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IN THE SUPREME COURT IN THE STATE OF NEW MEXICO

AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Supreme Court
No. S-1-SC-40473

DEFENDANTS-APPELLANTS' BRIEF IN CHIEF

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I. INTRODUCTION

Andrew Kuhlmann, former records custodian for the New Mexico Corrections Department, (NMCD), and NMCD, by and through counsel, Cuddy & McCarthy LLP., and pursuant to Rules 12-318(B) and 12-210(C)(2)(b) NMRA, hereby submit their Brief-in-Chief in this cause.

II. NATURE OF THE CASE

This case arises under the New Mexico Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (1947 as amended through 2019) ("IPRA"). This case relates to the authority of the Secretary of Corrections to enact policies which are essential to the safe operation of NMCD.

On or about October 10, 2019, Plaintiff-Appellee American Civil Liberties Union of New Mexico ("ACLU") submitted a request to inspect NMCD's public records. [RP 182-183]. This request sought documents related to NMCD's confidential use of force policy and all materials related to the use of force at NMCD facilities. *Id.* The request was sufficiently broad as to encompass NMCD's Use of Force ("UoF") policy as well as internal grievance reports submitted by inmates. On October 22, 2019, NMCD responded to this IPRA request by informing Plaintiff-Appellee that these materials were excluded from disclosure pursuant to IPRA's

residual exceptions, which uphold all forms of confidentiality "as otherwise provided by law." NMSA § 1978, 14-2-(L)[1]. [RP 184-186]

NMCD's designated IPRA custodian was obligated to withhold the UoF policy and grievance reports because – as is undisputed – these documents were expressly designated as confidential by the rulemaking authority of the Secretary of Corrections. As more fully described below, the Secretary of Corrections has a clear legislative mandate to enact regulations necessary to safely operate correctional facilities. *See,* e.g., NMSA 1978, §§ 9-3-5, 33-1-6(B). This necessarily includes limited, reasonable forms of confidentiality required to protect inmates, staff and volunteers.

NMCD does not arbitrarily restrict access to public documents. NMCD strongly supports liberal transparency and the greatest possible access to public records. However, a corrections agency must be able to safeguard certain basic security information: for example, the location of stored deadly weapons, specific tactical details for preventing escape and de-escalating conflicts, and statements made by inmates to NMCD with the expectation that their anonymity will be protected. This fact has been recognized by the Secretary of Corrections and has been established by uncontroverted testimony in this case. It is difficult to imagine

[1] During the course of this litigation, the location of this provision within IPRA has changed as the Legislature has expanded the number of recognized IPRA exceptions. However, the text of the residual exception remains identical.

the Legislature would not have allowed, or indeed required, the Secretary to lawfully promulgate agency regulations designating this information as administratively confidential.

This is precisely the information which the May 31, 2024 Opinion by the New Mexico Court of Appeals has now made completely public. This result is not only inconsistent with IPRA's language and intent, contrary to the intent of the New Mexico legislature, it has also made NMCD facilities far less secure. Inmates and prison personnel in New Mexico are now subject to potential dangers not tolerated in any other state. Determining that the Secretary of Corrections is not authorized, by NMCD's enabling statutes, to make reasonable confidentiality rules regarding the use of reasonable force in the operation of our prisons represents a completely unprecedented and legally unsupported intrusion by the judiciary into the delicate and complex sphere of corrections administration. Nothing in IPRA supports such a categorical and arbitrary limitation on the Secretary's authority to make agency rules which have the force of law for purposes of NMSA 1978, § 14-2-1(L).

III. SUMMARY OF PROCEEDINGS

On October 26, 2020, the ACLU filed its Motion for Partial Summary Judgment and for Injunctive Relief. [RP 75-90]. On January 5, 2021, NMCD and its records custodian filed their Cross Motion for Summary Judgment. [RP 171-

123]. On April 27, 2021, the district court issued its Order Denying Defendants' Cross Motion for Summary Judgment and Taking Plaintiff's Motion under Advisement. [RP 275-277] The district court's April 2021 Order required NMCD to produce the disputed materials, including the confidential UoF policy, for *in camera* review. *Id.*

Although not requested by either party, the district court also ordered that "the portions of the documents that NMCD would seek to have withheld through redaction shall be highlighted for the Court's ease of reference" along with a document equivalent to a privilege log. [RP 276]. Effectively, the district court asked NMCD to subjectively identify which portions of the confidential materials posed an extreme safety or security risk to inmates and prison personnel in the event of public disclosure. NMCD complied with the district court's request, despite its contention that the Secretary's regulations made these materials confidential in their entirety. The district court did not reference any authority supporting this novel piecemeal approach to IPRA enforcement.

On June 21, 2021, following its *in camera* review of the highlighted version of the disputed documents, the district court issued an Order Granting Plaintiff's Partial Motion for Summary Judgement and Injunctive Relief. [RP 282-285]. In doing so, the district court concluded that certain, limited portions of the disputed

records could be properly withheld. *Id.* However, all remaining portions of the UoF policy and grievance reports were ordered to be disclosed under IPRA. *Id.*

On July 26, 2021, NMCD filed its Motion to Reconsider the Order Granting Plaintiff's Motion for Partial Summary Judgment. [RP 288-302]. The Court denied this motion on November 4, 2021. [RP 339-341]. Before filing their cross appeals, the parties stipulated to an amount of statutory damages to be awarded in the event the ACLU prevailed through all appeals of the district court's order. [RP 474-475].

On January 30, 2023, NMCD submitted its Brief in Chief to the New Mexico Court of Appeals, arguing that the UoF policy and grievance materials were subject to a lawful form of regulatory confidentiality consistent with IPRA's residual exception. ACLU submitted its own Brief in Chief as to its cross appeal on April 17, 2023. Additionally, on May 30, 2023, the Court of Appeals accepted an amicus brief submitted by the New Mexico Foundation for Open Government which argued in support of the ACLU's position.

After thorough briefing on both cross appeals, the New Mexico Court of Appeals issued its Opinion on May 31, 2024 in Cause No. A-1-CA-404086. The Court of Appeals found in favor of the ACLU, determining that for the first time the New Mexico Corrections Act cannot be used to limit disclosure of highly sensitive security information. On July 1, 2024, Defendants-Appellants timely petitioned this Court for a Writ of Certiorari to the New Mexico Court of Appeals seeking reversal

of the May 31, 2024 Opinion. This Court granted the Petition for Writ of Certiorari on September 6, 2024, with a subsequent order specifying the briefing timeline.

IV. ARGUMENT

As outlined in Defendants-Appellants' Petition for a Writ of Certiorari, there are five related questions raised in this appeal. This Court must first address the overarching issue of whether the New Mexico Court of Appeals erred in concluding that the entire confidential UoF policy, and related documents, must be disclosed to the public through IPRA. The second issue raised on appeal is whether the Court of Appeals erred in concluding that NMCD regulations designating these materials as confidential do not have the force of law for purposes of NMSA 1978, § 14-2-1(L). The third question is whether policies expressly intended to promote the safe operation of NMCD are "necessary to carry to carry out the duties of the department and its divisions" within the meaning of NMSA 1978, § 9-3-5(E) or otherwise "necessary for the administration of the corrections act" within the meaning of NMSA 1978, § 33-1-6(B). The fourth issue raised on appeal is whether, as the Court of Appeals concluded, the Secretary of Corrections lacks authority to promulgate confidentiality rules expressly intended to protect the Eighth Amendment rights of inmates incarcerated in New Mexico. Finally, Defendants-Appellants respectfully request that this Court address whether the Court of Appeals erred in abrogating the

well-established precedent governing the substantial deference afforded to prison administrators.

The NMCD maintains that the Legislature empowered the Secretary of Corrections to make lawful regulations governing New Mexico's administration of Corrections consistent with the two relevant enabling acts, NMSA 1978, §§ 9-3-5 and 33-1-6(B). The Secretary's rulemaking power is especially robust where the challenged regulation is linked to the safe and constitutional operation of the NMCD. Where these objectives depend upon the confidentiality of certain highly sensitive documents such as NMCD's UoF policy, that information should be kept from public scrutiny and non-disclosable through IPRA.

To be clear, NMCD has never argued that the Secretary has unfettered authority to exempt any record from IPRA disclosure. Rather, NMCD maintains that regulations which allow for the promulgation of the NMCD's UoF policy and inmate grievance documents have the force of law because they are premised on a sound and compelling penological basis and are necessary for the safe administration of New Mexico's penal system. Stated differently, and consistent with the NMCD's enabling acts, the UoF policy is necessary for the safe and effective administration of the NMCD. Indeed, it is difficult to imagine public records which have a greater need for confidentiality than a UoF policy, which is designed to allow prison personnel the needed confidential tools to quell prison riots and similar disturbances

which are endemic in the corrections setting. NMCD regulations making the subject documents confidential bear the signature of the Secretary of Corrections and cite statutory authority as conferred by the Legislature, including the broad enabling provisions under NMSA 1978, § 9-3-5 and § 33-1-6.

In this case, the Secretary of Corrections – exercising authority granted through the NMCD's enabling act under NMSA 1978, § 33-1-6 – made the penologically legitimate determination that disclosure of the UoF policy pursuant to IPRA would (1) sever an inmate's only protected channel to anonymously voice concerns about prison conditions, but also, importantly, complaints about fellow inmates, and (2) allow inmates insight into the means and methods correctional officers might use to prevent or diffuse hostile situations. The Secretary was correct in determining such disclosure would likely undermine NMCD's statutory and constitutional mandates. NMCD emphasizes that no testimony or other evidence has been introduced which would undermine the Secretary's reasoning. Rather, the 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." NMSA 1978, § 33-1-6(B). The law gives great deference to the Secretary in making such a determination. That deference should be recognized here.

A. NMCD's Designation of the Use of Force Policies as Confidential is Consistent with, and Essential to, its Enabling Acts and has the Force of Law for Purposes of IPRA's Residual Exception.

Although IPRA is intended to promote governmental transparency, as evidenced by the inclusion of exceptions in Section 14-2-1, the Legislature also recognized that confidentiality of public records must be maintained in certain circumstances. Indeed, IPRA's enumerated exceptions reflect important public policy concerns which were equally as important to the Legislature as the general policy favoring disclosure of public records.

The exception NMCD asserts in support of its argument that the UoF policy is confidential and protected from public disclosure is IPRA's residual exception precluding disclosure "as otherwise provided by law." § 14-2-1(H). This exception has been interpreted to include "statutory and regulatory bars to disclosure" as well as "constitutionally mandated privileges." *Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 13, 283 P.3d 853 (citing *City of Las Cruces v. Pub. Emp. Labor Relations Bd.*, 1996-NMSC-024, ¶6, 917 P.2d 451, 453-54).

The Secretary's ability to categorize the UoF policy and grievance documents as confidential is based upon her statutory mandate and rulemaking authority. [RP 188, 298-302]. NMCD's two primary enabling acts authorize and require the Secretary to enact a wide range of regulations. The Corrections Department Act expressly allows for the creation of "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). Additionally, the Corrections Act authorizes the Secretary of Corrections to broadly "adopt rules and regulations necessary for administration of the Corrections Act [§§ 33-1-1 to 33-1-9 NMSA 1978] and enforce and administer those so adopted." NMSA 1978, § 33-1-6. These enabling acts authorize a wide and flexible degree of regulatory authority within the area of corrections administration. The Legislature instructs that the Corrections Act is intended "to create a single, unified Corrections Department to administer all laws and exercise all functions formally administered and exercised by the Penitentiary of New Mexico and the State Board of Probation and Parole except to the extent delegated to the parole board by the Parole Board Act. [§ 31-21-22 NMSA 1978]." NMSA 1978, § 33-1-3.

With its ruling, the Court of Appeals has effectively invalidated all lawfully promulgated regulations which use the asymmetry of information between inmates and NMCD personnel as a vehicle to maintain the safe and peaceful operation of NMCD facilities. [RP 187-193, 298]. This includes confidentiality policies used to control and deescalate a wide variety of disturbances, including escape attempts and prison riots. *Id.* NMCD has provided clear, extensive, and uncontroverted testimony demonstrating that the confidential status of its UoF policy and grievance materials are, under any fair interpretation, "necessary to carry out the duties of the department

and its divisions" within the meaning of NMSA 1978 § 9-3-5(E) or otherwise "necessary for the administration of the corrections act" within the meaning of NMSA 1978 § 33-1-6(B).

NMCD's UoF policy consists of a 36-page detailed manual setting forth specific policies and procedures for correctional officers to apply when using force against inmates. The front page of the written volume of the policy states: "NOT TO BE PLACED IN INMATE LIBRARIES OR AVAILABLE TO THE PUBLIC. LIMITED DISTRIBUTION AND DUPLICATION TO: 'EMERGENCY PREPAREDNESS MANUALS ONLY.'" [RP 213]. It is difficult to imagine how the Secretary of Corrections could have been clearer about the UoF policy's sensitive and necessary nature, with the desire that such information not be disseminated, distributed or otherwise made available to the public as well as those within the prison population. The Secretary's confidential designation of the UoF policy is a regulatory bar to disclosure within the scope of IPRA's residual exception.

This is not an arbitrary designation, but a recognition of the sensitive nature of instructing prison personnel on the strategies, protocols and operations to be executed during prison uprisings. As explained by former NMCD General Counsel, Brian Fitzgerald, in a supporting affidavit, the use of force policy outlines "methods and tactics [which] are to be used in carrying out various levels of force given certain circumstances." *Id.* In promulgating a comprehensive Use of Force policy, the

Secretary of Corrections has addressed the obvious danger posed by allowing inmates access to the procedures and strategies used by prison personnel in keeping the peace within the walls of the prison setting. Such unfettered access not only undermines its effectiveness but directly threatens the safety of prison personnel and inmate. That circumstance would allow inmates to "develop and utilize counter-measures which would place other inmates, prison employees and officials in grave danger." [RP 191]. Detailed knowledge among the prison population of use of force policies, strategies, and procedures would "be used to counteract NMCD's attempts to deescalate and end violent conflicts between inmates." *Id.*

The Secretary of Corrections has determined that security imperatives require the UoF policy be kept confidential in its entirety. This is because "[d]isclosure of any of these provisions could dramatically increase the avoidable violence and injuries amongst inmates and staff." [RP 297]. Broadly speaking, the confidentiality of the policy advances three major security goals: (1) deterring conflict by eliminating an inmate's ability to calculate the risks of misconduct, (2) deterring conflict by controlling the perception of force, and (3) withholding information about the location and use of weapons, restraints and other dangerous tools. [RP 297-302]. Disclosure of the UoF policy would severely undermine NMCD's ability to safely and effectively meet its statutory obligations. *Id.* The confidential

nature of the UoF policy is "necessary" for NMCD to safely administer New Mexico's prisons.[2]

The UoF policy contains a blueprint for officer behavior in the event of a prison riot and is intended to minimize the overall need to use force against inmates when necessary. [RP 297-302]. This Court can appreciate that inmates are less likely to initiate a situation requiring use of force if the inmate cannot calculate exactly how that interaction will play out. [RP 298]. For example, disclosing permitted use of force tactics "would inform inmates of the methods and limitations NMCD uses to avoid escalating a conflict. Inmates could then organize attacks, escape attempts, riots, or other forms of misconduct and violent behavior around the known details of NMCD's anticipated response." [RP 298]. Disclosing all or part of the UoF policy would lead to a dangerous asymmetry of information wherein inmates would know precisely what an NMCD officer can and cannot do in a given situation. Conversely, the officer would not be able to predict the inmate's behavior. *Id.*

This asymmetry of knowledge would result in an imbalance of power, putting NMCD officers and, indeed, other inmates in a perpetually vulnerable position.

[2] One need only reflect back on the history of prison riots in New Mexico, such as that which occurred at the main Santa Fe facility in 1980, to understand the level of department concern in promulgating confidential policies designed to minimize or eliminate inmate or officer injuries and death in the event of inmate uprisings.

NMCD understands that "[i]f inmates cannot predict the consequences of engaging in dangerous behavior, they will be less likely to take an unknown risk. This decreases the overall need to use force. However, if an inmate understands that committing a certain wrongdoing would necessitate a use of force which they deem tolerable, that inmate could strategize accordingly." [RP 298]. While NMCD officers follow clear use of force guidelines, these procedures are useless if they can be reverse engineered by inmates. "In effect, the *perceived unpredictability* of officers disincentivizes inmate violence." *Id.* (emphasis in original). Of course, this perceived unpredictability depends on keeping the use force methods confidential. It is hard to imagine that the Legislature, in giving the Secretary such a broad mandate to enact reasonable regulations to effectively administer corrections in New Mexico, would not have had similar confidential rules in mind.

The second security goal achieved by keeping this information confidential relates to the distinction between a "use of force" and a "show of force." [RP 299]. "Whereas a use of force physically addresses a conflict, a show of force presents the credible possibility that force may be used. Simply put, the show of force may be a bluff or warning designed to give the inmate an opportunity to correct their behavior." *Id.* If NMCD announced when its officers are instructed to merely *feign* a use of force, this tactic would prove hollow. "If inmates knew when NMCD officers would not actually use force against them, shows of force could not serve as

effective warnings." *Id.* *See also* [RP 300]. Unless accompanied by a clear warning, inmates do not question whether a demonstration of the ability to use force may be followed by an actual use of force. *Id.*

Another circumstance in which it is essential that NMCD control the perception of force is when NMCD officers are out in the community. [RP 300]. This applies to a variety of situations, such as when inmates are participating on institutional work crews. In these circumstances it is crucial that NMCD "prevent inmates from learning how, and to what extent, standard use of force procedures change when an offender is not within an NMCD facility." [RP 301]. Many provisions of the use of force policy describe specific ways in which NMCD officers have more limited use of force authorization in community settings. *Id.* To compensate for these restrictions, NMCD officers "must rely more on the perception of force." *Id.* Therefore, "[w]ithholding this information is necessary to keep consistent expectations of behavior when offenders are brought into a community setting." *Id.* Given that these situations may lend themselves to escape attempts, it is paramount that inmates behave as if they were under the same level of NMCD authority outside the prison walls as that within. For example, the UoF Policy governs "how NMCD officers behave in 'hot pursuit' situations, which could be critical information to an inmate planning an escape attempt." *Id.*

The final category of the relevant confidential policies relates to the placement, storage and use of security equipment. One striking example is a provision of the UoF Policy which, if revealed, "would let inmates know *where to find weapons*, especially in sensitive transport situations where there is an elevated risk of escape." [RP 301]. (emphasis in original). These aspects of the confidential policy relate to information about what type of restraints and weapons could be used in a given scenario. Advance knowledge about what restraints may be used would allow an inmate to "understand where to hide implements to escape a given form of restraint. Inmates could also deliberately make the appropriate type of restraint difficult to administer." *Id.* In this way, NMCD's control of information is just as vital to inmate and staff safety as any piece of a prison's physical security infrastructure. Given the indisputable link between the confidential status of the UoF policy and NMCD's legitimate penological interests, the regulatory designation of the confidential nature of the UoF policy should have the valid force of law for purposes of IPRA's residual exception.

The decision by the Court of Appeals does not engage or acknowledge these arguments whatsoever. Consequently, the court's opinion fails to appreciate how the completely uncontroverted testimony establishes how the subject confidentiality policies are "necessary" to enforce and implement the New Mexico Corrections Act. This strips the Secretary of crucial rulemaking authority where is it is effectively

undisputed that doing so will gravely harm the fundamental purpose of the NMCD in keeping its prisons safe for both inmates and personnel alike.

Under the Court of Appeals' invention, out of whole cloth, of a requirement that the UoF policy is not protected under IPRA because NMCD's enabling acts do not specifically mention IPRA or the UoF policies, no confidentiality policy can ever be found valid under the "catchall" exception. The Court of Appeals observes of NMCD's enabling acts that "[b]y their plain language, neither addresses IPRA, the confidentiality of records or information, or the Secretary's ability to declare records or information as confidential." *Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't*, at *3 (N.M. Ct. App. May 31, 2024). While true, this fundamentally misapprehends the Legislative purpose of NMSA 1978, § 9-3-5(E) and NMSA 1978, § 33-1-6(B). *See, State, ex rel. Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346, 871 P.2d 1352 ("But courts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning."). Indeed, NMCD's enabling acts neither mention IPRA, nor any specific statute. The same is generally true for nearly all enabling acts. This does not, however, mean that the Secretary of Corrections should not be able to enact regulations or policies designed to protect inmates and prison personnel as is

necessary for the safe and effective administration of the corrections system. The Court of Appeals decision has the result of effectively swallowing the purpose and design of the very enabling acts which were designed to safely and effectively allow the prions to function.

The Court of Appeals is also concerned with the possibility that, if an agency may rely upon a general enabling act to promulgate confidentiality policies, it would necessarily "… allow a myriad of other entities to assert the same authority to declare documents beyond the reach of IPRA." *Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't*, 2024 at *4 (N.M. Ct. App. May 31, 2024). There is, however, no danger of agencies arbitrarily declaring all their records confidential. 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. Such analysis would necessarily incorporate consideration of IPRA's policy of liberal disclosure. Unfortunately, the Court of Appeals did not engage in this important analysis. Nonetheless, whether IPRA is expressly mentioned in an enabling act should not be relevant to this analysis.

The Court of Appeals held that for an agency to promulgate any type of confidentiality policy:

> There must be specific authorizing statutes that relate to the effects of disclosure and the confidentiality of the information. This holding represents another aspect of the general rule that "an administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *See Princeton Place v. N.M. Hum. Servs. Dep't*, 2022-NMSC-005, ¶¶ 28, 29, 503 P.3d 319 (internal quotation marks and citation omitted); *see also, Edenburn*, 2013-NMCA-045, ¶ 26, 299 P.3d 424 ("A regulation making certain records private may be proper if the regulation is authorized by a statute and is necessary to carry out the statute's purposes." (internal quotation marks and citation omitted))

Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't, at *4 (N.M. Ct. App. May 31, 2024)

Here, the NMCD has provided a thorough and detailed account as to how these specific confidentiality rules are "in harmony" with its central responsibility and purpose. There is no purpose more "in harmony" with NMCD's enabling acts than the safe and constitutional operation of NMCD facilities. The Court of Appeals has simply substituted its own judgment for that of the Secretary and has elected to completely ignore the evidentiary record in this case.

It is notable that recent decisions by the Court of Appeals on this issue have taken a more accommodating approach to allowing agencies to enforce common-sense regulations which fall within IPRA's residual exception. For example, in

Maralyn Beck v. State of New Mexico ex. Rel Children, Youth & Families Dep't, at *1 (N.M. Ct. App. September 21, 2024), the plaintiff challenged the withholding of names and addresses of foster families by the New Mexico Children Youth & Families Department ("CYFD") on the grounds that "no agency may rely on a regulation promulgated by that agency to make additional personally identifiable information confidential and exempt from inspection under IPRA's catchall exception."[3] Unlike the prior decision in this matter, the court in *Maralyn Beck* concluded that "… CYFD's regulation protecting personally identifying information of foster parents is a regulation having the force of law, enforceable under the 'as otherwise provided by law' exception …." *Id.* In doing so, the court held that one of the goals of IPRA's residual exception is, at least in part, to defer to "agency regulations properly promulgated…." *Id.* at *26. Further, in this context, "a regulation has the force of law if it is necessary to carry out the statute's purpose." *Id.* at *30. At the very least, this apparently new standard calls for a close evaluation, while giving the agency its due deference, whether the UoF policies at issue are consistent with the NMCD's mandate to operate corrections in a safe and constitutional manner.

[3]Because the opinion in *Maralyn Beck v. State of New Mexico, ex rel. Children, Youth & Families Department* was issued after submission of the Defendants-Appellants petition, it was not discussed therein, nevertheless, the Court of Appeals reasoning bears on the issues presented in the petition and therefore should be considered.

B. The Designation of NMCD's Grievance Materials as Confidential is Consistent with, and Essential to, its Enabling Acts and has the Force of Law for Purposes of IPRA's Residual Exception.

The ACLU's IPRA request also applied to confidential grievance reports and other internal incident report records made by inmates, usually grieving about the behavior of fellow inmates. These documents are governed by NMCD policy CD-040101(C)(1)(g)(1-9), which designates such materials as confidential pursuant to the Secretary's rulemaking authority. [RP 188]. The regulation declaring grievance reports and associated inmate documents confidential likewise carries the force of law sufficient to fit within IPRA's residual exception. *Id.* Like the UoF policy, the reasons for withholding this information from the general public are related to prison security. [RP 190]. Inmate grievance reports are submitted by inmates with a critical expectation of privacy. *Id.* The records are considered confidential in order to prevent "open conflicts between inmates which could endanger the physical safety of NMCD employees, personnel, and other inmates." [RP 187]. The confidential status of inmate grievances against fellow inmates is necessary to prevent inmate retaliation "of the contents of those grievances from being publicly inspected [by other inmates]." *Id.*

Making inmate grievances public would structurally alter an inmate's opportunity to safely and privately raise concerns about any number of issues. "Ensuring the integrity of the grievance process is critical to responsibly resolving

the concerns of inmates and is an essential duty of NMCD." [RP 187-188]. In other words, allowing unrestricted disclosure of inmate grievances would severely chill an inmate's already limited ability to privately report personal problems to NMCD, including safety concerns, without fear of potentially violent repercussions. As the former records custodian explained in responding to the underlying IPRA request:

> "[c]ertain inmates, if they were to obtain copies of or review the grievances filed by other inmates, would use the personal and sensitive information in the grievances to harass or intimidate or create disturbances. Such a disclosure of the inmate grievance to you or other members of the public would therefore jeopardize the safety and security of the complaining inmates, chill if not prevent the filing of the grievance to the detriment of the department and its inmates, and interfere with its inmates' rehabilitation and subsequent reintegration into society pursuant to Section 33-1-6(H) NMSA of the Corrections Act, (which requires the Secretary to encourage and promote the rehabilitation, education, employment, and reintegration into society of offenders sentenced to a corrections facility)."

[RP 185].

NMCD has created a record which cannot better illustrate the degree to which the lower court's effective elimination of the current inmate grievance system will disrupt prison operations. Again, the decision by the Court of Appeals does not address these arguments or otherwise address the notion that such policies are "necessary" for the administration of corrections or otherwise "in harmony" with the purpose of NMCD. Where the Secretary of Correction's decision-making on a

confidential regulation is necessary for the safe administration of New Mexico's prisons, the regulation has the force of law for the purposes of IPRA's residual exception.

C. The Abrogation of the Secretary's Authority to Enact Limited Confidential Use of Force Regulations is Inconsistent with the Unique Deference Afforded to Prison Administrators.

The lower court's judicial usurpation of the Secretary's authority represents a departure from the well-established policy of deference to prison administrators. The United States Supreme Court has held that the policies which govern the operations of public correctional agencies are entitled to unique deference because correctional institutions "bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). As a general matter, "courts owe 'substantial deference' to the professional judgment of prison administrators." *Levie v. Ward,* 2007 WL 2840388 (W.D Okla.) (internal citation omitted). Indeed, "[t]he Supreme Court has clearly cautioned against judicial interference with the daily administration of prisons," *Oakleaf v. Martinez*, 297 F. Supp. 3d 1221, 1233 (D.N.M. 2018) (internal citations omitted), recognizing that "[p]rison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy

of judicial restraint." *Turner v. Safley*, 482 U.S. 78, 85 (1987). The Supreme Court also cautioned that:

> "Courts are ill equipped to deal with the increasingly urgent problems of prison administration reform. (Citations omitted). [R]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint …."

Id. at 84-85 (1987) (internal citation omitted).

Moreover, "[w]here a state penal system is involved," as is the case here, there exists "additional reason to accord deference to the appropriate prison authorities." *Id.* To effectuate this policy of restraint, the Supreme Court in *Turner* created a four-factor test to analyze the lawfulness of prison regulations. Although *Turner* was not a case evaluating prison regulations in the context of public records disclosure laws, it considered the validity of such regulations juxtaposed against an equally important body of constitutional principles, specifically the constitutional rights of prisoners. *Id.*, at 84. The test formulated in *Turner* is applicable here. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 84-85. Second, the court must evaluate "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* Third, the court must consider "the impact

accommodation … and on the allocation of prison resources generally." *Id.* The final factor is whether there is an "absence of ready alternatives." *Id.*

There is substantial authority emphasizing the need for exceptional judicial restraint in the area of prison administration, particularly when it concerns means and methods of prison riot control. For example, courts have held that "[t]o satisfy the first *Turner* factor, 'the prison administration is required to make a *minimal* showing that a rational relationship exists between its policy and stated goals.'" *Boles v. Neet*, 486 F.3d 1177, 1181 (10th Cir. 2007) (emphasis added). Other courts have concluded that to uphold a corrections department policy, it ultimately "'does not matter whether we agree with' the defendants or whether the policy 'in fact advances' the jail's legitimate interests …. The only question that we must answer is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests." *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (internal citation omitted).

In this case, the Court of Appeals categorically rejected the notion that any such judicial deference, in the context of prison operations, applies to policies that involve IPRA or the topic of confidentiality. Rather, in the appellate court's view, the "deference to prison authorities is irrelevant to NMCD's obligations under IPRA." *Am. Civil Liberties Union of New Mexico v. New Mexico Corr. Dep't*, at *3 (N.M. Ct. App. May 31, 2024). NMCD submits that regardless of whether the

challenged prison regulation relates to constitutional issues or confidentiality provisions, judicial interference in corrections is strongly discouraged. The danger of such interference is the same regardless of the specific subject of the challenged regulation.

D. The Confidentiality of the Subject Records is Consistent with Federal and New Mexico Law.

The decision of the Court of Appeals overturning the Secretary's rulemaking authority is incompatible with fundamental legal concepts governing NMCD generally. The United States Supreme Court has explained that, under the Eighth Amendment to the United States Constitution, "prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citing *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)). *See also,v. Cty. of Eddy*, 1980-NMSC-145, ¶ 23, 622 P.2d 234 (recognizing that "[w]hen one party is in the custodial care of another, as in the case of a jailed prisoner, the custodian has the duty to exercise reasonable and ordinary care for the protection of the life and health of the person in custody").

Under the Eighth Amendment, it is unconstitutionally cruel and unusual for a prison to exercise "deliberate indifference" when faced with a situation where an "identifiable group of prisoners" would likely be "singled out for violent attack by other inmates." *Farmer*, 511 U.S. at 843. This is precisely the circumstance which will likely result if NMCD's confidentiality rules are swept away. [RP 297-302,

187-193]. As discussed, inmates could leverage the UoF policy to plan attacks and subvert de-escalation tactics while also obtaining unfettered access to sensitive information about their fellow inmates. [RP 187-193]. When the Legislature delegated rulemaking authority under NMSA 1978, § 9-3-2 and charged NMCD with the responsibility to "ensure a comprehensive criminal justice system in New Mexico," it clearly delegated, at the barest minimum, the power to make rules necessary to prevent unconstitutional outcomes.

In addition to the fundamental Eighth Amendment concerns, New Mexico law generally recognizes that confidentiality plays an important role in the security of correctional operations. Unlike the vast majority of other agency regulations, most rules promulgated under the Corrections Department Act are not subject to the usual restrictions governing administrative law in New Mexico. Typically, rules issued by state agencies are governed by the New Mexico State Rules Act (SRA), NMSA 1978, § 14-4-1, *et seq.*, which regulates the basic process wherein agencies must generally submit their proposed rules for public "notice and comment" in addition to other procedural requirements. For example, state agencies must normally provide "notice of proposed rulemaking" to the public and "specify a public comment period of at least thirty days" during which time the agency must facilitate a hearing guaranteeing the public "a reasonable opportunity to submit data, views or arguments orally or in writing." NMSA 1978, § 14-4-5.3 (a)-(b). Like IPRA, the

purpose of this notice and comment process is to promote the public's interest in knowing, reviewing, and indeed criticizing an agency's policies.

It also is through the SRA that agency rules are incorporated into the New Mexico Administrative Code. To this end, NMSA 1978, § 14-4-7.2 (a) dictates that "the state records administrator shall create and have published a New Mexico Administrative Code, which shall contain all adopted *rules*." (emphasis added). However, the Legislature has directly excluded most regulations issued by NMCD from the overarching requirements of the SRA. This is evident in the SRA's central definition of what qualifies as a "rule," which explains that:

> "rule" means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency. [...] *"Rule" does not include rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution,* [...]

NMSA 1978, § 14-4-2 (emphasis added).

Confidentiality is a critical and inseparable feature of effective prison administration. The confidentiality of the documents at issue in this case is just as essential to the safe and effective operation and management of state prisons as is the knowledge about which guards carry which keys. Allowing the Secretary of

Corrections the authority to promulgate and enforce basic confidentiality regulations is consistent with the overarching legal framework governing corrections rules and regulations.

V. CONCLUSION

Here, the subject IPRA requests clearly fall within the residual exception because there is no reasonable interpretation of either of NMCD's enabling acts which would allow NMCD to knowingly disclose information which would directly jeopardize the safety and welfare of its inmates and staff or prevent it from safely operating its prison facilities pursuant to its legislative mandate.

The purpose of the enabling acts is to provide New Mexico with a functioning corrections system, consistent with the United States Constitution. It is axiomatic that the NMCD Secretary's authority to create policies to enforce the enabling acts includes an implicit mandate to, at minimum, operate correctional facilities in a manner which prioritizes the health, safety and welfare of inmates and staff. Under these circumstances, the Secretary's confidentiality rules are rationally linked to a legitimate penological interest and therefore have the force of law. Therefore, IPRA's residual exception properly prevents disclosure of the disputed materials in their entirety, and the lower court erred by circumventing the Secretary's authority.

This Court should reverse the district court's ruling and mandate entry of an order granting the NMCD's Cross-Motion for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-319(B), Appellants request oral argument.

STATEMENT OF COMPLIANCE

In accordance with Rule 12-318(G) NMRA, Appellants certify that this brief complies with the type-volume limitation of Rule 12-318(F)(3) NMRA. This brief was prepared using a proportionally-spaced type style, Times New Roman, in 14-point font for the text and 12-point font for footnotes, and according Microsoft Word for Microsoft 365 MSO, the body of this brief, as defined by Rule 12-318(F)(1) NMRA, contains 6,812 words.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned hereby certifies the above pleading was filed through Tyler Tech/Odyssey e-file system, and e-service was requested the Court's e-file system on all counsel of record, noted below, and this pleading was emailed to the counsel noted below:

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