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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' REPLY BRIEF

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I.

INTRODUCTION

The central question raised in this appeal is whether the Secretary of the New Mexico Corrections Department (NMCD) has the authority to make narrow confidentiality policies consistent with NMCD's enabling acts. NMSA 1978, §§ 9-3-5 and 33-1-6(B). Plaintiff-Appellee (ACLU) argues that IPRA's policy of liberal disclosure must be construed so broadly as to require NMCD to fully disclose its confidential Use of Force (UoF) policy, confidential inmate grievances, and other highly sensitive security information. As more fully argued in NMCD's Brief-in-Chief, there is sworn and uncontroverted testimony in the record below from NMCD describing exactly how the confidentiality of this information is essential to ensuring the physical safety and constitutional operation of all NMCD facilities. Because the Secretary has valid rulemaking authority to designate these materials as confidential, NMCD properly withheld this information pursuant to the residual exception of the New Mexico Inspection of Public Records Act, NMSA 1978, 14-2-1 *et seq*. (IPRA).

II.

ARGUMENT AND AUTHORITY

A. The ACLU has Failed to Controvert the Record Establishing that the Policies at Issue are Necessary to Properly Administer the New Mexico Corrections Act.

Making the subject policies non-confidential would compromise NMCD's ability to fulfill its duty to protect inmates, staff, and the public from known acts of violence which are inherent within the Corrections setting. These duties are uniquely tied to the ability of prison administrators to ensure the security of their facilities. As the record in this case demonstrates, it is impossible to create a constitutionally secure environment without allowing the Secretary of Corrections the bare minimum authority to make certain security information confidential.

The Legislature recognizes, in very broad but clear terms, that the Secretary must have the authority to enact rules and policies "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). This Court has the opportunity, through this appeal, to affirm IPRA's policy of open government while also recognizing that the Secretary of Corrections must have the necessary tools to carry out NMCD's statutory and constitutional mandate to operate a safe and secure prison system. This case offers a clear example of a circumstance in which the Legislature envisioned

using the residual exception to allow a governmental agency the means to properly fulfill one of its main purposes. Implementing such lawful forms of confidentiality, including valid agency rules, is precisely the purpose of IPRA's residual exception. Application of the residual exception here gives true meaning and effect to the enabling acts through which NMCD exists and operates.

While the Legislature surely envisioned a strong public policy in favoring the liberal disclosure to the public in the affairs of government, it just as clearly recognized that the Secretary of Corrections must be able to carry out the statutory and constitutional mandate to operate the prison system safely. This appeal asks this Court to draw clear limits with respect to the right of public access to government records under circumstances in which the Legislature clearly intended for the residual exception to apply when it enacted NMSA 1978, § 14-2-1(L). To hold otherwise would render the residual exception, as well as NMCD's enabling acts, meaningless.

The ACLU claims that NMCD offers only "broad legal and policy-based arguments" amounting to "unwavering deference to prison administrators" which seek "limitless discretion" to designate virtually any information as confidential. (Plaintiff-Appellee's Answer Brief, p. 1, 5). The ACLU characterizes the testimony of NMCD officials as merely a "parade of horribles" equivalent to the policy-based and previously overturned "rule of reason" test. *Id.* p 23. See, *Republican Party of*

New Mexico v. New Mexico Taxation & Revenue Dept., 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860. This is a mischaracterization of NMCD's argument. This case has never been about an abstract, generalized authority to arbitrarily withhold any NMCD record at the Secretary's whim. Rather, this case involves questions of whether the UoF policy and internal grievance reports *specifically* contain information, the confidentiality of which and withholding from public view is "necessary" to the proper and safe administration of NMCD, as this agency is statutorily and constitutionally tasked. NMSA 1978, § 9-3-5(E), § 33-1-6(B).

NMCD has never asserted that the relevant enabling acts grant plenary power to designate all NMCD records as confidential. The distinction between those documents, which are fundamentally necessary for the safe operation of the prison system as determined by those most qualified to make those judgments, and those which are not, should be obvious. Without dismissing the concerns this Court expressed in *Republican Party,* NMCD and other agencies must be able to assess what is appropriate and necessary for the proper and safe function of its facilities and this Court must have some flexibility to assess what agency rules are necessary for the same reason and as envisioned by the Legislature through the enabling acts. This is accomplished through IPRA's residual exception. The ACLU suggests that the Court should not engage in this type of analysis because "a patchwork of district court-decision making is not the answer" where judicial review of agency

rulemaking would be "unworkable." (Plaintiff-Appellee's Answer Brief, p. 2, 23). The Court should reject this argument.

Of course, courts in New Mexico have a clear history and prerogative of determining, on a case-by-case basis, whether an agency has acted outside the scope of its prescribed authority, especially in a manner deemed to be arbitrary or capricious. See e.g. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶ 16, 61 P.3d 806, 61. The fact that future courts may be asked to evaluate whether different confidentiality rules are legally valid does not justify categorically eliminating the Secretary's authority to make any confidentiality rules for NMCD.

The ACLU makes various policy arguments as to why, in its view, NMCD should operate without any confidentiality policies whatsoever. These arguments are nothing more than policy averments. NMCD has given a thorough account of the tangible dangers that will likely result if the UoF policy and internal grievances are disclosed. There is nothing speculative about this testimony. The NMCD offers informed, firsthand, and an expert understanding of the need and impact of the confidential policies at issue. To call this account of how inmates, staff, employees, and volunteers will be harmed a speculative "parade of horribles," without any contradictory evidence in the record ignores the basic deference courts grant to public officials.

The ACLU makes no attempt to refute the substance of the testimony of NMCD officials articulating the purpose and the need of the disputed confidentiality policies. Specifically, there is no evidence in the record of (1) any testimony or evidence from any entity disputing NMCD's claims as to why its confidentiality policies are necessary for corrections administration; (2) any legal authority from any jurisdiction suggesting that these confidentiality policies are not necessary for corrections administration, (3) any legal authority from any jurisdiction suggesting that corrections agencies can safely and constitutionally operate without these confidentiality policies. This Court should not arbitrarily elevate the ACLU's policy arguments over the unrefuted account of NMCD officials concerning what is necessary to effectively administer the duties of NMCD in accordance with its statutory mandate.

B. The Court Should Not Abandon Basic Considerations of Safety, Security and Comon Sense in Determining the Scope of NMCD's Rulemaking Authority Given its Eighth Amendment Mandate.

The ACLU's re-interpretation of the enabling acts would subject inmates and prison personnel in New Mexico to a radical, unconstitutional experiment. The ACLU has pointed to no other jurisdiction where officers do not have an asymmetry of information which may be used to de-escalate violent situations, no other jurisdiction in which inmates know the precise locations of weapons and security equipment, and no other jurisdiction in which inmates may report their grievances

without any expectation of confidentiality. While New Mexico does not follow the "rule of reason" when evaluating the disclosure of public records, this does not mean that fundamental considerations of safety, security and common sense must be abandoned.

While the Legislature did not, and indeed could not, set forth every conceivable type of policy which may be necessary to administer NMCD's enabling acts, this does not mean that the Legislature intended to prevent the Secretary from enacting limited confidentiality rules impacting prison security. To hold that the mere absence of language within the enabling acts discussing the UoF policy requires disclosure of those policies under IPRA is inconsistent with the principle that courts "… must not override common sense and the evident statutory purpose…" *State v. Davis*, 2003-NMSC-022, ¶ 13, 74 P.3d 1064, 1069 (internal citation omitted). Plaintiff-Appellee's position not only ignores the fundamental deference courts should give to an agency such as NMCD in determining what is necessary for the safe and secure operations of prisons and correctional facilities in this State, but also ignores the constitutional mandate to do so, through the Eighth Amendment to the United States Constitution, and similar New Mexico authorities as discussed in NMCD's Brief-in- Chief.

III.

CONCLUSION

The ACLU does not address the substance of the uncontroverted testimony of NMCD officials concerning the purpose and need for the confidentiality rules at issue. The ACLU offers only broad policy arguments, general appeals to transparency and advances a novel re-interpretation of NMCD's enabling acts which would render them meaningless with the practical effect of rendering New Mexico prisons less safe for inmates, personnel and visitors. This surely was not the Legislature's purpose in enacting either NMCD's enabling acts or the residual exception.

The Court should not adopt an interpretation of the Corrections Act and IPRA's residual exception which, by the uncontroverted testimony in the record of those officials charged with prison administration, would result in the creation of an environment completely incompatible with the Eighth Amendment to the United States Constitution and the New Mexico Constitution. This is especially true where the testimony of prison administrators is based on the honest realities of prison administration and the irreducible security challenges they face.

IV. STATEMENT OF COMPLIANCE

Pursuant to Rule 12-502(E) NMRA, undersigned counsel certifies that this Defendant-Appellant's Reply Brief complies with Rule 12-502(D)(3) NMRA in that it contains 1854 words in a proportionally-spaced type.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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On this ___18th____ day of November, 2024.

*/s/ Scott P. Hatcher*_____
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