

# THE SUPREME COURT OF NEW MEXICO: A PARTISAN COURT WITH A PRO-ABORTION RECORD

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The New Mexico Supreme Court (“Court”) has seen a major turnover in its composition since its pro-abortion decision *New Mexico Right to Choose/NARAL v Johnson*.<sup>2</sup> However, the Court is chosen by party affiliation, all of the current justices are Democrats, and there is nothing in its record to suggest it would reverse prior decisions or take a pro-life stance.

## I. LIFE ISSUES

The Court has not addressed many life issues. Some of the more important life issues were ruled upon by the New Mexico Court of Appeals, with certiorari denied by the Court.

### **Abortion**

In 1973, the New Mexico Court of Appeals, in *State v Strance*,<sup>3</sup> declared portions of New Mexico’s abortion statute unconstitutional. The statute prohibited abortion, except where the pregnancy was the result of rape or incest or where the pregnancy threatened the life of the mother or would cause grave impairment of her physical or mental health or where the child had grave physical or mental defects.<sup>4</sup> The decision to perform an abortion required the approval of a special hospital board.<sup>5</sup> Two judges, Hendley and Lopez, held those provisions unconstitutional, in light of *Roe*.<sup>6</sup> They left in place the remaining provisions of the statute, which required that the abortion be performed by a physician licensed in the state with the consent of the woman, or if she is under eighteen years of age, with the consent of her parent or

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2 975 P.2d 841 (N.M. 1998).

3 506 P.2d 1217 (N.M. Ct. App. 1973).

4 N.M. Stat Ann. 40A-5-1 et seq. (1972).

5 40A-5-1 et seq. (1972)

guardian. These judges went far beyond simply accepting the binding force of *Roe* but endorsed the reasoning in their own decision. They endorsed the position that the unborn child had no cognizable interest and that the only protection for his or her life was an unspecified “state interest” in the child in later stages of development.<sup>7</sup> The third judge dissented in part, arguing the entire statute was unconstitutional.<sup>8</sup> His opinion was based solely on his approval of policy arguments in a law review article published three years earlier that advocated denying any protection to an unborn child.<sup>9</sup> The majority opinion was based entirely on *Roe* and did not claim any independent state constitutional basis for its holding. The Court did not review the decision.

The Court addressed the abortion funding issue for the first time in 1998. That year, the Court decided *New Mexico Right to Choose/NARAL v Johnson*,<sup>10</sup> tackling the issue of compelled medical assistance payments for abortion. New Mexico limited its Medicaid payments for abortion to situations in which the pregnancy was the result of rape or incest or in which the pregnancy threatened the life of the mother. The restrictions were challenged by NARAL and four New Mexico abortionists as violative of the equal rights provision of the New Mexico Constitution.

The Attorney General of New Mexico, Tom Udall, refused to represent the state and instead filed an *amicus* brief on behalf of the abortionists. Udall then ran for Congress in 1999 and now represents the Third District of New Mexico, as a Democrat. The district court permitted two private citizens of New Mexico to intervene as taxpayers, on behalf of the defendant. The parties filed a lengthy set of stipulated facts, and the district court granted summary judgment to the plaintiffs, entering a permanent injunction against enforcement of the limitations on payment.

The Court, in a unanimous decision written by Justice Pamela B. Minzner—who

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6 506 P.2d at 1218-19.

7 *Id.* at 1219.

8 *Id.* at 1220-21.

9 *New Mexico’s 1969 Criminal Abortion Law*, 10 NAT. RESOURCES J. 591 (1970)

continues to sit on the Court—affirmed the lower court’s issuance of the injunction but reversed its grant to private citizens of the right to intervene.

The Court first addressed the issue of plaintiffs’ standing in 1998, acknowledging that standing is found only where the plaintiffs allege they are directly injured as a result of the action they seek to challenge in court. Among the plaintiffs, not a single woman alleged she was eligible for medical assistance, was pregnant, had a medical condition requiring an abortion, or had been denied medical assistance to obtain an abortion. The Court upheld the standing of the abortionists, because they had a direct financial interest in state funding of abortion and a close relation to the women whose children they abort, though apparently there was no allegation they lost any money or had contact with any women who were denied funding. The Court upheld the standing of NARAL, based on its allegation that among their members were women eligible for medical assistance, though apparently there was no allegation that these women were pregnant or needed or wanted an abortion. They also cited the privacy concerns and time restraints of pregnant women to serve as plaintiffs.

The Court then reversed the district court’s decision granting standing to two private citizens to intervene either as taxpayers or as guardians of unborn children. They held that the citizens, as taxpayers, did not assert their tax burden would be affected by a decision in the case or assert a right different from any other taxpayer. The Court denied their standing to protect the rights of the unborn on the grounds that they were adequately protected by the State. There is nothing in either the district court’s decisions or the Court’s decision to suggest the rights of the unborn were ever considered, the Court dismissing such consideration on the grounds that, under federal law, the State’s interest in the potential life of the unborn is never compelling enough to outweigh its interest in the life and health of the mother.

The Court then determined that, under the equal rights clause of the New Mexico Constitution, which prohibits discrimination based on sex, the denial of payment for abortion, a medical procedure unique to women, was prohibited. The Court did not address the question of

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10 975 P.2d 841.

whether abortion was ever medically necessary or an appropriate treatment for the medical conditions caused or aggravated by pregnancy. Of the justices currently on the Court, only Justice Minzner took part in the decision.

In a separate opinion, the Court denied NARAL's appeals from the district court decision to deny them attorney's fees. NARAL argued the Court should adopt the private attorney general doctrine, in which attorneys' fees were awarded to an attorney for a private party when, through his or her efforts, rights of societal importance are protected to the benefit of a large number of people. They conceded New Mexico followed the American rule that each party paid its own attorneys' fees but urged the Court to exercise its inherent power to create an exception to the rule for private attorneys generals.

Chief Justice Minzner held that "it remains within the province of the judiciary to define the contours of a court's inherent powers," that is to say, the Court would create for itself powers not granted by the Constitution or laws. However, they refused to extend their inherent powers to create a private attorney general exception, holding that "unbridled judicial authority to 'pick and choose' which plaintiffs and causes of action merit an award of attorney fees under the private attorney general doctrine would not promote equal access to the courts for the resolution of good faith disputes inasmuch as it lacks sufficient guidelines to prevent courts from treating similarly situated parties differently and could easily result in decisions that favor a particular class of private litigants while unduly discouraging the government from mounting a good faith defense." *New Mexico Right to Choose/NARAL v Johnson*.<sup>11</sup> Of the justices currently on the Court, only Justice Minzner took part in the decision.

In summary, the Supreme Court of New Mexico has adopted the abortion rationale of the Supreme Court of the United States and has gone beyond it in compelling public funding of abortion.

### **Protection of the Unborn from Criminal Violence**

New Mexico criminalizes injury to pregnant women. The statute provides: "Injury to a

pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or still birth as a result of that injury . . . Whoever commits injury to a pregnant woman is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978." 12 A third-degree felony carries a penalty of three to six years in prison, under the cited section. Note that the statute is directed toward the pregnant woman and not to the unborn child. The statute has not been construed by the Court.

### **Assisted Suicide**

New Mexico prohibits assisted suicide. In *State v Sexson*,<sup>13</sup> the Court of Appeals distinguished between assisted suicide and murder. The Supreme Court's denial of certiorari left the reasoning of the Court of Appeals as the public judicial interpretation. New Mexico's statute on assisted suicide states, "Assisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth degree felony."<sup>14</sup>

In *Sexson*, the defendant entered into a suicide pact with his wife. He shot her but then did not kill himself and confessed to the police. He was convicted, not of assisted suicide, but of murder. The Court held the assisted suicide statute refers only to a situation in which the defendant provides the means of suicide to another but where the defendant actively participates in causing death, the more severe penalty of the murder is appropriate. A doctor, therefore, who injected a patient with a fatal drug at the patient's request, could be prosecuted for murder, rather than assisted suicide.

### **Healthcare Provider Right of Conscience**

New Mexico provides for a general healthcare conscience protection. The Court has not construed the statute. The statute provides, "A health care provider may decline to comply with

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11 986 P. 2d 450 (N.M. 1999)

12 N.M. Stat Ann. 30-3-7C (2007).

13 [117 N.M. 113 \(N.M. Ct. App. 1994\)](#), *cert. denied*, 870 P. 2d 753 (N.M. 1994).

14 N.M. Stat. Ann. 30-2-4 (2007).

an individual instruction or health care decision for reasons of conscience.”<sup>15</sup> A health care provider is defined as “any person licensed by the state or permitted by law to provide health care services.”<sup>16</sup>

New Mexico also has a specific right of conscience statute that provides, “This article does not require a hospital to admit any patient for the purposes of performing an abortion, nor is any hospital required to create a special hospital board. A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital, in which a justified medical termination has been authorized and who objects to the justified medical termination on moral or religious grounds shall not be required to participate in medical procedures which will result in the termination of pregnancy or other recriminatory action against such person.”<sup>17</sup> The Court has not construed this statute.

### **Cloning**

There are no court decisions on the issue of cloning.

### **Destructive Embryo Research**

By statute, New Mexico prohibits maternal, fetal, and infant experimentation.<sup>18</sup> The statute provides in part that “[n]o fetus shall be involved as a subject in any clinical research activity unless the purpose of the activity is to meet the health needs of the particular fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs or no significant risk to the fetus is imposed by the research activity.”<sup>19</sup> A fetus is defined as the “product of conception from the time of conception until the expulsion or extraction of the fetus or the opening of the uterine cavity, but shall not include the placenta, extraembryonic membranes, umbilical cord, extraembryonic fluids and their resident cell types and cultured cells.”<sup>20</sup> Violation of the statute is a misdemeanor, with a penalty of less than one year in jail or

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<sup>15</sup> N.M. Stat. Ann. 24-7A-7E (2007).

<sup>16</sup> N.M. Stat. Ann. 41-9-2B (2007).

<sup>17</sup> N.M. Stat. Ann. 30-5-2 (2007).

<sup>18</sup> N.M. Stat. Ann. 24-9A-1 et seq. (2007).

<sup>19</sup> 24-9A-3A (2007).

<sup>20</sup> 24-9A-1G (2007).

a fine or \$1000 or both.<sup>21</sup> There are no Court decisions construing the statute.

## II. JUDICIAL RESTRAINT

Two recent cases illustrate the New Mexico Supreme Court approach to controversial issues. In the 2004 presidential election President Bush defeated John Kerry in New Mexico by 5598 votes. The Green Party and Libertarian Party candidates petitioned for a recount. These two parties received a combined total of 3608 votes. They did not argue that a recount might show that either of their parties had won, but rather that a total recount of the votes might result in John Kerry being declared the winner. They made a deposit with the State Canvassing Board of \$114,400, more than the sum required by statute for the recount, composed of \$50 for each precinct and \$10 for each voting machine to be rechecked. However, the Board demanded an additional \$1,400,000, the actual cost of the recount, claiming that the statute required a deposit of the entire cost. If the recount resulted in a change of winner, the state would pay the cost, but if it did not, the petitioner would pay. While the case was pending, the New Mexico legislature added an amendment to the recount statute explicitly giving the canvas board the discretion to require a full deposit before a recount. By the time the case reached the New Mexico Supreme Court, the issue was moot, the New Mexico electors had voted, a change in their votes would not have changed the outcome of the 2004 presidential election and the voting machines had been cleared so that a recount was impossible.

In *Cobb v New Mexico State Canvassing Board*<sup>22</sup> the Supreme Court of New Mexico held that the statute required only the original amount deposited and that the amendment was an unconstitutional delegation of legislative power. The Court recognized that the case was moot but decided it on the basis that it involved an issue of public importance that might evade review in the future. They also recognized that the amendment was not applicable to the current controversy since it was not retroactive (and therefore not strictly before the Court) but struck it

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<sup>21</sup> 24-9A-6 (2007).

<sup>22</sup> 140 P.3d 498 (N.M. 2006)

down because of its future applicability

In *Johnson v Vigil-Giron*<sup>23</sup> the New Mexico Supreme Court considered an appeal by three Republican candidates for office whose names had been excluded from the ballot by the New Mexico secretary of state. The first, a candidate for district court judge was nominated by the County Central Committee. The secretary of state held that she had to be nominated by the State Central Committee under the applicable statute because a district court judgeship was a state rather than a county office. The Supreme Court upheld the exclusion.

The second involved a candidate for state representative. The Republican Party did not run a candidate in the primary. The Democratic nominee withdrew from the race to run for state auditor. The Republican Party Central committee then nominated a candidate and sent his name to the secretary of state. She refused to put the name on the ballot because no “vacancy” existed as required by statute, since the Republicans had no candidate in the primary who had withdrawn from the race. The Democratic Central Committee could, however, nominate a candidate because the withdrawal of their candidate created such a vacancy. The Court upheld the action of the secretary of state and excluded the Republican nominee from the ballot.

In the third dispute the Republican Party petitioned the Court to remove the name of Hector Balderas from the ballot for state auditor. The original Democratic candidate for auditor, Armijo, held a press conference to announce he had withdrawn. The Democratic Party sent a copy of his press release to the secretary of state. On September 5, 2006, the last day to withdraw from the race, Armijo held another press conference to announce he had not withdrawn.

The Democratic Party on September 9 informed the secretary of state that Balderas was their candidate. She placed his name on the ballot. The Republicans argued that Armijo had not properly withdrawn and should therefore still be on the ballot. The withdrawal statute, however, did not specify any particular formality of withdrawal. The Supreme Court declined to issue a writ of mandamus since the secretary of state had no clear legal duty to continue Armijo’s name

on the ballot.

The two cases illustrate the willingness of the court to become involved in highly partisan issues, even though in the first instance the case was moot. While the two cases involving four situations all benefited or would have benefited the Democratic Party, the Court also issued an order without an opinion reversing a lower court ruling and ordered Ralph Nader's name to be placed on the ballot as an independent, an order that would presumably be harmful to the Democratic candidate, in *Nader v Griego*.<sup>24</sup>

A detailed study was made of the opinions of the justices of Court by Ilana A. Eck for the Albany Law Review in 2003. Her article, "Liberal Behind the Label: A Comparative High Court Case Study of the New Mexico Supreme Court from 1997-2002,"<sup>25</sup> analyzed 51 decisions of the Court where there were divided opinions. These included opinions of Justices Minzner, Maes, and Serna, who are currently on the Court. The author considered their opinions in criminal appeals, dividing them as pro-prosecution or pro-defendant, and in civil appeals, dividing them as pro-individual or pro-government and corporation. If being pro-prosecution, pro-government, and pro-corporation is considered conservative, Justice Serna is the most conservative, siding with the prosecution 82% of the time and with the government or corporation 61%. Whether such conservatism can be predictive of a pro-life position is questionable.

Justice Minzner authored the decisions in the two *New Mexico Right to Choose/NARAL* cases and is the most liberal member of the Court, by the author's analysis. Justice Maes is considered the swing vote, with a brief record tending to be pro-prosecution in criminal matters and pro-individual in civil matters.

### III. THE COURT

The Court is composed of five justices, elected by partisan ballot. They are thereafter

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23 146 P.3d 312 (N.M. 2006)

24 *Nader v Griego*, No. 28900

25 Ilana A. Eck, *Liberal Behind the Label: A Comparative High Court Case Study of the New Mexico Supreme*

required to run on a nonpartisan ballot for an eight-year term. Judicial vacancies are filled by the governor from a list provided by a judicial nominating commission. The justice must then compete in a partisan election at the next general election for the remainder of the unexpired term.<sup>26</sup>

All of the current justices are Democrats, appointed by Democratic governors, and elected in partisan elections as Democrats. Justice Bosson joined the Court in 2002 and Justice Chavez in 2003; neither has established a clear record at the Court. Justices Serna and Maes did not participate in the *New Mexico Right to Choose/NARAL* decision. Only Justice Minzner has a clear record, and it is clearly in favor of abortion.

### Biographical information of the current justices of the Supreme Court of New Mexico

Member	Elected/ Appointed by/ Year	Term Expires	Miscellaneous
Petra J. Maes	Governor Johnson (D)/ 1998 Elected/ 1998 Retained/ 2002	2010	-Biographical Information: University of New Mexico - B.A. 1970; University of New Mexico Law School- J.D. 1973; Private practice 1973-1975; District Court Judge 1981 to 1998; Chief Justice 2003.
Pamela B. Minzner	Governor King (D)/ 1994 Elected/ 1996 Retained/ 2002	2010	-Biographical information: Miami University (Ohio) - B.A. 1965; Harvard Law School – J.D. 1968; New Mexico School of Law faculty 1973-1984; New Mexico Court of Appeals Judge 1984-1994; Chief Judge of the Court of Appeals 1993-1994; 1 <sup>st</sup> woman to be elected Chief Justice of the NM Supreme Court 1999-2001; -Other: married to Richard Minzner, former secretary of the NM Department of Taxation and Revenue and member of the NM House

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*Court from 1997-2002*, 66 ALB. L. REV. 943 (2003).

<sup>26</sup> N.M. CONST. art. VI, §§ 4, 33.

			of Representatives
Patricio M. Serna	Governor Johnson (D)/ 1996 Elected/ 1996 Retained/ 2000	2008	-Biographical Information: College of St. Joseph on the Rio Grande- B.S.; University of Denver School of Law - J.D.; Harvard Law School - Master of Law; University of Denver School of Law -Honorary Doctor of Laws; District Court Judge 1985-1996; Adjunct Professor at George Town University Law School and Columbus School of Law at Catholic University of America in D.C.; Chief Justice 2001-2002. -Awards: Business Magazine’s 100 Most Influential Hispanics in America; Judge of the Year Award and Outstanding Lawyer Award from the National Hispanic Bar Association -Professional/social affiliations: President/Moderator of the National Consortium on Racial and Ethnic Fairness in the Courts
Richard C. Bosson	Elected/ 2002 Retained/ 2004	2012	-Biographical Information: Wesleyan University- B.A. 1966; Georgetown Law School - J.D. 1969; University of Virginia School of Law –Master in Judicial Process 1998; Teaching Fellowship in Colombia-South America 1975; Attorney General’s Office work 1976-1978; Private practice 1981-1994; Court of Appeals - Judge 1994 - 2002; -Professional/social affiliations: Founding member of Mexican-American Legal Defense and Education Fund; Legal Aid Society; New Mexico Constitution Revision Commission 1994-1995; Board of Trustees New Mexico Trial Lawyers Association
Edward L. Chavez	Governor B. Richardson (D)/	2014	-Biographical Information: Eastern New Mexico University- B.B.A. 1978; University

	2003 Retained/ 2006	of New Mexico Law School - J.D. 1981; Private practice 1981 -2003; President of Legal Aid Society of Albuquerque; Chairman of the UNM Mental Health Center; Chairman of the Disciplinary Board; Adjunct Instructor at UNM School of Law -Awards: Best Lawyers in America; -Professional/social affiliations: American College of Trial Lawyers; International Academy of Trial Lawyers.
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## CONCLUSION

The Supreme Court of New Mexico has a pro-abortion and activist record that suggests little prospect of future pro-life decisions.