No. 12-17

IN THE

Supreme Court of the United States

Mark J. McBurney, *et al.*,

Petitioners,

v.

Nathaniel L. Young, Deputy Commissioner and Director, Virginia Division of Child Support Enforcement, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, may a state preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens?

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INTEREST OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Judicial Watch regularly requests access to public records of federal, state, and local government agencies and officials and disseminates its findings to the public. In addition, Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a not-for-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

As educational foundations, *Amici* are concerned that if the Fourth Circuit's opinion is not reversed, a valuable weapon in their arsenal will be weakened, if not lost entirely. The ability of organizations and individuals such as *Amici* to access public records of all states is vital to them furthering their public interest missions. In this brief, *Amici* intend to

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici Curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting the parties' consent have been filed with the Clerk.

present the history of the right of access to public records as well as how *Amici* recently have exercised this right. In doing so, *Amici* seek to help demonstrate that the right of access to public records is basic to the maintenance and well-being of the country. Because the right of access to public records bears upon the vitality of the nation as a single entity, the Court should reverse the lower court's decision and reaffirm the right of all persons to access public records from all states.

SUMMARY OF THE ARGUMENT

The "Privileges and Immunities Clause" of Article IV of the U.S. Constitution protects basic rights bearing upon the vitality of the nation as a single entity. One such right is the right of access to public records. Since the founding of the nation, courts have recognized the right of the people to gain access to and inspect the public records of state and local governments. However, just because the requested records may be those of a city, county, or state government does not mean such records are only of local importance and value. The inspection of public records of city, county, and state governments are relevant to and often shed light on the policies and activities of the federal government. Sometimes, gaining access to local records is the only way to fully understand the actions of the federal government. In addition, many policy decisions or activities of local governments are being debated or implemented in other localities across the nation. Therefore, the right of access to a public record not only sheds light on local government, but it also bears upon the vitality of the nation as a single entity.

ARGUMENT

I. The "Privileges and Immunities Clause" Protects the Rights of All Citizens of Free Governments.

Article IV, Section 2 of the United States Constitution states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The clause, commonly referred to as the "Privileges and Immunities Clause" or the "Comity Clause," was intended to "fuse into one Nation a collection of independent, sovereign States." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (*quoting Toomer v. Witsell*, 334 U.S. 385, 395 (1948)); *see also Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) ("The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates . . . the structural balance essential to the concept of federalism."). The Court has not definitively designated what constitutes "privileges and immunities;" however, it has interpreted the clause at various times through the years. In the *Slaughter-House Cases*, the Court adopted the analysis found in *Corfield v. Coryell*, 6 F. Cas. 546 (CC ED Pa. 1825). 83 U.S. 36, 76 (1873). Specifically, the Court reiterated:

> The inquiry . . . is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and

> which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign.

Slaughter-House Cases, 83 U.S. at 76 (*quoting Corfield*, 6 F. Cas. at 551). In addition, the Court explained that the court in *Corfield* found that the "privileges and immunities" were

> those rights which are fundamental. Throughout [the] opinion, ["privileges and immunities"] are spoken of as rights belonging to the individual as a citizen of a State. . . . And they have always been held to be the class of rights which the State governments were created to establish and secure.

Slaughter-House Cases, 83 U.S. at 76.

In *Baldwin v. Fish and Game Commission of Montana,* 436 U.S. 371 (1978), the Court held that the state of Montana could charge nonresidents higher fees to obtain an elk-hunting license than it charged residents of Montana to obtain the same license. In doing so, the Court explained that states may treat residents and nonresidents differently; however, some distinctions "are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Baldwin*, 436 U.S. at 383. The "Privileges and Immunities Clause" therefore protects all rights "bearing upon the vitality of the Nation as a single entity." *Id.*

The Court recently affirmed this interpretation and expounded that the Court "has never held that the Privileges and Immunities Clause protects only economic interests." *Piper*, 470 U.S. at 281. At issue in *Piper* was whether the state of Vermont could restrict bar admissions to state residents only. *Id.* at 275. In holding that such a restriction violated the "Privileges and Immunities Clause," the Court stated:

> We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. The lawyer who champions unpopular causes surely is as important to the maintenance or well-being of the Union.

Id. at 281 (internal citations omitted). In some instances, only nonresidents will challenge the policy decisions or activities of local governments.

II. The Right of Access to Public Records Is a Well-Recognized Common Law Right.

As the Court has previously declared, "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents." *Nixon v. Warner Communications, Inc.*, 435

U.S. 589, 597 (1978). In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that "the right of access" exists "in the common law of the states." *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897, 903 (D.C. Cir. 1996). In other words, the right of access to public records applies not only to public records of the federal government but also public records of state governments.

For over 100 years, state courts have recognized the common law rule that "every person is entitled to the inspection of" public documents. *State v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879); *see also Burton v. Tuite*, 78 Mich. 363, 374 (1889) ("I do not think that any common law ever obtained in this free government that would deny the people thereof the right of free access to, and public inspection of, public records."). Significantly, in 1891, the Virginia Supreme Court held, "At common law, the right to inspect public documents is well defined and understood." *Clay v. Ballard*, 87 Va. 787, 791 (1891).

Although much of the concern of the courts focused on whether a citizen had a private, individualized interest in the requested records, case law also illustrates the importance of the right of access to public documents for the general good. For example, in 1900, an individual requested access to the public records of the auditor's office in a town of Indiana for the purpose of "discovering whether the money and property of the county had been duly accounted for by the persons and officers charged with the collection and disbursement of the same." *State v. King*, 154 Ind. 621, 622 (1900). The town auditor refused to provide access to public records because, he as-

serted, the requester did not have a personal interest in the requested records. The court rejected that argument. In ordering the town auditor to provide access to the requested records, the court stated, "The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent, provided he had an interest in the matters to which such records related." *Id.* at 625. In addition, the court held that a person's interest "to discover the condition of the public . . . to ascertain if the affairs of his county have been honestly and faithfully administered by the public officials charged with that duty" is completely appropriate. *Id.* The right of access to public records is therefore grounded in the public's right to know "what the government is up to." *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 800 (1989); *see also National Archives and Records Administration v. Favish*, 541 U.S. 157, 172 (2004) (The Court recognized that the information contained in public records "belongs to [the] citizens.").

In 1928, the Michigan Supreme Court again examined the common law right of access to public records and the origin of that right. In doing so, it noted, "If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people." *Nowack v. Auditor General*, 234 Mich. 200, 203 (1928). In addition, the court stated, "There is no question as to the common-law right of the people at large to inspect public documents and records." *Id.* at 204. Moreover, it reinforced the notion that

the common law right "to inspect public records" includes those circumstances when a person's interest is solely that "as a member of the general public." *Id.*

In the last 60 years, state legislatures have enacted statutes addressing the right of access to public records. However, the statutory right does not narrow or displace the common law right of access. Courts continue to recognize "the right to an examination of public records, either under statutory grant or on common law principles." *Wiley v. Woods*, 393 Pa. 341, 346 (1958).

As demonstrated above, the right of access to public records is nothing new. In fact, the basic right to inspect public records has played an important role in the maintenance of democracies in state and local governments since the founding of the individual states as well as the formation of the nation as a whole. As the former Chief Justice of the Ohio Supreme Court expressed:

> The public availability of government information has long been recognized as a fundamental tenet upon which democratic theory rests. This principle, venerated by the founding fathers and later codified by state legislatures, has its foundation in the common-law courts of England. . . . The common-law right to inspect government documents has been recognized in Ohio since the earliest reported court decisions. As there was no statutory provision to the contrary (and no constitutional mandate),

> the right to inspect public records was subject only to the condition that the inspection did not endanger the safety of the record or unreasonably interfere with the duties of the public official having custody of the record. These early Ohio cases, like those of other jurisdictions, recognized that public records were available for inspection regardless of whether an individual had a private interest in the record.

Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: a Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247, 247-248 (2003). In sum, the right of access to public records is a basic right of all persons in democratic societies.

III. The Right of Access to Public Records of All States is Important to the Maintenance and Well-Being of the Union.

In its opinion, the Fourth Circuit held, "Access to a state's records simply does not bear upon the vitality of the Nation as a single entity." *McBurney v. Young*, 667 F.3d 454, 466 (4th Cir. 2012) (internal quotations omitted). Such a sweeping declaration is simply incorrect. As the Third Circuit noted:

> No state is an island – at least in the figurative sense – and some events which take place in an individual state may be relevant to and have an impact upon the policies of not only the national government but also of the states. Accordingly, political advocacy regard-

> ing matters of national interest or interests common between the states play an important role in furthering a vital national economy and vindicating individual rights.

Lee v. Minner, 458 F.3d 194, 199-200 (3d Cir. 2006). Although each state is sovereign, the actions and policies of an individual state often have an effect on other states and the nation as a whole.

This interconnectedness is evident in the recent attempt by the federal government to address the recent housing meltdown. In February 2012, federal and state officials entered into a $26 billion foreclosure settlement with five of the largest home lenders. Chris Isidore & Jennifer Liberto, *Mortgage deal could bring billions in relief*, CNN Money (Feb. 15, 2012), available at http://money.cnn.com. The agreement settled the potential charges brought by individual states concerning allegations against numerous companies of improper foreclosures. *Id*. The settlement, which was signed by the U.S. Department of Justice, the U.S. Department of Housing and Urban Development, and 49 state attorneys general, created a federal monitoring system to oversee the foreclosure process and to assist distressed homeowners in receiving assistance related to prior foreclosures of their homes. *Id*. Clearly, the federal government was instrumental in orchestrating a settlement between the individual states and the mortgage lenders.

Yet the extent of the federal government's involvement in the day-to-day negotiations was not disclosed to the public. During a March 16, 2011

hearing of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, Elizabeth Warren, the interim head of the Consumer Financial Protection Bureau ("CFPB"), characterized the CFPB's involvement in the state settlement negotiations as: "We have been asked for advice by the Department of Justice, by the Secretary of the Treasury, and by other federal agencies. And when asked for advice, we have given our advice." Press Release, *Chairman Bachus Comments on Elizabeth Warren's Role in Mortgage Settlement Talks*, The Committee on Financial Services (Apr. 4, 2011). Because Ms. Warren did not indicate with any specificity the CFPB's role in the settlement negotiations, *Amicus* Judicial Watch sought public records from the CFPB under the federal Freedom of Information Act. For whatever reason, the federal agency failed to provide all relevant and responsive records. Therefore, Judicial Watch expanded its investigation and sought access to public records of all 50 state attorneys general.

In response to its requests for access to public records of all state attorneys general, Judicial Watch received records such as electronic mail, meeting minutes, and memoranda from more than half of the attorneys general. These public records demonstrated, among other things, that Ms. Warren initiated and led emergency meetings with state attorneys general that her office had insisted remain secret. *See Letter to the Honorable Timothy Geithner*, U.S. House of Representatives Committee on Financial Services, dated June 20, 2011, available at http://financialservices.house.gov. In addition, the public records suggest that the CFPB's participation

in the settlement negotiations was far more intense and aggressive than Ms. Warren described to Congress. Therefore, the ability to inspect public records of numerous states provided the public with a more complete understanding of the federal government's role in the settlement agreement between state attorneys general and the mortgage lenders. The public records of the state attorneys general inspected by Judicial Watch directly relate to the "vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383.

Similarly, Judicial Watch investigated the circumstances underlying the U.S. Department of Justice's announcement that the Department of Justice had entered into a consent decree with the City of Dayton concerning the allegation that the city had engaged in discrimination against African-Americans in its hiring of entry-level police officers and firefighters in violation of Title VII of the Civil Rights Act of 1964. Judicial Watch originally sought access to public records directly from the Department of Justice. Because the federal agency failed to respond to the Freedom of Information Act request, Judicial Watch sought access to public records under the Ohio Public Records Act.

In response to Judicial Watch's request for communications between the Department of Justice and the Dayton Fire Department, the local entity provided records detailing the Department of Justice's objections to the entrance examinations used by the City of Dayton. Specifically, Judicial Watch discovered that the Department of Justice disapproved of the use of written tests for firefighter applicants purportedly because it is very unlikely that an entry-

level firefighter would have to do much writing. Judicial Watch subsequently disseminated this information to the public. Through access to the public records of the City of Dayton, Judicial Watch was able to shed light on how the U.S. Department of Justice used its enforcement authority under the Civil Rights Act of 1964 to prevent the Dayton Fire Department from testing whether firefighter applicants had the ability to write. The public records of the City of Dayton directly related to the activities of the federal government and the "Nation as a single entity." *Baldwin*, 436 U.S. at 383.

Besides shedding light on the federal government's interactions with state governments, the right of access to public records of all states also allows for the inspection of controversial information that may not otherwise be inspected. A citizen of a state may be reluctant to request access to particular records due to the sensitivity or nature of the public records. In such instances, an individual or organization outside the state may be the only entity willing to request an unpopular inspection. *Piper*, 470 U.S. at 281. Most importantly, such a situation is not merely hypothetical. In fact, Judicial Watch frequently requests access to a state's public records that citizens of that state may be reluctant to request because of undesired consequences. Through the right of access to public records, Judicial Watch has revealed corrupt practices of police departments, abuses of authority by regulating bodies, and waste of taxpayer funds on illegal expenditures.

For example, Judicial Watch was recently in litigation with the Colorado Attorney Regulation Counsel relating to records created and maintained by one

of the administrative offices of the Colorado Supreme Court. As one court described Judicial Watch's efforts:

> Judicial Watch questions the use of one state's resources (here, in the person of [the Attorney regulation Counsel] and his staff), to assist another state in a politically-charged ethics probe. Further, in this time of state budget shortfalls, the people of this State no doubt would be interested in how it came to be that a state employee was ordered to work for another jurisdiction and whether Colorado was adequately reimbursed for that work.

Gleason v. Judicial Watch, Inc., Case No. 10CV0952, City and County of Denver District Court (Bruce, J., Apr. 22, 2011). It is self-evident that the challenge to the authority and decision-making of the Colorado Supreme Court is unpopular and controversial. It is also likely that attorneys within the state would be hesitant to challenge their regulators. Therefore, without individuals or organizations like *Amici,* questions concerning the use of one state's resources may remain unanswered. In such scenarios, the right of noncitizens to access public records is no different than the noncitizen-attorney's ability to try unpopular cases within a state. The requester is just as important to the "maintenance or well-being of the Union" as "[t]he lawyer who champions unpopular causes" and as "the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin*."

IV. The State of Virginia Is Entitled to Impose Reasonable Fees on Records Requesters.

The State of Virginia may impose reasonable charges on individuals or entities that seek access to public records. Such fees may be imposed not only on residents but also nonresidents of the state. Therefore, the state would not be burdened by additional costs; it may recoup all monies expended to produce public records to residents and nonresidents alike.

In *Barnard v. Thorstenn*, the Court, similar to its opinion in *Piper*, held that the residency requirement of the Bar of the District Court of the Virgin Islands violated the Privileges and Immunities Clause. 489 U.S. 546, 559 (1989). In its holding, the Court explained:

> Petitioners' fourth contention, that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership, is not a justification for the discrimination imposed here. Increased bar membership brings increased revenue through dues. Each lawyer admitted to practice in the Virgin Islands pays an initial fee of $200 to take the bar examination, annual bar association dues of $100, and an annual license fee of $500. There is no reason to believe that the additional moneys received from nonresident

> members will not be adequate to pay for any additional administrative burden.

Id. at 558-559. In other words, preventing admission to the Bar by nonresidents was not justified by the potential administrative burden placed on the Bar. The Bar could collect dues from residents and nonresidents alike to cover the costs associated with monitoring the activities of its members. This principle applies in the public records context as well. The fact that the state may incur additional costs in processing public records requests of nonresidents does not justify the state denying nonresidents the ability to seek public records.

CONCLUSION

The right of access to public records preexists the formation of the nation. In fact, the right of access to public records predates the development of the states. Individuals have always relied on the right to seek public records from city, county, and state governments to ensure that the people's representatives are properly and positively maintaining democracies and adhering to good government principles. If not reversed, the Fourth Circuit's ruling will hinder, if not abolish, the people's ability to monitor the workings of all governments. Because many policy decisions and activities of local governments are being debated or implemented in other localities across the nation or effect the United States as a whole, the right of access to a public record not only sheds light on local government, but it also directly bears upon the vitality of the nation as a single entity. For the foregoing reasons, *Amici* respectfully request that the Court reverse the Fourth Circuit's

decision and hold that citizens of other states enjoy the same right of access to public records that the state affords its own citizens.

Respectfully submitted,

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