IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ARNOLDO CARRILLO and SANTA FE HORSE RACING BY CARRILLO'S, LLC, a domestic limited liability company,

Plaintiffs-Appellants,

vs.

MY WAY HOLDINGS, LLC, a foreign limited liability company d/b/a SUNLAND PARK RACETRACK AND CASINO, et al.

Defendants-Appellees.

No. 34,429

Appeal from the First Judicial Court, Santa Fe County, New Mexico

The Honorable T. Glenn Ellington, Judge

CONSOLIDATED REPLY BRIEF

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Statement of Compliance

The typeface in this brief is Times New Roman, a proportionally-spaced typeface. According to the word-count feature in Microsoft Word 2008, the body of this Consolidated Reply Brief contains 8,121 words. Pursuant to Rule 12-213(F)(2) NMRA, the body of a Reply Brief shall not exceed fifteen (15) pages or, pursuant to Rule 12-213(F)(3) four thousand four hundred (4,400) words if a proportionally-spaced typeface is used. The

Court granted leave for a thirty (30) page limitation for this Consolidated Reply Brief–double the number of pages. The equivalent of the thirty (30) page limitation for a proportionally-spaced typeface is eight thousand eight hundred (8,800) words. Accordingly, this Consolidated Reply Brief of 8,121 words in Times New Roman complies with the length limitation set by Order of this Court.

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I. THE LEGISLATURE ENACTED SECTION NMSA 1978, SECTION 60-1A-28.1 (2014) IN ORDER TO PROVIDE RACETRACK PROPRIETORS A LIMITED RIGHT TO EXCLUDE HORSE RACING OCCUPATIONAL LICENSEES.

On the issues of the relevance and proper construction of NMSA 1978, Section 60-1A-28.1, Plaintiffs-Appellants (Mr. Carrillo) mainly stand on the argument in the Brief In Chief. **[BIC 14-35]** To summarize: When Section 60-1A-28.1 is construed in accordance with established canons of statutory construction to harmonize and give effect to each provision, **[BIC 17-19, 32-33]** within the context of the legislative scheme, **[BIC 19-27, 32-33]** with reference to relevant and permitted legislative history materials, **[BIC 27-33]** and in consideration of public policy, **[BIC 33-35]** the statute provides that Defendants-Appellees (Defendants) can exclude occupational licensees such as Mr. Carrillo when a license "has been suspended or revoked by the commission for administering a performance-altering substance as provided in Subsection A of Section 60-1A-28 NMSA 1978." Section 60-1A-28.1(A). Below, Mr. Carrillo addresses selected contentions and arguments raised in the four Answer Briefs of Defendants.

A. This Court Should Construe Section 60-1A-28.1.

Defendants contend that Section 60-1A-28.1 should not be construed by this Court because the issue of the statute's effect on the contour of the right to exclude is not before this Court on appeal **[SunRay AB 24-26; Ruidoso AB 23-24, 43; My**

Way AB 12-15; Zia AB 25] and because the statute was not in effect at the time of the original exclusions. **[SunRay AB 28; My Way AB 16-17; Zia AB 27]** Defendants are not correct. Mr. Carrillo's exclusion from four of the five racetracks in New Mexico is ongoing. All four exclusions began more than two years ago, one more than three years ago. Section 60-1A-28.1 defines the right of racetrack proprietors to exclude occupational licensees. That statute is dispositive as to Mr. Carrillo's ongoing exclusion: if Defendants do not have a current right to exclude Mr. Carrillo under Section 60-1A-28.1, then they cannot invoke the trespass statute against him should he now seek to enter one of the racetracks. Nor would Defendants be entitled to an injunction if they chose to pursue one. In short, the legality of the ongoing exclusion depends on Section 60-1A-28.1. Therefore, this Court must reach Section 60-1A-28.1 irrespective of whether it applied at the time of Defendants' original exclusionary acts.

Moreover, Section 60-1A-28.1 has not yet been construed by our appellate courts. The meaning of this statute affects not just Mr. Carrillo, but also the rights of all horse racing licensees, all racetrack proprietors, the New Mexico horse racing administrative bodies, and everyone that attends or might attend a horse race in the State. Therefore, it is in the general public interest that this statute be interpreted and, accordingly, this Court should interpret Section 60-1A-28.1. *See* Rule 12-216(B)(1) NMRA (stating that an appellate court may review unpreserved

questions of general public interest); *see Azar v. Prudential Ins. Co. of Am.*, 2003–NMCA–062, ¶ 28, 133 N.M. 669, 68 P.3d 909 (stating that this Court reviews matters on the basis of general public interest when review is likely to settle a question of law that affects the public at large).

In addition, the issue of the contour of the right to exclude, including the effect of Section 60-1A-28.1 on this right, was preserved. The issue of the contour of Defendants' power to exclude was the central issue in the summary judgment motions and is the central issue in this appeal. The district court relied on the statute in its order **[RP 566]** and Defendants relied on the statute in their motions for summary judgment **[RP 534].** Mr. Carrillo may have significantly developed his position about the effect of Section of Section 60-1A-28.1 in his Brief in Chief since that time, but the issue is preserved.

For all the reasons above, this Court should construe Section 60-1A-28.1.

B. The Text of Section 60-1A-28.1 Provides For A Limited Power to Exclude Licensees.

In relevant part, Section 60-1A-28.1 provides:

> A. A racetrack licensee may eject or exclude from the association grounds any person whose occupational license has been suspended or revoked by the commission for administering a performance-altering substance as provided in Subsection A of Section 60-1A-28 NMSA 1978.
>
> B. Nothing in this section shall be construed to limit a racetrack licensee's power to eject or exclude a person from the association grounds for any other lawful reason.

Defendants contend that Subsection B provides for a broad rule that allows racetrack proprietors to exclude licensees such as Mr. Carrillo for any and all reasons except for invidious discrimination and that, in effect, Subsection A provides one example of one reason among the near-infinite reasons that a racetrack proprietor might exclude someone. **[*See, e.g.*, SunRay AB ("The plain meaning of sub-section B – indeed the only possible meaning – is that the right to eject or exclude a person for any lawful reason overrides all portions of § 60-1A-28.1"); Zia AB 26 ("the only reasonable interpretation is that subsection (A) defines one lawful reason for which persons licensed by the Racing Commission may properly be excluded"); *see also* Ruidoso AB 28; My Way AB 19-20]** This construction runs contrary to established canons of statutory construction and is not correct. When Subsection B is read to mean that racetrack proprietors can exclude anyone without reservation for any reason not unlawful–that is, any reason but invidious discrimination–Subsection A is drained of any operative meaning, and is therefore surplusage. Our courts will not construe a statute such that part of it is rendered surplusage or superfluous. *See State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 ("[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous") (internal quotation marks and citation omitted) (alteration in original); *State v. Johnson*, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 ("We have always rejected an

interpretation of a statute that would make parts of it mere surplusage or meaningless"); *Corley v. U.S.*, 556 U.S. 303, 314 (2009), (it is "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (quotation marks and citation omitted) (alteration in original).

Under the construction of Section 60-1A-28.1 put forth by Defendants, the purpose of the Legislature in enacting Subsection A defies explanation. Defendants have not put forth any reason that the Legislature would include just one, very narrow, example of the exclusionary power over a licensee when, under the broad rule that flows from Section B as it is posited by Defendants, a licensee can be excluded for any reason other than invidious discrimination. Nor has Defendant cited any other statute that is so constructed by the Legislature. Nor has Mr. Carrillo discerned any reason for the Legislature to put forth a solitary, narrow, example of the all-encompassing rule posited by Defendants. If racetrack proprietors have the power to exclude occupational licensees under Section B because of, for example, an unsubstantiated rumor of a licensee having administered performance altering drugs, or for winning too many races, or for creasing one's jeans, or almost anything else, there is no discernable rationale for the Legislature to provide such a narrow, specific, example as Subsection A. *See* § 60-1A-28.1(A) (providing specifically that a racetrack proprietor can exclude a

licensee if the Racetrack Commission has suspended or revoked the license of the licensee for the administration of performance enhancing drugs). There would be still less reason for the Legislature to enact Subsection A if, as posited by Defendants, racetrack licensees already had the power to exclude licensees for any reason other than invidious discrimination under the common law and Section 60-1A-28.1 merely codified that sweeping power. The choice of the Legislature under the construction of Defendants is without reason and, therefore, absurd. This Court should reject such a construction of Section 60-1A-28.1. *See State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 ("we must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction.") (internal quotation marks and citations omitted).

Defendant My Way argues that the specific/general canon of statutory construction favors Defendants' interpretation of Section 60-1A-28.1. **[My Way AB 20]** Defendant My Way has turned that canon of construction on its head. Quoting the United States Supreme Court, Defendant My Way states: "general language of a statutory provision, although broad enough to include it will not be held to apply to a matter specifically dealt with in another part of the same enactment." **[My Way AB 20]** *Bloate v. United States*, 559 U.S. 196, 207-08 (2010). Indeed, a specific provision controls over one of more general application.

See Albuquerque Commons P'ship v. City Council, 2011-NMSC-002, ¶ 23, 149 N.M. 308, 248 P.3d 856 ("When faced with two provisions addressing the same topic, we resort to a familiar principle of statutory construction: a statute dealing with a specific subject will be considered an exception to, and given effect over, a more general statute.") (internal quotation marks and citation omitted); *see also* 2B Norman Singer, *Sutherland Statutory Construction* § 46:5 (7th ed.) ("A statute or provision relating to a specific subject may be understood as an exception to a statute or provision involving the same subject."). This canon of construction cuts in favor of Mr. Carrillo's proffered construction of Section 60-1A-28.1. Here, Subsection A specifically addresses the power of racetrack proprietors to exclude occupational licensees. Subsection B addresses the exclusionary power of racetrack licensees more generally. Therefore, in accordance with specific/general canon of construction, Subsection A controls as to the power of racetrack proprietors to exclude occupational licensees. In accordance with the specific/general canon of construction, Section A is to be read as an exception to Section B for occupational licensees such as Mr. Carrillo. Thus, Subsection A controls as to the power of Defendants to exclude Mr. Carrillo.

C. The Fiscal Impact Report is Properly Before This Court.

Two Defendants contend that the Fiscal Impact Report for SB 116 (FIR) is not before this Court and, therefore, should not be considered. **[Zia AB 29-30;**

Ruidoso AB 33] That contention is not correct. The Fiscal Impact Report is a proper legislative fact, and need not be in the record for this Court to consider it. "Unlike adjudicative facts, legislative facts do not concern individual parties, such as who did what, when, where, and how . . . . Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take." *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 25, 147 N.M. 583, 227 P.3d 73 (quotation marks and citation ommitted). "[T]his Court—or any court, trial or appellate—may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts." *Griego v. Oliver*, 2014-NMSC-003, ¶ 47 n.7, 316 P.3d 865 (quotation marks and citations omitted).

Moreover, the Fiscal Impact Report is available not only on the website of the New Mexico Legislature, per the citation in the Brief In Chief, **[BIC 30]** but also the FIR is on Westlaw, a standard legal research tool, making the FIR similar to extrinsic aids to construction such as law review articles and treatises.

D. The Fiscal Impact Report Directly and Clearly Supports Mr. Carrillo's Interpretation of Section 60-1A-28.1.

The Fiscal Impact Report for Senate Bill 116 straightforwardly articulates the purpose and effect of the bill:

> Currently the S[tate]R[acing]C[ommission] has the statutory authority to administer sanctions against occupational licensees who administer performance altering drugs to a racehorse . . . .
>
> **SB 116 would delegate additional authority to the Commission's licensee, the racetrack owner/operator, to decide whether to eject any person from the racetrack licensee's premises if their occupational license has already been suspended or revoked for administering a performance-altering substance** . . . .
>
> Due process concerns could be resolved primarily by administrative authorities, the Commission or its appointed stewards, before seeking judicial relief. While the bill would give racetrack licensees immunity from suits arising from the ejection/exclusion, **they would not have unchecked and unreviewable power to control and/or eject other racing participants from their premises.**

S.B. 116, Fiscal Impact Report, 51st Leg., 2nd Sess. (N.M. 2014), *available at* http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14 (follow "Fiscal Impact Report" hyperlink) (hereinafter the FIR) (emphasis added).[1]

Although the language in the FIR is clear and direct, three points bear emphasis: (1) racetrack proprietors were granted authority only to exclude or eject licensees "if [that person's] occupational license ha[d] already been suspended or revoked for administering a performance-altering substance"; (2) the Legislature, which is presumed to know the law, *Chavez v. Am. Life & Cas. Ins. Co.*, 1994-

[1] This Fiscal Impact Report is also available on Westlaw: follow the "History" tab at the Westlaw page of Section 60-1A-28.1 to the "Legislative History" section.

NMSC-037, ¶ 9, 117 N.M. 393, 872 P.2d 366, intended to grant racetrack proprietors authority that they did not already possess ("SB 116 would delegate additional authority to . . . the racetrack owner/operator"); (3) the Legislature did not intend to grant racetrack proprietors "unchecked and unreviewable power" to exclude or eject licensees, and the Legislature was concerned with due process for licensees. S.B. 116 FIR.

E. When Construing Statutes, Our Courts May Consider Legislative History to Resolve Ambiguities.

Understandably, Defendants have tried to persuade this Court not to consider the legislative intent expressed in the FIR, which is directly contrary to their position. Defendants argue that this Court cannot or should not consider legislative history materials. **[Ruidoso AB 33; SunRay AB 30-31; My Way AB 22-23; Zia AB 27-29]** That is not correct.

Defendants correctly note that our courts "look primarily to the legislation itself to ascertain legislative intent." **[*See, e.g.*, SunRay AB 28-29]** *Int'l Chiropractors Ass'n v. N.M. Bd. of Chiropractic Exam'rs*, 2014-NMCA-046, ¶ 32, 323 P.3d 914. However, our Uniform Statute and Rule Construction Act recognizes that, when necessary, legislative history may be used by our courts to ascertain the intent of the legislature to resolve statutory ambiguity. NMSA 1978, § 12-2A-20(C)(2) (1997). Our appellate courts are in accord. *See Claridge v. N.M. State Racing Comm'n*, 1988-NMCA-056, ¶ 28, 107 N.M. 632, 736 P.2d 66 ("to

determine legislative intent, it is proper to look to the legislative history of an act"); *Muckey v. N.M. De'pt. of Human Serv. Income Support Div.*, 1985-NMCA-001, ¶ 19, 102 N.M. 265, 694 P.2d 521 ("[w]hen the language of the statute is ambiguous, recourse to legislative history is appropriate"); *Javier M.*, 2001-NMSC-030, ¶ 31 ("Although we primarily look to the plain language, we may also consider the history and background of the statute to determine the Legislature's intent.").

F. The FIR is Appropriate Legislative History Material and Should be Considered by This Court.

The FIR is the exactly the kind of legislative history material that may be considered by our courts in order to ascertain legislative intent. In order to ascertain legislative intent, our courts may consider "contemporaneous documents presented to the Legislature or statements of legislators made while legislation is pending[.]" *Int'l Chiropractors Ass'n*, 2014-NMCA-046, ¶ 32, 323 P.3d 914, 923; *see also U.S. Brewers Ass'n v. Dir. of the N.M. Dept. of Alcoholic Beverage Control,* 1983-NMSC-059, ¶ 9, 100 N.M. 216, 668 P.2d 1093 ("in determining legislative intent it is proper to look to the legislative history of an act or contemporaneous statements of legislators while the legislation was in the process of enactment"); *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 35, 117 N.M. 346, 871 P.2d 1352 (stating that "contemporaneous documents presented to the legislature during the course of enactment of a statute" may be considered by a court in ascertaining legislative intent).

The legislative history material Mr. Carrillo asks this Court to consider was prepared for and presented to the Legislature during the course of enactment. It was prepared by an arm of the Legislature, the Legislative Finance Committee. *See About the Legislative Finance Committee*, available at http://www.nmlegis.gov/lcs/lfc/lfc_about.aspx (stating that the Legislative Finance Committee was established as a fiscal and management arm of the Legislature in 1956). Importantly, it speaks directly to the issue before this Court: the definition of the power of racetrack proprietors to exclude licensees intended by the Legislature. The FIR is relevant to this Court's analysis, its consideration is permitted under New Mexico law, and, therefore, the FIR should be considered by this Court.

We pause briefly to clarify a distinction that Defendants' Answer Briefs ignored: "contemporaneous documents presented to the Legislature or statements of legislators made while legislation is pending may be considered to bear upon legislative intent, [but] our courts do not generally consider statements of legislators or others after legislation has passed." *Int'l Chiropractors Ass'n*, 2014-NMCA-046, ¶ 32; *see also U.S. Brewers Ass'n,* 1983-NMSC-059, ¶ 9 ("Statements of legislators, after the passage of the legislation, however, are generally not considered competent evidence to determine the intent of the legislative body enacting a measure."). Defendant Zia cites *Regents of the University of New*

Mexico v. New Mexico Federation of Teachers for the proposition that "the New Mexico Supreme Court instructed other courts to avoid legislative history as a means to determine legislative intent[.]" **[Zia AB 28]** 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236. That case involved testimony by "citizens" and "labor representatives" made subsequent to the passage of the legislation at issue, not a contemporaneous document created for and presented to the Legislature while the legislation was pending. *Id.* ¶ 29, 32. The legislative history materials in *Regents* were very different than the materials in this case. Here, the FIR is a contemporaneous document presented to the Legislature–exactly the kind of legislative history materials permitted under New Mexico law.

G. Section 60-1A-28.1 Determines the Contours of Racetrack Proprietors' Right to Exclude, not the Common Law.

Defendant Zia argues that the common law right to exclude held by racetrack proprietors survives the passage of Section 60-1A-28.1, absent the Legislature's express abrogation thereof. **[Zia AB 21-22]** Defendant, citing *Sims v. Sims*, notes that we have "a strict rule that the common law must be expressly abrogated." 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153. However, "when legislation directly and clearly conflicts with the common law, the legislation will control because it is the most recent statement of the law." *Id.* ¶ 23; *State v. Torres*, 2012-NMCA-026, ¶ 29, 272 P.3d 689; Singer, *Sutherland Statutory Construction* § 50:1 ("where legislation and the common law conflict, legislation governs because

it is the latest expression of the law"). Moreover, "when the [L]egislature has spoken comprehensively and in detail on a subject, it is an indication that the [L]egislature intends to displace the common law dealing with the same subject." *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot*, 2005-NMCA-051, ¶ 39, 137 N.M. 524, 113 P.3d 347. Section 60-1A-28.1 speaks directly to the contour of the right of racetrack licensees to exclude from their premises. Section 60-1A-28.1 is the only statement by our Legislature on this subject, and there is not a statement on this subject by our appellate courts. This Court must look not to the common law of another jurisdiction to locate the contour of this power but, instead, to the direct statement of our Legislature.

H. Conclusion.

Section 60-1A-28.1 provides that racetrack proprietors can exclude or eject licensees when the licensee's license has been suspended or revoked by the commission for administering a performance-altering substance. The licenses of Mr. Carrillo are not and have never been suspended or revoked. Therefore, Defendants do not and never did have the right to exclude or eject Mr. Carrillo under Section 60-1A-28.1.

II. THE COMMON LAW RIGHT IN NEW MEXICO TO EXCLUDE DOES NOT GIVE RACETRACK PROPRIETORS THE POWER TO ARBITRARILY EXCLUDE LICENSEES.

Pursuant to the common law of New Mexico, Defendants contend that racetrack proprietors have an absolute right to exclude any horse racing licensee for any reason other than invidious discrimination. **[*See, e.g.*, Zia AB 13 ("Appellees retain a right to exclude Appellant from their premises for any lawful reason (i.e. other than gender, race, sexual orientation, etc.)")]**. However, that unyielding formulation is contrary to the underlying principle of property rights that informs difficult right to exclude cases, and is the wrong standard in this case. Under the standard articulated by the district court, Defendants are granted the power to exclude licensees unreasonably and arbitrarily. If racetrack licensees have that power with regard to the only five places where Mr. Carrillo can engage in his profession, he is treated little differently than someone that knocks on the door of a stranger's home and asks to enter the living room. Under the common law rule announced by the district court, it would be irrelevant that Mr. Carrillo has a recognized right under New Mexico law to engage in his profession, possesses licenses to race issued by New Mexico, earns a living in horse racing, has invested significant resources in his horse racing career, is subject to comprehensive regulation by the State for conduct related to racing, and has only a handful of venues in the state where he can work. Equally irrelevant under Defendants' formulation would be the following facts: that racetrack proprietors have opened their premises to the public, are granted near-

exclusive franchises by New Mexico, operate with quasi-monopoly power during the time they hold race meets, and are protected by the exhaustive regulation of racing behavior by the state administrative bodies, including on-site regulators. Also irrelevant would be the State's interest in maintaining ultimate regulatory power over horse racing, and using that power to achieve the mandate of the Legislature to ensure horse racing in the State is conducted with fairness. NMSA 1978, § 60-1A-5(A) (2013).

A. The Right to Exclude Admits of Many Exceptions Because Such Cases are, in Essence, Competing Rights Cases.

Defendants point out that the power to exclude is one of the essential sticks in the bundle of property rights. **[*See, e.g.*, Sunray AB 8]** That is true. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (noting that the power to exclude is "one of the essential sticks in the bundle of property rights."); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). However, like all property rights, the power to exclude is not absolute. *See State v. Shack*, 277 A.2d 369, 373 (N.J. 1971) ("A man's right in his property is not absolute"); *see PruneYard,* 447 U.S. at 84-85 ("Neither property rights nor contract rights are absolute . . . . [e]qually fundamental with the private right is that of the public to regulate it in the common interest"). Courts have held under numerous

circumstances that the common law right to exclude is limited or overcome by the interests or rights of individual non-owners, the public, the government, or some combination thereof. *See* Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 642-43 n.8, 643, 665-66, 669-70, 674-75, 737-8 (identifying numerous areas of law in which the rights and interests of non-owner individuals, the public, or the government have been held sufficient to favor access by non-owners over exclusion by owners, including prescriptive easements, implied easements, easements by necessity, the doctrine of necessity, adverse possession, the public trust doctrine, and eminent domain, among others); Elizabeth M. Glazer, *Rule of (Out)Law: Property's Contingent Right to Exclude,* 156 U. Pa. L. Rev. PENNumbra 331, 338 (2008) ("The right to exclude is, of course, riddled with exceptions.").

According to the standard offered by Defendants, the only relevant fact is that the horse races take place on their private property. **[*See, e.g.*, Zia AB 12-13]** Defendants do not cite to any principle that dictates this result. Instead, they mechanically rely on the right to exclude, arguing that precedent from other jurisdictions, in sum, favors exclusion of licensees for any reason. **[*See, e.g.*, Sunray AB 9-13]** The absolutist formulation for which Defendants advocate fails to account for the principle that right to exclude cases are, at bottom, competing rights cases. *See, e.g., Shack,* 277 A.2d at 372-74 (balancing the right to exclude of

the owner of a farm not open to the public against the right of the farm workers to receive government services or charitable aid by means of entry by aid workers onto the farm); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd* 447 U.S. 74 (1980) (balancing a shopping-center owner's right to exclude against the right of protestors to access the property for political speech, holding in favor of the protesters); *see also* Lee Anne Fennell, *Order With Outlaws?*, 156 U. Pa. L. Rev. PENNumbra 269, 278 (2007) ("The work of refining property law to strike the right balance between access and exclusion is ongoing"); Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. at 643 (1988) ("Because property law regulates the use and disposition of property . . . . [t]he the real issue is adjusting the relationships among the parties"). In other words, the common law right to exclude is not an absolute rule, it is one part of an equation. The underlying adjudicative principle of common law right to exclude cases that are complex or unusual is that the property owner's power to exclude must be balanced against the access rights and interests of non-property owners and the state in order to determine the just result. Under the correct legal analysis, the full measure of facts and circumstances are meaningful and, in this case, dictate a different legal standard for proper exclusion than was articulated by the district court.

B. In Complex Cases, Rights and Interests Favoring Access are Balanced Against the Power to Exclude.

A number of prominent right to exclude cases illustrate the foundational adjudicative principle that informs such cases: right to exclude cases require a balancing of all the rights, interests, and circumstances, in order to achieve a just result. *See Shack*, 277 A.2d at 374 ("We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between [them]."); *Uston v. Resorts Int'l. Hotel*, 445 A.2d 370, 375 (N.J. 1982) ("Whether a decision to exclude is reasonable must be determined from the facts of each case."). The cases examined below illustrate that, in a complex case such as the one before this Court, the mechanical reference to the right to exclude for which Defendants argue is not sufficient.

In *State v. Shack*, the New Jersey Supreme Court balanced a farm owner's right to exclude against a farm worker's right to receive private visitors. 277 A.2d at 374. In that case, a farm owner excluded aid workers who attempted to visit migrant farm workers living and working on the farm in privacy. *Id.* at 370-71. The aid workers were there to provide legal and medical aid under programs created by Congress. *Id.* at 370. As between the rights of owners and non-owners, the court noted "the inevitable proposition that rights are relative and there must be an accommodation when they meet." *Id.* at 373. As framed by the *Shack* court, the

task of the court was to achieve "a fair adjustment of the competing needs of the parties." *Id.* at 374. Mindful of the farmer's rights, the court held that the farm owner could "reasonably require a visitor to identify himself, and . . . state his general purpose." *Id.* at 374-75. However, informed by the maxim that "[p]roperty rights serve human values[,]" *id.* at 372, the court held in favor of access for the aid workers. *Id.* at 374-75. The *Shack* court held that there was the right of reasonable access to the farmer's private property on behalf of the farm workers. *Id.*

In *PruneYard v. Robins*, the United States Supreme Court balanced the right to exclude from a privately owned shopping center open to the public for commercial uses against the state protected free speech rights of protestors. 447 U.S. 74. The Court affirmed the California Supreme Court in holding that, under state law, protesters could access the access the property contrary to the will of the owners and that this did not constitute a taking. *Id.* at 83, 88. The Court recognized the primacy of the right to exclude. *See id.* at 82 ("It is true that one of the essential sticks in the bundle is the right to exclude others."). However, the Court found that the owners of the shopping center "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a taking." *Id.* at 84.

The court in *Uston v. Resorts International Hotel*, which concerned the exclusion of a patron from a casino, explicitly balanced the right of access to a

regulated, publicly held-open place of amusement against individual rights and public policy. 445 A.2d at 371. The person excluded was a professional gambler who employed advantageous but not illegal methods of blackjack. *Id.* at 371-2. The casino ejected him, relying on the common law right to exclude anyone for any lawful reason. *Id.* at 372. The court decided that only the Casino Control Commission could exclude patrons based upon patron game-playing strategies because the casino's common law right to exclude based on patron strategy was abrogated by the Casino Control Act.[2] *Id.* 372. The court was nevertheless compelled to determine the contours of the right to exclude in the context of the case. *See id.* (stating that the court felt compelled "to refute any implication . . . that absent supervening statutes, the owners of places open to the public enjoy an absolute right to exclude patrons without good cause."). The court held "that the common law right to exclude is substantially limited by a competing common law right of reasonable access to public places." *Id.* The *Uston* court concluded that "[p]roperty owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use . . . . [and]

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[2] The court noted that an extensive regulatory scheme under state law "ma[d]e clear that the Commission's control over the rules and conduct of licensed casino games is intended to be comprehensive. The ability of casino operators to determine how the games will be played would undermine this control and subvert the important policy of ensuring the credibility and integrity of the regulatory process and of casino operations." *Uston*, 445 A.2d at 373 (quotation marks and citation omitted). Accordingly, the court held the casino's common law right to exclude in this area was abrogated and, therefore, extinguished. *Id.* at 372, 373.

[w]hether a decision is reasonable must be determined from the facts of each case." *Id.* at 375.

Other right to exclude cases in numerous areas of law equally illustrate the fundamental balancing principle discussed and illustrated above. *See* Singer, *The Reliance Interest in Property,* 40 Stan. L. Rev. at 670-678.

C. Balancing Rights in Easy Cases.

The analysis in easy right-to-exclude cases is unchanged by the balancing of rights and interests. When someone knocks on the door of a stranger's private property and asks to be let in, the person can be excluded or ejected. He has no right or legitimate interest in entry. A private home not held open to the public remains sacrosanct.

D. Racetrack Exclusion Cases.

Mr. Carrillo mainly rests on his Brief In Chief analysis of racetrack exclusion cases under the common law from other jurisdictions. **[BIC 38-42]** Below, he selectively addresses certain issues raised by the Answer Briefs.

Racetrack-based cases tend, like other right to exclude/trespass cases, toward complexity. Defendants would have this Court ignore the complexity. For example, Defendant Zia cites numerous racetrack right to exclude cases without details of the facts and circumstances of the case, the statutory regulatory structure

in the jurisdiction, and sometimes without full detail as to the standard of exclusion actually applied by the court. **[Zia AB 12-13]**

The case law from around the country is mixed in both result and reasoning, and the relevant facts and circumstances vary widely. When the full measure of facts and circumstances from this case is taken into account–including Mr. Carrillo's recognized right to engage in his profession, the limited number of tracks where he can do so, the State-granted power exercised by Defendants over Mr. Carrillo's ability to work in horse racing, the State's interest in remaining the ultimate regulatory authority over horse racing, and the public policy considerations of giving Defendants such unfettered authority–the thrust of case law in this context supports Mr. Carrillo's position that the broad standard of exclusion articulated by the district court and Defendants is incorrect in this case.

E. No Authority Binds This Court With Regard to the Right to Exclude at Issue in this Case

Defendants have cited no authority from New Mexico that supports a common law right to exclude for any reason other than illegal discrimination in the context of horse racing. Nor have Defendants cited New Mexico appellate authority for such an expansive common law right to exclude in any other context. Furthermore, horse racing licensee exclusion cases from other jurisdictions sometimes balance rights and interests, *Cox v. National Jockey Club*, 323 N.E.2d 104, 107-109, as do right to exclude cases generally. *Supra*, at 16-22. Thus, this

Court is unbound by precedent on this matter and has discretion to elucidate a rule or principle that comports with the circumstances particular to horse racing in this state generally and to this case in particular.

F. The Right to Exclude Mr. Carrillo for Any Non-Discriminatory Reason is the Wrong Standard Under the Facts of This Case, the Circumstances of Horse Racing in New Mexico, and Public Policy.

Mr. Carrillo has a recognized due process right under New Mexico law to engage in his profession as a horse trainer and owner operating under valid New Mexico licenses. *See State Racing Comm'n v. McManus*, 1970-NMSC-134, ¶ 19, 82 N.M. 108, 476 P.2d 767 (stating that although horse racing jockeys, trainers, and owners do not have vested rights in their licenses, they possess a "right to engage in [their] chosen profession and [are] entitled to due process of law if . . . denied an opportunity to do so"); *Stinebaugh v. N.M. Racing Comm'n*, No. 32,840, mem.op. ¶ 8 (N.M. Ct. App. July 9, 2015) (non-precedential) ("a horse's jockey, owner, or trainer has a right to engage in his chosen profession and is entitled to due process of law if he is to be lawfully denied an opportunity to do so") (internal quotation marks and citation omitted). Moreover, the United States Supreme Court has gone further in recognizing the rights of horse racing licensees. In *Barry v. Barchi*, the Court held that licensed horse trainers, owners, and jockeys have a property right in their licenses sufficient to invoke the Due Process Clause. *See* 443 U.S. 55, 65 (1979) ("it is clear that [the licensee] had a property interest in his

license sufficient to invoke the protection of the Due Process Clause").[3] The Court stated further that "the consequences to a trainer of even a temporary suspension can be severe; and we have held that the opportunity to be heard must be at a meaningful time and in a meaningful manner." *Id.* at 66 (internal quotation marks and citation omitted). Thus, under both New Mexico and federal law, Mr. Carrillo has a recognized interest in the practice of his profession.

Each of the four Defendants holds a significant amount of power over Mr. Carrillo's ability to engage in his profession. There are only five racetracks in the State, so, collectively, the four exclusions amount to a de facto suspension of his license. Moreover, during any given horseracing meet, each Defendant acts with monopoly power granted by the State of New Mexico because there is only one meet at any given time.

Furthermore, the interests of Defendants with regard to race-related conduct and other behavior by licensees are protected by an extensive regulatory scheme. **[*See* BIC 20-25 (outlining in detail the extensive statutory and administrative**

[3] Mr. Carrillo respectfully urges this Court to hold that horse trainers, and owners, and jockeys have a sufficient property right in their licenses to invoke the Due Process Clause of the Fourteenth Amendment of the United States Constitution, in order to bring New Mexico case law into conformity with the United States Supreme Court on this matter of Federal Constitutional interpretation. U.S. Const. Art VI, cl. 2; *Barry,* 443 U.S. at 65; *see Bd. of Regents v. Roth*, 408 U.S. 564, 571(1972) ("the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights").

regulatory scheme)] Unlike typical businesses, there are state regulators on-site at every racing meet. NMSA 1978, § 60-1A-12 (2007). These regulators have extensive power granted by the Legislature to take action against licensees for misconduct, and can even summarily suspend a license pending a hearing. *See, e.g.*, 15.2.3.8(B)(1-9) (granting numerous specific regulatory powers and duties to the on-site racing stewards, including, among many others, the authority to supervise both participants and patrons of horse racing, 15.2.3.8(B)(1)(c) NMAC; 15.2.1.9(B)(1) NMAC (stating that stewards have the power to summarily suspend a license pending a hearing if the licensee's actions pose an immediate danger). Racetrack proprietors can rely on the regulatory bodies empowered by the Legislature, who maintain a presence at the track during every racing meet, to take action against licensees for misbehavior. *See, e.g.*, NMSA 1978 § 60-1A-4 (2007) (stating that the Racetrack Commission can "exclude or compel the exclusion of a person from all horse racetracks who the commission deems detrimental to the best interests of horse racing or who willfully violates the Horse Racing Act"). Because of the exhaustive regulatory oversight of licensees, racetrack proprietors such as Defendants have substantially less need than other businesses for a broad right to exclude.

Pubic policy considerations weigh heavily against allowing racetrack proprietors a common law right to exclude licensees for any and all reasons except

invidious discrimination. First, that rule would provide Defendants superintending regulatory powers such that Defendants, not the Racing Commission, would wield ultimate regulatory power over licensees. Defendants would have the power to, in effect, overrule decisions of the Racing Commission and the Stewards by excluding licensees that a State regulatory body found unworthy of suspension or even entirely blameless. Put another way, racetrack proprietors could superimpose their standards onto the regulatory structure. This would undermine the duty assigned to the Racing Commission by the Legislature to "ensure that horse racing in New Mexico is conducted with fairness." Section 60-1A-5(A).

Also, allowing arbitrary exclusions also would serve to disincentivize licensees from reporting unsafe conditions or other improprieties at New Mexico racetracks. A licensee who feared the exclusionary power of racetrack proprietors would be unlikely to report unsafe conditions or misconduct. A broad power of exclusion would thus be likely to make horse racing less safe.

In addition, racetrack proprietors could use a broad power to exclude for anticompetitive purposes. Excluding a winning trainer creates opportunity for others. Allowing unreasonable or arbitrary exclusions under the common law could breed corruption.

The threat of the arbitrary loss of one's access to racing facilities would keep principled horsemen from racing in New Mexico. Why invest the time, effort, and

capital to build a racing career in New Mexico when access to the means of to engage in one's profession would be in the hands of only a few people who wield absolute power?

Finally, allowing arbitrary exclusions could allow racetrack proprietors to mask illegal discriminatory practices. If a racetrack proprietor had the power to exclude a licensee for any arbitrary reason, it would be nearly impossible to prove that an exclusion was based on illegal discrimination.[4]

Under the specific facts of this case, the general circumstances of horse racing in New Mexico, and for reasons of public policy, the standard for exclusion of licensees by racetrack proprietors under the common law articulated by the district court and defended here on appeal by Defendants–i.e., any and all reasons other than invidious discrimination–is much too broad.

G. Under an Appropriate Legal Standard for Exclusion, Summary Judgment Should be Overturned.

Mr. Carrillo, as a State-licensed trainer and owner, who earns a living as a horseman, who relies on access to the few racing venues in New Mexico to engage

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[4] It has been noted by both courts and scholars that the broad right of exclusion from public places emerged during reconstruction and that masking discriminatory practice was one of the intended purposes. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1292-95 (1996) (stating that the exclusionary power of private property owners under the common law expanded after the civil war, and that "without doubt the purpose [was to] enabl[e] businesses to continue to serve white customers while choosing to exclude blacks"); *Uston*, 445 A.2d at 374 n.4 (stating that the common law rule allowing unreasonable exclusions has "less than dignified origins").

in his profession, and whose behavior is heavily regulated by the State, should not be subject to exclusion under the common law of New Mexico for any reasons other than invidious discrimination by racetrack licensees that hold their properties open to the public, can not hold races but for a State-granted franchise, maintain State-wide monopolies during the periods they hold races, and are protected by State regulatory bodies with broad powers both on-site and off. Complex common law right to exclude cases such as this require this court to balance all the rights, interests, and circumstances, in order to achieve a just result.

Mr. Carrillo respectfully suggests that a heavy burden be placed on Defendants because Mr. Carrillo's entire living as a horseman is at stake. Moreover, his conduct is subject to extensive regulation by the State pursuant to the will of the Legislature, and Defendants have willingly subjected themselves to the exhaustive regulatory authority of the State in order to receive the benefit of holding horse races in New Mexico. In short, there is no need and much cost in allowing racetrack proprietors the power to exclude horse racing professionals arbitrarily. Given the rights, interests, and circumstances inherent to this case, the standard for exclusion under the common law should be highly restrictive.

The grant of summary judgment against Mr. Carrillo should be overturned under any appropriate standard for common law-based exclusion of licensees by racetrack proprietors in New Mexico. In their summary judgment motions,

Defendants argued for the broadest possible standard of exclusion. **[RP 308; RP 322; RP 391-92; RP 467-68]** Under the standard of exclusion Defendants asserted, no possible set of facts sustained Mr. Carrillo's claims because Mr. Carrillo did not assert invidious discrimination in his complaint. **[RP 1-37]** Thus, Defendants' motions for summary judgment functioned as motions to dismiss. Moreover, Defendants filed these motions early in the litigation, well before the end of discovery, and in two cases before even the scheduling order was filed. **[RP 299 My Way MSJ (June 5, 2014); RP 319 SunRay MSJ (July 2, 2014); RP 378 Scheduling Order (July 16, 2014); RP 388 Ruidoso MSJ (July 21, 2014); RP 448 Zia MSJ (August 5, 2014); RP 380, ¶ 5, 381 ¶ 12 (Discovery deadline was February 26, 2015, and trial was to take place on May 26, 2015)]** Mr. Carrillo had already been suspended by Defendants for as long as nearly two years by the time the first summary judgment motion was filed. **[*cf.* RP 455 ¶¶33-34, RP 299]** Expensive discovery to meet an insurmountable legal standard was impractical, perhaps even impossible.

Even with the limited discovery that took place in this case, summary judgment should be overturned under a standard for exclusion that requires reasonableness, and under any more restrictive standard. The administrative bodies in New Mexico did not take any disciplinary action against Mr. Carrillo for the incidents pointed to by Defendants. **[RP 362 ¶ 3]** Mr. Carrillo's licenses have

never for any reason been suspended or revoked by the Racing Commission or the Stewards. **[RP 362 ¶ 3]** Furthermore, the penalties under the horse racing regulations for the incidents that purportedly justify the de facto revocation of Mr. Carrillo's licenses are minor. **[*see* BIC 7-8]** Mr. Carrillo maintains that he is a clean horseman, and that he has been excluded for reasons that are unreasonable and, as he has come to believe, discriminatory.[5] Genuine issues of material fact exist as to whether the exclusions by Defendants were reasonable. Thus, under a standard for exclusion that requires even reasonableness, the grant of summary judgment should be overturned and this case remanded to the district court for additional discovery and a trial. The only standard for summary judgment that Defendants can meet is one that allows exclusions that are arbitrary.

In the alternative to this Court crafting a restrictive standard of exclusion under the common law, Mr. Carrillo respectfully requests that this Court find that Defendants' common law right to exclude for reasons of horse racing related conduct was abrogated because of the comprehensive regulation in this area by statute and under the administrative code. *See infra,* at III.

III. THE POWER OF RACETRACK PROPRIETORS TO EXCLUDE OR EJECT LICENSEES UNDER THE COMMON LAW IS ABROGATED BY THE HORSE RACING ACT (HRA) AND THE RULES AND REGULATIONS ENACTED PURSUANT TO THE HRA

[5] Mr. Carrillo has recently filed a civil rights suit relating to these exclusions: *Carrillo et al. v. Penn National Gaming, et al.*, No. D-101-CV-2015-02357. Part of the basis of that claim is Mr. Carrillo's disparate treatment as compared to licensees with substantially worse records.

This Court may–and Mr. Carrillo argues should–hold that racetrack proprietors' common law power to exclude or eject licensees is abrogated as to (at least) conduct related to horse racing because the Racing Commission and the Stewards have the duty to regulate participation in horse racing meets and because the exhaustive rules and regulations make it clear that the Commission's control is intended to be comprehensive as to licensees.

Defendant Zia argues that the common law right to exclude was not abrogated by the regulatory supervision over racing meets. **[Zia AB 23-24]** As analogous authority, Defendant relies on *Cox v. National Jockey Club*, 323 N.E.2d 104 (Ill. App. Ct. 1974). *Cox* states that "a perusal of [the Illinois Racing Board's rules and regulations] indicates that the pervasive powers granted to the supervising stewards relate to the [a]ctual running of the racing meet and not to who is to be allowed to participate." *Id.* at 107. Defendant Zia analogizes the situation from Illinois in *Cox* to New Mexico, arguing that although our rule may also may provide pervasive power over the our meets, the rules do not provide equivalent power over access to the meets. **[Zia AB 23-24]** The analogy offered by Defendants is inapposite. Our rules provide for regulatory power over access to meets: "The [Racing C]omission shall regulate . . . the persons who participate in each race meeting." 15.2.1.8 NMAC. In accordance with this provision, the Racing Commission is not merely vested with authority, but has an affirmative duty, to

regulate who participates in racing meets. Moreover, as discussed extensively in the Brief In Chief, the control over the licensure, conduct, access, penalties, and punishment of licensees is comprehensive. **[BIC 19-24]** Particularly detailed is the regulation, penalty, and punishment regime for the administration of substances to horses. *See, e.g,* 15.2.6.9(A) NMAC (establishing five classes of substances); 15.2.6.9(B) NMAC (discussing substance penalties and establishing penalty categories); 15.2.6.9(C) NMAC (establishing a detailed penalty regime based on the category of substance). In short, the statutory and administrative regime is intended to be comprehensive as to control over the relationship between licensees and horse racing in New Mexico.

Uston v. Resorts Int'l. Hotel, 445 A.2d 370, provides a better analogy than *Cox*. In *Uston*, the New Jersey Supreme Court found that the common law right to exclude was abrogated as to the authority of a casino to exclude patrons based on card playing strategies. *Id.* at 372 ("the Commission alone has the authority to exclude patrons based upon their strategies for playing licensed casino games"). The *Uston* court found that the pervasive and intensive statutory and administrative controls over casino games indicated that the "[Casino] Commission's control over the rules and conduct of [the] games [was] intended to be comprehensive." *Id.* at 373. To allow casino owners to exclude based on different parameters "would undermine th[e Commission's] control and subvert the important policy of

ensuring the credibility and integrity of the regulatory process[.]" *Id.* (internal quotation marks and citation omitted). The instant case is analogous to *Uston*, not *Cox*. To allow racetrack proprietors to exclude licensees on the basis of their horse racing conduct would undermine the comprehensive statutory and regulatory regime in New Mexico as to licensee access and conduct, and would interfere with the regulatory mandate of the Legislature to "ensure that horse racing in New Mexico is conducted with fairness." Section 60-1A-5(A).

A holding by this Court that the common law power of racetrack proprietors to exclude licensees on the basis of racing conduct was abrogated comports with the understanding of the Legislature. The FIR, which is evidence of the intent of the Legislature, *Int'l Chiropractors Ass'n*, 2014-NMCA-046, ¶ 32, states that the Bill that became Section 60-1A-28.1 was intended to "delegate additional authority to . . . racetrack [proprietors], to decide whether to eject any [occupational licensee] from the racetrack [proprietor]'s premises if their occupational license has already been suspended or revoked for administering a performance-altering substance." S.B. 116 FIR. The Legislature is presumed to know the law. *Chavez*, 1994-NMSC-037, ¶ 9. Therefore, the Legislature's understanding that it was delegating additional authority means that, prior to the enactment of Section 60-1A-28.1, racetrack proprietors did not have even the authority to exclude from the premises licensees whose licenses were already suspended. This gives rise to an

inference that the Legislature understood that the common law right of racetrack proprietors to exclude licensees was abrogated as to racing conduct.[6] This Court should so hold.

CONCLUSION

For the reasons stated in this Reply Brief and the Brief in Chief, Plaintiffs respectfully ask this Court to reverse the grant of summary judgment entered by the district court and to remand this case for further proceedings. Plaintiffs further, and, again, respectfully, ask this Court to hold that the right of racetrack proprietors to exclude licensees under Section 60-1A-28.1 is limited to the reason specifically stated in Section 60-1A-28.1(A).

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[6] The Legislature's understanding that it was conferring an additional power to racetrack proprietors when the Legislature permitted by statute the exclusion of licensees with suspended or revoked licenses is the lens through which this Court should construe 15.2.2.8(V) NMAC, if the Court sees any need to construe that regulation. Defendant SunRay seems to argue that 15.2.2.8(V)–which reads, "[a]n association may eject or exclude a person for any lawful reason"–conferred a right to exclude licensees independent of common law or statute. Not so. Prior to the enactment of Section 60-1A-28.1, that regulation could provide no more power than the common law, and since the enactment of Section 60-1A-28.1 it can provide no greater power to exclude than the statute. The Legislature's understanding of the state of the law prior to the enactment of Section 60-1A-28.1–namely, that racetrack proprietors could not even exclude licensees with suspended licenses–must mean that 15.2.2.8 does not confer a broad power to exclude licensees.

Respectfully submitted,

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