IN THE

SUPREME COURT OF VIRGINIA

Record No. 181375

TRANSPARENT GMU and AUGUSTUS THOMSON,

Appellants;

v.

GEORGE MASON UNIVERSITY and GEORGE MASON UNIVERSITY FOUNDATION, INC.,

Appellees.

OPENING BRIEF OF APPELLANTS

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Governing is messy business. Compromise can be distasteful; honest mistakes costly; constituents fickle. Even well-intentioned public servants will at times wish there was a place to banish unpopular—or even easily misunderstood—information. "After all," they may tell themselves, "I know I've acted honorably, and the public should be shielded from information that might be misinterpreted or weaponized in bad faith."

In framing Virginia's Freedom of Information Act, Virginia Code §§ 2.2-3700–2.2-3714, the General Assembly was not naïve to that impulse. The Act's mandate for disclosure is not, to be sure, absolute; the law includes a host of carefully crafted (and narrowly interpreted) exceptions to disclosure. But beyond those exceptions, the Assembly took great pains to ensure government action remained in the sunlight. A public body cannot, for example, evade disclosure by outsourcing a key function to a separate entity; the Act expressly reaches the records of a public body's "agents in the transaction of public business." *Id.* § 2.2-3701. Nor can an agency obscure documents behind a legal fiction designed specifically to take on (and integrate with) agency operations; an entity created to transact public business under delegation is no less subject to the Act than the agency it serves. *Id.*

The Act anticipates and disarms those tactics precisely because they mock the statute's central premise: the people, through their directly elected representatives, define the contours of governmental secrecy. The Act leaves no room for agencies to usurp that power by cleverly structuring their operations.

If that principle is to stand, the rulings below cannot. In sustaining demurrers on four of Appellants' claims and denying any form of relief on the remaining claim, the circuit court disregarded the Act's plain language, ignored the "informative views on [its] meaning" by the Freedom of Information Advisory Council, and refused to entertain the approach this Court has employed in applying the Act to corporate entities. In each instance, the court committed reversible error.

But the cumulative effect of those rulings is more troubling. In the circuit court's view, a public body—not the General Assembly—can decide whether records of certain operations are subject to public disclosure. Because the text, structure, and policy of the Act refute that premise, Appellants Transparent GMU and August Thomson (collectively, Mr. Thomson) ask this Court to reverse the decision below and remand for further proceedings—including, as appropriate, judgment in their favor, an award of attorneys' fees, or further fact-finding.

STATEMENT OF THE CASE

I. Factual Background

1. Augustus Thomson was troubled by a developing trend in the academy. According to news reports from across the country, public universities in other states had agreed to give high-level, private donors influence over curriculum development, faculty decisionmaking, and other important educational functions. App. 145–46. As an undergraduate student at George Mason University, Gus had concerns that similar agreements could be influencing decisions about his own instructors and their curricula. *Id.* Those concerns led Mr. Thomson to join with other University students to form Transparent GMU, an unincorporated association dedicated to researching the nature and magnitude of private contributions to the University and advocating for greater transparency between the administration, the faculty, and the student body. *Id.*

After University officials rebuffed his initial efforts to inquire into the school's gift agreements, Mr. Thomson submitted a formal request under the Virginia Freedom of Information Act, seeking "any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding . . . involving a contribution or potential contribution to or for the University" from entities he knew provided, or were affiliated with entities that

provided, significant funds to the University. App. 91–94. Consistent with the Act, Mr. Thomson specifically requested records "prepared or owned by or in the possession of either (a) the University's agents in the transaction of public business; or (b) any other entity, however designated, performing delegated functions on behalf of the University." App. 92.

The University responded by claiming it had no such records in its "physical custody" and suggesting it would litigate Mr. Thomson's right to anything beyond that. App. 164. For anyone familiar with the University's fundraising process, the implication was clear. Mr. Thomson would have to seek the records from the "primary depository of private gifts on behalf of the University:" the George Mason University Foundation. App. 63.

2. Organized in 1966 by three officials of then-George Mason College, [1] the George Mason University Foundation is a nonstock corporation organized "exclusively to receive, hold, invest and administer property and to make expenditures to or for the benefit of" the University. App. 443. Although the Foundation's name has changed—most notably when George Mason College graduated to a full-fledged, four-year

1 The three incorporators were the chair, vice-chair, and counsel for the George Mason College Advisory Committee, a public body formed by the University of Virginia—then the College's parent entity—to advise the University on issues pertinent to the College. App. 250–51, 448; Petitioners' Trial Exhibit 4 at 36.

University, App. 251–53—its "exclusive[ ]" purpose remains to "promote the advancement and further the aims . . . of [the] University" and "accept, apply, and use property acquired by gift [or] grant" to that end. App. 30.

Like its founding articles, the Foundation's current charter requires all its assets transfer to the University or a University affiliate upon dissolution. App. 31, 447. It also requires that at least six University representatives serve *ex officio* as voting members of the Foundation's board of trustees. App. 33–34. Beyond the boardroom, the Foundation's day-to-day operations are managed by the University's Vice President for University Development—who, according to the two entities' "mutual agreement," serves *ex officio* as the Foundation President and CEO. App. 58. The Foundation President is "responsible for communicating the University's fundraising priorities" to the Foundation Board. App. 50. And although the Foundation Chair participates in the annual review of the President's performance as a University officer, *id.*, the University remains solely responsible for her salary, App. 58.

Coordination between the University and Foundation is crucial because an "Affiliation Agreement" between the entities officially designates the Foundation as the "primary depository of private gifts on behalf of the University." App. 63. After the University solicits gifts, its

internal policies require they be deposited directly with the Foundation. App. 68. The Foundation then acts as a "caretaker" of those funds, App. 313, before disbursing them in accordance with University policies, App. 63. The Foundation must seek University authorization before accepting certain gifts, App. 65; altogether refuse certain others, App. 61; consult with the University regarding the Foundation's internal gift acceptance and management policies, *id.*; obtain the University's consent before removing the Foundation president, App. 64; and allow the University to audit its financial records, App. 66.

The University also requires the Foundation "ensure that the University can correctly report Foundation resources" on the University's financial statements, App. 62, presumably because public accounting standards require the University report the Foundation as a "component unit," App. 319, 528. That treatment is necessary because the University has determined, per those accounting standards, that it "is entitled to, or has the ability to otherwise access, a majority of the [Foundation's] economic resources" and that those resources are so significant to the University that omitting them "would cause the [University's] financial statements to be misleading or incomplete." *See* Governmental Accounting

Standards Board, *Statement No. 39: Determining Certain Organizations are Component Units* at i (2002), available at *https://bit.ly/2G1b64b*.[2]

Integration between the two entities is evident even to more casual observers. The Foundation operates out of Merten Hall in the University's Fairfax campus. It shares that building with a variety of important University offices—the President, Provost, Senior Vice President, and University Counsel—and shares an office suite, mailing address, and website with the University's Advancement Office. App. 311, 359–61. Foundation employees can be reached at *gmu.edu* e-mail addresses, App. 374, indexed on the University's "People Finder" service—an "online University Directory . . . of student, faculty, and staff information," Petitioners' Trial Exhibit 6.

In light of that intimacy, a donor could be forgiven if he—like one recent philanthropist—made the "error" of donating directly to the University. App. 340–41 (testimony of Foundation CFO Susan Van Leunen).

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2 As the circuit court acknowledged, judicial notice of accounting standards is appropriate. App. 335; *see also Zulfer v. Playboy Enterprises*, No. CV-12-08263-MMM, 2013 WL 12132075, *2 (C.D. Cal. 2013) (collecting cases holding that judicial notice is "appropriate for accounting rules as they are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned"). This Court may take notice of the standards on appeal under Rule 2:201.

3. Recognizing that the University's formal policy required it "receive all gifts . . . through the . . . Foundation," App. 68, Mr. Thomson submitted a materially identical request for records to the Foundation, App. 96–99. The Foundation's response did not deny it possessed records responsive to the request; it would later confirm that it did. *See* Transcript (April 16, 2018) at 27:12–14. Nonetheless, the Foundation refused to process the request, arguing it was neither "a public body" nor "an agent of [the] University with respect to the [records] in question." App. 424.

II. Material Proceedings Below

1. Mr. Thomson filed a verified mandamus petition in the Fairfax Circuit Court, naming both the University and the Foundation as respondents. As amended, the petition pled five distinct claims relevant to this appeal—two against the University, two against the Foundation, and one against both entities.

Mr. Thomson's claims all shared the central allegation that the agreements he requested were "public records" subject to the Act's general disclosure requirement, because "[f]undraising for a public university [and] administration of a public university's endowment" are forms of public business. App. 25, 168–69, 173, 175–76, 182. From that premise, each claim

explained why the Act considered the University, the Foundation, or both to be a "custodian" tasked with responding to the request.

(a) Mr. Thomson's principal claims alleged that the Foundation acted as the University's agent in receiving, administering, and disbursing private gifts for the school's sole benefit—a form of public business—and that any agreements prepared, owned, or possessed in the course of that business are "public records" under Virginia Code § 2.2-3701. App. 166–67, 182.

(i) Citing opinions of the Freedom of Information Advisory Council,[3] Count I alleged that the University was the custodian of the requested records and therefore responsible for ensuring access to those records held by its agent, the Foundation. App. 166–72.

(ii) Alternatively, Count V alleged the Foundation was the custodian of any public records it physically possessed as an agent transacting University business. App. 181–83.

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3 The Advisory Council is a legislative agency composed of members of the General Assembly and non-legislators—including the Attorney General, the Librarian of Virginia, and the Director of Legislative Services. Virginia Code § 30-178(A), (B). The Council's duties include promulgating "advisory opinions or guidelines, and other appropriate information regarding the . . . Act, *id.* § 30-179(1), and annually reporting its "recommendations for changes in the law" to the General Assembly and Governor, *id.* § 30-179(8).

(b) In Count II, Mr. Thomson alleged that the records he requested were in the actual, physical, or constructive possession of Dr. Janet Bingham, who concurrently served as the University's Vice President of Development and the Foundation's President and CEO. App. 172–74. Thomson alleged that Dr. Bingham used the records in both capacities, App. 173, and that the University was therefore a custodian of those records, App. 173–74.

(c) Finally, Mr. Thomson asserted two claims based on the Foundation's status as a public body under the "delegated functions" clause of the Act. That clause expands the definition of "public body" to include any "committee, subcommittee, or other entity, however designated, of [another] public body created to perform delegated functions of . . . or advise th[at] body." Virginia Code § 2.2-3701.

(i) Relying on this Court's decision in *RF & P Corp v. Little*, 247 Va. 309 (1994), Mr. Thomson's unnumbered [4] "alter ego claim" alleged that the Foundation and University shared a unity of

4 The circuit court dismissed the alter-ego claim with prejudice before Mr. Thomson filed his amended petition. In order to preserve his right to appeal that decision, he followed this Court's guidance in *Ayers v. Shaffer*, 286 Va. 212, 217 (2013), and referred to the claim in his amended petition. App. 145. Because the amended petition did not repeat the claim in its entirety, however, it does not follow the same numbering convention as the other claims.

interest and identity sufficient to disregard the Foundation's corporate form and consider it to be a University committee for the narrow purposes of the Act. App. 21–26.

(ii) Count III alleged that the Foundation was, if not a committee, an "other entity . . . of the [University] created to perform delegated functions." App. 175–78 (quoting Virginia Code § 2.2-3701).

Mr. Thomson requested a writ of mandamus ordering that the University provide a complete response to his request—one that included public records prepared, owned, or possessed by agents—or that the Foundation respond to his request in accordance with Virginia Code § 2.2-3704(B). App. 26–27, 171, 174, 178, 183.

2. The University and Foundation demurred to Counts I, II, V, and the *alter ego* claim, arguing that each failed to state a viable claim under the Act. Over Mr. Thomson's objection, the court sustained the demurrers and dismissed each of those counts on the pleadings. App. 141–43, 230–48.

(a) *Count I.* The circuit court sustained the University's demurrer to Count I because, in the court's view, the Act did not "specifically provide[ ] for" a public body's custodianship over its agent's records. App. 240. The court reached that conclusion through negative inference, citing Section 2.2-3704(J)'s clarification that a public body is considered the custodian of

records it has "transferred possession of . . . to any [other] entity . . . for storage, maintenance, and archiving." Because no similar provisions addressed the precise circumstances before it, the circuit court concluded the Act did not require the University to respond to requests for records held by its agents on its behalf. App. 240–41.

(b) *Count V*. The circuit court rejected Mr. Thomson's alternate claim that the Foundation must respond to requests for public records it possesses as the University's agent. Its two-sentence treatment of Count V began by quoting Section 2.2-3704(B), which describes the appropriate response a "public body that is subject to th[e Act] and . . . is the custodian of the requested records" can provide to a records request. App. 246. Based on that formulation, the circuit court concluded that "the statute requires both (1) a public body and (2) public records, before any action under [the Act] is required or any rights . . . arise." *Id.* Because Count V alleged only that the Foundation was an agent of a public body—and not itself a public body—the court dismissed the claim.

(c) *Count II*. In sustaining the University's demurrer to Count II, the circuit court concluded that, "to the extent [Mr. Thomson's] request targeted records of the Foundation," Dr. Bingham was not "an agent of the University for purposes of th[at] request." App. 242. The court did not,

however, consider whether Dr. Bingham *in fact* used or possessed the requested agreements in performing her duties as a University officer.

(d) *Alter Ego Claim*. Addressing the *alter ego* claim, the circuit court found it "dispositive" that "there was no evidence that the [Foundation] was created as a sham entity." App. 238. It also emphasized that the Virginia Code expressly allows the university to "set[ ] up a private entity to engage in fund raising." App. 239. The court concluded that the statute required it altogether ignore "how many 'indicia of control' there are between the University and the Foundation," as the University's control over the Foundation "cannot be said to be *impermissible* control" required to justify an *alter ego* claim "when it is exactly the sort of control envisioned by the General Assembly and prescribed by law." *Id.*

3. The circuit court ordered briefing and a bench trial on the remaining claim—Count III—contending the Foundation was subject to the Act as an "entity of [the University] created to perform delegated functions of the" University. After taking limited testimony and legal argument, the court issued an opinion letter concluding that the Foundation was not a public body under the Act "[a]s a matter of law." App. 268.

The circuit court opined that a separately incorporated foundation operating "under its own bylaws, articles of incorporation, and statutes"

cannot be "a sub-entity of the public [university] it serves." App. 263–64. In support of that conclusion, the court cited a 1996 Attorney General opinion advising that university foundations are not considered "agencies or institutions of the Commonwealth" for purposes of Virginia's Workforce Transition Act, Virginia Code §§ 2.2-3200–2.2-3206. *Id.* [5] Despite previously rejecting the Advisory Council's interpretation of the Act in dismissing Mr. Thomson's claims against the University, App. 240–41, the court cited the Council's narrower interpretation of the Act's "delegated entity" clause in support of its decision, App. 263 (citing Freedom of Information Advisory Opinion No. AO-09-09 (October 23, 2009), available at *https://bit.ly/2UliBeS*).

Although not necessary to its ruling, the circuit court also concluded that the records requested were not "public records" subject to the Act. App. 265–66. Although it acknowledged the weight of persuasive authority holding that receipt, administration, and disbursement of funds for the sole benefit of a public university is a form of "public business," the court reasoned that it was bound to "rely on the plain statutory expressions" rather than "project any unspoken purpose behind the definition[ ] of what

5 Although the circuit court did not expressly identify the opinion it relied upon, the language cited seems to mirror that found in Virginia Attorney General Opinion No. 96-15, 1996 WL 658746 (September 3, 1996).

constitute[s] . . . a public function." App. 266. Over Mr. Thomson's objection, the court entered a final order adopting the reasoning in its letter. App. 270–72. Mr. Thomson timely appealed.

ASSIGNMENTS OF ERROR

1. The circuit court erred by concluding that accepting, administering, and disbursing funds for the sole benefit of a public university is not a form of "public business" under the Act.

   Preserved at: App. 167–68, 272; Petitioners' Pre-Trial Brief at 16–18, 25–26; Transcript (April 24, 2018) at 19:20–20:4, 116:14–117:22, 119:5–119:19, 127:5–129:1.

2. The circuit court erred by sustaining the University's plea and demurrer to Count I of the Amended Petition and concluding that the Act did not consider the University the custodian of records held by its agents in the transaction of public business.

   Preserved at: App. 166–72; Response to University's Plea of Immunity at 8–14; Transcript (September 22, 2017) at 28:4–16; Transcript (October 26, 2017) at 19:17–20:4, 25:8–26:19.

3. The circuit court erred by sustaining the Foundation's demurrer to Count V of the Amended Petition and concluding that the Act did not consider the Foundation the custodian of records it held as the University's agent in the transaction of public business.

   Preserved at: App. 181–83; Response to Foundation's Second Demurrer at 1–4; Transcript (October 26, 2017) at 39:8–40:16, 56:10–58:20.

4. The circuit court erred by sustaining the University's plea and demurrer to Count II of the Amended Petition and concluding that the University was not the custodian of records possessed by its Vice President for University Development in the transaction of public business.

   Preserved at: App. 172–74; Response to University's Plea of Immunity at 14–16; Transcript (October 26, 2017) at 20:5–25:7.

5. The circuit court erred by sustaining the Foundation's demurrer to the alter-ego claim in the original Petition and concluding that the Act did not allow an alter-ego claim absent an allegation of illegal conduct.

   Preserved at: App. 21–26, 143, 145; Brief Opposing Demurrers at 4–9; Transcript (September 22, 2017) at 33:21–34:18.

6. The circuit court erred by entering judgment in the Foundation's favor on Count III of the Amended Petition and concluding that the Foundation was not an "other entity . . . of [a] public body created to perform delegated functions of the public body" under the Act.

   Preserved at: App. 175–78, 272; Petitioners' Pre-Trial Brief at 11–25; Transcript (April 24, 2018) at 18:7–20:4, 110:17–130:19, 158:5–166:23.

STANDARD OF REVIEW

Each assignment of error presents a question of law reviewable *de novo*. Assignments of Error 2–5 concern claims the circuit court dismissed on the pleadings alone; its decision to do so is reviewed *de novo*. *Bragg v. Rappahannock County Board of Supervisors*, 295 Va. 416, 423 (2018). On appeal, as below, "all material facts alleged in the [petition], all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts" are accepted as true. *Assurance Data v. Malyevac*, 286 Va. 137, 143 (2013). Review is limited to the grounds actually raised in the demurrers. *Sales v. Kecoughtan Housing*, 279 Va. 475, 481 n.* (2010).

Although the errors described in Assignments 1 and 6 followed an evidentiary hearing, the circuit court's ruling in both instances addressed "a matter of law" based on "stipulated and undisputed facts." App. 261, 268.

On appeal, then, this Court "reviews *de novo* both the construction of the relevant statute and its application to th[ose] undisputed facts." *Neal v. Fairfax County Police Department*, 295 Va. 334, 343 (2018).

For all claims, this Court's "*de novo* review takes into account any informative views on the legal meaning of statutory terms offered by those authorized by law to provide advisory opinions"—here the Virginia Freedom of Information Advisory Council. *Fitzgerald v. Loudon County Sheriff's Office*, 289 Va. 499, 504–05 & n.2 (2015). And while this Court alone "shoulder[s] the duty of interpreting" the Virginia Freedom of Information Act, the General Assembly instructs it to put the "interpretative thumb on the scale in favor of disclosure" and "liberally construe[ ]" each provision to "promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." *Id.* at 505 (quoting Virginia Code § 2.2-3700(B)).

ARGUMENT AND AUTHORITIES

I. Accepting, administering, and disbursing funds for the sole benefit of a public university is a form of public business under the Act.

1. The Act ensures access only to "public records"—writings prepared, owned, or possessed by "a public body or its officers, employees or agents

in the transaction of public business." Virginia Code § 2.2-3701. The circuit court concluded that the records Mr. Thomson requested were not "public records" because the services the Foundation provides to the University are not a form of "public business." App. 265–66. Citing statutory provisions that confirmed the "legitimacy of the Foundation's efforts undertaken on behalf of a public entity," the court opined that "[f]undraising is neither itself a service nor a statutory objective" of a public university. App. 265.

The circuit court's analysis missed the mark. The "legitimacy" or legislative "approval of the work of the Foundation" was entirely irrelevant to the question of "public business." The question, rather, was whether the Foundation performed "activities" or "operations of" the University. *See* Virginia Code § 2.2-3700(B) (requiring Act be interpreted so as to promote public awareness of "activities" and "operations of government"). As the circuit court itself acknowledged, accepting "gifts from private sources" is not only a function but a statutory emphasis of Virginia's public universities. App. 265. If the University had not designated another entity as its "primary depository of private gifts," those gifts would naturally flow to the University itself. The University has, in short, outsourced a "very important, if not vital, function of the modern university and an integral part of its

continuing viability." *Gannon v. Board of Regents*, 692 N.W.2d 31, 40–41 (Iowa 2005).

But even setting aside that commonsense approach, the circuit court failed to interpret the statutory term "public business" within its statutory context. As a consequence, it reached a decision at odds with the nationwide consensus of authority regarding the governmental nature of foundation activities and with this Court's jurisprudence distinguishing between public and private functions.

2. In deciding that the Foundation transacted no "public business," the circuit court asserted it was bound to "rely on the plain statutory expressions by the General Assembly rather than . . . project any unspoken purpose behind the definition[ ] of what constitute[s] . . . a public function." App. 266. The Act, however, does not expressly define "public function"—or, for that matter, "public business." The circuit court's expectation for a "plain statutory expression," then, was error.

An undefined term is the beginning, not the end, of a court's "duty . . . to say what the law is." *Fitzgerald*, 289 Va. at 505 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). As with any statute, "[w]hen the legislature leaves a term undefined, courts must give the term its ordinary meaning, taking into account the context in which it is used."

American Tradition Institute v. Rector & Visitors of University of Virginia, 287 Va. 330, 341 (2014). Considering that context requires "interpret[ing] the several parts of the statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" *Chaffins v. Atlantic Coast Pipeline*, 293 Va. 564, 568 (2017) (quoting *Eberhardt v. Fairfax County Employees' Retirement System*, 226 Va. 382, 387–88 (2012)).

Here, the Act's statutory exceptions prove the rule. The more-than-100 statutory exemptions from disclosure illustrate the breadth of functions the General Assembly considers "public business." Most relevant here, Section 2.2-3705.4(7) allows the redaction of certain sensitive "[i]nformation maintained in connection with fundraising activities by or for a public institution of higher education." By its own terms, that exemption does not protect "information relating to the amount, date, purpose and terms of [a] pledge or donation," nor "the identity of the donor unless the donor has requested anonymity." Virginia Code § 2.2-3705.4(7).

That the General Assembly saw fit to include that exemption means it considers public university fundraising activities generally—and, more specifically, the negotiation of "terms and conditions" in gift and grant agreements—to be a matter of "public business." Otherwise, the exemption would be superfluous: records of those activities would fall outside of the

Act entirely. This Court should not assume the General Assembly did "a vain and useless thing" by allowing redaction—and only *limited* redaction—of those records. *Williams v. Commonwealth*, 190 Va. 280, 293 (1949); *see also State v. Nelson*, 434 S.E.2d 697, 706 (W. Va. 1993) (existence of a statutory exception for certain law enforcement records confirmed those records were generally subject to open records law).

The exemption's unique structure is also telling. Unlike many statutory exemptions, Section 2.2-3705.4(7) has both exclusionary and inclusionary components: it exempts from disclosure certain sensitive "[i]nformation maintained in connection with fundraising activities," but expressly subjects other information, including "information relating to the amount, date, purpose and terms of [a] pledge or donation," to disclosure. The latter, inclusionary component demonstrates that the General Assembly was not concerned merely with fundraising information that might be incidentally swept up in the disclosure of other forms of "public business." By deliberately including certain fundraising information within the Act's mandate, the General Assembly has designated that information, and the activities it documents, as "public business."

More than recognizing university fundraising as a form of public business, Section 2.2-3705.4(7) also confirms that the function is no less so

when performed by a third-party. By its plain language, the exemption applies to information "maintained in connection with fundraising activities by *or for* a public" university. Virginia Code § 2.2-3705.4(7) (emphasis added). That qualifier is notably absent from the Act's only other fundraising exemption. *See id.* § 2.2-3705.7(28) (allowing redaction of certain information "maintained in connection with fundraising activities *by* the Veterans Services Foundation") (emphasis added). Its inclusion in Section 2.2-3705.4(7) evinces the General Assembly's understanding that public university fundraising is a public function even when performed by an entity other than the university itself. *See Zinone v. Lee's Crossing Homeowners Association*, 282 Va. 330, 337 (2011) ("[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that difference in the choice of language was intentional.").

3. Recognizing public university fundraising as "public business" also comports with this Court's jurisprudence. In prior cases, this Court has evaluated whether an activity constitutes the transaction of public business under the Act with reference to the Commonwealth's traditional police power "to promote the health, peace, morals, education and good order of

the people." *Tull v. Brown*, 255 Va. 177, 183 (1998). The Court employs a similar approach in distinguishing "governmental" from "proprietary functions" for purposes of sovereign immunity. *Carter v. Chesterfield Health Commission*, 259 Va. 588, 594 (2000). At the very least, then, activities considered "governmental" in nature under the sovereign immunity doctrine likewise qualify as "public business" under the Act.

Applied to public universities, the scope of "governmental" functions is "very liberal." *Kellam v. Norfolk School Board*, 202 Va. 252, 257 (1960) (quoting 160 A.L.R. 7, 67 (1946)). The operative question is whether the activity "tends to promote the cause of public education." *Id.* And more generally, this Court has recognized as governmental functions not only the services that *directly* promote health, safety, or education, but also actions taken to secure the means of providing those services. Entering into agreements to acquire property "for a valid governmental purpose," for example, is an "[u]nquestionably" public function. *Virginia Beach v. Carmichael Development*, 259 Va. 493, 501 (2000).

No one disputes that the University's educational functions are public business. App. 265. By entering into agreements for and receiving, managing, and disbursing gifts to further the University's educational

mission, the Foundation is no different from an entity that "acquires real estate for a valid governmental purpose." *Carmichael*, 259 Va. at 501.

4. Although this Court's precedent addresses it only by analogy, other courts have confronted the precise question at issue here: does a foundation that accepts and manages gifts on behalf of a public university perform a public function for purposes of an open-records law? Those courts have unanimously held that it does. *See Chicago Tribune v. College of Du Page*, 79 N.E.3d 694 (Ill. App. Ct. 2017) (foundation "serv[ing] as the primary depository of private donations on behalf of" public college performed "governmental function"); *Gannon*, 692 N.W.2d 31 (foundation's solicitation and management of gifts is a "very important, if not vital, function of the modern university" and a "dut[y] or function[ ]" of a public university); *State ex rel. Toledo Blade v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992) (foundation's "receipt and solicitation of gifts is an indispensable function of any institution of higher learning" and therefore a "function of government" for purposes of open records law).[6]

The few courts that have held university foundations beyond the reach of open records laws do so based on other criteria in the relevant

6 *Accord Jackson v. East Michigan University Foundation*, 544 N.W.2d 737, 741–42 (Mich. Ct. App. 1996); *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496, 502–505 (Pa. Commw. Ct. 2010).

statute. *See, e.g.*, *California State University v. Superior Court*, 108 Cal.Rptr.2d 870 (Cal. Ct. App. 2001) (concluding that foundation was not subject to statute applicable only to "state agencies"); *4-H Road Community Association v. West Virginia University Foundation*, 388 S.E.2d 308 (W. Va. 1989) (same under statute applicable only to bodies "created . . . or funded by the state or local authority"). The public or governmental nature of a foundation's activities was simply irrelevant under those laws.

In this case, however, whether the Foundation transacts "public business" in its role as the "primary depository of private gifts on behalf of the University" is a threshold question. In concluding that it did not, the circuit court ran afoul of the language of the Act, this Court's precedent, and a unanimity of persuasive authority from other states. This Court should reject the erroneously narrow interpretation below and restore the full breadth of the General Assembly's conception of "public business."

II. The circuit court erred in holding that neither the University nor the Foundation is a custodian of public records that the Foundation holds as an agent of the University.

The Act is categorical in declaring "*all* public records . . . open to the citizens of the Commonwealth . . . during the regular office hours of the[ir] custodian." Virginia Code § 2.2-3704(A) (emphasis added). According to

the Act's statutory definitions, that mandate applies to "all writings and recordings . . . prepared or owned by, or in the possession of a public body or its . . . agents in the transaction of public business." *Id* § 2.2-3701. The term "agent" is undefined, indicating the General Assembly's intent to incorporate common law principles of agency. *Houston v. Commonwealth*, 87 Va. 257, 262 (1890) ("[A] word or phrase which has already been used in the common law or in another statute, and has there acquired by construction an established meaning, . . . is to be understood in the meaning previously determined."). The Act's reach thus extends to records held by an entity that has agreed to act on a public body's behalf and subject to its control. *See Acordia of Virginia Insurance Agency v. Genito Glenn LP*, 263 Va. 377, 384 (2002).[7]

Although records of a public body's agents are plainly "open to the citizens of the Commonwealth," the Act is less clear about whether the "custodian" tasked with providing "[a]ccess to such records" under Section 2.2-3704(A) is the public-body-principal, its agent, or both. Accordingly,

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7 The existence of an agent–principal relationship is a question of fact. *Drake v. Livesay*, 231 Va. 117, 121 (1986). Neither the University nor the Foundation argued below that Thomson inadequately pled the existence of that relationship or that the Foundation cannot, as a matter of law, be an agent of the University for purposes of the Act. Any attempt to do so on appeal is barred. *See Sales*, 279 Va. at 481 n.* ("An appellate court's consideration of the demurrer on appeal is limited to the grounds raised by the demurrer.").

Mr. Thomson pled alternate claims against both the University and Foundation. App. 166–72, 181–83. In Count I against the University, Mr. Thomson relied on long-standing precedent from the Virginia Freedom of Information Advisory Council indicating that the University is responsible for responding to requests seeking records held by its agents in the transaction of public business. App. 169. But should the court determine that custodianship required actual possession, Count V alleged that the Foundation itself was required to ensure access to the records at issue. App. 182–83.

Confronted with those alternate claims, the circuit court concluded that *no* party was responsible. In reaching that conclusion, the court to disregarded the long-standing interpretation of the Act espoused by the Advisory Council and Attorney General. More importantly, the circuit court's interpretation effectively nullifies the General Assembly's decision to extend the law's reach to cover records held by public bodies' agents. The circuit court's interpretation is erroneous as a matter of law and must be reversed.

A. *The Act considers public bodies to be the custodians of public records their agents hold on their behalf.*

1. In dismissing Count I against the University, the circuit court appeared to believe it could consider the University the custodian of

records only if the Act "specifically provided for" that conclusion. App. 240. In deciding it did not, the court pointed to Section 2.2-3704(J) of the Act, which clarifies that a public body is the custodian of records it has "transferred possession of . . . to any [other] entity . . . for storage, maintenance, or archiving." App. 240. The court reasoned that Section 2.2-3704(J) represented the *only* instance in which a public body is considered the custodian of records beyond its immediate possession. *Id.* Because Mr. Thomson did not allege that the University transferred specific records to the Foundation, the court reasoned that the University could not be the custodian of records alleged only to be prepared, owned, or possessed by its agents in the transaction of its business. App. 240–41.

The court's reasoning is fundamentally flawed. As with "public business," the Act "does not define the term 'custodian.'" *Daily Press v. Office of the Executive Secretary*, 293 Va. 551, 558 (2017). Although the "ordinary meaning" of a term generally controls, *American Tradition Institute*, 287 Va. at 341, the Advisory Council has opined that "custodian" has little explanatory force on its own. Its dictionary definition—"one in charge of something"—merely begs the question. *See* Freedom of Information Advisory Opinion No. AO-37-01 (August 6, 2001), available at *http://bit.ly/2IvFmFX* (quoting *American Heritage Dictionary* (3d ed.

1993)). Construing the term, then, requires reading the Act in its entirety, "interpret[ing] the several parts of the statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" *Chaffins*, 293 Va. at 568. Only *after* evaluating the statute in its entirety can a court resort to canons of statutory construction. *Id.*

The term "custodian" in Section 2.2-3704(A) draws its meaning from neighboring provisions of the Act. One of those provisions, Section 2.2-3701, plainly includes within the statutory definition of "public records" any records prepared, owned, or held by a public body's agents in the transaction of public business Meanwhile, other provisions describing the procedure for requesting records generally presume that the entity responding to a record request will be a public body.[8] The most sensible way to harmonize those provisions is to recognize a public body as the custodian of records its officers, employees, *and* agents hold on its behalf.

2. For more than fifteen years, the Advisory Council has endorsed that interpretation. *See* Freedom of Information Advisory Opinion Nos. AO-19-03 (July 10, 2003), available at *https://bit.ly/2wtroyC*; AO-10-08

8 *See*, *e.g.*, Virginia Code § 2.2-3704(B) (enumerating appropriate responses a public body can make to a request); *id.* § 2.2-3704(F) (allowing public body to make reasonable charges for supplying records); *id.* § 2.2-3704(G) (requiring public bodies produce nonexempt records by electronic means on request); *id.* § 2.2-3704.01 (requiring public bodies segregate exempt and non-exempt material).

(October 29, 2008), available at *https://bit.ly/2EHNEdC*; AO-13-08 (December 5, 2008), available at *https://bit.ly/2zoLwaD*. The Council has explained that the Act's several provisions, read together, demand the term "custodian" embrace more than strict, physical possession. *See* Freedom of Information Advisory Opinion No. AO-37-01 (August 6, 2001), available at *https://bit.ly/2xP3a22*. It has also noted that assigning responsibility to the principal tracks the common law practice of holding "the principal . . . generally liable for the actions of the agent."[9] Advisory Opinion No. AO-19-03.

The Attorney General and another circuit court have arrived at the same conclusion. *See Butcher v. Richmond City School Board*, No. CL08-553-1, 2008 WL 6928126 (Va. Cir. Richmond 2008) (records in possession of public body's counsel were in the body's "constructive possession as 'public records in the possession of agents'") (alterations omitted); Virginia Attorney General Opinion No. 03-101, 2004 WL 440537, *2 (February 2,

9 Although not mentioned in the Council's advisory opinions, a principal also has a right to "information relevant to affairs entrusted to" its agent. Restatement (Second) of Agency § 381 (1958). General agency law holds that principals have control over—if not an explicit ownership interest in—records held by their agents in the scope of the relationship. *See Southern Financial Life Insurance v. Combs*, 413 S.W.3d 921, 929 (Ky. 2013); *Northwest Underwriters v. Hamilton*, 151 F.2d 389, 391 (8th Cir. 1945).

2004) (records "prepared or owned by, or in the possession of . . . [public body's] agents" are "[r]ecords of" that body for purposes of the Act).

Given the Council's expertise and familiarity with the Act, its interpretation is the sort of long-standing administrative construction "entitled to great weight" by this Court. *Almond v. Gilmer*, 188 Va. 822, 844–45 (1949). This is especially true given the General Assembly's apparent disinterest in amending the statute to "correct" the prevailing interpretation: Despite amending the relevant sections of the Act at least eighteen times in the interim,[10] the General Assembly has not disturbed the language that underlies the Council's interpretation. That sort of legislative inaction is certainly a relevant consideration in evaluating the weight of Attorney General opinions, including the 2004 opinion cited above. *See Daily Press*, 293 Va. at 559. It is even more compelling when the opinion reflects a long-standing interpretation by a legislative agency composed in part of General Assembly members. *See* Virginia Code § 30-178.

3. In rejecting the Advisory Council's interpretation, the circuit court relied heavily on Section 2.2-3704(J). App. 240. Presumably invoking the

10 2007 Virginia Acts Chapters 439, 945; 2008 Virginia Acts Chapters 233, 789; 2009 Virginia Acts Chapter 626; 2010 Virginia Acts Chapters 627, 706; 2011 Virginia Acts Chapters 242, 604; 2015 Virginia Acts Chapters 131, 195, 224; 2016 Virginia Acts Chapters 620, 716; 2017 Virginia Acts Chapters 616, 778; 2018 Virginia Acts Chapters 54, 55.

"negative-implication canon," the court believed the express mention of non-possessory custodianship in that subsection precluded non-possessory custodianship in any instances beyond those described therein. *See Du v. Commonwealth*, 292 Va. 555, 565 n.7 (2016) (describing the "negative-implication canon," or *expressio unius est exclusio alterius,* as advising that "express mention of one thing should operate as an exclusion of all others").

The circuit court's reliance on Section 2.2-3704(J), however, was misplaced. As an initial matter, the court had a duty to harmonize all parts of the statute *before* resorting to canons of construction. *Chaffins*, 293 Va. at 568. Even if that analysis alone did not lead it to the same conclusion as the Advisory Council, the circuit court was obligated under Section 2.2-3700 to "liberally construe[ ]" the Act to promote access to public records. If the court believed the Act was ambiguous—that it was "capable of more senses than one" or "open to various interpretations," *Virginia Broadcasting v. Commonwealth*, 286 Va. 239, 249 (2013)—Section 2.2-3700 required it resolve that ambiguity in Mr. Thomson's favor. *See Appalachian Regional Healthcare v. Cunningham*, 294 Va. 363, 375 n.10 (2017) (explaining that rule of liberal construction controls "where there is doubt as to the meaning of [applicable] provisions and two contrary constructions are equally possible").

Moreover, the Act's legislative history altogether refutes the circuit court's reliance on Section 2.2-3704(J). The General Assembly added Section 2.2-3704(J) in 2010—more than a decade *after* it expanded the definition of "public records" to include records held by public body's agents. *Compare* 1999 Virginia Acts Chapter 703 (March 28, 1999) *with* 2010 Virginia Acts Chapter 627 (April 11, 2010). The General Assembly could not, therefore, have had Section 2.2-3704(J) in mind when it amended the Act to reach records held by public bodies' agents. And had it intended Section 2.2-3704(J) to narrow the breadth of its prior amendment, it would not have done so by implication. *Lillard v. Fairfax County Airport Authority*, 208 Va. 8, 13 (1967) (explaining "well established rule of construction that full force and effect must be given to each provision of statutory law," even if a later-enacted provision appears on the surface to limit its predecessor).

B. *The only defensible alternative is to hold a public body's agent responsible for ensuring access to records it holds on the public body's behalf.*

Assuming, as the circuit court did, that a public body is *not* the custodian of public records held by its agents, that obligation must fall on the agents themselves. Although many of the Act's provisions assume the

responsible party will be a public body,[11] its central mandate is not so narrowly drawn. *See* Virginia Code § 2.2-3704(A) ("Except as otherwise specifically provided by law, all public records shall be open to citizens," and "[a]ccess to [those] records shall be provided by the custodian in accordance with th[e Act]."). Admitting no limitation to public bodies, Section 2.2-3704(A) "is simple and direct in its requirements. If the requested record is an official record,[12] then it shall be open to inspection and copying except as otherwise specifically provided by law." *Tull*, 255 Va. at 182. And if access is refused, the requestor may resort to an equally broad enforcement provision. *See* Virginia Code § 2.2-3713(A) ("Any person . . . denied the rights and privileges conferred by th[e Act] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction.").

Given the General Assembly's directive to "liberally construe[ ]" the Act, *id.* § 2.2-3700(B), provisions detailing a public body's specific duties in responding to a request cannot be read to limit the Act's general applicability. By its terms, Section 2.2-3704(A) states that access to public records is defeated only when "otherwise *specifically* provided by law."

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11 *See supra* note 9.

12 Prior versions of the Act used the term "official records" rather than "public records." *See* Virginia Code § 2.1-341 (1998).

(Emphasis added). Neither the Foundation nor the circuit court invoked any provision of law that *specifically* holds the requested records—records that fit comfortably within the statutory definition of "public records"—beyond the Act's mandate.

It is unreasonable to assume the General Assembly intended that the Act's reach exceed its grasp. The Assembly's manifest intent in expanding the definition of "public records" was to apply the "best disinfectant"[13] to records documenting the transaction of public business by public bodies' agents. Concluding, as the circuit court did below, that there is *no* custodian responsible for ensuring access to those records is an absurdity that the General Assembly could not have intended. The rulings below, therefore, reflect an interpretation that does far more "violence to the clear intent and purpose of the enactment" than either alternative described above. *City of Richmond v. Grand Lodge of Virginia*, 162 Va. 471, 476 (1934). It should be reversed accordingly.

III. The circuit court erred by failing to view Count II in the light most favorable to Mr. Thomson.

An Affiliation Agreement between the University and Foundation requires the University's Vice President of Development serves *ex officio* as

13 *See* Louis Brandeis, *Other People's Money and How the Bankers Use It* (1914), available at *http://bit.ly/2yqc6sN* ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

the Foundation's President and CEO. App. 154–55. In Count II, Mr. Thomson alleged that the University was the custodian of the requested agreements because its Vice President of Development, Dr. Janet Bingham, possessed and used the agreements in *both* her capacity as a University officer *and* her capacity as Foundation President. App. 173.

In sustaining the University's demurrer, the circuit court did not consider whether Dr. Bingham *in fact* used or possessed the requested agreements in performing her duties as a University officer. Rather, it reasoned that the University was the custodian only of records its officers control *as* its officers and that, "to the extent [Mr. Thomson's] request targeted records of the Foundation," Dr. Bingham could not be considered "an agent of the University for purposes of th[at] request." App. 242.

Even assuming Dr. Bingham's professional duties can and should be sorted into discrete categories, Mr. Thomson's petition, read "in the light most favorable" to him, states a valid claim for relief under the Act. *McDermott v. Reynolds*, 260 Va. 98, 100 (2000). His claim did not, in fact, hinge on some novel "dual employment" theory. *Cf.* App. 242. Rather, he alleged: (1) that Dr. Bingham was both a University officer and the Foundation's President, App. 172; (2) that she performed fundraising and endowment management activities in her capacity as a University officer

and in her capacity as a Foundation officer, App. 173; and (3) that she possessed or used the requested documents in performing those activities, *id*. Accepting those allegations as true, the fact that Dr. Bingham used (and therefore necessarily possessed) the records at issue in performing her duties *as* a University officer is, at the very least, "a reasonable inference[.]" *Assurance Data*, 286 Va. at 143. As such, Mr. Thomson pled a sound claim for relief under the Act, and the circuit court erred in sustaining the University's demurrer to Count II.

IV. The circuit court erred in concluding the Foundation was not a public body under the Act's "delegated function" clause.

Mr. Thomson's remaining claims alleged the Foundation was a public body under the "delegated functions" clause of the Act's definition of "public body." According to that clause, the term "public body" includes "any committee, subcommittee, or other entity however designated, of [a] public body created to perform delegated functions of th[at] body or to advise th[at] body." Virginia Code § 2.2-3701.

It was not always so. Until 2001, the clause included only "committees and subcommittees." *See* 2001 Virginia Acts Chapter 844 (April 5, 2001). This Court considered that earlier formulation in *RF & P Corporation v. Little*, concluding that a "distinct legal entit[y]" like a

corporation cannot be considered a "committee" under the Act unless the equities allow disregarding its separate legal identity. 247 Va. at 316. That required "prov[ing] the corporation is the alter ego, alias, stooge, or dummy of" a public body and "was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *Id.* (quoting *Cheatle v. Rudd's Swimming Pool Supply*, 234 Va. 207, 212 (1987)). Absent that showing, a court must treat the public body and the corporation as "distinct legal entities." *Id.*

Subsequent to *RF & P*, the General Assembly expanded the "delegated functions" clause to include not only "committees [and] subcommittees," but also "any other entity, however designated, of a public body created to perform delegated functions of th[at] body." In light of that amendment, Mr. Thomson alleged in Count III of his petition that the Foundation qualified as an "other entity . . . of [the University] created to perform [its] delegated functions." App. 175–78. In the alternative, Mr. Thomson petitioned the court to disregard the Foundation's separate legal identity and to consider it an effective committee of the University for purposes of the Act. App. 21–26.

The circuit court dismissed both counts, reasoning that a separately-incorporated foundation cannot, as a matter of law, be considered "a sub-entity of the public [university] it serves" so long as it operates "under its

own bylaws, articles of incorporation, and statutes." App. 263–64. It similarly concluded that it could not disregard the Foundation's corporate identity unless it found its relationship with the University to be "impermissible," App. 238. Those rulings rely on an inappropriately narrow reading of the Act and this Court's precedent.

A. *The Foundation is a "public body" as an entity of the University, created to perform delegated University functions.*

1. To determine whether the Foundation was an "entity of" the University for purposes of the Act, the court should have started with the "known legal definition" of the term "entity." *Chappell v. Perkins*, 266 Va. 413, 420 (2003). The defining characteristic of an "entity" is its "legal identity apart from its members or owners." *Entity*, *Black's Law Dictionary* (10th ed. 2014). That separate legal identity is what sets "entities" apart from "committees" and "subcommittees"—both of which, this Court held in *RF & P*, exist within the formal structure of a public body. 247 Va. at 316. In fact, *RF & P* expressly distinguishes between committees on one hand, and "distinct legal entities" like corporations on the other. *Id.*

Plainly, the General Assembly intended to expand the scope of the Act when it added the term "entity" to the delegated functions clause in 2001. *Chappell*, 266 Va. at 420 ("Legislation is presumed to effect a change in the law unless there is clear indication" to the contrary.). In determining the

extent of that expansion, it is presumed that the General Assembly used the term "entity" in "its judicially established meaning." *McDaniel v. Commonwealth*, 199 Va. 287, 294 (1957). In light of those principles, the 2001 amendment must be read to cover entities, including nonstock corporations that, despite their separate legal identity, were nonetheless created to perform delegated functions of a public body.

The requirement that an entity be "of" a public body does not, as the circuit court appeared to believe, require that a corporation be a "sub-entity" or "part of" the public body it serves. App. 263–64. The preposition "of" always draws meaning from its surrounding context. *Pacific Gas & Electric v. Hart High-Voltage Apparatus Repair*, 226 Cal. Rptr. 3d 631, 644–47 (Cal. Ct. App. 2017). Although sometimes a word of "proprietorship or possession," "of" can also be a term of mere "identification and relation," *id.* at 645, describing one thing that is "associated with or connected with" another, *Shaw v. Dawson Geophysical*, 657 F. Supp. 2d 740, 748 (S.D. W. Va. 2009). In other contexts, it "denot[es] that from which anything proceeds[,] indicating origin, source, descent, and the like." *Id.* (quoting *Black's Law Dictionary* (4th ed. 1968)).

In order to respect the General Assembly's deliberate use of the term "entity," the preposition "of" cannot, in the context of the "delegated

functions" clause, require a body be a "sub-entity" or "part of" a public body. Under that reading, there would be no distinction between "entities" with a separate legal identity and mere "committees" that exist within the formal structure of a public body. Rather, the preposition "of" is best understood as a term of "identification and relation," denoting the entity's status as a delegate *of* the public body it serves.

Not only does that construction respect the import of the term "entity," it also comports with the Foundation's own materials describing itself as an entity "of" the University: the Foundation's bylaws, for example, have historically identified the entity as "the main fund-raising organization *of* George Mason University." App. 450, 466 (emphasis added). It is also consistent with the language courts have used in describing the relationship between separately incorporated foundations and their affiliated universities.[14] In applying Ohio's open records law, for example, that state's high court explicitly described one foundation as an "entity of the university" it supported, tracking the precise language that the General Assembly would later include in Section 2.2-3701. *Toledo Blade*, 602 N.E.2d at 1162.

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14 *See, e.g.*, *Stone v. Consolidated Publishing*, 404 So.2d 678, 680 (Ala. 1981) ("alter ego of"); *Cape Publishing v. University of Louisville Foundation*, 260 S.W.3d 818, 820 (Ky. 2008) ("arm of"); *In re Beachport Enterprises*, No. CC-02-1268, 2005 WL 6960182 at *8 (9th Cir. 2005) (unpublished opinion) ("instrumentality of").

The contention that the George Mason University Foundation is in no way "of" George Mason University also offends common sense. The Foundation was formed by officials of then-George Mason College for the express and "exclusive" purpose of serving the College "or its successor." App. 443. It shares an office suite with a University department, App. 311, in a University building, *id.*, with a University official as its chief executive, App. 58. It is even "significant[ly]" involved in crafting University policy. App. 331–32. While a demand for liberal construction is not a license to rewrite the statute, *Daily Press*, 293 Va. at 563, it does require the Court give the Act the most comprehensive application its language fairly allows. The intimate relationship between the University and Foundation—together with the Foundation's self-description as an "organization *of* [the] University"—demonstrates that applying the "delegated function" clause to the Foundation does no violence to its language.

By contrast, requiring a delegate-entity also qualify as a "sub-entity" or "part of" the public body it serves, as the court did below, is to *narrow* the Act's plain language—and in the process, violate the clear directive to "put the interpretative thumb on the scale in favor of disclosure." *Fitzgerald*, 289 Va. at 505.

2. The circuit court's narrow interpretation of the "delegated function" clause brought its analysis to a premature end. The court did not appear to address whether the Foundation was, in fact, "created to perform a delegated function" of the University. In the usual instance, answering that question would require additional factual findings. However, the purpose for the Foundation's creation is discernible from the "undisputed facts [and] by unambiguous written documents" in the record. *Acordia*, 263 Va. at 384. As such, it presents a question of law that this Court may resolve on appeal. *Schwartz v. Brownlee*, 253 Va. 159, 162–63 (1997).

The record admits no speculation as to why the Foundation was created. Its initial 1966 Articles of Incorporation are conclusive: the Foundation was organized "exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of George Mason College . . . or its successor." App. 443. The Foundation's current charter evinces its continuing mission to "promote the advancement and further the aims and purposes of [the] University" and to "accept, apply, and use property acquired by gift [or] grant" to that end. App. 30. As further detailed above, those activities represent a "very important, if not vital, function of the modern university and an integral part of its continuing viability." *Gannon*, 692 N.W.2d at 40–41. In short,

they represent "function[s] of" the University that the Foundation was created to perform.

Not only was the Foundation created to perform those functions, it actually *does* perform them under an express delegation from the University. The Affiliation Agreement designates the Foundation as the primary depository of private gifts for the University's benefit, App. 63, and formal University policy required all private donations be routed through the Foundation, App. 68. In light of that express delegation, the Foundation fits comfortably within the Act's "delegated entity" clause.

3. Although admittedly not "dispositive" in its analysis, the circuit court explained that its ruling on Count III was based in part on the fact that "the General Assembly proposed and declined to pass a bill last session that would have expanded the . . . definition of 'public body' to expressly include any tax-exempt foundation 'that exists for the primary purpose of supporting a public [university].'" App. 268 (citing Senate Bill No. 1436 (January 13, 2017)). That reliance on post-enactment legislative history—particularly a bill that would have had a fundamentally different effect than the interpretation advocated here—was error.

Mr. Thomson has never contended that *every* public university's foundation is subject to the Act. University foundations are a diverse lot,

and the level of control over an affiliated foundation will vary from one school to the next. Senate Bill 1436 would have ignored those distinctions and indiscriminately swept *all* public university foundations into the Act's purview. The General Assembly's failure to enshrine a *per se* rule that *all* university foundations are subject to the Act cannot be read to insulate a *particular* foundation from the generally applicable standards already set forth in the Act. A failed amendment like Senate Bill 1436 lacks any value in considering an interpretation of existing language that "would have . . . a different effect." *Lockhart v. United States*, 546 U.S. 142, 147 (2005).

In any event, "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory construction." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). True legislative *history* may "shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law," but any subsequent events "could have had no effect" on the enactment in question. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)). And a *failed* legislative proposal is a "particularly dangerous ground on which to rest an interpretation of a prior statute." *Lockhart*, 546 U.S. at 147 (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)). Legislative inaction "lacks persuasive significance because several equally tenable inferences may be

drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Craft*, 535 U.S. at 287. Any reliance whatsoever on Senate Bill 1436 was error.

B. *The court erred in concluding that the Foundation could not, as a matter of law, be considered an* alter ego *of the University for the narrow purposes of the Act.*

In *RF & P*, this Court signaled that a separately incorporated entity could be considered a "committee" of a public body for purposes of the Act if it operates as "the alter ego, alias, stooge, or dummy" of the public body. 247 Va. at 316. Disregarding an alter ego's separate identity is an equitable remedy appropriate when the corporate form is used to, among other things, "defeat public convenience" or "evade a personal obligation." *Lewis Trucking v. Commonwealth*, 207 Va. 23, 31 (1966); *O'Hazza v. Executive Credit*, 246 Va. 111, 115 (1993). Arising from courts' equitable powers, the alter ego doctrine resists any "single rule or criterion," *O'Hazza*, 246 Va. at 115, and is available "wherever reason and justice require," *Lewis Trucking*, 207 Va. at 31–32 (quoting 4 *Michie's Jurisprudence, Corporations* § 5 (1948)).

In the context of statutory claims, the analysis generally rests more on the regulatory policy behind the statute than on "traditional piercing factors [such] as undercapitalization, informalities, and misrepresentation."

Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell Law Review 1036, 1061–62 (1991). *RF & P* reflects that contextual approach. In declining to invoke the doctrine against a corporation owned by a public body, the Court first considered the nature of the corporation's operations, whether the public body "instructs or advises [it] regarding th[o]se operations," and whether directors on the corporation's board were affiliated with the public body. 247 Va. at 316.

Rather than consider those factors, the circuit court below concluded that another statute, Virginia Code § 23.1-1010(3), was dispositive of the alter ego claim. App. 238–39. As relevant here, that statute allows public universities to "[c]reate or continue the existence of one or more nonprofit entities for the purpose of soliciting, accepting, managing, and administering grants and gifts." According to the court, "a party that takes advantage of a right provided for by the General Assembly has engaged in lawful conduct and is not susceptible to a claim of veil piercing." App. 240.

The court's reasoning is flawed in two respects. First, the court assumed that veil-piercing requires explicitly unlawful conduct. The alter ego doctrine, however, is not "limited to cases [of] actual fraud and criminal intent." *Lewis Trucking*, 207 Va. at 32. The University's mere authority to create a nonprofit foundation is not a license to use that entity in any way it

pleases. Contrary to the circuit court's reading, nothing in Virginia Code § 23.1-1010 "prescribe[s]" the "sort of control" the University exerts over the Foundation. App. 239. Conversely, *every* alter ego case involves individuals or entities who "t[ook] advantage of a right provided for by the General Assembly"—usually, incorporation under general corporation laws. The very nature of the doctrine is to curb the inequities that can arise through the otherwise legal exercise of that right.

Second, the reasoning below cannot be squared with this Court's analysis in *RF & P*. Similar to the University, the public-body-parent in that case was authorized by statute to "acquire and retain every kind of property . . . and investment." 247 Va. at 312 (quoting Virginia Code § 51.1-116). But the fact that the parent-entity acted under broad, statutory authority was simply not a determinative factor—or even a factor worth mentioning—in the Court's analysis.

More telling still, the factors the *RF & P* Court *did* consider all militate in favor of Mr. Thomson's claim. Unlike the corporation in *RF & P*, the Foundation *was* created to perform delegated functions of the University; it *does* work alongside, under the control of, and for the sole benefit of the University; it *does* receive instruction and advice from its affiliate; and its board *does* include members affiliated with the University.

Compare 247 Va. at 316 *with* App. 14, 21–23. Those were all relevant considerations in *RF & P*, and the circuit court erred by disregarding them in favor of a categorical rule inconsistent with both reason and precedent.

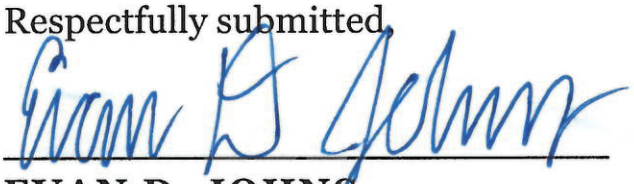
CONCLUSION

The law should not—and does not—discourage private citizens from advancing the Commonwealth's educational mission. Donors should be encouraged to contribute to the education of their fellow-citizens. Depending on the conditions they place on their philanthropy, the law may even provide some reasonable expectation of anonymity for those who do.

But the central argument accepted below—that a government agency can shroud its essential activities in secrecy by outsourcing them to a private corporation subject to its control—violates not only the Act's text and structure, but also the democratic principles at its core. Accordingly, Transparent GMU and Mr. Thomson ask the Court to reverse the rulings below and remand for further proceedings consistent with the Act.

Dated: April 22, 2019

Respectfully submitted,



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RULE 5:26 CERTIFICATE

In accordance with Rule 5:26(e) and Rule 5:26(h) of the Rules of the Supreme Court of Virginia, I certify the following:

1. Appellants Transparent GMU and Augustus Thomson are represented by:

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4. This Opening Brief does not exceed 50 pages in length, excepting the Cover Page, Table of Contents, Table of Authorities, and this Certificate.

5. This Opening Brief complies with all other requirements of Rules 5:6, 5:26, and 5:27 of the Rules of the Supreme Court of Virginia.

6. On the date of this filing, I sent an electronic version of this Opening Brief by electronic mail to counsel for each of the parties at the electronic mail addresses listed above.

Dated: April 22, 2019

Respectfully submitted,

/s/ Evan D. Johns

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