees are not severable from the rest of a settlement agreement. This would spread the risk of a voided settlement from being on the defendants alone to being on both parties and would put defendants in no worse a position than if the plaintiff simply had rejected the defendants' last offer.

213. *See* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 733 (1987) (O'Connor, J., concurring) (internal quotation marks omitted).

214. Matthew R. Segal, *The Promise and Perils of State Civil Rights Litigation*, 54 N.M. L. REV. 355, 362 (2024).

so only if their new civil rights practices would be equally profitable with their current practice. Contingency multipliers can compensate the attorney for abandoning hourly fees (that are paid as they are incurred) or even other contingency work (that comes with a higher likelihood of success) in favor of seeking to vindicate a client's constitutional rights. New Mexico courts should account for contingent risk involved in bringing a particular civil rights case in determining the size of attorney-fees awards.

The same access-to-justice considerations in our above proposals apply here, too. The New Mexico Civil Rights Commission's purpose behind recommending Section 5—that is, ensuring the availability of counsel to right constitutional wrongs—remains relevant. And, fortunately, the possibility of contingency multipliers is not foreclosed by any New Mexico precedent. In fact, New Mexico has already broken lockstep with *Dague* on this issue in *Atherton v. Gopin*.[215] There, plaintiffs obtained a summary judgment ruling that defendants violated the Unfair Practices Act (UPA). As a result, the plaintiffs were entitled to attorney fees and sought a multiplier factor of the lodestar method. The district court refused the request.[216]

The New Mexico Court of Appeals reversed.[217] The court first emphasized that a reasonableness standard applies to attorney fees under the UPA, and that courts will reference the factors in Rule 16-105 of the Rules of Professional Conduct to determine reasonableness.[218] One of those factors is "whether the fee is fixed or contingent."[219]

The court noted that two policies supported awarding attorney fees under the UPA: "enabling individual plaintiffs to pursue their claims, however small, and encouraging individuals to enforce the UPA on behalf of the general citizenry."[220] If attorney fees were not available, the court reasoned, "prospective plaintiffs might have difficulty pursuing their claims and enforcing the UPA on behalf of the public."[221] The court then concluded that the district court erred by declining to consider the use of a multiplier.[222] The policies supporting a multiplier in the UPA context apply just as well to the NMCRA. For the reasons stated in *Atherton*, along with the strong access-to-justice policy reflected in Section 5,[223] New Mexico courts should continue to recognize contingency risks when awarding attorney fees.

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When the Legislature enacted Section 5, it sought to guarantee that New Mexicans would have access to counsel when state officials violated rights

215. *See* 2012-NMCA-023, ¶ 10, 272 P.3d 700, 703.

216. *Id.* ¶¶ 1–2 (citing N.M. STAT. ANN. §§ 57-12-10(C) (2005)).

217. *Id.* ¶1.

218. *Id.* ¶ 6 (first quoting Jones v. Gen. Motors Corp., 1998-NMCA-20, ¶24, 124 N.M. 606, 953 P.2d 1104; then quoting *In re* N.M. Indirect Purchasers Microsoft Corp., 2007-NMCA-007, ¶ 76, 140 N.M. 879, 149 P.3d 976).

219. *Id.* (quoting Rule 16-105(A)(8) NMRA).

220. *Id.* ¶ 8.

221. *Id.*

222. *Id.* ¶ 9.

223. *See* Sections II.C.1, II.C.4, *supra*.

guaranteed by the New Mexico Bill of Rights. And both the majority and minority commissioners of the New Mexico Civil Rights Commission made clear that the availability of attorneys would not depend on the amount of damages or type of relief. New Mexico courts now have the opportunity to safeguard the Legislature's promise of legal representation. To do so, our courts must learn from the federal system's mistakes in *Buckhannon*, *Evans*, and *Dague*.

CONCLUSION

In a recent article in the *New Mexico Law Review*, Judge Linda M. Vanzi and Mark T. Baker called for the development of New Mexico constitutional law.[224] They posited that the NMCRA "opens the door to litigation that will require our courts to decide claims arising under the state bill of rights."[225] This, of course, comes with the exciting possibility that the New Mexico Constitution will be increasingly protective of our civil rights, exceeding its federal counterpart.

The enjoyment of increased protections from the NMCRA and the development of New Mexico constitutional law should be available to all New Mexicans who suffer constitutional wrongs—not just those whose harms can be reflected in high-dollar amounts or who can afford an attorney's hourly rate. Breaking lockstep with federal precedent construing § 1988 can accelerate breaking lockstep with federal constitutional law. Abandoning *Buckhannon* and *Evans* and continuing to leave *Dague* in the dust will create a positively reinforcing cycle: attorneys will be available to advocate for New Mexicans who are entitled to small-dollar damages or injunctive relief after suffering constitutional wrongs; this advocacy will further develop New Mexico constitutional rights; and this development of New Mexico constitutional rights will provide more tools for New Mexico attorneys to protect civil rights.

Ultimately, "[t]he goal [of a civil rights act] is not to create lawsuits; it's to create justice."[226] But until civil rights attorneys in New Mexico can work themselves out of the job, the NMCRA should be interpreted to ensure that they are adequately incentivized to do the work that remains to be done.

224. Vanzi & Baker, *supra* note 205, at 2.

225. *Id.* at 25.

226. Segal, *supra* note 214, at 362.