IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOSHUA SMITH, individually and on
behalf of other similarly situated individuals,

Plaintiff,

v. No. S-1-SC-39659

INTERINSURANCE EXCHANGE OF
THE AUTOMOBILE CLUB aka AAA,

Defendant.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB AKA AAA

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, *amici curiae* hereby certifies that this *Amicus* Brief complies with the limitations and requirements set forth in Rule 12-318(F)(3) NMRA and is printed in Times New Roman, 14-point type, and contains 3,345 words.

INTRODUCTION

The Chamber of Commerce of the United States of America ("Chamber"), as *amicus curiae*, files this brief in support of Interinsurance Exchange of the Automobile Club aka AAA ("Exchange"), as all parties were timely notified.[1] The certified question before the Court is "[w]hether *Crutcher v. Liberty Mut. Ins. Co.*, 2022-NMSC-001, 501 P.3d 433, applies prospectively or retroactively?" *Memorandum Opinion and Order Sua Sponte Certifying Question to the New Mexico Supreme Court*, filed Nov. 21, 2022 in Case No. 1:22-cv-00447-WJ-KK (D.N.M.) ("Certification Request"); Order granting Certification Request, filed Jan. 10, 2023. In *Crutcher*, this Court held:

> [W]e will now require every [automobile] insurer to adequately disclose the limitations of minimum limits UM/UIM policies in the form of an exclusion in its insurance policy[, *i.e.*, "that a purchase of the statutory minimum of UM/UIM insurance may come with the counterintuitive exclusion of UIM insurance if the insured is in an accident with a tortfeasor who carries minimum liability insurance"]. If the insurer provides adequate disclosure, it may lawfully charge a premium for such coverage.

2022-NMSC-001, ¶¶ 32-33.

The Chamber agrees with the arguments presented in the Exchange's brief in chief establishing that *Crutcher* should apply only to policies sold after the Court

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[1] Pursuant to Rule 12-320(C) NMRA, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

issued that decision. The Chamber independently encourages the Court to reach that holding as a matter of equity. Insurers like the Exchange reasonably relied on extant law when they sought and obtained the Superintendent of Insurance's approval of the uninsured motorist/underinsured motorist ("UM/UIM") premium rates they charge their policyholders. If, as Plaintiff requests, they are now forced to assume the unanticipated financial burden of foregoing or refunding a portion of their insureds' premiums, they will necessarily have to charge higher premiums on a go-forward basis to ensure they may pay valid claims. Higher premiums would result in significant long-term harm to New Mexico's interests in encouraging motorists to purchase auto insurance and in attracting insurance companies to compete in the State to serve the motoring public. In order to avoid those inequities and the ensuing frustration of important societal interests, the Court should make clear that *Crutcher* applies prospectively.

ARGUMENT

The rule of law is supposed to "give[] people confidence about the legal consequences of their actions." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Laws that retroactively impose new obligations on, or that grant new rights to, contracting parties disrupt such confidence because they "change the legal consequences of transactions long closed." *E. Enters v. Apfel*, 524 U.S. 498, 548 (1998).

In the interest of promoting equity, certainty, and confidence in the conduct of people's legal affairs, "[t]his Court has declined to follow the federal courts' bright-line rule applying appellate court decisions retroactively in all civil cases." *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 26, 245 P.3d 1214. Instead, "New Mexico follows 'a presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively.'" *Id.* (quoting *Beavers v. Johnson Controls World Servs., Inc.*, 1994-NMSC-094, ¶ 21, 881 P.2d 1376). That presumption "can be overcome by an express declaration, in the case announcing the new rule, that the rule is intended to operate with modified or selective (or even, perhaps pure) prospectivity." *Beavers*, 1994-NMSC-094, ¶ 22. It may also "be overcome by a sufficiently weighty combination of one or more of the *Chevron Oil* factors." *Id.* (observing that in *Whenry v. Whenry*, 1982-NMSC-067, 652 P.2d 1188, this Court "espoused" the factors articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). The *Chevron Oil* factors turn on three issues: (1) whether the decision "establish[es] a new principle of law," (2) "whether retrospective operation will further or retard its operation," and (3) "the inequity imposed by retroactive application[.]" *Id.* ¶ 23 (internal quotations omitted).

In its brief in chief, the Exchange explained why *Crutcher* should be applied prospectively under *Beavers*'s "express declaration" test (BIC 9-14) and pursuant to all three of the *Chevron Oil* factors (BIC 14-46). The Chamber will not repeat those

arguments, but it will elaborate upon *Chevron Oil*'s third factor, which presents an issue of equity. Under that factor, this Court must "'weigh[] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.'" *Whenry*, 1982-NMSC-067, ¶ 7 (quoting *Chevron Oil Co.*, 404 U.S. at 107); *Beavers*, 1994-NMSC-094, ¶ 22. As explained below, applying *Crutcher* retroactively (A) would be unjust to insurers who set UIM premiums with the Superintendent of Insurance's approval based upon their justifiable reliance on the Court's pre-*Crutcher* jurisprudence, and (B) would undermine New Mexico's societal interests of encouraging motorists to purchase auto insurance by forcing them to pay higher premiums in a less-competitive insurance market.

A. It would be unjust to penalize insurance companies that justifiably relied on the Court's pre-*Crutcher* jurisprudence in setting UIM premium rates with the Superintendent of Insurance's approval

In *Beavers*, this Court observed that "one of the powerful considerations informing [*Chevron Oil*'s] inequity factor is . . . the degree of reliance that persons affected, or potentially affected, by the rule may have placed on the state of the law antedating the rule." 1994-NMSC-094, ¶ 38. Thus, "[t]he greater the extent a potential defendant can be said to have relied on the law as it stood at the time he or she acted, the more inequitable it would be to apply the new rule retroactively." *Id.*

After all, "one of the cherished, fundamental principles of this nation's jurisprudence is that persons are at least entitled to know in advance what consequences adhere to their actions." *Id.* (quotations omitted). This principle is at its "strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction." *Id.* ¶ 28; accord *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved[.]").

Relying on *Beavers*'s exposition of *Chevron Oil*'s inequity factor, this Court has held that a judicially-imposed insurance disclosure in the UM/UIM context should be applied prospectively. *Montaño v. Allstate Indem. Co.*, 2004-NMSC-020, ¶ 22, 92 P.3d 1255. In *Montaño*, the insurer claimed its insured could only stack the coverage limits of two of his four insurance policies based on their anti-stacking clauses. *Id.* ¶ 1. The insured countered that the policies' anti-stacking clauses should be voided on public policy grounds, thereby allowing him to stack all four coverage limits. *Id.* Resolving the issue in the insured's favor, this Court held that because the subject policies were ambiguous, the insured could stack all four policies. *Id.* Rather than endorse a traditional case-by-case ambiguity analysis for other cases, the Court announced a new rule requiring all insurers to obtain written rejection of stacking in order to limit their liability. *Id.*

In announcing the new disclosure mandate in the UM/UIM stacking context, the *Montaño* court explained that its holding should be given "a purely prospective application." *Id.* ¶ 22 (citing *Beavers*). For support, the Court recognized that its holding "is a new, and not easily foreshadowed, aspect to our jurisprudence on stacking[.]" *Id.* Indeed, "until *Montaño*, no statute or regulation suggested that premium disclosure was required for a UM/UIM rejection to be effective." *Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 25, 329 P.3d 646. Because the disclosure was new and did not arise from a plain reading of New Mexico's insurance statutes or regulations, this Court held "it would be inequitable to apply it against Allstate before it has had an opportunity to alter its policy language[.]" *Montaño*, 2004-NMSC-020, ¶ 22.

Montaño is reflective not only of New Mexico's general approach to the prospectivity/retroactivity analysis, but also of the specific manner in which that analysis bears on insurance contract issues. The ability to rely on extant law at the time of contract formation creates certainty for all parties. *E. Enters*, 524 U.S. at 548. But such certainty is especially critical for insurance companies, for whom predictability and continuity in the law are essential. *American Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983) (refusing to retroactively apply new judicially-created rules to avoid "unfair hardship upon insurers and insureds who have set rates, purchased coverage for reasonably anticipated risks, and otherwise

justifiably acted in reliance upon" extant law); *N.J. Mfrs. Ins. Co. v. Breen*, 688 A.2d 647, 653 (N.J. App. 1997), *aff'd on other grounds*, 710 A.2d 421 (N.J. 1998) ("Changing that rule without allowing a period for adjustment and for changes in the policy form prescribed by the Department of Insurance would be inequitable" to automobile insurers and their policyholders). The business of insurance requires that insurance company resources be prudently managed so funds are available to pay claims on those risks policyholders have paid insurers to assume. Conversely, those resources cannot be used cavalierly to pay unanticipated claims or expenses that are retroactively imposed outside the terms and expectations embodied in the parties' own contracts.

Insurance is a contractual means of managing risk whereby a policyholder transfers a specified risk — here, the risk of being in an accident with an at-fault driver who carries less liability insurance or none at all — to an insurer in exchange for a specified premium. NMSA 1978, § 59A-1-5 (defining "insurance" as "a contract whereby one undertakes to pay or indemnify another at a loss from certain specified contingencies or perils[.]"). The premium the policyholder pays is "the consideration for insurance[.]" NMSA 1978, § 59A-18-3. That premium, which the Superintendent of Insurance must review and approve (NMSA 1978, §§ 59A-17-1 to -36), is based on an insurer's estimate of the likelihood and amount of covered future losses by determining the nature, probability, and magnitude of any assumed

risk. *See, e.g.,* 1 Steven Plitt *et al.*, Couch on Insurance 3d, § 1:2. To calculate premiums, an insurer thus relies on various factors, including the probability and amount of potential loss, policy limits, and the insurer's operational costs. *Id.*, § 1:6. Insurers must also accurately calculate and set aside reserves that enable them to continue operations while maintaining their ability to timely pay policyholders' future valid covered claims. *Id.*

To determine the appropriate premiums for UM/UIM coverage and thereby create sufficient reserves to pay covered claims, insurers like the Exchange have relied on extant New Mexico law permitting them to offset an insured's UIM coverage by the tortfeasor's liability coverage. *Schmick v. State Farm Mutual Automobile Ins. Co.*, 1985-NMSC-073, ¶ 24, 704 P.2d 1092; *see also* BIC 12-13 (addressing *Schmick*). Insurers' reliance on the "*Schmick* offset" has been both reasonable and justified, as this Court has repeatedly reaffirmed its legality for the last 38 years. *See, e.g.*, *Crutcher*, 2022-NMSC-001, ¶¶ 18-20; accord *Samora v. State Farm Mut. Auto Ins. Co.*, 1995-NMSC-022, ¶¶ 8-14, 892 P.2d 600; *State Farm v. Conyers*, 1989-NMSC-071, ¶ 13, 784 P.2d 986; and, *Fasulo v. State Farm*, 1989-NMSC-060, ¶ 15, 780 P.2d 633. Indeed, *Crutcher* nowhere suggested that the *Schmick* offset is illegal, nor could it, because the offset is dictated by statute. *Crutcher*, 2022-NMSC-001, ¶ 19 ("'[U]nder a statute like ours, where the most an insured can receive is the amount of underinsurance purchased for [the insured's]

benefit, that amount must be offset by available liability proceeds.'") (quoting *Schmick*, 1985-NMSC-073, ¶ 30).

Given the insurers' justifiable reliance on the *Schmick* offset in setting and collecting appropriate premiums for UM/UIM coverage with the Superintendent's approval, forcing them to reimburse, recalculate, or forego UIM premiums under pre-*Crutcher* policies would be inequitable. Under that scenario, the premiums charged and collected would necessarily be inadequate. After all, one purpose of the Insurance Rate Regulation Law, NMSA 1978, §§ 59A-17-1 to -36, is to "promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates[.]" *Id.,* § 59A-17-3(A)(1). Because the Superintendent-approved rate is *per se* reasonable, *Valdez v. State*, 2002-NMSC-028, ¶ 5, 54 P.3d 71, reducing insurers' premiums will materially impact the funds available to cover the risk and expenses they have undertaken. This dilemma is exacerbated by the fact that insurers will be forced to devote administrative resources to account for and comply with any modifications to the *Schmick* offset as it relates to the collection of premiums and resolution of claims. For example, the insurers' claims' departments will be forced to reopen and readjust all claims dating back potentially to the time *Schmick* was decided in 1985. Insurers have not allocated administrative resources

to comply with newly-created but retroactively-imposed requirements, but rather base the premiums they charge policyholders on the legal requirements applicable at the time of contracting. Increasing insurers' administrative expenses without notice only leads to a reduction in their reserves or to an increase in premiums, neither of which is equitable. Without sufficient reserves, insurers could be left with inadequate funds to pay valid claims, thus jeopardizing both the insurers and their insureds. Any retroactive application of *Crutcher* would therefore threaten to upend automobile insurance policies statewide.

Nor is the Chamber's concern hypothetical or overstated. In addition to the Exchange, the list of insurance companies against whom class action lawsuits have been brought under Plaintiff's *Crutcher* theory of liability keeps growing and now includes Allstate, Geico, Kemper, State Farm, Liberty Mutual, Nationwide, Progressive, Republic Underwriters, Travelers, The Hartford, and Young America (the "*Crutcher*-type class actions"). Specifically, undersigned counsel is aware of at least fifteen *Crutcher*-type class actions, listed in alphabetical order as follows:

1. *Aguilar-Tafoya v. Travelers*, No. D-202-CV-2023-01173 (filed February 17, 2023);

2. *Apodaca v. Young American Insurance Co.*, No. 1:18-cv-00399-JB-JHR (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2018-01469);

3. *Belanger v. Allstate Insurance Co.*, No. 1:19-cv-00317-WJ-SCY (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2019-00789);

4. *Bhasker v. Kemper Casualty Insurance Co.*, No. 17-cv-00260-KWR-JHR (D.N.M.) (removed from Second Judicial District Court (No. D-202-CV-2017-00024) (preliminarily settled as of 2/8/2023);

5. *Crutcher v. Liberty Mutual Insurance Co.*, No. 1:18-cv-00412-JCH-LF (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2018-01371);

6. *Garcia v. Republic Underwriters Ins. Co.*, No. D-202-CV-2020-07018;

7. *Lucero v. Nationwide*, No. 1:19-cv-00311-KK-JHR (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2019-01051);

8. *Marrs et al. v. U.S.A.A. Casualty Insurance Co.*, No. 1:22-cv-00417-MV-JHR (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2020-03572);

9. *Martinez v. Progressive Preferred Insurance Co.*, No. 1:19-cv-00004-JHR-KK (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2018-03583);

10. *Padilla v. Geico Advantage Insurance Co., et al.*, No. D-202-CV-2019-2317;

11. *Palmer v. State Farm Mutual Auto Insurance Co.*, No. 1:19-cv-00301 (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2019-01228);

12. *Schwartz v. State Farm Auto Ins. Co.*, No. 1:18-cv-00328-KWR-SCY (D.N.M.) (removed from Second Judicial District Court, No. D-202-CV-2018-01264);

13. *Soleil v. Property and Casualty Ins. Co. of Hartford*, No. D-101-CV-2020-02761;

14. *Thaxton v. Geico*, No. 1:18-cv-00306-KWR-KK (D.N.M.) (settled as of 2/3/2023); and,

15. *Vega v. Metropolitan Direct Property and Casualty Ins Co.*, No. D-202-CV-2021-01096.

While fifteen *Crutcher*-type class actions brought against eleven different insurance companies is an alarming statistic unto itself, it is by no means the "finish line." Apart from the above-referenced insurance companies, *Crutcher*'s ruling renders vulnerable all insurers who issued automobile policies in New Mexico during the putative class period, even those not yet sued. Indeed, the first listed case, *Aguilar-Tafoya v. Travelers*, D-202-CV-2023-01173, was filed less than a month ago (Feb. 17, 2023) and is the first such case brought against Travelers. This is proof-positive that the litigation pipeline of *Crutcher*-type class actions remains open and active.

Given the growing number of *Crutcher*-type class actions, it is imperative that the Court make clear that *Crutcher*'s disclosure requirement is to be prospectively applied. As *Montaño* teaches us, when this Court imposes a new rule of law that does not arise from a plain reading or application of New Mexico's insurance statutes or regulations, it is "inequitable" to apply that rule against insurers before giving each insurer "an opportunity to alter its policy language[.]" 2004-NMSC-020, ¶ 22. Because *Crutcher*'s disclosure obligation is both new and judicially-imposed, the Court should therefore refuse Plaintiff's invitation to penalize insurance companies like the Exchange for using insurance policy forms and charging premiums directly scrutinized and expressly approved by their regulator, the Superintendent of Insurance.

B. It would be injurious to New Mexico's societal interests and the motoring public to apply *Crutcher* retroactively, as doing so will inevitably result in higher premiums and fewer insured motorists

The fallout from applying *Crutcher* retroactively would not be limited to insurers like the Exchange. To the contrary, if insurers are unable to accurately estimate the cost of regulatory compliance in New Mexico, in this case because a new rule of law is applied retroactively, they would be forced to impose higher premiums at the outset to account for the risk and uncertainty of newly-created but retroactively-imposed legal requirements. Such a result would ultimately harm New Mexico residents.

The purpose of New Mexico's Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-205 to -277, is to "ensure[ ] that motor vehicle operators have the ability to respond in damages to accidents occurring on New Mexico roadways." *State v. Yazzie*, 2016-NMSC-026, ¶ 4, 376 P.3d 858 (internal quotations and citation marks omitted). The Act serves that purpose by requiring each motor vehicle operated in the State of New Mexico to either be insured or accompanied by valid evidence of financial responsibility. NMSA 1978, § 66-5-205. Similarly, New Mexico's UIM statute and implementing regulations were designed to "expand insurance coverage to protect the public from damage or injury caused by other motorists who were not insured and could not make the impaired party whole." *Sandoval v. Valdez*, 1978-NMCA-016, ¶ 16, 580 P.2d 131. That policy "is reflected

in the plain language of Section 66-5-301(A) and (B), which mandate that all automobile liability policies shall include UM/UIM coverage for the persons insured under the liability policy." *Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 15, 228 P.3d 462.

Despite the laudable purpose of the foregoing statutes, New Mexico is fourth in the nation by percentage of uninsured drivers, with an estimated 21.8 percent — or 1 in 5 — motorists being uninsured. *See Facts + Statistics: Uninsured Motorists*, Insurance Information Institute, available at https://www.iii.org/fact-statistic/facts-statistics-uninsured-motorists (last visited Feb. 27, 2023). It follows that insurance companies offering automobile policies in our State incur a disproportionately high number of UM/UIM claims. Yet, if UM/UIM and other coverage is rendered more expensive because of the unforeseen cost and uncertainty created by a retroactive application of *Crutcher*, likely even fewer New Mexico motorists will carry *any* automobile insurance in the future.

Last but not least, a retroactive application of *Crutcher* would harm New Mexico and its public by discouraging insurers from coming to or remaining in the State due to the significant uncertainty such application would create. This concern is not hypothetical. *See, e.g.*, *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 18, 309 P.3d 1047 (recognizing that New Mexico experienced an "insurance crisis" after the "withdrawal of the insurance company underwriting the medical society's

professional liability program" based on unpredictable liability exposure). Holding that *Crutcher* applies retroactively would also more broadly create a dangerous precedent that private contracts of all types may be judicially rewritten through the retroactive application of new legal obligations not pronounced in any statute or regulation. Any such precedent would have adverse effects on both consumers and businesses in New Mexico, extending not only to the insurance market but to other markets more broadly.

CONCLUSION

For all of the foregoing reasons, the Chamber respectfully requests that the Court hold that the new disclosure requirement judicially imposed in *Crutcher* applies prospectively only.

Dated: March 3, 2023.

Respectfully,

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