IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2020-308

Human Rights Defense Center,
Appellant

v.

Correct Care Solutions, LLC, and Correctional Care Solutions Group Holdings, LLC, d/b/a Wellpath,
Appellees

Appeal from Vermont Superior Court, Civil Division, Washington Unit
Docket No. 51-2-019 Wncv

Brief of Amici Curiae Secretary of State James Condos, Auditor Doug Hoffer, the Prisoners' Rights Office, the New England First Amendment Association, and the American Civil Liberties Union of Vermont in Support of Appellants

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INTEREST OF AMICI[1]

As a Constitutional officer with oversight of the Vermont State Archives and Records Administration, Secretary of State James C. Condos is and has been devoted to transparency and accountability in state government. The Vermont Constitution, Chapter 1, Article 6 states:

> *That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times in a legal way, accountable to them.*

The PRA references this provision in its statement of policy in 1 V.S.A. § 315. Secretary Condos advocates strongly that state officials and agencies should operate as if there are 625,000 Vermonters looking over their shoulders. Government should not be allowed to delegate state responsibility to avoid transparency. Good government is open government.

As a Constitutional officer, Auditor Doug Hoffer is devoted to transparency and accountability in state government. Although statute gives his office virtually unlimited access to records, its modest resources prevent it from auditing more than a few state entities, programs, or contracts in any given year. Therefore, the Public Records Act is an essential tool for those who don't have the same statutory authority to obtain records like those at issue here. Auditor Hoffer's view of the matter is expressed concisely in this quote from this Amicus Curiae Brief:

[1] No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The PRA's purposes cannot be achieved if agencies can outsource their core responsibilities—but not their accountability to the public—to private entities.

The Prisoners' Rights Office is statutorily charged with investigating and advocating for the welfare of people who are incarcerated and who are detained pretrial. Much of this investigation and advocacy occurs outside the context of litigation. The Public Records Act is an essential tool that can actually reduce litigation by mandating the flow of information outside the discovery process; without it, inmates' only options may be to remain in the dark or to sue the government. Open public records permit better-informed and less wasteful litigation decisions.

The New England First Amendment Coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians, and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

The American Civil Liberties Union of Vermont (ACLU-VT) is a nonprofit, nonpartisan organization founded in 1967 to protect and advance the civil rights and civil liberties of all Vermonters. The ACLU-VT strives to ensure that the rights guaranteed by the Vermont and United States Constitutions—including the right to ensure that the government is accountable to the people of Vermont, Vt. Const. ch. 1, art. 6—are protected equally under the law. The ACLU-VT has brought multiple freedom of information lawsuits under Vermont's Public Records Act. *See, e.g.*, *Doyle v. City of Burlington Police Dep't*, 2019 VT 66, __ Vt. __, 219 A.3d 326; *Prison Legal News v.*

Corr. Corp. of Am., No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Jan. 10, 2014); *Duffort v. Vt. Agency of Educ.*, No. 380-7-16 Rdcv, 2017 WL 7052184 (Vt. Super. May 22, 2017). The ACLU-VT has approximately 8000 members throughout the state and is the statewide affiliate of the national ACLU, which has approximately 1.5 million members nationwide. The ACLU and its affiliates have appeared in countless lawsuits to protect the right to open government.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case from Appellant's brief.

ARGUMENT

I. A Liberal Construction of the Public Records Act Requires that Private Entities Performing Essential Government Functions Be Subject to its Mandates

A. The Public Records Act Must Be Liberally Construed to Achieve Its Purposes

In this case of statutory interpretation, the Court is "guided by the Legislature's intent as evidenced principally by the language of the statutes themselves." *Judicial Watch, Inc. v. State*, 2005 VT 108, ¶ 7, 179 Vt. 214, 892 A.2d 191 (citing *In re Huntley*, 2004 VT 115, ¶ 6, 177 Vt. 596, 865 A.2d 1123 (mem.)). As this Court has stated, the inquiry into the meaning of the PRA's provisions "start[s] with the statement of legislative intent in the Act." *Caledonian Record Publ'g Co. v. Walton*, 154 Vt. 15, 20, 573 A.2d 296, 299 (1990). The plain language of that statement establishes a sweeping and broad declaration of purpose: "to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution." 1 V.S.A. § 315(a). Broad access to records of government business furthers the public interest in "enabl[ing] any person to review and criticize [governmental] decisions even though such examination may cause inconvenience or embarrassment." *Id.* The Legislature has further provided that "[p]ublic records document the legal responsibilities of government, help protect the rights of citizens, and provide citizens a means of monitoring government programs and measuring the performance of public officials." *Id.* § 315(b).

To ensure that these goals are honored, the Legislature took the unusual step of specifying how the PRA's provisions are to be interpreted: they are to "be liberally

construed to implement this policy."[2] *Id.* § 315(a). A liberal construction of a statute "is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." 3 Norman Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 60:1 (7th ed. 2008). Thus, in deciding whether the PRA extends to novel situations, this Court remains "mindful that the PRA represents a strong policy favoring access to public documents and records." *Rueger v. Natural Res. Bd.*, 2012 VT 33, ¶ 7, 191 Vt. 429, 49 A.3d 112 (citation and internal quotation marks omitted).

B. This Court Has Interpreted the Public Records Act as Necessary to Ensure Its Purpose Is Effectuated

In keeping with the Legislative directive to liberally construe the Public Records Act, this Court has closely examined whether certain plausible, but strict, readings of the PRA were nevertheless incompatible with its purpose and intent. And if they were, the Court has adopted a more liberal construction.

For example, in *Toensing v. Attorney General*, 2017 VT 99, 206 Vt. 1, 178 A.3d 1000, this Court held that records of agency business are public records under the PRA even if they were created on and are contained in the private electronic devices and accounts of public officials. The trial court, however, had read the statute differently: noting that the PRA permits requestors to inspect or copy "any public record of a public agency," 1 V.S.A. § 316(a), the court held that a "public agency" "is defined in terms of

[2] By extension, a liberal construction of the PRA requires a strict construction of its exemptions, in all cases favoring more rather than less openness. *E.g.*, *Caledonian Record*, 154 Vt. at 20, 573 A.2d at 299 ("Consistent with [the PRA's] policies, the exceptions listed in § 317(b) should be construed strictly against the custodians of the records and any doubts should be resolved in favor of disclosure.").

institutions, rather than individuals, which patently implies that a record must be in the custody or control of the agency to be subject to search and disclosure." *Toensing v. Attorney General*, No. 500-6-16 Cncv, 2017 WL 3475542, at *2 (Vt. Super. Feb. 8, 2017). This Court unanimously rejected that plausible-but-strict construction of the PRA and instead adopted, as required by the PRA itself, the plausible-and-liberal construction that "records produced or acquired in the course of agency business are public records under the PRA, regardless of whether they are located in private accounts of state employees or officials or on the state system." *Toensing*, 2017 VT 99, ¶ 12. The strict reading adopted by the trial court was incompatible with the purpose of the PRA of ensuring that the public can "'review and criticize' government actions," a purpose that "would be defeated if a state employee could shield public records by conducting business on private accounts." *Id.* ¶ 20 (quoting 1 V.S.A. § 315(a)).

Similarly, in *Trombley v. Bellows Falls Union High School District No. 27*, 160 Vt. 101, 624 A.2d 857 (1993), this Court adopted a narrow interpretation of the exemption for "[p]ersonal documents relating to an individual, including information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency," 1 V.S.A. § 317(c)(7).[3] The trial court had adopted a broad reading of the exemption, reasoning that *any* "'information in any files maintained to . . . discipline any employee' is confidential." *Trombley*, 160 Vt. at 108, 624 A.2d at 862 (quoting trial court opinion). This Court noted that this was "a possible reading of the provision," but unanimously held that it was "overbroad and inconsistent with the liberal construction we must accord to the Public Records Act overall." *Id.*, 624 A.2d at 862. It thus held that

[3] This exemption was found at 1 V.S.A. § 317(b)(7) (1993) at the time of the *Trombley* decision.

records in such files were exempt only if they were, in fact, "personal documents." *Id.*, 624 A.2d at 862.

The *Trombley* Court rejected a strict reading of the PRA/liberal reading of an exemption in a second sense, as well. It noted that the term "personal records," left undefined by the Legislature, was "vague" and that, "[i]n its broadest sense, it includes any document about specific people, including most opinions of this Court." *Id.* at 109, 624 A.2d at 863. The Court noted that "such a use of the term would consume the disclosure rule," and, although the PRA does not explicitly include any limiting principle on this broadest sense, the Court read one into it: the personal records exemption will only apply when a privacy interest is at stake, and thus "only if [the records] reveal intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends." *Id.* at 110, 624 A.2d at 863 (citation and internal quotation marks omitted). And, even if a privacy interest is implicated, disclosure will still be required if the public interest in disclosure outweighs the personal privacy interest. *Id.*, 624 A.2d at 863; *see also Kade v. Smith*, 2006 VT 44, ¶ 14, 180 Vt. 554, 904 A.2d 1080 (directing trial court on remand to "balance the interests in privacy and disclosure" and listing factors that must be considered in that analysis).

Here, Wellpath asks this Court to depart from this tradition—and from the PRA's mandate of liberal construction—and instead choose a plausible-but-strict reading of the scope of the PRA. As will be described below, the Court should decline the invitation. The PRA's purposes cannot be achieved if agencies can outsource their core responsibilities—but not their accountability to the public—to private entities.

C. In the Absence of an Explicit Legislative Directive, Courts Around the Country and in Vermont Have Interpreted their Public Records Acts to Reach Private Entities Performing Government Functions

This Court would not be staking out a novel or unusual position in interpreting the PRA to encompass private entities when and to the extent that they are acting as the functional equivalent of the government. Courts around the country have done the same when determining how to harmonize a legislative command of liberal construction with a public records act that does not mention private or quasi-public entities.

The Connecticut courts have applied a functional equivalence test to non-governmental entities since 1980, when Connecticut's definition of "public agency" said nothing on the subject. In *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 436 A.2d 266 (Conn. 1980), the Connecticut Supreme Court was asked whether a private school created by the legislature and funded by three towns was subject to the public records act. At the time, Connecticut's definition of "public agency" mirrored Vermont's, reaching "any executive, administrative or legislative office of the state . . . and any state or town agency, any department, institution, bureau, board, commission or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state." Conn. Gen. Stat. § 1-18a(a) (1980). There, as here, the entity resisting disclosure argued that the definition of public agency must be strictly construed. But the state supreme court disagreed, concluding that, given the public records act's purpose, "a policy of liberal access to public records would necessarily be thwarted if 'public agencies' were given a narrow construction." *Woodstock Acad.*, 436 A.3d at 269. The Court adopted an analysis that examined the following factors: "(1) whether the entity performs a governmental function; (2) the level of government

funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government." *Id.* at 270-71. This test is to be applied on a case-by-case basis "to ensure that the general rule of disclosure underlying this state's FOIA is not undermined by nominal appellations which obscure functional realities."[4] *Id.* at 271.

Maine has reached the same conclusion. *See Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶¶ 16-17, 769 A.2d 857 (applying similar test as in *Woodstock Academy*, and noting that a finding of functional equivalency does "not require that an entity conform to all factors, but that the factors be considered and weighed"). As has New Hampshire. *E.g.*, *Prof'l Firefighters of N.H. v. Local Gov't Ctr., Inc.*, 992 A.2d 582, 588 (N.H. 2010) ("In the end, we examine the structure and function of an entity to assess the entity's relationship with government, and determine whether that entity is conducting the public's business."). And Massachusetts. *See Globe Newspaper Co. v. Mass. Bay Transp. Auth. Ret. Bd.*, 622 N.E.2d 265, 266-67 (Mass. 1993) (applying a five-factor test almost identical to *Woodstock Academy*'s). Each of these states' supreme courts have adopted a functional equivalence test despite having open records statutes that make no mention of private entities. *See* 1 Maine Rev. Stat. § 402(3) (defining public records as those in the "possession or custody of an agency or public official of this State or any of its political subdivisions . . . [that] has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental

[4] Twenty-one years later, the Connecticut legislature amended the definition of "public agency" to conform to the holding of *Woodstock Academy*. *See* An Act Concerning Privatized Public Records, 2001 Conn. Legis. Serv. P.A. 01-169 (S.H.B. 6636) (West). The definitional section has been renumbered to Conn. Gen. Stat. § 1-200(1).

business"); N.H. Rev. Stat. Ann. § 91-A:4, I (stating that the public "has the right to inspect all governmental records in the possession, custody, or control of [all] public bodies or agencies"); Mass. Gen. Laws ch. 4, § 7(26) (defining public records in relevant part as those "made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose").

Examples are not limited to our New England neighbors. Washington has construed its public records act to reach private entities performing government functions. *See Fortgang v. Woodland Park Zoo*, 387 P.3d 690, 693 (Wash. 2017) (adopting *Woodstock Academy* test first adopted by Washington appellate courts in *Telford v. Thurston County Bd. of Comm'rs*, 974 P.2d 886 (Wash. Ct. App. 1999)). Similar to Vermont's PRA, Washington's public records act applies to "every state office, department, division, bureau, board, commission, or other state agency" and "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." Wash. Rev. Code § 42.56.010(1). Noting the public records act's "strongly-worded mandate for open government . . . that must be liberally construed . . . to ensure that the public's interest [in broad disclosure] is protected," the Washington Supreme Court concluded that the *Woodstock Academy*/*Telford* test "furthers the PRA's purposes by preventing governments from evading public oversight through creative contracting." *Fortgang*, 387 P.3d at 692-93.

Tennessee provides yet another example of a liberally construed open records act applying to private entities performing government functions. Tennessee's act did not

define what entities are subject to it, but simply stated that "[a]ll state, county and municipal records . . . shall . . . be open for personal inspection by any citizen of Tennessee, . . . unless otherwise provided by state law."[5] Like Vermont's PRA, Tennessee's open records provision must "be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d). So, while not intending "to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies," the Tennessee Supreme Court held that, "when an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency, the Tennessee Public Records Act guarantees that the entity is held accountable to the public for its performance of those functions." *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002).

Maryland has reached this result via a different route. Like Vermont's, Maryland's public information act extends to records made or received by a "unit or instrumentality of the State government or of a political subdivision . . . in connection with the transaction of public business." Md. Code Ann., Gen. Prov. § 4-101(j)(1). Also like Vermont's, Maryland's act is to be construed liberally. *See* Md. Code Ann., Gen. Prov. § 4-103(b) (requiring public information act to "be construed in favor of allowing inspection of a public record"). In keeping with this mandate, the Maryland Supreme Court gave "instrumentality" its "ordinary and popular meaning" as the "quality or state

[5] The current version of the statute now provides that public records are those "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity," Tenn. Code Ann. § 10-7-503(a)(1)(A)(i), and that "[a] governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity," *id.* § 10-7-503(a)(6).

of being instrumental," or "a thing used to achieve an end of purpose." *City of Balt. Dev. Corp. v. Carmel Realty Assocs.*, 910 A.2d 406, 427 (Md. 2006) (citations and internal quotation marks omitted). Examining "all aspects of the relationship between the entity and the state or political subdivision," the Court determined that a non-profit urban renewal organization formed to further the city's development goals was an instrumentality within the meaning of the act.[6] *Id.*

The common-sense conclusion of these courts (among others)—when the government contracts with an external entity to step into its shoes in performing its essential functions, that entity must be subject to the public records law—has also been adopted by at least four decisions of Vermont's superior courts. In *Prison Legal News v. Corrections Corp. Of America*, No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Ct. Jan. 10, 2014) (Bent, J.), the court adopted the functional equivalency test and found a private prison corporation to be the functional equivalent of a public agency. In *Whitaker v. Vermont Information Technology Leaders*, No. 781-12-15 Wncv, 2016 WL 8260068 (Vt. Super. Ct. Oct. 28, 2016) (Teachout, J.), the court applied the functional equivalency test and held that a nonprofit providing services for the state in health care technology and reform was the functional equivalent of a public agency. In *McVeigh v. Vermont School Boards Ass'n*, No. 484-9-19 Wncv, slip op. at 3 (Vt. Super. Ct. Sept. 21, 2020) (Bent, J.) (appeal pending), the court applied the functional equivalency test and held that a voluntary membership-based association for school boards was not the functional equivalent of a public agency. And, in the order appealed from here, the

[6] At the time of this ruling, the relevant provisions were codified at Md. Code Ann., State Gov't §§ 10-611(i) and 10-612(b). They have been recodified with only one minor change to the quoted language. *See* § 10-612(b) (1984, 2004 Repl. Vol.) ("this subtitle shall be construed in favor of *permitting* inspection of a public record" (emphasis added)).

superior court held that the functional equivalency test applied, but found it not satisfied on the facts here (in error, as will be argued *infra*). P.C. 5-6.

This Court has previously rejected interpretations of the PRA that would permit records reflecting the public's business to be shielded from disclosure by virtue of seemingly simple acts. In *Toensing*, the simple act was performing public business on private devices and/or in private accounts: "Wide access to records created in the course of agency business is crucial to holding government actors accountable for their actions. Exempting private accounts from the PRA would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private." 2017 VT 99, ¶ 21 (citation and internal quotation marks omitted). And in *Trombley*, the Court rejected an interpretation of the PRA that would "allow agencies to avoid disclosure by the simple act of placing a document in a personnel or similar file." 160 Vt. at 108, 624 A.3d at 862. Amici urge the Court to likewise reject an interpretation of the PRA that would allow the State to evade accountability to the public by the simple expedient of paying a private entity to stand in its shoes in performing its essential and mandatory functions. *See Prison Legal News*, 2014 WL 2565746, at *3 (excluding private agencies performing government functions from the PRA "would have an anomalous and disturbing consequence: it would enable any public agency to outsource its governmental duties to a private entity and thereby entirely avoid, intentionally or unintentionally, the fundamental interests in transparency and accountability that the [PRA] is designed to protect").

II. Wellpath Performed a Core, Mandatory Government Function Under Its Contract with the Department of Corrections

Applying the functional equivalency test here, there is little difficulty in concluding that Wellpath is a "public agency" for purposes of the PRA. Amici focus on the government function prong of the analysis, leaving the remaining prongs in the capable hands of Appellant. "The cornerstone of [the functional equivalence] analysis, of course, is whether and to what extent the entity performs a governmental or public function, for we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity." *Memphis Publ'g*, 87 S.W.3d at 79; *see also Whitaker*, 2016 WL 8260068, at *5 ("[T]he most important factor is the first, public or governmental function.").

The DOC has contractually delegated to Wellpath a function that the DOC is both constitutionally and statutorily mandated to undertake. "[T]he Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, requires the State to provide adequate medical care to incarcerated prisoners." *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198 (1989) (citations and internal quotation marks omitted). The Vermont Legislature has gone further, requiring DOC to "provide health care for inmates in accordance with the prevailing medical standards." 28 V.S.A. § 801(a).

The Illinois Supreme Court found that the fact that the state had a "constitutional and a statutory duty to provide medical care to inmates" necessarily meant that a private entity providing that care by contract with the Illinois DOC was performing a

governmental function on the DOC's behalf. *Rushton v. Dep't of Corr.*, 2019 IL 124552, ¶ 24, 160 N.E.3d 929.[7] The court noted that the contractor "stood in the shoes of the DOC when it provided medical care to [a prisoner]." *Id.* ¶ 32. The court further held that settlement agreements between the contractor and individuals alleging inadequate medical care—like the records sought here—were plainly subject to disclosure under the public records act:

> [T]he governmental function that [the contractor] contracted to perform for the DOC—its normal government business—was the provision of medical care to inmates. The settlement agreement directly relates to performance of that governmental function. It is the settlement of a claim that [the contractor's] inadequate medical care—its alleged *inadequate performance of its governmental function*—led to the death of an inmate. The connection is neither indirect nor tangential. It is direct and obvious.

Id. at ¶ 31.

Similarly, the New Mexico Court of Appeals found that a private entity that contracted with the government to provide prison medical services was performing a government function, and that settlement agreements between the contractor and individuals claiming flawed medical care were "plainly created and maintained in relation to a public business, here, the medical care and personal safety of the inmates held by the [New Mexico DOC]." *N.M. Found. for Open Gov't v. Corizon Health*, 2020-

[7] The Illinois open records law, and the New Mexico and Florida laws discussed in the next paragraph, differ from Vermont's in that they expressly contemplate subjecting certain private entities to those laws. *See* 5 Ill. Comp. Stat. Ann. 140/7(2) (a record "in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body."); N.M. Stat. Ann. § 14.2.6(G) (open records law extends to documents "that are used, created, received, maintained or held by *or on behalf of* any public body and relate to public business" (emphasis added)); Fla. Stat. Ann. 119-011(2) (defining "agency" as including private entities "acting on behalf of any public agency"). Amici cite the cases applying these laws simply to show how courts have determined whether providing medical care for people in DOC facilities constitutes a government function and whether settlement agreements relating to that care relate to public business.

NMCA-014, ¶ 18, 460 P.3d 43 (N.M. Ct. App.). The court went so far as to say it "cannot envision, nor does [contractor] cogently point us toward an alternative conclusion regarding records of this nature—involving civil compensation based upon flawed medical care or sexual abuse in New Mexico prisons." *Id.* To allow the public's access to records of governmental business to be circumvented by delegating that function to a private entity "would thwart the very purpose of [public records act] and mark a significant departure from New Mexico's presumption of openness at the heart of our access law." *Id.* at ¶ 19; *see also Prison Health Servs. v. Lakeland Ledger Publ'g Co.*, 718 So.2d 204, 205 (Fla. Dist. Ct. App. 1998) (affirming trial court's order that private entity providing prison medical services "undertook to act on behalf of the Sheriff by providing these medical services and, therefore, all of its records that would normally be subject to the Public Records Act if in the possession of the public agency are likewise covered by that law, even though in the possession of PHS, a private corporation" (internal quotation marks omitted)).

Wellpath argued below that it should not be considered to be performing a government function because the provision of health care "is predominantly the province of private entities and professionals." P.C. 24-25. That may be true, but it is also beside the point. The function at issue here—providing comprehensive health care services to individuals incarcerated by the State pursuant to constitutional and statutory mandates imposed upon the State—is and historically has been a government function. This is a fundamentally distinct scenario from the provision of medical care in the community setting: unlike those in the community, individuals in DOC facilities have no choice of medical providers and instead, during the lifetime of the Wellpath-DOC

contract, could only get care from Wellpath or—if Wellpath thought it necessary—those external providers Wellpath selected.

Not only does this distinction show the fallacy of comparing Wellpath to a community provider, but it also is another reason that it is necessary that these records be accessible to the public: the State has made the choice of who will provide medical care to those in its custody and, without access to records held by DOC's medical services provider, the public is unable to exercise its right to "review and criticize," 1 V.S.A. § 315(a), the government's decision to outsource the medical care provided to those in its facilities to a private provider in general and to this private provider in particular. In short, Vermonters deserve to know whether their $90 million were wisely spent.

The public interest lies in examining the work done on the State's behalf by Wellpath as the DOC's proxy provider of medical services. Voters and policymakers cannot assess whether DOC's policy of contracting out its constitutional and statutory duty to provide adequate medical care is a good one without understanding the frequency and circumstances under which prisoners have alleged that Wellpath failed to properly discharge that delegated duty. Amici understand that settlement agreements are not conclusive proof of wrongdoing—but voters and policymakers do not make decisions on the same technical basis on which courts determine liability, and they tend to weigh the value of the settlement against the gravity of the claim as a barometer of wrongdoing's acknowledgment. Accordingly, courts across the country (and here in Vermont) have concluded that the public's interest in settlement agreements resolving allegations of improper government conduct outweighs agencies' preference against disclosure of them. *See Trombley*, 160 Vt. at 107-08, 624 A.2d at 862 ("[T]he contract

cannot override the provisions of the Public Records Act, and the confidentiality provision was not a ground for denying plaintiffs access to the records."); *Judicial Watch*, 2005 VT 108, ¶ 12 (citing cases for the proposition that "confidentiality provisions in litigation settlement agreements . . . cannot override public records acts").

Wellpath argued below that there is no principled way to distinguish between it and every private entity that contracts with the State for any reason whatsoever. P.C. 23-24. But the functional equivalency test provides that principled way. It ensures that a private entity will be subject to the PRA only when its "relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency" carrying out an essential government function. *Memphis Publ'g*, 87 S.W.3d at 78-79. The functional equivalency test strikes the appropriate balance, and Amici urge the Court to adopt it—and find it satisfied—here.

CONCLUSION

For all of these reasons, the Court should reverse the order granting Wellpath's motion for summary judgment and denying HRDC's motion for summary judgment.

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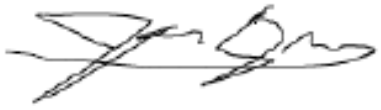

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 5232 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. 32(a)(7)(C). I have relied upon the word processor used to produce this brief, Microsoft Word for Microsoft 365, to calculate the word count.

I additionally certify that the electronic copy of this brief submitted to the Court via email was scanned for viruses, and that no viruses were detected.

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