Nos. S17G1677 / S17G1676

IN THE

SUPREME COURT OF THE STATE OF GEORGIA

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA AND CAMPAIGN FOR ACCOUNTABILITY,

Appellants,

v.

CONSUMER CREDIT RESEARCH FOUNDATION,

Appellee.

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GEORGIA PRESS ASSOCIATION, GEORGIA FIRST AMENDMENT FOUNDATION, AND ATLANTA JOURNAL-CONSTITUTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE INTERESTS OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an 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 assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Georgia Press Association ("GPA") is a nonprofit association whose members are 139 daily and weekly Georgia newspapers. An important mission of GPA is to protect, promote, foster and advance open government in Georgia. One way in which this is accomplished is to advocate for the Georgia statutory guarantees of open government. While GPA is an organization of newspapers, its advocacy is intended to benefit all Georgians who are served by open government and transparency.

The Georgia First Amendment Foundation is a Georgia non-profit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues, and to provide legal support in cases in which the public's access to public institutions is threatened.

The Atlanta Journal-Constitution is Atlanta's largest local news organization and publishes Atlanta's major daily newspaper as well as several news websites that cover issues of interest to the greater metropolitan area and the state. It depends

upon the enforcement of the Georgia Open Records Act to obtain information necessary to the newspaper's goal of informing the public concerning the operation of public entities and programs.

ARGUMENT

The Court of Appeals' decision must be reversed for three basic reasons. *First*, it violates the rule of construction prescribed by the General Assembly, which provides that the Open Records Act must be "broadly construed" and that exceptions to disclosure must be "interpreted narrowly." O.C.G.A. §50-18-70(a). Instead of applying this rule, the Court of Appeals adopted an atextually *restrictive* construction of the statute. *Second*, the Court of Appeals' interpretation of the Act would lead to untenable policy consequences, such as preventing state agencies from releasing any information—from the most vital to the innocuously trivial—if it falls into one of the exemptions; or worse, rendering the Open Records Act an obstacle to the release of information to the public. Either way, the Court of Appeals' decision, if left to stand, would impose excessive administrative burdens on state agencies. *Finally*, the Court of Appeals' approach would make Georgia an outlier among the states and the federal government, leaving citizens here with far *less* access to government information than they would enjoy in most other jurisdictions. That is an indefensible result—especially considering Georgia's "strong public policy . . . in favor of open government." *Id.*

I. The Court of Appeals' Holding Violates the Text and Purpose of the Act

A. The very first sentence of the Open Records Act proclaims a "strong public policy . . . in favor of open government." O.C.G.A. §50-18-70(a). This commitment to open government implies that "public access to public records should be encouraged." *Id.* Greater governmental transparency "foster[s] confidence in government" and allows the public to "evaluate the expenditure of public funds and the efficient and proper functioning of its institutions." *Id.*

In light of these policy commitments, the General Assembly adopted a "strong presumption that public records should be made available for public inspection without delay." *Id.* And to ensure that this presumption would be effectuated, the legislature articulated an express rule of construction for courts to follow. Specifically, the Act itself "shall be broadly construed to allow the inspection of governmental records." *Id.* By contrast, any exceptions contained in the Act "shall be interpreted narrowly." *Id.*

This Court has frequently recognized and applied this rule of construction. *See, e.g.*, *Evans v. Georgia Bureau of Investigation*, 297 Ga. 318, 319 (2015) (noting that the Act creates "a presumption that public records are to be made available for public inspection, and that the statutory exceptions to that presumption are to be interpreted narrowly"); *United Gov't of Athens-Clarke Cty v. Athens Newspapers, LLC*, 284 Ga. 192, 195 (2008) (similar); *City of Atlanta v. Corey Entm't, Inc.*, 278

Ga. 474, 476 (2004) (similar); *Hardaway Co. v. Rives*, 262 Ga. 631, 634–35 (1992) (observing that "any purported statutory exemption from disclosure under the Open Records Act must be narrowly construed" and adopting "the most narrow construction" of the statutory term at issue).

In short, Section 70(a) creates a simple rule for courts: if there is an available construction that *limits* the scope of an exception and allows the contested information to be released, that construction must be adopted. It is true, of course, that this presumption does not justify reading the Act "in derogation of its express terms." *Evans*, 297 Ga. at 319 (internal quotation marks omitted). But as demonstrated below, there are no express statutory terms prohibiting the release of all information covered by Section 72(a). To the contrary, the text and structure of the Act would clearly refute the Court of Appeals' interpretation even if the legislature had not required the Act to be construed broadly in favor of disclosure.

B. Section 71(d) of the Act is especially helpful in analyzing the question presented in this case. It provides that in all cases where "an agency *is required to or has decided to* withhold all or part of a requested record," it must "notify the requester of the specific legal authority exempting the requested record or records from disclosure." O.C.G.A. § 50-18-71(d) (emphasis added). The italicized language makes it clear that while *some* of the Act's exemptions prohibit an agency

from disclosing records, others allow an agency to "decide[]" whether or not a given record should be disclosed.

Section 71(d) creates an insurmountable textual problem for the Court of Appeals' reading, which would interpret *all* of the exemptions in the Act as mandating non-disclosure. Notably, Appellee Consumer Credit Research Foundation ("CCRF") has made no attempt to address this critical issue in its briefing before this Court.

By contrast, the Appellants' reading fits comfortably with Section 71(d). As they correctly observe, some of the Act's exceptions are self-evidently phrased in a way that prohibits disclosure. Section 72(c)(1), for example, provides that exhibits used in civil or criminal trials "shall not be open to public inspection" without the judge's approval. *See also* O.C.G.A. § 50-18-72(d) (physical evidence "shall not be open to public inspection except by court order"). Section 72(a), however, simply states that "[p]ublic disclosure *shall not be required* for records" that fall within its scope. (emphasis added). The absence of any language *forbidding* disclosure signals that Section 72(a) preserves agencies' discretion to disclose covered documents.[1]

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[1] CCRF attempts (Appellee's Br. at 13) to mount a textual argument of its own by relying on the 1995 amendments to the Open Records Act, in which the General Assembly added four exemptions to Section 72(a) and noted that this change "add[ed] limited restrictions on the disclosure of [the exempted information]." 35 Bill No. 347 (Senate Bill No. 170) (1995), reprinted in General Acts and Resolutions, Vol. I, at 704-705). This phrase does not support CCRF's position because it is ambiguous.

The Court of Appeals' reading also generates surplusage, another point which CCRF has not attempted to refute. For example, Section 72(a)(20)(A) states that "[i]tems exempted by this subparagraph shall be redacted prior to disclosure of any record requested pursuant to this article." This language would be completely unnecessary if agencies were already barred from releasing the information. Similarly, Section 72(a)(34) provides that agencies "shall withhold" certain covered records. But according to the Court of Appeals, agencies are already obligated to withhold *all* records covered by Section 72(a).[2]

In short, the text and structure of the Act make plain that Section 72(a) does not deprive agencies of discretion to release covered information (unless specific language within one of the Section 72(a) exceptions explicitly prohibits disclosure).

Specifically, the legislature could have been referring either to "restrictions on *the public's right to obtain* disclosure" or to "restrictions on *the agency's authority to furnish* disclosure." The former reading seems more plausible, but in any event this language is of no help to CCRF.

[2] CCRF argues (Appellee's Br. at 12) that the Appellants' reading also creates a surplusage problem. If Section 72(a) generally preserves an agency's discretion, it asks, why is it necessary to note in Section 72(a)(17) that "nothing in this paragraph shall prevent the release" of certain records to other agencies where the release "is necessary to prevent or control disease or to protect public health, safety or welfare"? This argument is misconceived. The point of the quoted language is to expressly provide that, where the release of covered documents to another government agency is necessary to protect the public, the agency that is in possession of those documents *does not have discretion* to withhold them.

And Section 70(a)'s rule of construction—which obligates courts to read the Act broadly and exceptions to it narrowly—reinforces that conclusion.

C. The Court of Appeals based its decision almost exclusively on this Court's decision in *Bowers v. Shelton*, 265 Ga. 247 (1995). *See Consumer Credit Research Foundation v. Board of Regents of the Univ. System of Ga*, 341 Ga. App. 323, 329 (2017). However, *Bowers undercuts* the Court of Appeals' reasoning and illustrates the proper way to read and apply the statute.

Bowers established that the Act "mandates the nondisclosure of *certain* excepted information." 265 Ga. at 248 (emphasis added). This description of the Act follows from the ordinary meaning of its plain text, as outlined in this brief: *some* of the exceptions in Section 72 prohibit disclosure, but others make disclosure discretionary. If the Court of Appeals were correct, then *Bowers* should have said that the Act mandates the nondisclosure of *all* excepted information. *Bowers* then went on to analyze the then-current version of Section 72(e)(3), which provided that the Act "shall not be construed to repeal: . . . [s]tate laws making certain tax matters confidential." 265 Ga. at 250. That language, in turn, imported the prohibition contained in O.C.G.A. § 48-7-60(a), which "mandate[d]" in no uncertain terms "that tax information be maintained inviolate." 265 Ga. at 250. Accordingly, the Court held that the records at issue "consisted of confidential tax information which is not subject to disclosure." *Id.*

In sum, *Bowers* (1) observed that the Act prohibits the disclosure of *some* exempted records; (2) analyzed one of the Act's exemptions, which clearly prohibited disclosure; and (3) concluded that records covered by *that* exemption could not be disclosed. But under the Court of Appeals' analysis, the Act prohibits the disclosure of *all* exempted records. That would mean that step (1) of the *Bowers* analysis is wrong, and steps (2) and (3) are unnecessary. Accordingly, far from supporting the Court of Appeals' interpretation, *Bowers* refutes it by engaging in an analysis that would be completely irrelevant if every exemption mandated nondisclosure.

D. CCRF spends much of its brief dwelling on an issue the Court of Appeals did not even mention: namely, that the documents at issue are purportedly covered by a confidentiality agreement. *See, e.g.,* Appellee Br. 2-4. This is a red herring.

First, the Court did not grant certiorari on this issue. Instead, the question framed by the Court is whether the Act "forbids the disclosure of *all excepted information* listed in [Section 72(a)]" (emphasis added). The question of how Section 72(a) interacts with confidentiality agreements is analytically distinct, and the Court should not consider it. *See, e.g.*, *Columbus Bd. of Tax Assessors v. Med. Ctr. Hosp. Auth.*, 806 S.E.2d 525, 526 n.1 (Ga. 2017) ("We did not grant certiorari on this question, and, therefore, we do not review it.").

In any event, Section 72(a) is entirely irrelevant to the enforceability of confidentiality agreements. Section 72(a) does exactly one thing: it provides that an

agency is *not required* to disclose covered documents. If disclosure is prohibited—by another statute, by an enforceable confidentiality agreement, or by any other valid means—Section 72(a) has nothing at all to say about it. In this respect, Section 72(a) differs markedly from the Act's provisions *mandating* disclosure. It is well-established that agencies cannot contract their way out of the Act's disclosure requirements. *See, e.g.*, *Georgia Hosp. Assoc. v. Ledbetter*, 260 Ga. 477, 479 (explaining that agency action "is subordinate to the Open Records Act"); Ga. Op. Att'y Gen. 89-32, at 73 (June 30, 1989) (explaining that "a contract cannot overrule . . . the Open Records Act").

In other words, *amici*'s position in no way implies that Section 72(a) somehow voids valid confidentiality agreements. The correct view is simply that Section 72(a) does not *substitute* for confidentiality agreements by barring the disclosure of *all* covered records, regardless of whether any confidentiality agreement applies to them.

II. The Court of Appeals' Holding Will Lead to Untenable Consequences

The rule announced by the Court of Appeals can be interpreted in one of two ways. The first is that Section 72(a) imposes an outright prohibition on releasing the covered documents—through any mechanism and in any context. The second is that Section 72(a) prevents agencies from releasing records *only in response to an Open Records Act request*. As demonstrated below, the first interpretation is wholly unmoored from the statute, and would lead to such radical consequences that even

CCRF is unwilling to defend it. Meanwhile, the second interpretation is entirely incoherent from a policy perspective, and would perversely *disfavor* the Open Records Act as a mechanism for releasing government records. In addition, *both* interpretations would impose excessive administrative burdens on the state's agencies.

A. One way to understand the Court of Appeals' holding is that Section 72(a) bars agencies from releasing covered documents under any circumstances. This aggressive interpretation is impossible to reconcile with the statutory text. For example, the "research exceptions" which are at issue in this case *expressly contemplate* the disclosure of the covered records. The first of the exemptions applies only to information that "has not been publicly released" or "published"; and the second only "until [exempted] information is published" or "otherwise publicly disseminated." O.C.G.A. § 50-18-72(a)(35), (a)(36). These qualifications would be nonsensical if the information covered by the research exceptions *could never be* published or publicly disseminated.

Moreover, this reading of Section 72(a) would lead to obviously unacceptable policy consequences. In the context of the research exceptions, it would essentially mean that Georgia universities could not publish research conducted by their faculty or staff. *Id.* § 50-18-72(a)(35), (a)(36). Elsewhere in Section 72(a), it would mean that law enforcement could not release body camera footage from a pending investigation, even if such footage were highly relevant to an important public debate, or

to an effort to apprehend a suspect. *Id.* § 50-18-72(a)(4). The University of Georgia could not congratulate its president on his birthday. *Id.* § 50-18-72(a)(21). The Metropolitan Atlanta Rapid Transit Authority ("MARTA") could not release transit route options discussed in the context of promoting ridesharing programs. *Id.* § 50-18-72(a)(24). Georgia State University could not announce gifts or donations in a way that would reveal any personal information about the donors. *Id.* § 50-18-72(a)(29). And a state agency facing criticism for running an excessively costly self-insurance program could not release records demonstrating that the cost of the program was reasonable. *Id.* § 50-18-72(a)(45). The General Assembly clearly did not intend to impose such an illogical and draconian regime.

B. These consequences are so radical that not even CCRF attempts to defend them. Instead, it observes that "[p]olice officers release sketches independently of an Open Records Act request, and a public agency does not have to wait for an Open Records Act request to release the findings of an investigation." Appellee Br. 21–22. In other words, CCRF's position appears to be that agencies are entitled to release the information covered by Section 72(a)—as long as they are not doing so in response to an Open Records Act request.

This view is nothing short of bizarre. Under this reading of Section 72(a), a university is free to put a covered document on its website, or send it out by mail to all of its alumni. It is also free to release the document in response to an informal

request. However, the university is prohibited from disclosing the same document pursuant to an Open Records Act request. It is hard to conceive of a coherent justification for such an interpretation of the statute.

Indeed, CCRF's approach is directly contrary to the legislature's stated policy. As noted above, the General Assembly adopted "a strong presumption that public records should be made available for public inspection," and required the Act to be "broadly construed to allow the inspection of governmental records." O.C.G.A. § 50-18-70(a). Under CCRF's view, however, the Open Records Act would be *disfavored.* In fact, it would be the *worst* mechanism for obtaining the myriad public records covered by Section 72(a). This is not a defensible result.

C. In addition, regardless of how the Court of Appeals' holding is interpreted, it would impose excessive administrative burdens on government agencies. The Act requires agencies to respond to public records requests within a reasonable amount of time not to exceed three business days. O.C.G.A. § 50-18-71(b)(1)(A), (d). Under the Court of Appeals view, even if an agency *wishes* to disclose a particular document, it cannot do so until it has determined whether that document qualifies for *any* of the 50 exemptions listed in Section 72(a) (many of which have multiple subparts).

As an example, the agency would have to determine whether the record at issue was originally "acquired by [the] agency for the purpose of establishing or

implementing . . . a carpooling or ridesharing program," including for "the development of . . . demand management strategies such as variable working hours and telecommuting." O.C.G.A. § 50-18-72(a)(24). Similarly, the agency would have to determine whether the record at issue "*pertain[s]* to the rating plans, rating systems, underwriting rules, surveys, inspections, statistical plans, or similar proprietary information used to provide or administer liability insurance or self-insurance coverage to any agency." *Id.* § 50-18-72(a)(45) (emphasis added). And it would also have to determine if the document happens to contain any personal information concerning a donor *or a potential donor* to any public postsecondary institution in Georgia, and whether such a donor has transacted business with that institution within three years of the donation. *Id.* § 50-18-72(a)(29). After that, the agency would have to evaluate whether any of the other 47 exceptions were applicable. This onerous and complex task would have to be performed, in three business days or less, for every record that is responsive to any Open Records Act request. It is implausible that the General Assembly intended to impose such a burden on every agency, instead of merely *allowing* agencies to disclose documents that may fall within an exemption when the agency deems it appropriate to do so.

III. The Court of Appeals' Holding Makes Georgia an Outlier in Restricting Access to Government Records

The Court of Appeals' decision would leave Georgians far *less* access to government information than is enjoyed in the vast majority of other jurisdictions.

Every state, the District of Columbia, and the federal government have passed laws establishing a default presumption that government records are to be open and available to the public. The vast majority of state open records statutes allow the government to withhold exempt records without prohibiting disclosure. *See, e.g.*, Mo. Rev. Stat. § 610.022(4) ("nothing in sections 610.010 to 610.028 shall be construed as to require a public governmental body to hold a closed . . . record"); S.C. Code Ann. § 30-4-40(a) ("A public body may but is not required to exempt from disclosure the following information . . . ."); Iowa Code § 22.7 ("The following public records shall be kept confidential, unless otherwise ordered by . . . the lawful custodian of the records . . . ."); *Mercer v. S. Dakota Attorney Gen. Office*, 864 N.W.2d 299, 305 (S.D. 2015) (where statutory exemption applied, "the Attorney General's Office had authority under SDCL 1–27–37, as the custodian of the record, to exercise its discretion" not to release the exempted records). In total, no fewer than 40 jurisdictions grant public agencies the discretion to release information covered by at least some statutory exemptions, thus providing greater access to public records than the Court of Appeals' decision would allow to the citizens of Georgia.[3]

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[3] *See* Cal. Gov't Code § 6253(e); Conn. Gen. Stat. § 1-210(b); *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. Dist. Ct. App. 1991); 5 Ill. Comp. Stat. 140/7(1); Iowa Code § 22.7; *Lawson v. Office of Att'y Gen.*, 415 S.W.3d 59, 68 (Ky. 2013); *Globe Newspaper Co. v. Boston Ret. Bd.*, 388 Mass. 427, 442 n.24 (1983); *Tobin v. Michigan Civil Serv. Comm'n*, 98 Mich. App. 604, 608 (1980), *aff'd*, 416 Mich. 661 (1982); Mo. Rev. Stat. § 610.022(4); 1999 N.M. Op. Att'y Gen. 03

(N.M.A.G.), 1999 WL 33135100; N.D. Cent. Code § 44-04-17.1(5); State of Oregon Department of Justice, Att'y Gen.'s Public Records and Meetings Manual 119 (Nov. 2014), https://www.doj.state.or.us/wp-content/uploads/2017/06/pulic_records _and _meetings_manual.pdf; 65 Pa. Cons. Stat. § 67.506(c); *R.I. Fed'n of Teachers, AFT, AFL-CIO v. Sundlun*, 595 A.2d 799, 802–03 (R.I. 1991); S.C. Code Ann. § 30-4-40(a); *Mercer v. S. Dakota Att'y Gen. Office*, 864 N.W.2d 299, 305 (S.D. 2015); Tex. Gov't Code Ann. § 552.007(a); Va. Code Ann. § 2.2-3705.1(1); Wash. Rev. Code § 42.56.070 (1) ("which exempts *or* prohibits disclosure" (emphasis added)); Wis. Stat. § 19.356.

See also Alaska Stat. § 40.25.120(a)(4) (using permissive nondisclosure language); Ariz. Rev. Stat. Ann. § 39-128(B) (same); Colo. Rev. Stat. § 24-72-204(2)(a) (same); D.C. Code § 2-534(a) (same); Haw. Rev. Stat. § 92F-13 (same); Ind. Code § 5-14-3-4(b) (same); Kan. Stat. Ann. § 45-221 (same); Md. GP § 4-343 (same); 25-61 Miss. Code. R. § 12(2)(a) (same); Mont. Code Ann. § 2-6-1003(2) (same); Neb. Rev. Stat. § 84-712.05 (same); N.J. Stat. Ann. § 47:1A-3 (same); N.Y. Pub. Off. Law § 87(2) (same); N.C. Gen. Stat. § 132-1.1(a) (same); Utah Code Ann. § 63G-2-201(b) (same); Wyo. Stat. Ann. § 16-4-203(b) (same).

Compare Idaho Code § 74-105(14) (no mandatory nondisclosure language) *with id.* § 74-105(5) ("shall be exempt from disclosure to the public"); *compare* La. Stat. Ann. § 44:3(A) ("[n]othing . . . shall be construed to require disclosures of records") *with id.* § 44:3(B) ("[n]o officer or employee of any of the officers, agencies, or departments . . . shall disclose said . . . information"); *compare* Me. Rev. Stat. Ann. tit. 1, § 402(3)(B) (exception for documents protected by privilege, which can be waived upon disclosure) *with Dubois v. Dep't of Envtl. Prot.*, 2017 Me. 224 ¶ 20, 174 A.3d 314, 319 (" '[A] record that is or contains intelligence and investigative record information is confidential and may not be disseminated by a Maine criminal justice agency . . . if there is a reasonable possibility that . . . inspection of the record would . . . [d]isclose the identity of a confidential source."); *compare* Okla. Stat. tit. 51, § 24A.5(2) (the exempted information at issue "may be redacted or deleted prior to release") *with id.* § 24A.5(1) (the Act "does not apply to records specifically required by law to be kept confidential including . . .").

By contrast, only three states are known to treat all of their statutory exemptions as mandatory bars to disclosure.[4] And in two of these outlier states, that result is dictated by specific statutory language. Tenn. Code Ann. § 10-7-504 (using language like "shall be treated as confidential" and/or "shall not be open for inspection by members of the public" in the text of *every* statutory exemption); Ark. Code Ann. § 25-19-105(b) (records in all exempt categories "shall not be deemed to be made open to the public").

The General Assembly certainly knows how to prohibit access to information when that is its intent. *See, e.g.*, O.C.G.A. § 48-2-15 (providing for the confidentiality of tax information). But it included no such overarching prohibition in the Open Records Act. To the contrary, it reiterated Georgia's "strong public policy . . . in favor of open government." O.C.G.A. § 50-18-70(a).

The Court of Appeals erred in interpreting the Act to create a regime that is far more restrictive than that of most other states.

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[4] These three states are (1) Arkansas, Ark. Code Ann. § 25-19-105(b); (2) Tennessee, *e.g.*, Tenn. Code Ann. § 10-7-504, and (3) West Virginia, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. Marcum*, 799 S.E.2d 540, 547 (W. Va. 2017) ("Our statute provides a blanket prohibition against disclosure of any record coming within its exemption.").

CONCLUSION

For the reasons stated above, *amici* respectfully request that the Court reverse the ruling of the Court of Appeals.

Dated: January 29, 2018

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