IN THE SUPREME COURT OF OHIO

STATE of OHIO *ex rel.*	:	
CABLE NEWS NETWORK, Inc., et al.,	:	**Case No. 2019-1433**
	:	
Relators-Appellants	:	**On Appeal from the**
	:	**Ohio Court of Appeals,**
v.	:	**Second Appellate District,**
	:	**Greene County**
BELLBROOK-SUGARCREEK LOCAL	:	
SCHOOLS, et al.	:	**Court of Appeals**
	:	**Case No. 2019CA0047**
Respondents-Appellees	:	
	:	

BRIEF OF AMICUS CURIAE WBNS-TV, INC., IN SUPPORT OF RELATORS-APPELLANTS CABLE NEWS NETWORK, INC., ET AL.

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I. SUMMARY OF ARGUMENT

Amicus WBNS-TV, Inc. ("WBNS"), supports reversal of the Second District's decision in *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 2nd Dist. Greene No. 2019CA0047, 2019-Ohio-4187 (hereinafter the "Opinion"), and submit this amicus brief in support of Relators' request for the issuance of a writ of mandamus ordering Respondents Bellbrook-Sugarcreek Local Schools and Douglas Cozad, in his capacity as Superintendent of the school district, to produce records relating to former student Connor Betts, who shot and killed nine people and injured twenty-seven others in Dayton, Ohio, on August 4, 2019, and who was shot and killed by Dayton police officers at the scene.

WBNS writes separately to emphasize the erroneous approach taken by the Second District. Indeed, how one forms the question often dictates the answer, and that is what happened below. First, despite long-settled principles that Ohio's Public Records Act, R.C. 149.43 ("PRA" or the "Act"), must be liberally construed in favor of access to public records and that any exceptions must be strictly construed against the public office, the Second District set up a series of hurdles for Relators to surmount in order to enforce their rights under the Act.

Then, the court structured the question to compel a particular result. Specifically, instead of applying settled rules of statutory construction to determine whether the statutory right of privacy created under the Ohio Student Privacy Act ("OSPA"), R.C. 3319.321, survived the death of the student, the Second District misframed Relators' argument as seeking to create "an exception to an exception," *which it then construed extremely narrowly against the Relators*. The predictable result: Writ denied. But

Relators did not seek to create an "exception to an exception"; rather, they merely sought to apply here the rule that statutes in derogation of the common law must be strictly construed. Application of this rule makes clear that the statutory privacy right in student records (which is an exception that must be construed in Respondents' favor) lapses upon the death of the student.

This Court should reverse the Second District and grant the writ.

II. STATEMENT OF AMICUS INTEREST

WBNS-TV, Inc. ("WBNS"), is the broadcast licensee of WBNS-TV, Channel 10 (or "10TV"), in Columbus. As a broadcaster that provides regular news coverage of issues involving state and local government in Ohio, WBNS routinely requests and uses public records in its newsgathering efforts. It has a strong interest in robust enforcement of the public's rights under the Public Records Act, including in this particular case, as WBNS itself was denied access to the subject records.

III. STATEMENT OF FACTS

WBNS incorporates by reference the Statement of Facts in Relators' Merit Brief.

IV. ARGUMENT

PROPOSITION OF LAW NO. 1: The protections afforded under the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, and the Ohio Student Privacy Act, R.C. 3319.321, expire upon the death of a student who has reached adulthood, such that neither statute prohibits release of records under the Ohio Public Records Act exception for "[r]ecords the release of which is prohibited by state or federal law," R.C. 149.43(A)(1)(v).

A. Public Records Are "The People's Records," And Ohio's Public Records Act Must Be Construed Liberally In Favor Of Access.

This case involves application of the Public Records Act exception under R.C. 149.43(A)(1)(v) for "[r]ecords the release of which is prohibited by state or federal law."

At issue is whether Respondents satisfied their burden of demonstrating that the public records sought by Relators may be withheld from release by operation of a state statute, in this case the OSPA.[1]

As this Court has often declared, "[t]he rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people." *White v. Clinton County Bd. of Comm'rs*, 76 Ohio St.3d 416, 420, 667 N.E.2d 1223 (1996) (citations omitted). It is long settled that access to public records must be *liberally construed in favor of access*, that the public office has the burden of identifying and establishing any claimed exception to the PRA to justify withholding requested records, and that the exceptions must be *strictly construed against the public office*. *See*, *e.g.*, *State ex rel. Mahajan v. State Med. Bd. of Ohio,* 127 Ohio St.3d 497 , 2010-Ohio-5995, 940 N.E.2d 1280, ¶¶ 21, 24; *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 30.

In short, this Court "construe[s] the Public Records Act liberally in favor of broad access and resolve[s] any doubt in favor of disclosure of public records." *State ex rel. Rocker v. Guernsey County Sheriff's Office,* 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6.

[1] The Second District's Opinion focused almost solely on the OSPA. The court noted that it "need not" address Respondents' second grounds for withholding the records, the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, although the court indicated, at least in dictum, it believed that FERPA would provide grounds for withholding the requested records in this case and did so even though the U.S. Department of Education has long advised that FERPA rights of eligible students expire upon the death of the student. Opinion at ¶¶ 27, 30.

B. Even Though Mandamus Is The Traditional Statutorily Provided Remedy For Respondents And The Parties Stipulated To The Facts Of This Case, The Second District Characterized The Remedy Sought As A Virtually Insurmountable Obstacle.

In its Opinion, the Second District first erected a series of hurdles for Relators to surmount even before reaching the issue at bar. For example, the lower court repeatedly stressed the "clear and convincing evidence" standard applicable to relators in mandamus actions. *See, e.g.,* Opinion at ¶ 8 ("Relators must "prove the elements of their mandamus claim by clear and convincing evidence"; and " '[t]he facts submitted and the proof produced must be plain, clear, and convincing before a writ will be granted.' "). Certainly, that is the standard, but in this case there is no dispute about the evidence: *The facts are stipulated*. The issue is one of statutory construction.

Similarly, although it tacitly acknowledged that a mandamus action *is the specific remedy traditionally authorized by statute*, per R.C. 149.43(C)(1)(b), for persons "aggrieved by the failure of a public office" to release public records, the Second District portrayed mandamus as virtually an insurmountable bar to relief. *See, e.g.,* Opinion at ¶ 7 (mandamus "only applies in a limited set of circumstances"); ¶ 13 (noting that even though the PRA is construed liberally, "a relator must still establish entitlement to the requested extraordinarily relief by clear and convincing evidence"); ¶ 27 (court commented that to read the OSPA "to include an exception for the death of an adult former student on the basis of common law" is "inherently problematic in the context of an extraordinary writ of mandamus").

But the issue at hand is resolved by rules of statutory construction. If Relators' construction is correct, the remedy for Respondents' failure to release the public records

is prescribed by R.C. 149.43. This is hardly the insurmountable bar that the Second Circuit attempted to construct.

C. The Second District Erred In Strictly Construing The Stated Exception To the PRA Against Relators Instead Of Against Respondents.

Following these barriers, the Second District next formulated the issue in a way that preordained its conclusion – applying a theory that Respondents were seeking to "create an exception to an exception." The court should properly have framed the question as whether, in its liberal application of the PRA, it should strictly construe the exception for "[r]ecords the release of which is prohibited by state or federal law" *against the Respondents*.

In enacting the OSPA, the General Assembly simply created a statutory right to privacy in certain records, and a right to privacy generally expires upon a person's death. Remarkably, in order to reach its conclusion for the question it had erroneously framed, the Second District took the view that because the General Assembly did not specify when the right to privacy in student records expires, this right does not ever expire, on death or otherwise; it lasts forever. The court declared that *only the General Assembly* can define the scope of exceptions that fall under the R.C. 149.43(A)(1)(v) catch-all for "[r]ecords the release of which is prohibited by state or federal law" because "the rights/duties enforced in mandamus must be legislatively created, not judicially created, meaning that common law rights are not determinative or particularly relevant." Opinion at ¶ 27.

This is not an accurate statement of law. Another example of a right that is judicially (not legislatively) created and which is subject to enforcement in mandamus

via the PRA and the R.C. 149.43(A)(1)(v) catch-all is the attorney-client privilege. *See, e.g., State ex rel. Nix v. Cleveland,* 83 Ohio St.3d 379, 383, 700 N.E.2d 12 (1998) (holding the attorney-client privilege "is a state law prohibiting release of these records"). Yet the attorney-client privilege – like the right to privacy – is a right that arises, *and may be deemed to be extinguished*, under common law principles.

We need not belabor the point, which is addressed in detail in Relators' Brief, that privacy is a common law right, and the general rule of statutory construction is that statutes in derogation of common law are to be strictly construed in favor of retaining the common law. In sum, if the General Assembly intended to write a statute that extended the right to privacy beyond a person's death, it needed to state with specificity that it was legislating in derogation of the common law.

Alternatively, at best, the statute is ambiguous, and the law is clear that any doubt or ambiguity must be construed in favor of releasing records.

IV. CONCLUSION

For all of these reasons, we respectfully ask the Court to grant the requested mandamus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on December 16, 2019, and served via e-mail on the following:

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