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IN THE SUPREME COURT OF NEW MEXICO

DANIEL LIBIT,

Plaintiff-Appellee,

v.

UNIVERSITY OF NEW MEXICO LOBO CLUB, JALEN DOMINGUEZ, in his capacity as Custodian of Records for the University of New Mexico Lobo Club, THE UNIVERSITY OF NEW MEXICO FOUNDATION, THE BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, and CHRISTINE LANDAVAZO, in her capacity as the Interim Custodian of Records for the University of New Mexico,

Defendants-Appellants

No. S-1-SC-39396

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

COME NOW *Amici Curiae* The New Mexico Foundation for Open Government ("NMFOG") and The Brechner Center for Freedom of Information ("The Brechner Center"), by and through their attorney, Gregory P. Williams of the firm of Peifer, Hanson, Mullins & Baker, P.A., and move the Court for leave to file an *amici curiae* brief in the above-captioned matter.

As grounds for this motion, *Amici Curiae* state as follows:

1. NMFOG 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 ("IPRA") and the Open Meetings Act.

2. In pursuit of these purposes, NMFOG has participated in judicial proceedings, either as a party or as *amicus curiae*, where access to public records and information is at stake. *See, e.g., Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013 (*amicus*); *New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-14 (party); *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64 (*amicus*); *Palenick v. City of Rio Rancho*, 2013-NMSC-029 (*amicus*); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045 (*amicus*); and *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep't*, 2012-NMSC-026 (*amicus*).

3. The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for over 40 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds

to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

4. NMFOG and The Brechner Center seek leave to file a joint *amici curiae* brief in this matter because of the important issue presented by this case, which is whether a foundation that operates in conjunction with a public university is exempt from IPRA.

5. Because NMFOG and The Brechner Center are devoted to matters of open government and access to public records, they are well-situated to offer this Court assistance in addressing the issues before it in this case.

6. NMFOG and The Brechner Center submitted an *amici* brief in both the district court and in the Court of Appeals in this matter.

7. A copy of the proposed *amici* brief is attached hereto.

8. Pursuant to Rule 12-309(C) NMRA, counsel for *amici* contacted counsel for the parties to determine their clients' position on this request. All parties consent to the filing of the *amici* brief.

WHEREFORE, New Mexico Foundation for Open Government and The Brechner Center for Freedom of Information request leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was submitted for e-filing and e-service on all counsel of record via the Court's EFS on December 9, 2022, which caused all counsel of record to be served by electronic means to their respective email addresses of record, as more fully reflected on the Notification of Service generated by the Court's EFS.

PEIFER, HANSON, MULLINS & BAKER, P.A.

By: */s/ Gregory P. Williams*
Gregory P. Williams

IN THE SUPREME COURT OF NEW MEXICO

DANIEL LIBIT,

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Defendants-Appellants.

No. S-1-SC-39396

BRIEF OF *AMICI CURIAE* THE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT AND THE BRECHNER CENTER FOR FREEDOM OF INFORMATION

Respectfully submitted,

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Amici Curiae New Mexico Foundation for Open Government ("NMFOG") and The Brechner Center for Freedom of Information submit this brief in support of Plaintiff-Appellee Daniel Libit's Answer Brief.[1]

STATEMENT OF INTEREST

NMFOG 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 ("IPRA") and the Open Meetings Act. In pursuit of these purposes, NMFOG has participated in judicial proceedings, either as a party or as *amicus curiae*, where access to public records and information is at stake. *See, e.g., Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013 (*amicus*); *New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-14 (party); *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64 (*amicus*); *Palenick v. City of Rio Rancho*, 2013-NMSC-029 (*amicus*); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045 (*amicus*); and *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep't*, 2012-NMSC-026 (*amicus*).

[1] In accordance with Rule 12-320(C) NMRA, *amici* state that no counsel for any party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation of submission of the brief.

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for over 40 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

Pursuant to Rule 12-320(D)(1), *amici* provided notice of their intent to seek leave to file this brief on November 7, 2022.

ARGUMENT

Amici submit this brief because if this Court accepts the arguments of The University of New Mexico Foundation ("the Foundation") and the University of New Mexico Lobo Club ("the Lobo Club") and reverses the Court of Appeals, it will for the first time hold that a statutory provision that does not clearly and explicitly exempt specific records from IPRA may still be a basis to bar the public from inspecting such records. It would announce to public entities and their records custodians, members of the public, and district courts interpreting IPRA that specific statutory exemption of public records from IPRA is no longer required by New Mexico law. Such a ruling would have implications beyond these parties and this case, and would significantly undercut the public policy underlying IPRA.

The New Mexico Legislature strongly favors transparency. It has stated explicitly 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. NMSA 1978, Section 14-2-5 (1993). This Court, in enforcing that mandate, has interpreted IPRA broadly and its exemptions narrowly. In this case, the district court and the Court of Appeals refused to block inspection of public records where the Legislature had not clearly authorized it.[2] This Court should do the same. Where the Legislature has not plainly and explicitly exempted records from IPRA, the legislative directive of transparency requires that the records be made public.

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE LEGISLATURE, IN ENACTING SECTION 6-5A-1, DID NOT CREATE AN IPRA EXEMPTION FOR THE RECORDS OF THE FOUNDATION AND THE LOBO CLUB

This Court should affirm the ruling of the Court of Appeals that NMSA 1978, Section 6-5A-1(D) (2011) does not exempt from inspection the records requested by Mr. Libit from the Foundation and the Lobo Club. Because the Legislature did not explicitly exempt the records from IPRA, this Court must affirm both lower courts and permit their inspection.

[2] *Libit v. Univ. of New Mexico Lobo Club*, 2022-NMCA-043 (hereinafter "Court of Appeals decision").

A. Transparency is the Starting Point for Every Analysis of an IPRA Exemption.

IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve. *San Juan Agric. Water Users v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64. The Court of Appeals has described at length the procedure for interpreting a provision of IPRA:

> The starting point for any court tasked with resolving an IPRA challenge is to place into statutory context the particular arguments made vis-à-vis the Legislature's declared purpose in enacting IPRA. Unlike many statutes, for which the Legislature has provided no express statement of intent, IPRA contains a clear declaration of the public policy the Legislature intended to further by enacting IPRA. Section 14-2-5 provides:
>
>> Recognizing that a representative government is dependent upon an informed electorate, the intent of the [L]egislature 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 [L]egislature, 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.*

Britton v. Office of Attorney Gen., 2019-NMCA-002, ¶ 29 (emphasis in decision). Following this legislative mandate, both this Court and the Court of Appeals have held that IPRA must be construed in light of its purpose and that statutory provisions under IPRA should be interpreted to mean what the Legislature

intended them to mean, and to accomplish the ends sought to be accomplished. *New Mexico Foundation for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 15, citing *San Juan Agric. Water Users Ass'n v. KNME-TV,* 2011-NMSC-011, ¶ 14, 150 N.M. 64; *see also Crutchfield v. New Mexico Dept. of Taxation & Revenue*, 2005-NMCA-022, ¶ 18, 137 N.M. 26 ("IPRA unquestionably sets a policy of citizen entitlement to access to public records"); *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, ¶ 17, 148 N.M. 934 (in light of IPRA's purpose, as set forth in Section 14-2-5, "[e]ach inquiry starts with the presumption that public policy favors the right of inspection.").

In applying exemptions to IPRA, our courts have relied on the Legislature's statement of policy in doing so narrowly. *See, e.g., State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 22 ("IPRA should be construed broadly to effectuate its purposes" and courts should avoid application of the statute in a way that would defeat the intent of the Legislature); *Dunn v. New Mexico Dep't of Game & Fish*, 2020-NMCA-026, ¶ 13 (describing IPRA's exemptions as "narrow"); *see also New Mexico State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 73 (in regard to Open Meetings Act, which has the same underlying policy as IPRA, "we construe [the Act's] provisions broadly and their exceptions narrowly." Notably, in *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶¶ 1, 38, the Court rejected a district court's interpretation of an

IPRA exemption, NMSA 1978, Section 14-2-1(A)(4) (2011), that expanded the exemption beyond its plain language ("the district court certainly did not apply the plain language of Section 14-2-1(A)(4) … Section 14-2-1(A)(4) does not create a blanket exception from inspection for law enforcement records relating to an ongoing criminal investigation").[3]

When a public entity asserts an exemption to IPRA, it bears the burden to prove the applicability of the exemption. *See Noll v. New Mexico Dep't of Pub. Safety*, 2019 WL 1615040, at *4 (N.M. Ct. App. Mar. 19, 2019) ("[i]n an IPRA enforcement action, the burden is on the public entity to establish that the records requested are exempt from inspection), *citing City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶ 13-14, 146 N.M. 349, overruled on other grounds by and *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep't*, 2012-NMSC-026, ¶ 16 (stating that the burden is on "the custodian of the records to demonstrate a reason for non-disclosure"). When considering whether a statute outside of IPRA exempts records from public inspection, a court must do so in the context of IPRA's transparency requirements. *See, e.g., N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 13, 142 N.M. 248 (internal citation omitted) ("we apply the fundamental rule of statutory construction ... that all provisions of a

[3] That exemption (Section 14-2-1(A)(4) (2011)) has since been recodified at Section 14-2-1(D) (2019).

statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent.”).

B. The Foundation and the Lobo Club Did Not Prove the Applicability of the Statutory Exemption.

The Legislature, in enacting Section 6-5A-1, did not clearly exempt any records from inspection. As a result, the district court and Court of Appeals correctly determined that the “as otherwise provided by law” exemption to IPRA does not apply. *See* NMSA 1978, Section 14-2-1(H).

When the Legislature has intended to exclude certain otherwise public records from public inspection, it has done so explicitly. For example, in the most recent legislative session, the Legislature enacted the Opportunity Enterprise Act, which included specific language stating that information obtained by the New Mexico finance authority regarding applicants for enterprise financing “is confidential and not subject to inspection pursuant to the Inspection of Public Records Act.” NMSA 1978, § 6-34-14(B) (2022). Similarly, in a statute regarding small business loans, the Legislature’s enactment stated that “[i]nformation obtained by the authority regarding individual loan applicants is confidential and not subject to inspection pursuant to the Inspection of Public Records Act.” NMSA 1978, § 6-32-7 (2020). The Legislature has done this many times; for a non-exhaustive list of examples of the Legislature’s explicit exclusion of records from IPRA, *see* Addendum A.

The Legislature did not do so in Section 6-5A-1, which is part of the Public Finance chapter of the statutes. It chose very different language, stating only that "Nothing in this section subjects an organization to the provisions of the Open Meetings Act or makes its records, other than the annual audit required under this section, public records within the purview of Section 14-2-1 NMSA 1978." Section 6-5A-1(D). The Legislature did not specify any particular public records as confidential, nor specifically exclude them from IPRA, as it has done dozens of times. *See* Addendum A. To accept the argument of the Foundation and the Lobo Club that Section 6-5A-1 clearly and unambiguously exempts all of its records from IPRA, the Court would have to ignore or disregard the fact that the Legislature has consistently used different, more specific language in exempting records in other contexts. Doing so cannot be reconciled with the public policy of transparency underlying IPRA, or with basic canons of statutory interpretation, which is why both the district court and the Court of Appeals refused to do so.

The assertion of the Foundation and the Lobo Club that the Legislature has used "a wide range of language to exempt records from IPRA" and that "several of those exemptions use language strikingly similar to Section 6-5A-1(D)" **[BIC 18-19]**, is not supported by the exemptions they cite. Those exemptions are not "strikingly similar" to Section 6-5A-1(D). In none of them did the Legislature state, as it did in Section 6-5A-1(D), that "nothing in this section … makes

[particular] records … public records within the purview of Section 14-2-1." To the contrary, the Legislature, in the exemptions cited by the Foundation and the Lobo Club, explicitly excluded specific records from public inspection. *See* NMSA 1978, Section 51-5-56 (1991) (death reports "shall be confidential and shall not be considered as public records under the provisions of Sections 14-2-1 through 14-2-3 NMSA 1978"); NMSA 1978, Section 24-14A-8(C) (2015) ("individual forms, electronic information or other forms of data collected by and furnished for the health information system shall not be public records subject to inspection pursuant to Section 14-2-1 NMSA 1978"); NMSA 1978, Section 61-4-10(C) (2006) ("[a]ll written and oral communication … are confidential communications and are not public records for the purposes of the Inspection of Public Records Act"); NMSA 1978, Section 58-22-19(A) (2006) ("[d]ivision examination reports, financial information contained in licensee applications and renewal applications and information on investigations relating to violations of the Escrow Company Act that do not result or have not yet resulted in administrative, civil or criminal action … are not public records subject to the Inspection of Public Records Act").

Section 6-5A-1 is a statute of limited scope; it serves only to set forth the requirements of written agreements between state agencies and certain 501(c) organizations. As set forth in detail by Mr. Libit in his Answer Brief, the most

straightforward interpretation of Section 6-5A-1(D) is that an organization which enters into written agreement with a state agency, in the context of that statute, does not, by the fact of having done so, automatically subject its records to IPRA. As stated by the Court of Appeals, "[p]ut another way, a plain reading of the statutory language is that records of an organization are not affirmatively designated as public records under IPRA." Court of Appeals decision, ¶ 11.[4] Nothing in Section 6-5A-1(D) suggests that the Legislature intended to exempt any particular public records held by private entities from disclosure. And nothing in the statute comes close to demonstrating, as the Foundation and the Lobo Club argue, that the Legislature specifically intended to create a wholesale exclusion of records relating to donations to public universities and the use of these donations.

[4] The Foundation and the Lobo Club's argument that in 1992, before the decision in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, there was no New Mexico law "that even suggested the records of a private entity could be considered public records" **[BIC 22]** ignores that by that time there was already a nationwide body of law holding that under certain circumstances, some records held by private entities were subject to public records laws. *See, e.g., News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.,* 284 S.E.2d 542 (N.C. App. 1981); *A.S. Abell Publishing Co. v. Mezzanote,* 464 A.2d 1068 (Md. 1983); *News & Sun–Sentinel Co. v. Schwab, Twitty & Hanser Architectural Gr., Inc.,* 596 So.2d 1029 (Fla. 1992); *Connecticut Humane Soc'y v. Freedom of Info. Comm'n,* 591 A.2d 395 (Conn. 1991). Considering this emerging body of law, the suggestion by the Foundation and the Lobo Club that the Legislature in 1992 "could not have intended to defer to other existing statutory or common law or authorities or principles" **[BIC 22-23]** is speculative and not supported by the statute.

II. IF THIS COURT APPLIES *TOOMEY V. TRUTH OR CONSEQUENCES*, IT SHOULD AFFIRM THE DISTRICT COURT ON THAT ISSUE.

The district court in *Libit I* applied a multi-part test set forth in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶¶ 23-24, and found that the records held by the Foundation were subject to IPRA. In *Toomey*, the Court of Appeals held that records held by a private entity are subject to IPRA when that entity acts on behalf of a private entity. *Id.* The Court of Appeals, in the present case, did not address the district court's ruling regarding the application of *Toomey*, on the basis that the Foundation had not challenged it on appeal. Court of Appeals decision, footnote 5. The Foundation appears to disagree, as it addresses the *Toomey* issue in its Brief in Chief **[BIC 2, 36-40]**. If the Court decides to address the *Toomey* issue, it should affirm the district court.

As demonstrated by the district court, resolution of whether the Foundation's records were subject to IPRA required at least two procedural steps. The first step was to determine whether the records were "public records" as defined in IPRA.[5] In a case such as this where the records are in the possession of a private entity, it is at this step that the district court conducts applies the test set forth in *Toomey* to

[5] Per NMSA 1978, Section 14-2-6(G), "'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."

determine whether the records "are used, created, received, maintained or held by or ***on behalf of any public body*** and relate to public business" (emphasis added). If a district court determines that the records held by the private entity are held on behalf of the public body, the second step is to determine if the records are exempt from IPRA (if the entity asserts an exemption). The district court in the present case followed this process, finding that 1) under the *Toomey* test, the Foundation's records were public records; and 2) the statutory exemption asserted by the Foundation, Section 6-5A-1(D), did not apply.

The district court's ruling was correct. As set forth in detail in Mr. Libit's Answer Brief, there was extensive evidence presented to the district court that, under the *Toomey* test, the Foundation held the records requested by Mr. Libit on behalf of the University of New Mexico. In summary, both the Foundation and the Lobo Club are functional equivalents of departments or divisions of UNM. By their own admission, each entity serves one function: raising money for UNM. **[BIC 5, 11]** (the Foundation's "primary purpose is raising and managing private donations to support the University, its programs and its students … [t]he Lobo Club's sole purpose is to solicit, manage, and distribute private gifts and donations given for the benefit of the University of New Mexico."). These entities serve no other partners than UNM; their operating boards include numerous UNM administrators and employees, including UNM's president and athletic director;

they share some facilities and overhead expenses with UNM, or UNM provides them outright; and UNM hand-picks some of their leadership. **[AB 3-10]**. This is not a situation in which an independent private entity provides certain services to a public entity while also providing services to others; to the contrary, both the Foundation and the Lobo Club are creations of UNM and exist only to carry out one of UNM's core needs: fundraising. **[BIC 5, 11]**

This type of intertwined relationship between foundation and educational institution is what has led other courts to conclude that a foundation's records are subject to public records requests under state sunshine laws. *See, e.g., Chicago Tribune v. Coll. of Du Page*, 79 N.E.3d 694, 708 (Ill. App. Ct. 2d Dist. 2017) (where a foundation was plainly performing a governmental function (fundraising) on behalf of the College of Du Page, its records were subject to Illinois's open records law); *Gannon v. Board of Regents*, 692 N.W.2d 31, 32 (Iowa 2005) (private not-for-profit corporation that managed gifts to the university was subject to Iowa Freedom of Information Act due to its service agreement with university); *Jackson v. Eastern Mich. Univ. Found.*, 544 N.W.2d 737 (Mich. Ct. App. 1996) (state university foundation was a public body under freedom of information act and open meetings act), *State ex. rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159 (Ohio 1992) (nonprofit corporation that solicited and received donations for public university was a public office subject to public records

disclosure, including donor names); *Cape Publications, Inc. v. Univ. of Louisville Found., Inc*., 260 S.W.3d 818, 822-23 (Ky. 2008) (holding that Kentucky open-records act applied even to foundation records disclosing names of certain donors); *Weston v. Carolina Research and Dev. Found.*, 401 S.E.2d 161 (S.C. 1991) (holding that private foundations that receive public funds are subject to the state freedom of information act), *Calif. State Univ., Fresno v. McClatchy Co.*, 90 Cal.Rptr.2d 870 (Cal. Ct. App. 2001) (holding that documents revealing identities of donors were public records).

The Foundation does not argue that, under the *Toomey* test, its records are not held on UNM's behalf. In fact, it concedes that if the test is applied, it loses on this issue ("it is difficult to imagine any Section 6-5A-1 organization could effectively fulfill its statutory obligations without automatically satisfying *Toomey*'s nine-factor test.") **[BIC 38]** Faced with this reality, the Foundation makes a novel argument, which, although unclear, appears to be that *Toomey* is not even applicable because 1) the relationship between UNM and the Foundation is governed by statute; 2) *Toomey* did not involve organizations governed by that statute; and 3) UNM's relationship with the Foundation is so intertwined, statutorily and practically, that application of *Toomey* "serves no purpose." **[BIC 36-40]**

The Court should reject these arguments. The *Toomey* test analyzes whether a private entity holds records on behalf of a public entity. No court has held that whether the test should be applied depends on the basis of the relationship between the two entities, i.e., whether the relationship is based on statute, contract, or some other basis. And certainly no court has held that when there is a statutory scheme that addresses, in whole or in part, the relationship between the private and public entity, *Toomey* should not be applied. Considering that such statutorily-governed relationships are common, it would significantly undercut *Toomey* – and thus transparency – if *Toomey* could not be applied in those situations. Notably, in *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, the Court of Appeals affirmed the decision of a district court that settlement agreements held by a private prison were, under *Toomey*, held on behalf of the state and thus subject to IPRA. The state's authority to contract with private entities for prison services is governed by statute (the Corrections Act, NMSA 1978, Section 33-1-1 *et seq*), including specific provisions regarding the scope and details of prison contracts (NMSA 1978, Section 33-1-17). There was no suggestion in *Corizon Health* that the statutorily-defined relationship between the state and the private prisons prohibited application of *Toomey*.

And the argument that the Foundation and UNM are so entangled that *Toomey* should not be applied – because the *Toomey* test would necessarily be

satisfied in every case – is backwards in its logic. The more that a private entity and a public entity are linked in purpose and conduct, the more likely that the private entity is acting on the public entity's behalf. The fact that the Foundation is the practical equivalent of a department of UNM, rather than a separate entity, only serves to increase the public importance of its records, and thus the need to permit public inspection of its records.

III. TO THE EXTENT THE COURT MAY CONSIDER PUBLIC POLICY CONSIDERATIONS, THOSE CONSIDERATIONS FAVOR ACCESS TO THE RECORDS.

This Court is limited in applying policy considerations to resolution of this appeal. In considering the Foundation and the Lobo Club's request that this Court recognize an exemption to IPRA, the Court may not substitute its own policy judgments for those of the Legislature. *See Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012-NMSC-026, ¶ 16 (rejecting the non-statutory "rule of reason" exemption to IPRA). Policy is the province of the Legislature:

> Our role is to construe statutes as written and we should not second guess the legislature's policy decisions. We adhere to the principle that a statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.

State v. Maestas, 2007-NMSC-001, ¶ 14, 140 N.M. 836 (citations omitted).

"Unless a statute violates the Constitution, we will not question the wisdom,

policy, or justness of legislation enacted by our Legislature." *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dept.*, 2006-NMSC-017, ¶ 11, 139 N.M. 589 (citations omitted).

Should the Court address policy issues, the policy of transparency underlying IPRA strongly favors affirmance of the Court of Appeals. The public has a considerable interest in access to information about donations to, and fundraising by, UNM and the state's other institutions of higher learning. The Court should not permit these institutions to hide such information through the creation of a nominally separate, but functionally equivalent, private entity.

The rationale for recognizing that state open records statutes apply to university-created foundations was addressed by the Kentucky Supreme Court in a case brought by a news organization against the University of Louisville Foundation:

> As a public institution that receives taxpayer dollars, the public certainly has an interest in the operation and administration of the University…. The Foundation's stated goal is to advance the charitable and educational purposes of the University of Louisville. To this end, it solicits, receives, and spends money and other assets on behalf of the University. The public's legitimate interest in the University's operations then logically extends to the operations of the Foundation.

Cape Publications, Inc. v. Univ. of Louisville Found., Inc., 260 S.W.3d 818, 822-23 (Ky. 2008) (holding that Kentucky open-records act applied even to foundation records disclosing names of certain donors).

The Foundation asserts that in 2015-16, it received $5.4 million in direct support payments from UNM, assessed $2.7 million in fees from the endowments owned by UNM, and raised $87 million to benefit UNM. **[BIC 6]** Raising money to sustain the operations of a university is a core governmental function. It is increasingly accepted that attracting grants and donations is the single most important and time-consuming job of the university president. *See* Melissa Ezarik, "The President's Role in Fundraising," University Business, April 27, 2012 (quoting estimates that university presidents can spend as much as 70 percent of their time on fundraising). A 2013 survey of 142 public university presidents found that, by their own estimate, they spent an average of 6.7 workdays per month on fundraising and 3.85 workdays per month traveling for fundraising. *See* Robert L. Jackson, "The Prioritization of and Time Spent on Fundraising Duties by Public Comprehensive University Presidents," Int'l J. of Leadership & Change, Vol. 1: Iss. 1, Art. 9 (May 2013). It is not possible to transform the character of this core governmental function into a private function simply by delegating it to a nonprofit entity of the agency's own creation. The public has a considerable interest in how this money is raised and spent on UNM's behalf, and that interest is not diminished by the fact that UNM has created separate entities to conduct such matters.

In addition, the Foundation's arguments that access to records "would likely have a catastrophic effect" on its ability to fundraise for UNM **[BIC 8]** is at best

speculative. The Foundation and the Lobo Club offer no evidence that the foundations in California, Pennsylvania or any other state subject to open-government laws have ceased being able to effectively fundraise because their records are accessible. Foundations across California, for instance, have reported record donations in recent years, indicating that it does not handicap these institutions to make their operations transparent. *See, e.g.,* University of California-Davis news release, "UC Davis Has Record Fundraising Year: $323 Million," September 20, 2022[6]; and University of California-Berkeley news release, "A record-breaking 2022 for fundraising at Berkeley Haas," August 19, 2022.[7]

Furthermore, while foundations commonly argue that they need confidentiality to avoid compromising donors' privacy, universities and their foundations routinely publicize the names of donors – even chiseling their names into the edifices of buildings – when disclosure serves their objectives. They cannot be heard to argue that disclosure is appropriate only where the information flatters the university and not where the information might be disadvantageous.

[6] https://www.ucdavis.edu/news/uc-davis-has-record-fundraising-year-323-million.

[7] https://newsroom.haas.berkeley.edu/a-record-breaking-2022-for-fundraising-at-berkeley-haas/#:~:text=The%20Haas%20School%20of%20Business,the%20Berkeley%20Haas%20Undergraduate%20Program.

Open government laws do not allow agencies to release only those records that they regard as strategically helpful.

Because there is no practical separation between foundations and their host universities, ethically dubious behavior at a foundation often ensnares the host institution as well. Using public records that are accessible under Michigan's equivalent to IPRA, the *Detroit Free-Press* reported on what gives the appearance of a "pay to play" system at the University of Michigan's $11 billion endowment fund, where the foundation had placed billions with money management firms run by executives who have made large donations to the university or served on the foundation's board. *See* Matthew Dolan & David Jesse, "University of Michigan pours billions into funds run by contributors' firms," *Detroit Free Press*, Feb. 1, 2018. The disclosures prompted an outcry from student leaders, who signed a joint statement declaring that the foundation's investment practices "eroded our trust" in the university. *See* Dolan & Jesse, "University of Michigan students: Be more transparent about endowment investments," *Detroit Free Press*, Feb. 15, 2018. Thus, if New Mexicans are to be assured that their universities operate in an honest and above-board manner, they need access not just to the universities' public records but to their foundations' records as well.

In an illustrative case, journalists from the *Pocono Record* were forced to file suit against Pennsylvania's East Stroudsburg University Foundation to obtain

access to records comparable to those sought here, in their attempt to inform the public about a scandal that resulted in the ouster of the foundation's chief fundraiser, Isaac Sanders. *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. 2010). After winning that legal challenge, the journalists used foundation records to expose irregularities in the way the university doled out scholarship money, and raised questions about whether the former director misused foundation money to cultivate inappropriate personal relationships with students, over which he and the university were later sued. *See* Dan Berrett, "ESU Foundation records may hold clues to Sanders scandal," *Pocono Record*, June 30, 2013. Similarly, a student editor at Texas A&M University won a national investigative-reporting award by analyzing records of his university's endowment investments to show how frequently the university invested donors' money in companies implicated in human-rights abuses in the developing world. *See* Spencer Davis, "The bottom line first: Without a social policy, A&M is invested in companies of unclear character," *The Battalion*, Nov. 12, 2015; University of Georgia news release, *Investigative series examining Texas A&M's investments wins 2016 Holland Award*, July 26, 2016.[8] In California, reporting by the *Santa Rosa Press Democrat* prompted an investigation

[8] http://grady.uga.edu/investigative-series-examining-texas-ams-investments-wins-2016-holland-award/

by the state Attorney General into the Sonoma State University Foundation, after a series of stories disclosed that the SSU Foundation made unorthodox personal loans to clients of a foundation board member, and loaned the board member himself $1.25 million, which he was unable to fully repay. Nathan Halverson, "Attorney General auditing SSU loans to Carinalli," *Santa Rosa Press-Democrat*, July 29, 2009.

Furthermore, universities can be financially responsible for mismanagement by their foundations. At the University of Wisconsin-Oshkosh, where the university's purportedly "separate" and "private" foundation ended up suing the university to make good on millions of dollars that the foundation lost to improvident investments. When the foundation declared bankruptcy, it brought a claim arguing that the university was the guarantor of its debts, and won a $15 million judgment from a U.S. bankruptcy judge that eventually settled for a $6.3 million payout of university funds.[9] This scandal dispels any notion that the finances of a university and its foundation are meaningfully separate.

These concerns are especially relevant at UNM. Mr. Libit's records requests ask for information related to fundraising by the Foundation and the Lobo Club for UNM's athletic department. That department has been beset with problems related

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[9] https://madison.com/wsj/news/local/education/university/uw-system-settles-with-uw-oshkosh-foundation-in-6-3-million-agreement/article_6da6e329-ec49-55b2-9bb3-acf2977199ff.html

to financial irregularities. In 2017, the New Mexico State Auditor designated "UNM and its component units" for a special audit due to questions about athletic fundraising and expenses.[10] The subsequent report, as reported in the media, "revealed extensive mismanagement of public and private funds, a glaring lack of accountability within the athletics department and the school's various fundraising entities, and a confusing array of internal policies that led to years' worth of financial missteps and perks to employees and donors."[11] The audit report led to an inquiry by the Higher Learning Commission that threatened to jeopardize UNM's reaccreditation.[12] Furthermore, repeated budget issues within the athletic department led to the state Higher Education Department to place UNM on a "enhanced fiscal oversight program."[13]

In sum, the public policy favoring transparency of the actions of UNM and its athletic department apply equally to the Foundation and the Lobo Club. Without access to those entities' records, the public's ability to monitor and oversee UNM is significantly impaired.

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[10] https://www.abqjournal.com/1049037/unm-audit-prompting-concerns.html.

[11] https://www.santafenewmexican.com/news/local_news/state-audit-blasts-unm-athletics-over-mismanagement-of-funds/article_69ca69ab-180f-54df-aa80-47f3c43bc301.html

[12] https://www.santafenewmexican.com/sports/accreditation-agency-questions-unm-s-finances/article_b375a2db-2987-5f17-b21f-96b590268447.html

[13] https://www.abqjournal.com/1172926/state-to-continue-close-watch-of-unm-athletics-finances.html#:~:text=In%20April%20%E2%80%94%20six%20months%20after,save%20%241.9%20million%20a%20year.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was submitted for e-filing and e-service on all counsel of record via the Court's EFS on December 9, 2022, which caused all counsel of record to be served by electronic means to their respective email addresses of record, as more fully reflected on the Notification of Service generated by the Court's EFS.

PEIFER, HANSON, MULLINS & BAKER, P.A.

By: *Is/ Gregory P. Williams*
Gregory P. Williams

ADDENDUM A

NMSA 1978 § 1-6B-12 (from the Uniform Military and Overseas Voters Act)

A. The county clerk shall request an electronic-mail address from each federal qualified elector who registers to vote. An electronic-mail address provided by a federal qualified elector shall not be made available to the public **and is exempt from disclosure pursuant to the Inspection of Public Records Act**.

NMSA 1978 § 1-12-69 (relating to elections)

G. Paper ballots marked by voters, their digitized equivalents and records related to voting **are exempt from the Inspection of Public Records Act** until forty-five days following any recount, contest or other judicial inquiry or until forty-five days after adjournment of the state or county canvassing board, whichever is later.

NMSA 1978 § 6-32-7 (from the Small Business Recovery Act of 2020)

B. Information obtained by the authority regarding individual loan applicants **is confidential and not subject to inspection pursuant to the Inspection of Public Records Act**; …

NMSA 1978 § 9-15-49 (from the Defense Conversion and Technology Act)

E. Information developed or obtained by the commission that pertains to proprietary commission strategies or related to the relocation of military units **shall be confidential and not subject to inspection pursuant to the Inspection of Public Records Act**.

NMSA 1978 § 15-7-9 (relating to risk management claim documents)

The following records created or maintained by the risk management division of the general services department **are confidential and shall not be subject to any right of inspection by any person** except the New Mexico legislative council or a state employee within the scope of the New Mexico legislative council's or state employee's official duties:…

NMSA 1978 § 21-1-16.1 (relating to applications for university president)

A. Public records containing the identity of or identifying information relating to an applicant or nominee for the position of president of a public

institution of higher education **are exempt from inspection under the Inspection of Public Records Act**.

NMSA 1978 § 24-1-5.9 (from the Public Health Act)

A. A hospital, a long-term care facility or a primary care clinic shall provide information sufficient for the secretary to make a reasonable assessment based on clear and convincing evidence of its financial viability, sustainability and potential impact on health care access. Information provided to the secretary pursuant to this section **shall remain confidential, is exempt from the Inspection of Public Records Act**, unless disclosure or use is mandated by the state or federal law, and shall not be used as a basis for suspension, revocation or issuance of a license.

NMSA 1978 § 24-14A-8 (from the Health Information System Act)

A. Health information collected and disseminated pursuant to the Health Information System Act **is strictly confidential and shall not be a matter of public record or accessible to the public** except as provided in this section and Sections 24-14A-6 and 24-14A-7 NMSA 1978.

NMSA 1978 § 34-9-19 (relating to the national instant criminal background check system)

J. The administrative office of the courts is prohibited from disclosing information regarding a court order, judgment or verdict referred to in Subsection B of this section or regarding a petitioner or proceedings under this section, except as otherwise provided by law. Information compiled and transmitted under this section **is not a public record and is not subject to disclosure pursuant to the Inspection of Public Records Act**.

NMSA 1978 § 30-51-3 (from the Money Laundering Act)

G. Any report, record, information, analysis or request obtained by the department of public safety or other agency pursuant to the provisions of this section **is not a public record as defined in Section 14-3-2 NMSA 1978 and is not subject to disclosure pursuant to the provisions of Section 14-2-1 NMSA 1978.**

NMSA 1978 § 40-13B-5 (from the Confidential Substitute Address Act)

E. A participant’s residential or delivery address, telephone number and email address that are maintained by an agency are not public records and **shall not be disclosed pursuant to the Inspection of Public Records Act** while a person is a participant.

NMSA 1978 § 51-5-56 (from the Unemployment Compensation Law)

Such reports **shall be confidential and shall not be considered as public records under the provisions of Sections 14-2-1 through 14-2-3 NMSA 1978**. Such reports shall be used by the employment security division for administrative purposes only, and except for authorized personnel of the labor department, shall not be divulged to any person for any reason.

NMSA 1978 § 53-7A-6 (from the Economic Development Corporation Act)

C. Information obtained by the corporation that is proprietary technical or business information or related to the possible relocation or expansion of a business **shall be confidential and not subject to inspection pursuant to the Inspection of Public Records Act**.

NMSA 1978 § 57-22-9.2 (from the Charitable Solicitations Act).

The attorney general may exchange information obtained by the civil investigative demand with comparable authorities of other states or the federal government regarding charitable organizations, professional fundraisers and professional fundraising counsel. Information acquired by exchange with other states or the federal government **shall be exempt from inspection pursuant to the Inspection of Public Records Act**.

NMSA 1978 § 58-22-19 (from the Escrow Company Act)

Division examination reports, financial information contained in licensee applications and renewal applications and information on investigations relating to violations of the Escrow Company Act that do not result or have not yet resulted in administrative, civil or criminal action:

A. **are not public records subject to the Inspection of Public Records Act**; …

NMSA 1978 § 58-31-18 (from the Spaceport Development Act)

A. The following information obtained by the authority is **not subject to inspection pursuant to the Inspection of Public Records Act**: …

NMSA 1978 § 58-33-5 (from the New Mexico Work and Save Act)

A. Information obtained by the board that is proprietary or information about covered employees or participants in the New Mexico retirement plan marketplace **is confidential and not subject to inspection pursuant to the Inspection of Public Records Act**.

NMSA 1978 § 59A-5A-9 (from the Insurance Code)

A. To the extent not set forth in any other form accessible to the public, all information in risk-based capital reports, risk-based capital plans, results or reports of any examination or analysis of an insurer or health organization performed exclusively for the purposes required by the Risk-Based Capital Act and all corrective orders issued by the superintendent pursuant to such examination or analysis are and shall be kept confidential by the superintendent and **are not subject to the Inspection of Public Records Act**.

NMSA § 59A-8A-4 (from the Insurance Code)

E. (8) except as provided in Paragraph (12) of this subsection, the documents, materials and other information that constitute a memorandum in support of the opinion and that are in the possession or control of the office of superintendent of insurance, and other materials provided by the company to the superintendent in connection with the memorandum, **are confidential and are not subject to the Inspection of Public Records Act**.

NMSA 1978 § 59A-8A-11 (from the Insurance Code)

B. Except as provided in this section, a company's confidential information **is confidential and is not subject to the Inspection of Public Records Act**.

NMSA 1978 § 59A-11-13 (from the Insurance Code)

K. The documents and materials related to termination or cancellation of an insurance producer's appointment shall be deemed confidential as follows: (1) any documents, materials or other information in the control or possession of the office of superintendent of insurance that is furnished by an insurer, insurance producer or an employee or agent thereof acting on behalf of the insurer or insurance producer, or obtained by the superintendent in an investigation pursuant to this section, **shall be confidential and shall not be subject to the Inspection of Public Records Act**.

NMSA 1978 § 59A-13-17 (from the Insurance Code)

B. Records submitted to the superintendent pursuant to this section that contain information identified in writing as proprietary by the public adjuster and accepted as confidential by the superintendent shall be treated as confidential by the superintendent, **shall not be subject to the Inspection of**

Public Records Act, shall not be subject to subpoena and shall not be subject to discovery or admissible as evidence in any private civil action.

NMSA 1978 § 59A-37-24 (from the Insurance Code)

A. All documents, materials or other information in the possession or control of the office of superintendent of insurance that are obtained by or disclosed to the superintendent or any other person in the course of an examination or investigation made pursuant to Sections 59A-37-20 through 59A-37-22 NMSA 1978, and all information reported pursuant to Section 59A-37-4 NMSA 1978, **shall be confidential and shall not be subject to the Inspection of Public Records Act**.

NMSA 1978 § 61-4-10 (from the Chiropractic Physician Practice Act)

B. All written and oral communication made by any person to the board or an agent of the board relating to actual or potential disciplinary action, including complaints made to the board, **are confidential communications and are not public records for the purposes of the Inspection of Public Records Act**; provided that all information contained in a complaint file is public information and subject to disclosure when the board acts on a complaint.

NMSA 1978 § 61-6-34 (from the Medical Practice Act)

All written and oral communications made by any person to the board relating to actual and potential disciplinary action shall be confidential communications and **are not public records for the purposes of the Inspection of Public Records Act**.

NMSA 1978 § 61-9-5.1 (part of the Professional Psychologist Act)

B. All written and oral communications made by a person to the board relating to actual or potential disciplinary action shall be confidential communications and **are not public records for the purposes of the Inspection of Public Records Act**. All data, communications and information acquired by the board relating to actual or potential disciplinary action shall not be disclosed except: …

NMSA § 61-14-4.1 (from the Veterinary Practice Act)

B. All written and oral communications made by any person to the board relating to actual or potential disciplinary action shall be confidential communications and **are not public records for the purposes of the Inspection of Public Records Act**.

NMSA 1978 § 61-3B-6 (from the Lactation Care Provider Act)

G. All written and oral communication made by any person to the board relating to actual or potential disciplinary action, including complaints made to the board, shall be confidential communications and **are not public records for the purposes of the Inspection of Public Records Act**.

NMSA 1978 § 62-16A-16 (from the New Mexico Renewable Energy Transmission Authority Act)

Information obtained by the authority that is proprietary technical or business information **shall be confidential and not subject to inspection pursuant to the Inspection of Public Records Act**.