

Legislative Council Service

Information Memorandum

DATE: October 23, 2024

DISCUSSION DRAFT

TO: Representative Andrea Romero

FROM: Sabina Gaynor, Staff Attorney

SUBJECT: ARTICLE 9, SECTION 14 OF THE CONSTITUTION OF NEW MEXICO;
DRAFTING STRATEGIES

You have requested information regarding Article 9, Section 14 of the Constitution of New Mexico. You also asked for strategies to amend this constitutional provision, commonly referred to as the "Anti-Donation Clause", including considering similar provisions in state constitutions for Arizona, Iowa, Colorado and California. This memorandum is drafted in compliance with that request. Any opinions expressed are those of the author and do not necessarily reflect the opinions of the New Mexico Legislative Council or any other member of its staff.

Background

Article 9, Section 14 of the Constitution of New Mexico provides what is widely known as the Anti-Donation Clause. In part, the Anti-Donation Clause provides that:

"Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through H of this section.[...]"

This clause provides sweeping limitations on the use of public funds. Simply, any arm of the state is prohibited from providing money or pledging its credit, via appropriation or otherwise, to a private person. Unless an exception listed in Subsections A through H of the

clause applies, a transfer of money from the state to a non-state entity will likely be found to be unconstitutional. Considering the clause, to determine whether a provision of money would violate this provision, one should apply the following analysis¹: 1) Has the state or an arm of the state, including a state agency, a county, a school or otherwise (i.e., "the government"), made a donation of money or pledged its credit to a private person?²; and 2) If the answer to this question is "yes", then does an exception provided in Subsections A through H of the clause apply? If an exception does not apply, then the donation or pledge of credit is violative of the Anti-Donation Clause.

I. Has the State or an Arm of the State, Including a State Agency, a County, a School or Otherwise (i.e. "The Government"), Made a Donation or Pledged its Credit to a Private Person?

The initial inquiry in an Anti-Donation Clause analysis is whether the state has made a donation or pledged its credit. A donation, for purposes of the Anti-Donation Clause, is often construed as "a 'gift', an allocation or appropriation of something of value, without consideration, to a 'person, association or public or private corporation'".³ Purpose is not relevant in determining whether a donation is permitted under the Anti-Donation Clause.⁴ New Mexico courts have found that a donation or a pledge of credit does not occur in four different scenarios⁵:

¹ This analysis was described by Jeremy Farris, the executive director of the State Ethics Commission, in a presentation to the New Mexico Finance Authority Oversight Committee in August 2022. Jeremy Farris, *The Anti-Donation Clause*, New Mexico Finance Authority Oversight Committee, 2 (August 30, 2022), <https://www.nmlegis.gov/handouts/NMFA%20082922%20Item%207%20Oversight%20Anti-Donation%20Farris.pdf>. The following background material reiterates parts of Farris' presentation, in brief.

² For the remainder of the memorandum, "private person" will be used to refer to "any person, association or public or private corporation". See *City of Gallup v. New Mexico State Park & Recreation Comm'n*, 1974-NMSC-084, 86 N.M. 745, 527 P.2d 786 (holding that the Anti-Donation Clause is not applicable to appropriations between government agencies).

³ *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, 62 N.M. 18, 303 P.2d 920.

⁴ That a private enterprise serves a highly commendable public purpose alone does not warrant the state's or any county's or city's making a donation or pledging its credit in aid of it. See *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110, 314 P.2d 714; *State Hwy. Comm'n v. Southern Union Gas Co.*, 1958-NMSC-124, 65 N.M. 84, 332 P.2d 1007, 75 A.L.R.2d 408, overruled in part by *State ex rel. City of Albuquerque v. Lavender*, 1961-NMSC-096, 69 N.M. 220, 365 P.2d 652.

⁵ See Farris, *supra*, note 1, at 2-4.

1) when government agencies transfer money between each other;⁶ 2) when the state issues revenue bonds for projects leased to private entities wherein the payments are used to pay the state's obligation on the principal and interest;⁷ 3) when the state receives consideration in return for the transfer of money;⁸ and 4) when the state compensates a private person in the form of damages.⁹

II. Does a Valid Exception Apply?

Article 9, Section 14 of the Constitution of New Mexico provides six exceptions to the Anti-Donation Clause. Thus, if a donation is made to a private person, that donation or a law created to allow for the donation may be valid if the donation or pledge of credit: 1) provides "for the care and maintenance of sick and indigent persons";¹⁰ 2) establishes veterans' scholarship programs;¹¹ 3) establishes a loan program "for students of the healing arts";¹² 4) provides infrastructure that will create new job opportunities;¹³ 5) is used to develop affordable

⁶ See *City of Gallup*, 1974-NMSC-084, ¶ 11 (wherein the City of Gallup provided financing to a state park); *but see also* N.M. CONST. ART. 4, § 31 (prohibiting legislative appropriations to persons who are "not under the absolute control of the state").

⁷ See Farris, *supra*, note 1, at 3.

⁸ See *City of Gallup*, 1974-NMSC-084, ¶ 9.

⁹ *State ex rel. City of Albuquerque v. Lavender*, 1961-NMSC-096, ¶ 1, ¶ 10, 69 N.M. 220, 365 P.2d 652.

¹⁰ N.M. CONST. ART. 9, § 14 (A).

¹¹ N.M. CONST. ART. 9, § 14 (B) and (G).

¹² N.M. CONST. ART. 9, § 14 (C).

¹³ See N.M. CONST. ART. 9, § 14 (D) (providing that "[n]othing in this section prohibits the state or a county or municipality from creating new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses if this assistance is granted pursuant to general implementing legislation that is approved by a majority vote of those elected to each house of the legislature"); *but see also* the Local Economic Development Act, §§ 5-10-1 through 5-10-17 NMSA 1978 (providing the implementing law for this subsection).

housing;¹⁴ or 6) provides infrastructure for certain essential services, but primarily for residential purposes.¹⁵

Numerous pieces of legislation have been introduced to modify or repeal the clause. Successful attempts have taken the form of introducing new exceptions. For instance, House Joint Resolution 1 (2022) was passed and adopted at the general election held on November 8, 2022, creating the "essential services" exception listed above. However, the Anti-Donation Clause still provides an expansive prohibition of donations and pledges of credit to private persons.

Analysis

The legislature may look to other states for strategies to broaden the scope of constitutionally permissible donations under New Mexico's Anti-Donation Clause. As will become apparent though, the language of many of these anti-aid provisions mirror New Mexico's Anti-Donation Clause, almost exactly at times. However, court interpretations of these anti-aid provisions indicate that redrafting language alone may not be sufficient to broaden permissible expenditures because each of these states uses a public purpose exception to validate otherwise unconstitutional donations to private persons. New Mexico may broaden the scope of constitutionally permissible donations by amending the Anti-Donation Clause to provide more exceptions, including explicitly providing for a public purpose exception or repealing the clause in its entirety.

Briefing of Various State Anti-Aid Provisions

Article 9, Section 7 of the Constitution of Arizona, often referred to as the "Gift Clause", roughly provides the same language and effect as the Anti-Donation Clause. This provision states that:

"Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or

¹⁴ N.M. CONST. ART. 9, § 14 (E)-(F) (providing authorized donations or expenditures relating to affordable housing; providing a process for authorizing legislation); *but see* the Affordable Housing Act, §§ 6-27-1 through 6-27-9 NMSA 1978 (providing an example of an authorizing law enacted in accordance with these subsections).

¹⁵ N.M. CONST. ART. 9, § 14 (H) (providing that the expenditure of "state funds or resources shall also be for residential purposes...if the assistance is granted pursuant to general implementing legislation approved by a majority vote of those elected to each house of the legislature").

become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state".¹⁶

Like the Anti-Donation clause, Arizona's Gift Clause prohibits a donation or a pledge of credit from the state or an arm of the state to individuals, associations and corporations, generally. But the Gift Clause goes beyond that, prohibiting the holding of shares in a business with limited exceptions. However, as will be discussed below, Arizona courts use a public purpose exception to evaluate the constitutionality of a donation or pledge of credit.

Article 16, Section 6 of the Constitution of California, while different in language, ultimately elicits the same effect as the Anti-Donation Clause. This section provides, in part, that:

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation [...]"¹⁷

This provision is almost identical to the Anti-Donation Clause in substance. Based on the language of this section alone, it appears that either a loan, a pledge of credit or a gift violates the provision because it is from the state to a private entity, or an exception applies — in essence, the New Mexican approach. This section also prohibits gifts to municipal corporations.¹⁸ As will be discussed below, California state courts incorporate a public purpose analysis, which

¹⁶ AZ CONST. ART. 9, § 7.

¹⁷ *But see* CA CONST. ART. 16, § 6 (providing a lengthy list of exceptions).

¹⁸ "An appropriation of money by the legislature for the relief of one who has no legal claim therefore is a 'gift' — within the meaning of the constitutional ban on legislative gifts to any individual or municipal or other corporation, even if a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration." *Jordan v. California Dept. of Motor Vehicles* (App. 3 Dist. 2002), 123 Cal.Rptr.2d 122, 100 Cal.App.4th 431.

greatly changes the legal implications of the plain language reading of this section. Thus, amending the language of the provision may result in different wording but ultimately the same outcome for evaluating donations or pledges of credit. Court interpretation remains the determinative issue.

Article 11, Sections 1 and 2 of the Constitution of Colorado provide the state's anti-aid provisions. Section 1 provides a prohibition against pledging of credit:

"Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state".¹⁹

Section 2 provides a more extensive prohibition on aid to corporations:

"Neither the state, nor any county, city, town, township, or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company or a joint owner with any person, company, or corporation, public or private, in or out of the state, except as to such ownership as may accrue to the state by escheat, or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township, or school district, or to either or any of them, jointly with any person, company, or corporation, by forfeiture or sale of real estate for nonpayment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties, or forfeiture of recognizance, breach of condition of official bond, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested. Nothing in this section shall be construed to prohibit any city or town from becoming a subscriber or shareholder in any corporation or company, public or private, or a joint owner with any person, company, or corporation, public or private, in order to effect the development of energy resources after discovery, or production, transportation, or transmission of energy in whole or in part for the benefit of the inhabitants of such city or town".²⁰

Combined, the provisions appear to accomplish the same ends as the Anti-Donation Clause: the state or an arm of the state is prohibited from pledging its credit to, loaning money to, making

¹⁹ CO CONST. ART. 11, § 1.

²⁰ CO CONST. ART .11, § 2.

donations to or taking on any debt or contractual obligation or other liability of a private person. Colorado's constitutional provision, like California's and New Mexico's, provides extensive exceptions.

Public Purpose Exception Approach

Despite having similar or nearly identical language as Arizona, California, Colorado and Iowa each do in their anti-aid provisions, New Mexico is unable to donate or pledge its credit in the same way because, as will be discussed below, New Mexico courts have not interpreted there to be a public purpose exception to the Anti-Donation Clause. If New Mexico intends to take the same approach as those states, it should explicitly provide for a public purpose exception. Each of these states and their respective courts recognize a public purpose exception to prohibitions to providing state funds to private persons, either explicitly or at common law. Conversely, New Mexico courts and the state Department of Justice have routinely rejected the notion that an expenditure's public purpose validates the expenditure under the Anti-Donation Clause.²¹ Thus, the determinative issue is not the language in the provision as much as it is the court's interpretation.

Public Purpose Exception in California

If the Anti-Donation Clause were amended to mirror California's anti-aid provision, it would likely not result in a broadened scope of constitutionally permissible donations. Though not in an explicit exception, California courts have found a public purpose exception to exist for expenditures that New Mexico courts would not consider to be donations within the parameters of the Anti-Donation Clause. To determine whether an expenditure violates California's provision, "the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this

²¹ See *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 1, 63 N.M. 110, 314 P.2d 714 (S. Ct. 1957); *Harrington v. Atteberry*, 1915-NMSC-058, 21 N.M. 50, 153 P. 1041 (1915) ("[S]erving a highly commendable public purpose" does not make a donation constitutionally valid under New Mexico's Anti-Donation Clause); 1979 Op. Att'y Gen. No. 79-07 (considering tuition grants); but cf. Att'y Gen. Adv. Ltr. 2022-11 (opining that "public funds may still be used to repair private roads, consistent with the Anti-donation Clause, provided the general public has unfettered access and the right of travel", because "[i]n such a case, the public's free access to and use of the private road means that the project would primarily serve a public purpose, even if it did result in an incidental benefit to private entities").

constitutional prohibition."²² The benefit derived by funds expended under the public purpose exception "is in the nature of consideration and the funds expended are therefore not a gift ... even though private persons are benefited there from".²³ Similarly, New Mexico courts do not find a donation where the state receives consideration, among other situations.²⁴ So in California, the public purpose exception is less an exception than it is a standard to determine whether the state's anti-aid provision applies at all. Thus, New Mexico courts and California courts use different means to accomplish the same ends.

However, cursory reading of California case law on this issue indicates that California courts have found the public purpose exception to apply in narrow circumstances. One example of this can be seen in *In re Samuel G.*, wherein the Court of Appeal for Division 1 of the Fourth District of California considered whether payment of travel expenses of an educational representative for a dependent child of the state constituted an improper gift of public funds.²⁵ In *Samuel*, the court applied the public purpose exception to find that this use of public funds was not a gift because it met the purpose of "ensuring the educational needs of a dependent child are met".²⁶

The issue in *Samuel* mirrors New Mexico cases in which compensation for services are provided. New Mexico courts have routinely found that compensating public employees for their services does not constitute a donation for purposes of the Anti-Donation Clause.²⁷ In *Treloar v. County of Chaves*, the Court of Appeals of New Mexico considered whether payment

²² *Page v. MiraCosta Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 495, 102 Cal. Rptr. 3d 902 (2009).

²³ *W. Contra Costa Unified Sch. Dist. v. Superior Ct. of Contra Costa Cnty.*, 103 Cal. App. 5th 1243, 323 Cal. Rptr. 3d 904, 912 (2024), review filed (Sept. 9, 2024).

²⁴ *See State ex rel. Off. of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 51, 141 N.M. 1, 150 P.3d 375 (wherein because the state received valuable consideration for the purchase of land and water rights, the purchase of upstream junior water rights as part of a settlement agreement did not violate the Anti-Donation Clause).

²⁵ *In re Samuel G.*, 174 Cal. App. 4th 502, 94 Cal. Rptr. 3d 237, 241 (2009).

²⁶ *In re Samuel G.*, 94 Cal. Rptr. 3d 237, 245.

²⁷ *See, e.g., Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32, 32 P.3d 803, 812 (severance pay provided under an employment contract was "deemed to be in the nature of wages that have been earned" and did not constitute a gift in violation of the Anti-Donation Clause). *See also National Union of Hosp. Employees v. Board of Regents*, 2010-NMCA-102, ¶ 39, 245 P.2d 51, 63 (bonus provision in arbitrator's award did not represent compensation for past or expected work and constituted a retroactive wage contrary to the Anti-Donation Clause).

of severance provided under an employment contract constituted an impermissible donation.²⁸ In that case, the state did not derive its consideration through a public purpose, like in *Samuel*; the state received consideration through the earning of wages by the employee.²⁹ Thus, the court held that there was no gift under the Anti-Donation Clause.³⁰

California courts have also used the public purpose exception to allow the state to provide damages.³¹ In *West Contra Costa Unified School District v. Superior Court of Contra Costa County*, the Court of Appeal for the First District, Division 5, of the State of California considered whether a law that provided a three-year window for plaintiffs to bring childhood sexual assault claims against public entities that would otherwise be barred on statute of limitations or claim presentation grounds constituted a gift in violation of California's anti-aid provision.³² In that case, the school district claimed that "[a] statute creating liability that did not exist (because any prior liability was extinguished when no timely claim was presented) is a 'gift' or 'thing of value' to [the plaintiff]", constituting a violation of California's Gift Clause provision.³³ However, the court held that the law in question served a public purpose on various grounds. Particularly, the court pointed to the public importance of allowing victims of childhood sexual abuse to bring claims and hold government actors accountable and considered the legislative history of the law, wherein a committee raised issues of psychological and physiological impacts of sexual abuse.³⁴ The court went on to reason that "seeking to aid victims of childhood sexual assault [...] is not fundamentally different from the public purpose involved

²⁸ *Treloar v. County of Chavez*, 2001-NMCA-074, 130 N.M. 794, 32 P.3d 803.

²⁹ *Treloar*, 2001-NMCA-074, ¶ 32.

³⁰ *Treloar*, 2001-NMCA-074, ¶ 32.

³¹ See generally *W. Contra Costa Unified School District*, 323 Cal. Rptr.3d 904.

³² *W. Contra Costa Unified School District*, 323 Cal. Rptr.3d 904, 908.

³³ *W. Contra Costa Unified School District*, 323 Cal. Rptr.3d 904, 918.

³⁴ *W. Contra Costa Unified School District*, 323 Cal. Rptr.3d 904, 919-920.

in any of a number of other enactments providing assistance to other disadvantaged classes of persons 'in the best interests of the general public welfare'".³⁵

Under the Anti-Donation Clause, expenditures like the payment of travel expenses in *Samuel* would not be considered donations, and thus, a public purpose exception would not be necessary. In *State ex rel. City of Albuquerque v. Lavender*, the New Mexico Supreme Court considered whether the Anti-Donation Clause was violated by a statute that required the State Highway Commission to reimburse the City of Albuquerque for utility relocation costs due to the state requiring this relocation for the construction of a highway.³⁶ The court acknowledged that "[t]he legislature is the branch of the government charged with the duty of placing in operation the police power and providing how it is to be exercised" and thus may "enact laws for the benefit of society at large", including placing an obligation on a utility.³⁷ The court reasoned that the statute at issue was a valid use of the police power because unless the legislature acted to provide for "the orderly relocation of utility facilities in the path of highway construction, great danger could result affecting not only the traveling public but the health, safety, welfare and convenience of the tremendous group of utility consuming public, which is dependent on the services furnished".³⁸ Therefore, through use of that power, the state may pay the relocation costs to protect consumers from raised utility costs that would ultimately result if the utilities were not reimbursed.³⁹ The court upheld the statute, stating that "[w]e approve a proper balancing of the benefits to be obtained by the exercise of the state's police power in requiring the relocations of utilities at the sole expense of the owners thereof, as opposed to the burdens, fully justifies the expenditure of public monies for the purpose of doing equity".⁴⁰

The New Mexico court holding in *Lavender* accomplishes the same end as that in *West Contra Unified School District* in California. In *Lavender*, while not explicitly reaching its

³⁵ *W. Contra Costa Unified School District*, 323 Cal. Rptr.3d 904, 922.

³⁶ *State ex rel. City of Albuquerque v. Lavender*, 1961-NMSC-096, ¶ 1, ¶ 10, 69 N.M. 220, 365 P.2d 652.

³⁷ *Lavender*, 1961-NMSA-096, ¶ 18, 30.

³⁸ *Lavender*, 1961-NMSA-096, ¶ 28.

³⁹ *Lavender*, 1961-NMSA-096, ¶ 29.

⁴⁰ *Lavender*, 1961-NMSA-096, ¶ 33.

conclusion on public purpose exception grounds, the New Mexico court did so implicitly by considering the impacts on state citizen purchasers of utilities should the utilities relocation not be reimbursed, namely, that the expense would be passed on to the consumer; but more importantly, the court considered the health, safety and welfare issues that could result if the facilities were not relocated. In doing so, the New Mexico legislature, through its police power, enacted a law for the benefit of the public, which is arguably a public purpose. Likewise, one could argue that the California court in *Contra* acknowledged that the California legislature was acting out its police power in creating a damages law for the general public welfare of its citizens.

In considering the above cases, it appears that much of what has been validated in California through the use of a public purpose exception has been accomplished by New Mexico courts in considering whether an expenditure constitutes a donation. In fact, one can argue that if a public purpose argument fails in a New Mexico court, a police power argument could be used to validate certain expenditures that fall within the constraints of that power. California courts' application of the public purpose exception illustrates that simply adding a public purpose exception to the Anti-Donation Clause may not allow for more donations because what is permissible is dependent on a court's interpretation.

Public Purpose Exception in Arizona

While not clearly provided for in a plain language reading of the provision, Arizona courts apply a public purpose analysis in determining whether the state's Gift Clause is violated. "[T]o determine whether a public entity has violated the Gift Clause, [f]irst, a court asks whether the challenged expenditure serves a public purpose. If not, the expenditure violates the Gift Clause, and the inquiry ends. If a public purpose exists, the court secondarily asks whether 'the value to be received by the public is *far exceeded* by the consideration being paid by the public.' If so, the public entity violates the Gift Clause by 'providing a subsidy to the private entity'."⁴¹ Courts have interpreted a public purpose to be something that promotes public enjoyment or

⁴¹ *Schires v. Carlat*, 250 Ariz. 371, 480 P.3d 639, 643 (2021).

welfare.⁴² The Gift Clause "was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises".⁴³ Despite appearing to be a strict application, Arizona courts will usually find there to be a public purpose in an expenditure "absent only in those rare cases in which the governmental body's discretion has been 'unquestionably abused'".⁴⁴ However, under the second prong of this Gift Clause analysis, consideration is required, and "[a]lthough the consideration paid by a public entity may be legally sufficient under contract law, it does not necessarily follow that it is sufficient under the Gift Clause, because paying far too much for something effectively creates a subsidy from the public to the seller".⁴⁵

In *Schires v. Carlat*, the Arizona Supreme Court considered whether an expenditure of public funds to contribute to the opening of a private university brand campus constituted a violation of the Gift Clause.⁴⁶ In that case, the City of Peoria entered into an agreement with Huntington University whereby the city would make payments totaling up to \$1,875,000 to develop a new campus in the city as a strategy to induce economic development.⁴⁷ The court stated that the city had not "unquestionably abuse[d] its discretion" in finding a public purpose in the economic development that would result from the agreement and subsequent opening of a new university campus.⁴⁸ The court went on to find a public purpose even if Huntington University also benefited in the exchange.⁴⁹ However, the court did not find there to be adequate

⁴² See *Schires*, 480 P.3d 639, 643; *City of Glendale v. White*, 67 Ariz. 231, 236, 194 P.2d 435 (1948) (stating that "the term 'public purpose' is incapable of exact definition", changes with the times and is "best elucidated by examples").

⁴³ *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 358, 687 P.2d 354 (1984).

⁴⁴ See *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2010); cf. *City of Glendale v. White*, 67 Ariz. 231, 238, 194 P.2d 435 (1948) (characterizing a prior case as recognizing that public money spent to defeat a proposed amendment to the Workmen's Compensation Law served a political purpose rather than a public purpose).

⁴⁵ See *Schires v. Carlat*, 250 Ariz. 371, 480 P.3d 639, 644 (2021).

⁴⁶ *Schires*, 250 Ariz. 371.

⁴⁷ See *Schires*, 250 Ariz. 371, 374.

⁴⁸ See *Schires*, 250 Ariz. 371, 376.

⁴⁹ See *Schires*, 250 Ariz. 371, 376.

consideration where "neither [the university] nor Arrowhead signed an enforceable promise to provide the city with any particular economic impact".⁵⁰ The court concluded that there was not proper consideration to satisfy the requirements of the Gift Clause analysis because "although economic development activities can fulfill a public purpose, the public entity must receive a bargained-for benefit as part of the private party's performance, and the payment of public funds must not be grossly disproportionate to the fair market value of that benefit".⁵¹

If New Mexico adopts Arizona's approach, New Mexico courts will likely not find a donation, for purposes of the Anti-Donation Clause, in which the state receives value in exchange for the provision of public funds.⁵² In *City of Gallup v. New Mexico State Park and Recreation Commission*, the New Mexico Supreme Court considered a statute that authorized the issuance and sale of severance tax bonds for McKinley County to develop a state park and a statute that allowed the New Mexico State Park and Recreation Commission to lease the state park to the City of Gallup. The defendants challenged the statute based on lack of consideration. The court rejected an anti-donation claim because, under an agreement, the state would receive consideration by receiving title to 640 acres in Red Rock State Park, \$1.5 million for construction and maintenance and operation of the park for the life of the lease contract with the City of Gallup.

A recent New Mexico attorney general opinion addresses the issue of consideration in the context of an appropriation by the legislature to the City of Santa Fe to pay for capital improvement projects on a crisis center's privately owned building.⁵³ The attorney general stated that the crisis center could contract with the City of Santa Fe to provide its services to the residents of Santa Fe in exchange for the appropriated public funds, which would constitute

⁵⁰ See *Schires*, 250 Ariz. 371, 377.

⁵¹ See *Schires*, 250 Ariz. 371, 378.

⁵² See *City of Gallup v. N.M. State Park & Recreation Comm'n*, 1974-NMSC-084, ¶ 9 (rejecting an anti-donation claim because the state would receive 640 acres in Red Rock State Park, construction money and maintenance and operation of the park for the life of the lease contract with the City of Gallup).

⁵³ Allocation of Capital Outlay Funds to Solace Crisis Treatment Center (12/1/2022), Att'y Gen. Adv. Ltr. 2022-14.

adequate consideration and thus not be a violation of the Anti-Donation Clause.⁵⁴ However, absent consideration, providing money to the private, nonprofit crisis center would constitute a donation in violation of the Anti-Donation Clause.⁵⁵

If New Mexico were to include in the Anti-Donation Clause some sort of language providing for an analysis similar to Arizona's Gift Clause, it may result in the same or more stringent outcomes with regard to prohibited expenditures. While Arizona courts consider the public purpose of a donation, the analysis of a donation seems to turn on whether the consideration provided is adequate to rise to the level of what is required, namely, that "the value to be received by the public is far exceeded by the consideration being paid by the public".⁵⁶ Considering that the crisis center funds could be validated by the performance of services, it is unclear if the services provided would be proportional to the amount of money provided in the legislature's appropriation. It seems apparent that if New Mexico courts were instead to take the consideration approach provided for in *Schires*, New Mexico courts would find consideration less often than they have in current cases because Arizona courts apply a more strict standard than what would be normally sufficient in contract law. While New Mexico courts will not look into the adequacy of consideration, Arizona courts go beyond. Thus, taking Arizona's Gift Clause approach will probably not provide increased options for constitutional donations from the state to a private entity.

Public Purpose Exception in Colorado

Colorado state courts also apply a public purpose exception in interpreting the anti-aid provisions.⁵⁷ In *Witcher v. Canon City*, the Colorado Supreme Court considered whether a lease entered into by the Royal Gorge Company and Canon City violated Colorado's anti-aid provisions.⁵⁸ In this case, the city leased a portion of a park to someone who agreed to build a

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 3.

⁵⁷ *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986).

⁵⁸ *Witcher*, 716 P.2d 445, 447.

suspension bridge across the Royal Gorge.⁵⁹ Later, the Royal Gorge Company purchased the original lease from the lessee.⁶⁰ At some point in various cycles of the lease, the city and the Royal Gorge Company created an amendment to the lease to allow modernization efforts to begin on the bridge.⁶¹ In financing these modernization efforts, the city allowed the company to keep the city's portion of tolls accumulated from use of the bridge and a percentage of a fee collected by the city on concessions and certain sales made at the park, up to a specified amount.⁶² The citizens of Canon City sued, arguing that the modernization efforts proposed in the new lease amendment violated Colorado's anti-aid provisions.⁶³ The court first held that the city did not pledge its credit and that only the Royal Gorge Company, not the city, was obligated to perform the modernization of the bridge and to contract with third parties.⁶⁴ Additionally, the court held that the amendment did not constitute a donation to a corporation because the city "has received the benefit of an improved facility with an extended life in exchange for its agreement to forego certain revenues", and this was the case even if the company benefited indirectly.⁶⁵ The court also held that the city's decision to forego fees and tolls met the public purpose exception because it served the purpose "of improving and extending the life of a valuable source of municipal revenue and enhancing a major attraction that brings visitors to the City".⁶⁶

In *Denver Urban Renewal Authority v. Byrne*, the Colorado Supreme Court considered various challenges to tax allocation bonds that would be issued to complete an urban renewal

⁵⁹ *Witcher*, 716 P.2d 445, 447.

⁶⁰ *Witcher*, 716 P.2d 445, 447.

⁶¹ *Witcher*, 716 P.2d 445, 447.

⁶² *Witcher*, 716 P.2d 445, 447-448.

⁶³ *Witcher*, 716 P.2d 445, 448.

⁶⁴ *Witcher*, 716 P.2d 445, 454.

⁶⁵ *Witcher*, 716 P.2d 445, 455.

⁶⁶ *Witcher*, 716 P.2d 445, 455.

project.⁶⁷ Among many challenges, the City of Denver argued that the payment of relocation benefits to private residents constituted an unconstitutional donation of public funds to private persons.⁶⁸ The court rejected this argument, holding that there was no violation of Colorado's anti-aid provisions because the relocation benefits "undisputably" constituted a public purpose, reasoning that "[t]he purpose of this provision is to provide supplemental assistance for particular and well-defined losses resulting from relocation. No net benefit will accrue to the relocated person or business".⁶⁹

Similar to the case law illustrated above for California, these Colorado cases illustrate that the public purpose exception as applied by Colorado state courts has been used to accomplish much of what New Mexico has in the current state of its Anti-Donation Clause. Like in *Byrne*, the New Mexico court in *Lavender* acknowledged the equity that would come from making utilities whole after requiring relocation. The New Mexico court justified this on police power grounds, while the Colorado court applied the public purpose exception to ultimately reach the same end, which was to put the private parties in the same place they would have been had the required relocation never occurred. In contrast, in *Witcher*, the Colorado court found there to be a public purpose justifying the city's forgoing of fees and tolls to the Royal Gorge Company to modernize the bridge, in that it would attract visitors and thus bring revenue to the city. Similarly, in *Lavender*, the New Mexico court additionally justified the relocation reimbursement on grounds of protecting the safety, health and welfare of the public. Taken together, these cases again indicate that providing a public purpose exception to the Anti-Donation Clause may not result in different uses of public funds than are currently available. Again, this is more dependent on court interpretation than on the drafting of the Anti-Donation Clause.

The public purpose exceptions applied by Arizona, California and Colorado courts indicate that New Mexico has already accomplished what these states have, absent a public purpose exception spelled out in its constitution. None of these states have the public purpose exception included within the language of their constitutional anti-aid provisions. Instead, the

⁶⁷ *Denver Urb. Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980).

⁶⁸ *Byrne*, 618 P.2d 1374, 1382.

⁶⁹ *Byrne*, 618 P.2d 1374, 1384.

courts of Arizona, California and Colorado apply a public purpose analysis to determine whether an expenditure of public funds or a pledge of credit violates their anti-aid provisions. New Mexico courts have routinely rejected reading in a public purpose exception to validate a donation under the Anti-Donation Clause but have accomplished the same ends without a public purpose exception by a plain language reading of the clause. Thus, if New Mexico's Anti-Donation Clause were redrafted to mirror that of Arizona, California or Colorado, this would likely result in no change to the constitutional validity of donations to private persons.

Iowa's Approach

If the Anti-Donation Clause were to be drafted to mirror Iowa's restriction on aid for local and private purposes, it would likely result in an increased variety of constitutional public funds donations. Article 3, Section 31 of the Constitution of Iowa provides in part that: "no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly".⁷⁰ On its face, this provision appears to allow public money to be appropriated for private purposes, upon a two-thirds' vote by each house of the legislature, without any regard to who the recipient of the funds is. In comparison to the Anti-Donation Clause, Iowa's anti-aid provision provides for the opposite considerations in appropriating funds because New Mexico does not focus on the purpose but instead focuses on the recipient. In determining whether this constitutional provision is violated, Iowa courts first consider whether the appropriation at issue is for a public or private purpose. The Iowa Supreme Court has stated that the concept of public purpose is to be given "flexibility and expansive scope" in order "to meet the challenge of increasingly complex, social, economic, and technological conditions".⁷¹ Iowa's anti-aid provision has been used to finance nonprofit and for-profit ventures.⁷²

⁷⁰ IA CONST. Art 3, § 31.

⁷¹ *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d 89 (Iowa 1977).

⁷² See the following Iowa attorney general opinions: Op.Atty.Gen. 98-1-2, 1998 WL 541522 (providing that assuming a city's urban renewal plan properly provides for the demolition of a privately owned building and assures that the use of public funds will achieve a public purpose, the state constitutional prohibition against using public funds for private purposes does not necessarily preclude the city from expending funds from tax increment financing to demolish the building); Op.Atty.Gen. (Anderson), May 9, 1980, 1980 WL 25979 (reasoning that while a tax levied by a county for support of nonprofit historical societies may not be used for construction or maintenance of a building, a county may make an appropriation for construction of a building to be owned by a nonprofit historical society with the approval of two-thirds of the general assembly); Op.Atty.Gen., May 10, 1967, 1967 WL 167057 (providing that appropriations to the state Dairy Association, Beef Cattle Producers Association, Swine

In *Dickinson v. Porter*, a land owner challenged the Agricultural Tax Credit Act, which "appropriates for each fiscal year \$500,000 to be apportioned as a credit against the tax on each tract of agricultural lands in school districts where the millage for the general school fund exceeds 15 mills", arguing that it constituted a donation of public money for a private purpose in violation of Iowa's aid restriction provision.⁷³ The Iowa Supreme Court rejected the argument that the expenditure was for a private purpose, reasoning that encouraging agricultural activity and improving school districts was of great import to the state as a matter of public policy.⁷⁴

Dickinson should be read in comparison with *State ex rel. Mechem v. Hannah*. In *Mechem*, the New Mexico Supreme Court considered appropriations made to "pay in part the state's share of emergency hay and roughage certificates issued to livestock owners as contribution to be used by the recipient livestock owner in the purchase of hay for their foundation herds of livestock", which was occasioned by an extended drought in the state.⁷⁵ In dicta, the court considered how it would be a "wonderful thing" if such appropriations of state money were allowed to be spent to aid the livestock industry, as it would in turn benefit the state economy.⁷⁶ However, without the private party ranchers and farmers being indigent, the court held that this public purpose of maintaining herds of livestock was not sufficient to save the appropriation because, ultimately, it was an appropriation of money to a private individual in violation of the plain language of the Anti-Donation Clause.⁷⁷

The holding of the New Mexico court in *Mechem* illustrates, once again, that a plain language reading of the Anti-Donation Clause by the courts, explicitly restricting donations from

Producers Association and State Sheep Association require only a majority vote of the legislature, rather than a two-thirds' vote required for appropriations for private or local purposes); Op. Atty. Gen. (Harbor), Oct. 18, 1971, 1971 WL 240841 (providing that an appropriation to be paid by the executive council to a private college of osteopathic medicine and surgery for planning, constructing and equipping a new medical school on land owned by the college is for a public, rather than a private, purpose and a two-thirds' vote in each house of the general assembly is not required).

⁷³ *Dickinson v. Porter*, 240 Iowa 393, 396, 35 N.W.2d 66 (1948).

⁷⁴ *See Dickinson*, 240 Iowa 393, 417-418.

⁷⁵ *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110, 314 P.2d 714, ¶ 1 (S. Ct. 1957).

⁷⁶ *See Mechem*, 1957-NMSC-065, ¶ 39.

⁷⁷ *See Mechem*, 1957-NMSC-065, ¶ 40.

the state to a private person, will continue unless the Anti-Donation Clause is amended to provide otherwise. While New Mexico courts do not read in a public purpose exception, neither do the Iowa courts, like the court in *Dickinson*, because the Iowa anti-aid provision that restricts appropriations does so explicitly on the basis of the appropriation's purpose. This allowed the court in *Dickinson* to uphold a donation for a public purpose because the state sought to encourage agriculture, and, in comparison, the New Mexico court in *Mechem* held that donations to ranchers during a drought were unconstitutional despite the public purpose. Thus, Iowa courts were able to consider the perceived merits of the appropriation, where New Mexico courts could not.

If New Mexico were to take the same approach as Iowa in redrafting the Anti-Donation Clause, it may result in more constitutionally permissible donations. First, removing the prohibition on donations of public funds to private persons and replacing this with language that provides a restriction only on private purposes would explicitly create a public purpose exception regardless of who is receiving the funds. Second, even if a donation did not serve a public purpose, the legislature would be able to vote on each appropriation to create constitutional validity upon passage with a two-thirds' vote in each house. Doing so would allow each appropriation to go through the vetting process provided by the legislative process and would also allow each appropriation to be considered on its merits. However, it is important to note that if the Iowa approach were fully taken, doing so would likely also require a repeal of Article 4, Section 31 of the Constitution of New Mexico,⁷⁸ as the Iowa provision seems to allow for direct appropriations to these private entities.

Repealing the Anti-Donation Clause

An additional option to opening lines of donations to private persons, regardless of their purpose, is to repeal the Anti-Donation Clause. The Economic Development Department has indicated that "[t]he anti-donation clause can sometimes cause complications and difficulties engaging in economic development efforts, but that clause also safeguards taxpayers' money,

⁷⁸ See N.M. CONST. ART. IV, Section 31 (providing that "[n]o appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine").

ensuring benefit to the state in exchange for funds; eliminating the anti-donation clause eliminates that safeguard. If the anti-donation clause is repealed, the state would presumably be able to give money to any person or any company for any or no purpose."⁷⁹ Further, "[a]nti-aid provisions were drafted to serve the foundational public-trust principle that the exercise of the tax power and expenditure of public funds must be for the benefit of the public and not private interests".⁸⁰ Thus, there are public perception concerns that may influence the choice to amend or repeal the Anti-Donation Clause.

CONCLUSION

The Anti-Donation Clause prohibits the state or an arm of the state from making donations to a private person, with certain exceptions. The New Mexico Legislature has previously considered constitutional resolutions to amend or repeal the Anti-Donation Clause in full. New efforts may include taking similar approaches to the anti-aid constitutional provisions of states like Arizona, California, Colorado and Iowa. However, taking such an approach may prove to be fruitless, as the plain language of their anti-aid provisions mirror that of the Anti-Donation Clause in substance. While the courts in those states apply a public purpose exception analysis to evaluate the validity of a donation from the state to a private person, New Mexico courts have refused to read in a public purpose exception because the Anti-Donation Clause does not explicitly provide for one. Alternatively, if New Mexico were to take an approach similar to Iowa in redrafting the Anti-Donation Clause, it may result in more constitutionally permissible donations because that anti-aid provision explicitly requires each appropriation to be for a public purpose or to be subject to a vote of the legislature if it is not. Further research into the fiscal safeguards of other states that do not have anti-aid provisions may be worth considering. Finally, the Anti-Donation Clause could be repealed, which would eliminate this issue but may result in public perception concerns and the loss of fiscal safeguards, or at least the perception of safeguards.

- 20 -

⁷⁹ Fiscal Impact Report, S.J.R. 9, 2021 Regular Sess. (N.M. 2021), <https://www.nmlegis.gov/Sessions/21%20Regular/firs/SJR09.PDF>.

⁸⁰ See Farris, *supra*, note 1, at 5.