

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**JOSE LUIS LOYA,**

**Plaintiff,**

**v.**

**Supreme Court No. 33,447**

**Court of Appeals No. 32,405**

**D. Ct. Cause No. D-101-CV-2010-3854**

**GLEN GUTIERREZ, Commissioned Officer  
of Santa Fe County,**

**Defendant/Third-Party Plaintiff/Appellant-Petitioner**

**v.**

**COUNTY OF SANTA FE,**

**Third Party Defendant/Appellee-Respondent.**

**BRIEF OF AMICUS CURIAE NEW MEXICO ASSOCIATION OF  
COUNTIES IN SUPPORT OF APPELLEE-RESPONDENT COUNTY OF  
SANTA FE**

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SUPREME COURT OF NEW MEXICO  
FILED

JUN 19 2014



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**STATEMENT OF INTEREST OF AMICUS CURIAE NEW MEXICO  
ASSOCIATION OF COUNTIES<sup>1</sup>**

Counsel for amicus curiae New Mexico Association of Counties timely provided all parties notice of intent to file this brief on May 30, 2014, as required by N.M. Rule App. Proc. 12-215(B).

The New Mexico Association of Counties ("NMAC") is a non-profit corporation whose membership consists of the state's thirty-three (33) counties. The NMAC promotes member communication and coordination on local government issues, including issues concerning how their respective sheriffs facilitate law enforcement and public safety in New Mexico.

Further, the NMAC allows for harmonized action by members in matters affecting their rights and liabilities. Specifically, as concerns this case, the NMAC administers the New Mexico County Insurance Authority Multi-Line Pool ("Multi-Line Pool"). The Multi-Line Pool is a separate and independent governmental and legal entity formed pursuant to the New Mexico Joint Powers Act, NMSA §§ 11-1-1 to -7. The Pool is a mechanism by which its member counties self-insure through pooled reserves based on premium contributions. The Pool also offers its members excess coverage above individual self-insured retentions by procuring such

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<sup>1</sup> In compliance with N.M. R. App. Proc. 12-215(F), amicus curiae NMAC states that this brief was not written in whole or in part by the parties' counsel, and no one other than amicus curiae made a monetary contribution to its preparation.

coverages in the private insurance markets. New Mexico statute expressly grants counties the right to insure against risk by these means. See Romero v. Bd. of Cnty. Comm'rs of Cnty. of Taos, 2011-NMCA-066, 150 N.M. 59, 257 P.3d 404, 406 (“[NMSA] Section 3–62–1 permits New Mexico counties to self-insure through self-insurance reserves as an alternative to, or in combination with, insurance secured by ‘any other method provided by law.’ [NMSA] Section 3–62–2(A) permits two or more counties to pool their self-insured reserves, claims, or losses.”).

The Pool also maintains a subsidiary fund known as the “Law Enforcement Pool,” specifically to cover defense and indemnity exposure of members for claims relating to member provision of law enforcement services, and offers excess coverage for same. Every county in New Mexico participates in the Multi-Line Pool and the Law Enforcement Pool except for Lea County, Los Alamos County, Rio Arriba County, and San Juan County.

Given these roles as a coordination node for New Mexico sheriffs, and as an administrator of the Law Enforcement Pool, the NMAC has a profound interest in the case at bar for two main reasons. First, the NMAC desires that New Mexico’s sheriffs continue to commission officers of other agencies because doing so enhances law enforcement and public safety in this state. Second, the NMAC desires that the Law Enforcement Pool remain solvent, and remain a viable means by which

participating members may insure against risk exposure created by acts of actual county law enforcement officers.

Unfortunately, the (mis)interpretation of the New Mexico Tort Claims Act ("TCA"), NMSA §§ 41-4-1 to -27, urged on this Court by Officer Gutierrez<sup>2</sup> jeopardizes both of these interests. With respect to public safety, if this Court holds that an employee of another law enforcement agency, merely by dint of a commission by a county sheriff, becomes a "public employee" of that county under the TCA, the practical effect likely will be that county sheriffs will stop issuing commissions to such officers, and public safety will suffer. As detailed herein, New Mexico's sheriffs frequently commission law enforcement officers of multiple other local, state and federal agencies, to further those agencies' law enforcement activities and to enhance public safety in New Mexico generally.

Such commissioned officers do not, by their commission alone, become subject to the commissioning sheriff's chain of command. Nor by dint of the commission alone does the commissioning sheriff acquire the power to hire, train, supervise, discharge or otherwise control the manner in which commissioned

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<sup>2</sup> For clarity and consistency with briefs of the parties, amicus curiae in this brief will refer to Defendant/Third-Party-Plaintiff/Petitioner Glen Gutierrez as "Officer Gutierrez" and to Third-Party Defendant/Respondent County of Santa Fe as "the County."

officers employed by other agencies carry out law enforcement functions for their actual employer.

Still, these commissions empower sheriffs to enhance public safety by allowing officers of other agencies to act when they otherwise could not, as when a municipal officer commissioned by a sheriff responds to a call in an area outside of the municipality's incorporated limits; or to act when they are better positioned to do so, as when officers commissioned from other agencies respond to emergency situations because they are closer, or otherwise are available when sheriff's deputies are not. While New Mexico's sheriffs would like to continue commissioning officers of other agencies in the interest of public safety, they likely will stop—if continuing to do so essentially makes their county strictly liable for defense and indemnity exposures of commissioned officers, with no regard for *respondeat superior* principles generally, or the specific fact that those officers actually work for somebody else.

Moreover, if every officer commission (by participating counties choosing to continue commissions) equates to another officer that must be covered under the Law Enforcement Pool, reserves may be insufficient to cover increased exposures, which in the short term would put fund solvency at risk. And in the long term, participation rates may change as counties ceasing commissions may not want to be pooled with counties continuing commissions, on the basis that commissioning

counties would burden the Law Enforcement Pool with risks arising from the conduct of officers they neither employ nor control. Either way, in both the short and long term, these uncertainties will affect both the cost and availability of excess coverage in the private market, which will further undermine the purpose of the Law Enforcement Pool altogether.

Of course, these issues need not arise at all if this Court sees this case for what it is—a studied (if curious) effort by a sovereign nation to refuse recourse to its own coverages for defense and potential indemnity, for the alleged bad acts of one of its own law enforcement officers, taken within that nation's boundaries. This effort should not be countenanced by a strained and incorrect interpretation of the TCA, especially when such an interpretation would have pernicious consequences on public safety in New Mexico, and on counties' statutory rights to insure their risks through the Law Enforcement Pool.

Respectfully, amicus curiae request that the result reached by the Court of Appeals be affirmed.



## UNDERLYING FACTS AND PROCEEDINGS

Amicus curiae adopt and incorporate herein the Supplemental Summary of Proceedings set forth in Respondent's Answer Brief ("Answer"). See Answer at 1-6.

## ANALYSIS AND AUTHORITY

**I. New Mexico sheriffs commission literally thousands of officers of local, state and federal agencies, and this form of inter-agency cooperation enhances law enforcement and public safety in multiple ways.**

**A. New Mexico's sheriffs exercise their lawful authority to commission thousands of officers from a diverse array of other agencies.**

New Mexico sheriffs have authority to commission as deputies the employees of other law enforcement and other agencies. See generally NMSA §§ 41-4-5; 41-4-8; 41-4-10; 29-1-11(G). No statute imposes on sheriffs a requirement that such commissions be made pursuant to written agreements with such other agencies. In connection with preparing its brief, amicus curiae NMAC surveyed its sheriff affiliates regarding their commissioning practices. Information obtained reveals the actual network of relations on which the Court's decision in this matter will bear.

Data is provided by county size, but the sample set is representative of the diverse character of counties and commissions throughout New Mexico. Unless otherwise noted, sheriffs did not report that these commissions exist pursuant to any type of memorandum of understanding, mutual aid agreement, or any other type of

written agreement concerning commissioning or cross-commissioning of law enforcement officers of other agencies. Clearly, the vast majority of commissions in this state are not made subject to such written agreements.

The **Bernalillo County Sheriff** commissions approximately 1,998<sup>3</sup> total officers from 32 other agencies, as follows: Albuquerque Fire Department (7); Albuquerque Fire Department Arson Division (5); Albuquerque Public Schools (with written Memorandum of Understanding) (61); Albuquerque Police Department (1,530); Albuquerque Police Department Aviation Police (47); Belen Police Department (9); Bernalillo Police Department (4); Bosque Farms Police Department (4); Cibola County Sheriff's Department (5); Cibola National Forest (2); Corrales Police Department (23); District Attorney of Bernalillo County (3); Federal Bureau of Investigation (6); Department of Homeland Security (1); Isleta Tribal Police Department (34) (with written Mutual Law Enforcement Assistance Agreement); Laguna Tribal Police Department (10); Los Lunas Police Department (3); Albuquerque Open Space Police (18); Rio Rancho Department of Public Safety (114); Sandia Pueblo Police Department (22) (with written Mutual Law Enforcement Assistance Agreement); Sandoval County Sheriff's Department (7); Santa Ana Police Department (2); Santa Fe Police Department (6); Santa Fe County

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<sup>3</sup> For ease in reading, all numbers in this section are provided as digits, rather than in longhand form, notwithstanding citation convention to the contrary.

Sheriff's Department (4); Torrance County Sheriff's Department (10); University of New Mexico Police Department (49) (with written Memorandum of Understanding); U.S. Forest Service (2) (with written Memorandum of Understanding); United States Department of the Interior (Customs) (1); United States Border Patrol (4); United States Department of the Interior (Petroglyph National Monument) (2) (with written Memorandum of Understanding); Valencia County Sheriff's Department (2).

The **Doña Ana County Sheriff** commissions approximately 222 officers from 5 other agencies, as follows: Grant County Sheriff's Department (60) (with Memorandum of Understanding for "Border Sheriff Coalition"); Hidalgo County Sheriff's Department (7); Las Cruces Police Department (122); Luna County Sheriff's Department (33); Otero County Sheriff's Department (unknown number) (with Memorandum of Understanding for "Border Sheriff Coalition").

As of 2011, the **Santa Fe County Sheriff** commissioned an unknown number of officers from at least 8 other agencies as follows: Edgewood Police Department; Los Alamos Police Department; Santa Fe Police Department; Tesuque Pueblo Police; Torrance County Sheriff's Department; United States Bureau of Indian Affairs and Northern Pueblo Agency; United States Bureau of Land Management; United States Forest Service. R.P. 133, ¶13.

The **Sandoval County Sheriff** commissions approximately **326** officers from **22** other agencies as follows: Albuquerque Police Department (5); Bernalillo County Sheriff's Department (5); Bernalillo Police Department (27); Corrales Police Department (5); Cuba Police Department (4); Jemez Pueblo Tribal Police (16); Jemez Springs Police Department (2); Jicarilla Apache Tribal Police (12); Laguna Pueblo Tribal Police (11); Los Alamos National Laboratory (1); Los Ranchos Public Safety Department (1); Pojoaque Pueblo Police (3); Rio Rancho Police Department (128); Sandia Pueblo Tribal Police (18); Santa Ana Pueblo Tribal Police (26); Santa Fe Police Department (15); San Ysidro Marshal (1); Thirteenth Judicial District Attorney's Office (3); United States Bureau of Indian Affairs (9); United States Bureau of Land Management (5); United States Forest Service (9); Valencia County Sheriff's Department (1).

The **San Juan County Sheriff** commissions approximately **215** officers from **9** other agencies as follows: Aztec Police Department (16); Bloomfield Police Department (25); Farmington Police Department (142); La Plata County (Colorado) Sheriff's Office (1); New Mexico Parks Department (3); San Juan County Adult Detention Center (16); San Juan County Fire Department (3); United States Bureau of Land Management (4); United States Department of Homeland Security (5).

The **Valencia County Sheriff** commissions approximately **217** officers from **14** other agencies as follows: Albuquerque Police Department (19); Belen Police

Department (16); Bernalillo County Sheriff's Department (4); Bosque Farms Police Department (16); Isleta Police Department (19); Los Lunas Police Department (39); Los Lunas Public Schools (15); New Mexico Rangers (17); Pojoaque Pueblo Police (2); Rio Rancho Police Department (1); Sandoval County Sheriff's Office (1); University of New Mexico Valencia Campus (14); United States Department of Homeland Security (20); Valencia County Reserves (34).

The **Chaves County Sheriff** commissions approximately 32 officers from 5 other agencies as follows: Chaves County Drug Task Force (7-8); Dexter Police Department (1); Hagerman Police Department (1); Roswell Police Department SWAT (12); Roswell Police Department CID Division (10).

The **Eddy County Sheriff** commissions approximately 59 officers from 4 other agencies as follows: Artesia Police Department (13); Carlsbad Police Department (41); Loving Police Department (2); United States Federal Law Enforcement Training Center (3).

The **Curry County Sheriff** commissions approximately 1 officer from 1 other agency as follows: Clovis Police Department (1) in connection with Region V Drug Task Force.

The **Taos County Sheriff** commissions approximately 3 officers from 1 other agency as follows: United States Forest Service (3).

The **Grant County Sheriff** commissions approximately 313 officers from 9 other agencies as follows: Bayard Police Department (unknown number); Doña Ana County Sheriff's Department (163) (with Memorandum of Understanding for "Border Sheriff Coalition"); Hidalgo County Sheriff's Department (12) (with Memorandum of Understanding for "Border Sheriff Coalition"); Hurley Police Department (unknown number); Luna County Sheriff's Department (34) (with Memorandum of Understanding for "Border Sheriff Coalition"); Otero County Sheriff's Department (44) (with Memorandum of Understanding for "Border Sheriff Coalition"); Santa Clara Police Department (unknown number); Silver City Police Department (unknown number); United States Forest Service (unknown number).

The **Cibola County Sheriff** commissions approximately 17 officers from 4 other agencies as follows: Grants Police Department (7); Milan Police Department (4); United States Forest Service (4); United States National Park Service (2). The Cibola County Sheriff also is finalizing a Memorandum of Understanding with the Navajo Nation Division of Public Safety to provide for cross-commissioning of officers of the Navajo Nation and Cibola County.

The **Luna County Sheriff** commissions approximately 259 officers from 4 other agencies as follows: Doña Ana County Sheriff's Department (163) (with Memorandum of Understanding for "Border Sheriff Coalition"); Grant County Sheriff's Department (40) (with Memorandum of Understanding for "Border Sheriff

Coalition"); Hidalgo County Sheriff's Department (12) (with Memorandum of Understanding for "Border Sheriff Coalition"); Otero County Sheriff's Department (44) (with Memorandum of Understanding for "Border Sheriff Coalition").

The **Roosevelt County Sheriff** commissions an unknown number of officers from 2 other agencies as follows: Eastern New Mexico University Police Department; Portales Police Department.

The **Torrance County Sheriff** commissions approximately 20 officers from 4 other agencies as follows: Albuquerque Police Department/Bernalillo County Sheriff's Department/Region 1 Drug Task Force (3); Estancia Police Department (5); Moriarty Police Department (10); Mountainair Police Department (2).

The **Colfax County Sheriff** commissions approximately 10 officers from 4 other agencies as follows: Angel Fire Police Department (number unknown); Cimarron Police Department (number unknown); Raton Police Department (number unknown); Springer Police Department; Region IV Drug Task Force (number unknown).

The **Quay County Sheriff** does not commission officers from other agencies, but maintains a reserve officer program for retired law enforcement officers, that are unpaid, but are trained by Quay County Sheriff's Department, and perform their duties under the direct supervision of the Quay County Sheriff.

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The **Hidalgo County Sheriff** commissions approximately 267 officers from 6 other agencies as follows: Doña Ana County Sheriff's Department (163) (with Memorandum of Understanding for "Border Sheriff Coalition"); Grant County Sheriff's Department (40) (with Memorandum of Understanding for "Border Sheriff Coalition"); Lordsburg Police Department (10); Luna County Sheriff's Department (34) (with Memorandum of Understanding for "Border Sheriff Coalition"); Motor Transportation Police (14); New Mexico State Police (6).

The **Guadalupe County Sheriff** does not commission officers from other agencies.

The **Union County Sheriff** commissions approximately 2 to 3 officers from 1 other agency as follows: The Region IV Drug Task Force.

The **De Baca County Sheriff** does not commission officers from other agencies.

**B. Sheriff's commissions enhance law enforcement and public safety in New Mexico in multiple ways.**

The above data makes clear that (at present) New Mexico sheriffs do not hesitate in exercising their power to commission persons employed by other agencies. Such commissions aid those agencies in their own law enforcement pursuits, and enhance public safety in New Mexico generally. Several examples easily obtain.



First, sheriff's commissions for officers of municipal law enforcement agencies allow those officers to enhance law enforcement and public safety beyond their municipal jurisdictions. Simply put, this means that more law enforcement officers are available to enforce laws throughout the counties issuing such commissions. This is particularly true in areas along the boundary of municipalities, where commercial, residential, and infrastructure development generally proceeds without regard to where a municipality "ends" and where a county "begins." Moreover, as incorporated parts of municipalities increase or diminish, areas that once were beyond a municipality's boundary suddenly fall within them, and vice versa.

Sheriff's commissions to municipal officers allow those officers to enforce the law without constant recourse to maps and plats. With respect to counties having large metropolitan areas, consider that the Bernalillo County Sheriff commissions 1,530 Albuquerque Police Department officers, the Doña Ana County Sheriff commissions 122 Las Cruces Police Department Officers, the San Juan County Sheriff commissions 142 Farmington Police Department officers, and Sandoval County Commissions 128 Rio Rancho Police Department Officers.

Second, in counties of a more rural character, commissions to municipal officers allow for police response during periods where county sheriffs and their limited deputies are not available because they are too far away or simply are not on

duty. For example, in Roosevelt County, the county seat is Portales. The overwhelming majority of the county's population lives within nine (9) miles of the city limits, and beyond that there are another 2,500 square miles of county where populations, though sparse, do exist, and have equal entitlement to law enforcement presence. Frequently, Roosevelt County's deputy staff will be out on calls to remote areas of the county, and become unavailable for calls in county areas closer to Portales. In such situations, Portales Police Department officers by dint of their commissions are available to respond.

Also, the Roosevelt County Sheriff's Department is not staffed between 0200 and 0700 hours, so in the event a call comes in during this window for immediate response, commissioned Portales Police Department officers often respond until a Roosevelt County deputy can be alerted at home and make it to the call. The same holds true in Hidalgo County, where the Sheriff's Office is minimally staffed from 0200 to 0600 hours, during which time commissioned Lordsburg Police Department officers primarily provide law enforcement response in the county areas around Lordsburg. These are examples of a phenomenon common essentially to all sheriff's commissions to officers of other agencies—namely improved response times to calls based on greater numbers of officers having the authority to respond to them.

Third, sheriff's commissions to officers of other counties similarly allow for enhanced law enforcement and public safety along county borders, which, as with

municipal borders, generally are not bright-line marked on developments, roads, or soil to alert law enforcement officers where one county begins and another ends. Moreover, such commissions among and between county sheriffs provide for cooperation among counties facing common law enforcement issues. This is true of the Memorandum of Understanding entered into by the counties of Doña Ana, Grant, Luna, Hidalgo, and Otero. Such joint efforts effected in part by cross-commissions have allowed for these counties to receive funds to engage in certain border security operations funded by the United States Department of Homeland Security.

Fourth, sheriff's commissions to officers of other agencies allow specially-equipped or trained law enforcement personnel to put their talents to use in situations occurring beyond their jurisdictional boundaries. For example, Chaves County Sheriff's commissions to officers in the Roswell Police Department SWAT and Criminal Investigations Divisions forces allow those specially trained and equipped personnel to respond, for the benefit of the public, to situations demanding their skillset but not conveniently occurring within City of Roswell boundaries. Similarly, Bernalillo County Sheriff's commissions to officers of the Albuquerque Fire Department and of the Albuquerque Fire Department Arson Division allow those specially trained and equipped personnel to respond, for the benefit of the public, to situations demanding their skillset but not conveniently occurring within City of Albuquerque boundaries.

Fifth, sheriff's commissions to officers of other agencies facilitate cooperation among multiple agencies with respect to law enforcement investigation and response regarding certain classes of offenses, such as drug offenses. As examples, consider the many sheriff's commissions to officers of other agencies in connection with regional drug task forces, as with commissions to officers of other agencies by sheriffs in the counties of Curry, Torrance, Colfax and Union.

Sixth, sheriff's commissions to officers of sovereign Indian nations, as in the facts underlying this case, which equip those nations with law enforcement powers they otherwise would not enjoy, result in enhanced law enforcement and public safety within the territory of those sovereign nations. Officer Gutierrez's entire position seems to be motivated by the false premise that, somehow, the County, and the Santa Fe County Sheriff's Department are the real beneficiaries of commissions to Pojoaque Pueblo officers. This false premise leads to the false conclusion that the County must not get a "free ride" by receiving the "benefit" of a commissioned officer without having to insure that officer's risk.

But that does not make any sense. Sure, the County and the Sheriff's Department are as interested as any other person in less crime and more public safety, but they do not directly or uniquely benefit when crime goes down and public safety is enhanced through commissions to officers of other agencies. Rather, it is the public as a whole that benefits, and in this case, it really is the Pueblo of Pojoaque

that benefits, by having through Sheriff's commissions an additional jurisdictional tool to provide for enhanced law enforcement within the Pueblo's sovereign territory.

Seventh, sheriff's commissions to officers of sovereign Indian nations also allow for increased potential for law enforcement response, and concomitant enhancements to public safety, along the boundaries of sovereign nations (similar to the benefits discussed above concerning boundary areas for municipalities and counties). For example, the Navajo Division of Public Safety in Ramah currently responds to calls that may or may not be within Navajo Nation boundaries, in a rural area of checkerboarded jurisdiction, approximately 56 miles southwest of Grants, and thus extremely far from the Cibola County Sheriff's Department.

**II. The Tort Claims Act must be construed under canons of construction familiar to this Court, and *in pari materia* with other relevant statutes.**

**A. Prefatory comment and basic principles of construction.**

Amicus curiae urge that the Court affirm the holding of the Court of Appeals below. The County in its briefing has provided sound reasoning in arguing that the Court should affirm the Court of Appeals. Accordingly, amicus curiae adopt and incorporate that argument herein as if set forth in full. See Answer at 7-22, Argument, Section I. Still, amicus curiae wish to supplement such argument with a few observations concerning statutory construction, which may aid the Court in construing the TCA provisions at issue in the case at bar.

The Court has articulated clear canons to construe statutes. “Our ultimate goal in statutory interpretation is to find and give effect to the intent of the legislature by looking to the plain meaning of the language used in the statute. We avoid any construction that would be ‘absurd, unreasonable, or contrary to the spirit of the statute.’” State v. Padilla, 2006-NMCA-107, ¶ 10, 140 N.M. 333, 339, 142 P.3d 921, 927 rev’d, 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299 (quoting State v. Smith, 2004-NMSC-032, ¶ 9, 136 N.M. 372, 98 P.3d 1022). “To search for legislative intent, we look at the overall structure and function of the statute in the comprehensive legislative scheme, we consider any particular provision in reference to the statute as a whole as well as to other statutes dealing with the same subject, and we strive to read different enactments as harmonious.” Id. “If the language of a statute renders its application absurd or unreasonable, it will be construed according to its obvious spirit or reason.” State v. Nance, 77 N.M. 39, 46, 419 P.2d 242, 247 (1966).

In construing the TCA, the Court has stated: “We noted in State ex rel. Kline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988), that we must ‘read the act in its entirety and construe each part in connection with every other part to produce a harmonious whole.’ In addition, in Methola we held that because the Act is in derogation of one's common law right to sue, it should be strictly construed.” Bd. of Cnty. Comm’rs of San Miguel Cnty. v. Risk Mgmt. Div.,

1995-NMSC-046, ¶17 120 N.M. 178, 182, 899 P.2d 1132, 1136 (citing Methola v. Eddy Cnty., 1980-NMSC-145, ¶23, 95 N.M. 329, 333, 622 P.2d 234, 238) (applying these principles to narrowly construe NMSA § 41-4-4(B) , and to hold that duty to provide for defense does not include duty to provide defense to mandamus actions).

**B. The Tort Claims Act must not be construed to define “public employee” so broadly that it would encompass every officer of other law enforcement agencies that a sheriff commissions, and thereby trigger a statutory duty for the commissioning county to insure the risks for such a “public employee.”**

The central issue in this case is whether the County must defend and possibly indemnify Officer Gutierrez under NMSA §§ 41-4-4(B) and -4(D) with respect to the claims made against him by Mr. Loya. Officer Gutierrez contends the answer is yes because he is a “public employee” under NMSA § 41-4-3(F)(3), which enumerates as a specific category of “public employee” those “persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation.”<sup>4</sup>

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<sup>4</sup> Officer Gutierrez’s suggestion that if he is not a “public employee” under the TCA then non-salaried, or part-time non-certified deputies paid on an hourly wage basis are not either. The specter of such “uncovered” potential tortfeasors is a chimera; and in any event makes no sense. These persons would appear to be “public employees” under the threshold definition of “public employee” at NMSA §§ 41-4-3(F) (“‘Public employee’ means an ‘an officer, employee or servant of a governmental entity, excluding independent contractors . . .’”). Officer Gutierrez never has argued that he falls under this threshold definition of “public employee.” But just because that definition does not apply to him does not mean it cannot apply to non-salaried, or part-time non-certified deputies paid on an hourly wage basis. In any event, the issue of whether these types of officers are “public employees” under

Officer Gutierrez contends that he falls within NMSA § 41-4-3(F)(3) merely because he was a “commissioned county sheriff’s deputy sued under 42 U.S.C. §1983 for actions taken ‘under color of state law’ in exercise of his county law enforcement authority.” Brief in Chief (“B-in-C”) at 11. He goes on to say that his construction relies on the “common sense notion that (absent some mutual aid agreement or other statutory provision to the contrary) the ordinary Tort Claims Act laws and protections provided for public employees of the government whose law enforcement jurisdiction was exercised and whose law was enforced should be applied to determine questions of governmental liability (and defense and indemnity for the officers involved) regarding suits filed against them for actions they took in the course and scope of their duties for that governmental entity.” B-in-C at 17-18.

And finally, in a footnote no less, Officer Gutierrez concedes, in passing, the astonishing consequence of his argued-for reading: “The County has admitted that the Sheriff has routinely deputized the law enforcement officers of other cities and counties and Pueblos and even federal agencies to serve as Santa Fe County Deputies . . . [t]here is **nothing in the TCA that excludes any of them from “public employee” status under §41-4-3(F)(3).**” B-in-C at 18, n.5 (emphasis added). Thus, according to Officer Gutierrez, the literally thousands of officers of other agencies

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the TCA is not the issue before the Court—the question is whether Officer Gutierrez is. So his ponderings on whether these officers are “public employees” can be ignored.



commissioned by sheriffs across this state, exemplars of which are recited supra at Section I.A., are “public employees” under NMSA §41-4-3(F)(3). As such, the county that commissioned them apparently should be prepared to defend and indemnify claims made against them. Put differently, by his reasoning, if Officer Gutierrez gets defense and indemnity protections as a Section 41-4-3(F)(3) “public employee” from the commissioning county then the thousands of other commissioned officers in New Mexico get the same thing too.

Officer Gutierrez apparently thinks that this is no big deal because counties “could have (and may have) entered into agreements with those other agencies securing a valid reallocation of those defense and indemnity obligations,” B-in-C at 18, n.5. As a threshold matter, this ignores the reality of commissions in this state. Most commissions are not issued in connection with written agreements reallocating risk arising from TCA defense and indemnity obligations. This is not surprising because no case has ever read the TCA so broadly as to render every officer commissioned by a sheriff a “public employee” of that sheriff’s county by dint of the commission alone. Nor is there any statute that imposes on sheriffs an obligation to guard the county coffers by commissioning officers from other agencies only in concert with written reallocations of liability entered into with the agencies that actually hire, employ, supervise, train, and control the commissioned officers. To the contrary, NMSA §§ 41-4-5, -8, and -10 allow for appointments and commissions

even absent such agreements. Accordingly, the likely result of such a reading is not that sheriffs are going to tighten up their standards on memoranda of understanding or cross-commissioning arrangements, especially when, even if entered into, the enforceability of such arrangements may be contested, as Officer Gutierrez does here. Instead, Sheriffs likely will just stop issuing commissions. And as a result law enforcement and public safety throughout the state will suffer.

More critically, if the reading urged by Officer Gutierrez is adopted, it is unclear whether a county could even “reallocate” defense and indemnity obligations in the manner he so glibly suggests could be done. NMSA § 41-4-20 **expressly and specifically mandates** that local public bodies cover all risks for which they may be liable under the TCA. See NMSA § 41-4-20(A) (“It shall be the duty of governmental entities to cover every risk for which immunity has been waived under the provisions of the Tort Claims Act or any liability imposed under Section 41-4-4 NMSA 1978” by a combination of insurance, or reserves, or by participation in a public liability fund provided for by NMSA §41-4-25). This statute dictates the answer to the question of who has to worry about procuring risk coverage in the first instance. But the statute says nothing about who ultimately may be responsible for paying out on the basis of any risk reallocated by written indemnity agreements as between sheriffs and other law enforcement agencies. Officer Gutierrez fails to read the TCA as a whole, nowhere even cites to this statute, and so fails to appreciate this

critical distinction posed by its existence, and the effect of that distinction on Officer Gutierrez's argument.

Obviously, if commissioned officers are not "public employees" of the commissioning local public body by dint of their commission alone, this problem does not exist. The mandate of NMSA § 41-4-20 would not impose on a county a duty to cover the risk for commissioned officers because such officers would not be "public employees" of the county. As such, sheriffs actually could issue commissions without triggering for their county a statutory duty to insure against potential risks arising from the acts of commissioned officers.

Consider a concrete example. The Bernalillo County Sheriff commissions an Albuquerque Police Department ("APD") officer. That officer is sued for excessive force on a stop made within the County but beyond city limits. Under the law as it exists, and in line with the Court of Appeals' decision below, Bernalillo County has no basis to believe that it would be liable for the acts of the APD officer, because that officer is not a "public employee" of Bernalillo County by dint of his commission.

But to be extra safe, the Bernalillo County Sheriff might enter into a written agreement with APD clarifying that the APD, and in turn the City of Albuquerque ("City"), remains liable for the acts of its commissioned officers. Such an agreement would not be required by statute or otherwise.

Officer Gutierrez's obtuse reading of the TCA would destroy this entire arrangement. Under his reading, the commissioned APD officer suddenly would be a "public employee" of Bernalillo County through the Sheriff. Apparently he also still would be a "public employee" of the City through APD. Maybe the parties could hammer out what would have to be a truly elaborate written agreement to provide for indemnity of Bernalillo County by the City of Albuquerque for defense and indemnity costs on a case having facts like the one hypothesized, but limiting the indemnity so that it would not apply to other facts. Yet it is difficult to see how any such agreement could relieve Bernalillo County of its statutory duty under NMSA § 41-4-20 to insure against potential risks arising from the acts of its "public employee," the commissioned APD officer. Nor could such an agreement address the obvious inanity resulting from the fact that the City, too, would have a statutory duty under NMSA § 41-4-20 to insure against the potential risks arising from the acts of its "public employee," the commissioned APD officer.

The bottom line is that in Officer Gutierrez's hoped-for world, such a commission likely never would issue in the first place and public safety would suffer. His treatment of the TCA in that world is as confused and inefficient as it is dangerous. It should remain a thought experiment.

**C. The Tort Claims Act must not be construed to define "public employee" so broadly that it would render the Law Enforcement Pool impossible to administrate, place its solvency at risk, and frustrate**

**county efforts to procure excess coverages in the private insurance markets.**

An additional set of problems results from Officer Gutierrez's suggested (mis)reading of the TCA. If every officer a sheriff commissions is a "public employee" under NMSA §§ 41-4-3(F)(3), then, as explained, it would appear that the county must insure against such risk under NMSA §41-4-20. As noted, all of New Mexico's counties save four (4) would insure against any such risks through the Law Enforcement Pool. The increase in the number of officers that would have to be covered would give rise to exposures orders of magnitude greater than currently provided for. That would lead to an immediate need for increased premium funding to shore up reserves, and not all counties may be in a position to fund such an increase. Some counties would then elect to cease commissions so as to avoid these increased costs. But some counties might continue to issue commissions in the interest of public safety if they could afford them. This would create differentials in rating the risk of participating counties because some would be insuring risks over which they essentially have no control, as the commissioned officers being added to the pool would not by dint of their commission alone become employees or otherwise be subject to the control of the county sheriff issuing them the commission in the first place.

Moreover, with respect to commissions as between deputies of different counties, it is unclear which of the counties would have to pay for the risks of officers

enjoying commissions. Would this mean that the risk of some officers would be reserved for twice, or thrice, or multiple times over, once by premiums charged to the county employing the officer, and again for premiums charged to any counties commissioning that officer in the interest of public safety? The answer is unclear.

As well, with respect to procurement of excess coverages, there is no guarantee that the risk morass created by deeming all commissioned officers “public employees,” of multiple local government entities even could be placed in the private insurance markets. This would jeopardize the counties’ right to self-insure baseline risk through the Law Enforcement Pool, and to insure excess risk through the private markets, as currently facilitated by amicus curiae NMAC in administering Law Enforcement Pool. This right is specifically provided for by statute and recognized in caselaw. See Romero v. Bd. of Cnty. Comm’rs of Cnty. of Taos, 2011-NMCA-066, 150 N.M. 59, 257 P.3d 404, 406 (specifically construing these statutes *in pari materia* with the UM/UIM statute: “[NMSA] Section 3–62–1 permits New Mexico counties to self-insure through self-insurance reserves as an alternative to, or in combination with, insurance secured by ‘any other method provided by law.’ [NMSA] Section 3–62–2(A) permits two or more counties to pool their self-insured reserves, claims, or losses.”). As this Court in Romero construed the uninsured and underinsured motorist statute *in pari materia* with the statutory rights of counties under NMSA §§ 3-62-1 and -2(A), so it must do here in construing

the TCA. When it does so, it must give the counties' rights meaning. And the reading suggested by Officer Gutierrez must be rejected because it would eviscerate these rights rather than preserve them. See New Mexico Mun. League, Inc. v. New Mexico Env'tl. Improvement Bd., 1975-NMCA-083, ¶7, 88 N.M. 201, 206, 539 P.2d 221, 226. ("All statutes are presumed to be enacted by the legislature with full knowledge of all other statutes *in pari materia* and with reference thereto. Furthermore, statutes which are *in pari materia* should, as far as reasonably possible, be construed together as though they constituted one law so as to give force and effect to each. This rule applies even though the statutes being construed together were enacted at different times and the latter contains no reference to the former.") (emphasis in original) (citations omitted).

### CONCLUSION

For the above reasons, amicus curiae respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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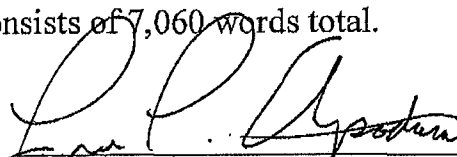
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### STATEMENT OF PAGE/WORD COUNT COMPLIANCE

This Brief contains fewer than the permitted 35 pages. Counsel used a proportionally spaced typeface using Microsoft Word 2013 in 14 point font Times New Roman. The body of the document consists of 7,060 words total.

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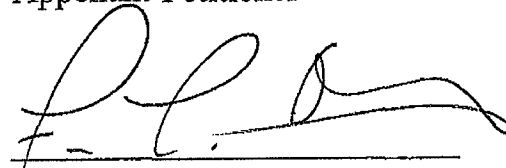


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