

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,

Defendants-Appellants.

**NEW MEXICO STATE UNIVERSITY FOUNDATION, INC.'S MOTION
FOR LEAVE TO FILE AMICUS BRIEF**

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**NEW MEXICO STATE UNIVERSITY FOUNDATION, INC.'S MOTION
FOR LEAVE TO FILE AMICUS BRIEF**

The New Mexico State University Foundation, Inc. (“NMSU Foundation”) respectfully files this Motion for Leave to File Amicus Brief and its Amicus Brief (attached) in this appeal pursuant to New Mexico Rules of Appellate Procedure 12-309 and 12-320 and would respectfully show the Court the following:

NMSU Foundation is a New Mexico non-profit corporation established in 1959 for the purpose of raising and managing private donations to support New Mexico State University (“NMSU”), New Mexico’s first university and first land-grant university. The NMSU Foundation is registered as an independent 501(c)(3) charity under the U.S. Internal Revenue Code. The Foundation provides necessary resources to support NMSU, including monies for student scholarships, faculty

positions, and research entities that are part of the university.

The Foundation provides an ever more crucial source of steady and reliable funding for NMSU as the State of New Mexico has decreased the amount of the State's contributions to NMSU's budget. Although there have been generalized decreases in state funding for public universities across the nation, cuts to higher education in New Mexico have been especially severe, with the State reducing spending by an average of 34% per student between 2008 and 2018. <https://www.krwg.org/local-viewpoints/2018-10-04/report-new-mexicos-cuts-to-higher-education-second-worst-in-nation>. When public funding for higher education declines, the cost to students and families increases. <https://www.nmvoices.org/archives/12453>. In fact, the cost to attend college in New Mexico at a public university increased by an average of 38% between 2008 and 2018. *Id.* In light of these cuts, NMSU's ability to provide a quality education to college-age students in the State is greatly dependent upon the amount of money available to fund the university from the Foundation.

The NMSU Foundation seeks leave to file an amicus brief because it believes that the Court of Appeals' decision in this case must be reversed in order to avoid a catastrophic reduction in private funding to support NMSU and other public universities in the State if donors' privacy cannot be protected.

The Foundation's amicus brief will assist the Court by providing

information about the impact of the Court's decision on NMSU and offering additional insights and perspectives to the Court on the relevant legal issues.

CERTIFICATE OF CONFERENCE

Counsel for NMSU Foundation has contacted Counsel for Defendants-Appellants and they are unopposed and attempted contact with Plaintiff-Appellee but has been unsuccessful in obtaining consent or opposition to this Motion.

WHEREFORE, PREMISES CONSIDERED, NMSU Foundation requests that the Court grant its Motion for Leave to File Amicus Brief and accept for filing its Amicus Brief, and such other and further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 12-307 NMRA, I hereby certify that a true and correct copy of the foregoing pleading was sent by e-service to all counsel of record this 10th day of October, 2022.



KEN SLAVIN

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**NEW MEXICO STATE UNIVERSITY FOUNDATION, INC.'S
AMICUS BRIEF**

New Mexico State University Foundation, Inc. (“NMSU Foundation” or “Foundation”) offers this amicus brief¹ in support of the position of Defendants-Appellants The University of New Mexico Foundation, Inc., The University of New Mexico Lobo Club, Inc., The University of New Mexico Lobo Club, Inc.’s Executive Director Jalen Dominguez, the Board of Regents of the University of New Mexico, and Christine Landavazo in her capacity as Interim Custodian of Records for the University of New Mexico that Section 6-5A-1 of the New Mexico Public Finances Act, NMSA 1978, Section 6-5A-1 (2011) (“Section 6-5A-1”), provides an exception to the disclosure requirements of the New Mexico

¹ No counsel for any party to this case authored this brief, in whole or in part, nor did any counsel for a party or any party make a monetary contribution intended to fund the preparation or submission of this brief.

Inspection of Public Records Act, NMSA 1978, § 14-2-1-12 (2019) (“IPRA”), as it constitutes an “otherwise provided by law” exception under Section 14-2-1(H) of IPRA.

NMSU Foundation is a New Mexico non-profit corporation established in 1959 for the purpose of raising and managing private donations to support New Mexico State University (“NMSU”), New Mexico’s first university and first land-grant university. The NMSU Foundation is registered as an independent 501(c)(3) charity under the U.S. Internal Revenue Code. The Foundation provides necessary resources to support NMSU, including monies for student scholarships, faculty positions, and research entities that are part of the university.

NMSU Foundation fundraising from private donors and management of perpetual endowments provide an increasingly critical source of stable and sustainable funding for NMSU as the State of New Mexico has reduced its contributions to NMSU’s budget. Nationally, state funding for public universities has proven to be unreliable, especially in periods of economic downturn, and has generally been declining for many years. *See, e.g.,* <https://www.cbpp.org/research/state-budget-and-tax/state-higher-education-funding-cuts-have-pushed-costs-to-students>. But even in this climate, New Mexico stands out as one of nine states that cut higher education spending dramatically – by more than 30% per student, full-time student equivalent (“FTE”) – between 2008 and

2018. <https://www.krwg.org/local-viewpoints/2018-10-04/report-new-mexicos-cuts-to-higher-education-second-worst-in-nation>. “That nearly \$5,000 drop in per-student, FTE funding since the start of the recession ranks New Mexico second worst in the nation for such funding cuts.” <https://www.nmvoices.org/archives/12453>. As a consequence of these funding cuts, tuition and fees on a per student FTE, inflation-adjusted basis at New Mexico’s public four-year institutions have increased by an average 38% since 2008. *Id.* Cuts to New Mexico’s higher education system are making college less affordable and threatening the quality of education students receive at the State’s public four-year and community colleges, necessitating that NMSU Foundation and other educational foundations to do more.

In order to do more to address this dire financial situation, private foundations supporting public universities must maintain the privacy of donors and donor records. Donor privacy and the confidentiality of donor records is a core principal for 501(c)(3) organizations and has been essential to the unique success of American charitable giving. *See e.g.*, <https://www.philanthropyroundtable.org/donor-privacy/>. The Philanthropy Roundtable explains, “Donor privacy is a part of our nation’s long-standing tradition of philanthropic freedom and is protected under the Constitution. The freedom to give privately helps enable our vibrant and diverse charitable culture that benefits all Americans.” *Id.* Ensuring donor privacy

and confidentiality is a stated best practice in developing fundraising policies and procedures in order to acknowledge that it is vital to donors and the organization that donor information be kept confidential, as detailed in the Association of Fundraising Professionals' guidance document on fundraising policies and procedures. https://afpglobal.org/sites/default/files/attachments/201901/AFP%20Ready%20Ref%20Develop%20Fund%20Policies%200119_1.pdf.

NMSU Foundation, in particular, considering the funding shortfalls that NMSU faces, is obligated to protect the privacy of its donors and donor records in order to raise the crucial funds needed to support NMSU. As mandated by state law, the Foundation operates under a Memorandum of Understanding with NMSU that clearly states the expectation of privacy and confidentiality expected by Foundation donors. *See* NMSA 1978, § 6-5A-1(B) (2011). This is a commitment that the NMSU Foundation has made for decades, first, with NMSU in the Foundation's establishment, and second, in legal agreements with donors in connection with their donations. For 63 years, donors have chosen to make hundreds of millions of dollars in gifts to the Foundation rather than directly to NMSU because they did not wish for their gifts to become State funds and because they valued the commitment to privacy and confidentiality offered by the Foundation. Importantly, several of the Foundation's largest donors have made their donations with the express condition that their gifts remain anonymous in

order to protect their privacy. Forced disclosure of private donor records would violate the MOU and contractual agreements with donors for on-going donations.

The inability to continue to maintain such donations as private would affect the Foundation's future ability to raise donations as it would significantly chill future giving. Reduced donations to the Foundation resulting from this Court's decision would threaten the ever more essential source of funding to NMSU that the Foundation now delivers.

All parties to this case received timely notice of NMSU Foundation's intent to file this brief.

ARGUMENT

SECTION 6-5A-1 PROVIDES AN "AS OTHERWISE PROVIDED BY LAW" EXCEPTION TO THE GENERALLY-APPLICABLE REQUIREMENT OF IPRA THAT PUBLIC RECORDS BE RELEASED.

The "as otherwise provided by law" exception to the generally applicable requirement of IPRA that public records be released prohibits the release of records (other than annual audits) held by private university foundations. NMSA 1978, §§ 6-5A-1, 14-2-1. Under principles of statutory construction, statutes related to the same subject matter – the disclosure of records – must be read together and harmonized and construed together in a way that facilitates the operation and achievement of the goals of each, "under the presumption that the legislature acted with full knowledge of relevant statutory and common law." *State*

ex. rel. Quintana v. Schnedar, 1993-NMSC-033, ¶ 4. Thus, IRPA’s “as otherwise provided by law” exception must be read together with Section 6-5A-1. In considering two statutes relating to the same subject matter, the laws “should, if possible, be construed to give effect to every provision of each.” *First Nat’l Bank of Santa Fe v. Sw. Yacht & Marine Supply Corp.*, 1984-NMSC-075, ¶ 15. “A statute must be construed so that no part of the statute is rendered surplusage or superfluous.” *Katz v. N.M. Dep’t of Hum. Servs.*, 1981-NMSC-012, ¶ 18.

Section 6-5A-1(D) states that “[n]othing in this section . . . makes records, other than the annual audit required under this section, public records within the purview of Section 14-2-1.” Yet, the Court of Appeals in the present case gave effect only to the language of this provision stating that annual audits are public records, ignoring the remaining statutory language. *Libit v. Univ. of N.M. Lobo Club*, 2022-NMCA-043, ¶ 11. Although Section 6-5A-1 makes clear that annual audits are “public records” subject to IPRA, it also states that no other records of university foundations are consequently made “public records,” which is a clear indication that the Legislature understood them not to be public records under IPRA or otherwise. In construing the meaning of Section 6-5A-1, the Legislature is “presumed to have been well informed and reasonable” in enacting statutory provisions and this Court should “give effect to every part of the statute” and “construe it as a harmonious whole.” *See Varoz v. N.M. Bd. of Podiatry*, 1986-

NMSC-051, ¶ 8. As the Court said in *Republican Party of New Mexico v. New Mexico Taxation and Revenue Department*, courts should apply the “rule of reason” to determine whether an exception to IRPA applies. 2012-NMSC-026, ¶ 14. Construing IRPA’s “as otherwise provided by law” exception together with all of Section 6-5A-1(D) and applying the rule of reason requires that records held by university foundations other than annual audits be excepted from disclosure.

Additionally, Section 6-5A-1(D)’s language should be given effect as it is provides more specific requirements for universities and supporting university foundations than exist under general law, including with respect to the maintenance of their records. It is a principle of statutory construction that a more specific statute prevails over a general statute. *State v. Farish*, 2021-NMSC-030, ¶ 21. The general/specific statute rule “should be applied in a flexible manner and should be used in conjunction with other rules of statutory interpretation to achieve the ultimate goal of discerning the intent of the Legislature.” *Id.* In the instant case, Section 6-5A-1 provides the more specific law applicable to the records of university foundations. Accordingly, Section 6-5A-1(D)’s express authorization to treat *only* annual audits held by university foundations as public records, and statement that no other university foundation records are, thus, designated as public records, should be read to express the Legislature’s intent to keep other records held by university foundations outside the reach of IPRA’s general law

requirements.

Finally, the New Mexico and U.S. Constitution's protection of donors' First Amendment rights provides an "as otherwise provided by law" exception to the generally-applicable requirement of IPRA that public records be released. The "catch-all" exception to the requirement to release public records under IPRA includes records protected by constitutionally mandated privileges. *Republican Party of N.M.*, 2012-NMSC-026, ¶ 13. In determining whether records meet the "catch-all" exception, "courts should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution." *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013 (citing to *Republican Party of N.M.*, 2012-NMSC-026, ¶ 13, 16, internal citations removed).

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Similarly, Article II, Section 17 of the New Mexico Constitution guarantees: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be

passed to restrain or abridge the liberty of speech or of the press.” The First Amendment to the U.S. Constitution has been held to protect private donor lists from disclosure. *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373 (2021) (finding that California law that required that tax-exempt charities disclose donor information violated First Amendment association rights). As the U.S. Supreme Court noted, “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 as [other] forms of governmental action.” *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 462 (1958) (cited in *Bonta*, 141 S.Ct. at 2382).

New Mexico courts generally apply the analysis of the First Amendment in federal cases to their consideration of the provisions of Article II, Section 17 of the New Mexico Constitution. See e.g., *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 24. Furthermore, under the Supremacy Clause of the Federal Constitution, “The relative importance to the State of its own law is not material when there is a conflict with a valid federal law,” for “any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.” *Felder v. Casey*, 487 U.S. 131, 138 (1988) (citing *Free v. Bland*, 369 U.S. 663, 666 (1962) (internal quotations omitted)). The Court must recognize that private donors enjoy the constitutional privilege to maintain the donations and information they provide to university foundations private and this

constitutional protection affords an as otherwise provided by law exception to the release of such documents under IPRA.

In light of the funding gaps that NMSU faces, in order to raise the crucial funds needed to support NMSU, NMSU Foundation must preserve the privacy of its donors and donor records. Many gifts to the Foundation have been conditioned on anonymity and forced disclosure of private donor records would violate both contractual agreements with donors, as well as the MOU with NMSU. Privacy is critical to the Foundation's future ability to raise donations and to the support that the Foundation now offers to NMSU for the benefit of New Mexico.

For the above reasons and the reasons stated by Defendants-Appellants, the decision of the Court of Appeals should be reversed and the Court should determine that the donor records of university foundations are not subject to disclosure under IPRA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 12-307 NMRA, I hereby certify that a true and correct copy of the foregoing pleading was sent by e-service to all counsel of record this 10th day of October, 2022.



KEN SLAVIN

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318 NMRA, I hereby certify that the body of this brief contains 2,037 words.



KEN SLAVIN