

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

**JEFFERSON CENTRAL LLC
AND GILLAM KERLEY,**

Appellants,

No. D-202-CV-2025-04970

v.

**THE CITY OF ALBUQUERQUE and
THE CITY OF ALBUQUERQUE
OFFICE OF ADMINISTRATIVE HEARINGS**

Appellees.

APPELLANTS' REPLY TO MOTION FOR CERTIFICATION

New Mexico courts have recognized that certain cases are better suited for first consideration at the Court of Appeals. Such examples range from cases presenting novel constitutional questions, to cases asking state-wide questions of public importance, to cases that will almost certainly be appealed, regardless of the outcome at the district court. This case has all of the above. Rather than address those considerations, Appellees City of Albuquerque and its Office of Administrative Hearings (together, City) instead looks elsewhere in its response in opposition to certification. It makes merits-stage arguments about whether Kerley has standing and whether the right to seek and obtain safety even exists, and it also argues the request is premature because the record has not yet been delivered to this Court. Kerley will show in due course that he is right on the merits; the record is on its way. But this motion asks whether this case involves novel constitutional questions of state-wide impact and imperative public importance. Rule 1-074(S) NMRA. These are

questions that the City does not contest—and for good reason, as the claims are novel and important.¹ Kerley respectfully requests that this Court grant the motion for certification.

I. Kerley has standing to assert violations of his rights under the New Mexico Constitution.

The City starts by arguing that Kerley lacks standing to challenge the constitutionality under Article II, Section 4 of the City’s enforcement, including penalties, against him for letting a few people sleep in his bookstore’s parking lot. The City enforced against Kerley’s property, penalizing him and seeking to prevent him from using his property in a particular way. He is “a person aggrieved by a final decision,” and thus may appeal to this Court to challenge the agency’s actions. NMSA 1978, § 39-3-1.1(C) (1999); *see also Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 16, 108 P.3d 558, 563 (recognizing a party with standing to appeal under NMSA 1978, § 39-3-1.1). “[I]f a plaintiff is an object of the action (or foregone action) at issue, then there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Diamond Alt. Energy, LLC v. EPA*, 145 S. Ct. 2121, 2134 (2025) (citations omitted). The New Mexico Supreme Court has long adopted this logic, holding that “to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise.” *De Vargas Sav. & Loan Ass’n of Santa Fe v. Campbell*, 1975-NMSC-026, ¶ 15, 535 P.2d 1320, 1324.

Kerley has standing to assert that the City’s actions violated his constitutional rights. He will argue deprivations of his rights under two provisions of the New Mexico Constitution: the

¹ As the administrative hearing judge below recognized, Kerley raised his constitutional claims, preserving them for appeal. [NOA Ex. 1, 1–2.]

right to seek and obtain safety and the due process clause, N.M. Const. art. II, §§ 4, 18.² See [Mot. 2–3.] The City’s standing arguments rest entirely on a misunderstanding of Kerley’s claim. The right to seek and obtain safety in Article II, Section 4 necessarily includes the right to provide safety to others. Whether that argument is right or wrong (as discussed below, it’s correct), Kerley has standing to raise the claim because he was penalized for providing safety to others. This is not a third-party claim; his claims are rooted solely in the City’s enforcement against him for the activities he allows on his property.

II. Kerley asserts two novel constitutional rights that warrant certification.

Nearly all of the City’s response is a merits-stage argument about whether Kerley will win his claim that the right to seek and obtain safety in Article II, Section 4 of the New Mexico Constitution protects his ability to allow a few people to sleep on his property who would otherwise have nowhere to go. The City argues that the constitutional text has no role to play here, but even if it did, Kerley did not introduce evidence to support his claims. [Resp. 6–9.] The City never once addresses any factor in Rule 1-074(S) NMRA, leaving un rebutted Kerley’s arguments for why this Court should certify the case to the Court of Appeals. Indeed, the City’s merits argument shows the novelty of these claims, as it cites decisions of other states (Rhode Island, Illinois, Kentucky, New Jersey, and Tennessee) to argue about the scope of the New Mexico Constitution’s Article II, Section 4. [Resp. 6–7.] It cites a single New Mexico case in its response, [Resp. 8], and that case makes clear that the right has not been fully fleshed out. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 51, 376 P.3d 836 (stating that Article II, Section 4 may “ultimately be a source of greater

² The City only argues that Kerley lacks standing under the right to seek and obtain safety and does not assert that he lacks standing to pursue his due process claim. [Resp. 4–5.]

due process protections”). It cites no factually analogous case. Why? Because this is a novel question about the meaning of the New Mexico Constitution, which is what certification is for.

When the time comes to argue the merits of his claims, Kerley will argue that the penalties imposed on him by the City deprive his constitutional rights protected by the right to seek and obtain safety and the due process guarantees.³ N.M. Const. art. II, §§ 4, 18. As set forth in his Motion, these arguments present novel questions of statewide importance. **[Mot. 2–4.]**

A. The Right to Seek and Obtain Safety protects Kerley’s ability to help those in need.

1. The Right to Seek and Obtain Safety is an important part of the New Mexico Constitution that plays an important role in constitutional cases.

The inherent rights clause of the New Mexico Constitution explicitly protects the right to seek and obtain safety. N.M. Const. art. II, § 4. And while the full scope of this clause has not been defined, the New Mexico Supreme Court has addressed it several times, whether relying on it to “inform[] our analysis,” *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 49, 376 P.3d 836, or warning courts to be “mindful of the more intimate relationship existing between a state government and its people,” *Cal. First Bank v. State*, 1990-NMSC-106, ¶ 44, 111 N.M. 64, 801 P.2d 646. What the courts haven’t yet addressed is whether the language protecting the right to seek and obtain safety provides an independent source of rights for those helping others. Kerley will show that New Mexico’s rich history and unique sense of hospitality and charity led to the framers’ drafting and ratification of the right to seek and obtain safety. Kerley will be the first to call upon that history to demonstrate the import of Article II, Section 4 and why it provides New Mexicans experiencing

³ He may also make other arguments, such as the City’s final decision was not supported by substantial evidence. *See* NMSA 1978, § 39-3-1.1(D)(2). He preserves his right to seek reversal of the final decision by any of the arguments set out by statute. However, he anticipates that his constitutional claims will be his main focus.

homelessness a right to seek and obtain safety, and gives Kerley a corollary right to provide that safety on his private property.

On the other hand, the City urges this Court to ignore the inherent rights clause as duplicative of the due process clause. **[Resp. 6–7.]** Apart from giving short shrift to the drafters of the clause, the City compares it to provisions within the Rhode Island and Illinois constitutions. *Id.* Although they share some common themes of freedom, New Mexico’s inherent rights clause explicitly provides an illustrative list of protected rights: “enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of seeking and obtaining safety and happiness.” N.M. Const. art. II, § 4. By contrast, Illinois’ provision secures a more generalized “life, liberty, and the pursuit of happiness,” Ill. Const. art. I, § 1, while Rhode Island’s focuses on the role of government in providing “for the protection, safety and happiness of the people,” R.I. Const. art. I, § 2. New Mexico’s provision is textually different and should be interpreted in light of its unique history. Kerley is asserting property rights and the right to obtain safety, which are unique to New Mexico’s inherent rights clause. At minimum, the scope of the clause merits further analysis before being relegated to an advisory, toothless clause.

2. *The City’s other arguments regarding the right to seek and obtain safety fail.*

A theme of the City’s response is that Kerley seeks a right to ignore zoning laws. **[Resp. 7–8.]** To be clear, Kerley does not assert that he has a freewheeling constitutional right to violate zoning regulations. Rather, Kerley argues that the City’s enforcement of its zoning ordinances to punish him for letting people sleep on his property who would otherwise face violence and harassment violates his constitutional rights. The City’s arguments fail to understand that all government action is subject to constitutional limitations.

The City also argues that Kerley failed to prove a constitutional violation. **[Resp. 8–9.]** This argument is premature and ignores a detailed record below demonstrating the contrary. A motion for certification provides the district court judge with information about the claims and issues that an appeal presents, and why it is in the interests of judicial efficiency to allow for certification to the Court of Appeals. Rule 1-074(S) NMRA. As such, Kerley emphasized the novel constitutional claims and the likelihood of appeal rather than providing a merits-based argument. He will provide the substantive argument at the appropriate time. Even so, the City’s complaints regarding a lack of evidence demonstrate a fundamental misunderstanding about constitutional rights.

The City argues that Kerley presented no evidence that people were actively seeking out his property to seek safety or that it was safer than other locations. **[Resp. 8–9.]** Once again, this argument is premature and unsupported. The nature and amount of evidence supporting Kerley’s claims is a question for the merits of the case, not part of the motion for certification. What the evidence will show is that there are not enough safe locations for destitute Albuquerqueans and that the City’s enforcement against Kerley seeking to evict those people—particularly without providing them a safe location to go to—violates the New Mexico Constitution. Further, as explained above, Kerley is asserting a violation of *his* constitutional rights, not a third-party claim on behalf of any third-party homeless people. Therefore, his claims do not hinge on proving that the homeless people sheltering on his property are inherently safer there than anywhere else in the City. He only needs to prove that his rights to provide safety and include others on his private property were infringed.

Although a strict safety comparison is unnecessary, Kerley did address the City’s alternatives and the public impact of the homelessness situation in his motion for certification. The City

faults Kerley for not demonstrating that his property is safer than the alternatives, but failed to address that “the other outdoor areas where people camp in the City” constitute a single approved Safe Outdoor Space and that the city shelters do not contain an adequate number of beds, leaving over a thousand individuals completely unsheltered. [Resp. 8]; *see also* [Mot. 4 & n.1.] The City also ignores the record below detailing the harm that unhoused individuals face on public property and the testimony by Kerley’s expert that unhoused people are safer on his property than they are in public. It belies common sense to argue that greeting a friendly face in a bookstore parking lot is less safe than fighting it out after having been turned away from a full shelter.

B. Under the New Mexico Constitution, property rights incorporate the right to include.

In addition to the right to seek and obtain safety, Kerley also argues that due process protects his right to use his property in this way. The New Mexico Constitution’s Due Process Clause ensures that “[n]o person shall be deprived of life, liberty or property without due process of law.” N.M. Const. art. II, § 18. This clause provides Kerley with substantive property rights, including the right to exclude those he does not want on his property, as well as the right to include people he wishes. *See generally Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (describing the right to exclude as “one of the most treasured rights of property ownership” (citations omitted)); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 742-43 (1998) (“the right to exclude must encompass ... the owner’s right to include others.”); Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691, 1710 (2012) (“The right to exclude does not require an owner ... to actually exclude others; the gatekeeper can decide to include.”). A property owner’s role as the gatekeeper of their property must contain both the ability to keep unwanted visitors out and wanted visitors in.

New Mexico courts have long recognized the importance of property rights and the right to exclude in particular. *See Santa Fe Cnty. Bd. of Cnty. Comm'rs v. Town of Edgewood*, 2004-NMCA-111, ¶ 5; 136 N.M. 301; *Carrillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 15, 389 P.3d 1087, 1093. As the lawful owner of his bookstore, Kerley has the right to include anyone he wants. The City cannot impose punishments through fines to bully Kerley to kick people off his own property—the New Mexico Constitution does not allow it.

III. The motion for certification is ready for this Court's review.

The City also argues that Appellants' request for certification is premature because Kerley has not filed a certificate in the district court stating that he has arranged with the agency to prepare and pay for the record, pursuant to Rule 1-074(F)(2) NMRA. **[Resp. 5.]** Though Kerley had not filed a certificate at the time the City filed its response, he has requested that the agency prepare the record and has since filed the certificate. On July 10, 2025, the undersigned counsel for Kerley emailed counsel for the City asking about the status of the record. It was our belief that Rule 1-074(H) governed the record, such that the service of the notice of appeal on the agency would trigger the agency's obligation to prepare the record. Counsel for the City informed us otherwise, and we emailed the agency to request that it prepare the record. The agency should file the record with this Court shortly. The City has not asserted that this delay has been unduly burdensome or prejudicial. "After receipt of the completed record," this Court can make its decision concerning certification. *See* Rule 1-074(S) NMRA.

CONCLUSION

The City fails to address the question before this Court with this motion: Does it involve "an issue of substantial public interest that should be decided by the Court of Appeals." Rule 1-074(S) NMRA. The answer to that is yes. The constitutional issues in this case are important questions of first impression. The scope of the inherent rights clause and the guarantees of due process,

as they come together in this case, have not been addressed by New Mexico courts. The issues reverberate across the state, impacting thousands of people without homes and those wishing to help them. Because this appeal involves novel constitutional questions of public importance, Kerley respectfully requests that this Court certify the case to the Court of Appeals.

Dated: July 29, 2025

Respectfully submitted,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing to be filed through the Odyssey File &
Serve this 29th day of July, 2025, causing counsel of record to be served by electronic means.

INSTITUTE FOR JUSTICE

By: */s/ Diana Simpson*
Diana Simpson