IN THE SUPREME COURT OF OHIO

CHRISTOPHER R. HICKS, Relator-Appellant, vs. UNION TOWNSHIP, CLERMONT COUNTY BOARD OF TRUSTEES, Respondent-Appellee.	)	Case No. 2023-0580 On Appeal from the Twelfth District Court of Appeals Clermont County, Ohio Court of Appeals Case No. CA2022-10-057

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF RELATOR-APPELLANT

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I. STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Amicus curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at Buckeye accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policy solutions, and promoting those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a non-partisan, non-profit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission.

The Buckeye Institute advocates for government transparency and accountability. Ohio's public records law allows individuals and organizations—like The Buckeye Institute—to effectively monitor the government's activities. The Buckeye Institute regularly files public records requests with political subdivisions and advocates for governmental compliance with Ohio's public records law.

II. STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Facts and Case set forth in Relator-Appellant's Memorandum in Support of Jurisdiction.

III. ARGUMENT AND LAW

A. Introduction

Transparency in government is a matter of "great general interest." S.Ct.Prac.R. 7.10(B)(1)(d)(iii). The "first three words of [the U.S. Constitution] – 'We The People' – affirm that the government of the United States exists to serve its citizens"—not the other way around. U.S. Senate, *Constitution of the United States*, https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm (accessed Aug. 28, 2023). Indeed, a

transparent government is essential to a successful free society and fosters trust and confidence in government. Concealing information only generates suspicion and distrust.

> A democratic government is only as strong as the trust it builds with the people it serves, and trust building starts with transparency. That means openness in public decision-making and access to records that document the work of public bodies -- as each of us has a right to know what our government is doing * * * .

Ohio Attorney General, *Ohio Sunshine Laws 2023: An Open Government Resource Manual*, www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/Sunshine-Laws-Publications/2023-Sunshine-Manual.aspx (accessed Aug. 28, 2023).

To effectively ensure that the government is operating for the people, open access to public records has been a staple in the United States for over a century. *See* Aker, *Towards Darkness: Ohio's Presumption of Openness Under the Public Records Act*, 41 Cap. U.L. Rev. 361, 368–370 (2013). Subject to numerous legislative exceptions, the Ohio public records law requires the release of a document that is

> created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

R.C. 149.011(G).

Despite the requirement that Ohio courts must liberally construe Ohio's public records law in favor of broad access, court-created doctrines have narrowed the definition of public records—arguably engendering distrust and undermining the very concept of "We The People." When the government conceals information, the public can only wonder what the government is hiding.

Today, trust in the federal government is at an almost all-time low. Pew Research Center, *Public Trust in Government: 1958-2022* (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/. Even trust in the federal judiciary fell to 25 percent in 2022 from 36 percent in 2021. David F. Levi, Raymond J. Lohier Jr., Diane P. Wood & Jeffrey S. Sutton, *Losing Faith: Why Public Trust in the Judiciary Matters* (2022), https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf. State governments may rank higher on the trust level, but not by much. O'Leary, Welle & Agarwal, *Improving trust in state and local government* (Sept. 22, 2021), https://www2.deloitte.com/uk/en/insights/industry/public-sector/trust-in-state-local-government.html.

So, when governments—facilitated by court-created doctrines—close the door to "We The People" seeking to monitor the government's actions, that trust is further undermined. Of course, there will always be a need to protect private information. But when those privacy concerns arise, it is the duty of the General Assembly, not the courts, to balance the interests of transparency and privacy. The General Assembly can seek public comment, hold committee hearings, hear from stake holders, and create clear and detailed rules to address relevant concerns. And if the legislature makes a mistake, it can correct it faster than the Ohio Supreme Court can when it needs to modify or abandon a court-made rule that later proves to be unworkable. Absent a legislative change, governments must produce records that meet the text of the public records law, as it is liberally construed in favor of the people.

B. The administrative convenience doctrine is a judicially created doctrine that undermines the public records law's purpose.

"[I]nherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it." *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 171, 680 N.E.2d

956 (1997). Yet, in *McCleary*, the court ignored that requirement and held that "[p]ersonal information of private citizens, obtained by a 'public office,' * * * and used by the public office in implementing some lawful regulatory policy, is not a 'public record,'" *State ex Rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 365, 725 N.E.2d 1144 (2000), paragraph 1 of the syllabus. The Public Records Act (PRA) contains no such language.

The court in *McCleary* was understandably concerned that the relator sought private "information regarding children who use the City's swimming pools and recreational facilities." *Id.* at 366. The court emphasized its concern that "[t]hey are children—private citizens of a government, which has, as a matter of public policy, determined that it is necessary to compile private information on these citizens." *Id.* at 369. The court's concerns for the children's privacy interests was laudable, but its creation of new judge-made law, with wide ranging impacts, was not. At the time, the Revised Code listed 18 exceptions to disclosure under the PRA, but not one for this specific instance.[1] Rather than acknowledge this statutory shortcoming and then following the law, the court created its own malleable exception to the law.

As Justice Cook noted in her *McCleary* opinion, the court's "new syllabus law [ ] arguably restricts the definition of 'public record' in a manner that could undermine the disclosure-oriented purpose of the Public Records Act in future cases." *Id.* at 373 (Cook, J., concurring in part and dissenting in part). While this new judge-created public records exception may have seemed like a good idea at the time, then Justice Cook's observation that *McCleary*'s syllabus "could undermine" the purpose of the PRA, has proved to be prescient.

Two years after *McCleary*, in *State ex rel. Beacon J. Publ'g Co. v. Bond*, 98 Ohio St. 3d

[1] In 2000, shortly after *McCleary* was decided, the General Assembly added an exception to cover this precise privacy issue. See Section D below. Arguably this abrogated the need for the courts to utilize or expand upon the new *McCreary* administrative convenience test.

146, 2002-Ohio-7117, 781 N.E.2d 180, the court applied this "new syllabus law" and redefined it as an "administrative convenience" test. In two sentences, the *Bond* court expanded *McCleary* and rejected a request to release juror names and addresses, finding that the addresses were kept "for the administrative purpose of identifying and contacting individual jurors." *Id.* at ¶¶ 11–12. The *Bond* court refused to apply *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 485 N.E.2d 706 (1985), instead of *McCleary* because the trial court in *Bond* had not "utilized" the juror list "to render its decision." *Id.* at ¶ 12. This seems contradictory to the PRA—the administrative purpose of contacting jurors *is* an "operation[], or other activit[y] of the office." R.C. 149.011(G). According to this new administrative convenience test, if governments have a document containing information that it uses for administrative convenience, that document is not a "record" under Ohio's public records law.

In *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 25, the court found that home addresses of state employees kept in a payroll file "represent contact information used as a matter of *administrative convenience*." To distinguish the organization, functions, policies, decisions, procedures, operations, or other activities of state agencies within the meaning of R.C. 149.011(G) from employee addresses, the court noted that "'state employees did not agree to become a readily available source for media reports or corroboration of newspaper stories when they became public servants.'" *Id.* at ¶ 26 (citation omitted in original). However, the court further noted that this was not an entire ban on releasing employee addresses but was limited to releasing addresses that did not meet the statutory definition of public records. *Id.* at ¶¶ 39, 41. Apparently recognizing that it might be pushing the envelope and not giving due credit to the requirement that "courts in Ohio must construe R.C. 149.43 liberally in favor of broad access to and disclosure of public records," the court stressed that it

would "reject as unpersuasive the arguments of governmental bodies in future cases attempting to place great weight on this case as precedent in unrelated contexts." *Id.* at ¶ 41.

Regardless of the soundness of the administrative convenience test, this case is one of those cases in an unrelated context. If applied broadly, as the Appellee advocates, the administrative convenience test "restricts the definition of 'public record' in a manner that [] undermine[s] the disclosure-oriented purpose of the Public Records Act * * * ." *McCleary,* 88 Ohio St.3d at 373, 725 N.E.2d 1144 (Cook, J., concurring in part and dissenting in part). Rather than recognizing the narrowness of the *Johnson* opinion, the court below again expanded the administrative convenience test and summarily concluded that the email and mailing lists do not document the activities of the Township as required by R.C. 149.011(G) but "represent contact information used as a matter of convenience in distributing the newsletters." *Hicks v. Union Twp.*, 12th Dist. Clermont No. CA2022-10-057, 2023-Ohio-874, ¶¶ 34, 41 (Twelfth District Opinion). While obviously those lists *are* used for administrative convenience, that does not mean that they are not *also* documents that "serve[] to document" the "operations, or other activities of the office." The email and mailing lists do both. Indeed, that is the purpose of nearly all databases, lists, directories, and data compilations of all types—for administrative convenience and for operations of the office. And data compilations are routinely considered public records subject to public records requests. *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 24 ((Emphasis deleted) "[A] compilation of information gathered from public records is a separate public record subject to disclosure under R.C. 149.43." quoting *State ex rel. Margolius v. Cleveland*, 62 Ohio St.3d 456, 459, 584 N.E.2d 665 (1992)).

This demonstrates that the administrative convenience test is antithetical to the text of R.C. 149.011. "[T]he names and addresses are kept in a Township-created database and are used to send

the Township-created newsletter * * * .” Twelfth District Opinion at ¶ 37. The email and mailing lists “serve[] to document” how that function or activity is carried out by showing to whom the newsletters are sent and who was excluded from those emails.

If the lists do not match the reality of who has signed up for emails or all addresses in the zip code, then the list may also document policies, decisions, procedures, or operations taken by the Township in deciding not to send the newsletters to certain individuals. In this instance, Hicks would not have been required to point to any specifically missing email or mailing address, because “[t]he law does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials * * * .” *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170, 173–74, 527 N.E.2d 1230 (1988).

Contrary to the Twelfth District’s conclusion, this case is unlike the previous cases in which the court prevented the release of addresses. Here, unlike *Bond*, the Township utilizes the email and mailing lists to determine to whom the newsletter will be sent, and the release of the email and mailing lists “assures the proper functioning of the governmental unit,” *Gosser* 20 Ohio St.3d at 33, 485 N.E.2d 706. And unlike *Johnson*, those who signed up for the email list did agree to have their names and contact information used by the government in exercising its functions and other activities.

Instead, the facts of this case reflect those in *State ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, Fifth Dist. Tuscarawas No. 2013 AP 06 0024, 2014-Ohio-1222. There, the Fifth District distinguished *Johnson*’s restriction on the release of employee addresses, noting that “[u]nder the facts of this case, the addresses being sought do document at least one of the functions of the District which is to enter into rental contracts and collect rents from the lessees.” *Id.* at ¶ 8.

Similarly, the email and mailing lists here serve to document how the Township operates its newsletter by disclosing to whom the Township sends the newsletter.

Because of "the fundamental policy of promoting open government," *Miami Univ.*, 79 Ohio St.3d at 171, 680 N.E.2d 956, inherent in the public records law, and the requirement that Ohio courts construe the public records law "liberally in favor of broad access to and disclosure of public records," *Gilbert v. Summit Cnty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 7, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996), broad judicially created exceptions cannot be the basis for denying access to public records. This is especially true where—as here—the documents requested are public records based on the text of the law.

C. The court below misapplied the Attorney General's opinion.

The court below recognized the persuasive value of the Ohio Attorney General's opinions on issues not yet addressed by this Court. Twelfth District Opinion at ¶ 35. However, the court failed to adequately analyze the request in the context of the cited Attorney General's opinion. In determining whether email addresses compiled by the government can themselves constitute a public record, the Attorney General identified as relevant

> (1) whether the email was sent as part of the township's or its employees' official duties,
>
> (2) whether a township resolution required the sending of such email,
>
> (3) whether the recipients are constituents of the township,
>
> (4) whether the recipients' email addresses are maintained in a database of the township, and
>
> (5) whether the recipients provided their email addresses to the township for the

purpose of receiving an email that is sent by the township as part of its official activities.

Id. at ¶ 36, quoting 2014 Ohio Atty.Gen.Ops. No. 2014-029 at 9.

The answers in this case are mostly affirmative. First, the emails, utilizing the email list, were sent as part of the Township employee's official duties—they were not personal emails using government equipment.

Second, while the township did not pass a resolution to "require" the sending of the emails, they were sent out using government funds as authorized by R.C. 9.03.

Third, while the court below indicated that anyone—not just constituents—could submit an email to receive a newsletter, this observation is not helpful. It is highly likely that only residents would be signing up for the Township letter given that it is focused on Township issues. Twelfth District Opinion at ¶ 5. And even if non-residents happened to submit an email for a newsletter distribution, that should not transmute a Township email list from a record into a non-record. The list certainly "serves to document the decision[]" of who will receive government communications, the "operation[]" of how those communications will be distributed, and an "activit[y] of the office." R.C. 149.011(G).

Fourth, definitionally, the recipients' email addresses are maintained in a database of the Township.

Fifth, and finally, the recipients provided their email addresses to the Township for the purpose of receiving an email that is sent by the Township as part of its official activities. Twelfth District Opinion at ¶ 37. The Attorney General's opinion strongly suggests that these types of lists are public records.

If the court chooses to implement or adopt the Attorney General's opinion, the court should

be clear that the PRA "must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156, 684 N.E.2d 1239 (1997).

D. Any further narrowing of the Public Records Act is the legislature's—not the judiciary's—responsibility.

Ohio's public records law provides an extensive definition of what is not a public record. *See* R.C. 143.43(A)(1)(a)–(ss). As privacy and other concerns have come to light, the General Assembly has—as is its prerogative—added more exceptions to the PRA to address those concerns. Nearly every year since 2013, the General Assembly has added exceptions as the need has arisen—a total of 17 amendments over those 10 years. Consequently, the number of exceptions has increased from 28 categories in 2013 to 45 categories currently. *Compare* R.C. 143.43(A)(1)(a)–(bb) (2013) *with* R.C. 143.43(A)(1)(a)–(ss). Notably, the General Assembly added an exception in 2000 after this Court expressed privacy concerns with the release of certain public records. *See McCleary*, 88 Ohio St. 3d at 365, 725 N.E.2d 1144, syllabus (excluding "the personal, identifying information regarding those children who were participating in" Columbus Recreation and Parks Department's photo identification program for use of the city pool, decided April 12, 2000); 2000 Sub.H.B. No. 539 (excluding "[i]nformation pertaining to the recreational activities of a person under the age of eighteen" from the definition of public records, effective June 21, 2000).

It is the responsibility of the General Assembly—not the courts—to determine what information should be excluded from the definition of public records. Where a document "serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of [a public] office," R.C. 149.011(G), it is a public record unless specifically excluded from the definition in R.C. 149.43(A)(1). Courts should not use judge-made doctrines to exclude

a document from the definition of record under R.C. 149.011(G) to avoid the fact that the General Assembly has not addressed a particular privacy issue in R.C. 149.43.

IV. CONCLUSION

For the foregoing reasons, the Court should narrow or abandon the administrative convenience doctrine.

Respectfully submitted,

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September 5, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of *Amicus Curiae* The Buckeye Institute in Support of Relator-Appellant was served via email transmission on this 5th day of September 2023 to the following:

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