IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,835

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.,

Petitioner,

vs.

NEWS-JOURNAL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF FERNANDINA BEACH NEWS-LEADER, INC., PUBLISHER OF THE NEWS LEADER; THE FIRST AMENDMENT FOUNDATION; THE FLORIDA SOCIETY OF NEWSPAPER EDITORS; GAINESVILLE SUN PUBLISHING CO., PUBLISHER OF THE GAINESVILLE SUN; LAKE CITY REPORTER, INC., PUBLISHER OF THE LAKE CITY REPORTER; LAKELAND LEDGER PUBLISHING CORP., PUBLISHER OF THE LEDGER; OCALA STAR-BANNER CORP., PUBLISHER OF THE OCALA STAR-BANNER; THE PALATKA DAILY NEWS, INC., PUBLISHER OF THE DAILY NEWS AND MARCO ISLAND EAGLE; SARASOTA HERALD-TRIBUNE CO., PUBLISHER THE SARASOTA HERALD-TRIBUNE; SEBRING NEWS-SUN, INC., PUBLISHER OF THE NEWS-SUN; SENTINEL COMMUNICATIONS COMPANY, PUBLISHER OF THE ORLANDO SENTINEL; SUN-SENTINEL CO., PUBLISHER OF THE SUN-SENTINEL OF FT. LAUDERDALE; TAMPA TELEVISION, INC. D/B/A WFLA-TV; AND THE TRIBUNE CO., PUBLISHER OF THE TAMPA TRIBUNE.

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STATEMENT OF INTEREST OF AMICI AND SUMMARY OF ARGUMENT

> The provision of adequate health care facilities fosters the health, safety and welfare of the citizens of this State and, therefore, serves a paramount public purpose.

Wald v. Sarasota County Health Facilities Authority, 360 So.2d 763, 770 (Fla. 1978).

In order to serve the "paramount public purpose" of providing adequate heath care facilities to the people of Florida, the legislature and local governments across the state have established publicly owned hospitals. See e.g., § 5, ch. 57-2085, Laws of Florida (1957) (empowering West Volusia Hospital Authority to construct and operate hospitals). This case concerns whether local governments -- by using leases to delegate this "paramount public purpose" to private corporations -- are able to eliminate the public's constitutional and statutory right to monitor performance of this public service, funded with public dollars.

Amici[1] include daily newspapers and newspaper editors from throughout Florida. These newspapers and editors regularly are on the front lines of the public's attempts to monitor public hospitals. Amicus First Amendment Foundation is a watchdog group whose specific duties include protecting the public's access rights. Amici constantly are attempting

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[1] Fernandina Beach News-Leader, Inc., publisher of the News Leader; the First Amendment Foundation; the Florida Society of Newspaper Editors; Gainesville Sun Publishing Co., publisher of the Gainesville Sun; Lake City Reporter, Inc., publisher of the Lake City Reporter; Lakeland Ledger Publishing Corp., publisher of The Ledger; Ocala Star-Banner Corp., publisher of the Ocala Star-Banner; The Palatka Daily News, Inc., publisher of The Daily News and Marco Island Eagle; Sarasota Herald-Tribune Co., publisher the Sarasota Herald-Tribune; Sebring News-Sun, Inc., publisher of The News-Sun; Sentinel Communications Company, publisher of The Orlando Sentinel; Sun-Sentinel Co., publisher of the Sun-Sentinel of Ft. Lauderdale; Tampa Television, Inc. d/b/a WFLA-TV; and the Tribune Co., publisher of The Tampa Tribune (collectively "Amici").

to help the public learn about the performance of local government, including its efforts to achieve the paramount public purpose of providing quality health care.

The arguments of Petitioner Memorial Hospital-West Volusia, Inc. threaten Amici's ability to keep the public informed about the performance of public hospitals, the expenditure of public money, and the use of public property. Moreover, acceptance of Petitioner's arguments by this Court would create a previously rejected evasive device and would thwart years of this Court's Public Records Act and Sunshine Law jurisprudence. Essentially, Petitioner contends that agreements delegating governmental health-care responsibilities to private entities eliminate the public's rights under the Florida Constitution,[2] the Sunshine Law[3] and Public Records Act[4] to monitor how those responsibilities are carried out. These legal rights are a fundamental part of Amici's newsgathering efforts.

The facts of this case illustrate how Petitioner's arguments will effect Amici and others who attempt to tell the public about the performance of public hospitals. For more than 30 years, the West Volusia Hospital Authority (the "Authority") owned and operated West Volusia Memorial Hospital (the "Hospital") subject to Florida's open-meetings and public-records laws. In 1994, Petitioner contends, all of that changed. At that time, Memorial Hospital-West Volusia, Inc., a private corporation, began leasing the hospital from the Authority. That fact alone, according to Petitioner, relieved the previously public hospital -- and by implication all others like it -- of any responsibility to allow public access to hospital

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[2] Art. I, § 24, Fla. Const. (1995).

[3] Section 286.011, Fla. Stat. (1995).

[4] Section 119.01 et seq., Fla. Stat. (1995).

meetings or records. A single lease agreement, Petitioner contends, ended three decades of citizen access to the decision-making process within a local public hospital. That same agreement, Petitioner urges, cut off decades of public scrutiny of the use of public property. That lease, Petitioner claims, precludes public monitoring of the use of tax dollars.

In this brief, Amici will show that Petitioner's arguments constitute a statewide threat to the public's interest in monitoring public hospitals and other public entities. Petitioner -- like any entity acting on behalf of a government agency -- is subject to the open-meetings and public-records requirements of Florida law. To ensure that the public's access rights are preserved in accordance with the Florida Constitution, Petitioner's arguments should be rejected. The decision of the Fifth District Court of Appeal should be affirmed.

ARGUMENT

I. Across the State, publicly owned hospitals are attempting to use leases to avoid public scrutiny of public services and funds.

The efforts of Respondent News-Journal Corporation to preserve public access to information concerning public hospitals are not unique. Amici regularly are engaged in similar efforts to facilitate public monitoring of public hospitals, whose buildings, equipment and staff are funded with tax dollars. Amici ask that this Court preserve the public's constitutional and statutory rights of access to this information.

The recent experience of Amicus the Lakeland Ledger Publishing Corporation is typical. The Ledger is a daily newspaper published in Lakeland, Florida. The City of Lakeland's primary hospital is the Lakeland Regional Medical Center (the "Center"). The City leased this facility to a private board of trustees in the mid-1980s. Since that lease was

entered, a number of concerns have arisen regarding the Center's business practices. See "Court Ruling: Sunshine for LRMC?" The Ledger, May 23, 1997, at A10 (Appendix Exhibit A). For example, city officials have come to believe that the Center is over-priced in some areas. The City, therefore, actually encourages its own insured employees to use other hospitals instead. Nurses attempting to form a union say the hospital's private administration has disregarded patient care to cut costs. A change order on a recent construction project at the Center is said to have cost tens of thousands of dollars based upon nothing more than a hospital administrator's whim. Because, however, all of this is going on at a privately run hospital, the Center -- like Petitioner -- contends these events are none of the public's business. Remarkably, hospital officials make this contention even though the corporation operating the hospital merely leases it from the City. Moreover, as in this case, if the corporation defaults or the hospital fails to perform to City standards, the lease can be terminated. In other words, the Center remains ultimately a public responsibility, worthy of the same public scrutiny that is applied to any corporation acting on behalf of a government entity and carrying out a paramount public purpose. Public property, public funds and public services are at risk.

Similar reasons for public scrutiny were protected by the Second District Court of Appeal in a case from Sarasota County. See Sarasota Herald-Tribune Co. v. Community Health Corp., 582 So.2d 730, 731 (Fla. 2d DCA 1991) (cited with approval by this court in News & Sun-Sentinel co. v. Schwab, Twitty and Hanser Architectural Group, Inc., 596 So.2d 1029, 1031-33 (Fla. 1992)). That case concerned the Sarasota County Public Hospital Board's assignment to Community Health Corporation, Inc. ("CHC") of certain important

tasks related to Sarasota Memorial Hospital. CHC received hundreds of thousands of dollars in grants from the board, as well as a $3 million loan. Id. at 732. The board was involved in CHC's creation and was "the primary and most immediate beneficiary" of its services. Id. at 734. CHC operated a hospital on valuable public property. Despite this close relationship, CHC broadly denied requests from the Sarasota Herald-Tribune for access to its hospital-related records. The Second District Court of Appeal, however, found that CHC was subject to the Public Records Act. Id.

Petitioner's arguments jeopardize continued public monitoring of organizations like CHC. That corporation's hospice facility, nursing home, preferred provider organization, magnetic resonance imager, and other health care activities are all matters of public significance and concern, related as they are to the board's paramount public purpose of providing public health care in Sarasota County. Id. at 732. CHC -- like Petitioner and other entities that provide services on government's behalf -- receives substantial public dollars and utilizes valuable public property. Id. Petitioner's arguments, however, would elevate form over substance and, if adopted by this Court, leave the citizenry with no right of access to information concerning the performance of tasks assigned to the corporations like CHC by public boards. This Court should preserve public access to such critical information.

Florida's Attorney General recently preserved public access to similar information that a privately owned hospital foundation in Tarpon Springs sought to conceal. See Fla. Att'y Gen. Op. 97-49 (Aug. 1, 1997). The foundation operates Helen Ellis Memorial Hospital, which was founded by and is still owned by the City of Tarpon Springs. Today, the City leases that hospital to the Tarpon Springs Health Facilities Authority, which subleases the

hospital to the Tarpon Springs Hospital Foundation. Neither the City nor the authority is involved in the hospital's day-to-day operations. Because, however, the foundation carries out the City's purpose of facilitating public access to adequate medical care, the Attorney General found that the Sunshine Law and Public Records Act applied to the hospital. Unhappy with this result, the foundation has sued the City and the St. Petersburg Times newspaper, seeking a declaratory judgment that the hospital's lease shields this public hospital from public scrutiny. In other words, the foundation in Tarpon Springs -- like Petitioner in this case and the corporations that operate public hospitals in Sarasota and Lakeland -- continues to fight public monitoring of public services, public funds and public property.

As these examples show, public hospitals in metropolitan areas and rural communities are aggressively fighting public scrutiny of public services, public property and taxpayer dollars. Public hospitals, however, are not the only entities striving to avoid public oversight. Public agencies increasingly are assigning other government duties to private parties. Florida courts have recognized that such delegation does not diminish the constitutional requirements of open meetings and records. See, e.g., Stanfield v. Salvation Army, 695 So.2d 501, 502 (Fla. 5th DCA 1997) (Public Records Act applies to private agency that provided probation services under contract with county); Fox v. News-Press Publishing Co., 545 So.2d 941, 942-43 (Fla. 2d DCA 1989) (Public Records Act applies to city towing contractor); Lakeland Ledger Publishing Co. v. Prison Health Services, Inc., Case No. GCG97-0146 (Fla. 10th Cir. Ct. Nov. 18, 1997) (Public Records Act applies to private corporation assigned task of providing healthcare to county jail inmates) (Appendix Exhibit B), notice of appeal filed, (Fla. 2d DCA Nov. 25, 1997); Times Publishing Co. v. Corrections Corp. of America, Case No.

91-429 CA 01 (Fla. 5th Cir. Ct. Dec. 4, 1991) (Public Records Act applies to private corporation operating county jail) (Appendix Exhibit C), aff'd without opinion, 611 So.2d 532 (Fla. 5th DCA 1993). If Petitioner's lease can effectively destroy public scrutiny here, then Petitioner will have provided a road map for the elimination of public review of public services, funds and property whenever a private business assumes government's duties. The statutory phrase "acting on behalf of any public agency" will become meaningless. See § 119.011(2), Fla. Stat. (1995). Instead of endorsing such an end run around the Public Records Act and Open Meetings Law, this Court should re-affirm that delegation of public duties does not remove the public's right to observe performance of those duties.

II. The Fifth District Court of Appeal correctly found that a mere lease cannot keep out Sunshine.

The significant danger that Petitioner's arguments pose to public access to government business is not the only reason those arguments should be rejected. Petitioner's attempts to shield public hospitals from the Sunshine also should fail because those arguments are inconsistent with established case law. Analysis of this Court's decisions in Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974) and in News & Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992) shows that, contrary to Petitioner's theories, Florida's constitutional commitment to open government meetings and records is not so narrow that a lease created with the intent of avoiding such laws can circumvent them.

The Gradison decision recognized that a government board's delegation of its responsibilities to private citizens does not remove those responsibilities from public scrutiny.

In that case, this Court considered the Palm Beach Town Council's appointment of a panel of private citizens to guide city zoning officials and to advise the town council concerning revisions to the town's zoning ordinances. 296 So.2d at 474. In other words, the council delegated to a private group much of the council's administrative and legislative authority over certain matters. Id. The private group that received these responsibilities from the town council was effectively an arm of the town council. Id. at 476. Consequently, this Court found that meetings of the private group were subject to the Sunshine Law. Id.

Petitioner in this case received a similar delegation of governmental duties. Until 1994, the West Volusia Hospital Authority directly operated a public hospital. In that year, the Authority decided a private corporation could run the hospital more efficiently than the Authority (just as the Palm Beach Town Council decided private citizens could handle certain zoning-related decisions more efficiently than the town council). The Authority, therefore, delegated to a private corporation the Authority's statutory task[5] of operating the hospital (just as the Palm Beach Town Council delegated to private citizens the council's task of formulating a proposed zoning ordinance). In Gradison, this Court unequivocally held that the Palm Beach Town Council's delegation of zoning matters to private citizens did not eliminate the public's right to monitor decision-making with regard to those matters. Similarly, in this case, the Authority's delegation of its statutory responsibilities does not eliminate the public's right to monitor decision-making with regard to those matters.

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[5] See § 5, ch. 57-2085, Laws of Florida (1957) (creating West Volusia Hospital Authority "to establish, construct, operate and maintain ... hospitals").

The Gradison decision is fatal to Petitioner's technical arguments in opposition to public access to the public hospital's business. Petitioner contends that because Article I, Section 24(b) of the Florida Constitution does not refer to groups "acting on behalf" of government, that open-meetings provision does not apply to such groups. In Gradison this Court construed Section 286.011, Fla. Stat. That provision -- like Section 24(b) -- does not contain any express statement of applicability to private groups operating on behalf of public bodies. Nevertheless, this Court in Gradison found that a private group carrying out public business is subject to the Sunshine Law. This Court should construe Section 24 in the same manner. See Monroe County v. Pigeon Key Historical Park, Inc., 647 So.2d 857, 868 (Fla. 3d DCA 1997) (Section 24 "does not create a new legal standard by which to judge Sunshine Law cases [but instead] has elevated Sunshine Law protection to constitutional proportions. [There is] no reason to construe the amendment differently than the Supreme Court has construed the statute.").

Contrary to Petitioner's arguments, Gradison's application of the Sunshine Law to private groups is not limited to government-formed advisory panels. This Court's Gradison holding is much broader and is applicable whenever authority ordinarily exercised by a governing body is delegated to a private group. Gradison, 296 So.2d at 475. Just as the private group in Gradison was "selected by the governmental authorities" to carry out a governmental task, Petitioner was selected by the Authority to carry out its statutory function of operating a public hospital. Id. Consistent with Gradison, therefore, this Court should find that a government agency's performance of statutory duties cannot be concealed by assignment of those duties to a private group.

This Court's Schwab, Twitty decision provides further evidence that open-records and open-meetings laws apply to Petitioner. The opinion recognizes that "a public agency cannot avoid disclosure under the [Public Records] Act by contractually delegating to a private entity that which otherwise would be an agency responsibility." 596 So.2d at 1031. Such delegation is precisely what happened in this case: In 1994, the Authority delegated its statutory responsibility of operating a public hospital to a private entity. Petitioner argues that the purpose of this delegation was to remove the hospital from the scope of Florida's open-meetings and public-records laws. This attempt, however, was inconsistent with Schwab, Twitty, which was two years old when Petitioner entered its lease with the Authority. Moreover, Petitioner's efforts to hide from Sunshine ignore this court's favorable discussion in Schwab, Twitty of the CHC decision, which involved Sarasota County's attempts to do the same thing Petitioner struggles to do. Petitioner's decision not to adhere to precedent does not justify a re-writing of the law to accommodate its wishes.[6]

Petitioner's attempt to rely upon its mistaken interpretation of Schwab, Twitty also conflicts with basic canons of public records law. Florida courts consistently (1) construe

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[6] Essentially, Petitioner contends it would be "unfair" to apply the Public Records Act in this case, because Petitioner did not want to be subject to the Act. This argument presents precisely the type of policy consideration that is improper in a Public Records Act case. See, e.g., Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979) (rejecting claim that "public policy considerations" compel recognition of exemptions to open-records laws, and stating that such arguments "should be addressed to the legislature"); Wallace v. Guzman, 687 So.2d 1351, 1252-54 (Fla. 3d DCA 1997) ("It is not within the scope of our authority to create new exemptions -- which is what we would be doing if we, in a balancing process, came down on the side of nondisclosure of nonexempt public documents."); News-Press Publishing Co. v. Gadd, 388 So.2d 276, 278 (Fla. 2d DCA 1980) ("Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure.").

exemptions narrowly;[7] (2) provide for access in close cases;[8] and (3) reject evasive devices.[9] Petitioner's argument is tantamount to reversing these rules of statutory construction. In fact, Petitioner asks this court to (1) give it the benefit of the doubt because it relied upon its flawed scheme to avoid the Public Records Act and Sunshine Law; and (2) protect and endorse a deliberate effort to circumvent public access. This can never be.

Analysis of the factors this Court considered in Schwab, Twitty confirms the applicability of the open-meetings and open-records laws in this case. As discussed more fully in the opinion below and in the Answer Brief of Respondent News-Journal Corporation, all nine factors support public access. The Authority provides public funds to Petitioner; Authority and corporate monies are used together to pay expenses; the hospital's services are provided on publicly owned property; Petitioner's work is an integral part of the Authority's overall mission of providing medical care to residents of the region; Petitioner provides services that the Authority itself would otherwise provide (and had provided for decades); the Authority controls Petitioner's work through lease requirements and standards; the Authority required Petitioner's creation as a condition of that lease; the Authority invests heavily in Petitioner and, therefore, has a financial interest in its success; and Petitioner functions for the benefit of the Authority as it provides services to the public. Compare News-Journal Corp. v. Memorial Hospital-West Volusia, Inc., 695 So. 2d 418, 421-22 (Fla. 5th DCA 1997)

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[7] Downs v. Austin, 522 So.2d 931, 933-34 (Fla. 1st DCA 1988).

[8] See Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 780 n.1 (Fla. 4th DCA 1985) (when in doubt, courts must prefer disclosure over secrecy), review denied, 488 So.2d 67 (Fla. 1986).

[9] Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974).

(applying factors in this case) with Schwab, Twitty, 596 So. 2d at 1031 (listing factors). The Fifth District Court of Appeal's analysis below, therefore, comports with this Court's standards as well as this Court's approval of the CHC analysis.

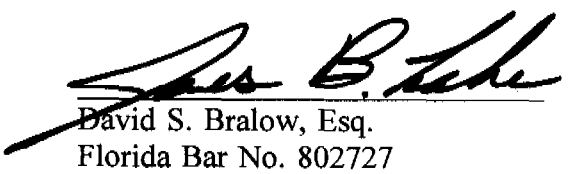
Finally, the decision below is correct because the Fifth District Court of Appeal simply re-applied the well-established rule that a government agency cannot by contract create an exemption to the public's access rights. See, e.g., State, Dept. of Health and Rehabilitative Services v. Southpointe Pharmacy, 636 So.2d 1377, 1383 (Fla. 1st DCA 1994) ("to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act") (quoting Mills v. Doyle, 407 So.2d 348, 350 (Fla. 4th DCA 1981)); Palm Beach County Classroom Teachers Ass'n v. School Board of Palm Beach County, 411 So.2d 1375, 1376 (Fla. 4th DCA 1982) ("provisions of a private agreement entered into by public bodies cannot be used to circumvent the requirements of public meetings"); Tribune Co. v. Hardee Mem. Hosp., 19 Media L. Rptr. 1318 (Fla. 10th Cir. Ct. Aug. 26, 1991) ("An agency simply cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements.") (Appendix Exhibit D). In accordance with this case law, this Court should reject the theory that Petitioner's contract with the Authority converted a hospital subject to public monitoring into a private entity immune from public oversight.

CONCLUSION

For the foregoing reasons, the decision of the Fifth District Court of Appeal in this case should be affirmed.

Respectfully submitted,

HOLLAND & KNIGHT LLP



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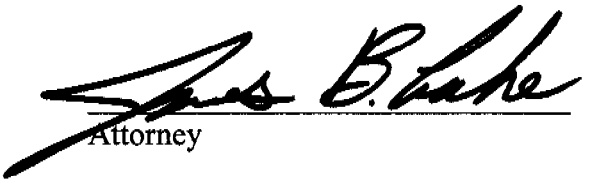

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