IN THE SUPREME COURT IN THE STATE OF NEW MEXICO

AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants.

Supreme Court
No. S-1-SC-40473

PLAINTIFF-APPELLEE'S ANSWER BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Plaintiff-Appellee American Civil Liberties Union of New Mexico, states that this Answer Brief complies with the length limitations of Rule 12-318(F)(2) NMRA. The Answer Brief uses a proportionately spaced font, has a typeface of 14 points and contains 6,808 words. The word count is obtained using Microsoft Word 2016.

/s/ Nicholas T. Davis
Nicholas T. Davis

I. INTRODUCTION

The Court of Appeals below, and the District Court before that, correctly held that Defendants-Appellants New Mexico Corrections Department ("NMCD") and Andrew Kuhlmann improperly withheld swaths of records based upon its own disseminated internal policies,[1] which were themselves premised solely on NMCD's general enabling statutes. The internal policies did not meet the standard of the catch-all "as otherwise provided for by law" exception of the Inspection of Public Records Act ("IPRA"). Contrary to Defendants-Appellants' broad legal and policy-based arguments to justify operating in the dark, the New Mexico appellate courts have spoken on this issue and found that mistreatment and abuse of inmates is precisely the type of information that requires sunshine.[2] Defendants-Appellants seek to overturn both the District Court's correct ruling and the Court of Appeals' subsequent affirmance of that ruling through variations of the same, single argument: unwavering deference to prison administrators. Oddly, NMCD rejects the District Court's use of a necessity test – likely because that court did not find broadly on its behalf – to then turn around and exhort this Court to overturn its own precedent and

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[1] As discussed in greater detail below, throughout the course of this litigation, NMCD erroneously refers to its relevant internal policies as "regulations." The policies at issue were made without the formal rulemaking process associated with rules and regulations, such as public notice and comment. Thus, they are not regulations and do not have regulations' corresponding force of law.

[2] See *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 21.

to create a necessity test based on broad and differential discretion given to NMCD's self-identified needs. The deference Defendants-Appellants seek would require a case-by-case analysis of enabling statutes by the courts, which is both unworkable and contrary to this Court's precedent and the purview of the legislature. The simpler and correct solution is, as articulated below, that any regulation needs to be based in particularized language of something more than a general enabling statute. The Court of Appeals' decision should be affirmed.

II. STATEMENT OF THE CASE

On October 10, 2019, Plaintiff-Appellee ACLU-NM submitted the following IPRA request for public records to NMCD:[3]

- All records pertaining to institutional use of force, restraints, and/or chemical agents (e.g., pepper spray or other chemicals) at Southern New Mexico Correctional Facility ("SNMCF") used to discipline, restrain, subdue, or otherwise exert control over any person in SNMCF custody.
- All incident reports regarding institutional use of force, restraint, and/or chemical deployment at SNMCF.

[3] There is some confusion amongst the filings between the various IPRA requests made by ACLU-NM in the latter part of 2019. The IPRA request at the heart of this lawsuit was the one made by ACLU-NM on October 10, 2019, to the New Mexico Corrections Department seeking records related to the Southern New Mexico Correctional Facility and which is referenced in Plaintiff-Appellee's Complaint **[RP 2]** and attached as Exhibit 1 to that pleading. **[RP 6-7]**. To the extent other IPRA requests are referenced in briefing in this appeal or in the lower court, those references were mistakenly made. Our apologies to the Court for any confusion this might cause.

- All records that list and/or document SNMCF employees who were involved in any incidents involving use of force, restraints, and/or chemical deployment at SNMCF.[4]
- All policies and procedures regarding institutional use of force, restraints, and/or chemical deployment at SNMCF.

[RP 6-7] The ACLU requested these records as part of an investigation of an influx of complaints it had recently received regarding excessive force being deployed by staff at SNMCF.

On October 22, 2019, NMCD responded to the IPRA request. **[RP 8-10]** NMCD did not produce any documents, redacted or otherwise, to ACLU in response to the request. **[RP 1-4]** NMCD's responsive letter made multiple legal arguments in its denial of the ACLU's IPRA request. **[RP 8-10]** The primary argument was that enabling statutes, NMSA 1978, §§ 9-3-1 to -13 (1977, amended 2019) and Section 33-1-6 (1969), authorize NMCD to unilaterally establish policies self-designating which public records may be withheld from production in response to IPRA requests. *Id.* Such records, NMCD argued, fall within IPRA's final catch-all exception contained within the IPRA, and that the agency's blanket denial is, thus, justified. *Id.*

During litigation, the parties filed cross motions for summary judgment. The ACLU's motion asked the court to find as a matter of law that NMCD's denial of

[4] Regardless of the outcome of this litigation, this specific subset of records is not at issue here and should therefore still be made available to Plaintiff-Appellee.

records based on Section 14-2-1(H),[5] IPRA's "catch-all" exception, was improper as the agency's general rulemaking authority (and other generalized law cited by the agency) was insufficient to meet the narrow standards of that IPRA exception. **[RP 75-90]** NMCD's motion asserted that it need not produce a single document in response to the ACLU's IPRA request because internal agency policies promulgated pursuant to the agency's general enabling statutes fall within the "as otherwise provided by law" exception. **[RP 176-181]**

The District Court denied NMCD's motion and took under advisement ACLU-NM's motion, requesting an unredacted copy of the responsive documents for *in camera* review. **[RP 275-277]** After reviewing the documents, the District Court granted ACLU-NM's motion and entered an order to that effect on June 21, 2021.[6] **[RP 282-285]** The Order held:

> NMSA 1978, §33-16(B) compels the secretary of corrections to "adopt rules and regulations necessary for administration of the Corrections Act…" As a result, for a rule or regulation promulgated pursuant to 33-

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[5] Pursuant to legislative amendments made to IPRA in the 2023 legislative session, IPRA's "as otherwise provided by law" exception is now codified at NMSA 1978, § 14-2-1(L). However, to avoid confusion, Plaintiff-Appellee will continue to refer to this exception as NMSA 1978, § 14-2-1(H), as it is referenced as such in the parties' lower court briefing and in Defendants-Appellants' Brief in Chief.

[6] Three other district courts have similarly found against Defendants-Appellants on this issue. *See* Order (12/4/20) *ACLU v. MTC, et al.*, D-1215-CV-2020-00232; Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment (9/27/21); *Halona v. New Mexico Corrections Department, et al.*, D-101-CV-2020-01640; Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment (10/27/21); *Gonzales v. New Mexico Corrections Dep't, et al.*, D-101-CV-2020-01888.

> 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.

[RP 283] (emphasis added)

The Court of Appeals found in favor of ACLU-NM in its Opinion on May 31, 2024, and concluded that all of the records at issue are subject to disclosure.

III. ARGUMENT

Defendants-Appellants argue that they should be given broad and seemingly limitless discretion to what they are required to produce to the public via IPRA. The exception at the heart of the case before this Court is the "as otherwise provided by law" provision, also known as the "catch-all" provision. NMSA 1978, § 14-2-1(H) ("Every person has a right to inspect public records of this state except . . . as otherwise provided by law."). Defendants-Appellants argue that the agency's two general enabling statutes (the Corrections Department Act and the Corrections Act) and the Eighth Amendment, provide them the legal basis required to deny broad swaths of public records simply by labeling them "confidential." The courts below unanimously rejected these arguments and held that Defendants-Appellants must point to a concrete and particularized law to avail themselves of the catch-all exception.

Without such a law, Defendants-Appellants would be free to designate any record they see fit as "confidential" and cite any safety concern to justify their

withholding of documents from the public view. The same could easily occur with other state agencies pursuant to their own general enabling statutes, leading to a cascade of IPRA litigation and a situation where our state's flagship transparency statute is rendered meaningless. Defendants-Appellants' response to this is that our state courts will simply have to sort it out. **[BIC 18]** ("Courts would merely analyze whether it can be demonstrated that the challenged confidentiality regulation is consistent with the agency's purpose and the language of the enabling legislation."). However, a patchwork of district court decision-making is not the answer. Instead, a clear rule requiring particularized statutory authority to withhold records is more sensible and conforms with the statute's express purpose and this Court's precedent.

Plaintiff-Appellee challenges NMCD's misapplication of the catch-all exception to its internal confidentiality policies. Government transparency, especially in carceral settings, is crucial to ensuring that the rights of incarcerated individuals in our state are respected. "Information about the mistreatment and abuse of New Mexico inmates . . . is exactly the type of public information that IPRA contemplates must be disclosed to the public in order to hold its government accountable." *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 21; *see also Bd. of Comm'rs of Dona Ana Cty. v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 2, 134 N.M. 283 (in which the county was required by IPRA pursuant to the "as otherwise provided by law" section to release records related to civil

claims brought by female inmates who were sexually abused by jail staff). Case in point – this case originated from the ACLU's investigation into widespread reports of excessive force at the Southern New Mexico Correctional Facility. Allowing NMCD to shroud large swaths of records in secrecy thwarts the purpose of IPRA, which is to "ensure . . . that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees," NMSA 1978, § 14-2-5 (1993), and would bestow upon the agency an unchecked ability to operate in darkness.

A. NMCD's General Enabling Statutes Do Not Carry the Force of Law as Contemplated by IPRA's Catch-All Exception.

Citation to a generalized, unspecific law is insufficient to trigger the "as otherwise provided by law" exception to IPRA, and an agency may not rely on it to generate internal policies that conflict with the purpose of the statute. Yet, NMCD does just that when it denies disclosure of records based on the enabling statutes of the Corrections Department Act, §§ 9-3-1 to -13, and the general rulemaking authority of the Corrections Act, § 33-1-6(B). **[RP 171-214]** It argues that these statutes authorize NMCD to unilaterally establish policies within the agency self-designating which public records may be withheld from production in response to IPRA requests pursuant to the catch-all exception. In this case, that argument led the agency to issue a blanket denial of the ACLU's IPRA request. As the District Court and Court of Appeals confirmed, these statutory provisions are insufficient to allow

NMCD to circumvent the protections afforded by IPRA by shielding the department from producing broad swaths of documents.

i. NMCD's Internal Policies Do Not Trigger IPRA's "As Otherwise Provided By Law" Exception.

Under IPRA's "as otherwise provided by law" exception, only specific and particularized statutes will authorize the government entity to deny disclosure of public records. The HIPAA (the Health Insurance Portability and Accountability Act) is one example of such a statute. Under HIPAA, the statute itself, not a regulation, specifically contemplates the confidentiality of a specific category of documents and information. Plaintiff-Appellee concedes that a narrowly tailored *regulation* premised on clear and specific statutory authority, as is the case with HIPAA, *could* justify the withholding of records under the catch-all provision. However, that fact pattern is decidedly not before this Court.

Defendants-Appellants argue that the Secretary of Correction's general enabling statutes alone allow them to adopt internal policies to withhold records from release under IPRA. **[BIC 7]** They cite the holding in *City of Las Cruces* for the premise that a regulation may satisfy the "as otherwise provided for by law" exception. *City of Las Cruces v. Public Emp. Labor Relations Bd.*, 1996-NMSC-024, ¶ 12, 121 N.M. 688. Even if, arguendo, NMCD's internal policies were properly promulgated regulations, they would still fail to meet the analysis of *City of Las Cruces*. In that case, the City of Las Cruces submitted a request under IPRA to the

Public Employee Labor Relations Board (hereinafter "PELRB") to produce copies of a petition for signatures to hold a representation election. The PELRB refused to release the petition. *Id.* ¶ 1. The New Mexico Supreme Court held that the PELRB was allowed to withhold the petition because in addition to the enabling statute, a New Mexico statute existed that specifically allowed for representation elections to be conducted by secret ballot. *Id.* ¶ 12. Because this statute existed, PELRB passed a regulation to also keep confidential the signature petitions to hold representation elections. *Id.* ¶ 3. The Court ruled that the PELRB was allowed to withhold the petitions because they fell under IPRA's exception permitting a record's confidentiality "as otherwise provided by law." *Id.* ¶ 12. In other words, because the regulation in question directly effectuated the purpose of a statutory provision that specified *particular information to be kept confidential,* the regulation had the "force of law," and therefore it fit under the "as otherwise provided by law" IPRA exception. *Id.* ¶ 5.

The authorities at issue in *Las Cruces* were *regulations* promulgated by the PELRB. Here, NMCD seeks to withhold from disclosure records subject to IPRA based on mere internal agency policies that have not gone through the customary rulemaking requirements.[7] And the regulations in *Las Cruces* were adopted pursuant

[7] It is unclear what Defendants-Appellants mean when they cite to NMCD's "lawfully promulgated regulations" as NMCD's internal confidentiality policies

to multiple points of specific statutory language that identified particular information to be kept confidential. In justifying its policies, NMCD points only to its enabling statute, which broadly directs the secretary to "adopt rules and regulations necessary for the administration of the Corrections Act." § 33-1-6(B). As discussed above, this broad and vague language is insufficient authority upon which to justify the withholding of records pursuant to the catch-all exception.

NMCD also relies on a misinformed reading of a recent Court of Appeals decision, *Maralyn Beck v. State of New Mexico ex. rel Children, Youth & Families Dep't*, No. A-1-CA-40529, 2024 WL 4343184 (N.M. Ct. App. September 25, 2024), to suggest that the Court of Appeals has lately "taken a more accommodating approach to allowing agencies to enforce commonsense regulations which fall within IPRA's residual exception." **[BIC 19]** This is an incorrect characterization of that case. In *Beck*, the plaintiff filed suit after CYFD redacted personally identifying information in its response to her IPRA request for agency case records. 2024 WL 4343184, at *2. CYFD justified the redaction by relying on a confidentiality regulation that was adopted under a specific section of the agency's governing statute, the Children's Code. *Id.* The agency argued that its regulation, based on specific statutory authority allowing it to make the identities of foster parents

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were not subject to customary rulemaking procedures such as notice and comment, nor do they cite any such regulations at any point. *See* **[BIC 10]**.

confidential, was incorporated into the catch-all section of IPRA. *Id.* In finding for CYFD, the court relied on *Las Cruces* and the test articulated by the Court of Appeals in the instant case, holding that a regulation exempting information from inspection under IPRA must meet two requirements before it has the force of law necessary for purposes of the IPRA catchall exception. *Id.* at *7. First, "the agency must be authorized by statute to promulgate regulations necessary for its administration," and second, the regulation "must be based on more *specific statutes that relate to the effects of disclosure and the confidentiality* of that information." *Id.* (emphasis added) (internal citation omitted). In *Beck*, CYFD was able to point to a bevy of confidentiality provisions within the Children's Code that are "plainly intended" to protect personally identifying information, so the court found that its associated regulation was concordant with and necessary to serve the purposes of the statute. *Id.* at *8.

Here, Defendants-Appellants can point to no statute that contemplates the confidentiality of any agency related information, let alone its Use of Force policies and corresponding documents. Instead, NMCD looks only to its general enabling statute to justify its confidentiality policies and its withholding of public records. New Mexico courts have found that this does not provide sufficient authority. *See id.* at *7 ("The promulgation of a regulation authorized by such generalized rulemaking authority . . . is not enough to give a confidentiality regulation the force

of law necessary to create an exception to IPRA inspection."). The Children's Code, unlike the Corrections Act, is a statute that commands confidentiality, makes particular references to what information is to be confidential, and is filled with provisions consistent with this purpose. In short, *Beck* works only to reinforce Plaintiff-Appellee's position.

Further, the ruling in the *City of Las Cruces* case was further clarified in *Edenburn v. New Mexico Dept. of Health*, in which the New Mexico Court of Appeals held that a regulation does not have the "force of law" unless the regulation directly supports the *specific* purpose of a particular statute to keep *certain* records confidential. 2013-NMCA-045, ¶ 26. If a regulation fails to carry out this specific purpose of a statutory provision, then that regulation cannot be used to withhold public documents under IPRA's "as otherwise provided by law" exception. *Id.* None of the policies or statutes that NMCD points to meet these standards, so they cannot be used to justify withholding the requested records.

ii. NMCD's Internal Policies are Not Properly Promulgated Rules that Carry the Force of Law Necessary to Withhold Records Pursuant to IPRA's "As Otherwise Provided by Law" Exception.

Defendants-Appellants argue that under the New Mexico State Rules Act, NMSA 1978, §§ 14-4-1 to -11 (1967, as amended through 2017), "rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution" are not contemplated in the definition of "rule" for the sake of

publication in the New Mexico Administrative Code. **[BIC 28]**; § 14-4-2. However, whereas Section 14-4-2(F) governs rulemaking generally for state agencies, another statute, Section 9-3-5(E), specifically governs the rulemaking authority of the Secretary of Corrections, and it requires that these regulations go through the standard procedures of rulemaking under the State Rules Act, such as notice and comment and a public hearing. While Section 14-4-2(F) states that a "rule" does not include rules "relating to the management, confinement, discipline or release of inmates of any penal . . . institution," this conflicts with Section 9-3-5(E), which specifically authorizes the Secretary of Corrections to "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." Since the duties of the Corrections Department include the "management, confinement, discipline [and] release of inmates," Section 9-3-5(E) gives the Secretary of Corrections rulemaking authority despite the contradictory language in the State Rules Act, Section 14-4-2(F). *See Stinbrink v. Farmers Ins. Co. of Arizona*, 1990-NMSC-108, ¶ 10, 111 N.M. 179, 182 ("[A] statute dealing with a specific subject will be considered an exception to, and given effect over, a more general statute."). The Secretary of Corrections' rulemaking authority is thus subject to the conditions requiring public hearings regarding proposed rules, notice of proposed rules, and publication of rules enacted specified in Section 9-3-5(E). None of that occurred before the enactment of the

current internal policies upon which NMCD relies to deny the records sought by Plaintiff-Appellee.

Further, NMCD policy No. CD-000100, titled "Adoption of Rules, Policies, and Procedures," draws a distinction between policies, which can be adopted internally, and rules, which are subject to rulemaking requirements. A rule is "[a]ny rule, regulation, order, standard, statement of policy . . . promulgated by the NMCD, and purporting to affect one or more agencies beside the NMCD or to affect persons not members or employees of the NMCD except those relating to the management, confinement, discipline or release of inmates, probationers, parolees and those relating to employees." **[RP 200]** "[N]o rule specifically affecting any person or agency outside the Department shall be adopted or amended or repealed without a public hearing on the proposed action as provided by 1.24.15 NMAC." **[RP 201]**

The confidential nature of policies CD-130600 and CD-040401(C)(g)(1-9) (which relate to NMCD's use of force policy and certain records within an incarcerated person's file, respectively) "affect persons not members or employees of the NMCD" in that they affect members of the public seeking related documents under IPRA. Thus, any rule establishing such policies would have to be accomplished through the rulemaking process pursuant to 1.24.15 NMAC (listing the requirements for notice and comment, among others) and pursuant to a reasonably particularized statute that authorizes such rules and regulations. None of

that is present in the case before this Court and, even if NMCD had gone through the rulemaking process, its designation of records as exempt from IPRA would still be inappropriate given the lack of particularity and specificity in the general enabling statutes upon which it would rely to make such designations.

In short, despite its argument about regulatory authority, the documents NMCD has sought to withhold and which the district court partially agreed to withhold should not fall within the "catch-all" provision of IPRA. To allow NMCD to unilaterally withhold public documents based on internal policies would lead to an absurd result: Defendants-Appellants would be able to create rules to shield any document they liked from release under IPRA, completely subverting IPRA's core purpose.

B. The Burden is on NMCD to Prove that Records Sought are Subject to an Exemption.

At the District Court and Court of Appeals, NMCD asserted that it may promulgate confidentiality rules that are "rationally linked to a legitimate penological interest" that then fall within the "as otherwise provided by law" exception to disclosure under IPRA. **[BIC 29]** In doing so, NMCD asked the Court of Appeals to require that Plaintiff-Appellee satisfy "an extremely high burden by showing that the Secretary's confidentiality rules did not serve a legitimate penological interest or were not necessary for the administration of Corrections." **[Court of Appeals BIC 9] (hereinafter "COA BIC").** While this explicit argument

has been abandoned in their Brief in Chief for the Supreme Court, the thrust of it continues when Defendants-Appellants ask for unfettered ability to regulate document confidentiality and only allow the courts to balance "whether such a policy is truly necessary for the effective and safe operation of that agency." **[BIC 18]** For a requester to then prosecute their case and have a court undertake this analysis is exactly what Defendants-Appellants asked of the Court of Appeals, namely, that the requester prove that the confidentiality rules do not serve a "legitimate penological interest or were not necessary for the administration of Corrections." **[COA BIC 9]** And if the Court were to adopt NMCD's proposed test, it would erroneously shift the burden onto the initiators of an IPRA request to justify their request, despite clear law that it is the burden *of the agency* seeking to withhold records responsive to a legitimate request to provide statutory justification pursuant to an enumerated exception. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 35, 90 N.M 790, 798 ("The burden is upon the custodian to justify why the records sought to be examined should not be furnished."), *overruled on other grounds by Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep't*, 2012-NMSC-26, ¶¶ 14-16; *Jones v. Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 49 (holding that the burden fell upon the Department of Public Safety to demonstrate that an IPRA exception from inspection covered records the department withheld). IPRA jurisprudence makes clear that NMCD's position is improper and that it is impermissible for a

governmental entity to shift the burden onto a requester of records to prove that the entity is improperly withholding documents.

Defendants-Appellants spend a significant portion of their Brief in Chief discussing their authority to regulate the innerworkings of New Mexican prisons. Plaintiff-Appellee does not contest the fact that New Mexico state agencies, including NMCD, are well-suited to determine which policies to adopt to best effectuate that agency's goals and interests. However, their ability to do so is not relevant to the case before this Court, and its lengthy discussion of those innerworkings distracts from the simple question at the heart of this litigation, which is whether NMCD has the authority to create internal policies that designate large swaths of documents as confidential and, thus, exempt from IPRA based solely on a generic enabling statute and the department's subjective determination that those policies are "necessary."

It is telling that in its Brief in Chief, NMCD is unable to cite to an actual regulation to justify its denial of records. While it refers to "lawfully promulgated regulations," **[BIC 10]**, when you peel away the layers, you find that the agency is merely referring to internal policies that have not gone through the customary rulemaking processes. Nor can it, nor does it, point to language in a statute that specifies particular information to be kept confidential. Thus, NMCD's attempt to shift the burden to Plaintiff-Appellee to prove that NMCD's reliance on internal

policies is improper is misguided. Simply stated, while NMCD is within its right and authority to create internal policies for the administration of the agency, it may not do so at the expense of subverting IPRA without direct legislative language allowing it to do so. In the absence of a clear statute that identifies specific information or documents to be confidential, neither New Mexico law nor case precedent support NMCD's attempt to grant itself through internal policy a blanket shield from the information requests to which New Mexicans are entitled through IPRA.

C. General Eighth Amendment Law is Insufficient to Trigger IPRA's "As Otherwise Provided by Law" Exception.

A significant portion of NMCD's Brief in Chief centers on Eighth Amendment jurisprudence and the deference granted to prisons to promulgate rules and regulations to administer their facilities. **[BIC 26-27]** This is yet another red herring attempting to distract this Court from NMCD's lack of specific authority to designate these records as confidential. NMCD cannot and does not point to specific law upon which to rest its claim for its blanket denial.

Instead, NMCD relied on its alleged authority under NMCD's general enabling statutes and asks this Court to apply the test laid out in *Turner*, an inapposite case that did not involve a records request but rather a challenge to a prison's deprivation of prisoners' fundamental rights of free speech and marriage under both

the United States Constitution's First and Fourteenth Amendments.[8] *See Turner v. Safley*, 482 U.S. 78 (1987). The *Turner* factors that NMCD asks this Court to apply are, for all intents and purposes, the same factors considered in a standard rational basis review – an analysis not applicable to this matter. A court typically employs this sort of analysis when plaintiffs allege that the laws or policies of a governmental body violate constitutional rights and protections, and the government must then show that its adopted means are at least rationally related to the intended purpose, a legitimate government interest. Here, NMCD once again attempts to distract the court with an altogether improper invocation of Eighth Amendment law by arguing that complying with IPRA (and, thus, with the will of the New Mexico Legislature) might somehow lead to incarcerated people in New Mexico being subject to cruel and unusual punishment. Plaintiff-Appellee wholeheartedly agrees with NMCD that the Eighth Amendment provides constitutional protections to imprisoned individuals. In fact, it is notable (and ironic) that the genesis of the IPRA request in question was in response to a prisoner at the Southern New Mexico Correctional Facility who reached out to Plaintiff-Appellee about systemic and unconstitutional

[8] NMCD goes so far as to attempt to equate the "deliberate indifference" displayed in *Farmer v. Brennan*, another inapposite case where a transgender inmate successfully proved that prison officials knew of the substantial risk she faced but did nothing to prevent her from being sexually assaulted, to the sort of "indifference" to prisoner safety prisons might demonstrate if required to produce public records pursuant to IPRA. *See* **[COA BIC 22]**; *Farmer v. Brennan*, 511 U.S. 825 (1994).

abuses of power and excessive force at that facility. NMCD's reliance on these principles simply does not give a legal basis to justify a wholesale, blanket denial of records under IPRA.

The question in this case is not whether NMCD's policies violate the Eighth Amendment – indeed, determining the answer to this question is unavailable as long as NMCD continues to withhold its Use of Force policies – nor is it whether disclosure of those policies would lead to constitutional violations. If one puts aside the attempts at distraction and focuses on the actual issue at hand, the question becomes simply whether there exists sufficiently specific statutory authority that allows NMCD to self-designate records as shielded from IPRA. No such authority exists and NMCD's argument fails accordingly.

D. NMCD Erroneously Seeks Reinstatement of Balancing Tests in IPRA.

New Mexico courts at one time applied a "rule of reason" balancing test, an analysis first articulated and employed in *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790. The *Newsome* court concluded that IPRA's then-existing exemptions to disclosure were insufficient and adopted an "implied rule of reason" to balance the public's interest in disclosure against privacy interests and to assist the court in determining "whether an exemption not specifically identified in IPRA shielded documents at issue from disclosure." *Republican Party*, 2012-NMSC-026, ¶ 16. The *Newsome* Court then called on the Legislature to abrogate this newly

formulated, judge-made rule by amending the statute to delineate "what records are subject to public inspection and those that should be kept confidential in the public interest." 1977-NMSC-076, ¶ 33. The Legislature did so by amending (and clarifying) the exemptions to IPRA, and the courts followed suit by then disavowing the *Newsome* balancing test in subsequent cases. Consequently, courts may no longer apply the "rule of reason" and are instead to "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." *Republican Party*, 2012-NMSC-026, ¶ 16 (emphasis added); *see also Jones*, 2020-NMSC-013, ¶ 19.

This directive is consistent with the longstanding rule that so long as legislatively authorized rules and regulations are not in conflict with legislative policy, they have the force of law, *Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 7, 111 N.M. 154, 156, but "[i]f there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute." *Jones v. Employment Servs. Div. of Human Servs. Dep't*, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 99. Furthermore, the absence in the law of an enumerated exception to public access may not be read as an oversight to be corrected by the courts. *See Republican Party*, 2012-NMSC-026, ¶¶ 51-52.

NMCD wishes to reintroduce, and directs this Court to apply, the type of long-rejected balancing test employed in *Newsome* or *City of Las Cruces* to determine the applicability of the "as otherwise provided by law" exception to IPRA. It is ironic that NMCD cites to *Republican Party* for the premise that regulations can have the power of law, while simultaneously seeking to convince the Court to overrule its primary holding: that the courts shall no longer engage in balancing because the legislature has clearly spoken through delineated exceptions. *See Republican Party*, 2012-NMSC-026, ¶ 16. This Court should not do so as such a holding would allow NMCD to promulgate policies that thwart the purpose of IPRA and further enshroud the innerworkings of NMCD in darkness. Further, it would usurp the legislature's authority and violate precedent by designating groups of public records as exempt from disclosure despite an absence of clear statutory authority to do so.

Though NMCD does not specifically invoke the term "rule of reason," the entirety of their argument is policy-based rather than one in which they rely on specific legal authority that would properly trigger the "catch-all" exception. And the thrust of their argument is to allow them to regulate confidentiality as they, or any agency, sees fit, leaving the courts to analyze whether any agency's given confidentiality policy is "in harmony" and "consistent" with the purpose and language of its enabling statutes and therefore "necessary" to carry out the duties of the relevant state agency. **[BIC 18, 22-23]**

The deference-driven analysis sought is also in line with the rational basis test of Eighth Amendment jurisprudence and the *Turner*-level extreme deference arguments upon which NMCD's briefing wholly relies. To further these arguments, NMCD articulates a parade of horribles that will occur if forced to comply with IPRA. Its argument is thus a *de facto* rule of reason, which courts have held to be the wrong analytical structure to undertake in making an IPRA determination.

Juxtaposed to NMCD's asserted parade of horribles are the very real consequences that incarcerated people in our state's prisons will surely face if the institutions that hold them are further shrouded in secrecy. IPRA currently plays a significant role in ensuring that the innerworkings of our state carceral system are known to the public. NMCD is responsible for the wellbeing and literal survival of over 5,000 people. Arguably, no other state entity has anywhere near the level of control over people in New Mexico that NMCD has over the people in its custody – when they eat, when they sleep, how much sunshine they will receive, when their families are allowed to hear their voices, etc. These are people that are largely forgotten by society because they are in prison and for that reason IPRA as a tool of accountability and transparency is of the utmost importance in the carceral setting. Allowing NMCD to self-designate what it deems confidential and, thus, exempt from IPRA will only serve to push the agency into further darkness, which can only lead to less accountability.

As the Court of Appeals recognized in its Opinion, the central issue at hand here is "whether our Legislature's strong policy of free and open access to public records permits NMCD to declare public records confidential and exempt from disclosure under IPRA," and that the Court's task is not to weigh policy considerations but "to determine if there is a *specific provision of law* that exempts the requested records from disclosure." *Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't*, at *7 (N.M. Ct. App. May 31, 2024). Defendants-Appellants have not and cannot point to such a provision.

i. NMCD Erroneously Asks the Court to Disavow Statutory Interpretation and Caselaw in Favor of a Newly Created Subjective Test.

In addition to harkening back to the renounced "rule of reason" approach, NMCD also asks the Court to disavow the rules of statutory interpretation and the directives of *Republican Party* in favor of another even more convoluted subjective test. In its Opinion, the Court of Appeals agreed with Plaintiff-Appellee and the New Mexico Foundation for Open Government that because most enabling statutes for state bodies are constructed in the same general manner as NMCD's, "[a]ccepting NMCD's argument would allow a myriad of other entities to assert the same authority to declare documents beyond the reach of IPRA," a result "directly contrary to the legislative policy of transparent governance." *Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't*, at *11 (N.M. Ct. App. May 31,

2024). NMCD asserts in its Brief, however, that there is "no danger" of this happening:

> Any analysis of whether a confidentiality policy is within or beyond an agency's rulemaking authority would be based upon the merits of whether such a policy is truly necessary for the effective and safe operation of that agency. Courts would merely analyze whether it can be demonstrated that the challenged confidentiality regulation is consistent with the agency's purpose and the language of the enabling legislation.

[BIC 18].

This new test is essentially the "clear necessity" standard that the District Court articulated below and that the Court of Appeals rightfully rejected. A few things stand out about the test that make it unworkable. First, as Plaintiff-Appellee argued in its Cross-Brief in Chief below, it is not based on or supported by IPRA, nor does it derive from any prior decision by any New Mexico court. The Court of Appeals correctly called it a "standardless" standard that is overly broad and discretionary. *Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't*, at *11 (N.M. Ct. App. May 31, 2024). Second, it does nothing to mitigate the danger of agency overreach, because agencies could simply write their confidentiality regulations in the same vague manner as their enabling statutes, and mere consistency between the two would necessitate that a court finds them enforceable, no matter how much they contradict the intent and purpose of IPRA. Indeed, this is what NMCD is asking the Court to do here with its internal policies.

Finally, it should not escape the Court's attention that NMCD's solution for what they perceive as court overreach is to propose a new test where the courts would still be forced to make subjective, after-the-fact determinations as to the validity of agency confidentiality determinations. NMCD complains that "[t]he Court of Appeals has simply substituted its own judgment for that of the Secretary," and both lower courts "have directly inserted themselves into corrections administration by making their own determination as to what is and is not 'necessary for the administration of the corrections act.'" **[BIC 19, 10]** Yet, this is precisely what NMCD's new proposed framework would have the courts do moving forward if adopted. NMCD bemoans the fact that the Court of Appeals correctly followed the directives of *Republican Party* instead of employing a test that has no basis in case law or statute. It appears that their true hope was for the Court of Appeals to find that the department's confidentiality policies were "truly necessary" merely because the department said so.

What NMCD is really asking this Court to do is to interpret the statute differently from both its plain language and the instruction from the myriad prior appellate decisions that have addressed how to apply the catch-all provision to disputed public records: read the statute narrowly and require specific, statutory language that allows for certain records to be withheld under the "as otherwise provided by law" exception. An adoption of Defendant's interpretation of IPRA

would eviscerate the law, leaving it toothless. Further, it would give license to other governmental entities to enact regulations to shield whatever records they wanted under IPRA, directly conflicting with the statute's stated intent, "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." § 14-2-5 (1993). Allowing state agencies to regulate first and be held accountable, if at all, later contravenes both the explicit purpose and the spirit of IPRA, which are transparency and public accountability. NMCD seeks this Court's blessing to allow agencies to shroud themselves in secrecy in direct conflict with the purpose of our state's open records law.

Even though "the exceptions to IPRA's mandate of disclosure are narrowly drawn," *Jones*, 2020-NMSC-013, ¶ 40, agencies such as NMCD still attempt to rely on broad delegations of authority to limit public access to records. These repeated, blanket denials of IPRA requests by New Mexico's agencies are burdening requesters by requiring them to engage the courts for relief. These cases then burden the courts, which, oftentimes, must conduct *in camera* reviews to resolve the issues. In the interests of justice, transparency, and efficiency, NMCD should be required to uphold its statutory obligations under IPRA to disclose requested information to which requesters are entitled under the Act.

IV. CONCLUSION

Plaintiff-Appellee respectfully requests that this Court uphold the decisions of the District Court and Court of Appeals and reject NMCD's argument that IPRA's residual exception allows for the wholesale withholding of the requested records at issue. What NMCD seeks to do through this case conflicts with the express legislative intent of IPRA and with decades of case law. Internal policies, untethered to specific statutory authority, are insufficient to justify blanket denials of the records requested by Plaintiff-Appellee. This is clear to the courts who have reviewed these arguments to-date. This Court should foreclose NMCD's argument once and for all. Failing to do so will further entrench the innerworkings of NMCD in darkness and thwart the purpose of IPRA. The holdings of the District Court and the Court of Appeals rejecting NMCD's arguments should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of November 2024, the above pleading was electronically filed through the Court's e-filing system (Odyssey), and was served via e-mail to the following counsel of record:

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