IN THE NEW MEXICO SUPREME COURT

NO. S-1-SC-35912

CHRISTINE STUMP,

Plaintiff-Petitioner,

v.

ALBUQUERQUE POLICE DEPARTMENT, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, BERNALILLO COUNTY, METROPOLITAN COURT, and ADMINISTRATIVE OFFICE OF THE COURTS,

Respondents-Appellees

BRIEF OF *AMICUS CURIAE* NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT IN SUPPORT OF DISTRICT COURT'S THE DECISION TO DENY EXPUNGEMENT OF RECORDS

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INTRODUCTION / INTEREST OF THE *AMICUS*[1]

Amicus New Mexico Foundation for Open Government ("NMFOG") submits its brief in support of the decision of the Second Judicial District Court to deny Petitioner-Appellant Stump's petitions for an order compelling the expungement of records related to her arrest.

This case concerns whether this Court, or any state court in New Mexico, has the authority to order another branch of government to destroy public records. Our Legislature and our courts have long protected the right of access to public records; at issue now is whether a court can or should look past that right – not just to shield records from public view, but to expunge them as if they never existed. In this case, the records at issue are of particular public interest, because they relate to an arrest that the Petitioner contends was a misuse of police power and a violation of her civil rights. NMFOG urges this Court to uphold the district court's refusal to expunge the records. New Mexico has never enacted a law permitting expungement, and our courts lack the power to force other branches to destroy public records. And even if courts had such a power, they should not exercise it.

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[1] This brief was not authored in whole or in part by counsel for any party, nor did a party, party counsel, or any other person besides those referenced in Rule 12-215(F) NMRA make a monetary contribution intended to fund the preparation or submission of the brief.

Expungement of public records does not serve the public interest; to the contrary, it serves only to hide public business from our citizens.

The importance of the issues in this matter prompted NMFOG to file this amicus brief. NMFOG is a non-profit, nonpartisan educational organization committed to assisting New Mexico citizens, educators, public officials, media and legal professionals in understanding and exercising their rights under the free-speech provisions of the federal and New Mexico Constitutions, and under state and federal sunshine laws, including the New Mexico Inspection of Public Records Act, the New Mexico Open Meetings Act, and the federal Freedom of Information Act. NMFOG regularly helps citizens obtain documents and information from government sources. NMFOG submits this brief to assist the Court in its resolution of the issues presented in this case.

As required by Rule 12-215(B) NMRA, all parties received timely notice of the intent of NMFOG to file this brief.

ARGUMENT

I. Any destruction of public records contravenes the strong public policy in favor of access to such records.

Petitioner asks that certain public records be expunged as if they never existed. The starting point in any consideration of this request is recognition of this state's long-standing policy that the public should have the greatest possible access to public records. Our Legislature enacted the New Mexico Inspection of

Public Records Act, NMSA 1978 14-2-1 *et seq.* (1993) ("IPRA") specifically to ensure citizen access to public records. In doing so, it clearly stated New Mexico's policy in favor of openness:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be 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. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

NMSA 1978, § 14-2-5 (1993) (emphasis added).

Our appellate courts have followed the Legislature's lead, repeatedly ruling that access to public records is a right that must be protected. *See, e.g., Faber v. King*, 2015-NMSC-015, ¶ 28 (in recognition of the stated public policy in Section 14-2-5, "we have long held that the public's right to inspect documents is paramount"); *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64 ("In order for government to truly be of the people and by the people, and not just for the people, our citizens must be able to know what their own public servants are doing in their name"); *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 51 ("Transparency is an essential feature of the relationship between the people and their government. This foundational principle far predates IPRA, New Mexico's statehood, and even

George Washington's first term as our nation's President"); *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, 90 N.M. 790, *overruled on other grounds by Republican Party of New Mexico*, 2012-NMSC-026, ¶ 16 ("The citizen's right to know is the rule and secrecy is the exception.").

It appears undisputed that the particular records in question in the present case are public records and subject to IPRA. Petitioner seeks expungement of her "arrest records" which would appear to mean any document or other material related to her arrest, presumably including an arrest report, warrant, fingerprint records, booking records, evidence records, etc. (to the extent these records exist) in addition to online court records. These are unquestionably public records in New Mexico. *See* NMSA 1978 § 14-2-6 (2013) ("'public records' means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained"). The Legislature has specifically enumerated certain limited exceptions to the right of access to public records (*see* NMSA 1978, § 14-2-1(A) (2011)), but arrest records are not included in those exceptions.

In addition, this Court has recently enacted or strengthened court rules that protect access to court documents and proceedings. *See, e.g.,* Rule 1-079 NMRA

and equivalent rules (setting forth presumption of public access to court records and strictly limiting ability of district court to seal records); Rule 1-104 NMRA and equivalent rules (effective January 1, 2017) (stating that all courtroom proceedings shall be open to the public, and restricting closure of courtrooms to very limited situations). Each of these rules serves to benefit the public's right to access public records and proceedings and highlights our state's commitment to transparency.

II. Our Legislature has not created a means for expunging arrest records.

The Court of Appeals, in its Order of Certification, noted two significant facts: 1) most states that permit expungement of records have done so by statute; and 2) New Mexico has not done so. Order of Certification, at ¶¶ 19-23. Our Legislature has considered the issue at length, and in fact has come close to enacting expungement statutes, but has not actually done so. As detailed by the Court of Appeals, the Legislature has considered expungement bills at least 11 times since 2005. *Id.* ¶¶ 20-21. Four times, the Legislature passed bills that would allow expungement in certain circumstances, but each time, the bills were vetoed by the Governor (one Republican, one Democrat). We are left with no expungement statute. Where most state legislatures have opted to create a statutory means for expungement, ours has simply not.

III. This Court may not override the Legislature's own actions with its own weighing of public policy concerns.

This Court has made clear that on issues of public policy, it will not interfere with the legislative process, nor "make" policy where it is better left to the other branches of government:

> [I]t is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature. The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government.

Torres v. State, 1995-NMSC-025, ¶ 10, 119 N.M. 609; *see also State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343 ("We also have recognized the unique position of the Legislature in creating and developing public policy.").

In regard to public records, the Legislature has stated definitively, in enacting Section 14-2-5, that access to public records is of the highest importance. In regard to the public records at issue (arrest records), it has chosen not to exclude arrest records from public view via exception to IPRA. And, in combination with the executive branch, it has also chosen not to enact expungement legislation that would undercut that access. In light of these legislative actions, this Court may not, and should not, substitute its own policy judgments for those of the legislative branch.

Other state courts have been faced with the same issue currently before this Court – where the legislative and executive branches have chosen not to enact an expungement statute, can and should the judicial branch override that judgment and permit expungement anyway? The analysis of these courts is helpful.

For example, in *State v. M.D.T.*, 831 N.W.2d 276 (Minn. 2013), the Supreme Court of Minnesota was asked to determine whether state courts in Minnesota had the inherent power to expunge criminal records where such expungement was not authorized by statute. *Id.* at 277. In doing so, the court noted that the records sought to be expunged were public records pursuant to Minnesota state law. *Id.* at 282-83. The court found that the district court did not have authority to expunge the records in the absence of an authorizing statute. *Id.* at 283. Specifically, the court held that expungement required policy judgments that the legislature should make, and not the courts:

> And specifically with regard to expungement, we have recognized that the judiciary is not to resort to inherent authority when doing so would not "respect the equally unique authority of" another branch of government. *[State v.] C.A.*, 304 N.W.2d at 359; *cf. Clerk of Lyon Cnty. Courts' Comp.*, 308 Minn. at 181–82, 241 N.W.2d at 786 ("The test [for determining whether inherent authority exists] must be applied with due consideration for equally important executive and legislative functions."). It is particularly apt in this case for us to adhere to that cautionary approach because of the clear legislative expressions of policy that confirm that M.D.T.s criminal records held in the executive branch are public information.

Id. at 282.[2]

Similarly, in *State v. Haug*, 699 P.2d 535 (Kan. 1985), the Kansas Supreme Court was asked to consider a request to expunge a petitioners' arrest record, criminal complaint, and subsequent diversion agreement. In considering its own inherent power to grant such relief, the court recognized that there were policy considerations that might support expungement. *Id.* at 537. Nevertheless, the court declined to grant the relief sought, holding as follows:

> We recognize there are substantial philosophical arguments supporting the position of the defendant and that perhaps expungement of diversion records would serve a valid public purpose. However, that decision must be left to the legislature which has not, as yet, authorized such action.

Id. at 538. Likewise, in *Loder v. Mun. Court*, 553 P.2d 624 (Cal. 1976), the California Supreme Court addressed circumstances similar to those at the case at bar. In that case, the plaintiff was arrested for battery, obstructing a police officer, and disturbing the peace, and a criminal complaint was filed charging him with these offenses. *Id.* at 626. The arresting officer was subsequently reported for the incident and temporarily suspended from duty; later, the city attorney decided not to press the charges against plaintiff, and the criminal complaint was dismissed by

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[2] Notably, following this decision, the Minnesota Legislature expanded its expungement statute (Minn. Stat. Ann. § 609A.02), demonstrating that persons favoring expungement can find a remedy in the legislative process. *See also* James Gempeler, "Expungement Revisited – Minnesota's New Second Chance Law," Bench & B. Minn., December 2014, Vol. 71 at 14.

the municipal court for lack of prosecution. *Id.* At the same time, the plaintiff executed a covenant not to sue, agreeing in consideration of the dismissal not to pursue any claim for damages against the officer, and sought judicial expungement of the arrest records and charges. *Id.* The California Supreme Court declined to authorize such relief:

> Indeed, even if the absence of an expungement provision in this connection were unintentional, we should nevertheless allow the Legislature to address in the first instance the difficult task of striking the proper balance between these competing concerns.

Id. at 636.

This Court should follow the lead of these courts and decline to substitute its own policy judgments for those of the legislative and judicial branches. To create a power of expungement by judicial means, where the other two branches have specifically declined to do so, would be improper.

IV. Even if courts have the power to order expungement, they should not do so.

Even if the Court should determine that it has the power to override the executive and legislative branches and grant expungement of records, it should not do so. This Court, and our state courts in general, should not be in the business of destroying public records. As noted by a federal court of appeals many years ago:

> Public policy requires here that the retention of records of the arrest and of the subsequent proceedings be left to the discretion of the appropriate authorities. The judicial editing of history is likely to produce a greater harm than that sought to be corrected.

Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972) (emphasis added).

As noted above, we have a strong public policy in New Mexico in favor of access to public records, a policy supported by legislative enactment and this Court's own rule-making. This Court should not undermine this policy by permitting lower courts to order other branches to remove public records as if they never existed.

Law enforcement is one of government's most important functions. Arrest records pertain not only to the arrestee – they are also records of the actions of our police departments. In the present case, Petitioner at various times has characterized her arrest as "in flagrant violation of her constitutional rights," "an egregious violation of [her] constitutional rights," "unjust," "unlawful," and "constitutionally unsound." *See* Second Judicial District Court's Final Post-Remand Order, at ¶ 31. Her arrest records are public records of police conduct; specifically, they are records of police conduct that a public citizen has alleged to be unlawful. "Retaining and preserving arrest records serves the important function of promoting effective law enforcement." *U.S. v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977). It would be improper for a court to determine that these records should be destroyed as if the events they documented never happened.

CONCLUSION

State courts in New Mexico have no power to expunge public records where our Legislature has not authorized them to do so. To permit expungement would undermine our state's long-standing policy in favor of access to public records. The New Mexico Foundation for Open Government respectfully requests the Court to deny the relief sought by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on the 28th day of October, 2016, a copy of the foregoing Brief was served upon all counsel of record via email as follows:

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