In the
Supreme Court of Ohio

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

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 10 MEDIA ORGANIZATIONS IN SUPPORT OF RELATORS-APPELLANTS URGING REVERSAL

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INTRODUCTION AND STATEMENT OF FACTS

On August 4, 2019, 24-year-old Connor Betts killed nine people and injured 27 others when he opened fire outside a crowded bar in Dayton, Ohio. (Compl., ¶ 12.) Approximately 30 seconds after Betts commenced the attack, he was shot and killed by police officers. (*Id.*) Relators-Appellants (hereinafter, "Relators") are members of the local and national news media,[1] who, in the days following the shooting, sought access to Betts' high school disciplinary records and other related records pursuant to the Ohio Public Records Act, R.C. 149.43. (Compl., ¶¶ 20–23.) Respondents-Appellees Bellbrook-Sugarcreek School District and Superintendent Douglas Cozad (collectively, the "School District") denied Relators' request, contending that the Federal Education Rights and Privacy Act of 1974, 20 U.S.C. 1232g ("FERPA"), and the Ohio Student Privacy Act, R.C. 3319.321 (the "OSPA"), prohibited release of the requested records. (Compl., ¶ 24.)

Relators sought a writ of mandamus from the Second District Court of Appeals on the ground that the privacy rights afforded to Betts under FERPA and the OSPA terminated upon his death. (Compl., ¶¶ 32–33.) The appellate court denied Relators' petition, holding that the OSPA precluded the School District from releasing Betts' records and that, therefore, the court need not consider whether such disclosure was also prohibited by FERPA. *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Sch.*, 2019-Ohio-4187, 134 N.E.3d 268, ¶¶ 30–31 (2nd Dist.). In reaching its conclusion, the court stated that "we are not convinced that the inability of a deceased person . . . to maintain an actionable common law tort claim necessarily

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[1] Relators are Cable News Network, Inc.; Cox Media Group, Inc. d/b/a Dayton Daily News and WHIO-TV Channel 7; WDTN-TV2; Scripps Media, Inc. d/b/a WCPO-TV; The Cincinnati Enquirer, a Division of GP Media, Inc.; The New York Times Company d/b/a The New York Times; American Broadcasting Companies, Inc. d/b/a ABC News; and the Associated Press.

means that anyone with a public records request can overcome the clear, codified rights of a deceased adult former student." *Id.* at¶ 20.

The Court of Appeals erred as a matter of law in failing to interpret the OSPA in accordance with longstanding common law principles in the absence of an express statutory intent to the contrary. *See United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1634, 123 L.Ed.2d 245 (1993) ("[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.") (internal citations omitted). Moreover, the court's restrictive interpretation of the OSPA undermines public policy and is squarely at odds with the principles of openness embodied in the Ohio Public Records Act.

For these reasons, amici urge this Court to reverse the decision below and remand to the Court of Appeals to issue a writ of mandamus ordering the School District to make available to Relators all requested records, including disciplinary records, relating to Connor Betts.

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are The Reporters Committee for Freedom of the Press, The Brechner Center for Freedom of Information, The Media Institute, MPA – The Association of Magazine Media, The National Press Club, The National Press Club Journalism Institute, The National Press Photographers Association, The Ohio News Media Association, The Online News Association, Society of Professional Journalists, and Student Press Law Center. A supplemental statement of identity and interest of amici curiae is included below as Appendix A.

Amici submit this brief in support of Relators, who seek to reverse the decision of the Court of Appeals denying their petition for a writ of mandamus. This case presents important issues regarding the interpretation of the Ohio Public Records Act and the OSPA, and it

implicates the public's fundamental right of access to information about matters of public interest. As members and representatives of the news media, amici have a strong interest in ensuring newsgatherers' ability to access and disseminate information of vital public concern.

PROPOSITIONS OF LAW

I. First Proposition of Law: Absent express evidence of statutory intent, statutes which invade the common law should not be construed to abrogate longstanding common law principles.

In denying Relators' mandamus petition, the Court of Appeals concluded that OSPA barred the School District from releasing the requested records. *See State ex rel. Cable News Network, Inc.*, 2019-Ohio-4187, 134 N.E.3d 268,, at ¶ 31; R.C. 3319.321(B) ("No person shall release, or permit access to, personally identifiable information other than directory information concerning any student attending a public school . . . without the written consent of each such student who is eighteen years of age or older."). But as a matter of law, the court erred in refusing to read the OSPA in accordance with the longstanding common law principle that individual privacy rights terminate upon death. *See Young v. That Was The Week That Was*, 423 F.2d 265, 265-66 (6th Cir.1970) (holding that the common law principle that the individual right of privacy lapses with death would also apply under Ohio law); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6th Cir.1969) ("The [invasion of privacy] cause of action is regarded as purely personal, and . . . the right lapses with the death of the person who enjoyed it."); *State ex rel. Findlay Publ'g Co. v. Schroeder*, 76 Ohio St.3d 580, 582, 669 N.E.2d 835 (1996) (finding that suicide victims did not have a right to privacy that would preclude a county coroner from disclosing their names); *Kutnick v. Fischer*, 8th Dist. Cuyahoga No.81851, 2004-Ohio-5378, ¶ 28 ("[A] cause of action for invasion of privacy is personal to the individual whose privacy is allegedly invaded, and lapses with his or her death"); *Estate of Leach v. Shapiro*, 13

Ohio App.3d 393, 398, 469 N.E.2d 1047 (9th Dist. 1984) (holding that the individual right of privacy "lapses with the death of the person who enjoys it.").

The U.S. Supreme Court has recognized that when a law-making body promulgates statutory language, it "does not write upon a clean slate." *See Texas*, 507 U.S. at 534. Rather, legislatures are "understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). Accordingly, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Texas*, 507 U.S. at 534 (internal quotations and citation omitted); *see also Frantz v. Maher*, 106 Ohio App. 465, 471, 155 N.E.2d 471, 476 (1957) ("[S]tatutes are to be read and construed with reference to the principles of the common law and are not to be presumed to have intended a repeal of the settled rule of the common law unless the language employed clearly expresses or imports such intention."). For a statute to abrogate a common-law principle, "the statute must 'speak directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534 (internal citation omitted).

The Supreme Court's opinion in *Texas* is instructive here. *Texas* dealt with the question of whether the Debt Collection Act of 1982 abrogated the federal government's common law right to collect prejudgment interest on debts owed to it by the states. *Texas*, 507 U.S. at 530. The State of Texas argued that because the statutory language spoke only of the federal government's right to collect prejudgment interest on debts owed to it by a *person* (with the definition of "person" specifically excluding state governments), that Congress intended the statute to abrogate the federal government's right under common law to collect prejudgment interest from states. Like the Court of Appeals in the present case which refused to "read into"

the OSPA a common law "exception for the death of an adult former student," *State ex rel. Cable News Network, Inc.*, 2019-Ohio-4187, 134 N.E.3d 268, at ¶ 25, the Fifth Circuit found in favor of Texas, concluding that courts "are not free to supplement Congress' enactment." *Texas*, 507 U.S. at 533 (citing S*tate of Tex. v. United States*, 951 F.2d 645, 651 (5th Cir. 1992)).

The Supreme Court, however, reversed. Recognizing that "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident," the Court refused to interpret the statute's silence regarding states' obligation to pay prejudgment interest as indicative of an abrogation of the longstanding common law rule. *Id.* at 534 (quoting *Astoria*, 501 U.S. at 508). As the Court explained, "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area." *Id.* at 535 (quotations and citation omitted); *see also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 522, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989) (holding that Fed. R. Evid. 609(a)(1)'s "ambiguity respecting civil trials hardly demonstrates that Congress intended silently to overhaul the law of impeachment in the civil context.").

In finding no specific intent to abrogate the common law rule at issue in *Texas*, the Court also looked to the statutory purpose of the Debt Collection Act, which was designed to "increase the efficiency of Government-wide efforts to collect debts owed the United States and to provide additional procedures for the collection of debts owed the United States." *Texas,* at 536 (citing the statute's legislative history). Given the Act's legislative purpose, the Court concluded that no intent to abrogate the common law right to collect prejudgment interest from states could be evident when doing so "would have the anomalous effect of placing delinquent States in a

position where they had less incentive to pay their debts to the Federal Government than they had prior to its passage." *Id.* at 537.

As in *Texas*, the fact that the OSPA is silent as to the privacy rights of deceased adult students should not be read as an intention on the part of the General Assembly to abrogate existing Ohio common law with respect to the privacy rights of deceased persons. Because the text of the OSPA does not show an express intent to abrogate or narrow existing common law principles, the OSPA should be interpreted in accordance with those principles. *See Texas*, 507 U.S. at 534 ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotations and citation omitted); *Frantz*, 106 Ohio App. at 471–72, 155 N.E.2d 471. ("An intention of the General Assembly to abrogate common-law rules must be manifested by express language. There is no repeal of the common law by mere implication.").

Moreover, interpreting the OSPA as supplanting the common law rule that individual privacy rights terminate upon death, as the Court of Appeals did, is inconsistent with the OSPA's intended purpose. The OSPA was enacted "to bring the state's public schools into compliance with FERPA." *State ex rel. Sch. Choice Ohio, Inc. v. Cincinnati Pub. Sch. Dist.*, 147 Ohio St. 3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 31. And the U.S. Department of Education has consistently stated that, in accordance with common law principles, the privacy rights afforded to students under FERPA terminate upon the student's death. *See* U.S. Dept. of Educ., *Does FERPA Protect the Education Records of Students That Are Deceased?*, https://perma.cc/T8YG-NBCA (accessed Dec. 6, 2019) ("Consistent with our analysis of FERPA and common law principles, we interpret the FERPA rights of eligible students to lapse or expire upon the death of the student."); *Letter of Gammill to Parker*, Family Policy Compliance Office, U.S. Department

of Education (Feb. 20, 2009) ("The FERPA rights of eligible students lapse or expire upon the death of the student."). To interpret the OSPA to abrogate this common law principle would place it squarely at odds with FERPA and in direct contravention of the OSPA's stated purpose, specifically, to bring Ohio schools into compliance with FERPA.

The Court of Appeals' failure to read and construe the OSPA with reference to longstanding common law principles is contrary to the U.S. Supreme Court's directive that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Texas*, 507 U.S. at 534; *see also Frantz.* at 471. The Court of Appeals' decision should be reversed and the requested records released to the Relators, in accordance with the Ohio Public Records Act. R.C. 149.43(B)(1) ("Upon request . . . all public records responsive to the request shall be promptly prepared and made available for inspection.").

II. Second Proposition of Law: The Ohio Public Records Act and public policy favor broad disclosure of public records.

In addition to being inconsistent with the statutory purpose of the OSPA, the Court of Appeals' restrictive interpretation of that statute is inconsistent with the principles of broad disclosure and open government underlying the Ohio Public Records Act. "It has long been the policy of this state, as reflected in the Public Records Act and as acknowledged by [the Ohio Supreme Court], that open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 2006-Ohio-1825, 848 N.E.2d 472,¶ 20. For these reasons, the Public Records Act is to be "construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records." *Id.* (internal quotations and citation omitted). Moreover, any "[e]xceptions to disclosure are strictly construed against the

custodian of the public records, and the burden to establish an exception is on the custodian." *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St. 3d 245, 247, 643 N.E.2d 126 (1994).

Inherent in the Public Records Act, and consistent with public policy, is the principle that "public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people." *State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St. 3d 13, 2018-Ohio-5108, 123 N.E.3d 887, ¶9. Where, as here, the records at issue concern a matter of the utmost public interest and could, if released, offer life-saving lessons to help prevent future tragedies, undue restrictions on the public's right of access is particularly unwarranted.

School disciplinary records of mass shooters, like those requested by Relators, can reveal missed warning signs and opportunities for intervention that, if known and understood, may be utilized to help prevent future shootings. One such example involves Seung-Hui Cho, a student at Virginia Polytechnic Institute and State University, who killed 32 people in a mass shooting on April 16, 2007. *See Virginia Tech Shootings Fast Facts*, CNN, https://perma.cc/8BEG-JR6D (last updated April 8, 2019). In the aftermath of the tragedy, Virginia Governor Tim Kaine ordered an independent review of the circumstances surrounding the shooting, including an examination of school records reflecting Cho's interactions with the student counseling center, campus law enforcement, and campus administrators. *See* Chapman, Note, *A Preventable Tragedy at Virginia Tech: Why Confusion Over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 Pub. Int. L.J. 349, 349 (2009). The ensuing report revealed that, although numerous school officials and employees were aware of Cho's violent tendencies, they failed to communicate or share this information because they believed that doing so would constitute a violation of Cho's privacy rights under FERPA. *Id.* at 350–51.

The results of this report—along with that of a Department of Health and Human Services report examining factors contributing to the shooting—revealed widespread confusion among school officials regarding FERPA, particularly with respect to when, and under what circumstances, FERPA's so-called "emergency exception" permits schools to share information about students with "appropriate persons" if "the knowledge of such information is necessary to protect the health or safety of the student or other persons." *Id.* at 351, 360; 20 U.S.C. § 1232g(b)(1)(I). As a result, the U.S. Department of Education released revised regulations regarding FERPA's emergency exception in an effort to provide schools with greater flexibility in utilizing the exception to help prevent similar tragedies. Chapman at 360–61.

When the Virginia Tech shooting occurred, it was the deadliest mass shooting in modern U.S. history. *See* Crehan, *What's Changed 12 Years Since the Virginia Tech Shooting*, NBC2, https://perma.cc/5FZZ-FFTF (last updated April 16, 2019). Today, it is the third deadliest. *Id.* In the intervening 12 years, at least 16 shootings resulting in more than ten fatalities have been reported. *See Mass Shootings in the US Fast Facts*, CNN, https://perma.cc/F4P2-4V8D (updated Aug. 19, 2019). It is incumbent upon the news media to provide the public with the information necessary to assess the efficacy of schools' practices for identifying high-risk students and employing proactive measures to protect public safety. When school records reveal that warning signs were missed, or that schools failed to effectively act upon such signs, the news media's dissemination of this information ensures that educators, mental health professionals, law enforcement, and the public have the opportunity to use this information to implement change and help prevent future tragedies.

A prime example of this can be found in the news media's coverage of the February 14, 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida. Nikolas

Cruz, a former student at the school, killed 17 people and injured 17 others. Cruz's school disciplinary records and a subsequent consultant's report regarding the school district's treatment of Cruz revealed numerous failings and missed opportunities, including unheeded reports from students and teachers of Cruz's disturbing and violent behavior, and suspension of Cruz's counseling and special education services in the 14 months prior to the tragedy. *See* Wallman and McMahon, *Here's What Broward Schools Knew About Parkland Shooter,* South Florida Sun Sentinel, https://perma.cc/FP87-HUPM (Aug. 3, 2018); O'Matz, et al., *Nikolas Cruz Was Regularly in Trouble at School for Years, Disciplinary Records Show*, South Florida Sun Sentinel, https://perma.cc/RM9A-5R7V (Feb. 17, 2018).

News reports detailing these findings garnered widespread national attention and have prompted significant public discussion about how to prevent future mass shootings like the one that occurred in Parkland. *See, e.g.*, McShane, *Can We Prevent Another Parkland?*, Forbes, https://perma.cc/EL3Q-33L7 (Sept. 10, 2019); Mazzei, *Parkland Shooting Suspect Lost Special-Needs Help at School When He Needed It Most*, New York Times, https://perma.cc/2E5W-CKU4 (Aug. 4, 2018); *Florida School Failed Parkland Shooter, Report Says*, Los Angeles Times, https://perma.cc/KW65-8YU5 (Aug. 3, 2018). In recognition of the public benefit provided by such reporting, the South Florida Sun Sentinel was awarded the 2019 Pulitzer Prize in Public Service for "exposing failings by school and law enforcement officials before and after the deadly shooting rampage at Marjory Stoneman Douglas High School." *See* The Pulitzer Prizes, *The 2019 Pulitzer Prize Winner in Public Service*, https://perma.cc/Z2DN-9AHQ (last accessed Dec. 7, 2019).

Ensuring that the press and the public have timely access to records relating to mass shooters is imperative. Each day the public is deprived of information from these records, an

opportunity to learn lessons that could help prevent another mass shooting is lost. The news media's ability to review school records of mass shooters and report on the warning signs can help students—and their parents—identify similar behaviors in other students.

Betts' high school records are likely to reveal important information that could help schools and citizens nationwide prevent the recurrence of another tragedy like the one in Dayton. If the Court of Appeals' decision is permitted to stand, neither Relators—nor any other member of the press or public—will be able to access or report on Betts' records, and the public will be permanently deprived of that potentially life-saving information. The court's restrictive interpretation of the OSPA undermines public policy and runs contrary to the principles of liberal construction and broad access embodied in the Ohio Public Records Act. The court's decision should therefore be reversed.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the decision below and remand to the Court of Appeals to issue a writ of mandamus ordering Respondents-Appellees to immediately make available to Relators-Appellants all requested records, including disciplinary records, relating to Connor Betts.

Dated: December 16, 2019

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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Brechner Center for Freedom of Information (the "Brechner Center") at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The Ohio News Media Association ("ONMA") is the not-for-profit trade association of local newspapers and local news digital outlets throughout Ohio. Founded in 1933, the ONMA engages in government relations and advocacy on First Amendment and business-related issues at the federal and state levels and also operates a legal hotline service for its members. Other activities include conferences, training and professional development programs in support of the newspaper industry and the profession of journalism.

The Online News Association ("ONA") is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

APPENDIX B

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