IN THE SUPREME COURT OF NEW MEXICO

DANIEL LIBIT,

Plaintiff-Appellee,

v. No. S-1-SC-39396

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,

Defendant-Appellants.

APPELLEE'S ANSWER BRIEF

On a Writ of Certiorari to the New Mexico Court of Appeals
Case No. A-1-CA-38255

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Oral Argument Not Requested

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CERTIFICATE OF COMPLIANCE

I certify, according to Rule 12-318(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains 9,526 words of substantive text, excluding all text excluded by that rule, and was prepared in size 14 Times New Roman font, a proportionally spaced typeface, using Microsoft Word as part of Microsoft Office 365.

/s/ Nicholas T. Hart
Nicholas T. Hart

TRANSCRIPT OF PROCEEDINGS

References to the Record Proper in *Libit v. University of New Mexico Foundation, et al.*, Case No. D-202-CV-2017-01620, are denoted by "Libit I R.P.," followed by the page number. References to the Record Proper in *Libit v. University of New Mexico Lobo Club*, Case No. D-202-CV-2019-00290, are denoted by "Libit II R.P.," followed by the page number. This brief only cites to the Transcript in *Libit v. University of New Mexico Foundation, et al.*, Case No. D-202-CV-2017-01620, which is denoted by "Libit I, TR.," followed by the volume number, the page number, and line numbers.

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Introduction

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis Brandeis, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, 62 (National Home Library Foundation ed. 1933). University foundations are a case study of Justice Brandeis' clarion call against secrecy. Yet the University of New Mexico and its fundraising entities, which were created in part to shield University of New Mexico business from public scrutiny, seek to undermine the well-established public policy and right of the public to examine records related to the operations of their government institutions.

The University of New Mexico Foundation and the University of New Mexico Lobo Club, though claiming to be private, independent, not-for-profit organizations, are funded, and controlled, by the University of New Mexico. They operate on University of New Mexico property. Their operating budgets are made up of public funds provided by the University of New Mexico. They enjoy the privilege of the free use of University of New Mexico employees. Their priorities are set by the University of New Mexico. And any money they receive must be given to or support University of New Mexico programs.

Daniel Libit, an investigative journalist who writes about college athletics, requested records held or created by these entities related the University of New

Mexico's, the University of New Mexico Foundation's, and the University of New Mexico Lobo Club's fundraising operations and the identity of their donors. Doing so makes perfect sense; after all, the public has a right to know the way the State's largest university conducts its fundraising to ensure that public representations by the University of New Mexico are correct and that the money raised for the University of New Mexico, which is only obtained using public money and employees directed by a public entity, is given, and used for a proper purpose. All three entities, however, have refused to turn over records related to these activities, wrongfully claiming that the records are exempt from public disclosure.

Mr. Libit, through these consolidated lawsuits, has attempted to remedy this infringement on the public's right to scrutinize its institutions. The dispute here is not merely academic. It invokes the real-world consequences of unchecked government authority. Records sought by Mr. Libit have since been found to relate to financial malfeasance at the University of New Mexico, resulting in public scandal, government investigations, and even the indictment of the University's former Athletics Director.

The New Mexico Court of Appeals properly determined that records held by the University of New Mexico Foundation and the University of New Mexico Lobo Club were records created by or on behalf of the University of New Mexico and

were not categorically exempt from public inspection. That decision was correct. The opinion of the New Mexico Court of Appeals must be affirmed.

Factual Background

The University of New Mexico Foundation and the University of New Mexico Lobo Club are not merely organizations that provide contracted-for services to the University of New Mexico. They are controlled by the University, with a relationship that spans all aspects of the Foundation's and Lobo Club's operations.

I. The Relationship Between the University of New Mexico and the University of New Mexico Foundation.

The University of New Mexico created the University of New Mexico Foundation to assist in its fundraising efforts. Libit I, Tr. Vol. I, 9. For the first 30 years of its existence, the Foundation operated as an "integrated and embedded" entity within the University. *Id.* at 32. In 2009, the University spun off the Foundation into an ostensibly separate entity, publicly noting that doing so would "offer greater assurance of . . . confidentiality, since [it would be] a separate not-for-profit corporation and not subject to open records laws." *Id.* at 671.

The relationship between the University and the Foundation is governed by a Memorandum of Agreement. *See* Libit I, R.P. 13. That agreement states that the Foundation will "have a close operation[al] and fiscal relationship with the University through the University President and academic leadership of the University." *Id.* The agreement adds that "all gifts and donations received by the

Foundation are given for the benefit of the University," and that the Foundation must promulgate policies which "assure accountability to the donor and to the public that supports the University." *Id.*

The actual connections between the University and the Foundation transcend this purportedly "close" relationship. In every meaningful way, the University controls the Foundation. Their Memorandum of Agreement requires that the President of the University, two University Deans, and one member of the University's Board of Regents serve on the Foundation's Board of Trustees. *See* Libit I, R.P. 14. The Foundation's President is supervised and controlled by the University's President. *Id.* The Foundation's activities are driven and directed by a Dean's Council, appointed by the University's President, which is tasked with "implementing appropriate fundraising strategies" for the Foundation. *Id.* at 17. The chairs of each University Department supervise a Foundation employee assigned to fundraise for their department. *Id.* at 679. Those University chairs participate in the hiring and firing decisions of Foundation employees. *Id.* Senior executives of the Foundation, including the Chief Financial Officer, are interviewed by University administrators prior to being hired. *Id.*

The University also holds the power of the Foundation's purse. For example, the Memorandum of Agreement states that "the University commits to provide revenue sufficient to allow the Foundation to fund its operations and to grow the

fundraising efforts to meet mutually identified strategic needs of the University." *See* Libit I, R.P., 17, 674. The Foundation is mainly funded by money it receives from the University through an excise tax on each of its Departments; fees that are paid to the Foundation for managing the University's endowment; and unrestricted donations to the University that are given to the Foundation. *Id.*, 674. The excise tax payments comprise more than forty percent of the Foundation's annual budget and provided the Foundation with $5,641,345 for the 2015 fiscal year and $5,387,330 for the 2016 fiscal year. *Id.*, 675. Fees for managing the University's endowment amounted to an additional $2,663,363 in the 2016 fiscal year. *Id.* The Foundation received an additional $7,131,715 in direct support from the University during the 2015 fiscal year. *Id.* These sources of funding—from University departments, other University payments, and fees for managing the school's endowment—accounted for 95 percent of the Foundation's operating expenses during the 2015 and 2016 fiscal years. *Id.*

The Foundation receives additional monetary support from the University in the form of employee cost-sharing. A group of Foundation employees receive their entire salaries and benefits from the University. Libit I, R.P., 677. Several Foundation employees receive portions of their wages from the University. *Id.*, 678. For example, the Foundation is reimbursed for 25 percent of the salaries paid to its development officers and other Foundation employees that raise money for the

University's Athletics Department. *Id.* A similar apportionment exists for the Foundation's employees tasked with fundraising for the University's Health Sciences Center and School of Engineering. *Id.* The University provides office space on the University's campus for nearly two dozen Foundation employees. *Id.*, 680. Since so many Foundation employees come and go throughout the University's campuses, the University provides school identification cards to Foundation employees, allowing them the same access to campus buildings as if they were University employees. *Id.*

The Foundation has also been designated by the University's Board of Regents to manage its endowment funds. Libit I, R.P. 672. Through this role, the Foundation invests tens of millions of dollars in endowment funds titled to the University. *Id.*, 675. The Foundation is directed to commingle the endowment funds titled to the University with other endowment funds that are titled to the Foundation. *Id.* This commingling is not limited to the endowment; deposition testimony established that the University authorized the Foundation to deposit into its own bank accounts donations explicitly made out to the University of New Mexico. *Id.*

The Foundation manages the President's Fund, which holds monies used by the University President to host events and leases luxury suites at the University's football stadium and basketball arena. Libit I, R.P., 678-79. The Athletics Director, a University employee, is contractually entitled to free trips, meals, and other

benefits, such as the free use of a courtesy car, provided through the Foundation. *Id.*, 679. Though many University employees help the Foundation fundraise, the Foundation does not reimburse the University for the time those employees spend working on its behalf. *Id.*

This control of the Foundation's operations and money is why, during a deposition, a University employee testified that "the University could make its decision not to have the Foundation anymore." *Id.*, at 671. In other words, the Foundation would have no recourse if the University decided to terminate the relationship. *Id.* But the University is also financially dependent on the Foundation, with a University witness testifying during a deposition that, absent money received from the Foundation, the University would have to reduce its budget, reduce programmatic spending, or replace the money by raising the funds itself. Libit I, R.P. 674. Put simply, the Foundation is not an independent organization that merely provides contracted for services to a public institution. The Foundation is a creature of the University, which the University controls (through the provision of money, office space, manpower, and other benefits) and can unilaterally terminate.

II. The Relationship Between the University of New Mexico and the University of New Mexico Lobo Club.

Like the relationship between the University and the Foundation, the University of New Mexico Lobo Club acts as the functional equivalent of the University. The Lobo Club, which is also registered as a 501(c)(3), not-for-profit,

entity, exists for the sole purpose of "soliciting, managing, and distributing private gifts and donations given for the benefit of University of New Mexico athletic programs, and, as the primary organization for developing and coordinating fundraising activities for University athletic programs." Libit II, R.P. 5-6. All of the Lobo Club's operational requirements are provided or funded by the University or the Foundation.

For example, under a Memorandum of Agreement between the University, the Foundation, and the Lobo Club, the University agrees to provide, "at no cost to the Lobo Club, suitable office and meeting space for the use of the Lobo Club." *Id.*, 6. The University is responsible for "the cost of utilities, maintenance and repairs, property insurance, and any other physical facility support services for the Lobo Club." *Id.*, 7. Like the Foundation, the University has also granted to the Lobo Club a license to use the name, "University of New Mexico," as well as "other trademarks of the University." *Id.* The University also provides the Lobo Club free "business, financial, legal, public relations, and consulting services," and complementary "computing support, including acquisition of appropriate hardware and software . . . required by the Lobo Club to record and maintain the required membership and donor records." *Id.*

As with the Foundation, the Lobo Club undergoes oversight and control by the University. This includes a restriction on soliciting gifts from any "donors whom

the University has priorities for other needs of the University, except with the approval of the Foundation President and University's Vice President for Athletics/Director of Athletics." Libit II, R.P. 7. The staffing needs of the Lobo Club are determined by the University's Athletics Director. *Id.*, 8. In fact, the Executive Director of the Lobo Club, who serves as the chief executive of the organization, is selected by the Athletics Director and the Foundation. *Id.* At the time this lawsuit was filed, that individual did not receive any compensation from the Lobo Club. *Id.* His salary and benefits were instead paid by the University and the Foundation. *Id.* The executive director of the Lobo Club also undergoes annual performance reviews by the University's Athletics Director and the Foundation's Vice President of Development. *Id.*

The Lobo Club does not, itself, have any employees. Four of the individuals working on behalf of the Lobo Club were compensated by the Foundation. *Id.* Another received pay and benefits from the University. *Id.* In the 2010 fiscal year, the Lobo Club was staffed by seven individuals, four of who were paid by the University. Libit II, R.P. 8. The other three were paid by the Foundation. *Id.*

This interdependent relationship manifests in many other ways. University employees have been responsible for carrying out the Lobo Club's essential administrative tasks, such as writing reimbursement checks from the Lobo Club's bank accounts to University employees. *Id.*, 10. University staffers were regularly

provided access to the Lobo Club's donor database, both to help fundraise activities and to perform administrative tasks. *Id.*, at 10-11. The University provides human resources services to the Lobo Club, including workplace investigations of sexual harassment complaints raised by female Lobo Club staffers against their superiors. *Id.* at 10. And the Lobo Club facilitates the Athletic Department courtesy car program, in which University employees receive free vehicles for their professional and personal use as part of their contracts, but where the vehicles are still solicited and distributed through the Lobo Club. *Id.* This program is managed by a University employee. *Id.*

Official communications from the Lobo Club, including meeting minutes for its Finance and Executive Committees, were routinely distributed by a University employee from a University email account. Libit II, R.P. 11. The same University employee would also disseminate messages on behalf of Lobo Club Executive Directors and Lobo Club Board Presidents using her University email account. *Id.*

Standard of Review

This Court has granted certiorari on two issues: 1) whether NMSA 1978 § 6-5A-1(D) of the Public Finances Act serves as a statutory exemption to inspection under IPRA; and 2) whether *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364, applies to organizations that provide support to public entities such as the University of New Mexico Foundation and the University

of New Mexico Lobo Club. Questions of statutory interpretations are questions of law that are reviewed de novo. *State v. Trujillo*, 2009-NMSC-012, ¶ 9, 146 N.M. 14, 206 P.3d 125. Whether *Toomey* applies to the Appellants here is also a question of law reviewed de novo. *Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 12, 147 N.M. 157, 218 P.3d 75. Appellants have preserved both issues for review by this Court.

Argument

The Inspection of Public Records Act declares that it is the public policy of New Mexico "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. The public right of inspection "is an essential function of a representative government and an integral part of the routine duties of public officers and employees." *Id.* Applying this public policy, the Legislature has defined public records to include those "maintained or held by or *on behalf of* any public body and relate to public business . . . ." NMSA 1978, § 14-2-6(G). This definition is purposefully broad to protect the public's right of inspection. *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, ¶ 17, 299 P.3d 424; *City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶ 7, 146 N.M. 349, 210 P.3d 246 (overruled on other grounds by *Republican Party of New Mexico v. New Mexico Tax'n and Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853).

Appellants concede that the requested records fit within the definition of public records. They assert, however, that the records are exempt from public inspection because § 6-5A-1(D) of the Public Finances Act serves as a statutory exemption from disclosure and because *State ex rel. Toomey v. City of Truth or Consequences* does not apply to support organizations governed by the Public Finances Act. That is incorrect.

I. Section 6-5A-1 is Not an Exemption to Inspection Under IPRA.

Whether a statute or regulation provides an exemption to public inspection under IPRA must "be analyzed on a case-by-case basis." *Toomey*, 2012-NMCA-104, ¶ 22. "IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the Legislature." *Id.* (citing *Cox v. New Mexico Dep't of Pub. Safety*, 2010-NMSC-096, ¶ 5, 148 N.M. 934, 242 P.3d 501). Because "access to information concerning the affairs of the government is a fundamental and necessary right of every person," asserted exemptions to public inspection should be interpreted narrowly to carry out IPRA's policy of public inspection of government affairs. *Id. See also Gannon v. Bd. of Regents*, 692 N.W.2d 31, 38 (Iowa 2005) ("Exceptions to the general rules of disclosure are to be narrowly construed.").

A. The plain language of § 6-5A-1(D) demonstrates that the Public Finances Act is not a statutory exemption to the inspection of public records.

Evaluating the meaning of a statute starts with examination of the plain text. *Garcia v. Gutierrez*, 2009-NMSC-044, ¶ 53, 147 N.M. 105, 217 P.3d 591. This is done through consideration of "the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, READING LAW, 167 (1st ed. 2012). "Context," after all, "is a primary determinant of meaning." *Id.*

The Public Finances Act states: "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" IPRA. NMSA 1978, § 6-5A-1(D). Because § 6-5A-1(D) states "[n]othing in this section subjects an organization" to IPRA, a review of the other sections of the statute is necessary.

First, the statute contains a definition sub-section, which defines "agency" as "any public institute of higher education." NMSA 1978, § 6-5A-1(A)(1). "Organization" is defined as a not-for-profit organization "whose principal and authorized purpose is to complement, contribute to and support or aid the function of or forward the purposes of a single agency through financial support of services, goods, data or information that help or aid the agency in carrying out its statutory

purpose and goals . . . .” *Id.*, § 6-5A-1(A)(2). Next, the statute states that “[p]rior to any agency accepting property or funds that have been transferred to an agency by an organization, the agency and the organization shall enter into a written agreement that includes” 1) “a concise statement of the organization’s purpose and of how that purpose is supportive of the agency’s statutory responsibilities and authority”; 2) provisions governing the “relationship of the agency to the organization in connection with such issues as authority, autonomy and information sharing”; 3) a description of how the “organization may complement and support functions that are the statutory responsibility of the agency” 4) requirements about accounting; 5) “a provision requiring that any funds or property transferred to the agency by the organization be subject to all state law and regulations”; 6) written language stating that the agency has reviewed the organizations bylaws and that the organization will provide copies of its bylaws to the agency; 7) “a provision requiring specification of the consideration that the agency received from the organization for any agency services provided in support of the organization”; and 8) a provision regarding statutory investments standards for any investments made by the organization. *Id.*, § 6-5A-1(B)(1)-(8). This written agreement “is not required for each transfer but is a precondition of any agency’s acceptance of any transfer,” and “[t]he agreement may be amended by mutual written agreement of the agency and the organization.” *Id.*, § 6-5A-1(C).

These consolidated cases have not sought records from the University of New Mexico, the University of New Mexico Foundation, and the University of New Mexico Lobo Club based on a Public Finances Act agreement; they have sought records because the relationship of the entities goes well-beyond the Public Finances Act's statutory requirements. For example, the record in these cases establishes twelve separate instances where the University of New Mexico exercises control over the University of New Mexico Foundation and the University of New Mexico Lobo Club that are not required by the Public Finances Act before the University may receive money from its support organizations:

University's Control over Foundation and Lobo Club	**Is it Required?**	**Not Required?**
All of Organization's funding provided by the Agency		X
Agency provides employees to the Organization		X
Agency pays salaries of Organization employees		X
Agency provides rent-free Agency property to the Organization		X
Leader of the Agency supervises leader of the Organizations		X
Organization's Board of Directors include employees of Agency		X
Organization reimburses Agency employees for fundraising activities		X
Organization provides free vehicles for Agency employees		X
Organization use the Agency's trademarks		X
Organization invests materially all of Agency's endowment		X
Agency involved in hiring and evaluation of Organization employees		X
Organization serves as advisor to Agency's governing board		X

Appellants ignore these facts and fail to analyze the first phrase of § 6-5A-1(D). Their only mention of this language is in a footnote, which states that "[t]he meaning of Section 6-5A-1(D)'s introductory phrase – "[n]othing in this section" – is apparent when one considers the historical legal context in which the statute was enacted, as discussed in Section (C)(2)(b) below," implying only that the phrase should be disregarded because there was no other authority at the time that would have made an organization's records subject to IPRA. BIC, at 19 n.5. But a plain reading of the entire Public Finances Act, and of subsection (D), demonstrates that this first phrase is critical to defining the scope of § 6-5A-1(D).

Because § 6-5A-1 merely identifies eight contractual requirements that must be met for the University of New Mexico to accept money from the University of New Mexico Foundation and the University of New Mexico Lobo Club, a plain reading of § 6-5A-1(D) shows that an agency contracting with an organization does not automatically subject the organization's records to public inspection. A plain reading does not provide that all documents created by the organization on behalf of the public agency, much less those in possession of the public agency itself or the public agency's employees, are exempt from public inspection.

This reading is validated by other methods of statutory interpretation. "The dominant mode of statutory interpretation over the past century has been premised on the view that legislation is a purposive act, and judges should construe statutes to

execute that legislative purpose." Robert A. Katzmann, JUDGING STATUTES, 31 (2014). "[I]t is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose." Learned Hand, *How Far is a Judge Free in Rendering a Decision?*, in NAT'L ADVISORY COUNCIL ON RADIO IN EDUC., LAW SERIES I 1 (1935), *reprinted in* THE SPIRIT OF LIBERTY 103, 106 (Irving Dilliard ed., 1952). The legislative purpose of the Public Finances Act is to allow public agencies to receive money from private support organizations. The purpose was never to govern, let alone restrict, the public's inspection of public records related to government agencies receiving money from private support organizations.

This interpretation is reaffirmed by the heading of § 6-5A-1. *See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) ("[The] heading is but a short-hand reference to the general subject matter involved."). *See also* Scalia & Garner, READING LAW, 222 (explaining that the title of a statute "may be resorted to for the purpose of ascertaining legislative intent") (citing *Lewis v. Simpson*, 167 So. 780 (Miss. 1936)). Section 6-5A-1 is titled: "requirements for governmental entities that receive funds or property from certain organizations." This establishes that purpose of the statute is to state the requirements for transferring money; the purpose is not to govern the effects of such transfers or relationships.

And the heading clarifies that the statute is directed towards the "agency," or the government entity, not an organization.

Applying established methods of statutory interpretation confirms that the Court of Appeals was correct: the Public Finances Act does not contain a categorical exemption from public inspection of records held by § 6-5A-1 organizations. Because the record establishes that the relationship between the University of New Mexico and the University of New Mexico Foundation and the University of New Mexico Lobo Club far exceed the requirements of the Public Finances Act, § 6-5A-1(D) cannot serve as exemption to the inspection of public records. The decision of Court of Appeals should be affirmed.

B. The Court of Appeals interpretation of § 6-5A-1 does not create an absurd result.

Appellants next assert that the Court of Appeals' reading of § 6-5A-1 creates an absurd result because § 6-5A-1(B)(1)(a) exempts donor information found in an annual audit from public disclosure. BIC, at 20-21. This argument appears to apply the maxim of negative implication. The maxim of negative implication, however, "requires great caution in its application." *Halebian v. Berv*, 457 N.E.2d 986 (Mass. 2010). *See also* Scalia & Garner, READING LAW, at 107 ("Virtually all authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context. Indeed, one commentator suggests that it is not a proper canon at all but merely a description of

the result gleaned from context."). Negative implication "properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." Scalia & Garner, READING LAW, at 107. This is not present here. Appellants' reading of § 6-5A-1(D) would require disclosure of an annual report, but not require disclosure of any communications between the entities discussing those reports, or notes or meeting minutes related to the operations discussed in that report, or any other records related to the annual report. Such exclusions would make no sense in the context of the statute. Any attempt to find statutory exemption through negative implication should be rejected.

The Legislature gave the University, the Foundation, and the Lobo Club a roadmap for structuring its relationship in a manner that could have prevented their records from being subject to IPRA. A plain reading of § 6-5A-1(D) means that a private entity which contracts with a public agency doesn't, by the fact of having done so, automatically subject its records to disclosure under IPRA. It does not provide that all documents created by the organization on behalf of the public agency, much less those in the possession of the public agency itself, are made exempt from disclosure.

C. New Mexico recognized that private entities could be functionally equivalent to public agencies before § 6-5A-1 was enacted.

Appellants contend that their interpretation of § 6-5A-1 must be correct because, "[a]t the time the Legislature enacted Section 6-5A-1 in 1992, there was no provision of New Mexico statutory or common law that even suggested the records of a private entity could be public records subject to inspection under IPRA." BIC, at 22. This contention, which includes carefully crafted limitations, incorrectly ignores the full scope of New Mexico law and the law of other states establishing that private entities may be subject to public disclosure laws.

The New Mexico courts recognized, as early as 1966, that a private entity could have to comply with open government laws when this Court held that the Raton Public Service Company, an allegedly private entity, had to comply with the Open Meetings Act. *Raton Pub. Serv. Co. v. Hobbes*, 1966-NMSC-150, ¶ 16, 76 N.M. 535, 417 P.2d 32. In 1992, the same year that the Public Finances Act became law, the Supreme Court of Ohio concluded that the University of Toledo Foundation was subject to Ohio's public records laws. *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992). That same year, the Kentucky Supreme Court held that the Kentucky State University Foundation was subject to Kentucky's open records law. *Frankfurt Publ'g Co. v. Kentucky State University Foundation*, 834 S.W.2d 681 (Ky. 1992). And the Court of Appeals, in

Toomey, discussed similar cases from other states that were decided in 1992 or earlier: *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), *A.S. Abell Publ'g Co. v. Mezzanote*, 464 A.2d 1068 (Md. 1983), and *News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 284 S.E.2d 542 (N.C. App. 1981). *See Toomey*, 2012-NMCA-104, ¶¶ 13-18.

The Legislature had ample opportunity to examine court opinions and statutes from New Mexico and other states that required private support organizations to comply with government transparency laws. Section 6-5A-1(D)'s language, therefore, is evidence of the Legislature's rejection of the type of categorical exemption sought by Appellants.

D. Appellants do not identify any statutory exemptions to disclosure with language like that in § 6-5A-1(D).

Appellants contend that the Legislature has used similar language as the language found in § 6-5A-1(D) to craft other exemptions to disclosure, including exemptions "[p]roviding that '[death reports] shall be confidential and should not be considered as public records under [IPRA],'" "Stating that forms, information and data collected by and furnished for the health information system 'shall not be public records subject to inspection pursuant to [IPRA],'" or that "Certain Division documents 'are not public records subject to [IPRA].'" BIC at 18-19. Those statutes, however, are not similar; they contain clear and absolute language such as "shall be

confidential" or "shall not be public records," that is not present in § 6-5A-1. Similarly, Appellants have not identified any statutory exemptions that contain a similar condition as the "nothing in this section" language found in § 6-5A-1.

In contrast, other statutes show that the Legislature uses unconditional language when creating exemptions to IPRA. For example, IPRA contains several exemptions from disclosure, prefaced by the phrase "[e]very person has a right to inspect public records of this state *except*," followed by the categories of exempted records. *See* NMSA 1978, § 14-2-1(A) (emphasis added). Such language leaves no doubt to the status of those records that fall within those exemptions. Another statute states that "[a]ll health information that relates to and identifies specific individuals as patients is strictly confidential and *shall not be a matter of public record or accessible to the public* even though the information is in the custody of or contained in the records of a governmental agency or its agent, a state educational institution, a duly organized state or county association of licenses physicians or dentists, a licensed health facility or staff committees of such facilities." NMSA 1978, § 14-6-1(A) (emphasis added). New Mexico's public financing laws state that "[r]ecords with regard to the ownership or pledge of public securities *are not subject to inspection or copying under any law of this state relating to the right of the public to inspect or copy public records*." NMSA 1978, § 6-14-10(E) (emphasis added). And the legislature has explicitly stated that certain records maintained by the New

Mexico Risk Management Division "are confidential and *shall not be subject to any right of inspection by any person* not a state officer, member of the legislature or state employee within the scope if his official duties." NMSA 1978, § 15-7-9(A) (emphasis added). Section 6-5A-1, however, does not contain similarly unequivocal language.

Appellants also assert that the Court of Appeals decision is a ruling that records may or may not be subject to inspection. BIC, at 21. That is incorrect. The Court of Appeals merely recognized that "the Legislature expressly designated organizations' annual audits a public record . . . , but also made clear that it was not doing the same for other records." *Libit v. University of New Mexico Lobo Club*, 2022-NMCA-043, ¶ 11, 516 P.3d 217. In other words, § 6-5A-1 identifies a record which it believes should be a public record. But the reverse is not true; the legislature identifying a document as a public record does not mean that every record not specifically identified as public is secret.

E. Public policy supports the public inspection of the University of New Mexico's fundraising activities.

Appellants argue that the Court of Appeals erred by refusing to engage with their public policy argument because they were "not arguing for a 'rule of reason' exemption from IPRA. BIC, at 33. Rather, Appellants assert that they "merely seek to point out that the strong and long-standing public policy of protecting donor information supports their conclusion that" § 6-5A-1 is a categorical exemption to

public discovery under IPRA "because the Legislature is presumed to have understood and carefully balanced the potentially competing public policies." *Id.* This argument, however, is identical to the rule of reason that this Court has rejected.

The rule of reason sought to "balance the fundamental right of all citizens to have reasonable access to public records against the countervailing public policy considerations which favor confidentiality and nondisclosure." *The Daily Times*, 2009-NMCA-057, ¶ 8 (overruled by *Republican Party of New Mexico*, 2012-NMSC-026) (internal quotations and citation omitted). The courts "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." *Republican Party of New Mexico*, 2012-NMSC-026, ¶ 16. Appellants public policy arguments should be rejected as irrelevant to this Court's review of the Court of Appeals' decision.

Even still, Appellants policy arguments are unpersuasive even if the Court accepts these public policy interests only to attempt to attain legislative intent. The affidavit submitted by Sergio Pareja, the former dean of the University of New Mexico School of Law, claiming that a certain donation to the School of Law may have to be returned if the University must disclose the donor's identity, is speculative. There is no record evidence that Appellants asked the donor whether they would demand return of the gift if the courts forced the University to disclose

the identity of its donors. Nor is there any record evidence that a single donor has threatened to sue or revoke a contribution if the law required the disclosure of their identity.

The assertion that public inspection of donor information would lead to a reduction in contributions is similarly speculative. Amici New Mexico Foundation for Open Government and Brechner Center for Freedom of Information noted, in a brief submitted to the Court of Appeals, that "[t]he Foundation and the Lobo Club offer no evidence that [university] foundations in California, Pennsylvania or other states [in which they are] subject to open-government laws have ceased being able to effectively fundraise because their records are accessible." *See* Brief Amicus Curiae of New Mexico Foundation for Open Government, at 11. That same brief also demonstrated that "Foundations across California, for instance, [were] reporting record donations, so it manifestly does not handicap these institutions to make their operations transparent." *Id.* (citing University of California-Davis news release, "UC Davis Announces Another Record-Breaking Fundraising Year," July 25, 2017, *available at* https://www.ucdavis.edu/news/uc-davis-announces-another-record-breaking-fundraising-year/; University of California-Berkeley news release, "Campus sets new records for fundraising," July 14, 2016, *available at* http://news.berkeley.edu/2016/07/14/campus-sets-new-records-for-fundraising/). That said, the higher education donor system, which is so often based on eponymous

transactions endowing chairmanships and professorships, naming rights for facilities, and the rechristening of departments in honor of benefactors, can hardly be said to be at risk because the source and amount of donations are subject to public review.

The policy of protecting donor confidentiality is also outweighed by the public's interest in rooting out unethical or even unlawful behavior related to fundraising transactions. For example, the disclosure of public records allowed the *Detroit Free-Press* to discover that the University of Michigan was investing much of its $11 billion endowment with investment firms run by executives that had made donations to the school. *Id.*, at 12. After prevailing in a public records lawsuit against the College of DuPage Foundation, the *Chicago Tribune* found that trustees and top administrators of Illinois' largest community college system misappropriated hundreds of thousands of dollars. *See* Jodi S. Cohen & Stacy St. Clair, *College of DuPage releases Breuder expenses showing wining, dining, hunting*, THE CHICAGO TRIBUNE (July 2, 2015), available at https://www.chicagotribune.com/investigations/ct-college-of-dupage-foundation-expenses-20150701-story.html (last accessed Dec. 2, 2022). This included $102,000 the College of DuPage President had expensed to the college's foundation over a four-year period for what was reported to the IRS as "leadership cultivation meetings," but was actually "spent

on trustees' bar bills, a rifle for an outgoing foundation officer, a limousine ride, [and] even a stuffed pheasant to decorate the campus's high-end restaurant." *Id.*

The James G. Martin Center for Academic Renewal released a report detailing how university foundations are often sources of "waste, fraud, and abuse that should concern any taxpayer or donor," including "questionable, and sometimes illegal, activity." Jenna A. Robinson & Joseph Warta, *University Foundations Enable Waste, Fraud, and Abuse*, The James G. Martin Center for Academic Renewal (Mar. 26, 2018), available at https://www.jamesgmartin.center/2018/03/university-foundations-host-plenty-scandals-avoid-transparency/ (last accessed Dec. 2, 2022). That report called on "legislators, donors, and university alumni [to] rein in the worse abuses at university foundations . . . [by] insisting on open and transparent accounting practices and contracts," and ensure that "university foundations that benefit public universities [are] subject to the same open records laws that govern the universities themselves." *Id.*

These problems are all too familiar at the University of New Mexico, the University of New Mexico Foundation, and the University of New Mexico Lobo Club. The University's former Athletics Director, Paul Krebs, was charged with seven felonies for attempting, in part, to cover up repayments he made for an ill-fated booster golf trip to Scotland, by attempting, in coordination with a Foundation employee, to make an anonymous $25,000 contribution to the Foundation. *See*

Former UNM athletics director Paul Krebs indicted in connection to Scotland golf trip, KRQE (Aug. 21, 2019), available at https://www.krqe.com/news/albuquerque-metro/paul-krebs-former-unm-athletics-director-indicted/ (last access Dec. 2, 2022). New Mexico's Office of the State Auditor subsequently released a report that found that the University of New Mexico's Athletics Department, along with the University of New Mexico Lobo Club, engaged in money mismanagement and improper use of funds for meals, alcohol, hotels, and golf outings. *See State Auditor Releases Special Audit of University of New Mexico Athletics*, KRQE (Nov. 10, 2017), available at https://www.krqe.com/news/state-auditor-releases-special-audit-of-university-of-new-mexico-athletics/ (last accessed Dec. 2, 2022).

Appellants public policy arguments ignore the overwhelming public interest in government transparency and accountability. Were this Court to consider any of the public policy arguments made by Appellants, then it must weigh those policies against the public's right to ensure that its government operates appropriately. This balancing of interests counsels against accepting Appellants' public policy arguments.

F. The 2007 Office of Attorney General Opinion is not persuasive.

Appellants contend that a November 27, 2007, Letter Ruling from the New Mexico Office of the Attorney General is persuasive authority that the Public Finances Act contains a categorical exemption to public inspection. BIC, at 29.

Attorney General opinions are not law, and they are not controlling. *Bd. of Cnty. Comm'rs, Luna County v. Ogden*, 1994-NMCA-010, ¶ 15, 117 N.M. 181, 870 P.2d 143 (explaining that "statements and opinions of the New Mexico Attorney General are not binding law"); *Martinez v. Research Park, Inc.*, 1965-NMSC-146, ¶ 26, 75 N.M. 672, 410 P.2d 200 ("Such an opinion is in no way binding upon us, and we will refuse to be persuaded thereby, when, as here, we deem it erroneous."). Attorney General opinion letters "are [only] prepared after a thorough review of all the circumstances, evidence, law, and precedent related to the request" at the time the opinion is prepared. *See* https://www.nmag.gov/opinions-and-advisory-letters.aspx (last accessed Dec. 2, 2022).

Appellants argue that the opinion remains persuasive because the Office of Attorney General did not change its opinion until it filed an amicus brief before the Court of Appeals. BIC, at 31. That the Office of Attorney General has critically reexamined its position based on changes in the public disclosure laws since 2007 is exactly what makes the 2007 opinion unpersuasive. And the Attorney General's decision to abandon the 2007 letter because it was "written prior to two significant appellate decisions which greatly clarified the meaning and scope of IPRA," demonstrates the careful nature of General Balderas' examination and application of IPRA to university foundations. *See* Amicus Brief of New Mexico Attorney General Hector Balderas, at 6 n.2.

Appellants also assert, by citing a New Mexico Legislature Fiscal Impact Report, that the Attorney General still agreed with the 2007 letter as late as 2019. *See* BIC, at 32. The Fiscal Impact Report cited by Appellants, however, was prepared by the Legislature, not by the Office of Attorney General. *See* Amicus Brief of New Mexico Attorney General Hector Balderas, at 6 n.2 ("Appellants have further cited to a 2019 Fiscal Impact Report as evidence of the 2007 letter's continued validity, the Fiscal Impact Report was not written by the Office of the Attorney General."). Appellants also continue to ignore that the Office of Attorney General's analysis of House Bill 29 concluded that *Toomey* and *Pacheco* "suggest that private organizations who exist solely to benefit government agencies *may* be [subject] to IPRA," and that the bill "would clarify the issue and definitively provide that agencies who exist solely to benefit a particular government agency are, in fact, subject to . . . IPRA. This bill would close any loophole and increase transparency." *See Agency Bill Analysis of HB 29*, at 2 (Feb. 23, 2019), available at http://public-records.nmag.gov/legislative-bill-analyses/2019 (last accessed Dec. 2, 2022).

There have been important changes in the interpretation of IPRA and its application to private entities that act on behalf of public institutions since the opinion was issued. The 2007 opinion is outdated and should be disregarded. *See Local 2238, AFSCME v. Stratton*, 1989-NMSC-003, ¶ 19, 108 N.M. 163, 769 P.2d 76 (rejecting the conclusion of an Attorney General opinion because it was not "in

line with our case law"). The 2007 opinion, which has since been abandoned by the Office of Attorney General, is not persuasive authority.

G. The Court of Appeals did not disregard the Public Finances Act in *pari materia* with the other statutes raised by Appellants.

Appellants assert that the Court of Appeals' decision "violates the familiar rule of statutory construction that all provisions of a statute, together with other statutes in *pari materia*, must be read together to ascertain legislative intent." BIC, at 25. The Court of Appeals concluded, however, did not ignore that argument; it concluded that it need not apply any canon of statutory construction because the plain language of § 6-5A-1 was clear. *See Libit v. University of New Mexico Lobo Club*, 2022-NMCA-043, ¶ 13 n.9. And the Court of Appeals rejected Appellants in *pari materia* argument because it relied on the Charitable Solicitations Act, which specifically exempts § 6-5A-1 organizations from its registration and reporting requirements. *Id.* Each conclusion of the Court of Appeals was correct.

The purpose of the Charitable Solicitations Act is to allow the Attorney General "to monitor, supervise and enforce the charitable purposes of charitable organizations and regulat[e] professional fundraisers operating in this state." NMSA 1978, § 57-22-2. Appellants contend that there is no "doubt" that § 6-5A-1 must be read in *pari materia* with the Charitable Solicitations Act because the Charitable Solicitations Act references § 6-5A-1. BIC, at 25. But Appellants fail to acknowledge that the only mention of § 6-5A-1 in the Charitable Solicitations Act

is to exempt organizations like the University of New Mexico Foundation and the University of New Mexico Lobo Club from the registration and reporting requirements of the Act. *See* NMSA 1978, § 57-22-4(B)(1) ("Exempt from the registration and reporting requirements of the Charitable Solicitations Act are: (1) educations institutions and organizations defined in Section 6-5A-1 NMSA 1978"); *id.*, § 57-22-6(A) ("A charitable organization existing, operating or soliciting in the state, *unless exempted by Section 57-22-4* NMSA 1978, shall register with the attorney general on a form provided by the attorney general.") (emphasis added).

It is unclear how Appellants infer from the Charitable Solicitations Act that the University of New Mexico Foundation's and the University of New Mexico Lobo Club's records should be subject to enhanced secrecy that no other charities, let alone ones that operate with public money and purpose, enjoy. The Charitable Solicitations Act may exempt the Foundation and Lobo Club from its oversight because other public agencies, such as the Office of State Auditor, are empowered to review the Foundation's and the Lobo Club's activities. Public scrutiny brought about by IPRA may be another explanation for this exclusion. In contrast, none of these safeguards are available for truly private charities subject to the Charitable Solicitations Act.

The same is true for the Taxpayer Bill of Rights. That law makes clear that it its protections are only "afforded [to] New Mexico taxpayers during the assessment,

collection and enforcement of any tax administered by the [Department of Taxation & Revenue] as set forth in the Tax Administration Act." NMSA 1978, § 7-1-4.2. This limiting language directly contradicts Appellants argument that the Taxpayer Bill of Rights provides for a public policy of donor privacy or confidentiality.

Even if this Court believes that the language of § 6-5A-1 is ambiguous, Appellants in *pari materia* analysis does nothing to clarify that language. This is no surprise as many canons of statutory construction do not help clarify statutory language. *See* Karl N. Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) (explaining that for every canon of construction there is an equal and opposite canon that can be invoked to justify any decision). But one canon which is helpful in this Court's statutory analysis is that "recent legislative action that consciously lets an interpretation stand" endorses the judicial interpretation of the statute. Einer Elhauge, STATUTORY DEFAULT RULES, 71 (2008). For example, a bill has been introduced in the New Mexico Senate to revise and modernize the Public Finances Act's audit requirements. *See* 2022 NM S.B. 55 (Jan. 19, 2022). That bill does not make changes to § 6-5A-1(D), which indicates legislative recognition that well-publicized decisions by several New Mexico courts regarding the application of IPRA to the University of New Mexico Foundation and University of New Mexico Lobo Club conform to the Legislature's understanding of the Public Finances Act.

Application of relevant statutory canons prove that the Public Finances Act does not contain a categorical exemption for the inspection of public records.

* * *

Records held by the University of New Mexico Foundation and the University of New Mexico Lobo Club or created on behalf of the University of New Mexico are subject to public inspection because of the close relationship between the entities, not because of a contract entered into under the Public Finances Act. Construing IPRA broadly, and narrowly tailoring any asserted exemption to public inspection, warrants the conclusion that § 6-5A-1(D) is not an unstated, sweeping exemption to IPRA. *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 73, 382 P.3d 923 (2016); NMSA 1978, § 14-2-5 ("it is declared 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"). Accordingly, the Court of Appeals properly concluded that § 6-5A-1(D) is not a categorical exemption from disclosing public records under IPRA.

II. The University's Fundraising Activities and Donor Information Are Not Protected by the First Amendment.

Appellants have asserted that the Court should hold that the University of New Mexico Foundation and University of New Mexico Lobo Club are exempt from IPRA because doing so "would avoid any future conflict between the statute and the First Amendment principles articulated by the Supreme Court in *NAACP v. Alabama*

and *Americans for Prosperity v. Bonta*." BIC, 36 n.15. Appellants admit that they "did not invoke a ruling on this issue from the District Court, and the District Court did not address the issue in its Order." BIC, at 35. Therefore, any analysis of Appellants' First Amendment defense was not preserved and should not be reviewed by this Court. *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 ("In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon be invoked."). In any event, this affirmative defense is meritless.

A. Appellants lack standing to raise a constitutional claim on behalf of the University of New Mexico's donors.

Neither the University of New Mexico, the University of New Mexico Foundation, nor the University of New Mexico Lobo Club have standing to raise constitutional claims on behalf of the University of New Mexico's donors. Appellants are a public university and its fundraising organizations, not membership organizations. Because Appellants are not organizations of members, there is no standing to bring a claim on behalf of their donors. *See Friends of Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000) ("An association has standing to bring suit on behalf of its *members* when its *members* would have standing to sue in their own right . . . ") (emphasis added). Nor can Appellants assert that they are organizations with "an indicia of membership" because the University's

donors do not guide the University's activities. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-345 (1977); *Flyers Rights Educ. Fund, Inc. v. United States Dep't of Transportation*, 957 F.3d 1359, 1361-62 (D.C. Cir. 2020).

B. The identities of Appellants' donors are not protected by the First Amendment because they are not organizations engaged in advocacy or that hold dissident beliefs.

"It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in *advocacy* may constitute as effective a restraint on freedom of association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (emphasis added). "Compelled disclosure of membership in an organization engaged in *advocacy* of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, *particularly where a group espouses dissident beliefs*." *Id.* (emphasis added). *See also Americans for Prosperity, Inc. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) ("Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Neither the University of New Mexico, the University of New Mexico Foundation, nor the University of New Mexico Lobo Club engage in public advocacy, let alone espouse a belief that can reasonably be described as dissident.

Appellants are a public university and its fundraising organizations whose alumni proudly wear its apparel, pay for branded license plates, and join in the thousands to cheer on its sports teams. Therefore, the donors of Appellants are not engaging in any type of expressive activity that would be subject to protection under the First Amendment just because they have given money to support University of New Mexico or its Athletics Department.

C. IPRA does not implicate the First Amendment because there is no risk of reprisal based on affiliation.

Appellants' First Amendment defense also fails because disclosure of their donors would not result in a risk of reprisal. *See NAACP v. Alabama,* 357 U.S. at 462-463 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."). *See also Talley v. California*, 362 U.S. 60, 65 (1960) ("Identification and fear of reprisal might deter perfectly peaceful discussions

of public matters of importance."). The disclosure of a public university's donors does not present a risk of reprisal similar to the disclosure of membership lists of advocacy organizations.

* * *

Allowing inspection of records related to the fundraising of a public entity does not infringe on the associational rights of donors to the University of New Mexico, University of New Mexico Foundation, and the University of New Mexico Lobo Club. *See, e.g., United States v. Brigham Young Univ.*, 485 F. Supp. 534, 537 (D. Utah. 1980) (overruled on other grounds by *United States v. Brigham Young Univ.*, 679 F.2d 1345 (10th Cir. 1982)). Appellants unpreserved First Amendment affirmative defense is meritless. The decision of the Court of Appeals should not be set aside based on specious, unpreserved issues.

III. *Toomey* Applies to Determine Whether the University of New Mexico Foundation and the University of New Mexico Lobo Club Create or Maintain Records on Behalf of a Public Body that are Subject to Public Inspection.

Appellants ask this Court to "hold as a matter of law that *Toomey* is entirely inapplicable to" the University of New Mexico, the University of New Mexico Foundation, and the University of New Mexico Lobo Club. BIC, at 37. First, Appellants assert that *Toomey* does not apply to them because that case "did not involve and therefore did not address private organizations government by Section 6-5A-1." BIC, at 37. Second, Appellants contend that *Toomey* does not apply to them

because the relationships between the University of New Mexico, the University of New Mexico Foundation, and the University of New Mexico Lobo Club are "already defined by statute." *Id.* at 38. Third, Appellants concoct a doomsayer scenario, disconnected from the record, that *Toomey*'s application would force them to either "abandon their commitment to donor privacy and likely suffer a substantial decrease in donations or seek to survive scrutiny under *Toomey*'s nine-factor test by limiting University participation in fundraising efforts, limiting the financial benefits they provide to the University, diminishing their role in managing and administering donations, and rejecting efficiencies created by sharing resources with the University." *Id.* at 39.

In *Toomey*, the New Mexico Court of Appeals formulated a test to answer a single question: "whether a private actor that contracts with a governmental entity to perform a public function is subject to the provisions of IPRA." *Toomey*, 2012-NMCA-104, ¶ 10. That question is present here. That § 6-5A-1 includes requirements for an agreement between a private organization and a governmental agency that must be entered into before the agency receives money from the organization does not change this analysis. In fact, nearly every relationship between a governmental entity and a private party is subject to statutory or regulatory requirements, including New Mexico's procurement code and its required contract clauses. *See* NMSA 1978, §§ 31-1-21 *et seq*. And the same policy interests advanced

by the University of New Mexico, the University of New Mexico Foundation, and the University of New Mexico Lobo Club—a close working relationship, oversight, and support of the University—are present in any contract the University of New Mexico enters into, whether it be for services, maintenance, construction, or otherwise.

That *Toomey* did not specifically reference § 6-5A-1 is not persuasive since *Toomey* addressed the essential question in these cases. There is no legitimate dispute that the University of New Mexico Foundation and the University of New Mexico Lobo Club are "private actor[s] that contract[] with a governmental entity to perform [the] public function" of fundraising for a public university. *Toomey*, 2012-NMCA-104, ¶ 10. The *Toomey* analysis applies to determine whether the University of New Mexico Foundation and University of New Mexico Lobo Club create or possess records that are subject to public inspection. The New Mexico Court of Appeals was correct when it rejected Appellants' argument.

* * *

Appellants argue that their fundraising records should be exempt from public disclosure because the Public Finances Act provides sufficient "accountability and transparency." BIC, at 16. This statement epitomizes Appellants continuous efforts to thwart accountability and transparency by wrongfully withholding critical records that the public has a right to inspect. The vindication of this right has already been

adopted by the Legislature and announced by the New Mexico Court of Appeals: The University of New Mexico Foundation and the University of New Mexico Lobo Club must disclose records of their operations and activities because they create or maintain records on behalf of the University of New Mexico.

Conclusion

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATEMENT ABOUT ORAL ARGUMENT

Mr. Libit does not request oral argument.

CERTIFICATE OF SERVICE

I certify that, on December 2, 2022, Appellee Daniel Libit's Answer Brief was electronically filed with the Supreme Court of New Mexico through the State of New Mexico's Tyler/Odyssey E-File & Serve System, which electronically served all parties through counsel of records.

/s/ Nicholas T. Hart
Nicholas T. Hart