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Tulip Joy by Sarah Hartshorne (see page 3) Matrix Fine Art
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Thank you to all of our sponsors that help make this a successful event!

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Meetings

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16
Committee on Women and the Legal Profession, Noon, Modrall Sperling, Albuquerque
18
Family Law Section BOD, 9 a.m., via teleconference
18
Trial Practice Section BOD, Noon, State Bar Center
19
Young Lawyers Division, 10 a.m., Hyatt Regency Tamaya Resort and Spa, Bernalillo
22
Intellectual Property Law Section BOD, Noon, Lewis Roca Rothgerber
24
Real Property, Trust and Estate Section BOD, Noon, State Bar Center
25
Immigration Law Section BOD, Noon, via teleconference

August
5
Appellate Practice Section BOD, Noon, via teleconference
5
Bankruptcy Law Section BOD, Noon, U.S. Bankruptcy Court

State Bar Workshops

July
23
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center
26
Consumer Debt/Bankruptcy Workshop, 9 a.m., The Law Office of Kenneth Egan, Las Cruces

August
6
Civil Legal Fair 10 a.m.–1 p.m., Second Judicial District Court, Third Floor Conference Room, Albuquerque
6
Divorce Options Workshop 6 p.m., State Bar Center
12
Civil Legal Clinic for Veterans 9 a.m.–noon, Raymond G. Murphy VA Medical Center, SCI Meeting Room, Albuquerque
27
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center
28
Consumer Debt/Bankruptcy Workshop, 5:30 p.m., The Law Office of Kenneth Egan, Las Cruces

Cover Artist: The focus of Sarah Hartshorne’s work has been on capturing the unique in the ordinary, the beauty in the mundane. Like the impressionists, she paints in oil from everyday life and the world around her, sharing what often goes unnoticed and exploring the play of light and shadow.
Notices

Court News

Fifth Judicial District Court

Announcement of Vacancy

A vacancy on the Fifth Judicial District Court exists in Chaves County as of Aug. 2 due to the retirement of Hon. Charles C. Currier. The opening will be for a general jurisdiction judge. Inquiries regarding details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. David Herring, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., July 29. Applicants seeking information regarding election or retention, if appointed, should contact the Bureau of Elections in the office of the Secretary of State. The Judicial Nominating Committee will meet on Aug. 7 at the Chaves County Courthouse, 400 N. Virginia, Roswell, to evaluate the applicants. The Committee meeting is open to the public. The Judicial Nominating Committee will meet on Aug. 24 at the Bernalillo County Metropolitan Courthouse in Albuquerque to evaluate the applicants. The Committee meeting is open to the public and anyone who wants to voice his or her opinion about a candidate will be heard.

Bernallillo County Metropolitan Court

Announcement of Vacancy

One vacancy on the Bernalillo County Metropolitan Court exists as of July 1 upon the retirement of the Hon. Julie N. Altwies. The vacancy will be a criminal court assignment, Division IV. Inquiries regarding details or the assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. The dean of the UNM School of Law, designated by the New Mexico Constitution to chair the Bernalillo County Metropolitan Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Section 34, Article 8A-4b of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., July 16. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The Judicial Nominating Committee will meet on July 24 at the Bernalillo County Metropolitan Courthouse in Albuquerque to evaluate the applicants. The Committee meeting is open to the public and anyone who wants to voice his or her opinion about a candidate will be heard.

U.S. District Court: District of New Mexico

Investiture of Judge Yarbrough

Hon. Steven C. Yarbrough will be sworn in as U.S. Magistrate Judge for the U.S. District Court for the District of New Mexico at 4 p.m., Aug. 1, in the Rio Grande Courtroom, third floor, of the Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Albuquerque. A reception hosted by the federal bench and bar of the U.S. District Court for the District of New Mexico will follow from 6–9 p.m. at the Albuquerque Country Club, 601 Laguna Blvd. SW. All members of the bench and bar are invited to attend. Reservations are requested at 505-348-2001 or usdcevents@nmcourt.fed.us.

Professionalism Tip

Judge's Preamble:

As a judge, I will strive to ensure that judicial proceedings are fair, efficient and conducive to the ascertainment of the truth. In order to carry out that responsibility, I will comply with the letter and spirit of the Code of Judicial Conduct, and I will ensure that judicial proceedings are conducted with fitting dignity and decorum.

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved by the dates shown below. Plaintiff(s) exhibits will be released to counsel of record for defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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<tr>
<th>Court</th>
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Memorial Service in Honor of Judge John Edwards Conway

The federal judges of the District of New Mexico and the Federal Bar Association invite members of the State Bar of New Mexico to attend a special memorial honoring the late U.S. District Judge John Edwards Conway at 2:30 p.m., July 25, in the Rio Grande Courthouse, third floor, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW. A reception will immediately follow at the Albuquerque Country Club, 601 Laguna Blvd. SW.

STATE BAR NEWS

Attorney Support Groups
• July 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the third Monday of the month.)
• Aug. 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the first Monday of the month.)
• Aug. 11, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, Room 1119 (The group meets the second Monday of the month.)
• For more information, contact Bill Stratvert, 505-242-6845.

Alternative Dispute Resolution Committee Institute in San Antonio

The State Bar Alternative Dispute Resolution Committee is co-sponsoring the ABA Section of Dispute Resolution’s Advanced Mediation and Advocacy Skills Institute on Oct. 16–17 in San Antonio. Registration is now open at http://shop.americanbar.org/eBus/Default.aspx?TabID=1444&productId=212819 for ADR Committee members at a discounted rate.

Board of Bar Commissioners Meeting Agenda
8 a.m., July 17, Hyatt Regency Tamaya Resort & Spa, Bernalillo
1. Approval of Feb. 28 and May 13 (special) meeting minutes
2. Finance Committee Report
3. Financials
4. Executive Session
5. Bylaws and Policies Committee Report and Recommendations
6. Personnel Committee Report and Recommendations
7. Appointment to ABA House of Delegates
8. Appointment to Judicial Standards Commission
9. Public Defenders Request
10. Moldovan Bar Resolution and Report
11. Solo and Small Firm Section bylaw amendment request
12. Judiciary Committee Update
13. President’s Report
14. President-elect’s Report
15. Executive Director’s Report
17. Bar Commissioner District and Division (SLD, YLD and PD) Reports
18. New Business

Children’s Law Section Support the Annual Art Contest

The Children’s Law Section is now accepting monetary donations for supplies and prizes for its Annual Art Contest for children 10 and older who have had contact with the juvenile justice system or Children’s Court. This year’s theme is “Making the Most of What I Have.” Gift cards, ranging from $15 to $100, are awarded to the top three artists and 10-plus honorable mention winners. For more information, contact Children’s Law Section Chair Alison Pauk at 505-369-3628 or alison.pauk@lopdnm.us.

Committee on Women and the Legal Profession ‘Get Golf Ready’ Program

The Committee on Women and the Legal Profession’s 2014 Get Golf Ready Program at the Sandia Golf Club in Albuquerque is under way. Students will learn basic techniques including chipping and putting, full swing and bunker play, and fundamental guidelines for the use and maintenance of golf equipment. Keeping score, and navigating the course. Clinics will be from 4–5 p.m. on July 16, 23 and 30. The cost includes club rental. Register online at https://www.cgmarketingsystems.com/onlineshop/index.asp?id=10324&courseid=1083. For more information, contact Jocelyn Castillo, jocelyn@moseslaw.com.

Immigration Law Section Opposes Expedited Deportation

After receiving input from its section members per State Bar Bylaws, the Immigration Law Section Board of Directors voted 7-0, with one abstention, in favor of endorsing a statement opposing the federal government’s expedited removal of unaccompanied minors from Central America who are in the U.S. illegally. Section board members voting “aye” were Pamela Muñoz, chair; Carolina Martin Ramos, chair-elect; Joel Hagaman, secretary; Kristin Kimmelman, budget officer; Horatio Moreno-Campos, Olsi Vrapi, and Abby Sullivan Engen. There were no “no” votes. Christina Rosado abstained. To view the statement, visit http://www.nmbar.org/AboutSBNM/sections/Immigration/Lmmdocs/expediteddeportations.pdf.
Young Lawyers Division
Annual Meeting Afterparty
Join the Young Lawyers Division for a party with music, a hosted bar, games and door prizes during the 2014 State Bar Annual Meeting—Bench and Bar Conference. The party will be from 10 p.m.–midnight, July 18, at the Cottonwood Pavilion at the Hyatt Regency Tamaya Resort.

UNM Law Library
Hours Through Aug. 17
Building & Circulation
Monday–Thursday 8 a.m.–8 p.m.
Friday 8 a.m.–6 p.m.
Saturday 8 a.m.–5 p.m.
Sunday Noon–8 p.m.
Reference
Monday–Friday 9 a.m.–6 p.m.
Saturday–Sunday Closed

Other Bars
Federal Bar Association: New Mexico Chapter Annual Meeting
The New Mexico Chapter of the Federal Bar Association will hold its annual meeting at 2:15 p.m., July 18, at the Hyatt Regency Tamaya Resort & Spa during the State Bar Annual Meeting—Bench and Bar Conference. The meeting will include an election of officers, a treasurer’s report, changes to the chapter’s bylaws, and an outline of proposed activities for the coming year. All current Federal Bar Association members are urged to attend. The meeting is open to anyone interested in becoming a member. For more information, including a list of candidates for officer positions, contact Chapter President Daniel W. Lewis at DLewis@allenlawnm.com.

New Mexico Defense Lawyers Association
NMDLA Annual Awards Nominations
The New Mexico Defense Lawyers Association is now accepting nominations for the 2014 NMDLA Outstanding Civil Defense Lawyer and the 2014 NMDLA Young Lawyer of the Year awards. Nomination forms are available at www.nmdla.org, nmddefense@nmdla.org, or 505-797-6021. The deadline is Aug. 1. The awards will be presented at the NMDLA Annual Meeting Luncheon on Oct. 3 at the Hotel Andaluz in Albuquerque.

Other News
National Association of State Auditors Comptrollers and Treasurers 2014 Conference in Santa Fe
The National Association of State Auditors Comptrollers and Treasurers will hold its 2014 Annual Conference on Aug. 9–13 at the Eldorado Hotel & Spa in Santa Fe. This year’s conference rate is $189/night plus tax. To reserve a room, call 800-955-4455 and ask for the NASACT Annual Conference rate. NASACT principals in good standing (or their designees) are eligible to receive up to $2,000 to attend the conference. Funds will be provided as reimbursement after the conference and can be used to cover travel or registration costs. Special activities include a reception at the La Fonda on the Plaza Hotel and an evening at the New Mexico History Museum and Palace of the Governors. For more information, visit www.nasact.org or call Donna Maloy, 859-276-1147.

New Mexico Lawyers for the Arts
Panel Discussion Series Begins
New Mexico Lawyers for the Arts, along with the city of Santa Fe Community Gallery, will present a series of panel discussions addressing issues related to the artist as entrepreneur. The dates are: July 16, “The Artist as Entrepreneur: The Visual Artist;” Aug. 20, “The Musician as Entrepreneur;” and Sept. 17, “The Filmmaker as Entrepreneur.” Events are free and open to the public. For more information, contact info@nmlawyersforthearts.org.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by noon Monday the week prior to publication.
The emerging scientific field known as positive psychology helps us understand how the brain can change, and that we can purposefully change it to create more positive emotions. Positive emotions, in turn, broaden our cognitive capacity allowing flexible, open-minded thinking for creative problem solving and building of personal resources such as skills, knowledge and relationships.

Positive psychology matters a lot in the field of law because, while many lawyers are actually happy, there are perhaps just as many who are not happy. It is well documented that lawyers are more likely to suffer from depression than any other occupational group. In a Johns Hopkins University study of more than 100 occupations, researchers found that lawyers led the country with the highest incidence of depression.¹

What makes so many lawyers so unhappy?

It appears the world view that makes lawyers effective in their profession can pollute other parts of their life. In other words, many of the qualities that help lawyers succeed in practice such as prudence, aggression, and critical and judgmental thinking are traits that can have disastrous consequences when applied in one’s personal life.

Take “prudence,” for example. Martin Seligman, Ph.D., former president of the American Psychological Association, and the “father” of positive psychology notes in his book, Learned Optimism: How to Change Your Mind and Your Life,² that a prudent lawyer strives to uncover every conceivable trap or disaster that might occur in a legal situation. This skill of anticipating a range of problems is highly adaptive for lawyers who then foresee even implausible outcomes and defend against them.

Seligman stresses that the trait of prudence makes a good lawyer, but does not make a happy person. This is because lawyers cannot readily turn it off. What operates in the legal world as “prudence” often determines your thinking in the non-legal world because the brain is wired to think that way. In the non-legal world, prudence is called “pessimism.”

Pessimistic thinking is a way of interpreting the world in which the worst is routinely expected. It affects how we interpret failure and events that don’t go well. For example, a pessimist experiencing failure often interprets the event globally: “I’m no good; I’ll always fail.” Sadness is interpreted as everlasting, with one believing that everything is going to be ruined. The pessimist experiences negative events as pervasive, permanent, and uncontrollable, which can create an all-encompassing unhappiness.

In contrast, an optimistic interpretation style, which can be learned, views negative events as specific, temporary and changeable. When an optimist fails for example, he or she experiences the hurt as specific to the event, and asks “What can I learn from the failure and how can I do better the next time?” The optimist is not immune to sadness, but thinks and experiences it as specific to the event and knows it will pass.

Pessimism in one’s personal life creates a high risk for depression. The challenge then is to remain prudent in the practice of law and contain this tendency outside of one’s practice. This is where positive psychology comes in. There are exercises that can help lawyers who see the worst-case scenario in every setting become more discriminating in their personal life. Seligman has termed this adaptation as “flexible optimism.”

Another common thinking style lawyers have is “perfectionism,” which similarly can be corrosive in one’s personal life. According to Dave Shearon, who has a master’s degree in positive psychology and is former director of Continuing Legal Education in Tennessee, “lawyers tend to be highly ambitious and overachieving, with a tendency toward perfectionism not just in their legal pursuits, but also in nearly every aspect of their life.”

When rigidly applied, the propensity to be a perfectionist can impede happiness. Tal Ben-Shahar, Ph.D., provides another
model that offers a more balanced perspective as an alternative to perfectionism. He calls it “optimalism” and describes it in detail in his book Being Happy - You Don't Have to Be Perfect to Lead a Richer, Happier Life.³

The “optimalist” believes that when appropriate, “good enough” is the best option, given the demands and constraints of life, Ben-Shahar writes. The optimalist also appreciates life as a whole and regards successes and even failures as opportunities to learn and grow.

In addition to the influence of thinking styles and traits, the heavily charged negative emotions inherent in the legal environment also play a part in lawyer unhappiness.

Take litigation, for example. Litigators are paid to resolve conflict, often between two hostile and irrational sides. In most conflicts that necessitate obtaining a lawyer, the lawyer usually is brought in after things have already gone horribly wrong. In the courtroom, tensions mount and anger, self-righteousness and combative behavior may dominate.

Another source of negative emotions—handling clients’ negative situations and hearing their negative stories on a regular basis—can cause secondary trauma. Counselors and therapists are trained how to handle this to keep it from tearing them down. In the legal world there is little precedent for recognizing the trauma, much less addressing it.

Negative emotions also occur with the high pressures, expectations and stress of the profession. These are exacerbated by many lawyers’ tendencies to focus on the implications of past decisions or events and anxiousness about possible future events.

Fortunately, positive psychology provides realistic solutions to the predicament of negativity in legal practice by offering interventions and exercises that generate positive emotions. One such exercise has us consistently noticing and genuinely appreciating simple pleasures. The word “appreciate” means “to be thankful or grateful,” which is the opposite of taking something for granted. Research on gratitude has repeatedly proven that when we appreciate the good in our lives, we enjoy higher levels of well-being and are more successful. They typically enjoy a better work-life balance, greater overall well-being and happiness.

Positive psychology introduces ways to change the brain. We can rewire our brains to affect:

- the way we interpret and experience the world, helping us feel more upbeat and optimistic more of the time;
- the way we bounce back from hardships and setbacks, helping us become more resilient; and
- the way we behave, helping us feel more balanced and levelheaded more of the time.

Further, positive people experience enhanced work productivity and more success. They typically enjoy a better work-life balance, greater overall well-being and happiness.

We already changed in law school. Neuroscience proves and the experts agree that if we want to, we can change again. Positive psychology offers the empirical research, proven interventions, and exercises to create and deepen the neural pathways that lead to reduced stress. Incorporating these practices can boost your positivity and provide you with many professional and personal benefits including the broadening and building effects of positive emotions.

Attorney Hallie N. Love, www.fitmindbodybrain.com, cum laude law school graduate, is nationally certified in positive psychology with Tal Ben-Shahar, Ph.D. Love uses positive psychology exercises as well as therapeutic yoga exercises and other techniques from her book, Yoga for Lawyers - Mind-Body Techniques to Feel Better All the Time, also help to de-stress and positively boost overall levels of well-being.

An exercise in appreciation: On a regular basis, choose three everyday things you’ve encountered in the past few days or that are around you right now (e.g., warm sunshine on your face, the smell of fresh coffee, trees or flowers, your laptop or mobile device, a person dear to you) and write a few words or sentences addressing what you genuinely appreciate, enjoy or find amazing about each one. To “genuinely appreciate,” it’s important to allow enough time for the enjoyment and amazement to sink in and the good feelings to linger. Research has proven that regularly experiencing moments of genuine appreciation changes our brains and help us overcome our negativity bias.

The therapeutic yoga exercises and other techniques including Yoga Nidra, described in my book Yoga for Lawyers - Mind-Body Techniques to Feel Better All the Time,⁴ also help to de-stress and positively boost overall levels of well-being.

### References

At the invitation of the Union of Cuban Jurists, the State Bar of New Mexico is organizing a delegation to visit Cuba to research the country’s legal system. State Bar President Erika Anderson will lead the delegation. We invite you to join in this unique opportunity.

This delegation will convene in Miami on Oct. 5 and will return to Miami on Oct. 10. Please see www.professionalsabroad.org for itinerary details.

Our delegation will undertake a comprehensive study of the Cuban legal system, from the teaching of law, to the criminal justice and judicial systems; civil and family code; business and commercial rights; and resolving domestic and international commercial conflicts. CLE credit will not be available.

A parallel program of people-to-people activities will be available for spouses and guests.

For more information, Professionals Abroad, 1-877-298-9677 or www.professionalsabroad.org
### Legal Education

#### July

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<td>Estate Planning for Real Estate, Parts 1–2</td>
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<td>The 29th Annual Bankruptcy Year in Review Seminar</td>
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<td>Skeptically Determining the Limits of Scientific Evidence V</td>
<td>5.0 G</td>
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<td>11th Annual Spring Elder Law Institute: Current Medical Developments Every Elder Law Attorney Should Know</td>
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August

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As Updated by the Clerk of the New Mexico Supreme Court

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**Certiorari Granted and Submitted to the Court:**

(Submission Date = date of oral argument or briefs-only submission) Submission Date

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http://nmsupremecourt.nmcourts.gov
Opinions
As Updated by the Clerk of the New Mexico Court of Appeals
Wendy F. Jones, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925
Effective July 4, 2014

Published Opinions

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No. 33215 8th Jud Dist Taos Cv-11-368, S LITTLE v T BAIGAS (reverse and remand) 7/1/2014
No. 32653 2nd Jud Dist Bernalillo CR-10-3437, STATE v B MOSLEY (remand) 7/1/2014
No. 33008 1st Jud Dist Santa Fe LR-11-39, STATE v R SANCHEZ (affirm) 7/3/2014

Unpublished Opinions

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No. 33372 11th Jud Dist San Juan DM-01-198, J ABERNATHY v S YOCUM (dismiss) 7/1/2014
No. 33510 1st Jud Dist Santa Fe CR-11-28, STATE v D MARTINEZ (affirm) 7/1/2014
No. 33541 2nd Jud Dist Bernalillo DM-12-4879, HSD v S KINDRED (reverse) 7/1/2014
No. 33566 5th Jud Dist Chaves JQ-12-24, CYFD v ASHLEY F (affirm) 7/1/2014
No. 33680 2nd Jud Dist Bernalillo CV-14-658, BECKER PROPERTIES v C SENA (dismiss) 7/1/2014
No. 33028 7th Jud Dist Torrance CV-09-106, L QUINTANA v A MONTANO (affirm) 7/3/2014
No. 33569 11th Jud Dist San Juan DM-12-7469, HSD v J LUJAN (dismiss) 7/3/2014
No. 31727 2nd Jud Dist Bernalillo LR-08-147, STATE v Z ANDERSON (affirm) 7/3/2014

Slip Opinions for Published Opinions may be read on the Court’s website:
http://coa.nmcourts.gov/documents/index.htm
Clerk’s Certificates
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Clerk’s Certificate of Suspension
For noncompliance with Rule 18-301 NMRA, governing minimum continuing legal education for compliance year 2013.

Effective June 25, 2014:

Widu Gashaw Abate
1089 Darwick Ct
St. Louis, MO 63132-2909

Alejandro Acosta
109 N Oregon St Fl 12
El Paso, TX 79901-1150

Tobanna Barker
1619 Betts NE
Albuquerque, NM 87110-4267
or
6301 Indian School Road NE, Suite 900
Albuquerque, NM 87110-8199

Lee Benshoof
503 Slate Ave NW
Albuquerque, NM 87102-2156

Robert E. Bivins
4425 Juan Tabo NE Ste 250
Albuquerque, NM 87111
or
701 Osuna NE, Suite 100
Albuquerque, NM 87113

Patrick A. Bowser
6802 Nashville Ave
Lubbock, TX 79413-6032
or
6109 Lynnhaven Drive
Lubbock, TX 79413

Raymond K. Chung
PO Box 5282
Santa Fe, NM 87502-5282

Carol A. Connor
2456 Plaza Vizcaya NW
Albuquerque, NM 87104-2936
or
555 Broadway Blvd. NE, Suite 200
Albuquerque, NM 87102-2362

Richard Atienza Costa
2350 Ptarmigan Ln
Colorado Springs, CO 80918-1424

Richard J. Deagüero
5001 Spring Valley Rd Ste 400E
Dallas, TX 75244-3947
or
3626 North Hall Street, Suite 704
Dallas, TX 75219

Thomas C. Esquibel
PO Box 2358
Los Lunas, NM 87031-2358

Milad Kaissar Farah
4141 Pinnacle St Ste 218
El Paso, TX 79902-1057

Julie Fritsch
5264 Na Pali St NE
Albuquerque, NM 87111-1939
or
PO Box 2307
Santa Fe, NM 87504-2307

Martina M. Gauthier
PO Box 1272
Keshena, WI 54135-1272

John G. George
4122 Hazelcrest Dr
Las Vegas, NV 89121-6346

Marcos Gonzalez
1905 Lomas Blvd NW
Albuquerque, NM 87104-1207
or
1303 Montoya Street NW
Albuquerque, NM 87104

James A. Greig III
PO Box 1600
Bernalillo, NM 87004-1600

David C. Hall
100 E 3rd St Ste 107
Sweetwater, TX 79556-4546
or
PO Box 168
Sweetwater, TX 79556-0168

Charles E. Hawthorne
PO Box 2387
Ruidoso, NM 88355-2387

Brandon Hertzler
423 6th St NW
Albuquerque, NM 87102-2093

Alain Jackson
423 6th St NW
Albuquerque, NM 87102-2093

Cody K. Kelley
315 5th St NW
Albuquerque, NM 87102-2105

Scott Allen Klundt
2378 Hearth Dr Apt 14
Evergreen, CO 80439-8974
or
3451 South Ammons Street, Suite 16-6
Lakewood, CO 80227

John N. Lieuwen
1803 Rio Grande Blvd NW
Albuquerque, NM 87104-2663
or
4101 Indian School Rd. NE, Ste. 310N
Albuquerque, NM 87110

Steven Robert Maher
631 W Morse Blvd Ste 200
Winter Park, FL 32789-3730

Michael P. Maloney
7 Park St Ste 201
Attleboro, MA 02703-3257
or
166 North Main Street
Attleboro, MA 02703-222

Mary Ann McConnell
57 State Road 503
Santa Fe, NM 87506-8980
or
PO Box 22694
Santa Fe, NM 87502-2694

Sheila C. McMullan
116 5th St NE
Washington, DC 20002-5936
or
152 11th St. NE
Washington, DC 20002-6216

Thomas T. Rutherford
1016 Monroe St NE
Albuquerque, NM 87110-5822

Yolanda Simmons
1140 N Wells St Apt 2
Chicago, IL 60610-7533

Ethan Samuel Simon
PO Box 26596
Albuquerque, NM 87125-6596

David Carlson Smith
215 Lincoln Ave Ste 105
Santa Fe, NM 87501-1940

Paquin M. Terrazas
PO Box 1743
Santa Fe, NM 87504-1743

Orlando J. Torres
1216 Montana Ave
El Paso, TX 79902-5512
or
718 Myrtle
El Paso, TX 79901

Jesse K. Tremaine
7030 W 20th Ave
Lakewood, CO 80214-6202

Susan S. Vance
515 Congress Ave Ste 2350
Austin, TX 78701-3562
or
515 Congress Ave Ste 1720
Austin, TX 78701

Rosanna C. Vazquez
PO Box 2435
Santa Fe, NM 87504-2435

Sandra K. Watts
PO Box 849
Browning, MT 59417-0849
or
95781 Sunny Slope Lane
Lakeview, OR 97630

Wanda Jo Wilkinson
1869 Candela St
Santa Fe, NM 87505-5602
or
435 St. Michaels Drive, Suite D
Santa Fe, NM 87505-7677

Jenna R. Yanez
PO Box 22876
Santa Fe, NM 87502-2876

Clerk’s Certificates

Clerk’s Certificate of Withdrawal

Effective December 31, 2014:
Charles Dale Arden
8837 Barnett Valley Road
Sebastopol, CA 95472

Clerk’s Certificate of Admission

On June 24, 2014:
Mary Shannon Driscoll
Edge Engineering and Science
901 S. Highway 85
Socorro, NM 87801
575-838-1263
575-835-0223 (fax)
maryshannondriscoll@gmail.com

On June 18, 2014:
Neal D. Gidvani
Silvestri Gidvani, PC
1810 Sahara Avenue, Suite 1395
Las Vegas, NV 89104
702-979-4597
702-933-0647 (fax)
gidvani@silgid.com

On June 25, 2014:
Peter James Horan
3039 Prenda De Oro
Albuquerque, NM 87120
505-261-6157
peterhoran@gmail.com

On June 26, 2014:
Stephan Michael Mares
1225 S. St. Francis Drive, Suite D
Santa Fe, NM 87505
505-988-5586
505-988-5587 (fax)

On June 23, 2014:
E. Sequoyah Simermeyer
5845 Blue Sky
Elkridge, MD 21075
202-486-6280
ssimermeyer@gmail.com

In Memoriam

As of May 30, 2014:
Benjamin K. Horton
406 San Mateo NE
Albuquerque, NM 87108

Clerk’s Certificate of Reinstatement to Active Status

As of June 17, 2014:
Brian L. Lewis
202 Lawrence Street, #603
Denver, CO 80205

As of June 17, 2014:
John Henry Stevens IV
9704 S. Mulberry Street
Highlands Ranch, CO 80129

As of June 26, 2014:
Jenna R. Yanez
PO Box 22876
Santa Fe, NM 87502-2876

Clerk’s Certificate of Change to Inactive Status

Effective June 5, 2014:
Edwin E. Macy
26 Camino A Las Estrellas
Placitas, NM 87043-8804

Clerk’s Certificate of Indefinite Suspension from Membership in the State Bar of New Mexico

Effective June 18, 2014:
Sabrina Price
2375 E. Camelback Road, Suite 600
Phoenix, AZ 85016

Clerk’s Certificate of Address and/or Telephone Changes

Charles Dale Arden
8837 Barnett Valley Road
Sebastopol, CA 95472
camasaca@comcast.net

Robert A. Bernstein
514 Marble Avenue NW
Albuquerque, NM 87102
505-243-5222
505-242-5777 (fax)
wizlaw@aol.com

Robert Jason Bowles
Bowles Law Firm
PO Box 25186
500 Marquette Avenue NW, Suite 1060 (87102)
Albuquerque, NM 87125-5186
505-217-2680
505-217-2681 (fax)
jason@bowles-lawfirm.com

Linda Burson
1544 Grace Pointe Drive, #27
Moore, OK 73170
bursonlinda@yahoo.com

Michael E. Cain
Law Office of Michael E. Cain, LLC
1100 S. Main Street, Suite 200
Las Cruces, NM 88005
575-541-6110
575-541-6111 (fax)
mike@southernnmlaw.com

Terry Calvani
Freshfields Bruckhaus Deringer, LLP
700 13th Street NW, 10th Floor
Washington, DC 20005

Taina L. Colon
PO Box 35985
Albuquerque, NM 87176-5985
505-850-9812
taina.l.colon@gmail.com

Deborah M. DeMack
The Law Office of George “Dave” Giddens, PC
10400 Academy Road NE, Suite 350
Albuquerque, NM 87111
505-271-1053
505-271-4848 (fax)
deborah@giddenslaw.com

Hope Eckert
Hope Eckert, Attorney at Law, LLC
500 Marquette Avenue NW, Suite 1200
Albuquerque, NM 87102
505-480-8580
heckert@swcp.com

Aric Grant Elsenheimer
Office of the Federal Public Defender
111 Lomas Blvd. NW, Suite 501
Albuquerque, NM 87102
505-346-2489
505-346-2494 (fax)
Aric_Elsenheimer@fd.org

Anthony F. Filosa
Law Offices of the Public Defender
800 Pile Street, Suite A
Clovis, NM 88101
575-769-1991
575-763-5882 (fax)
anthonyf.filosa@lopdnm.us

Patrick J. Hart
Laguna Development Corporation
14500 Central Avenue SW
Albuquerque, NM 87121
505-352-7843
pjhart@poldc.com

Samuel D. Hough
Lower Elwha Klallam Tribe
2851 Lower Elwha Road
Port Angeles, WA 98363
360-452-8471 Ext. 7436
360-452-3428 (fax)
sam.hough@elwha.org

J. Ryland Hutchins
108 Road 2350
Aztec, NM 87410
rylandhutchins@gmail.com

Dated June 30, 2014
Clerk’s Certificate of Change to Inactive Status

Effective May 26, 2014:
Andre Christian Shiromani
3500 Comanche Road NE, Bldg. D
Albuquerque, NM 87107

As of May 26, 2014:
Andre Christian Shiromani
3500 Comanche Road NE, Bldg. D
Albuquerque, NM 87107
Clerk’s Certificates

Bruce R. Kite
4440 Los Arboles Drive
Las Cruces, NM 88011
lawatty@yahoo.com

Cynthia Ann Kittle
PO Box 341141
Austin, TX 78734-1141
cindykittle.esq@gmail.com

Barbara J. Koenig
617 Tyler Road NW
Los Ranchos, NM 87107-6244
505-344-5564
bkoenig617@gmail.com

Zachary Adam Lerner
Lerner Venture Law
200 Broadway Blvd. NE
Albuquerque, NM 87108
505-227-8801
zach@lernerventurelaw.com

Brian L. Lewis
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
405-777-9539
720-904-6179 (fax)
lewisbr@gtlaw.com

David W. Livingston
4804 Valle Bosque NW
Albuquerque, NM 87120
505-250-0355
revolver4954@sbcglobal.net

Alicia C. Lopez
Rothstein, Donatelli, Hughes, Dahlstrom, Schoenberg & Bienvenu, LLP
500 Fourth Street NW, Suite 400
Albuquerque, NM 87102-2174
505-243-1443
505-242-7845 (fax)
alopez@rothsteinlaw.com

Anthony Michael Maestas
Law Offices of the Public Defender
211 N. Canal
Carlsbad, NM 88220
575-887-5573 Ext. 102
575-887-6874 (fax)
anthony.maestas@lopdnm.us

Seth D. Matus
Schoenberg, Finkel, Newman & Rosenberg, LLC
222 South Riverside Plaza, Suite 2100
Chicago, IL 60606
312-648-2300
312-648-1212 (fax)
Seth.Matus@sfnr.com

Shay E. Meagle
Meagle Law, PA
6500 Jefferson Street NE, Suite 260
Albuquerque, NM 87109-3490
505-255-0202
505-503-7641 (fax)
shay@meaglemaw.com

Cynthia Nguyen
Santa Barbara County Public Defender’s Office
115 Civic Center Plaza
Lompoc, CA 93436
415-265-7996
tcbnguyen@co.santa-barbara.ca.us

Antonia P. Ortiz
4414 82nd Street, Suite 212-148
Lubbock, TX 79424
575-802-5233
ortizpatriciaorhtiz@gmail.com

Sharon Pomeranz
143 Pine Street
Santa Fe, NM 87501
505-469-5051
sharonesantafe@gmail.com

Irm Rivas
Office of the Federal Public Defender
111 Lomas Blvd. NW, Suite 501
Albuquerque, NM 87102
505-346-2489
505-346-2494 (fax)
irma_rivas@fd.org

Quela Robinson
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102-2118
505-222-1033
505-241-1033 (fax)
qrobinson@da2nd.state.nm.us

Jennifer Rodriguez Rodgers
Barnett Law Firm, PA
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
505-275-3200
505-275-3837 (fax)
jen@thelbf.com

Lysette Romero
New Mexico Court of Appeals
PO Box 2008
237 Don Gaspar Avenue
Santa Fe, NM 87504-2008
505-827-4857
505-827-4946 (fax)
coalpr@nmcourts.gov

Dorothy C. Sanchez
PO Box 6630
Albuquerque, NM 87197-6630
505-242-2572
505-243-8175 (fax)
dorothysanchez@gmail.com

Pablo A. Seifert
Office of the State Engineer
PO Box 25102
130 South Capitol (87501)
Santa Fe, NM 87504-5102
505-827-6123
505-476-7408 (fax)
pablo.seifert@state.nm.us

David R. Smith
COG Operating LLC
600 West Illinois Avenue
Midland, TX 79701
DSmith1@concho.com

David John White
David J. White, PA
1166 Lost Tree Way
North Palm Beach, FL 33414
561-596-9123
561-753-4937 (fax)
shellyblanco@aol.com

Dated July 3, 2014

CLERK’S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

Adam Harrison Bell
Adam H. Bell, PC
PO Box 1468
110 E Arrington (87401)
Farmington, NM 87499-1468
505-326-2929
505-324-8629 (fax)
abell.law@gmail.com

Charles J. Brideau
2738 Oyster Bay Drive
Frisco, TX 75034-1064
214-641-3394
brideau5@att.net

Christopher Brian Charlton
Blue Cross Blue Shield of Arizona
8220 N 23rd Avenue MS C300
Phoenix, AZ 85021-4872
602-864-2017
brian.charlton@azblue.com

Thomas E. Dietrich
Mangum Wall Stoops & Warden, PLLC
PO Box 10
100 N. Elden Street
Flagstaff, AZ 86002-0010
928-779-6951
tdietrich@mwswlaw.com

James E. Dory
Barnett Law Firm, PA
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
505-275-3200
505-275-3837 (fax)
james@thelbf.com

http://nmsupremecourt.nmcourts.gov.
Clerk's Certificates

Matthew V. Edwards
Sutter Health
2200 River Plaza Drive, 3rd Floor West
Sacramento, CA 95833-4134
916-286-8451
916-286-6781 (fax)
EdwardM4@sutterhealth.org

Samantha Jane Fenrow
Office of the First Judicial District Attorney
PO Box 2041
327 Sandoval Street (87501)
Santa Fe, NM 87504-2041
505-428-6924
505-827-5076 (fax)
SFenrow@da.state.nm.us

Joyce Lida Frost
PO Box 58042
Seattle, WA 98138-8042
animeada@yahoo.com

Michelle S. Garcia
MEW Technologies
2505 Parkwest Drive NW
Albuquerque, NM 87120
915-309-8275
michgar12@gmail.com

Jessica Perez Gomez
Law Office of Jessica Perez Gomez, PC
1204 Montana
El Paso, TX 79902
915-626-5036
915-626-5011 (fax)
jgomez@jpgmazlaw.com

Molly Kicklighter
Law Offices of the Public Defender
2395 N Florida Avenue
Alamogordo, NM 88310
575-551-7209 Ext. 10605
575-437-5336 (fax)
molly.kicklighter@lopdnm.us

Kevin E. Lockhart
202 Claremont Avenue, Suite 1
San Antonio, TX 78209
512-669-1171
klockhart@ills-law.com

Floyd W. Lopez
Office of the County Attorney
105 Albright Street, Suite G
Taos, NM 87571
575-737-6311
575-737-6314 (fax)
floyd@taoscounty.org

Jill L. Marron
6001 Tomas Court NW
Albuquerque, NM 87107
505-344-4020
505-343-8201 (fax)
jill@marronlaw.com

Elizabeth Mason
Weinstein, Pinson & Riley, PS
20 First Plaza NW, Suite 603
Albuquerque, NM 87102
844-640-5409
elizbethm@w-legal.com

Carolina Martin Ramos
Justicia Digna, LLC
3904 Central Avenue SE
Albuquerque, NM 87108
505-266-0503
carolina@justiciadigna.com

Monica Rosenbluth
Butler Snow LLP
1801 California Street,
Suite 5100
Denver, CO 80202
720-330-2358
monica.rosenbluth@butlersnow.com

Hon. Mary W. Rosner
Third Judicial District Court
201 W. Picacho Avenue
Las Cruces, NM 88005-1833
575-523-8235
575-528-8330 (fax)

Susan Marie Scott
University of New Mexico
MSC 10 5590
1 University of New Mexico
Albuquerque, NM 87131-0001
505-272-6632
505-272-6620 (fax)
sscott@salud.unm.edu

Evan P. Woodward
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102-2118
505-222-1058
505-241-1058 (fax)
EWoodward@da2nd.state.nm.us

Casey Levi Stone
City of Santa Maria
615 S. McClelland Street
Santa Maria, CA 93454
cstone@ci.santa-maria.ca.us

Katherine R. Sutton
PO Box 94381
Albuquerque, NM 87199-4381
505-553-4524
ksutton01@gmail.com

Witter Tidmore
N.M. Department of Health
1190 S. St. Francis Drive,
#N 4080
Santa Fe, NM 87505-4174
505-827-2997
505-827-2930 (fax)
witter.tidmore@state.nm.us

Barbara A. Vicente
PO Box 519
Vaughn, NM 88353-0519
barbara.a.vicente@gmail.com

Evan P. Woodward
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102-2118
505-222-1058
505-241-1058 (fax)
EWoodward@da2nd.state.nm.us
### Recent Rule-Making Activity
As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective July 16, 2014**

#### Pending Proposed Rule Changes Open for Comment:

<table>
<thead>
<tr>
<th>Children’s Court Rules and Forms</th>
</tr>
</thead>
<tbody>
<tr>
<td>10-315 Custody Hearing</td>
</tr>
<tr>
<td>10-343 Adjudicatory hearing; time limits; continuances</td>
</tr>
</tbody>
</table>

#### Recently Approved Rule Changes Since Release of 2014 NMRA:

<table>
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<tr>
<th>Rules of Appellate Procedure</th>
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<tbody>
<tr>
<td>12-206A Expedited appeals from Children's Court custody hearings</td>
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<tr>
<td>12-303 Appointment of counsel</td>
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</table>

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<th>Rules Governing Admission to the Bar</th>
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<td>15 102 Admission requirements.</td>
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<td>15 103 Qualifications.</td>
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<td>15 105 Application fees</td>
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<td>15 107 Admission by motion.</td>
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</tbody>
</table>

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<tr>
<th>Supreme Court General Rules</th>
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<tr>
<td>23-109 Chief judges</td>
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</tbody>
</table>

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at [http://nmsupremecourt.nmcourts.gov](http://nmsupremecourt.nmcourts.gov).
To view recently approved rule changes, visit the New Mexico Compilation Commission's website at [http://www.nmcompcomm.us](http://www.nmcompcomm.us).
### Certiorari Granted, May 1, 2014, No. 34,613

From the New Mexico Court of Appeals

**Opinion Number:** 2014-NMCA-057

**Topic Index:**
- Appeal and Error: Standard of Review
- Constitutional Law: Sovereign Immunity
- Employment Law: Termination of Employment
- Federal Law: Armed Services; and Bankruptcy
- Government: Public Employee; and Sovereign Immunity

**PHILLIP G. RAMIREZ, JR.**, Plaintiff-Appellee/Cross-Appellant,

v.

**STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH AND FAMILIES**

DEPARTMENT, DORIAN DODSON, in her individual and official capacities, RON WEST, in his individual and official capacities, BARBARA AUTEN, in her individual and official capacities, ROGER GILLESPIE, in his individual and official capacities, TED LOVATO, in his individual and official capacities, TIM HOLESINGER, in his individual and official capacities, and DANIEL BERG, in his individual and official capacities, Defendants-Appellants/Cross-Appellees

Docket No. 31,820 (filed March 3, 2014)

**APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY**

CAMILLE MARTINEZ-OLGUIN, District Judge

**ROSARIO D. VEGA LYNN**
VEGA LYNN LAW OFFICES, LLC
Albuquerque, New Mexico

**ALICE T. LORENZ**
LORENZ LAW
Albuquerque, New Mexico
for Appellee/Cross-Appellant

**ELLEN S. CASEY**
JACLYN M. MCLEAN
HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.
Santa Fe, New Mexico
for Appellants/Cross-Appellees

**SAMUEL F. WRIGHT**
THE RESERVE OFFICERS ASSOCIATION OF AMERICA
Washington, D.C.

**THOMAS G. JARRARD**
LAW OFFICE OF THOMAS G. JARRARD, PLLC
Spokane, Washington

**DAVID A. STREUBEL**
STREUBEL KOCHERSBERGER MORTIMER LLC
Albuquerque, New Mexico

for Amicus Curiae The Reserve Officers Association of America

**MATTHEW L. GARCIA**
LEGAL PANEL MEMBER, ACLU-NM
Albuquerque, New Mexico
for Amicus Curiae American Civil Liberties Union

**DAMON MARTINEZ**
United States Attorney
MANUEL LUCERO
Assistant U.S. Attorney
Albuquerque, New Mexico

**M. PATRICIA SMITH,**
Solicitor of Labor
OFFICE OF THE SOLICITOR
Washington, D.C.

**THOMAS E. PEREZ,**
Assistant Attorney General
NATHANIEL S. POLLOCK
JESSICA DUNSAY SILVER
DEPARTMENT OF JUSTICE/ APPELLATE SECTION
Washington, D.C.

for Amicus Curiae United States
Opinion

Cynthia A. Fry, Judge

[1] Plaintiff, a member of the New Mexico National Guard, filed suit pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 to 4335 (1994, as amended through 2011), against his former employer, the New Mexico Children, Youth, and Families Department (CYFD), following his termination. The issue presented by this appeal is whether CYFD, as an arm of the State, is entitled to constitutional state sovereign immunity in regard to Plaintiff’s claim. Because we determine that Congress cannot override a state’s sovereign immunity when acting pursuant to its war powers and because the New Mexico Legislature has not waived the State’s sovereign immunity for USERRA suits, we conclude that CYFD is immune from Plaintiff’s claim and accordingly reverse the district court’s contrary determination.

BACKGROUND

[2] Plaintiff began working for CYFD as a community support officer in 1997. At that time, Plaintiff had been a member of the New Mexico National Guard for approximately six years. Plaintiff continued his military service throughout his term of employment with CYFD and, in 2005, Plaintiff was deployed to Iraq.

[3] By all accounts, Plaintiff served admirably while deployed. Upon his return from active duty, Plaintiff was re-employed by CYFD in his previous position. Plaintiff testified that soon after his return, his new supervisors began harassing him. His allegations of harassment included claims that supervisors placed unrealistic goals on him and leveled unfounded charges of insubordination. Plaintiff voiced his complaints of harassment with both his supervisors and those higher in the CYFD chain of command. However, Plaintiff’s working relationship with his supervisors continued to deteriorate, and he was placed on administrative leave and subsequently terminated in the spring of 2008.

[4] Plaintiff brought suit against CYFD alleging, in part, that he was discriminated against and wrongfully terminated because of his military service, in contravention of USERRA, 38 U.S.C. § 4311. CYFD argued on multiple occasions throughout the proceedings that, as a state agency, it was immune to USERRA claims by private individuals. The district court rejected CYFD’s argument, and the case proceeded to trial, where Plaintiff succeeded in his USERRA claim and was awarded damages. CYFD now appeals.

DISCUSSION

[5] The primary issue in this appeal is whether constitutional state sovereign immunity, as recognized by Seminole Tribe of Florida v. Florida and its progeny, precludes Plaintiff’s USERRA claim against CYFD. 517 U.S. 44 (1996) (holding that Congress cannot subject non-consenting states to suits in federal court when acting under its Article I powers); Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress cannot use its Article I powers to subject non-consenting states to suits in state court). This determination rests on two inquiries: (1) whether Congress has the authority to subject a state to a USERRA suit by a private individual in the state’s own courts and, (2) if not, whether New Mexico has waived sovereign immunity for USERRA claims and therefore consented to suit. We address these issues in turn.

Standard of Review


Congress Does Not Have the Authority to Subordinate State Sovereign Immunity Under the War Powers Clause

[7] Our Supreme Court has previously discussed the United States Supreme Court’s controversial recognition of constitutional state sovereign immunity and the impact of the Seminole Tribe line of cases on Congress’s authority to permit private suits for damages against non-consenting states. See State ex rel. Hanosh v. State ex rel. King, 2009-NMSC-047, ¶ 6, 147 N.M. 87, 217 P.3d 100 (“As a principle of federalism, constitutional sovereign immunity circumscribes the power of the U.S. Congress to create statutory rights and enforce them against the states absent their consent.” (emphasis omitted)); Gill v. Pub. Emps. Ret. Bd. of Pub. Emps. Ret. Ass’n of N.M., 2004-NMSC-016, ¶¶ 5–6, 135 N.M. 472, 90 P.3d 491 (discussing the principles of federalism underlying the United States Supreme Court’s decision in Seminole Tribe); see also Cockrell v. Bd. of Regents, 2002-NMSC-009, ¶¶ 4–8, 132 N.M. 156, 45 P.3d 876. Rather than reiterate the development of the constitutional sovereign immunity doctrine, we begin instead by discussing the history of USERRA in relation to the evolution of this jurisprudence.

[8] USERRA was enacted by Congress with the stated purpose of “encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.” 38 U.S.C. § 4301(a)(1). In addition to “providing for the prompt reemployment of [service members] upon their completion of such service,” USERRA aims to fulfill its goal by “prohibit[ing] discrimination against persons because of their service in the uniformed services.” Section 4301(a)(2), (3). Because the purpose of USERRA is to encourage military service, it is generally accepted—and undisputed by the parties in this case—that it was enacted pursuant to Article I, Section 8, Clause 11 of the United States Constitution, also known as the War Powers Clause. See Bedrossian v. Nw. Mem’l Hosp., 409 F.3d 840, 843–44 (7th Cir. 2005).

[9] USERRA originally provided for federal court jurisdiction over suits brought by private individuals against state employers. See USERRA, Pub. L. No. 103-353, § 2(a)(c)(1)(A) 108 Stat. 3149, 3165 (1994) (current version at 38 U.S.C. § 4323(b)(1) (2008)) (providing that “[t]he district courts of the United States shall have jurisdiction” over all USERRA actions, including suits against a state employer). However, the United States Supreme Court’s decision in Seminole Tribe cast significant doubt on Congress’s authority to subject states to USERRA suits by private individuals in federal court.1 Seminole Tribe, 517 U.S. at 45 (“The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon

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1 The current version of USERRA does provide for federal court jurisdiction over suits brought by the United States against a state on behalf of an individual. 38 U.S.C. 4323(a)(1). It appears from the record that the United States denied Plaintiff’s request to undertake his case.
federal jurisdiction.”); see Palmatier v. Mich. Dep’t of State Police, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (“Applying the lesson of Seminole Tribe, it necessarily follows that Congress, acting under Article I, could not effectively abrogate the states’ Eleventh Amendment immunity in USERRA [as originally enacted].”). Congress, therefore, in an apparent attempt to provide an alternative avenue of relief for private individuals seeking to enforce rights under USERRA against state employers, amended USERRA in 1998 to provide that “[i]n the case of an action against a state (as an employer) by a person, the action may be brought in a state court of competent jurisdiction in accordance with the laws of the state.” 38 U.S.C. § 4323(b)(2).

[10] Sooner after USERRA was amended to purportedly vest jurisdiction in state courts for private suits against state employers, the United States Supreme Court, in Alden, extended its holding in Seminole Tribe when it addressed the corollary question of whether Congress could subject non-consenting states to suit in state court. The Court held that it could not. Alden, 527 U.S. at 712 (“We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting states to private suits for damages in state courts.”).

In framing the issue, the Court examined whether there was compelling evidence that “Congress may subject the states to private suits in their own courts” pursuant to its Article I powers by virtue of “constitutional design.” Id. at 730-31 (internal quotation marks omitted). The Court stated:

[A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the states’ immunity from suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.” Id. at 754. Following Alden, it therefore appeared settled that Congress could not override a state’s constitutional sovereign immunity when acting under its Article I powers. See, e.g., Manning v. N.M. Energy, Minerals & Natural Res. Dep’t, 2006-NMSC-027, ¶ 24, 140 N.M. 528, 144 P3d 87 ("Alden and its progeny stand for the proposition that state constitutional sovereign immunity bars individual claims for damages that are based on legislation passed by Congress pursuant to its Article I powers."). Thus, Alden invalidated Congress’s attempt to sidestep Seminole Tribe by amending USERRA to provide for state court jurisdiction over private suits against state employers.

[11] However, the apparent clarity of Seminole Tribe and Alden was soon shaken by the Court’s opinion in Central Virginia Community College v. Katz, 546 U.S. 356 (2006). In Katz, the Court held that sovereign immunity did not bar an adversary proceeding in bankruptcy court to set aside the bankruptcy petitioner’s alleged preferential transfers to the state. Id. at 359. In a seeming retreat from the more definitive language of Seminole Tribe and Alden, the Court characterized as an “erroneous” assumption the notion that Seminole Tribe’s holding would apply to the Article I Bankruptcy Clause. Katz, 546 U.S. at 363; see U.S. Const. art. 1, § 8, cl. 4 (providing that Congress shall have the power to establish uniform Laws on the subject of Bankruptcies throughout the United States”). While the Court was careful to note that in rem jurisdiction and proceedings ancillary to a bankruptcy court’s exercise of its in rem jurisdiction do not generally interfere with a state’s sovereign immunity, Katz, 546 U.S. at 369-73, it further stated that to the extent such jurisdiction does interfere with a state’s sovereign immunity, the “States agreed in the plan of the Convention not to assert that immunity.” Id. at 373; see id. at 362-63 (“The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."). In ruling that at least one Article I power can provide a basis for subjecting states to suit despite statements in Seminole Tribe and Alden to the contrary, the Supreme Court’s decision in Katz has raised questions as to whether, in the “plan of the Convention,” the states may have agreed to waive sovereign immunity in the context of other Article I powers. Katz, 546 U.S. at 373; see Joseph M. Pellicciotti & Michael J. Pellicciotti, Sovereign Immunity & Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court’s Decades Long Decisional Trek, 1996-2006, 59 Baylor L. Rev. 623, 642 (2007) (“The Court did not overrule Seminole Tribe in the Katz decision. . . . [However,] it remains to be seen if the Court would undertake a similar course of study and reflection and, as it did in Katz end up refusing to follow its Seminole Tribe ‘dicta’ in future Article I case settings.

[12] It is within the ambiguity created by Katz that Plaintiff roots his argument that Congress has authority pursuant to the War Powers Clause to subject states to suit under USERRA. Plaintiff directs us to various sources establishing the unique and exclusive nature of Congress’s war powers and, using this historical context, seeks to analogize to the historical evidence of the exclusivity of Congress’s bankruptcy powers that the Court so heavily relied on in Katz. See Katz, 546 U.S. at 364-370 (discussing the “difficulties posed by [the] patchwork of insolvency and bankruptcy laws . . . peculiar to the American experience” and the need to establish a uniform federal response embodied by the Bankruptcy Clause). Important to an understanding of the historical context of Congress’s war powers, Plaintiff posits, is the recognition by the Founders that, while sovereign immunity is a key attribute of sovereignty, the Founders envisioned that state sovereignty could be surrendered by an exclusive delegation of power to the federal government, taking with it a state’s immunity to suit. See The Federalist No. 81, at 422 (Alexander Hamilton) (Gideon

Amicus briefs in support of Plaintiff were filed by both the Department of Justice and the Reserve Officers Association of America in partnership with the American Civil Liberties Union. For convenience, references to Plaintiff’s arguments may include those arguments made by Amici on behalf of Plaintiff.

is the unique nature of bankruptcy proceedings was chiefly in rem the jurisdiction exercised in bankruptcy proceedings. See *Katz* v. Bd. Regents of Univ. Sys. of Ga., 693 S.E.2d 868, 871 (Ga. Ct. App. 2010) (refusing to extend the rationale of *Katz* to recognize congressional authority to abrogate state sovereign immunity under the War Powers Clause; *See Anstadt* v. Bd. Regents of Univ. Sys. of Ga., 693 S.E.2d 868, 871 (Ga. Ct. App. 2010) (refusing to extend the rationale of *Katz* to recognize congressional authority to abrogate state sovereign immunity under the War Powers Clause); *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga.*, 633 F.3d 1297, 1314 (11th Cir. 2011) (rejecting argument that *Katz*'s rationale should be extended to the Copyright and Patent Clause in stating, "[t]he holding in *Katz* is carefully circumscribed to the bankruptcy context; its analysis is based upon the history of bankruptcy jurisdiction").

The scope of this consent was limited; see *id.* at 375-76. Thus, unlike other Article I powers, "the Bankruptcy Clause . . . simply [does] not contravene the norms [the U.S. Supreme Court] has understood the Eleventh Amendment to exemplify." *Id.* at 375; see *id.* at 378 ("The scope of this consent was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly in rem—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction."). This difference alone counsels against extending the Court's rationale in *Katz* to recognize congressional authority to override state sovereign immunity under other Article I powers, such as the War Powers Clause, *See Anstadt*, 633 F.3d 1297, 1314 (11th Cir. 2011) (rejecting argument that *Katz*'s rationale should be extended to the Copyright and Patent Clause in stating, "[t]he holding in *Katz* is carefully circumscribed to the bankruptcy context; its analysis is based upon the history of bankruptcy jurisdiction").

The plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.' (emphasis omitted)). Thus, Plaintiff argues, because the Constitution delegated exclusive war powers authority to the national government, the states never exercised, much less retained, sovereignty in this arena and, therefore, they enjoy no corresponding immunity.3 See *Lichter v. United States*, 334 U.S. 742, 781 (1948) ("[T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution.").

13) We do not agree with Plaintiff’s argument. As explained below, there are key differences between the War Powers Clause and both the subject matter of the Bankruptcy Clause and the historical evidence underlying the Court's decision in *Katz*. We therefore conclude that the War Powers Clause does not authorize Congress to subject the State to private USERRA suits for damages in our state courts, absent the State's consent.

14) Principal among these differences is the unique nature of bankruptcy jurisdiction in relation to state sovereign immunity, as discussed in *Katz*. The Court explained that "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally in rem jurisdiction" and, "[a]s such, its exercise does not, in the usual case, interfere with state sovereignty even when [s]tates' interests are affected." *Katz*, 546 U.S. at 369-70. Thus, unlike other Article I powers, "the Bankruptcy Clause . . . simply [does] not contravene the norms [the U.S. Supreme Court] has understood the Eleventh Amendment to exemplify." *Id.* at 375; see *id.* at 378 ("The scope of this consent was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly in rem—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction."). This difference alone counsels against extending the Court's rationale in *Katz* to recognize congressional authority to override state sovereign immunity under other Article I powers, such as the War Powers Clause, *See Anstadt*, 633 F.3d 1297, 1314 (11th Cir. 2011) (rejecting argument that *Katz*'s rationale should be extended to the Copyright and Patent Clause in stating, "[t]he holding in *Katz* is carefully circumscribed to the bankruptcy context; its analysis is based upon the history of bankruptcy jurisdiction").

15) Furthermore, Plaintiff’s argument—that an exclusive delegation of war powers to the national government is sufficient to recognize a waiver of state sovereign immunity by constitutional design—is unpersuasive for two additional reasons. First, Plaintiff’s argument essentially revives a prior understanding of the nature of congressional authority to abrogate state sovereign immunity, which was overruled in *Seminole Tribe of Indians of Florida v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989) ("Because the Commerce Clause withholds power from the [s]tates at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render the [s]tates liable in damages, it must be that, to the extent that the [s]tates gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.").

16) Second, while *Katz*'s analysis began with the recognition that the states agreed to an exclusive delegation of power to Congress to legislate in the arena of bankruptcy, this was not the definitive point of the Court's analysis. Instead, the states' recognition in the "plan of the Convention" that this entailed a subordination of their sovereignty led the Court to the "ineluctable conclusion" that the states agreed not to assert the defense of sovereign immunity in bankruptcy proceedings. See *Katz*, 546 U.S. at 377 ("[T]he power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere."). It was therefore not the exclusive delegation of power to Congress itself that justified a limited subordination of state sovereignty, but rather an understanding among the states, as evidenced by the history of bankruptcy jurisdiction, that an exclusive delegation of this power to Congress inherently included a subordination of their sovereignty to accomplish its purposes. *Id.* at 377-78 ("[T]he Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from [the s]tates' refusal to respect one another's discharge orders. . . . In ratifying the Bankruptcy Clause, the [s]tates acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts.").

17) In our view, this same justification does not exist in the context of Congress's war powers. While it is clear that

Because Plaintiff primarily argues that the states never exercised or retained sovereignty in regard to war powers, we do not address the parties' arguments concerning whether USERRA contains an explicit attempt by Congress to abrogate state sovereign immunity. If the states never exercised or retained sovereignty in this arena, as Plaintiff argues, then there would be no sovereign immunity to abrogate.
the centralization of war powers in the national government served important interests, it is unlikely that the states, in ratifying the Constitution, would have considered that these powers would be effectuated by a subordination of their sovereign immunity to the extent of permitting private suits for damages against the states. Cf. Velasquez v. Frawpwell, 160 F.3d 389, 393 (7th Cir. 1998) (“Even if it is true that the states did not surrender their war powers to the federal government in the Constitution because they didn’t have such powers… it doesn’t follow that they surrendered any part of their sovereign immunity from a suit seeking money from the state treasury. That immunity is an independent attribute of sovereignty rather than an incident of the war power.”). And, without evidence that the states would have considered the delegation of war powers to the national government to inherently include their amenability to private suits for damages, we are reticent to conclude that the states acquiesced in the plan of the Convention to a subordination of their sovereign immunity under this Article I power. See Katz, 546 U.S. at 362-63 (stating that the Bankruptcy Clause was intended “not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena”).

[18] In sum, while the Supreme Court appeared to backtrack in Katz on earlier dicta that no Article I power could provide a valid basis to override state sovereign immunity, it did so on a narrow basis justified by the unique history of bankruptcy jurisdiction. See Risner v. Ohio Dept’ of Rehab. & Corr., 577 F. Supp. 2d 953, 963 (N.D. Ohio 2008) (“Although the Supreme Court determined in Katz that the states waived sovereign immunity in bankruptcy proceedings by ratifying Congress’s Article I powers, the Court stressed that the exception for bankruptcy cases is a narrow one.”). The Supreme Court has thus far not recognized any Article I authority that permits the subordination of state sovereign immunity for private suits for damages against states. See Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1333 (2012) (“A foundational premise of the federal system is that [the states], as sovereigns, are immune from suits for damages[.] . . . As an exception to this principle, Congress may abrogate the [state’s] immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment.” (citations omitted)).

More importantly, in the context of a purported subordination of state sovereign immunity in state court pursuant to a federal cause of action, the Supreme Court’s decision in Alden forecloses such a possibility, Katz notwithstanding. See Alden, 527 U.S. at 739-40 (“[T]he Constitution reserves to the [s]tates a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress.”); Manning, 2006-NMSC-027, ¶ 24 (restating in the wake of Katz that constitutional sovereign immunity bars private suits for damages based on legislation pursuant to Congress’s Article I powers).

The State has Not Consented to Private USERRA Suits for Damages

[19] Because we have determined that Congress did not have the authority to subject the State to a private USERRA suit for damages by virtue of constitutional design, we now address Plaintiff’s argument that the New Mexico Legislature has consented to such suits through the enactment of various statutes regarding the military and service member rights. See Alden, 527 U.S. at 737 (noting the “general proposition that a [s]tate may waive its sovereign immunity and consent to suit”); Cockrell, 2002-NMSC-009, ¶ 13 (“[I]t is within the sole province of the Legislature to waive the [s]tate’s constitutional sovereign immunity.”). Contrary to Plaintiff’s argument, we conclude that the statutes relied on by Plaintiff do not meet the requisite specificity required to determine that the Legislature has intended to waive the State’s constitutional sovereign immunity to private USERRA suits for damages.


Our Supreme Court has previously expressed a reluctance to infer a waiver of constitutional sovereign immunity due to the “vital role of the doctrine of sovereign immunity in our federal system.” Cockrell, 2002-NMSC-009, ¶ 20 (internal quotation marks and citation omitted). Therefore, “any waiver of the [s]tate’s constitutional sovereign immunity must be clear and unambiguous.” Id. ¶ 24.

[21] Plaintiff implicitly recognizes that none of the statutes he relies upon explicitly waive sovereign immunity for USERRA claims. Instead, he argues that the several statutes, when read together, evidence the Legislature’s intent to incorporate the benefits and protections of USERRA and provide a remedy for New Mexico service members when those rights are violated, including when the State itself is guilty of the violation. Although Plaintiff essentially argues for a constructive waiver of sovereign immunity, which is generally insufficient, we nevertheless examine these statutes to determine whether the “overwhelming implications from the text … leave no room for any other reasonable construction.” See Edelman, 415 U.S. at 673 (citing Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). We do this while bearing in mind the United States Supreme Court’s caveat that “[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.” Edelman, 415 U.S. at 673.

[22] Plaintiff directs most of his attention to NMSA 1978, Section 20-4-7.1(B) (2004), which provides that “[t]he rights, benefits[,] and protections of the federal [USERRA] of 1994 shall apply to a member of the national guard ordered to federal or state active duty for a period of thirty or more consecutive days.” The purpose of this statute was to ensure that the rights, benefits, and protections of USERRA—which seemingly only applies to service members called to federal active duty—extended to national guard members ordered into state active duty. See 38 U.S.C. § 4303(16); 38 U.S.C. § 4312(c)(4)(E). However, as we determined above, subjecting unconsenting states to suit is not among the rights, benefits, or protections of USERRA, regardless of whether the national guard member was on state or federal active duty. Thus, there is no

4 Minnesota provides an example of an explicit waiver of sovereign immunity for USERRA claims. See, e.g., Minn. Stat. Ann. § 1.05(5) (West 2012) (“An employee . . . of the state who is aggrieved by the state’s violation of [USERRA], may bring a civil action against the state in federal court or another court of competent jurisdiction for legal or equitable relief that will effectuate the purposes of that act.”).
overwhelming implication from the text that by extending USERRA to national

[23] We are also unpersuaded that NMSA 1978, Sections 28-15-1 to -3 (1941, as amended through 1971) (reemployment of persons in armed forces) constitutes a waiver of state sovereign immunity for Plaintiff’s USERRA claim. Plaintiff pursued a private suit for damages under USERRA against the State for allegedly discriminatory treatment by the State due to his military service. While Section 28-15-1 does grant service members a right to reemployment enforceable against State employers, it does not recognize a private suit for damages for alleged discrimination due to military service. We will not construe a state statute to act as the implied basis for a new claim arising from an expansive federal scheme when it would not have provided Plaintiff with a valid state claim for the original wrong actually suffered.

[24] Furthermore, it is likely that a service member seeking to enforce or her rights under this statute against the State would be required to seek representation by a district attorney, not private counsel. See § 28-15-3 (“Upon application to the district attorney for the pertinent district by any person claiming to be entitled to the benefits of such provisions, such district attorney... shall appear and act as attorney for such person in the amicable settlement of the claim or, if no settlement can be arrived at herein, shall act as attorney for such person in a very limited procedural context. See Cockrell, 2002-NMSC-009, ¶ 28 (“Nothing in Alden suggests that a waiver of sovereign immunity— for rights to reemployment and lost wages— it does so in a very limited procedural context. See Cockrell, 2002-NMSC-009, ¶ 28 (“Nothing in Alden suggests that a waiver of sovereign immunity must be absolute, unconditional and applicable in all situations.” (alteration in original) (internal quotation marks and citation omitted); see Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 543 (2002) (“[W]ith respect to suits against a state sovereign in its own courts, we have explained that a [s]tate may prescribe the terms and conditions on which its consents to be sued[,]” (internal quotation marks and citation omitted)).

Finally, neither NMSA 1978, Section 20-1-2 (1987), nor NMSA 1978, Section 20-4-6 (1987) provides any basis for finding a waiver of sovereign immunity. Section 20-1-2 provides that the intent of the New Mexico Military Code is to conform New Mexico law on military matters to federal law on the same subject. However, as we have already determined, USERRA cannot validly override state sovereign immunity and, therefore, the Legislature’s intention to mirror federal law does not evidence a waiver of sovereign immunity. Similarly, Section 20-4-6, which prohibits discrimination in employment of service members, neither defines the State as an employer subject to the statute nor creates a private civil cause of action. See § 20-4-6 (stating that “violation of this section shall be a misdemeanor”). Thus, these statutes, when read either individually or collectively, do not meet the exacting “clear and unambiguous” standards necessary for finding waiver of sovereign immunity for Plaintiff’s USERRA claim.

Policy Considerations

[26] Although we conclude that Plaintiff’s claim is barred by state sovereign immunity, we take a moment to emphasize the responsibility of the State to comply with federal law. See Gill, 2004-NMSC-016, ¶ 10 (“[U]nder the federalist compact, the obligation of states to respect federal law and rights created thereunder is an essential corollary of state sovereignty.”). This case does not present the first time our courts have grappled with the discord between rights afforded under a federal statute and a state agency’s actions in contravention of that law. See Cockrell, 2002-NMSC-009, ¶ 27 (“We recognize the incongruity of the [s]tate’s obligation to pay overtime wages in accordance with the FLSA without a concomitant method of enforcement for [its] employees.”). As did the Court in Cockrell, we stress that “[s]uch holding in this case is certainly not intended to legitimize political defiance of valid federal law.” Id. (alteration, internal quotation marks, and citation omitted). However, we also recognize that at a time when many of our veterans are returning home to an often uncertain economic climate, such pronouncements by our courts ring hollow to a veteran wronged by the very government he or she served to protect. We recognize that our Legislature is the appropriate branch of government to consider responding to the void created by Alden by unequivocally ensuring that our service members have the opportunity to vindicate their rights against public and private employers alike. See Hartford Ins. Co. v. Cline, 2006-NMSC-033, ¶ 8, 140 N.M. 16, 139 P.3d 176 (“The predominant voice behind the declaration of public policy of the state must come from the legislature[,]”).

CONCLUSION

[27] For the foregoing reasons, we conclude that CYFD is immune from suit and accordingly reverse the district court. Because of our decision in this case, we do not reach the issues in Plaintiff’s cross-appeal regarding post-judgment interest.

[28] IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:

TIMOTHY L. GARCIA, Judge

MICHAEL D. BUSTAMANTE, Judge (dissenting).

BUSTAMANTE, Judge (dissenting).

[29] Respectfully, I disagree with the conclusion that the War Powers Clause does not provide Congress a font of power sufficient to subject the states to suit under USERRA. Before Katz, it seemed that the Supreme Court had foreclosed any argument that Article I could be a source of power sufficient to overcome state sovereignty claims. But the majority in Katz made clear that the Court’s broad “dicta” in Seminole Tribe and Alden was just that: dicta. While Katz did not signal a full retreat from recent orthodoxy, it did make room for debate—at least as to those provisions of Article I, such as the War Powers Clause, which have not been addressed before.

[30] The first task is to frame the debate. What should the courts take into account in deciding the potential reach of Congress under a given Article? The list of germane topics will vary with the provisions under consideration. As such, it is not surprising that Katz is not helpful here when it discusses the nature of bankruptcy jurisdiction and practice. But there are general topics that cut across the Articles. Katz is relevant when it discusses the need for national uniformity with regard to bankruptcy laws. In doing so, Katz revived uniformity as a valid topic of consideration in Article I jurisprudence.

[31] Uniformity and concentration of authority loom large in the area of national defense—the subject of the War Powers Clause. As the United States in its amicus brief notes, the Clause both delegates war powers to the national government
exclusively and prohibits the states from making war, absent consent of the Congress. (U.S. Amicus Brief 16, 20). It seems obvious that national defense and foreign affairs are areas in which the country must speak as one.

{32} Interwined with uniformity in this context are the nature and source of the power addressed by the War Powers Clause. By “nature” I mean to encompass the whole of the subject—including sending our armed forces to battle and the interest of the nation in protecting our service members in all ways possible when they return to civilian life. It cannot be gainsaid that the two are part of a spectrum of interests encompassed by the War Powers Clause. By “source” I refer to the oft-repeated observation that the individual states did not possess war powers at the time of the Constitutional Convention. The states had no sovereign interest to protect or cede when they approved the War Powers Clause. The lack of state sovereignty in this area then must have some effect on measuring the strength of the claim of immunity now.

{33} Comparing the interests and history at work in \textit{Katz} with those at work here leads me to conclude that the War Powers Clause presents the more compelling case. The commercial interests addressed by the Bankruptcy Clause are important. But national defense stands on higher ground and provides a stronger basis to disallow state interference with Congress’ will than that found in \textit{Katz}.

{34} Similarly, the state’s historical lack of sovereignty over the conduct of war argues against its resurrection here. In asserting this, I am not ignoring the difference between the power to conduct war and the power to refuse to allow suits seeking monetary compensation. But the distance between the two is not so vast that it cannot be spanned. The Court in \textit{Katz} faced the same issue—as the dissent in \textit{Katz} points out—yet found it necessary to resolve it in favor of Congressional power. The points made by the dissent in \textit{Katz} simply cannot be made with equal force in connection with the War Powers Act.

{35} To a great degree, the Majority and I are simply prognosticating. A full debate with regard to the War Powers Clause as a source of power for USERRA has not yet been held before the United States Supreme Court. When it is, I believe the Court will hold that this is another Article I provision which should not be controlled by the dicta in \textit{Seminole Tribe} and \textit{Alden}. The matter is hardly without doubt. But I believe that Appellant’s arguments and those of the United States in its amicus brief are closer to the mark.

MICHAEL D. BUSTAMANTE, Judge
Opinion

Cynthia A. Fry, Judge

[1] Defendant Howard Cannon appeals his conviction for aggravated driving while under the influence (DWI), first offense, following a de novo trial in district court. Defendant contends that the district court erred by not granting him a trial by jury. Defendant's appeal from the district court was untimely filed. This Court therefore ordered the parties to brief the issue of whether the conclusive presumption of ineffective assistance of counsel established in State v. Duran, 1986-NMCA-125, ¶¶ 4-6, 105 N.M. 231, 731 P.2d 374, should apply to appeals from a de novo trial in district court following a conviction in magistrate or municipal court. In briefing this issue, the State argued that this Court should overrule the presumption of ineffective assistance of counsel established in Duran in favor of allowing the district court to determine whether ineffective assistance of counsel occurred under the particular circumstances of a given case via an evidentiary hearing. The State contends that this result is required by the United States Supreme Court's ruling in Roe v. Flores-Ortega, 528 U.S. 470 (2000). We hold that, based on the jurisprudence and rules of this State, our courts should apply a conclusive presumption of ineffective assistance of counsel to an untimely notice of appeal following a de novo trial in district court. As to Defendant's claim of error, we affirm.

BACKGROUND

[2] Defendant was found guilty of aggravated DWI, contrary to NMSA 1978, Section 66-8-102(D)(3) (2010), following a jury trial in magistrate court. Defendant appealed the magistrate court conviction by filing a timely notice of appeal in district court pursuant to Rule 6-703(A) NMRA (providing that “[a] party who is aggrieved by the judgment or final order in a criminal action may appeal . . . to the district court of the county” and requiring that “[t]he notice of appeal . . . be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate court clerk’s office”). Defendant requested a setting for a de novo trial and filed a demand for a jury trial. The district court denied Defendant's request for a jury trial. A bench trial was held, and Defendant was found guilty and convicted of aggravated DWI. An order of conviction was entered on February 1, 2012. Pursuant to NMSA 1978, Section 39-3-3(A)(1) (1972), and Rule 12-201(A)(2) NMRA, a criminal defendant must file his notice of appeal from the final judgment of a district court within thirty days of the entry of that judgment. Defendant filed a notice of appeal with the district court on March 21, 2012. Defendant's notice of appeal was, therefore, untimely.

DISCUSSION

1. Application of the Duran Presumption

[3] In Duran, this Court created a conclusive presumption of ineffective assistance of counsel where counsel filed an untimely notice of appeal following a defendant's conviction in district court. We premised this conclusive presumption of ineffective assistance of counsel, in part, on our understanding that “[c]riminal defendants convicted at trial generally file a notice of appeal.” State v. Peppers, 1990-NMCA-057, ¶ 20, 110 N.M. 393, 796 P.2d 614. We reasoned that, because in an appeal from a criminal conviction counsel must “timely file either a notice of appeal or an affidavit of waiver of appeal[,]” Duran, 1986-NMCA-125, ¶ 3 (citing NMSA 1978, Crim. P. Rule 54(b) (Repl. 1985), now Rule 5-702(B) NMRA), “the absence of a notice of appeal and an affidavit of waiver strongly suggests the failure of trial counsel to consult adequately with the client concerning the right to appeal.” Peppers, 1990-NMCA-057, ¶ 20 (discussing Duran).

[4] Since Duran, this Court has extended the conclusive presumption of ineffective assistance of counsel to de novo appeals from magistrate court to district court, State v. Eger, 2007-NMCA-039, ¶ 2, 141 N.M. 379, 155 P.3d 784; to appeals from an order revoking probation, State v. Leon, 2013-NMCA-011, 292 P.3d 493, cert. quashed 2013-NMCERT-010, 313 P.3d 251; and to appeals from determinations of abuse and neglect and termination of...

[5] In contrast, the present case does not require this Court to extend the Duran presumption beyond the parameters of its original analysis. Rather, given that a de novo trial in district court is subject to the same procedural rule that the Duran presumption was premised on—namely, Rule 5-702(B)—it follows that the Duran presumption would apply to untimely notices of appeal from a de novo trial in district court. Perhaps recognizing the difficulty in distinguishing the circumstances of this case from the basis for Duran, the State instead asks this Court to overrule Duran’s conclusive presumption of ineffective assistance of counsel.

[6] The State relies on the United States Supreme Court’s opinion in Flores-Ortega, to argue that this Court should overrule Duran. In Flores-Ortega, the United States Supreme Court concluded that a bright-line rule for determining ineffective assistance of counsel for failure to file a timely notice of appeal was improper given that Strickland v. Washington, 466 U.S. 668 (1984), requires that a court look at the specific circumstances surrounding counsel’s actions. Flores-Ortega, 528 U.S. at 478. The State contends that, because this Court premised its ruling in Duran on the right to effective assistance of counsel under the United States Constitution and not the New Mexico Constitution, we are bound by the holding in Flores-Ortega. We disagree.

[7] While Duran was based, in part, on federal case law discussing a defendant’s right to counsel and right to appeal, Duran was also premised on New Mexico’s rules of criminal procedure. See 1986-NMCA-125, ¶ 3 (stating that “[t]his [C]ourt is mindful of the holding of the United States Supreme Court in Evitts v. Lucey, 469 U.S. 387 (1985)], to the effect that criminal defendants are not to be deprived of an appeal as of right where a procedural defect results from ineffective assistance of counsel on appeal”); Duran, 1986-NMCA-125, ¶ 4 (discussing how an attorney who fails to either file a notice of appeal or affidavit of waiver of appeal as required by the rules of criminal procedure “can be said to have neglected his duty and a conclusive presumption of ineffective assistance arises”). We further note that our rules impose a greater obligation on counsel than the Federal Constitution. As the United States Supreme Court recognized in Flores-Ortega,

[Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal); or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

528 U.S. at 480. The United States Supreme Court marked the difference between this constitutionally imposed obligation and the bright-line rule utilized by the First and Ninth Circuits, stating that the bright-line rule “effectively imposes an obligation on counsel in all cases either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly.” Id. at 478 (characterizing the First and Ninth Circuit Courts as having imposed a bright-line rule requiring that “[c]ounsel . . . file a notice of appeal unless the defendant specifically instructs otherwise; failing to do so is per se deficient”). The United States Supreme Court noted that, “while [s]tates are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented,” “[w]e cannot say, as a constitutional matter, that in every case counsel’s failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient.” Id. at 479.

[8] By promulgating Rule 5-702(B), our New Mexico Supreme Court has expanded the obligation of counsel to protect a defendant’s right to appeal beyond that required under the United States Constitution. As noted above, pursuant to Rule 5-702(B), counsel is responsible for either filing a notice of appeal or obtaining an affidavit of waiver from a defendant. Therefore, ultimately, our Supreme Court has imposed on counsel an obligation to consult with a criminal defendant regarding the defendant’s right to appeal. See Rule 5-702(B); see also Duran, 1986-NMCA-125, ¶ 4 (noting that counsel may file “his own affidavit in the district court stating that he has advised his client of his right to appeal and that the client has neither authorized an appeal nor signed an affidavit of waiver” in order to comply with the requirements of the rule and not be deemed ineffective). Thus, Rule 5-702(B) itself creates a requirement similar to the obligation imposed by the bright-line rule that the United States Supreme Court determined was not constitutionally required.

[9] Given that, as a state, we are free to extend additional procedural protections to a criminal defendant, and given that Duran was premised on the specific requirements contained in Rule 5-702(B), we reject the State’s argument that Flores-Ortega is controlling and requires us to overrule the conclusive presumption of ineffective assistance of counsel established in Duran. Nor do we choose to reconsider Duran of our own accord. After close to thirty years and various extensions of its application, Duran is firmly rooted in this State’s jurisprudence. To the extent the State advocates for a rule that would require remand to the district court to hold an evidentiary hearing whenever an untimely notice of appeal is filed, we conclude that this is an issue best left to our Supreme Court’s rule-making authority. This Court continues to maintain, as we did in Duran, that applying a conclusive presumption of ineffective assistance of counsel provides the greatest protection of a defendant’s right to appeal with the least judicial burden. See Duran, 1986-NMCA-125, ¶ 5-6. We therefore do not reweigh the balance of interests struck by this Court in Duran. Accordingly, we hold that the Duran presumption applies when counsel files an untimely appeal to this Court following a de novo trial in district court. We now turn to the merits of Defendant’s appeal.

II. Defendant’s Request for a Jury Trial

[10] Defendant contends that the district court erroneously denied him the jury trial he was entitled to under both the Sixth Amendment of the United States Constitution and Article II, Section 12 of the New Mexico Constitution. The State contends that, to the extent Defendant is arguing that the New Mexico Constitution provides greater protection than the Sixth Amendment, Defendant did not preserve this issue below. This Court does not read Defendant’s brief in chief or reply brief as
asserting an argument for greater protection under the New Mexico Constitution, and Defendant has made no attempt to rebut the State’s contention that this issue was not preserved. We therefore limit our analysis accordingly.

[11] In State v. Sanchez, 1990-NMSC-012, 109 N.M. 428, 786 P.2d 42, our Supreme Court examined the Sixth Amendment’s guarantee of an accused’s right to trial by an impartial jury. Our Supreme Court noted that in Duncan v. Louisiana, 391 U.S. 145 (1968), the United States Supreme Court “drew a line separating petty offenses from serious crimes, [and] held that certain petty offenses are not subject to the [Sixth] Amendment jury trial provision and should not be subject to the [Fourteenth Amendment] jury trial requirement applied to the states.” Sanchez, 1990-NMSC-012, ¶ 6. In distinguishing between a petty offense and serious crime, the United States Supreme Court relied on the objective criteria of maximum authorized penalty, “finding it to be the most relevant and reflective of the seriousness with which society regards an offense.” Id. ¶ 7. The United States Supreme Court held that “a potential sentence in excess of six months’ imprisonment is sufficiently severe by itself to take the offense out of the category of ‘petty’ so as to permit a defendant to demand a trial by jury.” Sanchez, 1990-NMSC-012, ¶ 7 (quoting Baldwin v. New York, 399 U.S. 66, 69 n.6 (1970) (plurality opinion) (internal quotation marks and citation omitted)).

[12] Defendant was charged with DWI, first offense, which carries a maximum sentence of ninety days’ imprisonment. See § 66-8-102(E). Given that the maximum period of imprisonment Defendant faces is less than six months, Defendant is not entitled to a jury trial under Sanchez.

[13] Defendant relies on Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989), to argue that this Court should treat DWI, first offense, as a serious offense despite a maximum term of imprisonment of less than six months. In Blanton, the United States Supreme Court noted that in determining the severity of a penalty for purposes of assessing a defendant’s right to a jury, “the word ‘penalty’ [. . . do[es] not refer solely to the maximum prison term authorized for a particular offense.” Id. at 542. Rather, “[a] legislature’s view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense.” Id. However, the Supreme Court instructed that it is “appropriate to presume for purposes of the Sixth Amendment that society views [an offense carrying a maximum prison term of six months or less] as ‘petty.’” Id. at 543. Where the maximum period of incarceration is less than six months, “[a] defendant is entitled to a jury trial . . . only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.” Id. ¶ 14. Attempting to overcome this presumption, Defendant directs this Court to the additional penalties contained in Section 66-8-102(E) for first offenses. These penalties include a minimum of twenty-four hours of community service, completion of an alcohol or drug screening program, completion of a court-approved alcohol or drug abuse treatment program, completion of a driver rehabilitation program, installation of an ignition interlock device on all motor vehicles driven by the offender for a period of one year, obtaining an interlock driver’s license, and payment of probation costs, along with various fees and fines. Section 66-8-102(E). Defendant calculates the cost of these penalties as $2,680.04. Defendant also notes that, “[i]n addition to the financial burden of a first offense DWI conviction, the penalties also involve a significant time investment.” Defendant contends that these penalties reflect a judgment by our Legislature that DWI, first offense, is a serious crime.

[15] Moreover, Defendant asserts that our courts have also consistently viewed DWI, first offense, as a serious crime. Defendant argues that in City of Santa Fe v. Martinez, 2010-NMSC-033, 148 N.M. 708, 242 P.3d 275, the New Mexico Supreme Court considered DWI to be a serious crime by choosing to treat it as a felony for the purpose of warrantless arrests. In Martinez, our Supreme Court acknowledged that “[t]he crime of DWI as defined by our Legislature is not a ‘minor crime’ as contemplated by the misdemeanor arrest rule” and held that “the crime of DWI should be treated as a felony for purposes of warrantless arrests.” Id. ¶ 13. In doing so, the Court stated:

Although a DWI offender who has had less than three convictions would only be guilty of a misdemeanor, such a classification makes no difference in the severity of the offense’s consequences, nor does it dilute the public’s concern; a first DWI or subsequent offense can have the same deadly results as a fourth offense.

Id. ¶ 14. Defendant also points to other acknowledgments by our courts that DWI is a serious offense. See State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, ¶ 9, 120 N.M. 619, 904 P.2d 1044 (“New Mexico has a serious problem with drunk drivers, with one of the highest rates in the nation of DWI-related fatalities. Our citizens are obviously concerned by this dangerous situation, and through their elected representatives have established a system providing punishment for drunk drivers along with remedial measures for the protection of the population.”); State v. Contreras, 2003-NMCA-129, ¶ 14, 134 N.M. 503, 79 P.3d 1111 (“In New Mexico, the elimination of driving while intoxicated and its related offenses is a matter of grave concern to society in general, and to our courts and Legislature in particular.”) (internal quotation marks and citation omitted).

[16] While we acknowledge that our law is replete with references to the seriousness with which we regard DWI, such statements made in other contexts do not inform our decision herein. Rather, as Blanton provides, it is the severity of the penalty that we must consider in determining whether a defendant is entitled to a trial by jury and, based on the penalties provided in Section 66-8-102(E), we conclude that Defendant cannot overcome the presumption that we view the offense of DWI, first offense, as “petty” for purposes of the Sixth Amendment.

[17] In Blanton, the United States Supreme Court noted that the Nevada legislature had chosen to punish first DWI offenses by imposing the following penalties: (1) “a minimum term of two days’ imprisonment and a maximum term of six months’ imprisonment” or, alternatively, “[forty-eight] hours of work for the community while dressed in distinctive garb which identifies him as a [DWI] offender”; (2) “a fine ranging from $200 to $1,000”; (3) revocation of the defendant’s driver’s license; and (3) attendance of “an alcohol abuse education course” at the defendant’s expense. 489 U.S. at 539-40. There, despite the combination of a maximum six months’ imprisonment and the additional penalties listed above, the United States Supreme Court determined that the Nevada legislature had not clearly
indicated that DWI was a serious offense. Id. at 544.

[18] While New Mexico provides more additional penalties than the Nevada legislature was identified as having done in Blanton, the total period of incarceration for a DWI, first offense, in New Mexico is ninety days, where the maximum incarceration under the Nevada legislation discussed in Blanton was six months. The United States Supreme Court concluded that the Nevada legislature had not indicated that DWI was a serious offense for purpose of the Sixth Amendment when it provided for a six-month maximum sentence and additional penalties and fines. Given that Blanton states that “[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration[,]” id. at 542, we cannot conclude that the additional penalties contained in Section 66-8-102(E), when viewed in conjunction with a ninety-day sentence, are sufficient to render DWI, first offense, a serious offense for Sixth Amendment purposes. As a result, we disagree with Defendant that he had a constitutional right to a jury trial.

[19] Defendant further argues that the district court’s denial of his request for a jury trial violated the rules of criminal procedure and therefore his right to due process. Specifically, Defendant asserts that the rules require that an appeal from magistrate court to district court be in the form of a trial de novo. See Rules 6-703(A); 5-826(J) NMRA. According to Defendant, “[t]he [same] rights and procedures afforded at the trial de novo must match those provided below.” Defendant provides no authority for this argument. See In re Adoption of Doe, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (providing that, where a party cites no authority to support an argument, we may assume no such authority exists). Moreover, Defendant’s argument is contrary to the concept of a de novo trial “in which the whole case is gone into as if no trial whatever had been had in the court below.” Miera v. Waltemeyer, 1982-NMCA-007, ¶ 18, 97 N.M. 588, 642 P.2d 139 (internal quotation marks and citation omitted). Accordingly, we conclude that the district court did not violate Defendant’s constitutional rights by denying his request for a jury trial.

CONCLUSION

[20] We hold that the Duran presumption applies when counsel files an untimely appeal to this Court following a de novo trial in district court. Having applied the Duran presumption in this case and considered the merits of Defendant’s appeal, we conclude that DWI, first offense, is not a serious offense for purpose of a defendant’s Sixth Amendment right to a jury trial. Because we conclude that the district court did not err in denying Defendant’s request for a jury trial, we affirm Defendant’s conviction.

[21] IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
TIMOTHY L. GARCIA, Judge

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Weststar Mortgage Corporation is seeking an individual to handle all mortgages that are currently in Bankruptcy and the Administrative work in the Post Foreclosure Claims Dept. Multi-tasking and working well under pressure is a must. Email resume to annette@westloaan.com

Bankruptcy Specialist

Compensation: salary to commensurate upon experience. Weststar Mortgage Corporation is seeking an individual to handle all mortgages that are currently in Bankruptcy and the Administrative work in the Post Foreclosure Claims Dept. Multi-tasking and working well under pressure is a must. Email resume to annette@westloaan.com

Legal Assistant

Busy insurance and civil defense firm seeks full-time legal assistant with minimum five years experience in insurance defense and civil litigation. Position requires a team player with paralegal skills in addition to strong word processing skills including proficiency with Word Perfect, knowledge of court systems and superior clerical and organizational skills. Minimum typing speed of 75 wpm. Excellent work environment, salary and benefits. Send resume and references to Riley, Shane & Keller, P.A., Office Manager, 3880 Osuna Rd., NE, Albuquerque, NM 87109 or e-mail to mvelasquez@rsk-law.com

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