IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO,

Plaintiff-Respondent,

v. No. S-1-SC-40473

NEW MEXICO CORRECTIONS DEPARTMENT and
ANDREW KUHLMAN, in his official capacity,

Defendants-Petitioners.

CONDITIONALLY FILED AMICUS BRIEF OF
NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT
IN SUPPORT OF PLAINTIFF-RESPONDENT

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Statement of Compliance

Pursuant to Rule 12-318(A)(1)(c) NMRA and Rule 12-318(G) NMRA, the undersigned counsel hereby certifies that this brief complies with the type-volume limitations set forth in Rule 12-318(F)(3) NMRA. According to Microsoft Office LTSC Professional Plus 2021, the body of the brief as defined by Rule 12-318(F)(1) NMRA contains 5087 words.

TABLE OF AUTHORITIES

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STATUTES AND RULES

This case concerns the "as otherwise provided by law" exception to the Inspection of Public Records Act ("IPRA"), NMSA 1978, § 14-2-1(H) (2009) (currently codified as § 14-2-1(L) (2023)), and specifically the power of administrative agencies to create their own "law" for purposes of the exception. Defendant-Petitioner New Mexico Corrections Department ("NMCD") invoked its own "regulations" in denying an IPRA request from Plaintiff-Respondent American Civil Liberties Union of New Mexico ("ACLU") for documents pertaining to the use-of-force policies employed by a correctional facility. With a nod to this Court's seminal decision in City of Las Cruces v. Public Employee Labor Relations Board, 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451, NMCD claimed that its own internal directives had "the force of law" because they had been promulgated in accordance with its general enabling statutes, which authorized NMCD to adopt rules and regulations that were "necessary" in the performance of NMCD's statutory duties.

The New Mexico Foundation for Open Government ("NMFOG") offers this amicus brief in support of the ACLU's position.[1] In the first place, the "rules and regulations" that NMCD cites in support of its wholesale withholding of the records

[1] Pursuant to Rule 12-320(C) NMRA, the undersigned counsel certifies that he authored the entirety of this brief, and that no party to the present action – and none of the parties' counsel – made a monetary contribution intended to fund the preparation or submission of the brief. Pursuant to Rule 12-320(D)(1), all parties received timely notice of NMFOG's intent to file the brief.

at issue are not rules and regulations at all, but policy statements at best, and in large part mere rubber-stamp legends affixed to the records at the direction of the Secretary of Corrections. Yet even if they had amounted to formally promulgated regulations, they would not have had the force of law, because NMCD's enabling statutes neither state nor suggest that use-of-force policies and related documents should be shielded from public view. Finally, in attempting to split the difference between the ACLU's position and NMCD's – by ruling that the enabling statutes were capable of carrying the force of law and creating an exception to IPRA, but only when the need to keep particular documents or portions of documents confidential was "clearly shown" – the district court erroneously sought to resurrect the "rule of reason" that was laid to rest by the supreme court more than a decade ago.

The court of appeals affirmed the district court's judgment to the extent that the judgment directed NMCD to disclose the withheld documents, and reversed the district court's resort to the rule of reason. The court of appeals' decision was sound. This Court should uphold it.

INTEREST OF THE AMICUS

NMFOG is a New Mexico nonprofit, nonpartisan organization whose mission is to help individuals, businesses, students, educators, journalists, lawyers, and other engaged citizens understand, obtain, and exercise their rights under IPRA, the Open

Meetings Act, the Arrest Record Information Act, the federal Freedom of Information Act, and the First Amendment, as well as to help public officials understand and discharge their obligations under those statutes and constitutional provisions. In furtherance of its mission, NMFOG maintains a hotline, engages in educational outreach, provides testimony at the legislature, and seeks to persuade public bodies to reconsider positions at odds with government transparency. When necessary, NMFOG also litigates, either on its own behalf or as an amicus supporting parties who aim to advance the cause of openness in government.

The assertion that an administrative rule or regulation makes confidential a document that would otherwise be subject to disclosure under IPRA is a recurring source of vexation for records requesters, and thus an ongoing matter of interest and concern to NMFOG. In 2015, for instance, NMFOG sued to invalidate a Department of Health regulation that purported to prohibit disclosure of the names, addresses, and telephone numbers of current and prospective holders of licenses to produce and distribute medical cannabis. See St. Cyr v. N.M. Dep't of Health, No. D-202-CV-2015-05674. That case resolved when the regulation in question was withdrawn.

But cabinet departments are not the only public bodies that claim the power to create exceptions to IPRA "as otherwise provided by law"; subunits of state government are also getting in on the act. NMFOG learned in 2022 that the City of Albuquerque had adopted an ordinance declaring employees' home addresses and phone numbers confidential. Though in sympathy with the privacy interests that had inspired the ordinance, NMFOG could find no constitutional provision, statute, or supreme court rule that would justify it. The City maintained that the ordinance was fully authorized by the City's right to self-governance as a home rule municipality. (The legislature has since enacted a similar exception by amending IPRA's definition of "protected personal identifier information." See NMSA 1978, § 14-2-6(F)(4) (2023).)

As regulatory confidentiality provisions proliferate, the task of keeping up with them – and of intervening in time to argue against their adoption – becomes more and more difficult. In a complex, pluralistic society in which a part-time legislature cannot be everything and everywhere all at once, the decentralization and diffusion of legislative power may well be unavoidable; it is the hallmark of the administrative state in which we live. But government transparency is a core democratic value and the public policy of the entire state, as the legislature has declared. See NMSA 1978, § 14-2-5 (1993). In NMFOG's view, we should be reluctant to allow subdivisions of state government to decide that their own policies are entitled to greater weight. If any such decision is to be made, it should be made at the top – in the legislature – where it stands the best chance of coming to the public's attention and receiving the careful consideration it deserves.

Eleven years ago, when the court of appeals wrestled with the question whether an administrative rule constitutes "other[] … law" within the meaning of Section 14-2-1(H), see Edenburn v. N.M. Dep't of Health, 2013-NMCA-045, 299 P.3d 424, NMFOG received permission to participate as an amicus. Likewise in the present case, the court of appeals granted NMFOG's motion for leave to file an amicus brief, and subsequently cited NMFOG's brief "with approval" in holding that the ACLU was entitled to the records it had requested. See Am. Civil Liberties Union of N.M. v. N.M. Corr. Dep't, 2024-NMCA-071, ¶ 17, 556 P.3d 565. NMFOG believes that its broad experience with the ways in which transparency can be eroded a little bit at a time, by a thousand bureaucratic cuts – or, conversely, protected on a statewide basis, by a single clear statement of principle – will assist the Court in reaching the correct decision. NMFOG therefore submits this amicus brief in support of the position taken by the ACLU.

SUMMARY OF PROCEEDINGS

In October 2019, the ACLU submitted an IPRA request to NMCD for public records concerning the institutional use of force at the Southern New Mexico Correctional Facility ("SNMCF"). The request encompassed "records pertaining to institutional use of force, restraints, and/or chemical agents … at [SNMCF] used to discipline, restrain, subdue, or otherwise exert control over any person in SNMCF custody," including all policies and procedures and incident reports regarding those subjects and all records identifying the SNMCF employees involved in the incidents reported. **[1 RP 6–7.]**

NMCD denied the entirety of the request and disclosed not a single document. NMCD's principal contention was that the records were confidential under IPRA's catch-all exception for records whose confidentiality is "otherwise provided by law," § 14-2-1(H), because NMCD's own directives made them confidential. Observing that the IPRA request "could … implicate inmate grievances," NMCD cited an internal "policy and procedure" making such documents confidential. **[1 RP 8.]** And regarding its use-of-force policies, NMCD stated only that it had "designated" such documents confidential. **[Id.]**

NMCD's confidentiality policies and designations were "law" under IPRA's catch-all exception, NMCD argued, because they were "authorized by a statute" **[1 RP 8]** – actually two statutes, as NMCD has since elaborated **[BIC 7]**. Both are enabling statutes. One of them, compiled within the Corrections Department Act, provides that the Secretary of Corrections "may make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions." NMSA 1978, § 9-3-5(E) (2004). The other, a part of the Corrections Act, similarly directs the Secretary of Corrections to "adopt rules and regulations necessary for administration of the Corrections Act, and enforce and administer those so adopted." Id. § 33-1-6(B) (1981).

The ACLU brought an IPRA enforcement action, and the parties filed cross-motions for summary judgment. **[AB 3.]** NMCD, in support of its motion, attached documents entitled "policies" that provided for the confidentiality of "inmate records" and "inmate grievances," that circularly classified "inmate files" as confidential except with respect to "documents … that are public records," and that – in similarly unenlightening fashion – accorded confidentiality to "[a]ny investigations, reports or other documents containing confidential information." **[1 RP 138–40, 144.]** NMCD's exhibits also made clear that no rule or regulation, and not even a "policy," provided for the confidentiality of its use-of-force manual; NMCD's sole basis for refusing to disclose that document was a boldfaced, italicized, all-caps legend on the cover declaring that it was "not to be placed in inmate libraries or available to the public." **[<u>Id.</u> 123, 213; BIC 11.]**

In denying NMCD's motion, the district court initially ruled that "the general enabling statutes relied upon by … NMCD are insufficient in [and] of themselves to meet the 'as otherwise provided for by law' exception." **[2 RP 275.]** But by order dated June 21, 2021, after reviewing the responsive documents in camera, the court "conclude[d] that [its original ruling was] flawed." **[<u>Id.</u> 282.]** Instead, the court decided: "for a rule or regulation promulgated pursuant to 33-1-6 to create an exception to IPRA inspection, it must be clearly shown to be necessary for administration of the Corrections Act. Upon that showing of clear necessity, the enabling statute is sufficient to fall under the 'otherwise provided by law' IPRA exception." **[Id. 283.]** The court went on to indicate that as to several documents – evidently including portions of NMCD's use-of-force policies – the requisite showing had been made. **[Id. 283–84.]**

NMCD filed a motion to reconsider, which the district court denied in May 2022. **[Id. 360–62.]** NMCD then appealed from the June 2021 and May 2022 orders. **[Id. 464.]** The ACLU filed a cross-appeal from the same two orders. **[Id. 476.]** Affirming the portion of the district court's decision from which NMCD had appealed, and reversing on the ACLU's cross-appeal, the court of appeals "conclude[d] that all of the records at issue are subject to disclosure." Am. Civil Liberties Union, 2024-NMCA-071, ¶ 1.

ARGUMENT

I. The policy statements and document labels on which NMCD relies are insufficiently formal to wield "the force of law."

"If not in conflict with legislative policy, legislatively authorized rules and regulations have the force of law." Romero v. Dairyland Ins. Co., 1990-NMSC-111, ¶ 7, 111 N.M. 154, 803 P.2d 243. Following the lead of cases like Romero, this Court held in City of Las Cruces v. Public Employee Labor Relations Board, 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451, that IPRA's "otherwise provided by law" exception "contemplates a regulation properly promulgated to further the legislative intent behind" the statute under which it was issued. Id. ¶ 5. And while that formulation raises questions about which sorts of statutes can give rise to confidentiality regulations possessing the force of law, see infra pt. II, NMCD's claim of confidentiality fails at the threshold – because no "rule" or "regulation" underlies it.

NMCD's own policies prove the point. They define a "policy" as a "statement that provides general direction to administrators, supervisors, [and] employees." **[1 RP 132.]** And they observe that while "rules" must be published in the New Mexico Register – and rules affecting persons outside NMCD must be aired in a public hearing before they can be approved – policies need only be approved by the Secretary of Corrections or the Secretary's designee. **[Id. 133.]** Nor is NMCD's discussion of the distinctions between "rules" and "procedures" excessively punctilious; NMCD's own enabling statute confirms its accuracy. The statute provides that "[a]ll rules and regulations shall be filed in accordance with the State Rules Act," and that regulations "affecting any person or agency outside [NMCD]" – as regulations purporting to curtail IPRA rights surely do – cannot be adopted "without a public hearing." NMSA 1978, § 9-3-5(E) (2004). NMCD does not suggest that the "policies" it cites in opposition to the ACLU's IPRA request were ever published in the New Mexico Register, filed in compliance with the State Rules Act, or considered in a public hearing. Nothing more than the Secretary's signature was necessary to effectuate them.

The "NOT TO BE PLACED IN INMATE LIBRARIES OR AVAILABLE TO THE PUBLIC" warning on the cover of NMCD's use-of-force manual **[1 RP 213]** merits less deference still. It is not a rule, a regulation, or even a policy; at best it is the end product of one of those sources of authority, an unexplained artifact of a hidden agenda. Because the guiding principle behind it is secret, the command's consonance with background legal norms – with NMCD's enabling statutes, for example – is impossible to evaluate.

In Princeton Place v. New Mexico Human Services Department, 2022-NMSC-005, 503 P.3d 319, the supreme court explored the difference between "legislative" rules and "interpretive" rules – a subject of particular relevance here. "[R]ules issued through an official notice-and-comment process are often referred to as legislative rules because they have the force and effect of law." Id. ¶ 28 (internal quotation marks and brackets omitted). By contrast, interpretive rules – like "general statements of policy, or rules of agency organization, procedure, or practice," id. ¶ 27 (internal quotation marks omitted) – "do not require notice-and-comment, which makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." Id. ¶ 28 (internal quotation marks omitted). But "that convenience comes at a price: [i]nterpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." Id. (internal quotation marks omitted). It follows that NMCD's "policies"

– having never been published, publicly filed, or subjected to the crucible of public comment – lack the rigor and formality necessary to constitute rules or regulations with the force of law. They therefore fail to qualify as laws that "otherwise provide[]" for confidentiality within the meaning of IPRA's catch-all exception.

II. Only statutes calling for confidentiality, or at least containing concrete, particularized indications of a need for it, can justify regulations exempting records from the scope of IPRA.

Suppose, however, that NMCD's policies and confidentiality markings amounted to regulations. Would they then stand as valid exceptions to IPRA? NMCD insists that the secrecy of its use-of-force manual is "necessary for NMCD to safely administer New Mexico's prisons." **[BIC 13]**. The argument is that because "the perceived unpredictability of officers disincentivizes inmate violence," disclosure of NMCD's use-of-force policies would "undermine [the policies'] effectiveness" by enabling inmates to "develop and utilize counter measures," thereby endangering correctional officers and prisoners alike. **[Id. 12–14.]**

As an initial matter, there is cause to be skeptical of this theory. Penologists employing similar reasoning might well have urged the Founders to redact the Eighth Amendment from the Bill of Rights, so as to keep inmates guessing about whether correctional officers would ever respond to prison unrest by inflicting cruel and unusual punishment. But whatever utility such an approach might have had in 1791, the cat is out of the bag now, and inmates know on some level – if not to the level of operational detail – that the Constitution places limits on guards' ability to act. They know, too, that policies are sometimes forgotten or ignored, and that correctional officers with weapons place them at risk, no matter what constraints on the officers' freedom of action may exist on paper. In short, it seems doubtful that disclosure of NMCD's use-of-force manual would make prisons substantially more dangerous places than they already are. Cf. Hjerstedt v. City of Sault St. Marie, 7 N.W.3d 102, 106–07, 112–13 (Mich. Ct. App.) (rejecting as "speculative" and unsupported by evidence the opinions of two police chiefs that disclosing department's use-of-force policy would enable lawbreakers to "circumvent" the policy and eliminate peace officers' "edge," particularly since "numerous other jurisdictions … have opted to make their use-of-force policies easily available to the public via the internet"), rev'd mem. in part on other grounds, 997 N.W.2d 451 (Mich. 2023).

At the same time, the other side of the equation – the value of openness – cannot be disregarded. In an era in which video clips of inexplicable violence inflicted by police officers and prison guards seem to emerge almost weekly, the issue takes on special resonance. The public availability of use-of-force policies is indispensable to any intelligent discussion of the problem. Nor is it possible to appraise NMCD's show-stopping contention that the protection of inmates' constitutional rights depends on the policies' continued confidentiality **[BIC 26–27]**, when the policies themselves – in accordance with this argument – remain unavailable for public inspection.

Ultimately, however, the controlling question is one of law, not public policy. See Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't, 2012-NMSC-026, ¶¶ 15–16, 283 P.3d 853. The question is whether NMCD's "rules" were "promulgated in accordance with [a] statutory mandate to carry out and effectuate the purpose of the applicable statute." City of Las Cruces, 1996-NMSC-024, ¶ 5. NMCD argues that they were, because the legislature empowered NMCD to adopt and enforce rules "necessary to carry out [NMCD's] duties," § 9-3-5(E), or "necessary for administration of the Corrections Act," § 33-1-6(B) – and holding the requested documents in confidence is "necessary" to enable NMCD to discharge its statutory duty to operate safe prisons.

There is nothing remarkable, however, about the general enabling language on which NMCD relies. In fact the legislature incorporated the same boilerplate grant of rulemaking authority in the enabling statute of nearly every cabinet department in New Mexico, see NMSA 1978, § 9-1-5(E) (2022), including the Children, Youth and Families Department, see id. § 9-2A-7(D) (1993), the Department of Finance and Administration, see id. § 9-6-5(E) (1983), the Department of Health, see id. § 9-7-6(E) (2017), the Department of Environment, see id. § 9-7A-6(D) (1991), the Health Care Authority, see id. § 9-8-6(E) (2024), the

Economic Development Department, see id. § 9-15-6(D) (1993), the Tourism Department, see id. § 9-15A-6(D), the Regulation and Licensing Department, see id. § 9-16-6(D) (2021), the General Services Department, see id. § 9-17-5(E) (1983), the Department of Public Safety, see id. § 9-19-6(E) (2015), the Indian Affairs Department, see id. § 9-21-6(E) (2004), the Veterans' Services Department, see id. § 9-22-6(E), the Aging and Long-Term Services Department, see id. § 9-23-6(E), the Public Education Department, see id. § 9-24-8(D), the Higher Education Department, see id. § 9-25-8(D) (2005), the Workforce Solutions Department, see id. § 9-26-6(E) (2007), the Department of Information Technology, see id. § 9-27-6(J) (2023), and the Homeland Security and Energy Management Department, see id. § 9-28-4(E) (2009); see also id. § 9-11-6.2(A) (2015) (similar but not identical language for the Taxation and Revenue Department); id. § 9-29-6(E) (2019) (Early Childhood Education and Care Department). Nor is that sort of enabling language confined to cabinet-level departments; it is, to the contrary, a common way of describing the delegation of rulemaking power. See, e.g., id. § 3-12-3(A)(7) (1967) (certain municipalities); id. § 9-5B-6(B)(1) (2020) (Youth Conservation Corps Commission); id. § 61-3-10(A) (2022) (Board of Nursing); id. § 61-14A-8(B) (Board of Acupuncture and Oriental Medicine); id. § 61-17A-7(A)(1) (Board of Barbers and Cosmetologists); id. § 61-17B-16(A)(1) (Board of Body Art Practitioners).

The secretary of a cabinet department, a commission, or a licensing board is typically presumed to be an expert in the subject matter of the department's organic statute. And in NMFOG's experience, public bodies that promulgate secrecy regulations almost always declare them to be "necessary" in furtherance of the public bodies' special missions. Should we therefore conclude that the legislature licensed nearly every entity of state, county, and municipal government to craft its own exemption from IPRA?

NMFOG believes not. "[T]he public policy of this state[is] that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees," and that "provid[ing] persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees." NMSA 1978, § 14-2-5 (1993). Given that top-down, statewide policy prescribed by the legislature, this Court should be reluctant to credit NMCD's sweeping claim of authority to carve out exceptions to the policy in the name of "necessity" – a claim that could be made with equal plausibility by any number of public bodies. Nor does NMCD suggest any check on the power of multiple government entities to curtain their records from public view under such a doctrine, other than to leave it to courts to determine whether confidentiality "is truly necessary for the effective and safe and effective operation" of the agency in question. **[BIC 18.]** That approach would merely put common-law courts back in the discredited business of determining on a case-by-case basis whether confidentiality, supposedly justified by enabling statutes that say nothing about confidentiality, would further "the public interest." See infra pt. III.

City of Las Cruces provides the proper framework for assessing the claim that an agency regulation purporting to place public records beyond the reach of IPRA carries "the force and effect of law." Princeton Place, 2022-NMSC-005, ¶ 28. The regulation at issue in City of Law Cruces, promulgated by the Public Employee Labor Relations Board, accorded confidentiality to petitions signed by employees who sought to trigger representation elections. See 1996-NMSC-024, ¶ 3. Although no statute expressly declared the confidentiality of such documents, the Public Employee Bargaining Act provided that representation elections were to be conducted by secret ballot. See id. Preserving the secrecy of the ballot, and thus avoiding interference with employees' right to unionize, would have been largely futile if the City opposing the election had gained access to the names of employees who had successfully petitioned the board to hold the election. Under these circumstances, the regulation had "the force of law" because it "was promulgated in accordance with the statutory mandate" – a mandate not merely to do whatever the board deemed "necessary" to fulfill the various purposes of the Public Employee

Bargaining Act, but specifically to avoid undermining an express statutory guarantee of secret-ballot representation elections. See id. ¶¶ 1–7.

Edenburn v. New Mexico Department of Health, about which NMCD's brief is silent, applied these principles to the question whether various regulations that characterized draft documents as "non-records" under the Public Records Act warranted withholding them from a requester under IPRA. See 2013-NMCA-045, ¶ 23. The Court explained that in contrast with the confidentiality regulation analyzed in City of Las Cruces – which had furthered the purposes of a statute that "specifically" called for the secrecy of ballots cast in union representation elections – the purpose of the Public Records Act was "solely organizational," "to establish a system for preserving records." Consequently, the regulations lacked "the force of law" in an IPRA lawsuit. See id. ¶ 26.

A late-breaking case in point is Beck v. State ex rel. Children, Youth & Families Department, No. A-1-CA-40259 (N.M. Ct. App. Sept. 25, 2024), in which the court considered whether the Children, Youth & Families Department ("CYFD") had properly redacted the names, e-mail addresses, and other personal identifying information of foster parents before disclosing records requested under IPRA. Beck, slip op. ¶¶ 1–2. CYFD had redacted the records on the strength of its own regulation making the identities of foster parents confidential. Id. ¶¶ 2–3. Rejecting the requester's argument that CYFD's confidentiality regulation lacked "the force of law" for IPRA purposes, the court explained:

> [T]wo requirements must be met before a regulation will … qualify for the IPRA catchall exception [for confidentiality "otherwise provided by law"]. First, the agency must be authorized by statute to promulgate regulations necessary for its administration…. [S]econd[,] … [the regulation] must be based on … specific statutes that relate[] to the effects of disclosure and the confidentiality of the information.

Id. ¶ 29 (citations and internal quotation marks omitted). The Children's Code, in contrast with the Corrections Act at issue in this case, is a statute that commands confidentiality; it teems with provisions protecting the identities of abused and neglected children and their parents. Though none of the Code's sections specifically extend that confidentiality to foster parents, the court reasoned that doing so was necessary to protect the identities of the abused and neglected children who are placed with foster parents. See id. ¶¶ 30–31.

The lesson of City of Las Cruces, Edenburn, and Beck is plain. Administrative rules and regulations have the force of law only to the extent that they advance, and do not conflict with, legislative policy. City of Las Cruces, 1996-NMSC-024, ¶ 5. And legislative policy is not divined from the emanations and penumbras of general enabling statutes, but instead from statutes that "specifically" set the policy forth. Edenburn, 2013-NMCA-045, ¶ 26. Here, NMCD has identified nothing in the Corrections Act or the Corrections Department Act specifically stating or suggesting that the documents NMCD refused to disclose should be confidential. Indeed, NMCD cannot even point to a statutory mandate enjoining NMCD to operate prisons "safely"; it argues only that the mandate is "implicit" in the enabling acts. **[BIC 29.]** Accordingly, the only public policy in play is the one declared by IPRA itself – "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5. If NMCD believes that confidentiality is essential to the proper functioning of New Mexico's corrections system, NMCD should make its argument to the legislature – not this Court.

III. The district court's compromise decision – rejecting NMCD's blanket refusal to disclose documents, but attempting to discern the "clear necessity" of confidentiality on a document-by-document basis – erroneously reintroduced the rule of reason.

The district court determined that NMCD's application of the "otherwise provided by law" exception to IPRA was "unlawfully broad." **[2 RP 283.]** But instead of ordering NMCD to disclose all the documents at issue, the court reviewed the documents in camera and undertook to identify the ones for which NMCD had made a "showing of clear necessity" for confidentiality. **[Id.]** The upshot of this procedure was to ratify the withholding of documents to which no specific IPRA exception applied. **[Id. 284.]**

The ruling was erroneous. In the first place it credited NMCD's defective contentions that NMCD "policies" are "rules and regulations" and that NMCD's enabling statutes are capable of "creat[ing] an exception to IPRA" under Section 14-2-1(H). See supra pts. I–II. Of equal concern, however, was the district court's return to a bygone era of IPRA adjudication – the reign of the rule of reason.

Under that "rule," courts considered themselves empowered to "determine whether records not specifically exempted by IPRA should be withheld from the requester on the grounds that disclosure 'would not be in the public interest.'" Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't, 2012-NMSC-026, ¶ 15, 283 P.3d 853. "[T]he rule of reason require[d] the district court to balance the fundamental right of all citizens to have reasonable access to public records against countervailing public policy considerations which favor[ed] confidentiality and nondisclosure." City of Farmington v. The Daily Times, 2009-NMCA-057, ¶ 8, 146 N.M. 349, 210 P.3d 246 (internal quotation marks and comma omitted), overruled by Republican Party, 2012-NMSC-026, ¶ 16. But in Republican Party, the supreme court did away with the rule of reason, because the legislature had "obviat[ed]" the need for it "by enacting specific exceptions to disclosure … and maintaining the exception 'as otherwise provided by law.'" 2012-NMSC-026, ¶ 16. "Accordingly," the court instructed, "courts should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution." Id.

The district court did not adhere to this instruction. Though the court nominally sought to ascertain whether particular documents qualified for confidentiality under the language of a claimed IPRA exception – namely, the "necessary for administration of the Corrections Act" formula of NMCD's enabling statute **[2 RP 283]** – the court effectively arrogated to itself the power to determine whether a showing of "clear necessity" for confidentiality overcame the rights of inspection that the public would otherwise enjoy. That the court engaged in a forbidden balancing of interests was aptly demonstrated in the court of appeals by the lament of NMCD – the apparent beneficiary of the court's unorthodox mode of analysis – that the court had engaged in "judicial policymaking" for which no clear standards existed. **[Ct. App. BIC 12–13.]**

There was no warrant for the district court to do what it did. Instead, the court should have "restrict[ed] its analysis" to the categorical legal judgments contemplated by <u>Republican Party</u>. 2012-NMSC-026, ¶ 16. That approach would have revealed that no constitutional, statutory, regulatory, or judicial-rule-based exception to IPRA inspection rights existed, <u>see</u> <u>id.</u> – which should have been the end of the matter. To the extent that the district court went beyond that boundary, the court of appeals properly reversed its decision. Yet by imploring this Court to weigh the "necess[ity]" of secrecy "for the safe and effective operation of [an] agency" against "IPRA's policy of liberal disclosure" **[BIC 18]**, NMCD effectively urges the Court to reinstate the regime of policy-based interest-balancing that the Court retired in Republican Party. The Court should decline the invitation.

CONCLUSION

NMCD cannot custom-make IPRA exceptions through the issuance of policy statements and the stamping of documents "confidential." But even if NMCD had articulated the exceptions in formal regulations adopted through notice-and-comment rulemaking, their incompatibility with the overarching public policy of openness enshrined in IPRA – and their lack of any foundation in countervailing public policies expressed in statute – would render them invalid. To the extent that the district court endorsed NMCD's withholding of some of the requested records nevertheless, it failed to follow these precepts, as the court of appeals held.

For the reasons set forth in this brief and in the briefs submitted by the ACLU, the Court should affirm the court of appeals' decision.

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We hereby certify that we have served the foregoing motion by e-mail and the Odyssey system on

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this 19th day of November, 2024.

/s/ Kip Purcell
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