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SCHOOL OF LAW
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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Supreme Court No. 34, 372

ROBERT FRY,
Petitioner-Appellant,

v.

JAMES LOPEZ, Warden,
Respondent-Appellee.

On Interlocutory Appeal from the Eleventh Judicial District Court
San Juan County, New Mexico
District Court Case No. D-1116-CR-2000-513
District Court Judge Karen L. Townsend

BRIEF OF *AMICI CURIAE*
PROFESSORS AT UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

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SUPREME COURT OF NEW MEXICO
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INTEREST OF THE AMICUS CURIAE

Amici are Professors of Law at the University of New Mexico School of Law who are concerned with the development of the state constitutional jurisprudence and the rights of all New Mexicans. *Amici* have no personal stake in the outcome of this litigation and have not been paid by a client for their participation in this brief. A list of *Amici* is appended to the signature page. On March 6, 2014, counsel for all parties were notified of the intent of *Amici* to file this brief. Counsel for all parties have responded that they do not oppose the filing of this brief.

Counsel for *Amici* wishes to express his deep gratitude for the hard work of several law students at the University of New Mexico School of Law, who deserve credit for many of the arguments made herein: Shayne Huffman, Kari Olson, Robyn Rose, Xochitl Torres Small, and Van Snow.

SUMMARY OF ARGUMENT[1]

This Court should reject the application of the death sentence to Robert Fry and Tim Allen for statutory and constitutional reasons. First, H.B. 285, 49th Leg., 1st Sess. (N.M. 2009) repealed the statutory authority governing execution of the death sentence. Without statutory authority, the Corrections Department cannot act.

In addition, in light of the repeal of the death sentence in New Mexico, the application of the death sentence to Mr. Fry and Mr. Allen would violate the Cruel and Unusual Punishment Clause and the Equal Protection Clause of the New Mexico Constitution. These clauses have been, and should be, interpreted to provide greater protections than their federal analogs.

Applying the New Mexico Constitution's prohibition of cruel and unusual punishment, this Court should find that New Mexico's history evidences unique "evolving standards of decency" that preclude application of the death penalty to Mr. Fry and Mr. Allen. Similarly, the unique nature of New Mexico's evolution regarding the death penalty would make the

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[1] No counsel for any party authored the brief in whole or in part nor did any counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief.

imposition of the death penalty in these cases "unusual" in violation of the prohibition on such punishments.

An alternative basis for precluding the use of the death sentence is the Equal Protection Clause of the New Mexico Constitution, which has been interpreted broadly by this Court. The Court should strictly scrutinize the classification at issue in these cases because it infringes upon the fundamental right to life protected by the Inherent Rights Clause of Article II, Section 4 of the New Mexico Constitution.

For these reasons, the Court should find that the imposition of the death sentence to Mr. Fry and Mr. Allen is unlawful.

ARGUMENT

I. H.B. 285's REPEAL OF THE STATUTORY PROVISIONS GOVERNING DEATH SENTENCE PROCEDURES PRECLUDES THE USE OF THE DEATH SENTENCE IN THIS CASE.

In 2009, the New Mexico Legislature passed, and Governor Richardson signed, H.B. 285, 49th Leg., 1st Sess. (N.M. 2009) available at http://www.nmlegis.gov/Sessions/09%20Regular/final/HB0285.pdf. H.B. 285 repealed the death sentence for crimes committed after July 1, 2009. While noting that the modified sentencing did not apply to individuals who committed capital crimes before July 1, 2009, H.B. 285 also independently repealed other statutory provisions within the criminal code that governed

the procedures for executing the death sentence. H.B. 285, § 5. Because of this repeal, no procedures governing the execution of a death sentence exist in the New Mexico statutory code. As a result, no statutorily prescribed death penalty procedures exist to execute Robert Fry or Tim Allen.[2] The absence of such procedures poses a substantial risk of undue infliction of pain or lingering death, in violation of the Cruel and Unusual Punishment clauses of the Eighth Amendment of the U.S. Constitution and Article II, Section 13 of the New Mexico Constitution.

The New Mexico Legislature, through H.B. 285, abolished the death penalty by amending NMSA 1978, Section 31-18-14 (1993, amended 2009) and substituting either a sentence of life or life without possibility of release or parole for a death sentence. H.B. 285 also amended NMSA 1978, Section 31-20A-2 (1979, amended 2009) to remove the subsection concerning a jury's determination of a life or death sentence and provided that upon a finding by the jury, beyond a reasonable doubt, that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment without possibility of release or parole. Id. citing NMSA 1978, § 31-20A-5 (1981). NMSA 1978, Section 31-21-10 (2007, amended 2009) was also amended to add a subsection stating that an inmate sentenced to life

[2] This brief is being submitted in the cases of Fry v. Lopez, No. 34,372, and Allen v. LeMaster, No. 34,386. The substance of this brief is identical in each case.

imprisonment without possibility of release or parole is not eligible for parole and shall remain incarcerated for life.

In addition, H.B. 285 repealed the sections relating to capital felony sentencing, capital felony cases heard by jury, and the execution of the death sentence. NMSA 1978, §§ 31-14-1 to -16 (repealed 2009), § 31-18-14.1 (repealed 2009), §§ 31-20A-2.1 to -4 (repealed 2009), and § 31-20A-6 (repealed 2009). In particular, H.B. 285 repealed NMSA 1978, Section 31-14-11 (repealed 2009) (Punishment of death; how inflicted), which set forth how lethal injection should be administered.

Thus, a careful reading of H.B. 285 demonstrates that the Legislature did four things: 1) in Sections 1–4, it amended the current laws codifying the treatment of capital felons, meaning that individuals who committed crimes on or after July 1, 2009 would no longer be potentially subject to the death sentence, but instead may be subject to life without parole; 2) in Section 5 it separately *repealed* statutory procedures to follow when implementing the death penalty; 3) in Section 6 it made clear that the provisions of the bill, meaning the amendments in Sections 1–4, applied only to crimes committed on or after July 1, 2009; and 4) it set an effective date for the law of July 1, 2009. On that date, the statutes set forth in Section 5 of the bill, which included the procedures for implementing the death sentence, were repealed

and taken out of the New Mexico statutory code. Those statutes are no longer on the books in New Mexico. As a result, no statutes codifying the procedures to implement the death penalty exist, even for individuals who committed capital crimes prior to July 1, 2009.

A plain reading of the statute, which should be the first step in every statutory analysis, confirms this. See State v. Jonathan M., 1990-NMSC-046, ¶ 4, 109 N.M. 789 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."). However, this reading of the statute is also confirmed by one of the few pieces of legislative history we have on this law, set forth in the Legislative Finance Committee's H.B. 285 Fiscal Impact Report, 49th Leg., 1st Sess. (N.M. 2009) at 3, available at http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0285.pdf (hereinafter "Fiscal Impact Report"). Therein, the Legislative Finance Committee, when submitting comments about "Technical Issues" within H.B. 285, noted that the procedural provisions would be repealed despite the fact that people are sitting on death row.

> There may be concern that the provisions for carrying out the death penalty, Sections 31-14-1 through 31-14-16 NMSA 1978, are repealed in the Act, despite the fact that there are currently inmates on death row.

Fiscal Impact Report, at 3. Despite that clearly articulated concern, the Legislature passed the bill with the repeal provisions in it. On July 1, 2009, the procedures in place for executing the death sentence were repealed and removed from the New Mexico statutory code.

If any procedures remain in existence for executing the death sentence, they lie solely within the policies of the New Mexico Corrections Department, and those policies are set forth without any guiding intelligible principle articulated by the New Mexico Legislature. Indeed, Penitentiary of New Mexico Policy 050400 (Revised April 5, 2012), explicitly indicates that the statutory authority for the policy has been repealed. Id., Section I, B. Without statutory authority, the Corrections Department cannot act.

> The Legislature can delegate legislative powers to administrative agencies but in so doing, boundaries of authority must be defined and followed. In New Mexico, action taken by a governmental agency must conform to some statutory standard, or intelligible principle.

Rivas v. Bd. of Cosmetologists, 1984-NMSC-076, ¶ 3, 101 N.M. 592 (internal citations omitted). To act without statutory guidance, the Corrections Department would be in violation of Article III, Section 1 of the New Mexico Constitution, which distributes power among the legislative, executive, and judicial departments of the state.

Setting aside the separation of powers violation, even if the Corrections Department attempted to execute a death sentence in the

absence of statutorily-prescribed procedures, doing so would pose a substantial risk of undue infliction of pain or lingering death, constituting cruel and unusual punishment in violation of the state and federal constitutions. See Baze v. Rees, 553 U.S. 35, 49 (2008) ("Punishments are cruel when they involve torture or a lingering death . . . .") (quoting In re Kemmler, 136 U.S. 436, 447 (1890)); Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("the unnecessary and wanton infliction of pain implicates the Eighth Amendment").

Given that questions have arisen in other states and in federal cases about the constitutionality of drug protocols during the use of lethal injection when the protocols are *prescribed* by statute, proceeding in the absence of statutory guidelines is particularly troubling. Contrast the situation in New Mexico with that in Kentucky, the latter of which was addressed in Baze, 553 U.S. 35. There, a person on death row challenged Kentucky's use of lethal injection by a three-drug protocol under the Cruel and Unusual Punishment Clause. In challenging Kentucky's detailed procedures, the inmate alleged that the procedures left open the possibility of severe pain and lingering death. Chief Justice Roberts's plurality opinion[3] explained the

[3] Because of the divide in the Supreme Court on the proper standard of review, Chief Justice Robert's plurality opinion, joined by Justices Kennedy and Alito, is the controlling opinion. Justice Scalia and Justice Thomas concurred and believed that the

contours of the Cruel and Unusual Punishment Clause in the context of the challenge to Kentucky's scheme:

> Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers." We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."

Baze, 553 U.S. at 49–50 (2008) (internal citations omitted) (quoting Helling v. McKinney, 509 U.S. 25, 33, 34–35 (1993) (emphasis added by the Court) and Farmer v. Brennan, 511 U.S. at 842, 846, & n.9 (1994)).

The plurality then noted that in Baze it was "uncontested that failing a proper dose of sodium thiopental to render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from potassium chloride." Baze, 553 U.S. at 53. However, a majority (under separate standards in various concurring opinions) of the Court found that Kentucky's elaborate written procedural standards and specific personnel training sufficiently ensured that the lethal injection procedure did not

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standard employed was unnecessary. The four other members of the Court would require application of a higher standard than the Roberts's plurality.

amount to a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. Baze, 553 U.S. at 62–63, 87, 94. The statutorily-prescribed procedures in Baze overcame the concerns that the three-drug protocol might be used in a way that would cause substantial risk of severe pain or lingering death. Id. at 62.

In New Mexico, however, there are currently *no* statutory procedures governing the implementation of the death sentence. Because of this void, the Corrections Department's execution of Mr. Fry and Mr. Allen would pose the exact risk articulated by the Court in Baze, under both the plurality's standard and the more scrutinizing standards articulated by other members of the Court. The procedures in place that protected Kentucky's use of lethal injection against an Eighth Amendment challenge do not exist in New Mexico in either its statutory code or its administrative code. The use of the death sentence in New Mexico would therefore pose a substantial risk of severe pain or lingering death in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment and its state constitutional analog.

Allowing the execution of death row inmates without statutory guidance from the Legislature risks inhumane administration and prolonged suffering, as seen in the recent execution of Dennis McGuire by the State of

Ohio. On January 16, 2014, the State of Ohio executed Dennis McGuire using a new and untried lethal-injection cocktail involving midazolam, a sedative, and hydromorphone, a morphine derivative, despite arguments that the new method would cause air suffocation and extreme agony. Robert Higgs, State executes murderer Dennis McGuire, marking first use of new blend of drugs for lethal injection, The Plain Dealer (Jan. 17, 2014, 7:29 AM), http://www.cleveland.com/open/index.ssf/2014/01/state_executes_murderer_dennis.html. Ohio announced its intention to use a new cocktail of drugs in response to the shortage of pentobarbital, the drug formerly used for lethal injection. Id.

McGuire was injected with the experimental cocktail at 10:29 AM. Id. About four minutes later, McGuire started struggling and gasping loudly for air, making snorting and choking sounds. His chest heaved and his left fist clinched as deep, snorting sounds emanated from his mouth. Id. This execution lasted for approximately 24 minutes and was one of the longest executions in Ohio history. Id.

Ohio's agonizing human experiment was immediately front and center in national news, leading to pleas for a moratorium on lethal injection until a humane administration method is available. Rick Lyman, Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections,

The New York Times (Jan. 16, 2014), http://www.nytimes.com/2014/01/17/ us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html?_r=0. McGuire's "botched execution" put Ohio's death penalty procedures under national scrutiny and has fueled the debate over whether lethal injection is even a constitutional method of executing individuals. Ohio chose to use an experimental "cocktail of drugs" when pentobarbital, the drug formerly used for lethal injection, was no longer available due in large part to the refusal of European pharmacies to supply United States prisons with the drug for the purpose of executing human beings. Higgs, State executes murderer Dennis McGuire, marking first use of new blend of drugs for lethal injection, The Plain Dealer (Jan. 17, 2014, 7:29 AM); Alan Johnson, Inmate's death called 'horrific' under new, 2-drug execution, The Columbus Dispatch (January 17, 2014, 10:02 AM) http://www.dispatch.com/content/stories/local/2014/01/16/ mcguire-execution.html. States that have either run out of pentobarbital or whose current supply of pentobarbital is expired are now forced to experiment with "alternative cocktails" like that used in the Ohio execution or to obtain non-FDA approved drugs from unregulated compound pharmacies. John Caniglia, Dennis McGuire's execution raises question in debate over death penalty: Why is it so hard to put a person to death

humanely?, The Plain Dealer (Jan. 27, 2014, 7:06 AM), http://www.cleveland.com/metro/index.ssf/2014/01/mcguires_execution_raises_key.html; Charlotte Alter, Oklahoma Convict who Felt "Body Burning" Executed with Controversial Drug, Time Mag. (Jan. 10, 2014), http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/; Graham Lee Brewer, Oklahoma attorney general brief says Oklahoma does not have drugs needed for Thursday execution, The Oklahoman (March 17, 2014, 8:52 PM), http://newsok.com/ag-brief-says-oklahoma-does-not-have-drugs-needed-for-thursday-execution/ article/3944219.[4] Either solution opens the door to agonizing pain and suffering between administration of the drugs and eventual death, in clear violation of the Eighth Amendment.[5] Many states

[4] For information on the lack of FDA regulation of compounding drugs, see Compounding and the FDA: Questions and Answers, U.S. Food and Drug Administration, http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm (last visited March 20, 2014) ("Compounded drugs are not FDA-approved. This means that FDA does not verify the safety, or effectiveness of compounded drugs."). See also Drug Quality and Security Act of 2013, Pub. L. No. 113-54, title I, Nov. 27, 2013, 127 Stat. 587.

For a discussion on varying state approaches to lethal injection due to drug shortages, see Death Penalty Information Center, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited March 22, 2014).

[5] Tim Talley, Okla. Pharmacy Won't Give Drug for Mo. Execution, http://bigstory.ap.org/article/okla-pharmacy-responds-mo-execution-drug-suit (February 17, 2014, 10:20 PM). Death row inmate Michael Taylor filed a lawsuit claiming drugs from compound pharmacy would cause undue pain, after Missouri allegedly turned to an Oklahoma pharmacy to supply compounded pentobarbital. The drug's only licensed manufacturer refused to provide the drug for lethal injection. Twenty seconds into

with death penalty statutes currently in place are now reconsidering lethal injection as a preferred method of execution and are instead considering a return to a firing squad or the electric chair. Jim Salter, States mull return of firing squads, electric chairs, The Washington Times (Jan. 28, 2014), http://www.washingtontimes.com/news/2014/jan/28/states-consider-reviving-old-fashioned-executions/?page=all.

Without statutory authority, the Corrections Department cannot execute Mr. Fry and Mr. Allen. Even if it attempted to do so, the risk of a "botched execution" would undoubtedly result in a procedure that was constitutionally infirm. For these reasons, the Court should declare the death sentence unlawful as applied to Mr. Fry and Mr. Allen.

II. THIS COURT MAY INTERPRET THE NEW MEXICO CONSTITUTION'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND EQUAL PROTECTION CLAUSE INDEPENDENTLY FOR ANY PRINCIPLED REASON.

Mr. Fry's and Mr. Allen's cases raise questions under the Cruel and Unusual Punishment Clause and the Equal Protection Clause of the New Mexico Constitution. These claims can be addressed by this Court independently of any federal court analysis and without resort to the

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Michael Lee Wilson's execution in Oklahoma, Wilson stated as his final words, "I feel my whole body burning." Wilson was executed using a cocktail of drugs that included pentobarbital from a compounding pharmacy. Lyman, Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections, The New York Times (Jan. 16, 2014).

interstitial approach. As a preliminary matter, it is worth examining the scope of this Court's interstitial approach that, by its own admission, has not always been applied consistently. State v. Leyva, 2011-NMSC-009, ¶ 38, 149 N.M. 435. This examination will demonstrate that it is not always necessary for the Court to grapple with the three-prong factors oft-cited from State v. Gomez, 1997-NMSC-006, 122 N.M. 77, in cases that raise a state constitutional provision with a federal analog. See Leyva, 2011-NMSC-009, ¶ 49. Instead, as this Court explained in State v. Leyva, when a state constitutional provision has previously been interpreted in a way that provides broader protections than the federal counterpart, it need only find some principled basis for relying solely on the state constitution as an independent source. Id. ¶ 40 ("Assertion of the legal principle and development of the facts are generally the only requirement to assert a claim on appeal." (quoting Gomez, 1997-NMSC-006, ¶ 22)). Because it has previously interpreted the state constitution's Cruel and Unusual Punishment Clause and Equal Protection Clause to provide broader protection than the federal counterparts, this Court, in this case, need only find some principled basis for relying solely on the state constitution. Relying on principled reasons for departure ensures that the fundamental reasons for using the interstitial approach remain protected.

The starting point for the Court's interstitial analysis is Gomez, 1997-NMSC-006, 122 N.M. 777. In Gomez, this Court considered various interpretive approaches to state constitutional law: primacy, interstitial and lockstep. Id. ¶ 18. The primacy approach would have required that New Mexico courts, when confronted with a state constitutional question, would *first* decide the matter independently under the state constitution, and resort only to federal law as a secondary matter. Id. The lockstep approach, also discussed by this Court in Gomez, is the analytical opposite of the primacy approach and requires strict adherence to federal constitutional interpretation, with no state independent interpretation of constitutional provisions. Id. ¶ 16. This Court chose the interstitial approach. The Court adopted the interstitial approach in part to avoid an "inefficient route to an inevitable result[,]" where the federal constitution would provide the same protection. Id. ¶ 21 (internal quotation omitted). The interstitial approach acknowledges "[o]ur national judicial history and traditions closely wed federal and state constitutional doctrine[,]" id., quoting State v. Hunt, 91 N.J. 338, 362 (1982) (Handler, J., concurring), but that there are principled reasons for interpreting the state constitution differently.

Under the interstitial approach, courts generally analyze the state constitutional issue only after deciding that federal law does not determine

the result. Gomez, 1997-NMSC-006, ¶ 19–20. This interstitial methodology originally developed in the context of motions to suppress under Article II, Section 10 of the New Mexico Constitution, Gomez, 1997-NMSC-006, ¶ 19–20, and a broad, deep body of precedent has confirmed the effectiveness of this analytic method in those cases. E.g., State v. Ketelson, 2011-NMSC-023, ¶ 20, 150 N.M. 137; State v. Rivera, 2010-NMSC-046, ¶ 22, 148 N.M. 659.

Outside the search and seizure context, the interstitial analysis has been used to interpret other parallel provisions of the state and federal constitutions. This Court has applied it to the portion of Article II, Section 18 that was added by the Equal Rights Amendment. See New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 28, 126 N.M. 788 (filed 1998). It also been used to interpret a diverse range of clauses of the New Mexico Constitution. See State v. Lopez, 2013-NMSC-047, ¶ 13 (interstitial approach applied to Confrontation Clause); Montoya v. Ulibarri, 2007-NMSC-035, ¶ 19-24, 142 N.M. 89 (Due Process and Cruel and Unusual Punishment); State v. Woodruff, 1997-NMSC-061, ¶ 25, 124 N.M. 388 (right to counsel/Due Process); and State v. Rueda, 1999-NMCA-033, ¶ 11, 126 N.M. 738 (Cruel and Unusual Punishment Clause).

When confronting a state constitutional provision for the first time, the interstitial approach involves a multi-step analysis. First, does the United States Constitution protect the right in question? Second, was the state constitutional claim preserved? Third, is divergence from the federal constitution appropriate for some principled reason, *such as* flawed federal precedent, structural differences between the state and federal government, or distinctive state characteristics? Leyva, 2011-NMSC-009, ¶ 49; Michael B. Browde, Gomez Redux: Procedural and Substantive Developments Twelve Years On, 40 N.M. L. Rev. 179, 187 n.65 (2010).

In State v. Leyva, this Court made clear that it had not always consistently applied the proper framework within the interstitial approach. 2011-NMSC-2009, ¶ 38. It went on to explain that the last prong need not be examined if the Court has previously interpreted a state constitutional provision to provide broader protection that the federal counterpart.

> We agree that the proper inquiry under Gomez is whether the *provision* of the state constitution has previously been construed to provide broader protection than its federal counterpart, and disavow any prior statements to the contrary.

Id. ¶ 48.

This statement in Leyva explains why, in several cases, this Court has not discussed the interstitial approach or why it chose to depart from federal precedent. For example, recently in Griego v. Oliver, this Court did not walk

through the reasons to depart from federal Equal Protection Clause jurisprudence. 2014-NMSC-003, ¶ 68 (filed 2013). It did not need to do so, because the state constitution's Equal Protection Clause had previously been interpreted more broadly in Breen v. Carlsbad, 2005-NMSC-028,¶ 27, 138 N.M. 331.

The interstitial approach is not unharnessed, however. In Leyva, the Court emphasized that not being restricted by the Gomez factors in cases where the provision has already been interpreted more broadly does not mean that it has moved to the primacy approach altogether.

> The fact that we have departed from the analysis used to determine whether a violation of the Fourth Amendment occurred in certain contexts, however, does not require us to do so in all contexts. It remains necessary to conduct our *de novo* review of the law, as "this Court has demonstrated a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees."

Leyva, 2011-NMSC-009, ¶ 51 (quoting State v. Gutierrez, 1993-NMSC-062, ¶ 32, 116 N.M. 431). That there must remain a principled reason for interpreting the state constitution differently than its federal counterpart protects the reasons this Court chose the interstitial approach over the primacy approach initially. This Court, at least in a situation where it is addressing a constitutional provision previously interpreted to provide

greater protections, must still conduct a *de novo* review of the law and find a principled reason for departing from federal jurisprudence.

In this case, Mr. Fry and Mr. Allen rely primarily upon two state constitutional provisions to argue that the death penalty is unconstitutional as applied to them: the Cruel and Unusual Punishment Clause and the Equal Protection Clause.[6] Both of these provisions have previously been interpreted by this Court to provide broader protections than their federal counterparts. Montoya v. Ulibarri, 2007-NMSC-035, ¶ 24, 142 N.M. 89 (holding that the New Mexico Constitution requires that a habeas petitioner must be allowed to plead innocence in a habeas petition in order to satisfy the New Mexico Constitution's Cruel and Unusual Punishment Clause); see also State v. Rueda, 1999-NMCA-033, ¶¶ 12–13, 126 N.M. 738 (holding that a sentence violated Article II Section 13 of the New Mexico Constitution even though the United States Supreme Court was unable to agree on a proportionality review in Harmelin v. Michigan, 501 U.S. 957 (1991)); Breen v. Carlsbad, 2005-NMSC-028, 138 N.M. 331 (interpreting state Equal Protection Clause more broadly than its federal analog).

Accordingly, this Court need not undertake the mechanical application of the Gomez factors to interpret the New Mexico Constitution's

[6] Mr. Fry and Mr. Allen also rely on the New Mexico Constitution's ban on Special Laws, which is outside the focus of this brief.

Cruel and Unusual Punishment Clause or its Equal Protection Clause independently. Instead, it need only find some other principled basis for interpreting the state constitutional provisions independently *in this context.* And, as set forth below, substantial principled reasons exist for doing so.

III. THE COURT SHOULD INTERPRET THE NEW MEXICO CRUEL AND UNUSUAL PUNISHMENT CLAUSE TO PRECLUDE THE DEATH PENALTY IN THIS CASE.

A. There is no federal precedent on point.

The issue before this Court – the constitutionality of the application of the death penalty to two persons on death row after repeal of the prospective application of the death penalty – has never been decided by the United States Supreme Court or any federal court. Accordingly, the absence of federal precedent should compel this Court to decide the issue under the state constitution. In cases where the scope of the federal right is unclear, the interstitial approach permits the state court to proceed to the state constitutional claim. State v. Garcia, 2009-NMSC-046, ¶ 25, 147 N.M. 134 (reaching the state constitutional question where there was "serious uncertainty" about the federal law issue).

B. Federalism concerns are not present.

There exists a structural difference in the relationship between the state government and its citizens that differs greatly from that of the federal

government. Whereas the federal government represents the entire nation, the New Mexico government represents New Mexicans. The absence of federalism concerns under our state constitution has already been recognized as a structural difference that supports reading the New Mexico Constitution more broadly than its federal counterpart. In Montoya v. Ulibarri, this Court accepted that a freestanding actual innocence claim may support a state habeas corpus challenge despite conflicting precedent from the United States Supreme Court. 2007-NMSC-035, ¶ 19. The United States Supreme Court decision to deny the habeas petition "was informed by concerns of federalism," id. ¶ 20, and those "principles of federalism" did not impose the same constraints on this Court. Id. ¶ 21.

The absence of a federalism constraint liberates this Court to diverge from the restrictive federal reading of constitutional provisions. See Michael B. Browde, State v. Gomez and the Continuing Constitutional Conversation Over New Mexico's State Constitutional Rights Jurisprudence, 28 N.M. L. Rev. 387, 406 n.112 (1998) (recognizing reduced federalism concerns as one reason to read the state constitution more broadly). Consequently, the meaning of cruel and unusual punishment in New Mexico should be based on a New Mexican consensus.

C. New Mexico has unique history reflecting our state's "evolving standards of decency."

This Court, in assessing proportionality review of a death sentence under the Cruel and Unusual Punishment Clause, has considered state laws, "public attitudes concerning a particular sentence and . . . its history, precedent, legislative attitudes and the responses of the jurors." State v. Garcia, 1983-NMSC-008, ¶ 35, 99 N.M. 771. The unique history of the use of the death sentence in New Mexico illuminates how the "standards of decency" have evolved. Gregg v. Georgia, 428 U.S. 153, 174 (1976) (cruel and unusual punishment is determined by assessing "evolving standards of decency").

Certainly, the exceedingly rare use of the death penalty renders it "uncommon" in New Mexico. Notably, the "last involuntary or forcible execution in New Mexico was in 1960." Marcia J. Wilson, The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis, 38 N.M. L. Rev. 255, 272 (2008). In its comment on H.B. 285, the Legislative Finance Committee noted that there was only a 4.5% chance that a death penalty prosecution would ever end in an execution in New Mexico. Fiscal Impact Report, at 3.

From 1979 (when the death penalty was reinstated) to 2007, there have been 211 capital crime cases. Of those cases, 43.1% were filed in the

first decade after the death penalty was reinstated (1980–1989). In total, juries have sentenced fifteen people to death (Terry Clark twice). Twelve of those sentences were later overturned or set aside: five were commuted by Governor Toney Anaya, five were reversed on direct appeal, two were reversed during post-conviction proceedings, and one individual died of natural causes. Wilson, 38 N.M. L. Rev. at 270–271. The only execution since 1960 was on November 6, 2001, after Terry Clark voluntarily abandoned his habeas claims. Id. at 271.

Since the reinstatement of the death penalty, New Mexico juries sentenced 9.9% of individuals in capital cases to death in the first decade and only 7.7% in the second decade. Robert Fry is the only person sentenced to death in New Mexico in this century. See id. at 298 (showing that only one person received a death sentence from 2000–2007). Since the 2009 repeal of the death sentence, *no* jury has sentenced an individual to death for a crime committed prior to July 1, 2009. In 2012, a New Mexico jury did not decide to sentence Michael Astorga to death, and the judge then sentenced him to life (life without parole was unavailable). Olivier Uyttebrouck, Life in Prison, Albuquerque J. (May 19, 2012), http://www.abqjournal.com/107698/news/life-in-prison.html. In federal court, New Mexico juries did not decide on death sentences for Larry Lujan

in 2011 and John McCluskey in 2013, both of whom were then sentenced to life in prison. Ashley Meeks, Lujan Dodges Death Penalty, Las Cruces Sun News (Oct. 5, 2011), http://www.lcsun-news.com/las_cruces-news/ci_19051796; Press Release, United States Department of Justice, John Charles McCluskey to Receive Life Prison Sentence for Murdering Oklahoma Couple (Dec. 11, 2013), available at http://www.justice.gov/opa/pr/2013/ December/13-crm-1305.html.

In New Mexico, attitudes and values of many citizens concerning the death penalty are informed by Roman Catholicism, the religion practiced by a majority of the population. The Roman Catholic Church opposes use of the death penalty. See United States Conference on Catholic Bishops, The Church's Anti-Death Penalty Position, http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm (last visited Mar. 12, 2014). When evaluating "evolving standards of decency" that *depend* upon an assessment of public attitudes, taking into account the religious attitudes that inform such an assessment is appropriate, particularly because of the practical ramifications of the religious influence. In its Fiscal Impact Report, the Legislative Finance Committee emphasized that one reason why jury selection in capital cases was so arduous and costly in New Mexico was

because the issue "potentially touches the . . . religious rights of New Mexicans[.]" Fiscal Impact Report, at 2. In signing H.B. 285, then-Governor Richardson noted that his decision was influenced by "the archbishop and the Catholic Church, because they are very, very influential in a Catholic state like New Mexico." Cindy Wooden, State's Decision to Abolish Death Penalty Marked at Rome's Colosseum, Catholic News Service (Apr. 15, 2009), http://www.catholicnews.com/data/stories/cns/0901704.htm.

All of this evidence demonstrates that the view of the death sentence in New Mexico has, over the last 50 years, and in particular the last 35 years, increasingly been met with public disdain. Two Governors have acted explicitly to avoid its imposition, the Legislature has repealed it prospectively, juries have increasingly rejected it, and New Mexico's unique religious culture informs the standards of decency that abhor it. For these reasons, this Court should find that applying the death penalty to Mr. Fry and Mr. Allen would violate notions of "fundamental fairness" enshrined in the New Mexico Constitution. Montoya v. Ulibarri, 2007-NMSC-035, ¶ 23.

D. Applying the death sentence now, in light of the prospective repeal, would be highly "unusual."

This Court has explicitly stated that the terms "cruel" and "unusual," in the context of the Eighth Amendment of the Federal Constitution and Article II, Section 13 of New Mexico Constitution, have different meanings.

State ex rel. Serna v. Hodges, 1976-NMSC-033, ¶¶ 10–12, 89 N.M. 351, overruled in part on other grounds by State v. Rondeau, 1976-NMSC-044, 89 N.M. 408. "We are unwilling to believe that the phrase simply uses two words where one would do. Probably it would be held to preclude the imposition of some form of punishment which was unknown to the history of the law, ***or at least rare in modern times*** ..." Id. (emphasis added). In Hodges, this Court quoted Chief Justice Warren in Trop v. Dulles, 408 U.S. 238 (1958), noting, "If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." Hodges, 1976-NMSC-033, ¶ 12 n.17.

In State v. Clark, Terry Clark argued that his death sentence was "unusual" because New Mexico, as of 1999, had not executed anyone since the death penalty became effective in 1979. 1999-NMSC-035, ¶ 60, 128 N.M. 119. The Court rejected this argument, stating that the meaning of "unusual" turns on the nature of the punishment under consideration, not the infrequency of its imposition. Id. However, the death sentence is now "unusual" in ways that it was not in 1999.

This Court in Clark was not faced with the "unusual" situation before it now. The Legislature has completely prohibited application of the death

sentence for crimes committed after July 1, 2009, and repealed any procedures regulating the execution of the sentence. This situation breathes life into the word "unusual" in a way that mere infrequency does not. Given that New Mexico has generally rejected the use of the death penalty prospectively, it would be *highly* unusual to use it against Mr. Fry and Mr. Allen.

For these reasons, the Court should declare that the death sentence, as applied to Mr. Fry and Mr. Allen, violates the New Mexico Constitution's ban on cruel and unusual punishment.

IV. THE APPLICATION OF THE DEATH PENALTY HERE WOULD VIOLATE THE EQUAL PROTECTION CLAUSE.

Mr. Fry and Mr. Allen argue that imposing the death sentence on them violates the Equal Protection clauses of the U.S. and New Mexico Constitutions. This Court should find that the executions would violate the state constitution's Equal Protection Clause because of New Mexico's history of strictly scrutinizing laws that affect Inherent Rights and the state's well-established commitment to equality.

A. The New Mexico Inherent Rights Clause should inform the Court's application of strict scrutiny under the Equal Protection Clause.

Article II, Section 4 of the New Mexico Constitution provides:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

This Court should give full meaning to this constitutional codification of basic human rights. The provision articulates fundamental rights that should be used to determine the level of scrutiny a court should employ under the state Equal Protection Clause. Indeed, New Mexico appellate courts have already indicated that the inherent rights language is judicially enforceable. See Griego v. Oliver, 2014-NMSC-003, ¶ 1 (filed 2013); State v. Sutton, 1991-NMCA-073, ¶ 23, 112 N.M. 449; State v. Brooken, 1914-NMSC-075, 19 N.M. 404.

In New Mexico, when a statute is attacked on equal protection grounds, one of three possible analyses generally is applied to determine the statute's constitutionality: (1) rational basis scrutiny, (2) intermediate scrutiny, or (2) strict scrutiny. Meyers v. Jones, 1988-NMSC-011, ¶¶ 8–10, 106 N.M. 708. "The most stringent analysis is termed 'strict scrutiny' and it is applied when the challenged legislation affects the exercise of a fundamental right expressly or implicitly guaranteed by the constitution . . . ." Id.

Most recently and most notably, this Court began its unanimous opinion in Griego v. Oliver by quoting the Inherent Rights Clause. 2014-

NMSC-003, ¶ 1. That the Court did so in a case that primarily turned on the Court's interpretation of the Equal Protection Clause illustrates how the two clauses work together. Notably, this Court in Griego decided to employ an intermediate level of scrutiny to the sexual orientation classification in that case. Id. ¶ 53. Thus, this Court has already relied upon the Inherent Rights Clause to inform its interpretation of the state Equal Protection Clause, one that results in heightened scrutiny of state laws. That same approach should guide the Court in this instance. See e.g., Marshall J. Ray, What Does the Natural Rights Clause Mean to New Mexico?, 39 N.M. L. Rev. 375, 403–04 (2009) (discussing how the Inherent Rights Clause may be applied to inform a due process analysis).

Such an approach, one that uses the Inherent Rights Clause to bolster other constitutional protections, is supported by historical precedent in New Mexico. In Reed v. State ex rel. Ortiz, this Court relied upon the Inherent Rights Clause to inform its due process jurisprudence. 1997-NMSC-055, ¶ 103, 124 N.M. 129, overruled on other grounds by N.M., ex rel. Ortiz v. Reed, 524 U.S. 151 (1998). "When extradition will directly result in the deprivation without due process of the defendant's life, the New Mexico Constitution requires the protection of his or her life and safety." Reed v. State ex rel. Ortiz, 1997-NMSC-055, ¶ 103 (citing N.M. Const. art. II, § 4

and § 18). See also id. ¶ 105 (holding that the extradition process was not meant to abrogate the inherent rights within N.M. Const. art. II, § 4). Thus, the Inherent Rights Clause should compel this Court to strictly scrutinize discriminatory laws that affect one of the fundamental, enumerated rights set forth in Article II, Section 4 of the New Mexico Constitution.

"There is no right more fundamental than the right to one's own life." Reed v. State ex rel. Ortiz, 1997-NMSC-055, ¶ 101. Because application of the death penalty to Mr. Fry and Mr. Allen implicates their fundamental right to life, this Court should employ a heightened level of scrutiny to the classification at issue here, that is, the one that draws the line of capital punishment based on whether the crime was committed before or after 2009. As this Court explained in Reed v. State ex rel. Ortiz, when interpreting the Inherent Rights Clause, the Court should remember the "intimate relationship" that exists between a state and its people, and therefore, the individual rights that are displaced at the federal level because of federalism concerns are entitled to greater protection by the Court. 1997-NMSC-055, ¶ 105 (quoting Cal. First Bank v. State, 1990-NMSC-106, ¶ 44, 111 N.M. 64). For this reason, when a law classifies individuals in a way that discriminates against their fundamental right to life, the state Inherent Rights Clause and

the state Equal Protection Clause should be read to require that the law be subject to the strictest form of scrutiny.

A similar approach can be drawn from U.S. Supreme Court precedent interpreting the U.S. Constitution's Equal Protection Clause. Before the Supreme Court's development of its substantive due process jurisprudence, the Supreme Court decided questions of "fundamental interests" under the Equal Protection Clause. In Skinner v. State of Okla. ex rel. Williamson, for example, the Supreme Court applied "strict scrutiny" under the Fourteenth Amendment's Equal Protection Clause to invalidate an Oklahoma law that mandated sterilization of individuals who committed two or more crimes of moral turpitude. 316 U.S. 535, 541 (1942). The law was constitutionally infirm because of the discriminatory fashion in which crimes of "moral turpitude" were defined. Id. at 541–542. In striking down the law as one that unconstitutionally discriminated against the fundamental right to procreation, the U.S. Supreme Court used language that is equally applicable (if not even *more* applicable) to the fundamental right to life at stake in the case at bar.

> We are dealing here with legislation which involves one of the basic civil rights of man. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that

> **strict scrutiny** of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." **When the law lays an unequal hand on those who have committed intrinsically the same quality of offense** and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Id. at 541 (emphasis added) (internal citation omitted) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886) and State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)). See generally, Victoria F. Nourse, In Reckless Hands: Skinner v. Oklahoma and the Near-Triumph of American Eugenics, (W. W. Norton & Co. 2008).

Like the law in Skinner, permitting the death penalty to apply to Mr. Fry and Mr. Allen lays a similarly "unequal hand on those who have committed intrinsically the same quality of offense." Indeed, the *only* difference here is a temporal one. The temporal distinction is insufficient to support a classification that must satisfy strict scrutiny, that is, the classification must be narrowly tailored to a compelling state interest. Here, neither the deterrent nor the retributive rationale can satisfy this rigorous test and permit the state to execute two men solely because they committed their crimes before July 1, 2009.

Altering Mr. Fry's and Mr. Allen's death sentences to life without parole would not detract from the government's interest in deterrence and retribution. In limited circumstances, the concern for deterrence and retribution does not supersede the government's ability to alter a sentence post-conviction. A post-conviction alteration to Fry's and Allen's sentences will not negate the punishment for their crime, but change it to a lifetime of punishment. The state's interests in deterrence and retribution are still fully served by such a post-conviction alteration.

By establishing a prospective-only repeal of the death penalty, H.B. 285 created two classes of people who committed similar crimes. As noted, because the classification treads upon the fundamental right to life, strict scrutiny must apply. The very passage of H.B. 285, repealing the death penalty prospectively, demonstrates that the state and the people of New Mexico recognize a less restrictive punishment for crimes similar to those for which Fry and Allen were convicted. Because the Legislature has recognized that any crime that would have been death-penalty eligible is now punishable by life without parole, the State itself has demonstrated a less restrictive means. Accordingly, the law is not narrowly tailored and thus fails strict scrutiny.

B. New Mexico's history contains a distinctive commitment to equality in all areas of law.

Throughout the history of New Mexico, its citizens and judiciary have steadfastly defended individual liberties and the right of all people to equality under the law. This commitment to individual rights crosses substantive areas of law and dates back to the state's founding and probably before. This strong, historic dedication to equal protection provides the foundation for close scrutiny of any discriminatory provision.

New Mexico's first proposed constitution, written in 1850, firmly rejected slavery at a time when the federal government was still debating the desirability of that loathsome institution. Dale R. Rugge, Comment, An Equal Protection Challenge to First Degree Depraved Mind Murder under the New Mexico Constitution, 19 N.M. L. Rev. 511, 532 (1989). The state constitution, ultimately adopted in 1911, protected the equality of Spanish-speaking citizens and provided that children of Spanish descent would never be denied the right of admission to public schools or placed in schools separate from other children. N.M. Const. art. VII, § 3 and art. XII, § 10. The same constitutional provisions also provide some of the strongest protections for minority language rights in the country. State v. Rico, 2002-NMSC-022, ¶ 5, 132 N.M. 570 (right of juror to serve even though he primarily spoke Navajo). More recently, New Mexico's Equal Rights

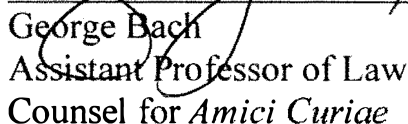
Amendment, adopted in the early 1970s, expanded Article II, Section 18 of the New Mexico Constitution to guarantee that "[e]quality of rights under law shall not be denied on account of the sex of any person."

Consistent with this history of equal treatment, the New Mexico Supreme Court has applied a version of rational basis review under the state Equal Protection Clause that is often more searching than the federal standard. Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 31, 125 N.M. 721 (noting that the "rational basis inquiry does not have to be largely toothless"). It has applied heightened scrutiny more broadly than federal law. Breen, 2005-NMSC-028, ¶ 15. The culmination of this history should be reflected in the Court's determination that a heightened level of scrutiny applies to a classification that directly affects a fundamental right.

CONCLUSION

Because of the statutory and constitutional provisions discussed above, *Amici* respectfully submit that executing Mr. Fry or Mr. Allen would be unlawful.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2014, I served the foregoing pleading by electronic mail on the following counsel of record, and that electronic service was successful.

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I further certify that the foregoing was hand-delivered to the Attorney General's Box at New Mexico Supreme Court this 24th day of March 2014.

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