IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S16C1463

E. KENDRICK SMITH,

Petitioner,

Vs.

NORTHSIDE HOSPITAL, INC., *et al.*

Respondents.

AMICUS BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

GEORGIA PRESS ASSOCIATION, GEORGIA FIRST AMENDMENT FOUNDATION, AND THE ATLANTA JOURNAL AND CONSTITUTION

David E. Hudson
Georgia Bar No.: 374450
dhudson@hullbarrett.com

HULL BARRETT, PC
Post Office Box 1564
Augusta, Georgia 30903-1564
Tel: 706-722-4481
Fax: 706-722-9779

I.

STATEMENT OF THE INTERESTS OF AMICI

The Georgia Press Association (GPA) is a nonprofit association whose members are 139 daily and weekly Georgia newspapers. An important mission of the 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 (GFAF) is a Georgia nonprofit 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 access to the records of public institutions is threatened.

The Atlanta Journal and Constitution is a daily newspaper published in Atlanta, Georgia, that covers issues of interest to the greater metropolitan area and throughout 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.

II.

WHY CERTIORARI SHOULD BE GRANTED

Suppose that a public Agency as defined in the Georgia Open Records and Open Meetings Acts decided to lease all of its publicly owned assets to a nonprofit corporation it created, and contracted for the nonprofit corporation to carry out the Agency's public functions. And further assume that the Agency maintained board

membership on the nonprofit corporation that it created, and maintained a revisionary interest in all of the assets transferred to or later acquired by the nonprofit. And further assume that the government Agency took a "hands off" approach to the day-to-day activities of its nonprofit, and thereby allowed the nonprofit to make business decisions and to hold all of the related documents without providing copies to the Agency. And lastly suppose that a citizen had the temerity to want to see documents generated in the operation of the nonprofit corporation, and the nonprofit responded that those documents are none of the public's business. The nonprofit contends that it did not consult the Agency on the particular transactions involved, and did not share the documents with the Agency. The nonprofit therefore contends that the Georgia Open Records Act does not apply to the citizen's request. Up until the Court of Appeals decision in the present case, it would have been said that the nonprofit's response was both brazen and wrong.

Because the majority of the Court of Appeals in a 5-2 decision has accepted that Northside can do just what is described above, this case merits certiorari review for several reasons.

1. The Court of Appeals decision is in conflict with all relevant precedents of this Court and the Court of Appeals. No prior Georgia decision has allowed an agency to establish a surrogate that withholds its records.
2. The Court of Appeals decision conflicts with the legislative mandate in O.C.G.A § 50-18-70(a) that there is a strong presumption that public records be made available for inspection and that the Open Records Act

"shall be broadly construed to allow the inspection of governmental records."

3. The Court of Appeals majority adopted a crimped interpretation of O.C.G.A § 50-18-71(b)(2) that defines public records to include "all documents, ... prepared and maintained or received by ... a private person or entity in the performance of a service or function for or on behalf of an agency...."

4. The Court of Appeals decision generated a strong dissent.

5. It cannot be gainsaid that the provision of health care to the public and the operation of public health institutions are of vital importance to the citizens of our State. Without the ability to conduct oversight via the Open Records Act, the public will be left uninformed or skeptical about the fulfillment of the public health responsibilities for which hospital authorities were created.

III.

ARGUMENT AND CITATION OF AUTHORITIES

(A) A straightforward application of O.C.G.A § 50-18-70(b)(2) and earlier appellate decisions demonstrate the mistake made by the Court of Appeals.

This case should never have gotten off track as it did in the trial court and the Court of Appeals. A straightforward reading of § 50-18-70(b)(2) shows that there is a simple test to apply to determine whether records in the hands of a private entity should be disclosed under the Open Records Act. Was the private entity performing "a service or function for or on behalf of an agency?" In the present case, there is no dispute that Northside and its entities were created by the Hospital Authority and charged with the

performance of the public health responsibilities of the Authority. It thus follows, even without the presumptions in favor of openness in § 50-18-70(a), that the documents requested in this case should have been made public.

This uncomplicated and straightforward approach was applied by the Court of Appeals in *Jersawitz v. Fortson*, 213 Ga. App. 796 (1994). The critical factors in ordering access to records of the Olympic Task Force Selection Committee was whether the private entity was (1) "formed with the knowledge and approval of [the agency], and (2) was the private entity "a vehicle to carry out [the agency's] responsibilities?" Since the answer to both was in the affirmative, the private entity, the Task Force Selection Committee, had to be open to the public. In the present case, the Hospital Authority formed Northside and charged it with the responsibility of carrying out the statutorily mandated public health responsibilities of the Authority. That should be the end of the inquiry. In every case where a public agency has created a subordinate entity to carry out public responsibilities, the appellate courts of this state have upheld public access to the subordinate entity's records.

In *Macon Tel. Pub. Co. v. Board of Regents*, 256 Ga. 443 (1986), the University of Georgia created the nonprofit athletic association to carry out "a legitimate function of the University" and its records had to be made public. *Id.* at 444-445. In *Red & Black Publishing Co. v. Board of Regents*, 262 Ga. 848 (1993), the University of Georgia established a student organization court to carry out student discipline functions, and this Court held that the Court was subject to the Open Records Act.

In two hospital cases, private nonprofit corporations created by public hospital authorities were held subject to the Open Records Act. In *Northwest Ga. Health Sys.,*

Inc. v. Times-Journal, Inc., 218 Ga. App. 336 (1995), the Court of Appeals decision that the records were public turned on the fact that the "private, nonprofit corporations became the vehicle through which the public hospital authorities carried out their official responsibilities." *Id.* at 340. In *Clayton County Hosp. Auth. v. Webb*, 208 Ga. App. 91 (1993), the Court of Appeals did not have to analyze how the private corporations were created by the County Hospital Authority because there was another statutory provision that made the records public. Because the Authority had actual physical possession and control of the documents, *Id.* at 93, its possession of the documents alone made them available to the public. O.C.G.A § 50-18-70(b)(2) ("documents...maintained or received by an agency....").

Northside's reliance on *Hackworth v. Board of Educ.*, 214 Ga. App. 17 (1994), demonstrates the fallacy of Northside's argument. *Hackworth* upheld the principle that records of a private business (Laidlaw Transit) are public to the extent that those records are "an integral part of the course of the operation of a public agency, ..." *Id.* at 20. Laidlaw Transit, Inc., which had possession of the records in *Hackworth*, was a wholly independent private company, neither created by the Board of Education, nor entrusted with all of the public responsibilities of the Board of Education. It only provided bus drivers and transportation services. As the Court of Appeals stated, the open records request did not "seek to examine all of Laidlaw's records, and no question exists that he could not do so." *Id.* at 20. But even then personnel records on Laidlaw bus drivers, transporting Atlanta students, had to be disclosed. And they had to be disclosed regardless of whether or not the Board of Education was involved, or not, in the specific drivers' hiring. Northside does not fall within the language of *Hackworth*

indicating that some records remained private, because Northside is a creation of a public agency that entrusted its assets and responsibilities to Northside.

Northside argues in its opposition to certiorari that Petitioner's argument would make all of the records of Northside and its affiliated entities subject to public inspection. Absolutely they should be. Everything about Northside as an entity created by the Authority to carry out the Authority's responsibilities makes its records subject to public inspection except where specific exemptions are contained in the Open Records Act, or in the exception for public hospitals' inchoate plans and strategies. O.C.G.A § 31-7-75.2.

(B) The Open Records Act requests serve as a critical check against government overreach and abuses.

Transparency is vital to our democratic system of government. "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both." Letter of James Madison to W. T. Barby (August 4, 1822), 9 *Writings of James Madison* 103 (G. Hunt ed. 1910); *see also* Office of the Attorney General of Georgia, *Georgia's Sunshine Laws: A Citizens Guide to Open Government* 2, *available at* http://gfaf.org/resources/sunshine_laws.pdf ("*Citizen's Guide*") ("A democratic government assumes that those who elect public officials will have free access to what those public officials are doing."). Closed-door politics leads inexorably to the abuse of the power of public office and the misuse of the public's money. *Atlanta Journal v. Hill*, 257 Ga. 398, 399 (1987). The government's business must, therefore, be performed in the open — "[p]ublic responsibility demands public scrutiny." *Davis v. City of Macon*, 262 Ga. 407, 408 n.3 (1992) (quoting *Arneson v. Bd. of Trs.*, 257 Ga. 579, 580 (1987)). For these reasons, "the strong public policy of this

state is in favor of open government." O.C.G.A. § 50-18-70(a); *see also Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 66-67 (1980) (same).

Georgia's Sunshine Laws (the Open Records Act at issue in this case, and the Open Meetings Act) are paramount in furthering the state's vital policy of open government. These laws are by far the public's most important tools for accessing and evaluating our state government's business. "[A]ccess to government meetings and records provides citizens with the information they need to participate in the democratic process and to insist that government officials are held accountable for their actions." *Citizen's Guide* at 2. As the General Assembly declared in the 2012 overhaul of the Georgia Open Records Act, Ga. L. 2012, p. 218, *et seq*, "public access to public records should be encouraged to foster confidence in government, and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions." O.C.G.A. § 50-18-70(a). Accordingly, the legislature has established a strong statutory presumption in favor of open access to public records:

> The General Assembly further finds and declares that there is a *strong presumption* that public records should be made available for public inspection without delay. *This article shall be broadly construed to allow the inspection of governmental records. The exceptions* set forth in this article, together with any other exception located elsewhere in the Code, shall be interpreted narrowly to exclude only those portions of records addressed by such exception. (emphasis added).

Id. In short, in case of any doubt, a public agency, and a reviewing court, should broadly construe the right of public access.

(C) Public access to the records of hospital authorities and their created entities are far too important to be concealed by the construct of the majority decision of the Court of Appeals.

Making the requested records available for public scrutiny is compelled by the very purposes of the Open Records Act: fostering the public's "confidence in government" and ensuring that the public "can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions." O.C.G.A. § 50-18-70(a). There can be no dispute that Northside and the many similarly situated entities in this state are carrying out duties and functions that the public hospital authorities have delegated to them, and which the authorities would otherwise perform — duties and functions that are undeniably public. O.C.G.A. § 31-7-75 ("[e]very hospital authority shall be deemed to exercise public and essential governmental functions"). As is true of the many similar authority-operator relationships around the state, the Authority created Northside, leased and transferred to it all of the Authority's public assets — property, cash, employees, and more — and delegated to Northside the Authority's mandated duty to "promote the public health needs of the community" as required by the law that permitted the lease agreement. O.C.G.A. § 31-7-75(7). Northside now operates public healthcare assets worth millions if not billions of dollars, and both state law and Northside's bylaws require it to operate those public assets for the benefit of the general public. The public must be able monitor such entities to evaluate whether they are properly and efficiently stewarding the public's assets and carrying out the statutorily mandated public functions and responsibilities of the hospital authority. Georgia's Sunshine laws ensure such public oversight. *See id.* § 50-18-70(a).

The transparency afforded by the Open Records Act's robust right of public access is especially vital in the healthcare context. This state and nation face skyrocketing healthcare costs, which reached $2.9 trillion, or 17.4 percent of GDP in 2013. *See Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group, Historic National Health Expenditure Data*, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/highlights.pdf (last visited June 7, 2016). An estimated 25 percent or more of these costs — almost $800 billion — are *waste* in the form of, *e.g.*, unnecessary services, inefficiently delivered services, excess administrative costs, too-high prices, and fraud. Institute of Medicine, *Best Care at Lower Cost: The Path to Continuously Learning Health Care in America* at 12–13, http://iom.nationalacademies.org/reports/2012/best-care-at-lower-cost-the-path-to-continuously-learning-health-care-in-america.aspx (last visited June 7, 2016). The public oversight afforded by Georgia's Sunshine laws is critical to guarding against potentially wasteful practices of the public health systems around the state.

To illustrate, in 2014, The Atlanta Journal-Constitution published an article reporting multi-million-dollar salaries and incentive plans for executives of several of the state's hospital systems, including Northside. Carrie Teegardin, *Millions on the line for hospital CEO pay: Incentives questioned in system that grapples with cost and quality issues*, Atlanta Journal-Constitution, Mar. 30, 2014, Available at http://www.myajc.com/news/news/how-atlantas-hospital-chiefs-earn-their-millions/nfL5s/ (last viewed June 7, 2016). (incentives set for executives "offer a window into the mindset of a hospital system and whether it's focused on value, on keeping the

community healthy and on making sure patients are protected from errors and infections"). *Id.* ("The fundamental tenet of CEO compensation ... is ... you get the behavior you reward."). *Id.* The article observed that "[w]hile some local hospitals that operate authority-owned hospitals readily complied with the AJC's requests, some others" – specifically, Northside and its $5.3 million CEO – "denied that the act applied to them." *Id.* For an entity like Northside, entrusted with running public assets on behalf of public agencies for the public's benefit, it is for good reason that such a response is impermissible. Without the access afforded by the Open Records Act, the public that these entities are supposed to serve is left in the dark. Are they in business to provide quality and affordable healthcare to the public, as the law requires, or are they incentivized simply to maximize revenue? Should not the public have the right to know when it is the public's assets — and its health — at stake?

Allowing Northside to hide its operations from the public would subvert the Open Record Act's purpose of improving and encouraging public access to public institutions. Northside and similarly situated entities that run this state's public healthcare systems must remain accountable to the public through inspection of their records. It cannot and should not be possible for a government agency to insulate itself from public scrutiny by spinning off a private entity and transferring its assets, duties and public functions to that entity. *See* Amicus Brief of The Georgia Attorney General in Support of Appellee in *Northwest Ga. Health Sys., Inc. v. Times-Journal*, 218 Ga. App. 336 (1995), at 4 ("It is the position of the Attorney General that when a hospital authority's obligation to provide for the health of the people is privatized by the lease of a public hospital to a non-profit corporation, this business reorganization and layering of corporate form cannot shield

the operations of that hospital from public scrutiny." Yet, to hide behind such a shield is exactly Northside's position in this case. Thankfully the Open Records Act does not permit that ploy, and Georgia's citizens are entitled to access the hospital's documents.

IV.

CONCLUSION

"Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[1] The majority decision of the Court of Appeals will allow private entities created by public hospital authorities that carry out their public responsibilities to operate in darkness. No one can anticipate the full magnitude of misfeasance or malfeasance that might occur in the future. It is to minimize the possibility of either that the Georgia Sunshine laws have been enacted and broadly construed. Amici join with Petitioner in urging this Court to take this case for further review and reversal of the Court of Appeals.

Respectfully submitted this 8th day of June, 2016.

s/s David E. Hudson
David E. Hudson
Georgia Bar No.: 374450
dhudson@hullbarrett.com

Hull Barrett, PC
Post Office Box 1564
Augusta, GA 30903-1564
706-722-4481 Phone
706-722-9779 Fax

ATTORNEY FOR AMICI

[1] L. Brandeis, Other People's Money 62 (1933); quoted at *Nebraska Press Ass'n. v. Stuart*, 427 U. S. 539, 587 (1976).

CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that he has caused to be served on the below-listed counsel of record a copy of the foregoing **AMICUS BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI** by United States mail, first-class postage prepaid and addressed as follows (and also by email):

Susan V. Sommers
1000 Johnson Ferry Road
Atlanta, Georgia 30342
ssommers@scrudderbass.com

J. Randolph Evans
Thurbert E. Baker
Bryan E. Bates
Dentons US LLP
303 Peachtree St., N.E., Suite 5300
Atlanta, Georgia 30308
randy.evans@dentons.com
thurbert.baker@dentons.com
nathan.garroway@dentons.com
jeremy.berry@dentons.com
bryan.bates@dentons.com

James C. Rawls
S. Derek Bauer
Ian K. Byrnside
Baker Hostetler
600 Peachtree Street, N.E., Suite 4400
Atlanta, Georgia 30308
jrawlsgbakerlaw.com
dbauer@bakerlaw.com
ibyrnsidegbakerlaw.com
S. Wade Malone
Charles Huddleston
Jessica Rutledge
Nelson Mullins Riley & Scarborough, LLP
201 17th Street, NW, Suite 1700
Atlanta, Georgia 30363

wade.malonegnelsonmullins.com
charles.huddleston@nelsonmullins.com
jessica.rutledgegnelsonmullins.com

Sidney Welch
Jeremy P. Burnette
Polsinelli, PC
1355 Peachtree St. N.E., Suite 500 South Tower
Atlanta, Georgia 30309
swelch@polsinelli.com
jburnette@polsinelli.com

Edward C. Konieczny
Edward C. Konieczny LLC
230 Peachtree Street, NW Suite 2260
Atlanta Georgia 30303
ed@koniecznylaw.com

Lucas W. Andrews
Peter C. Canfield
Andrew Pinson
Jones Day
1420 Peachtree Street, NE
Suite 800
Atlanta, GA 30309-3053
pcanfield@jonesday.com

This 8th day of June, 2016.

s/s David E. Hudson
David E. Hudson