IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ANDREW JONES,

Petitioner,

v.

NO-S-1SC-37094
NO. A-1-CA-35120
(D-202-CV-2014-03426)
(Bernalillo County)

THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF NEW MEXICO,

Respondent.

UNOPPOSED JOINT MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rules 12-320 and 12-309, NMRA, the American Civil Liberties Union Of New Mexico (ACLU-NM) and the New Mexico Foundation for Open Government (NMFOG) respectfully request the New Mexico Supreme Court to issue an order granting them leave to participate as *amici curiae* and to file the attached *amicus* brief (Exhibit 1) in support of Petitioner Andrew Jones (Mr. Jones). As grounds for this Motion, the ACLU-NM and NMFOG respectfully submit:

1) This matter addresses Mr. Jones's right to hold a government entity accountable for unlawfully denying and then substantially delaying production of requested public records under the Inspection of Public Records Act (IPRA),

NMSA § 14-2-1. Specifically, the following issues are presented here:

a) whether it was error for the lower Court to dismiss as moot a Plaintiff's claims in an IPRA lawsuit that a government entity had illegally denied a request for public records on the ground that the entity had produced the requested records after the lawsuit was filed;

b) whether it was error for the Court of Appeals to dismiss Mr. Jones's appeal on the ground that he had acquiesced in the lower Court's interim ruling by not instigating a discretionary interlocutory appeal of that ruling, but instead had consistently objected to the lower Court's interim and final rulings;

c) whether it was error under the facts of this case for the lower Court to deny Mr. Jones's request for public records on the basis of the narrow law enforcement exception set forth in the IPRA, § 14-2-1(A)(4), NMSA; and

d) whether it was error for the lower Court to deny Mr. Jones's request for public records without conducting a sufficient factual determination of the applicability of the narrow law enforcement exception set forth in the IPRA, § 14-2-1(A)(4), NMSA to the specific documents requested by Mr. Jones.

2) Both *amici* have strong institutional interests in this case and bring to this Court considerable expertise in the issues before the Court. Their participation as *amici* in this case will assist the Court in deciding the issues before it.

a) The American Civil Liberties Union (ACLU) is a nationwide, nonprofit,

nonpartisan organization with over 1,600,000 members, 3,200,000 online activists, and 3,700,000 social media followers dedicated to the principles embodied in the Bill of Rights. ACLU-NM is one of the ACLU's statewide affiliates with approximately 12,000 members. ACLU-NM has a strong, well-established interest in protecting the civil rights of the citizens of the State of New Mexico because it has been deeply involved in securing the principles embodied in the First Amendment and its analogous state constitutional provision, N.M. Const. art. II § 17, as well as statutes like IPRA that guarantee the right to receive information about government's activities. A significant portion of the ACLU-NM's work involves obtaining public records from local public bodies and disseminating information to the public that implicates their civil rights, especially the right to be protected from unlawful police conduct. The fundamental right to receive information is imperative to further the democratic process in both New Mexico and the United States and this right is particularly important when the public seeks information about government actors. Further, ACLU-NM was the Plaintiff in *American Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, a case that holds litigation securing the production of previously denied responsive records was "successful" for purposes of IPRA, even if the requesting party already had possession of the documents at the time litigation was filed, *Id*., at ¶ 33, and the holdings of the lower courts here are contrary to *Duran*.

b) FOG is a non-profit, nonpartisan organization committed to helping citizens, students, educators, public officials, media and legal professionals in New Mexico understand, obtain and exercise their rights and responsibilities under New Mexico's "sunshine laws," including the Inspection of Public Records Act and Open Meetings Act. FOG is dedicated to carrying out the public policy of the State of New Mexico, as set forth in IPRA, "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). In pursuit of these purposes, FOG has participated in judicial proceedings, both as a party or as *amicus curiae*, where access to public records and information is at stake, and has even been requested *sua sponte* by the court to participate as *amicus*. See, *e.g.*, *San Juan Agr. Water Users Ass 'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64; *Palenick v. City of Rio Rancho*, 2013-NMSC-029, 306 P.3d 447 (amicus); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, 299 P.3d 424 (amicus at the request of the Court); *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep 't*, 2012-NMSC-026, 283 P.3d 853 (amicus); *City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349 (party). FOG also offers guidance and training to citizens and elected officials around the state on issues related to access to public records. Because FOG is devoted to

matters of open government and access to public records, it is well-situated to offer this Court assistance in addressing the issues before it in this case.

3) FOG and ACLU-NM seek leave to file a joint *amici curiae* brief in this matter because of the important issues presented by this case, specifically whether the district court erred in applying the wrong standard under IPRA's so-called law enforcement exemption and without reviewing the specific records requested, and whether the Court of Appeals erred in deciding that all of Mr. Jones's claims under IPRA were mooted when he received the requested documents well after his lawsuit was filed and that he had acquiesced in the lower court's decision because he did not seek an interlocutory appeal. These erroneous rulings will substantially impact the enforcement of IPRA and the public's right to know what the state's many police departments are doing. In addition, the Court of Appeals decision as to mootness will encourage government agencies to unlawfully withhold records and then moot review of their unlawful action by turning over the documents during litigation that challenges their conduct. FOG has observed that governmental entities, records requestors and district courts have not agreed on the scope or application of the so-called law enforcement exemption and have continued to apply a broad erroneous standard that is not contained in IPRA, despite this Court's clear directive in *Republican Party*. Because this case

places both *Republican Party* and the effect of belated document production after the commencement of litigation before the Court, it is of substantial importance in the area of open government. *Amici* ACLU-NM and FOG respectfully submit that the issues presented here are of substantial importance to the public and to the fair administration of IPRA, as the decisions of the lower courts open the door for public entities to abandon their duty to respond to requests for public records in a timely fashion and to face no consequences for doing so, contrary to the requirements of IPRA.

4) Counsel for Respondent New Mexico Department of Public Safety and Mr. Jones have been contacted and do not oppose this motion.

WHEREFORE, the American Civil Liberties Union of New Mexico and the New Mexico Foundation for Open Government respectfully request that this Court grant them leave to file a brief as *amicus curiae* in this case. Pursuant to Rule 12-320(A) the proposed brief *amici curiae* is attached to this motion and is provisionally filed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Unopposed Joint Motion for Leave to File Brief as Amici Curiae with attached Brief to be mailed, by first-class mail, postage prepaid, on this, the 19th day of September, 2018 to counsel of record, as follows:

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DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF NEW MEXICO,

Appellee-Respondent.

BRIEF OF AMICI CURIAE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT AND AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO IN SUPPORT OF ANDREW JONES APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW MEXICO STATE CASES

OUT OF STATE CASES

NEW MEXICO STATE STATUTES

NEW MEXICO COURT RULES

INTEREST OF AMICUS CURIAE

NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT is a New Mexico non-profit is a non-profit, nonpartisan public interest organization committed to helping citizens, students, educators, public officials, media and legal professionals in New Mexico understand, obtain and exercise their rights and responsibilities under New Mexico's "sunshine laws," including the Inspection of Public Records Act and Open Meeting Act. FOG is dedicated to carrying out the public policy of the State of New Mexico, as set forth in IPRA, "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). In pursuit of these purposes, FOG has participated in many judicial proceedings, either as a party or as amicus curiae, where access to public records and information is at stake.

AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO is a New Mexico non-profit public interest organization with approximately 12,000 members. ACLU-NM is one of the national ACLU's state affiliates and has a strong, well-established interest in protecting the rights of New Mexico's citizens under the First Amendment and its analogous state constitutional provision, N.M. Const. art. II § 17, as well as the right to information about the government guaranteed by the Inspection of Public Records Act. A significant portion of the ACLU-NM's work

involves obtaining public records from local public bodies and disseminating information to the public that implicates their civil rights.

A more complete statement of the interests of Amici is set forth in their motion for leave to file brief amici curiae.

Pursuant to Rule 12-215(B) NMRA, counsel for amicus served all counsel with timely notice of the intent to file this brief via email on September 5, 2018.[1]

STATEMENT OF PROCEEDINGS

Amici hereby adopt and incorporate in full the statement of proceedings set forth in Appellants Brief in Chief, filed on September 12, 2018.

SUMMARY OF ARGUMENT

This case highlights the necessity for guidance by this Court regarding the scope of Inspection of Public Records Act ("IPRA") enforcement actions and the relief available to an aggrieved IPRA requester. In the instant case, Petitioner brought an IPRA enforcement action challenging whether the claimed exemption actually applied to all withheld records, arguing that DPS violated IPRA through its unlawful denial of records and failure to comply with IPRA requirements. The Court

[1] As required by Rule 12-215(F), NMRA, undersigned counsel certify that they authored this brief in its entirety. No party to this case or any party's counsel authored any part of this brief, nor did they provide any monetary contribution or support to fund the preparation or submission of the brief.

of Appeals wrongly held that the live controversy regarding whether DPS violated IPRA was moot based solely on Respondent's untimely production of the previously withheld records and that Petitioner had waived his right to appeal by acquiescing in the district court's interim ruling.

This Court should reverse the Court of Appeals decision and rule that courts must consider all the relief to which an aggrieved IPRA requester is entitled pursuant to §14-2-12(B) and (D). Post-filing production of previously withheld public records at most moots a claim for injunctive relief to compel production of unlawfully withheld records, but does not moot an IPRA enforcement claim as to whether a denial was lawful at the outset or whether the public body otherwise complied with the Act. This Court should further rule that a party does not acquiesce or waive his or her right to appeal an unfavorable interim ruling by failing to pursue discretionary remedies, especially when that party vigorously contests the ruling and continues to raise his or her entitlement to relief, as occurred here.

Lastly, this Court should reject Respondent's arguments that §14-2-1(A)(4) exempts all records related to an ongoing investigation or, in the alternative, that "countervailing public policies" justify withholding such public records. This Court should instruct the lower courts how to apply the plain language of §14-2-1(A)(4) which exempts only those records that would reveal previously unknown information about confidential methods, sources, or information, or would for the

first time reveal the identity of a person accused but not charged with a crime. This Court should hold that law enforcement agencies have the burden to show that each withheld record is lawfully exempt from disclosure and that they must provide access to all non-exempt information.

ARGUMENT

Courts are required to conduct fact-specific inquiries regarding the asserted basis for denying IPRA requests, including whether the claimed exemption actually applies to all withheld records and whether the public body has complied with IPRA requirements. This Court should enforce the *Republican Party* framework that all IPRA exceptions must be narrowly construed consistent with New Mexico's strong public policy in favor of disclosure as codified in the statute. *Republican Party of N.M. v. N.M. Dep't. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶16. To this end, this Court should rule on the proper scope and method for lower court application of the plain language of IPRA's so-called law enforcement exception, §14-2-1(A)(4), at issue here.

I. THE STATUTORY FRAMEWORK SUPPORTS REVERSAL

In enacting IPRA, the New Mexico Legislature declared that it is "the public policy of this state that all persons are entitled to **the greatest possible information** regarding the affairs of government and the official acts of public officers and

employees." 1978 NMSA, § 14-2-5 (emphasis added). "IPRA is intended to ensure that the public servants are accountable to the people they serve." *Republican Party*, ¶12, *quoting San Juan Agric. Water Users Ass'n v. KNME-TV,* 2011-NMSC-011 ¶16. The burden of establishing that public records can be withheld subject to an exception under IPRA lies with the custodian who seeks to prevent disclosure. "Each inquiry starts with the presumption that public policy favors the right of inspection." *Las Cruces Sun-News*, 2003-NMCA-102, ¶11. "The citizen's right to know is the rule and secrecy is the exception." *Republican Party*, ¶12, quoting *State ex rel. Newsome v. Alarid,* 1977-NMSC-076, ¶34, 90 N.M. 790. "Public business is the public's business." *Las Cruces Sun News*, ¶30 quoting *Newsome*, ¶16. IPRA exemptions to disclosure are interpreted narrowly to give effect to the presumption in favour of disclosure. *Cox v. N.M. Dep't of Public Safety,* 2010-NMCA-096, ¶¶15-17.

In *Republican Party*, this Court recognized that narrow interpretations of IPRA exceptions and limitations even on constitutional privileges are necessary to "curb encroachments on the public's access to records relating to the activities of their government." *Republican Party*, ¶ 48. This ruling is consistent with the jurisprudence of other states which recognize a broad right to public information. *See Ireland v. Shearin,* 417 Md. 401, 10 A.3d 754 (Md. App. 2010); *Schweickert v. Citrus County Florida Bd.*, 193 So.2d 1075, 1080 (Fla. 5th DCA 2016); *Baker v.*

Hayden, 55 Kan.App.2d 473, 478, 419 P.3d 31 (2018); *Wade v. Taylor*, 156 Idaho 91, 97, 320 P.3d 1250 (2014).

While *Republican Party* concerned whether a deliberative process privilege exists in New Mexico and the proper scope of the constitutionally mandated executive privilege, it set also forth the process by which courts should review the applicability of claimed exemptions from disclosure in IPRA actions, as opposed to balancing tests applied in the context of civil discovery. Courts "must independently determine whether the documents at issue are in fact covered by the privilege." *Republican Party*, ¶49. "Where appropriate, courts should conduct an in camera review of the documents at issue as part of their evaluation of privilege" or claimed exemption. *Id. See Spokane Research & Defense Fund v. City of Spokane*, 155 Wash.2d 89, 100, 117 P.3d 1117 (2005) (En banc) "[J]udicial oversight is essential to ensure that government agencies comply with the [Public Disclosure Act]."

II. PRODUCTION OF PREVIOUSLY WITHHELD RECORDS DOES NOT MOOT AN IPRA ENFORCEMENT CLAIM.

A. A person whose IPRA request is denied can bring suit to enforce all the provisions of the statute, and courts may order any appropriate remedy to address IPRA violations.

This case provides the Court with the opportunity to provide necessary and critical guidance to courts and IPRA litigants regarding 1) the scope of IPRA's broad enforcement provision (§14-2-12), and 2) the obligation of courts to rule on all the

relief sought in an IPRA enforcement action before dismissing such an action whenever a defendant governmental entity belatedly produces illegally withheld records. In the instant case, the Court of Appeals erred in finding that Respondent's post-filing production of previously withheld records mooted all of Petitioner's IPRA enforcement claims. In so doing, it ignored the scope of IPRA's enforcement provisions and Petitioner's several non-injunctive IPRA claims. In particular, the Court of Appeals unjustifiably refused to review the live controversy as to whether the denial of Petitioner's IPRA request was lawful at the outset, whether DPS otherwise complied with other IPRA requirements, and whether Petitioner was entitled to attorney's fees under IPRA.

To ensure timely compliance with all aspects of IPRA and protect the public's fundamental right to public information, the Act contains two separate enforcement provisions. First, 14-2-11 provides a remedy for IPRA requesters when the public entity either fails to respond to a written IPRA request within the statutory deadlines and/or fails to provide a timely explanation for denial of the request. *Faber v. King,* 2015-NMSC-015, ¶29. *See also Jaraysi v. City Of Marietta,* 294 Ga.App. 6, 9-10, 668 S.E.2d 446 (2008); *Roxana Community Unit School Dist. No. 1 v. Environmental Protection Agency*, 2013 IL App (4th) 120825, ¶42, 998 N.E. 2d

961. [2] Second, a person whose request is denied can bring suit to "enforce the Inspection of Public Records Act " under §14-2-12. The instant case concerns an IPRA enforcement action brought to enforce the provisions of the statute under §14-4-12.

IPRA addresses the various ways a request can be denied. An IPRA request can be deemed denied if the public body's response is unreasonably delayed. *Bd. of Com'rs of Dona Ana County v. Las Cruces Sun-News,* 2003-NMCA-102, ¶38 (Under the plain language of the statute, an IPRA request can be deemed denied if access is not permitted with a reasonable time). *See also Grapski v. City of Alachua,* 31 So.3d 193, 198 (Fla. 1st DCA 2010). In addition, if an IPRA respondent did not deny access to records, but failed to locate responsive public records, the IPRA requester would have a claim that the public body conducted an inadequate search. See *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wash.2d 702, ¶30, 261 P.3d 119 (2011) ("The failure to perform an adequate search precludes

[2] In *Derringer,* based on the specific facts of that case, the Court of Appealed ruled that a plaintiff could not file a lawsuit for statutory damages a year **after** the entity produced the withheld records. *Derringer v. State of N.M.,* 2003-NMCA-073, ¶13. Some courts have wrongly applied *Derringer* broadly to bar **any** IPRA enforcement action regarding IPRA violations if withheld records are produced prior to filing suit. This Court's subsequent clarification in *Faber* as to the scope of IPRA's separate enforcement provisions forecloses this improperly broad application of *Derringer.* In *Faber,* this Court stressed that an IPRA requester was still entitled to relief under IPRA's broad remedial provision if access to previously withheld records alone did not make him or her whole. *Faber*, ¶31.

an adequate response and production. The [Public Records Act] treats a failure to properly respond as a denial.").[3] Further, the public body may claim that it does not have any responsive records. *American Civil Liberties Union of N.M. v. Duran*, 2016-NMCA-063, ¶¶26-31 (The Secretary of State's office unlawfully denied IPRA request and when it wrongly claimed that emails were not responsive to the request.). The public body may claim that the requested records are not public records as defined by the statute. *State ex rel. Toomey v. City of Truth or Consequences,* 2012-NMCA-104, ¶¶26-28. *See Oliver v. Harborview Medical Center,* 94 Wash.2d 559, 564, 618 P.2d 76 (1980); *Forum Pub. Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986). Lastly, the public body may deny a request by claiming that the public records are exempt from disclosure under the limited exemptions set forth in IPRA.

An aggrieved IPRA requester can challenge a wrongful denial of records by asserting that IPRA procedures were not followed, that an exemption or privilege was wrongly claimed by the public entity, and that damages, attorney's fees and/or costs are appropriate. *See Faber,* ¶4; *Republican Party,* 2012-NMSC-026, ¶50. Here, Respondent claimed that the so-called law enforcement exemption (§14-2-

[3] Courts in other jurisdictions find that any improper response that results in an unjustified delay in accessing public records constitutes an unlawful denial. *Ireland v. Shearin*, 417 Md. 401, 408-412 (Public records request improperly denied when custodian directed requester to submit request to other departments within the institution); *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J.Super. 136, 140, 894 A.2d 72 (2006) ("[The fee imposed by the Township of Edison creates an unreasonable burden on plaintiffs' right of access[.]").

1(A)(4)) applied to all withheld records based on the FBI's pending investigation into the shooting death of Mr. Boyd. But DPS failed to meet its burden of showing how the cited IPRA exemption applied to each withheld record. In addition, Respondent not only failed to provide any information - such as an exemption log - as to which records it was withholding, it also failed to comply with its mandatory duty to sever and produce clearly non-exempt records under §14-4-9(A). Consequently, Petitioner had multiple remedies available to him in addition to the belated production of the requested documents and the Court of Appeals erred in holding that DPS's untimely production of previously withheld records mooted Petitioner's entire IPRA enforcement action.

While part of the relief sought by an aggrieved IPRA requester will almost always be production of the unlawfully withheld records, this is not the only relief to which an IPRA claimant is entitled. The plain language of the statute entitles such an aggrieved person to bring suit to "enforce the [Act]" and authorizes courts to "issue a writ of mandamus or order an injunction or **other appropriate remedy to enforce the provisions of the Inspections of Public Records Act**." NMSA 1978, §14-2-12(A) and (D) (emphasis added).

Under New Mexico case law, the public entities are liable for unlawfully withholding records "if the denial is later deemed unlawful." *Faber*, ¶¶30-31. In *Faber,* the IPRA defendant wrongfully withheld public records and did not disclose

those records until it was compelled to do so pursuant to the writ of mandamus issued by the district court. *Id.* ¶4. This Court held that the goal of government accountability was satisfied by the district court's **finding** that the public body had wrongfully withheld public records. *Id.* ¶30 (emphasis added). Moreover, this Court stressed that "[i]f the litigant is not made whole by the furnishment of the documents, he or she can seek actual damages, costs, and attorneys' fees" *Id.* ¶31. A successful IPRA claimant cannot "seek actual damages, cost, and attorneys' fees" or "any other appropriate remedy to enforce the provisions of the [Act]", if courts improperly dismiss the live controversy as moot whenever documents are belatedly produced.

The appellate courts of other states which, like New Mexico, recognize a broad right to access to public information routinely find that subsequent production of withheld public records does not moot a claim that the denial of access was unlawful at the outset. "Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time." *Spokane Research & Defense Fund*, at 103-104. "[W]hen the district court is reviewing a petition to access public records, the district court's inquiry is **whether the exemption from disclosure was justified at the time of the refusal to disclose** rather than at the time of the hearing. Further, in the event that the request covers both exempt and non-exempt records, the district court has an obligation to distinguish those records that are exempt from disclosure from those

that are not." *Wade,* at 96 (emphasis added). *See Schweickert,* at 1079 ("Appellant's case was not rendered moot simply because the Board produced the requested documents after the filing of the initial complaint[.]"). "One of the steps in deciding whether statutory fees should be allowed is to determine whether a person was wrongfully denied access to or the right to copy a public record." *Phoenix Newspapers, Inc. v. Molera,* 200 Ariz. 457, 27 P.3d 814 (Az. App. 2001). *See Ireland,* at 407 ("[W]e do not see how this case can be moot when Ireland maintains the right to challenge the adequacy of this later production [ ] and claims damages"); *Mazer v. Orange County,* 811 So.2d 857, 859 (Fla. 5th DCA 2002).

Moreover, in *American Civil Liberties Union of N.M. v. Duran,* the Court of Appeals correctly recognized that IPRA's purpose is not only to make government records available to the public, but rather "to ensure… that all persons are entitled to the greatest possible **information** regarding the affairs of government." *American Civil Liberties Union of N.M. v. Duran,* 2016-NMCA-06, ¶38 (emphasis in original).

> While information can come in the form of tangible documents, it can also be gathered based upon an agency's denials. … Denials are valuable information-gathering tools. With respect to any given record request, the absence of either (1) production of responsive records or (2) a conforming denial based upon a valid IPRA exception sends a strong message to the requester that no responsive public record exists.

Id. "People have a right to know that the people they entrust 'with the affairs of government are honestly, faithfully and competently performing their functions as public servants.'" *Las Cruces Sun News*, ¶30 quoting *Newsome,* ¶16. While public

records shed light on whether public servants are faithfully performing their functions, such information is also gathered by the governmental entity's failure to comply with IPRA itself, including unreasonable delays in responding to IPRA requests and unlawful denials based on the improper assertion of inapplicable and/or overly broad claims of privilege or other IPRA disclosure exemptions, inadequate searches for responsive public records, and claims that the records are not responsive or are not "public."

"New Mexico's policy of open government is intended to protect the public from having to rely solely on the representations of public officials that they have acted appropriately." *Cox*, ¶17 quoting *the Daily Times*, 2009-NMCA-057, ¶17. When courts improperly dismiss live IPRA enforcement claims and decline to review whether the defendant public body acted lawfully and in full compliance with the provisions of the statute, courts eviscerate the ability of IPRA claimants to hold public bodies accountable to those they serve by effectively denying their right to enforce the statute. Dismissing an entire IPRA enforcement action on such a basis directly contravenes the intent of the legislature to "create private attorneys general for more effective and efficient enforcement of IPRA than would be possible if only the attorney general or district attorney could enforce the statute." *Faber*, ¶28. *See Spokane Research & Defense Fund*, at 104. ("Permitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been force to file a lawsuit

… would undercut the policy behind the act.").

"'It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a [ ] court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Buckhannon Bd. and Care Home*, at 609, quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). In IPRA enforcement actions courts must delineate whether the public body complied with the law. Similarly, under analogous section 1983 litigation creating private attorneys general to enforce constitutional rights, "[o]nce such a judgment has been obtained, a party cannot simply change its mind and turn back to its old ways." *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1230 (10th Cir. 2008). "The purpose of IPRA's enforcement provision is to 'promote compliance and accountability' by governmental entities." *Duran*, ¶42, citing *Faber*, ¶28. In making a legal determination as to whether an IPRA response was lawful at the outset, courts mandate the adherence of the public entity to that ruling going forward and the ruling should curb reversion by an unsuccessful IPRA defendant to its illegal IPRA practices.

B. A live controversy exists as to whether the records were unlawfully withheld at the outset and Petitioner's enforcement claim was not mooted by subsequent disclosure of the records.

The present case is not moot for two reasons. First, this Court can and should

still grant actual relief as to whether the exemption was improperly and unlawfully asserted **at the outset** as to all withheld records, as well as Plaintiff's right to injunctive relief, damages and attorney's fees and costs. A case is found to be moot only "when no actual controversy exists and the court cannot grant actual relief." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734. Second, the issues raised in this case are capable of repetition but evading review. In *Republican Party*, by the time the case reached the Supreme Court, the parties agreed that the asserted privileges did not apply to the withheld records, and the governmental defendant claimed the privilege would not be asserted in the future for similar types of records. *Republican Party*, ¶9. Here, there is no such concession as to the applicability of the claimed exemption to the withheld records and the live controversy is not moot.

Petitioner brought an IPRA enforcement action alleging that none of the records sought would **reveal "**confidential sources, methods, information or individuals accused but not charged with a crime." Petitioner argued that - to the extent that the withheld records contained any such information - the information had ready been made public by DPS disclosures to the press. **[RP 153-155, COA Response Brief 9-12]** Respondent originally appeared to claim that it was withholding the responsive public records because the FBI had requested that DPS keep all records related to the shooting confidential "to the extent legally possible." **[RP 90]** Petitioner sought summary judgment that Respondent DPS failed to meet

its burden to show that the responsive records were exempt from disclosure, and Respondent failed to comport with IPRA's mandatory severability requirement pursuant to §14-2-9(A). Petitioner sought a determination –in his own motion for summary judgment and in response to Defendant's motion for summary judgment - that §14-2-1(A)(4) never applied to all withheld records. Petitioner also sought a ruling on his entitlement to attorney's fees. These are all live issues in this appeal which were not mooted by Respondent's untimely document production. **[RP 201-206]**

Erecting an unlawful barrier to production and then claiming the exemption has "expired" – as Respondent did here - conflicts with the plain language of IPRA and the public policy of the State of New Mexico. **[RP 134]** The unequivocal public policy of New Mexico as codified by the Act is that every citizen is entitled to the greatest possible information about the affairs of government, and the Act creates a cause of action for an aggrieved IPRA requester to enforce **all** the provisions of the statute. NMSA 1978, §§14-2-5 and 14-2-12. Moreover, courts are authorized to order any appropriate remedy if an IPRA violation is found. NMSA 1978, §14-2-12(D). Consequently, an IPRA claimant is entitled to the adjudication of whether an IPRA defendant improperly withheld responsive records and an injunction or any other appropriate remedy necessary to enforce the provisions of the Act, such as a ruling that the public body unlawfully withheld public records on an impermissible

basis at the outset. When Respondent produced the withheld records pursuant to the asserted expiration of the claimed exemption, DPS mooted only Petitioner's claim for injunctive relief to compel production of withheld records, but not Petitioner's claim concerning whether the exemption **ever** applied to all withheld records. Petitioner was entitled to a ruling on this claim based on a fact-specific determination of the applicability of the exemption to all the withheld records, and the extent to which Respondent failed to comply with 14-2-9(A). Petitioner was also entitled to all other remedies necessary to remedy the IPRA violation and enforce the statute, including declaratory relief, injunctive relief regarding the proper application of the statutory exemption, and reasonable attorneys' fees and costs. The District Court misapplied the IPRA law enforcement exception, and refused to conduct a fact specific inquiry as to the whether the initial denial was lawful once the records were disclosed. The Court of Appeals refused to consider the lawfulness of the denial at all, despite this Court's clear recognition of such claims in *Faber v. King*, 2015-NMSC-015.

The public policy objectives and plain language of the statute, New Mexico IPRA jurisprudence, and appellate case law from jurisdictions with similarly broad public records statutes require that courts determine whether records were lawfully withheld **at the time of the denial** and impose liability for unlawful denials to ensure that the right of inspection is not unlawfully impaired. "[The district court] must

determine **whether the agency was justified in initially withholding the requested documents**." *Hymas v. Meridian Police Dept*, 156 Idaho 739, 747, 330 P.3d 1097 (Id. App. 2014)(emphasis added). *See Fairley v. Superior Court*, 66 Cal.App.4th 1414 (Ca. App. 1998) ("It remains to be determined whether the pending litigation exemption was **ever** applicable to the disputed documents) (emphasis added); *State ex rel. Cincinnati Enquirer v. Ohio Dep't of Pub. Safety*, 2016-OHIO-7987, 71 N.E.3d 258.

In addition, permitting public entities to escape a determination by the courts as to the legality of their IPRA denials simply by their producing previously withheld records in any subsequent litigation would create a strong incentive for agencies to withhold public records, wait to see if any lawsuits are filed, and then evade review by mooting of the live controversy. This Court should not allow that to happen.

Finally, allowing such agency conduct to block court's consideration of the merits of Petitioner's IPRA claims would mean his and other cases raising issues of substantial public interest would be capable of repetition but evade review. While generally New Mexico courts will not decide moot cases, they will decide "cases which present issues of substantial public interest, and cases 'which are capable of repetition yet evade review.'" *Republican Party*, ¶10. In *Republican Party*, this Court found that judicial review of the proper scope of IPRA exemptions is a matter of substantial public interest. *Id*.

Disclosure exceptions to public information statutes concern the public's fundamental right to public information and almost always concern records which will continue to be sought by members of the public. *See State ex rel. Cincinnati Enquirer*, ¶31 ("Without resolution of the questions at issue here, we can reasonably expect the Enquirer and other media outlets to continue to request dash-cam recordings and law-enforcement agencies to continue to withhold them."); *Baker*, at 477 ("The right of the public to obtain audio recordings of court proceedings clearly involves a matter of public importance."); *Oliver*, at 564 ("[T]his case presents issues of continuing and substantial importance both to public hospitals and their patients. Without question further guidance is needed for all because the problem will recur."); *Forum Pub.Co.*, at 170-171.

Moreover, in New Mexico "[a]n issue is 'capable of repetition' yet evading review if the issue is likely to arise in a future lawsuit, **regardless of the identity of the parties**." *Republican Party*, ¶10, citing *Gunaji v. Macias*, 2001-NMSC-028, ¶11 (emphasis added). In the instant case, the issue of whether all public records concerning a criminal investigation can be withheld solely on the basis of the existence of an active investigation - without any fact-specific showing that the records are of the kind specifically exempted by the Act - is an issue that is likely to arise in another lawsuit, even if the parties or the specific investigatory records sought are different. A judicial determination of whether the claimed exemption ever

applied and whether DPS violated IPRA is necessary to resolve the live controversy in this case and curb further illegal IPRA denials by DPS on the same grounds.

III. A PARTY DOES NOT ACQUIESCE TO AN ADVERSE INTERIM RULING BY NOT PURSUING DISCRETIONARY REMEDIES.

While the Court of Appeals in the instant case improperly found that disclosure of the withheld records mooted all of Petitioner's IPRA enforcement claims, it devoted the bulk of its decision to finding that Petitioner had somehow acquiesced or otherwise waived his challenge to the District Court's interim ruling that the withheld records were exempt from disclosure by not pursuing discretionary remedies, such as interlocutory appeal or a motion for reconsideration under Rule 1-059(E). *Jones v. City of Albuquerque Police Dep't*, 2018 WL 3000216 *2-3. As clearly set out by the vigorous and well-reasoned dissent below by Judge Vargas, not only was this ruling by the Court of Appeals a dramatic and unnecessary departure from the prior jurisprudence of this state, it directly contravenes of the New Mexico Rules of Civil Procedure. *Id.* at *4.

The Court of Appeal's finding of acquiescence by Petitioner ignores the substantial evidence that Petitioner vigorously challenged whether the law enforcement exception applied to all withheld records in the briefs and hearings on both Petitioner's motion for summary judgment in 2014 and Petitioner's opposition to Respondent's motion for summary judgment in 2015, in which Petitioner again

sought a ruling from the court as to Respondent's unlawful denial and Respondent's failure to comply with IPRA requirements, such as §14-2-9(A). **[RP 59-69, 102-109, 148-182]** Moreover, Petitioner timely appealed the District Court's final order finding that this exemption applied to all withheld records. **[RP 201-206]** New Mexico case law and the rules of civil procedure do not require that a litigant do more to preserve a challenge to a district court's ruling. Similarly, in *Hymas,* the Idaho appellate court held that under the rules of civil procedure the appellant properly appealed the final judgment disposing of all claims for relief and was not required to appeal an initial order denying attorney's fees as argued by the department in that case. *Hymas,* at 744-745.

In effect the Court of Appeals appears to have ruled that in receiving the previously withheld records, which mooted only Petitioner's claim for injunctive relief as to production of the records, Petitioner elected his remedy and was barred from seeking any other remedy on his IPRA enforcement claim, including a ruling as to whether the denial was unlawful at the outset. Under the judicially created doctrine of election of remedies, courts can preclude a party from seeking a remedy, only if the "party has two inconsistent existing remedies on his cause of action and makes choice of one." *Romero v. J.W. Jones Const. Co.,* 1982-NMCA-140, ¶18, 98 N.M. 658. However, for relief to be barred under the doctrine of election of remedies, the remedies sought must first be inconsistent, and then the party must have made a

deliberate choice between those inconsistent remedies. *Id.* ¶¶ 18-21. In the instant case neither occurred. Petitioner's receipt of the previously withheld records was not inconsistent with seeking a ruling that the records were illegally withheld on the basis of an improperly applied exemption, that DPS failed to comply with §14-2-9(A), and that Petitioner was entitled to attorney's fees. Moreover, it is clear that Petitioner never chose receipt of the withheld records as his sole remedy.

The Court of Appeals clearly erred in finding acquiescence under the facts of this case. If permitted to stand, the Court of Appeals decision will undermine judicial efficiency and breed uncertainty among litigants, who will be compelled to pursue piecemeal interlocutory appeals and unnecessary motion practice seeking reconsideration of every adverse ruling lest they be found to have waived their challenge to an interim ruling. Clearly, the rules of civil procedure and New Mexico jurisprudence do not sanction such an unreasonable outcome, and this Court should reverse the Court of Appeals ruling as to acquiescence.

IV. SECTION 14-2-1(A) OF IPRA DOES NOT EXEMPT ALL RECORDS RELATED TO AN ONGOING INVESTIGATION.

This case also provides the Court with the opportunity to rule on the scope of § 14-2-1(A)(4), the so-called "law enforcement exception," and provide important guidance to courts, IPRA litigants and law enforcement agencies regarding this

improperly used exemption.[4]

The 2014 shooting of Michael Brown prompted a nationwide discussion about the use of deadly force by law enforcement. Almost weekly, video of police officers engaging in extreme force, in circumstances where it appears unnecessary and excessive, are posted on social media. Although there are no reliable national statistics, *The Guardian* estimated that law enforcement officers were responsible for 1092 deaths in 2016. *The Washington Post* estimates that, as of August 7, 2018, 613 people had been shot and killed by law enforcement officers nationwide. These incidents have raised significant questions about when and how such force is used.

New Mexico has seen more than its share of these incidents. The Albuquerque Police Department ("APD") killed nine individuals in 2010. *See* When Cops Break Bad: Inside a Police Force Gone Wild, https://www.rollingstone.com (last visited August 13, 2018). They killed another five in 2011. *Id.* These shootings eventually prompted an investigation by the United States Department of Justice ("DOJ"), which reviewed 20 shootings and found most to be unconstitutional. *See* Letter to the Honorable Richard J. Berry, https://www.justice.gov (last visited September 18, 2018). After the DOJ issued its report, APD entered into a settlement agreement with DOJ providing for continuing oversight of the Department and its practices.

[4] Describing §14-2-1(A)(4) as "the law enforcement exception" implies that the exception applies to all law enforcement records when, as set forth more fully herein, the exception applies to a limited set of records.

See Exhibit A to Complaint, United States v. City of Albuquerque, Civ. No. 1:14-cv-1025, filed November 12, 2014.

When such incidents occur, surviving family members, members of the press and the public often rely on IPRA to find out what happened and hold public officers accountable. Law enforcement agencies, however, routinely seek to avoid disclosing information about these incidents. In many instances, law enforcement agencies refuse to release all investigatory records while an investigation is ongoing in contravention of the plain language of § 14-2-1(A)(4). Moreover, law enforcement agencies deny access to such public records even as they frequently release negative information about the victim and any information that might support the conclusion that deadly force was justified.[5]

DPS, in particular, refuses to release such records as a matter of course, thwarting the ability of family members and the media to obtain information about incidents of public concern, including incidents involving the use of force. In so doing, DPS has increasing relied on two main arguments to defend its position, as it has done here. First, DPS claims that §14-2-1(A)(4) exempts all records related to an ongoing investigation. DPS claims that this categorical exemption applies even if

[5] Indeed, in many instances, APD would create a "red file" of negative information about the victim and release that information to the press in order to sway public opinion. *See* Your Son Is Deceased, www.newyorker.com (last visited August 7, 2018).

the only evidence of an investigation is a request from another law enforcement entity to deny access to the records "if possible." **[RP 90]** Second, DPS attempts to resurrect the "rule of reason" by arguing that "countervailing public policies" justify withholding such public records. This Court should reject each of these arguments and rule that §14-2-1(A)(4) means what it says and is not comprised of empty words. Section 14-2-1(A)(4) exempts **only those records that would reveal previously unknown information about confidential methods, sources, or information, or would for the first time reveal the identity of a person accused but not charged with a crime**. It should also reaffirm IPRA's mandate that law enforcement agencies have the burden to show that each withheld record meets this standard and have a duty to produce all records not lawfully exempted.

A. Section 14-2-1(A)(4) exempts a limited set of records.

The Court should reject the contention that IPRA creates a blanket exemption for all records related to an ongoing investigation. The statute, as written, exempts only those records whose release would reveal specific confidential information. The Court should make clear that, pursuant to the plain language of the statute, only those records that reveal confidential sources, methods, information, or the identity of persons who have been accused but not charged with a crime are exempt under §14-2-1(A)(4), and only to the extent that they contain such information. The Court should further make clear that each record withheld on the basis of §14-2-1(A)(4)

must meet this standard.

The New Mexico Legislature "enacted IPRA to promote the goal of transparency in our state government." *Republican Party*, ¶ 12. Under IPRA, the public's right to inspect records "is limited ***only*** by the Legislature's enumeration of certain categories of records that are excepted from inspection." *Id.* (emphasis added). "Each inquiry starts with the presumption that public policy favors the right of inspection." *Las Cruces Sun-News*, ¶11. Accordingly, the exceptions to IPRA's disclosure requirement must be read narrowly. See discussion of this statutory framework in Section I above.

Moreover, when a statute is limited in scope, it should not be construed to have a broader application. *See Casa Blanca Mobile Home Park v. Hill*, 1998-NMCA-094, ¶ 13, 125 N.M. 465 ("When a statute goes so far and no further, we infer that conduct beyond the line is not governed by the statute. We do not infer, as Kearns would have it, that because a statute takes two steps, it implicitly takes the third."); *see also D'Avignon v. Graham*, 1991-NMCA-125, ¶ 36, 113 N.M. 129, 137 ("Our function is to interpret the statute as enacted [.]"). Likewise, it is well established that courts should not "read in language that is not there." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230.

Section 14-2-1(A)(4) is limited in scope. It provides an exemption from disclosure for "law enforcement records that reveal confidential sources, methods,

information, or individuals accused but not charged with a crime" only the extent that the records contain such information. §14-2-1(A)(4). Thus, the statute by its plain language does not permit a law enforcement agency to withhold all records related to an ongoing investigation. This Court should clarify that only specific law enforcement records are exempt under IPRA – those whose release would reveal confidential sources, methods, information, or the identity of persons who have been accused but not charged with a crime - and a law enforcement agency must make this showing as to ***each withheld record***. IPRA requires that "[r]equested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection." § 14-2-9(A). An individual record – or portion thereof – can only be withheld if its release would reveal confidential sources, methods, information, or the identity of persons who have been accused but not charged with a crime.

The appellate courts of other states have rejected broad application of statutorily defined exemptions for law enforcement records as fundamentally inconsistent with the purpose of such statutes and the public's right to information, under their respective public records statutes. In particular, the Idaho Court of Appeals rejected the application of a categorical "active investigation" exemption from disclosure – similar to that applied by Respondent here – as inconsistent with

the plain language of Idaho's law enforcement records exception. *Hymas v. Meridian Police Dept,* 156 Idaho 739, 330 P.3d 1097 (Id. App. 2014). In *Hymas*, the plaintiffs requested documents related to the death of their son. *See id.* at 742. The Meridian Police Department refused to release any records claiming that the records were categorically exempt from disclosure, under Idaho's public records statute which exempts "records compiled for law enforcement purposes by a law enforcement agency' if production of those records would interfere with 'enforcement proceedings.'" *Id*. While the district court concluded that all records pertaining to an ongoing criminal investigation were categorically exempt from disclosure, Idaho's appellate court reversed. *Id.* at 745-746. The *Hymas* court explained that public entities must apply the precise language of the statutory exception to the withheld records and "the district court engages in the same analysis and has the same duty as the public agency to examine the documents [ ] and separate the exempt and nonexempt material when determining whether the agency was justified in claiming exemption for active investigatory records." *Id.* at 747. *See State ex rel. Cincinnati Enquirer*, ¶45 (Finding that only 90 seconds of one of three dash cam videos were lawfully withheld as "investigative work product" under Ohio's Public Records Act).

This Court, likewise, should reject DPS's categorical approach and hold that law enforcement agencies must determine that each record withheld pursuant to §14-2-

1(A)(4) would reveal confidential sources, methods or information, or the identity of persons accused but not charged with a crime. As Petitioner explained to the Court of Appeals, the exemption only applies if the records will **reveal** such information - *i.e.*, if the information is not already publicly known. In its arguments to the Court of Appeals and the district court, DPS improperly sought to read the words "reveal" and "confidential" out of the statute. This Court should rule that §14-2-1(A)(4) only applies when the release of records will reveal the specific confidential information identified by the Act and law enforcement agencies must determine that each withheld record would reveal such information before denying a request under §14-2-1(A)(4).

In the instant case, the District Court erred in not holding Respondent to its IPRA obligations. The District Court did not require DPS to present proof that each withheld record contained information that, if released to the public, would reveal confidential sources, methods, information, or individuals accused but not charged with a crime. Moreover, the District Court ignored Petitioner's evidence showing that the release of the records would not have revealed such confidential information, because the information was already publicly known. For example, the District Court accepted DPS's claim – made not in sworn testimony, but in the letter denying Mr. Jones's request – that a withheld video contained information that could affect witness testimony. **[RP 198]** But Petitioner presented evidence showing that the

information in the video was already known to the two accused officers and to the public. DPS refused to release this video even after Mr. Jones learned of it during discovery, and even after the media released information to the public. **[RP 150]** There were obvious disputed material facts as to whether the release of this video would reveal confidential sources, methods, information, or the identity of persons accused but not charged with a crime at the time of the request. The District Court, therefore, erred in granting summary judgment to DPS, and its decision should be reversed.

B. This Court did not adopt a broader interpretation of §14-2-1(A)(4) in *Estate of Romero v. City of Santa Fe*.

Respondent's reliance on this Court's decision in *Estate of Romero v. City of Santa Fe* is misplaced. [**RP 134-136, 186-187, COA AB 14-17]** In *Estate of Romero,* this Court did not determine how to apply §14-2-1(A)(4) to identify records exempt from disclosure under IPRA. The question to be decided in *Estate of Romero* was whether law enforcement agencies during the course of civil litigation could rely on §14-2-1(A)(4) to withhold records *in discovery*. *Estate of Romero v. City of Santa Fe,* 2006-NMSC-028, 139 N.M. 671. In *Estate of Romero,* the Court decided that the public policy concerns underlying the IPRA exemption could provide a basis for protecting some law enforcement records from disclosure in civil discovery. *Id.* ¶18. This Court then explained the balancing test that should be applied to resolve such discovery disputes. This Court has since held that balancing tests used to resolve discovery

disputes as to claimed protected records do **not** apply to disclosure disputes under IPRA. *Republican Party*, ¶49. [6]

Indeed, to the extent *Estate of Romero* gave any guidance on the meaning of §14-2-1(A)(4), it counseled in favor of the narrow construction sought here. This Court stressed that "the primary purpose of the IPRA is to provide access to public records rather than to create an evidentiary shield behind which the government can hide." *Estate of Romero*, ¶ 18 (internal citation and marks omitted). The Court also described §14-2-1(A)(4) as applying to a limited set of documents – i.e., "***confidential*** police investigatory materials, such as reports containing confidential investigative methods, information about individuals accused but not charged with a crime, and information only the perpetrator(s) would know." *Id.*, ¶ 15 (emphasis added). [7]

C. The FBI's request that investigatory records be kept confidential does not exempt records from disclosure under IPRA.

DPS also sought to justify its position that the records were properly withheld

[6] DPS has also argued that New Mexico should follow *Newman v. King*, which held that Washington's public records statute exempts all records related to an ongoing investigation. The Court cannot and should not follow *Newman v. King* because Washington's public records statute provides for a much broader exemption from disclosure than we have in IPRA. *See* RCW 42.17.310(1)(d).

[7] Moreover, in *Estate of Romero*, the Court did not find that the records could be categorically withheld but instead remanded the case so that the district court could determine whether the specific requested materials could be withheld from discovery under the facts of that case. *Estate of Romero*. ¶ 22.

by relying on its duty to cooperate with the FBI under § 29-3-3, a separate law enforcement statute. NMSA 1978, § 29-3-3 (1935, as amended through 2009). DPS claimed that once another law enforcement entity - here the FBI - requests that investigatory records be kept confidential those records are exempt under § 14-2-1(A)(4).

Contrary to Respondent's claims, § 29-3-3 does not create an exception from IPRA or otherwise authorize DPS to withhold public records based solely on a request from another law enforcement entity. There is nothing in the statutory scheme that indicates the Legislature intended through § 29-3-3 to designate any records as exempt under IPRA. Moreover, any attempt to interpret this statutory provision broadly to exempt such public records under § 14-2-1(A)(8) is indirect contravention of the plain language of the limited law enforcement exception under § 14-2-1(A)(4) and the public policy of the State of New Mexico.

At most, § 29-3-3 imposes a duty to "cooperate with agencies of the other states and of the United States." The term "cooperate" means "to act jointly or concurrently toward a common end." Black's Law Dictionary 302 (5th ed. 1979); *see also* Webster's Third New International Dictionary (defining "cooperate" to mean "to act or work with another or others to a common end"). It does not mean that one party must blindly follow instructions from other and it does not mean that an instruction or request from one party can override other statutory obligations. It does not authorize DPS to violate

IPRA by unlawfully withholding public records. In the face of such request – and as recognized by the FBI's request that the records be kept confidential "to the extent legally possible" **[RP 90]** - DPS must comply with its IPRA obligations and independently determine whether the release of the records would reveal confidential sources, methods, information or the identity of persons accused but not charged with a crime. Respondent's attempt to justify its unlawfully withholding of public records based on its obligation to cooperate with the FBI provides no grounds to affirm the decision of the district court.

D. Public Bodies Cannot Rely on "Countervailing Public Policy" to Withhold Public Records.

This Court should also reject DPS's claim that it can rely on "countervailing public policy" as a basis to withhold public records. This argument cannot stand in light of this Court's explicit rejection of the rule of reason – which permitted disclosure exemptions based on "countervailing public policy" in *Republican Party*. *Replublican Party,* ¶ 16.

While the rule of reason permitted agencies and courts to essentially create public policy exemptions to IPRA, it was explicitly overruled in 2010. *Id.,* ¶ 14 (overruling in part *State ex rel. Newsome v. Alarid*, 1977-NMSC-076). In *Newsome,* the Court held that "[w]here there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed[,]" but that the rule of reason would be used to exempt sensitive records from disclosure until such time as the Legislature

clearly defined which records are subject to public inspection. *Newsome,* ¶¶ 33-34. The Court concluded that "[u]ntil the Legislature gives us direction in this regard, the courts will have to apply the 'rule of reason' to each claim for public inspection as they arise." *Id*. Since 1977, the Legislature has amended IPRA to include a definition of "public records" and additional carefully crafted exemptions. In 2010, this Court eliminated the rule of reason since these amendments to IPRA "obviate[ed] any need that existed for application of the 'rule of reason.'" *Republican Party,* ¶ 16. "[C]ourts now should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution." *Id.*

In the wake of *Republican Party*, public bodies can no longer invoke "countervailing public policies" under an implied rule of reason as a basis to withhold public records. But that is precisely what DPS is trying to do. DPS has repeatedly argued that it could withhold records out of concern that there had been too much publicity about the shooting of Mr. Boyd. While similar arguments were considered under the rule of reason, they have no place in light of this Court's instruction that courts must now limit their analysis to specific enumerated IPRA exceptions. *Cf. Republican Party,* ¶ 16; *Las Cruces Sun-News*, ¶¶ 27, 32-34 (evaluating claim that County could deny access to settlement agreements based on countervailing public policies). DPS simply cannot rely on its purported concerns about excessive pretrial publicity - or any

other public policy justification - to deny access to public records.

Not only is DPS's argument contrary to *Republican Party*, it is dangerous. The "countervailing public policy" identified by DPS is its claim that there was excessive publicity about the Boyd shooting. A law enforcement agency should not be permitted to rely on its own judgment as to when there has been "too much" publicity about any criminal incident, particularly fatal shootings by police officers. "Leaving interpretation of the act to those at whom it is aimed would be the most direct course to its devitalization." *Spokane Research & Defense Fund,* ¶ 22. The Court should reject DPS's arguments and enforce its ruling in *Republican Party* by making it clear that public bodies cannot rely on claimed public policy concerns to deny access to public records.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and rule that a live controversy exists as to the legality of Respondent's IPRA response. This Court should further reinforce its prior holdings that IPRA exemptions are to be narrowly construed, the public entity seeking to prevent disclosure has the burden of showing that an IPRA exemption applies to withheld records, and courts must undertake fact-specific inquiries as to whether the entity has met its burden, including whether it complied with mandatory production of all non-exempt public records.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing **Amicus Curiae Brief**, with attached Motion to be mailed, by first-class mail, postage prepaid, on this, the 19th day of September, 2018 to counsel of record, as follows:

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), NMRA, *amici* hereby certify that this brief complies with the limitations of Paragraph F(3) of this rule, and is printed in Times New Roman, 14 pt. type, and contains 8,582 words.

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