No. A03-124
No. A03-155

STATE OF MINNESOTA
IN SUPREME COURT

Star Tribune Company, The Minnesota Daily,
Northwest Publications, Inc., The Rochester Post-Bulletin,
Minnesota Joint Media Committee,

Respondents,

vs.

Regents of the University of Minnesota, Maureen K. Reed,
Robert Bergland, Anthony R. Baraga, Peter Bell,
Frank Berman, Dallas Bohnsack, William Hogan,
Jean Keffeler, Richard McNamara, David Metzen,
H. Bryan Neel and Lakeesha Ransom,

Appellants,

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND STUDENT PRESS LAW CENTER

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STATEMENT OF INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.[1]

The Student Press Law Center is a national not-for-profit corporation created to conduct legal research and offer information and advocacy for the purpose of promoting and preserving the free press and freedom of information rights of high school and college journalists. To that end, the Center has collected information on student press cases nationwide and has filed amicus briefs with the United States Supreme Court and various state and federal appellate courts.

The selection of the president of the University of Minnesota is newsworthy, and journalists' ability to report on the selection is directly affected by the amount of information available under the open government laws. Where the selection process is conducted behind closed doors, journalists are unable to investigate and report, and the media can only announce a selection once one has been made. Additionally, the ability of journalists to access information about the selection of the university president directly affects the public's

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[1] Pursuant to Minn. R. Civ. App. P. 129.03, the undersigned certify that counsel for the parties to this appeal did not author this brief in whole or in part. No person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

access to such information, as most members of the public will have access to the process only through the media and not through open meeting and record requests of their own.

STATEMENT OF LEGAL ISSUES

Amici curiae adopt Respondents' Statement of Legal Issues.

STATEMENT OF THE CASE

Amici curiae adopt Respondents' Statement of the Case.

STATEMENT OF FACTS

Amici curiae adopt Respondents' Statement of Facts.

INTRODUCTION

Every year presidential searches are conducted in the open at dozens of public universities. Great things are accomplished at these public institutions. They are the jewels of their state's educational systems, conducting groundbreaking research and enabling their students to become leaders in many fields.

The Regents of the University of Minnesota ("Regents") and John Doe *amici curiae* would have this court believe that Minnesota's open government laws are aberrational statutes that overly burden public universities. In reality, it is common for the names of finalists in presidential searches at public universities to be made public, and with good reason. Open government laws allow oversight that ensures public confidence in public institutions and prevents waste and corruption. Considering all that the nation's public universities accomplish, they do not seem to be suffering from this oversight, nor is the

quality of university presidents suffering.

Because the public interest in open government outweighs the privacy interests asserted by the Regents and John Doe *amici*, and because open university presidential searches are effective in attracting highly qualified applicants throughout the country, this Court should affirm the judgments below and order the Regents to release the names of finalists for the position of President of the University of Minnesota as is required by the state's open government laws.

ARGUMENT

I. The Public Interest in Disclosure of Finalists' Names Outweighs Other Interests

A. The Public Has a Compelling Interest in Open Government

Through the Open Meeting Law, Minn. Stat. § 13D.01 et seq. (OML), and the Minnesota Government Data Practices Act, Minn. Stat. § 13.01 et seq. (MGDPA), the Minnesota Legislature acknowledges that citizens in a democracy have the right to oversee the institutions that act in their name and with their tax dollars. This Court reiterated the values served by the OML in *Prior Lake American v. Mader*, 642 N.W. 2d 729, 736 (Minn. 2002)(internal citations omitted):

> (1) to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning public bodies' decisions or to detect improper influences;
> (2) to assure the public's right to be informed; and
> (3) to afford the public an opportunity to present its views to the public body.

"Because the Open Meeting Law was enacted for the public benefit, we construe it in favor of access." *Id.*

The President of the University of Minnesota is a public official with an annual salary of more than $400,000, and sits at the head of an institution with an annual budget of $2 billion.[2] Furthermore, to most citizens, the President is the public face of the University. The public has an undoubted interest in being assured that a public official with responsibility for such vast amounts of public money is worthy of the public trust. An open search process allows the public to weigh the qualifications of and comment on applicants so that it may be assured that its public servants are worthy of that trust. Additionally, an open search process assures the public that the process itself is fair and equitable.

The students of the University of Minnesota have a special interest in the selection of the President of the University. The President influences the expenditure of funds and directs policy that affects students' day-to-day lives. The President is in many ways to the students what the Governor is to all citizens of the state. Restricting access to students to the presidential selection process is comparable to withholding public access to the name of a candidate for Governor.

Openness in the search process also has the benefit of ferreting out undesirable or problematic applicants – bringing to light problems that might otherwise be missed by a

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[2] University of Minnesota Press Release, *Bruininks Appointed U of M President*, *available at* http://www1.umn.edu/urelate/newsservice/newsreleases/02_11bruininksnamed.html; Kristina Torres, *Second Union Oks Strike Vote*, Pioneer Press, Aug. 28, 2003.

closed search committee. In 2001, the newly selected president of Northern Arizona University left after only four months when he was accused of making unwanted sexual advances toward a colleague.[3] His successor's hiring was delayed when it was revealed that inaccurate information had been given to the board of regents concerning his divorce. In both cases, the board of regents had relied on a private recruiting firm to provide background checks about the applicants, and in both cases it gave the regents incomplete and inaccurate information.

Last year, the University of South Florida's deputy athletic director was accused of sexual harassment by members of his staff.[4] The director had been ousted from his previous position at Colorado State University over allegations of dishonesty, incompetence and inappropriate treatment of staff. This was unknown to USF when it hired him because the allegations were not disclosed by the search firm that recommended him. An open search process allows independent investigation by the public and the media and could bring such problems with applicants to light sooner, avoiding the problems and embarrassment of discovery and the unsuitability of the choice after the applicant is in the later stages of the selection process or has already been hired.

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[3] *University President Searches by Headhunting Firm Flawed*, Associated Press Newswires, April 12, 2002.

[4] Brett McMurphy, *Suit, Allegations Follow Athletics Deputy at USF*, The Tampa Tribune, October 12, 2002.

B. Applicants for Public Office Have A Minimal Privacy Interest in Withholding Their Names from the Public

The President of the University of Minnesota is a public official paid with public funds, who directs public dollars and policy. John Doe *amici* and Petitioners assert that if names of applicants are disclosed to the public, applicants' reputations and privacy will be damaged. John Does and Petitioner miss an essential point: The applicants are applying for *public* office. If they desire to be servants of the people, they have only a minimal privacy right in withholding the fact of their application from those people.

John Does illustrated the fallacy of their argument in their brief to the Court of Appeals, where they argued:

> The responsibilities of the President of the University are not unlike those of CEO's of major corporations. ... Few would argue that a private corporation could effectively serve its best interests, and the best interests of the shareholders to whom it is responsible, by limiting its CEO search to only those candidates who would risk the personal and professional consequences that public disclosure of their candidacy would entail. The logic of this reality applies to the search for a president for the University of Minnesota.

Brief of *Amici Curiae* John Doe Applicants at 12, *Star Tribune Co. v. University of Minnesota Board of Regents*, 667 N.W.2d 447 (Minn. Ct. App. 2003). The President of the University of Minnesota is *not* a corporate CEO. Unlike a corporate CEO, the President of the University of Minnesota is responsible to the citizens of Minnesota who pay his or her salary through their tax dollars and tuition, and thus the public has an interest in the President's selection. The public has no such interest in the selection of a corporate CEO.

C. The Interest in Attracting Candidates Who Want Their Names Concealed is Outweighed by the Interest in Open Government

Petitioners argue that withholding applicants' names is necessary to attract candidates who would demand that their names remain concealed. This is not a compelling argument. In a democratic society there is an important interest in accountability to the public that supercedes economic efficiency and maximizing of profit. The public has a right to know how its officials operate in the public's name and with the public's money, even if this is not the most efficient or painless way to do business. Such efficiency arguments in applying open government laws to universities have been made to, and rejected by, courts in Kentucky, Ohio, Wisconsin and Alabama.[5]

More importantly, the dire predictions of the Petitioners and John Doe *amici* have not come to pass. All across the United States open university presidential searches are conducted with great success. Courts in Alabama, Arizona, Florida, Georgia, Kentucky, Nebraska and Texas have all held university presidential searches to be open under the states' open government laws,[6] and these states are not without qualified university presidents. The

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[5] *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884, 886 (Ky. 1987); *State ex rel. Besser v. Ohio State University*, 732 N.E.2d 373, 406 (Ohio 2000) (Lundberg, J. dissenting); *Milwaukee Journal v. Board of Regents of the University of Wisconsin System*, 472 N.W.2d 607, 614 (Wis. Ct. App. 1991) (Sundby, J. dissenting); *Birmingham News Co. v. Bartlett*, No. CV 88-504-403MC at 5-6 (Ala. Cir. Ct. Nov. 15, 1988).

[6] *Birmingham News Co.*, No. CV 88-504-403MC at 5-6; *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348, 352 (Ariz. 1991); *Wood v. Marston*, 442 So.2d 934, 941 (Fla. 1983); *Board of Regents of the University System of Georgia v. The Atlanta Journal*, 378 S.E.2d 305, 307-8 (Ga. 1989); *The Lexington Herald-Leader Co.*, 732 S.W.2d at 886; *Meyer v. Board of Regents of the University of Nebraska*, 510 N.W.2d 450, 454-6 (Neb. Ct. App. 1993);

courts of Alaska, Arkansas, California, Colorado, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, Nevada, New York, North Carolina, Ohio, Oklahoma, Tennessee, Vermont, Washington and Wisconsin have ruled that open government laws apply to their state universities in contexts other than presidential searches.[7] These cases all illustrate that, contrary to Petitioner's contentions, public universities such as the University of Minnesota prosper in the sunshine.

Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546, 547 (Tex. Ct. App. 1983). Although Georgia and Texas have subsequently amended their statutes to exempt some presidential search information from disclosure, those were policy decisions made by the legislatures, not based on any findings of harm by a court.

[7] *Carter v. Alaska Public Employees Association*, 663 P.2d 916, 921 (Alaska 1983); *University of Alaska v. Geistauts*, 666 P.2d 424, 427 (Alaska 1983); *Alaska Community Colleges' Federation of Teachers v. University of Alaska*, 677 P.2d 886, 888, n.2 (Alaska 1984); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350, 351 (Ark. 1975); *Regents of the University of California v. Superior Court*, 976 P.2d 808, 822 (Cal. 1999); *Dawson v. State Compensation Insurance Authority*, 811 P.2d 408, 409 (Colo. Ct. App. 1991); *Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 901, n.7 (Ind. Ct. App. 2003); *Greene v. Athletic Council of Iowa State University*, 251 N.W.2d 559, 560-2 (Iowa 1977); *Phillips v. Board of Supervisors of Louisiana State University*, 391 So.2d 1217, 1218-19 (La. Ct. App. 1980); *Guy Gannett Publishing Co. v. University of Maine*, 555 A.2d 470, 471 (Me. 1989); *Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*, 478 So.2d 269, 276-7 (Miss. 1985); *Tribune Publishing Co. v. Curators of the University of Missouri*, 661 S.W.2d 575, 585 (Mo. Ct. App. 1984); *Charlier v. Corum*, 774 S.W.2d 518, 519-20 (Mo. Ct. App. 1989); *Del Papa v. Board of Regents of the University and Community College System of Nevada*, 956 P.2d 770, 778-9 (Nev. 1998); *Sandoval v. Board of Regents of the University*, 67 P.3d 902, 903 (Nev. 2003); *Holden v. Board of Trustees of Cornell University*, 440 N.Y.S.2d 58, 59 (N.Y. App. Div. 1981); *DTH Publishing Corp. v. University of North Carolina*, 496 S.E.2d 8, 10-11 (N.C. Ct. App. 1998); *State ex rel. Besser*, 732 N.E.2d at 405; *Carl v. Board of Regents of the University of Oklahoma*, 577 P.2d 912, 915 (Okla. 1978); *Mid-South Publishing Co. v. Tennessee State University*, No. 01-A-01-9002CH00074, 1990 WL 207410, 5 (Tenn. Ct. App. Dec. 19, 1990); *Animal Legal Defense Fund, Inc. v. Institutional Animal Care and Use Committee of the University of Vermont*, 616 A.2d 224, 226 (Vt. 1992); *Cathcart v. Anderson*, 530 P.2d 313, 315 (Wash. 1975); *Milwaukee Journal*, 472 N.W.2d at 611.

II. The Majority of States Apply Their Open Government Laws to Universities Created and Empowered by the State Constitution

A. Other States with Constitutionally Created University Boards Have Applied Open Government Laws to Presidential Searches

Numerous other state courts have examined the issue of applying open government laws to university presidential searches by boards created by state constitutions. Contrary to the Supreme Court of Michigan's ruling in *Federated Publications, Inc. v. Board of Trustees of Michigan State University*, 594 N.W.2d 491 (Mich. 1999), these state courts have found no constitutional prohibition to applying open government laws to presidential searches.

In *Board of Regents of the University System of Georgia v. The Atlanta Journal*, 378 S.E.2d 305, 307 (Ga. 1989), the board argued, as the Regents do in this case, that application of the Georgia Open Records Act to a university presidential search committee would impair the university's ability to attract qualified candidates.[8] The Supreme Court of Georgia rejected this argument, holding that "The General Assembly has defined, directly and specifically, the extent of permissible secrecy as to the appointment of public officers or employees. *That is clearly within its prerogative*." *Id.* at 308 (emphasis added). The court noted "it would make for a strange rule, indeed, to hold that a person who applies for a public position – to serve the public and be paid by the public – has the right to keep secret from the public the very existence of such an application." *Id.* at 308, n.6.

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[8] "There shall be a Board of Regents of the University System of Georgia ... The Government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents of the University System of Georgia." Ga. Const. art. VIII, § IV.

The Supreme Court of Nevada applied the state Open Meeting Law to the constitutionally created board of regents in *Sandoval v. The Board and Regents of the University and Community College System of Nevada*, 67 P.3d 902 (Nev. 2003), and in *Del Papa v. The Board of Regents of the University and Community College System of Nevada*, 956 P.2d 770 (Nev. 1998).[9] At no point in either case did the court find a constitutional objection to the application of the Open Meeting Law to the board. In contrast, in *King v. Board of Regents of University of Nevada*, 200 P.2d 221 (Nev. 1948), the court found that the creation by the legislature of a non-voting advisory board to the board of regents violated the board's constitutional mandate. Read together, these cases illustrate an important difference between an advisory board created by the legislature to participate in all activities of the board of regents "up to the final vote,"*Id*, and the general Open Meeting Law. The advisory board was created to directly impact and influence the activities of the board of regents and was therefore found to be unconstitutional but the Open Meetings Law, which merely requires that the board of regents conduct its business in the open, does not intrude on the board's autonomy.

In the context of a presidential search, the Nevada Attorney General, after considering the interests of applicant privacy and attracting candidates who might object to publicity, concluded that "the public interest outweighs any need for confidentiality in the process of

[9] "The Legislature shall provide for the establishment of a State University ... to be controlled by a Board of Regents whose duties shall be prescribed by law." Nev. Const. art. XI § 4.

selecting a university system chancellor." Nev. Op. Atty. Gen. No. 94-16 (1994).[10]

The Supreme Court of Alabama applied the state Sunshine Law and its exceptions to the constitutionally created board of trustees in *Auburn University v. The Advertiser Co.*, No. 1002096, __ So.2d __, 2003 WL 21205832 (Ala. May 23, 2003).[11] This decision supports the earlier holding of a lower court that the Sunshine Law applies to a presidential search by the constitutionally created board of the University of Alabama in *Birmingham News Co. v. Bartlett*, No. CV 88-504-403MC (Ala. Cir. Ct. Nov. 15, 1988).[12] The board in *Bartlett* argued that "the best qualified candidate is likely to already be in a highly visible and responsible position with another institution. If such person knows that the fact of his candidacy for the office of President of the University of Alabama will be made public, he would be unwilling to be considered." *Id.* at 5. Nevertheless, the court held that the board "must comply with the procedural requirements imposed by the Sunshine Law as that law has been construed by the Supreme Court of Alabama." *Id.* at 5-6.

The Supreme Court of Arizona held in *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348, 352 (Ariz. 1991), that although names of all candidates for president of Arizona State University need not be disclosed by the constitutionally created

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[10] *Available at* http://www.ag.state.nv.us/agopinions/oldopinions/1994_ago.pdf.

[11] "Auburn University ... shall be under the management and control of a board of trustees." Ala. Const. Amend. 161.

[12] "The state university shall be under the management and control of a board of trustees." Ala. Const. art. XIV § 264.

board, names of finalists for the position must be released under the public records law.[13] "[T]he fact that the final candidates have an express desire for the job, should militate against maintaining confidentiality. ... they must expect that the public will, and should, know they are being considered." *Id*.

The Court of Appeals of Nebraska in *Meyer v. Board of Regents of the University of Nebraska*, 510 N.W.2d 450, 455-6 (Neb. Ct. App. 1993), allowed a closed session of the constitutionally created board appointing an interim president of the University of Nebraska under an exception to the public meeting law, but the court specifically relied on it being an *emergency* meeting appointing an *interim* president due to "difficulty in dealing with" the outgoing president.[14] In neither *Phoenix Newspapers, Inc.* nor *Meye*r did the courts find difficulty in applying the open government laws because of the constitutional status of the boards of regents.

B. Other States Have Applied Open Government Laws to Constitutionally Created University Boards in Contexts other than Presidential Searches

A number of states with university boards that are constitutionally created have ruled that open government laws apply to those boards in contexts other than presidential

[13] "The regents of the university ... shall be appointed by the governor." Ariz. Const. art XI § 5.

[14] "The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a ... Board of Regents." Neb. Const. art. VII § 10.

searches.[15]

The College Board of Mississippi argued that "as a constitutionally created board, it is prevented from discharging its constitutional responsibilities by the 'open meetings' statute" in *Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*, 478 So.2d 269, 271 (Miss. 1985).[16] In addition to its constitutional mandate, the Mississippi board is given "wide latitude and discretion" concerning control of the university by statute. *Id.* at 273-4.

Despite this broad constitutional and statutory discretion, the board is subject to the open meeting law, the Supreme Court of Mississippi held. *Id.* at 276. The court noted that "the Board is not beyond the lawmaking power of the Legislature ... [n]or is the Board's power to manage and control unconstitutionally infringed upon, interfered with, or diminished by submission to the requirement of open meetings." *Id.* "This Court acknowledges that openness in sensitive areas is sometimes unpleasant, or difficult, or competitive, and sometimes harmful. Nevertheless, in a democratic society the public's business must be open to maintain the public's confidence in its officials, to make intelligent

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[15] Other state courts have also applied laws of general applicability such as open government laws to constitutionally created and empowered bodies other than university boards. *See*, *Englemann v. State Board of Education*, 2 Cal. App. 4th 47 (Cal. Ct. App. 1991) (applying California's Administrative Procedure Act to the State Board of Education's constitutionally mandated textbook selection process); *Connell v. Kersey*, 547 S.E.2d 228 (Va. 2001) (holding that there is no constitutional objection to applying the Virginia Freedom of Information Act to a constitutionally created Commonwealth's Attorney).

[16] "The State institutions of higher learning ... shall be under the management and control of a Board of Trustees." Miss. Const. art. VIII § 213-A. "Such Board shall have the power and authority to elect the heads of the various institutions of higher learning." *Id.*

judgments, and to select good representatives." *Id.*

The Supreme Court of Mississippi noted that "[t]his interpretation is in agreement with the majority of other jurisdictions of this country that have addressed this question," thus the court "does not accept the premise that the people of this State cannot be entrusted with less disclosure than that of citizens of other states." *Id.* at 277-8.

The Supreme Court of Alaska rejected the argument that the University of Alaska's constitutional status, unique among the state's agencies, precludes the application of the public records disclosure statute in *Carter v. Alaska Public Employees Assoc.*, 663 P.2d 916, 919 (Alaska 1983), holding that "the legislature constitutionally may require the University to disclose its records upon public request."[17] In *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975) the Supreme Court of Alaska had held that the university was covered by the statute governing suits against the state.[18] "Despite the degree of constitutional as well as statutory autonomy the University clearly possesses, we are of the opinion that it must be considered to be an integral part of the state educational system mandated by the constitution." *Id.* at 124.

The Missouri Court of Appeals noted in *Charlier v. Corum*, 774 S.W.2d 518, 519-20

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[17] See also, *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983) (holding that the Public Meetings Act applies broadly to the University and not only to the Board of Regents); *Alaska Community Colleges' Federation of Teachers v. University of Alaska*, 677 P.2d 886, 888 n.2 (Alaska 1984) ("There is no dispute in this case that the Alaska Open Meetings Act applied to the Board of Regents.").

[18] "The University of Alaska shall be governed by a board of regents. ... The board shall, in accordance with the law, formulate policy and appoint the president of the university." Alaska Const. art. VII § 7.3.

(Mo. Ct. App. 1989), that the legislature had amended the Sunshine Law to specifically include records of the constitutionally created board of curators after a previous decision of the Court of Appeals, *Tribune Publishing Co. v. The Curators of the University of Missouri*, 661 S.W.2d 575 (Mo. Ct. App. 1984).[19] *Tribune Publishing Co.* recognized the board's constitutional origin, but held that "the Board of Curators cannot meet under the guise of an informal social meeting to circumvent the 'Sunshine Law.'" *Id.* at 585, n.3. The court found however that certain of the board's records were not public under the definition of "public governmental body" in the act. *Id.* The *Charlier* court noted that the legislature corrected this oversight. 774 S.W.2d at 519-20.

The Supreme Court of Oklahoma held that the Open Meeting Law applied to the board of regents because of its constitutional origin in *Carl v. Board of Regents of the University of Oklahoma*, 577 P.2d 912, 915 (Okla. 1978).[20]

The North Carolina Court of Appeals held that the Open Meetings Law applied to the university's undergraduate court in *DTH Publishing Corp. v. The University of North Carolina*, 496 S.E.2d 8, 10 (N.C. Ct. App. 1998). The court rejected the university's argument that the law only applied to university bodies appointed by the Board of Trustees.[21]

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[19] "The government of the state university shall be vested in a board of curators." Mo. Const. art. IX § 9(a). "The Board of Curators is sui generis; by constitutional mandate it is a separate entity given the status of a public governmental body." *Tribune Publishing Co.*, 661 S.W.2d at 579.

[20] "The government of the University of Oklahoma shall be vested in a Board of Regents." Okla. Const. art. XIII § 8.

[21] "The General Assembly shall provide for the selection of trustees of The University of North Carolina ... in whom shall be vested all of the privileges, rights, franchises, and

The Supreme Court of California in *The Regents of the University of California v. Superior Court*, 976 P.2d 808, 822 (Cal. 1999), and the Court of Appeals of Louisiana in *Phillips v. Board of Supervisors of Louisiana State University*, 391 So.2d 1217, 1218 (La. Ct. App. 1980), both applied open government laws to their constitutionally created university boards, although in both states an open government provision is also included in the state constitution.

C. The Michigan Decision Should Not Be Followed by This Court

In light of the numerous other cases applying open government laws such as the OML and MGDPA to constitutionally created university boards and other constitutional offices, both in the context of university presidential searches and in other contexts, the Supreme Court of Michigan's decision in *Federated Publications* gives inadequate weight to the important public interest in open government and should not be followed by this Court.

Furthermore, *Federated Publications* is distinguishable from this case because the Board of Trustees of Michigan State University operates under a more absolute constitutional mandate than that which governs the Regents of the University of Minnesota. The Michigan board is "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which within the scope of its functions, is co-ordinate with and equal to that of the legislature." 594 S.W.2d at 496, n.8. This absolute grant of authority is

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endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina," N.C. Const. art. VII § 8.

inconsistent with the balance between Regent and Legislative authority established by the precedents of this Court, as discussed below.

III. The Minnesota Constitution Provides for a Balance Between Board of Regents Autonomy and Legislative Control

The Minnesota Constitution does not grant absolute, unfettered authority to the Board of Regents to determine what laws will or will not apply to the university. It grants the Regents considerable autonomy, but also provides avenues for legislative oversight. Laws of general applicability such as the OML and MGDPA, not directed at usurping the Regents' constitutionally granted authority, are properly applied to the university, as this Court recognized when it said that the OML applied to the Regents in *Winberg v. University of Minnesota*, 499 N.W.2d 799, 801-2 (Minn. 1993).

Section 9 of the University Charter, given constitutional status by Article XIII § 3 of the Constitution of the State of Minnesota, provides that "The Regents shall have power, and it shall be their duty to enact laws for the government of the University; to elect a Chancellor, who shall be ex-officio, President of the Board of Regents**."**

This Court, in *State ex rel. University of Minnesota v. Chase*, 175 Minn 259, 266, 220 N.W. 951, 954 (1928)**,** interpreted the above language as meaning:

> the people of the state, speaking through their Constitution, have invested the regents with a power of management of which no Legislature may deprive them. *That is not saying that they are the rulers of an independent province or beyond the lawmaking power of the Legislature.* But it does mean that the whole executive power of the University having been put in the regents by the people, no part of it can be exercised or put elsewhere by the Legislature.

(emphasis added). *Chase* explained a dichotomy of Regent and Legislative power, saying "at one extreme, the Legislature has no power to make effective, in the form of law, a mere direction of academic policy or administration. At the other extreme it has the undoubted right within reason to condition appropriations as it sees fit." *Id.* at 954. Between these two extremes therefore, it is possible for the Regents to adopt policies and the Legislature to enact laws.

This balance between Regent and Legislative authority was again recognized in *Fanning v. University of Minnesota*, 183 Minn. 222, 236 N.W. 217 (1931), and in *Regents of the University of Minnesota v. Lord*, 257 N.W.2d 796 (Minn. 1977).

> The people by their Constitution chose to perpetuate the government of the university ... and the powers they gave are not subject to legislative or executive control; nor can the courts at the suit of a taxpayer interfere with the board while governing the university in the exercise of its granted powers. *This does not mean that the people created a corporation or institution which is above the law.*

Fanning, 236 N.W. at 219 (emphasis added). "[A]fter all, when the theorizing as to the relationship of the board and the university and the state is at an end, the university is the people's university. It does not rule; it serves." *Id.* "This power given to the university is separate and complete and is, by necessity, denied to the legislature. This is not to say that the university is above the law." *Lord*, 257 N.W.2d at 798.

The aforementioned cases establish that the Legislature has the ability to enact laws that affect the Regents. Thus, while the Legislature may not enact laws that usurp the constitutionally granted duties and powers of the Regents, the Regents are not beyond laws

of general applicability, such as the OML and MGDPA, that are not targeted at those constitutional duties, even though they may have an effect on them. To hold otherwise, and rule that any general law that may have an effect upon the Regents is invalid as applied to them, would mean that Minnesota's laws regarding contract, fraud, employment and possibly other areas could not apply to the University, leaving the Regents free to violate these laws as they see fit in exercising their constitutional duties. This is beyond what the constitution as interpreted by this Court permits them to do.

This ability of the Legislature to enact laws that affect the University was recognized in *Winberg v. University of Minnesota*, 499 N.W.2d. Although it rejected the application of the Veterans Preference Act to the University, this Court held that the Legislature could apply such laws to the University when it referenced the University more specifically:

> The legislature recognizes the University's unique constitutional status and, in the great majority of laws it passes affecting the University, it expressly includes or excludes the University or its board of regents as subject to or not subject to the law. Thus, if the legislature had intended the Veterans Preference Act to apply to the University of Minnesota, it most likely would have included the University by specific reference.

Id. at 801-2. In holding that the term "political subdivision" in the Veteran's Preference Act did not encompass the University, this Court contrasted the term "public body" as used in the OML as a broader term that did encompass the University. *Id.*

In addition to this specific reference to the OML applying to the University in *Winberg*, the language of both the OML and the MGDPA satisfy *Winberg's* specificity requirement. The OML applies to a "public body." Minn. Stat. § 13D.01.(a)(6). As pointed

out by *Winberg* above and as admitted by the University itself in *Zahavy v. University of Minnesota*, 544 N.W.2d 32, 42 (Minn. Ct. App. 1996), the University is a public body to which the OML therefore applies. The MGDPA refers to the University by name. Minn. Stat. § 13.02. Subd. 17.

The Court of Appeals has repeatedly recognized that the OML applies to the University, as it did again in ruling in this case. In denying a professor's challenge to action taken by the Regents in closed session in *Zahavy*, the Court of Appeals applied an exception to the OML, but noted "The University does not dispute it is a public body whose Board of Regents is subject to the open meeting law." 544 N.W.2d at 42. In *The Minnesota Daily v. The University of Minnesota*, 432 N.W.2d 189 (Minn. Ct. App. 1989), even when it found that the OML did not apply to the Presidential Search Advisory Committee because the committee did not fit the definition of bodies covered by the act, the Court of Appeals said its holding would not subvert the application of the OML to the Board of Regents.

> The regents cannot avoid public comment on a controversial matter by delegating the choice of a president to PSAC. We are mindful of the *Daily's* concern that PSAC will recommend only one finalist, thereby effectively closing the entire selection process. The University's counsel has assured this court that will not occur and all finalists will be interviewed at an open meeting.

432 N.W.2d at 194.

The Regents themselves have used the MGDPA in order to shield themselves from liability. In *Kobluck v. Regents of the University of Minnesota*, No. C8-97-2264 1998 WL 297525 (Minn. Ct. App. June 9, 1998)(unpublished decision), a former university employee

sued the Regents for defamation and violation of the MGDPA when the University released documents concerning the employee's denial of tenure. The Court of Appeals denied the claim, holding that "The University's disclosure of the contents of a public document is not a violation of the Data Practices Act. The district court erred in denying summary judgment on this claim." *Id.* at 5. The Regents should not be permitted to use the MGDPA as a shield from liability, but then claim it does not apply to them when a citizen wishes to use it to request information.

CONCLUSION

Accordingly, *amici* respectfully request that this Court affirm the decision of the court of appeals, declare that the Petitioners are subject to the OML and the MGDPA, and require them to disclose the finalist data immediately.

Dated: December 19, 2003

Respectfully submitted,

By _____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Rule 132.01, subd. 3(c), that this brief (exclusive of the Table of Contents and Table of Authorities) contains approximately 6,034 words, as ascertained using the word count feature of the WordPerfect 10 word-processing software used to prepare this brief.

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