IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRYCE FRANKLIN,

Petitioner-Appellant,

v. **No. S-1-SC-40715**

STATE OF NEW MEXICO, and RONALD MARTINEZ, Warden,

Respondents-Appellees.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, THE AMERICAN CIVIL LIBERTIES UNION, AND THE BRENNAN CENTER FOR JUSTICE FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* OUT OF TIME

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Proposed *amici curiae* the American Civil Liberties Union of New Mexico, the national ACLU, and the Brennan Center for Justice at NYU School of Law respectfully move under Rule 12-320(A) NMRA for leave to file their conditionally filed *Amici Curiae* Brief.[1] In support of this motion, *amici* state as follows:

1. *Amici* are nonprofit organizations that work to advance state constitutionalism, including the independent interpretation of state constitutions by state courts.

2. *Amici* have a strong, well-established interest in encouraging this Court to adopt a fully independent method of state constitutional interpretation "to ensure the people of New Mexico the protections promised by their constitution." *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 19 n.7, 539 P.3d 272.

3. *Amici* submit this brief following oral argument to address the questions in this Court's order of November 25, 2025, namely: "Whether *State v. Gomez*, 1997-NMSC-006, 122 N.M. 77, is valid and appropriate to the issues presented in this case" and "[w]hether the interstitial approach and preservation requirements set forth in *Gomez* should be overruled, and, if so, what governing principle, if any should replace *Gomez*?"

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[1] This brief does not purport to convey the position of New York University School of Law.

4. *Amici* were unaware of this Court's order until December 1, 2025. Since then, they have worked diligently to prepare a brief responsive to the order's questions. That brief is being conditionally filed together with this motion.

5. *Amici* notified the parties on December 16, 2025, that they intended to file an *amicus* brief. The Respondent opposes this Motion. The Petitioner does not oppose this Motion.

6. While Rule 12-320(D)(2)(a) NMRA requires a prospective *amicus curiae* to file a motion and brief within seven days after the due date of the principal brief and Rule 12-320(D)(1) NMRA requires a prospective *amicus curiae* to notify the parties of its intention to file a motion and brief at least fourteen days before the deadline, *amici* respectfully ask the Court to exercise its discretionary authority to grant their motion for leave to file, given the exceptional circumstances in this case, specifically the Court's November 25, 2025, order.

WHEREFORE, *amici* respectfully ask this Court to issue an order granting them leave to file the conditionally filed *Amici Curiae* Brief, attached as **Exhibit A**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true copy of the foregoing Motion for Leave to File Brief of *Amici Curiae* was filed electronically and served to all counsel of record this 19th day of December 2025 via the Odyssey e-filing/service system.

/s/ Lalita Moskowitz
Lalita Moskowitz

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, THE AMERICAN CIVIL LIBERTIES UNION, AND THE BRENNAN CENTER FOR JUSTICE

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-320(D)(3) NMRA, this Amicus brief complies with the limitations set forth under Rule 12-318(F), (G) NMRA:

1. This Amicus brief was prepared using Times New Roman typeface set at a 14-point font size.
2. This Amicus brief does not exceed the thirty-five-page limitation.
3. This Amicus brief contains a total of 6,381 words.
4. The word count was obtained using Microsoft Word for Microsoft 365 MSO's word-count feature.

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INTEREST OF AMICI

The ACLU is a nationwide, non-profit, non-partisan organization dedicated to defending the civil liberties and civil rights guaranteed by the federal and state constitutions, and the ACLU of New Mexico is its New Mexico affiliate. The Brennan Center is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve our country's systems of democracy and justice.

Amici have an interest in this case because they work to advance state constitutionalism, including the independent interpretation of state constitutions by state courts. They represent clients challenging the constitutionality of state laws and actions. *See, e.g.*, Compl., *Williams v. City of Albuquerque*, D-202-CV-2022-07562 (2d Jud. Dist. Ct. Dec. 19, 2022). And they have argued for robust protections for individual rights under state constitutions across the country. *See, e.g.*, Op. & Order Granting Pls.' Mot. for Prelim. Inj., *Perkins v. State*, No. DV-25-282 (4th Jud. Dist. Ct. Mont. May 16, 2025); Br. of *Amici Curiae* the ACLU and the ACLU of Pennsylvania, *Commonwealth v. Shivers*, No. 50 EAP 2024 (Sup. Ct. Pa. Sept. 26, 2024); *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, 139 N.M. 761, *reh'g denied*; Br. of *Amicus-Curiae* Brennan Center for Justice in Supp. of Pl.-Appellant Robert Reeves' Appl. for Leave to Appeal, *Reeves v. Wayne Cnty.*, No. MSC 158969 (Mich. Sup. Ct. Nov. 6, 2025). In addition, ACLU-*amici* regularly advocate for the rights of incarcerated individuals. *See, e.g.*, Compl., *Milligan v.*

Watson, D-101-CV-2023-00346 (1st Jud. Dist. Ct. Feb. 13, 2023); Compl., *Disability Rts. N.M. v. Tafoya Lucero*, No. 1:22-cv-00954 (D.N.M. Dec. 15, 2022).

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

In a recent order in this case, this Court has raised questions of vital importance to the development of New Mexico constitutional law: (1) whether this Court should overrule the interstitial approach and preservation requirements of *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777; and (2) if so, what governing principle should replace *Gomez*. *Amici* submit this post-argument brief to help answer those questions. For the reasons explained below, this Court should retire the interstitial approach, transition to an independent approach to interpreting the New Mexico Constitution, and bring its preservation requirements in constitutional cases into alignment with its preservation requirements in other cases.

The framers of the New Mexico Constitution created a unique regime of rights, and they "made it imperative upon the judiciary to give meaning to those rights." *State v. Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431. And so the judiciary has. Time and again, this Court has interpreted state constitutional provisions independently to preserve the "sanctity" of those guarantees. *Id.* ¶ 32. It has departed from federal precedent, for example, to uphold principles of equality

[1] Under Rule 12-320(C) NMRA, *amici* affirm that no person or entity beyond *amici* paid for or authored any part of this brief. *Amici* thank Lily Moore-Eissenberg, a Justice Catalyst Fellow with the ACLU's State Supreme Court Initiative, for her substantial contributions to the writing of this brief. Ms. Moore-Eissenberg's bar license was not yet processed at the time of filing.

and the rights of criminal defendants. In so doing, it has fulfilled its "constitutional duty" to breathe life into New Mexico's founding document. *Id.* ¶ 16.

Gomez marked an important step in this Court's effort to give meaning to the New Mexico Constitution's guarantees. There, the Court recognized that, after decades of "lock-stepping" with the U.S. Constitution, the Court had "tacit[ly]" transitioned to an interstitial approach. *Gomez*, 1997-NMSC-006, ¶ 20. *Gomez* made that interstitial approach explicit. It instructed New Mexico courts to "ask first whether the right being asserted is protected under the federal constitution" and to consider state constitutional claims only if the right is not protected under federal law. *Id.* ¶ 19. In that scenario, a court "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id. Gomez*, however, stopped short of adopting a thoroughly independent approach to state constitutional interpretation.

But *Gomez* was always a bridge—never a destination. It allowed New Mexico courts to lean on federal precedent while developing a more robust body of case law on, and tools for interpreting, the New Mexico Constitution. That is, far from being "inscribed in granite," *Gomez* has been "a means to an end." *State v. Garcia*, 2009-NMSC-046, ¶ 56, 147 N.M. 134 (Bosson, J., specially concurring). And, over time, the Court has honed its state constitutional jurisprudence, despite interstitialism's "presumption in favor of established federal jurisprudence." Michael B. Browde,

State v. Gomez and the Continuing Conversation Over New Mexico's State Constitutional Rights Jurisprudence, 28 N.M. L. Rev. 387, 387 (1998). This Court no longer needs to rely on federal precedent to chart its path. *Cf. Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 19 n.7, 539 P.3d 272 (questioning whether the interstitial approach should remain).

The time is now ripe for the Court to move to a fully independent, and less circuitous, method for interpreting the New Mexico Constitution. Instead of starting with federal law—which, in a given case, may prove both time-consuming and indeterminate—this Court should resolve state constitutional issues by starting with the document it is actually interpreting. That approach would best serve "the purposes of justice" and the "independent development of our state Constitution." *Garcia*, 2009-NMSC-046, ¶ 56 (Bosson, J., specially concurring). It would also ensure that New Mexicans enjoy not one but two layers of protection for individual rights. *Amici* therefore urge the Court to join several other states in adopting an independent approach to state constitutional interpretation, consistent with this Court's rich tradition of interpretive independence and the unique composition of the New Mexico Constitution.

Under an independent approach, courts would analyze the New Mexico Constitution before looking to federal jurisprudence, and they would do so in light of New Mexico's distinctive characteristics—potentially including constitutional

text, structure, and history, preexisting and developing state law, and state experience and values. Federal precedents could still serve as persuasive authorities, on par with case law from other states, but they would not anchor this Court's analysis. And, with the interstitial approach gone, courts would apply the same preservation standards to all constitutional claims, including those asserting broad protection for the first time.

The interstitial approach represented an important step away from lock-stepping and toward independent interpretation. But it should not be the Court's final stop on the road to true state constitutional independence.

ARGUMENT

I. This Court should move beyond the interstitial approach and endorse an independent approach to interpreting the New Mexico Constitution.

This Court should "give vitality to the organic laws of this state" by interpreting the New Mexico Constitution on its own terms, not on terms set by the federal judiciary. *Gutierrez*, 1993-NMSC-062, ¶ 55. The interstitial approach itself represented a first step toward that goal, adopted to formalize the Court's movement away from strict lock-stepping. *Gomez*, 1997-NMSC-006, ¶¶ 16–20. But today, *Gomez*'s reliance on federal precedents is no longer needed, given this Court's ever-growing body of case law interpreting the state constitution independently. Now is the time for the Court to take the final step toward true state constitutional independence. To do so, the Court should formally replace the interstitial model with

one that directs all state courts, including this one, to analyze the New Mexico Constitution before considering federal constitutional law.

A. Independent interpretation is deeply rooted in this Court's jurisprudence and the structure of the New Mexico Constitution.

This Court has long been "willing[] to undertake independent analysis of our state constitutional guarantees." *Gutierrez*, 1993-NMSC-062, ¶ 32. The Court "independently analyze[s]" the New Mexico Constitution, *id.* ¶ 16, by applying "principles . . . firmly and deeply rooted" in that document, *id.* ¶ 32 (quoting *State v. Cordova*, 1989-NMSC-083, ¶ 16, 109 N.M. 211). Recognizing that it is "not bound" to follow federal precedents when interpreting the state constitution, the Court has often construed state constitutional provisions as providing independent—and broader—protection relative to the U.S. Constitution. *State ex rel. Serna v. Hodges*, 1976-NMSC-033, ¶ 22, 89 N.M. 351, *overruled on other grounds by State v. Rondeau*, 1976-NMSC-044, ¶ 9, 89 N.M. 408. In that way, the Court makes good on its "constitutional duty to interpret the organic laws of this state." *Gutierrez*, 1993-NMSC-062, ¶ 16.

1. This Court's equal protection and criminal procedure cases demonstrate its longstanding commitment to independent interpretation.

This Court's precedents attest to its longstanding tradition of independent interpretation, notwithstanding its endorsements of lock-stepping and, later on, interstitialism.

For example, New Mexico's Equal Protection Clause, as construed by the Court, provides broader protection than its federal counterpart in at least four ways. First, the Court applies a "more robust" form of rational-basis review that demands scrutiny of the statute itself to ascertain its purposes, requires a basis in a "firm legal rationale or evidence in the record," and does not tolerate classifications that are "grossly over- or under-inclusive." *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶¶ 27, 13–15, 25, 29, 378 P.3d 13; *see also Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 30–32, 125 N.M. 721 (clarifying that New Mexico's rational-basis standard is not "toothless" and that it subsumes the separate "heightened" rational-basis standard that previously existed).[2] Second, the Court has departed from federal law in deeming certain classes "sensitive" for purposes of intermediate scrutiny. *See, e.g.*, *Griego v. Oliver*, 2014-NMSC-003, ¶¶ 39, 53, 316 P.3d 865 (deeming the LGBT community a sensitive class); *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 28, 138 N.M. 331 (deeming persons with mental disabilities a sensitive class). Third, the Court applies intermediate scrutiny not only when a classification burdens a "sensitive" class, but also when it burdens an "important" right. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734; *see Breen*, 2005-NMSC-028,

[2] Other high courts have adopted similar tests. *See, e.g.*, *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7–8 (Iowa 2004); *Baker v. State*, 170 Vt. 194, 203-204, 744 A.2d 864 (1999); *Balboni v. Ranger Am. of the V.I., Inc.*, 2019 V.I. 17, 19; *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 564 (Ky. 2020).

¶¶ 14, 17 (noting that New Mexico's tiers of scrutiny apply "to different groups and rights" than under federal law). And fourth, the Court has suggested that disparate-impact claims are cognizable under New Mexico's Equal Protection Clause. *See Wagner*, 2005-NMSC-016, ¶ 22 (noting that a cap on attorneys' fees that facially applied to workers and employers may nonetheless "disparately affect workers' right to access our appellate courts," but not ruling on the issue). Notably, none of these majority opinions on equal protection mention the interstitial approach.

In criminal procedure, too, this Court has proven willing to interpret the state constitution independently. Pre-*Gomez*, the Court diverged from federal law by retaining a two-pronged test for probable cause, *see State v. Cordova*, 1989-NMSC-083, ¶¶ 15-16; by rejecting a good-faith exception to the exclusionary rule, *see Gutierrez*, 1993-NMSC-062, ¶¶ 1, 33–56; and by ruling that a warrantless public arrest of a felon can be unconstitutionally unreasonable, *see Campos v. State*, 1994-NMSC-012, ¶ 10, 117 N.M. 155. Post-*Gomez*, the Court has continued to expand criminal defendants' state constitutional rights beyond the protections provided by the U.S. Constitution. *See, e.g.*, *State v. Garcia*, 2009-NMSC-046, ¶¶ 15, 35 (retaining a "free-to-leave" test for seizures); *State v. Martinez*, 2021-NMSC-002, ¶ 72, 478 P. 3d 880 (adopting a per se rule for excluding suggestive eyewitness identifications).

The Court thus has a rich tradition of independent state constitutional interpretation. If the Court were to move beyond the interstitial approach, it would be on firm footing.

2. The structure of the New Mexico Constitution requires an independent approach that treats the document as a unique and unified whole.

In addition to precedents, the structure of the New Mexico Constitution calls for an interpretive approach untethered from federal law. Indeed, because the New Mexico Constitution contains some provisions that have federal analogues and some that do not,[3] *all* of its provisions should receive their own, independent interpretation.

For starters, the New Mexico constitutional provisions that *lack* federal analogues frequently inform the meaning of provisions that *have* federal analogues. In *Grisham*, for example, this Court read New Mexico's Equal Protection Clause "together with" several Bill of Rights provisions lacking federal analogues. 2023-NMSC-027, ¶¶ 25–26. More broadly, several provisions of the New Mexico Bill of Rights set forth broad principles that arguably provide an instruction manual for how

[3] *See, e.g.*, N.M. Const. art. II, § 2 (self-government); *id.* § 3 (popular sovereignty); *id.* § 4 (inherent rights); *id.* § 5 (rights under the Treaty of Guadalupe Hidalgo); *id.* § 8 (freedom of elections); *id.* § 18 (sex discrimination); *id.* § 21 (imprisonment for debt); and *id.* § 24 (victims' rights).

to interpret other provisions in the New Mexico Constitution.[4] These provisions confirm that none of the New Mexico Constitution's provisions should "be considered in isolation" and that the document instead "should be construed as a whole." *State ex rel. King v. Raphaelson*, 2015-NMSC-028, ¶ 11, 356 P.3d 1096 *overruled on other grounds by State ex rel. Franchini v. Oliver*, 2022-NMSC-016, 516 P.3d 156 (quoting *In re Generic Investigation into Cable Television Servs. in State of N.M.*, 1985-NMSC-087, ¶ 13, 103 N.M. 345); *see generally* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 Wis. L. Rev. 1001 (2001) (observing that when multiple state constitutional provisions protect the same underlying right, state courts frequently read them jointly in a manner that enhances the underlying protection). It therefore makes little sense to reflexively interpret any provision of the New Mexico Constitution, even a provision with a clear federal analogue, by resort to the U.S. Constitution. The New Mexico Constitution is a different document containing a different set of provisions, and it should be interpreted accordingly.

This very case illustrates the point. The unique state constitutional right asserted here, namely the right to "acquire property," should necessarily inform the

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[4] *See, e.g.*, N.M. Const. art. II, § 2 ("All political power is vested in and derived from the people . . . ."); *id.* § 3 ("The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state."); *id.* § 4 ("All persons are born equally free, and have certain natural, inherent, and inalienable rights . . . .").

process that is due to Mr. Franklin under the state constitution, even though due process itself has a federal analogue. Consistent with *Grisham* and *Raphaelson*, this Court's due process analysis should therefore remain firmly rooted in the intersecting *state* constitutional rights at issue without reliance on federal assessments of due process with respect to incarcerated individuals' incongruous property rights under the federal constitution.

What is more, independently interpreting all provisions of the New Mexico Constitution would make it possible to use a single *method* of interpretation across the board. Whereas the interstitial approach commits this Court to bifurcating its analysis—consulting federal law for some provisions but not others, *see N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶ 28–29, 126 N.M. 788 (stating that the "lack of a federal counterpart to New Mexico's Equal Rights Amendment renders the federal equal protection analysis inapposite")—an independent approach would enable state courts to treat the New Mexico Constitution as a "harmonious whole," subject to one consistent methodology. *Raphaelson*, 2015-NMSC-029, ¶ 11 (quoting *Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 9, 135 N.M. 24).

B. The values that motivated this Court to adopt the interstitial approach would be better served by an independent approach.

This Court's adoption of the interstitial approach, in *Gomez*, was expressly intended as a move toward, rather than a retreat from, state constitutional independence. In abandoning the lock-step approach, *Gomez* affirmed the "inherent

power" of states "as separate sovereigns in our federalist system to provide *more* liberty than is mandated by the United States Constitution." 1997-NMSC-006, ¶ 17 (emphasis original). But the Court explained that it was adopting the interstitial approach, as opposed to a fully independent approach, for certain specific reasons: efficiency, cogency, and federalism. *Gomez*, 1997-NMSC 006, ¶ 21. Interstitialism was supposed to be efficient because it would allow New Mexico courts to consider "extensive and well-articulated" federal protections. *Id.* (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1357 (1982)). It was supposed to be cogent because it would permit a "reasoned reaction to the federal view." *Id.* (same). And it was supposed to promote federalism by "preserv[ing] national uniformity in [the] development and application of fundamental rights." *Id.* (quoting *Gutierrez*, 1993-NMSC-062, ¶ 16).

Even assuming those rationales were sensible in 1997, when *Gomez* was decided, they have since been overtaken by jurisprudential developments demonstrating that interstitialism has outlived its usefulness. Now, with the benefit of nearly thirty years of litigation under the interstitial approach, there are ample grounds to transition to true independence.

1. Interstitialism is increasingly inefficient.

The interstitial approach has proven far from efficient. For one thing, appellate courts apply the interstitial approach inconsistently, sometimes using *Gomez* as a

basis for lock-stepping, *see infra* Part I.B.2, sometimes interpreting the state constitution independently without citing *Gomez* at all, *see supra* Part I.A.1, and sometimes declining to apply *Gomez* because the relevant federal law is unclear, *see Grisham*, 2023-NMSC-027, ¶ 15. These varying approaches sow confusion among lower courts and litigants about when the interstitial approach ought to be applied.

Further, the interstitial approach often undermines judicial economy, instead of promoting it. Under interstitialism, state courts must embark on extended forays into federal law before they can reach a litigant's state constitutional claims, even when the relevant federal law is unclear. In *State v. Garcia*, for example, the Court announced at the outset its intention to review the defendant's state constitutional claim, and it ultimately ruled for the defendant on that basis. 2009-NMSC-046, ¶ 12. But because the "interstitial approach . . . mandate[d] that [it] consider whether the [d]efendant was protected under the federal constitution," the Court first analyzed federal precedents, despite "serious uncertainty" caused by a recent "shift" in federal search and seizure law. *Id.* ¶¶ 13-15. The Court's complex digression into federal law was not necessary to decide the case and could have been avoided by an independent interpretive approach.

Finally, the interstitial approach has proven inefficient because it has necessitated mini-appeals on the question whether litigants have done enough, within the meaning of *Gomez*, to preserve their state constitutional claims. *Cf.*

Garcia, 2009-NMSC-046, ¶ 55 (Bosson, J., specially concurring) (criticizing the lower courts' "unnecessarily restrictive" reading of *Gomez*); *State v. Leyva*, 2011-NMSC-009, ¶ 38, 149 N.M. 435 (acknowledging that *Gomez* "often has been construed more strictly than intended" as to preservation). Given that *Gomez* itself "is capable of more than one meaning" as to preservation, *Garcia*, 2009-NMSC-046, ¶ 56 (Bosson, J., specially concurring), these mini-appeals inevitably consume time and attention that could instead be devoted to the merits. As explained below, *see* Part II.C, mini-appeals on *Gomez*'s preservation rules would not be necessary if this Court were to transition away from the interstitial approach and subject parties asserting state constitutional rights to the same preservation rules as other litigants.

2. Interstitialism is no longer promoting cogency.

In 1997, when the U.S. Supreme Court's constitutional case law was relatively well-developed and stable, and this Court's constitutional case law was less developed than it is now, there was perhaps good reason for this Court to believe that the interstitial approach would promote cogency by insisting on a reasoned reaction to the federal view. Even assuming that belief was true in 1997, it is true no longer.

First, federal case law has proven to be less certain, and more volatile, than it might have seemed in 1997. As this Court has acknowledged, interstitialism's "utility is significantly diminished when federal precedent is unclear." *Grisham*, 2023-NMSC-027, ¶ 15. Accordingly, in a recent equal protection challenge to

congressional-districting maps, this Court expressly declined to apply interstitial analysis because of "uncertainty" as to the scope of the federal standard after decades of extensive U.S. Supreme Court debate. *Id.* ¶¶ 18-19. The Court reasoned that any state standard relying on the "unknown scope" of federal equal protection would be "especially uncertain," and that if federal law were to develop further, New Mexico's elections could "be thrown into chaos and confusion." *Id.* ¶ 19.

Uncertainty in federal law is becoming more common. In recent years, U.S. Supreme Court decisions have upended pillars of federal constitutional jurisprudence. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). When federal constitutional law is a moving target, it is less capable of anchoring state constitutional analysis.[5] *See State v. Barrow*, 989 N.W.2d 682, 689-90 (Minn.

[5] Development of jurisprudence under the U.S. Constitution has also been severely hampered in recent years by the doctrine of qualified immunity. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1815-18 (2018). The defense of qualified immunity involves a two-prong test, the first addressing whether a constitutional right has been violated, the second mandating dismissal if the asserted right was not "clearly established" at the time of the alleged violation. *Id.* at 1815. In 2009, the U.S. Supreme Court held that lower courts may dispense of cases by addressing the second prong first, and thus never ruling on whether a constitutional violation has occurred. *Id.* "By narrowly defining 'clearly established law' and allowing courts to grant qualified immunity without ruling on the underlying constitutional claim, the Supreme Court leaves important questions about the scope of constitutional rights 'needlessly floundering in the lower courts,' …. possibly never to be clarified." *Id.* at 1817 (quoting Karen M.

2023) (noting that Minnesota's search and seizure protections may no longer be coextensive with federal law due in part to "[t]he creeping expansion of the automobile exception, illustrated by . . . Supreme Court precedents"); Elizabeth Bentley, *State Court Adherence to Decisions Incorporating Federal Constitutional Law*, 110 Iowa L. Rev. 1013, 1026 (2025) (observing that "change[s] in federal law create 'stranded' state constitutional doctrine" (quoting Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* § 1.06[2] & n.193 (2006))).

Second, there is less need today for this Court to tie its constitutional analysis to federal law because New Mexico constitutional law is increasingly well-developed. *See Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 22, 142 N.M. 89 (noting the "many instances" in which this Court has interpreted the New Mexico Constitution as providing greater rights than the federal constitution, and collecting cases); *supra* Part I.A.1. To the extent gaps remain, the interstitial approach appears partly to blame. Appellate courts interpreting the New Mexico Constitution often lock-step with federal precedent that provides no protection, in line with *Gomez*'s presumption in favor of following federal law. *See, e.g.*, *State v. Adame*, 2020-

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Blum, Qualified Immunity: Time to Change the Message, 93 Notre Dame L. Rev. 1887, 1895 (2018)). This stunted development of federal jurisprudence represents another growing concern with looking first to federal law for state constitutional rights. *See id.*

NMSC-015, ¶¶ 21–28, 476 P.3d 872 (reviewing state subpoenas of personal banking records); *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 51, 376 P.3d 836 (reviewing physician aid in dying ban in line with federal equal protection, while acknowledging that New Mexico's inherent rights guarantee "may . . . ultimately be a source of greater due process protections than those provided under federal law"); *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶¶ 32–33, 284 P.3d 428 (reviewing constitutionality of New Mexico Human Rights Act as applied to refusal to photograph same-sex wedding), *aff'd*, 2013-NMSC-040, 309 P.3d 53; *City of Albuquerque v. Pangaea Cinema LLC*, 2012-NMCA-075, ¶¶ 19–20, 284 P.3d 1090 (reviewing zoning ordinance regulating adult entertainment), *rev'd sub nom. State v. Pangaea Cinema LLC*, 2013-NMSC-044, 310 P.3d 604. And of course, when federal law does provide protection, interstitialism prevents courts from considering the New Mexico Constitution at all. *See, e.g.*, *State v. Davis*, 2015-NMSC-034, ¶ 53, 360 P.3d 1161 ("[B]ecause we find the asserted right to be protected under the Federal Constitution[,] we do not reach the same claim under our New Mexico Constitution.").

3. Interstitialism undermines rather than promotes federalism.

Gomez adopted the interstitial approach based in part on the view that it would helpfully promote national uniformity in constitutional law. But since *Gomez* was decided, state high courts have increasingly concluded that national uniformity

between federal and state courts is not a desirable goal at all. Instead, they have recognized that, as contemplated by the framers of the U.S. Constitution, state courts can best advance federalism principles by declining to mirror federal law. *See State v. Wilson*, 543 P.3d 440, 446 (Haw. 2024); *State v. Athayde*, 2022 ME 41, ¶ 21, 277 A.3d 387, 394–95; *People v. Tanner*, 853 N.W.2d 653, 666 n.15 (Mich. 2014); *State v. Short*, 851 N.W.2d 474, 481–82 (Iowa 2014).

Properly understood, state courts have a "constitutional duty," *Gutierrez*, 1993-NMSC-062, ¶ 16, to provide what James Madison called a "double security" for liberty. *State ex rel. Cincinnati Enquirer v. Bloom*, 177 Ohio St.3d 174, ¶ 19, 2024-Ohio-5029, 251 N.E.3d 79 (quoting James Madison, *The Federalist No. 51*, at 323 (Clinton Rossiter ed. 1961)). And they are well-positioned to do so: since their rulings are binding only in a single state, state courts can provide broad protections, tailored to their states' specific circumstances, without worrying that those protections will prove a poor fit for the rest of the nation. Indeed, while "[f]ederalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees," state courts need not "apply a 'federalism discount.'" Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 175 (2018). Instead, they can tailor state constitutional rights to the needs of their states.

This double protection for individual rights becomes especially vital when, as now, federal law is in flux. "Real federalism means that state constitutions are not mere shadows cast by their federal counterparts, always subject to change at the hand of a federal court's new interpretation of the federal constitution." *Olevik v. State*, 806 S.E.2d 505, 513 n.3 (Ga. 2017). In the wake of momentous federal changes, *see supra* Part I.B.2, state constitutions can provide much-needed stability if interpreted independently. On the other hand, if they are interpreted in conformity with federal law, they can become part of the problem. *See, e.g.*, *State v. Robinette*, 98 Ohio St.3d 234, 239, 1997-Ohio-343, 685 N.E.2d 762 (abandoning prior independent state constitutional holding in light of federal changes to "harmonize" state and federal law).

In service of effective federalism, this Court should replace the interstitial approach with one that provides independent, stable protection for individual rights.

II. This Court should provide guidance to lower courts and litigants on the process for independently interpreting the New Mexico Constitution.

Applying an independent approach means interpreting the New Mexico Constitution by New Mexican lights. But the devil is in the details. Here, *amici* suggest a process state courts should follow, and factors they should consider, when reviewing claims under the New Mexico Constitution.

A. New Mexico state courts should analyze the New Mexico Constitution first.

When a litigant brings a New Mexico state constitutional claim, the Court should analyze the state Constitution first. This state-first process—sometimes called "primacy"—better reflects the view that state constitutions are the "primary" protectors of individual rights, not mere gap-fillers. *State v. Larrivee*, 479 A.2d 347, 349 (Me. 1984). Several high courts already employ this process, which has helped them further develop their own modes of constitutional analysis. *See, e.g.*, *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992); *Wilson*, 543 P.3d at 445 (Hawai'i); *Athayde*, 2022 ME 41, ¶¶ 20–21; *State v. Beauchesne*, 868 A.2d 972, 975–76 (N.H. 2005); *State v. Moore*, 390 P.3d 1010, 1014 (Or. 2017) (en banc); *Matter of Williams*, 496 P.3d 289, 296 (Wash. 2021) (en banc).[6]

The state-first process has several advantages. It promotes the development of state constitutional law, ensuring that a robust, reliable layer of protection for

[6] In its *amicus curiae* brief, the New Mexico Association of Counties concedes that other state courts are increasingly developing their own methods of state constitutional interpretation, yet it attmpts to characterize this trend as a reason to retain interstitial approach. *See* Amicus Curiae Br. of the New Mexico Association of Counties at 11–16. That is exactly backward. These state courts have capably demonstrated that independent methods of interpretating state constitutions can provide just as much "structure" as the interstitial approach, and they empower state courts to develop state constitutional law and methodologies much more effectively. In fact, the Association invokes several states that have actually rejected a "federal-first approach" approach like interstitialism. *Id.* at 13–15; *see, e.g.*, *State v. Kono*, 152 A.3d 1, 27 n.24 (Conn. 2016); *Matter of Williams*, 496 P.3d at 296.

individual rights at the state level can withstand sea changes in federal constitutional law. *Cf. Sitz v. Dep't of State Police*, 506 N.W.2d 209, 218 (Mich. 1993) ("[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so."). By contrast, starting with federal constitutional law cuts off analysis of the state constitution if federal law provides relief, which in turn suppresses the development of state constitutional law. *See* Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165, 170 (2009).

The state-first process also promotes respect for federal law by enabling state courts to "avoid issuing unnecessary opinions on the United States Constitution." *Athayde*, 2022 ME 41, ¶ 21. That is because, when resolving a state constitutional question that will also resolve the entire case, a New Mexico court may have no need to opine on any federal constitutional law. This "policy of judicial restraint" led the Maine Supreme Judicial Court to "forbear from ruling on federal constitutional issues before consulting [Maine's] state constitution." *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984); *cf. Avoidance of Federal Constitutional Questions – When Abstention Required*, 17A Fed. Prac. & Proc. Juris. § 4242 (3d ed.) (describing the parallel federal doctrine known as *Pullman* abstention, whereby "a federal court

may, and ordinarily should, refrain from deciding a case . . . if there are unsettled questions of state law that may be dispositive").

Analyzing the state constitution first therefore serves two values critical to federalism: state constitutional law development and judicial restraint.

B. In analyzing the state Constitution, this Court should look primarily to New Mexico-specific sources.

As to the substance of the analysis, this Court should focus on New Mexico-specific sources in interpreting the state constitution. Those could include (a) state constitutional text, structure, and history, (b) preexisting and developing state law, and (c) contemporary state experience and values.

Each of these factors already has a strong foundation in this Court's precedents, as described below, as well as in the jurisprudence of other states.[7]

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[7] *See, e.g.*, *Traylor*, 496 So.2d at 962 (setting forth factors "that inhere in [Florida's] own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law"); *Dupuis v. Roman Catholic Bishop of Portland*, 2025 ME 6, ¶ 11 n. 8, 331 A.3d 294 ("[W]e first examine our own precedent; our own common law; our own statutes and values; and our own sociological and economic context."); *State v. Misch*, 2021 VT 10, ¶ 9 ("[W]e begin with the text of the provision, understood in its historical context, and we consider our own case law, the construction of similar provisions in other state constitutions, and empirical evidence if relevant."); *Commonwealth v. Molina*, 104 A.3d 430, 441 (Pa. 2014) ("[T]he Court should consider: the text of the relevant Pennsylvania Constitutional provision; its history, including Pennsylvania case law; policy considerations, including unique issues of state and local concern and the impact on Pennsylvania jurisprudence; and relevant cases, if any, from other jurisdictions.").

Together, they would assist the Court in its quest to "give vitality" to the New Mexico Constitution. *See Gutierrez*, 1993-NMSC-062, ¶ 55; *see also State v. Misch*, 2021 VT 10, ¶ 9, 214 Vt. 309, 256 A.3d 519 (aiming to "discover and protect the core value that gave life to a constitutional provision, and to give meaning to the text in light of contemporary experience").

(a) Text, structure, and history. The Court closely examines the text and structure of the New Mexico Constitution to interpret provisions new and old. *See, e.g.*, *NARAL*, 1999-NMSC-005, ¶¶ 29–30 (analyzing the text of the Equal Rights Amendment); *Grisham*, 2023-NMSC-027, ¶ 26 (reading "Article II, Section 18 together with Sections 2, 3, and 8 to evaluate an individual's right to vote under the New Mexico Constitution"). In addition, the Court looks to New Mexico constitutional history to contextualize specific provisions, considering both the history of their formation and the broader historical "milieu" from which they emerged. *Gutierrez*, 1993-NMSC-062, ¶ 34–43 (examining the "historical context in which New Mexico achieved statehood" and "the milieu from which the New Mexico search and seizure provision emerged").

(b) Preexisting and developing state law. Crucially, the Court also looks to New Mexico's distinctive state characteristics beyond the Constitution itself. For example, the Court has looked to preexisting and developing New Mexico law to determine the scope of state constitutional provisions, from early common law to

statutes on the books today. *See, e.g.*, *NARAL*, 1999-NMSC-005, ¶ 34 (considering the "common-law view" of women in determining that strict scrutiny should apply to gender classifications); *Griego*, 2014-NMSC-003, ¶ 42 (canvassing New Mexico legislation offering protection based on sexual orientation); *Martinez*, 2021-NMSC-002, ¶ 67 (describing New Mexico's Accurate Eyewitness Identification Act as part of trend toward addressing problems with eyewitness-identification evidence).

(c) Contemporary state experience and values. Last but certainly not least, the Court should consider "the New Mexico experience" in independently interpreting the state constitution. *Cordova*, 1989-NMSC-083, ¶ 15. The Court has invoked this experience as a reason to diverge from federal law, *id.*, both as to the practical effects of legal rules and as to empirical realities on the ground, *see Gomez*, 1997-NMSC-006, ¶ 20 (quoting *State v. Sutton*, 1991-NMCA-073, ¶ 24, 112 N.M. 449) (describing courts' attention to the effects of a particular probable-cause test and the size of rural lots). This makes sense, given that New Mexico courts are "better acquainted" than federal courts with "the problems and traditions of [the] state." *Cordova*, 1989-NMSC-083, ¶ 16 n.8. In line with that expertise, this Court has emphasized New Mexico's culture in its analysis, looking to state values to determine the meaning of the state constitution today. *See, e.g.*, *NARAL*, 1999-NMSC-005, ¶ 31 (describing the "evolving concept of gender equality in this state");

Breen, 2005-NMSC-028, ¶ 27 (noting that "New Mexico has continually shown a concern for protecting the mentally disabled").

In analyzing state claims, this Court often consults the law of other states, as well as federal precedents. *See, e.g.*, *Martinez*, 2021-NMSC-002, ¶¶ 57–65 (canvassing departures from the federal test for admitting eyewitness identifications); *Garcia*, 2009-NMSC-046, ¶ 33 (collecting state-court cases departing from the federal seizure test); *Gutierrez*, 1993-NMSC-062, ¶ 16 (recognizing the value of "guidance" from federal and state precedents, as well as the common law, insofar as they are "persuasive"). The approach proposed here is consistent with that practice. But the Court should place federal precedents on the same plane as other states' precedents, treating both as non-binding and giving them weight "only to the extent [they are] persuasive." *Breen*, 2005-NMSC-028, ¶ 18; *see also Athayde*, 2022 ME 41, ¶ 20 ("[W]e consider federal interpretations of any analogous provisions of the United States Constitution only if we deem those interpretations persuasive, giving them weight similar to the weight we might give to interpretations of analogous provisions in other states' constitutions.").

In sum, *amici* urge this Court to adopt an independent approach that considers New Mexico's distinctive characteristics holistically and treats federal precedents as potentially persuasive authorities on par with sister states' precedents, in line with

the Court's existing interpretive practices and the "sanctity" of New Mexico's constitutional guarantees. *Gutierrez*, 1993-NMSC-062, ¶ 32.

C. Instead of subjecting state constitutional claims to special preservation rules, the Court should apply its general standard.

The proposed independent approach would not require courts to provide special justifications to depart from federal law. It follows that state constitutional claims would be subject to general pleading standards, not the special standard adopted in *Gomez* to support interstitial analysis.

Under *Gomez*, if a state constitutional provision has not already been interpreted to confer broader protection than its federal counterpart, litigants must provide reasons in the trial court for interpreting the provision more broadly, or else forfeit that claim. *Gomez*, 1997-NMSC-006, ¶ 23. This rule deserves a "fresh look." *Garcia*, 2009-NMSC-046, ¶ 56 (Bosson, J., specially concurring). A court engaging in independent interpretation would not need litigants to justify departing from federal law *because the court would not need to do so itself*. The special pleading rule from *Gomez* would present only downsides, making it harder for litigants to vindicate their state constitutional rights without meaningfully assisting judicial decision-making. Instead, courts should simply apply the preservation standard embodied in Rule 12-321 NMRA (formerly Rule 12-216)—requiring "[a]ssertion of

the legal principle and development of the facts"—as they would do with any other claim. *Gomez*, 1997-NMSC-006, ¶ 22.

Gomez's special preservation rule goes hand in hand with the interstitial approach. When the approach goes away, the rule should go with it. Thus, if the Court adopts an independent approach, as *amici* urge, it should also clarify that all state constitutional claims are subject to the same preservation rules as other claims.

CONCLUSION

Amici respectfully urge the Court to replace interstitialism with an independent approach to state constitutional interpretation that is rooted in and reflects New Mexico's distinctive law, history, and values.

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true copy of the foregoing Brief of *Amici Curiae* the American Civil Liberties Union of New Mexico and the American Civil Liberties Union was filed electronically and served to all counsel of record this 19th day of December 2025 via the Odyssey e-filing/service system.

/s/ Lalita Moskowitz
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