No. 90194-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW A. NEWMAN, an incapacitated adult; and RANDY NEWMAN AND MARLA NEWMAN, parents and guardians of said incapacitated adult,

Respondents.

v.

HIGHLAND SCHOOL DISTRICT NO. 203, a Washington State government agency,

Petitioner.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

ACLU OF WASHINGTON FOUNDATION

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization with over 50,000 members and supporters dedicated to the preservation of civil liberties, including the right of access to the courts. The ACLU also strongly supports the need for government transparency and accountability through litigation, public records access, and open meetings protections, along with other safeguards. The ACLU has participated in numerous cases supporting the right of access to the courts and the right of access to public records as *amicus curiae*, as counsel to parties, and as a party itself.

II. ISSUES ADDRESSED BY *AMICUS*

1. Whether the District's proposed expansion of the attorney-client privilege rule to former employees of government entities will undermine the public's right to access the courts under Article I, § 10 of the Washington Constitution.

2. Whether the District's proposed expansion of the attorney-client privilege rule to former employees of government entities conflicts with state public policies ensuring government transparency and accountability.

III. STATEMENT OF THE CASE

The following is based on the statement of facts and procedure set forth in Respondents' Brief with supporting citations to the record. In 2009, Respondent Matthew Newman was a student and football player at Yakima Highland High School. He suffered an alleged head injury during high school football practice and sustained additional hits during a football game he was permitted to play in the following day. At the game, Matthew collapsed on the field, lost consciousness, and went into a coma. Matthew sustained catastrophic brain injury and now suffers from severe brain injury deficits and learning disabilities. He was declared fully incapacitated as to both his person and his estate in 2011.

With his parents, Matthew sued Petitioner Highland School District No. 203 in 2012 for negligence in violation of the Lystedt Law, RCW 28A.600.190, which requires the removal of a student athlete from competition and practice if he or she is suspected of having a concussion. The student athlete cannot resume athletic participation until a trained health care professional provides written clearance. The Newmans alleged that the District's football coaches knew or should have known that Matthew had suffered a head injury during practice and should not have been allowed to play in the game the following day. The District has asserted that none of its coaches knew or should have known that Matthew

suffered a head injury during practice. The coaches, who were eyewitnesses at the football practice, were not named as defendants and were no longer employees of Highland School District when the Newmans filed suit. An investigator for the District obtained statements from Matthew's teammates and the former employee coaches soon after the Newmans filed suit.

The Newmans found support for their theory in the depositions of Matthew's teammates. Based on concerns of witness tampering by the District's attorneys, the Newmans sought, during the former employee coaches' depositions, discovery of communications that the District's attorneys had with the coaches in preparation for their depositions. The District's attorneys barred discovery into pre-deposition communications between the District's attorneys and the former employee coaches by claiming to represent the former coaches "for this matter and in particular this deposition so all . . . conversations are privileged." The Newmans moved to disqualify the District's attorneys, alleging, among other things, a conflict of interest in violation of the Rules of Professional Conduct arising from the attorneys' concurrent representation of the former employee coaches and the District. The Yakima County Superior Court denied the Newmans' Motion, but ordered that the District's attorneys "may not represent non-employee witnesses in the future."

Following the District's continued refusal to allow the Newmans to discover its attorneys' communications with the former employee coaches during the times that the coaches were unrepresented by counsel, the Newmans filed a motion to compel production. The District filed a motion for protective order. The Yakima County Superior Court denied the District's motion for protective order. This Court accepted review of the trial court's denial of the District's motion for protective order on August 26, 2014.

IV. ARGUMENT

A. Article 1, Section 10 of the Washington Constitution Protecting Access to the Courts Requires the Court to Reject the District's Proposed Expansion of the Attorney-Client Privilege to Former Employees of Government Entities

1. Article 1, Section 10 strongly protects the right to discovery as part of the right of access to the courts.

The District's proposed expansion of the attorney-client privilege rule to former employees of government entities conflicts with the constitutional guarantee of access to the courts. Washington courts have repeatedly recognized that that "[t]he right of access to the courts is closely tied to the command in [article 1,] section 10 of our constitution that justice be administered openly." *Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012) (citing *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780-81, 819 P.2d 370 (1991)). Access to the courts,

as guaranteed by our state constitution, is "'the bedrock foundation upon which rest all the people's rights and obligations.'" *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (quoting *Doe*, 117 Wn.2d at 780).

The right of access is effectuated by Washington's liberal civil procedure rules governing pleading and discovery. As a notice pleading state, Washington's civil court rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a)(1). *See also Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008) (requiring only that pleader provide opposing party with "fair notice"). This broad standard for stating a claim for relief in state court ensures access to the courts for virtually everyone in Washington State regardless of means or ability to afford legal assistance.

Concomitant to notice pleading, courts have repeatedly recognized that Washington's civil discovery rules are designed to help plaintiffs "uncover the evidence necessary to pursue their claims." *Putman*, 166 Wn.2d at 979 (citing *Doe*, 117 Wn.2d at 782); *see also id.* ("[I]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." (citations and internal quotation marks omitted)). Washington's discovery rules "are grounded upon the constitutional guarantee that justice will be

administered openly." *Lowy*, 174 Wn.2d at 788 (citations omitted); *see also Putman*, 166 Wn.2d at 979 ("This right of access to courts includes the right of discovery authorized by the civil rules.") (citations and internal quotation marks omitted).

2. The attorney-client privilege, particularly when asserted by a governmental entity, must be construed consistent with the constitutional right of access to the courts.

The right to discovery does not, of course, encompass privileged materials. "The fundamental principle of discovery is that a party 'may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .'" *Doe*, 117 Wn.2d at 777 (quoting CR 26(b)(1)). "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its aim is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Youngs v. PeaceHealth*, 179 Wn.2d 645, 650, 316 P.3d 1035 (2014) (citations and internal quotation marks omitted).

But, consistent with the goal of ensuring access to the courts, "privileges must be construed narrowly because privileges impede the search for truth." *Lowy*, 174 Wn.2d at 778 (citations and internal quotation

marks omitted). Narrow construction of privileges ensures that assertions of privilege "are limited in scope so as to accomplish their intended purpose" and "exclude the least amount of relevant evidence." *Id.* at 785, 787 (citations and internal quotation marks omitted).

So important is the fundamental right of access to the courts that this Court has repeatedly removed barriers to seeking justice through the courts. For example, in *Putman*, the Court struck down a state statute requiring a plaintiff to obtain a certificate of merit from a medical expert prior to filing a medical malpractice lawsuit, finding that the statute unduly burdened the right of access to the courts guaranteed by Article I, Section 10 of the Washington Constitution. 166 Wn.2d at 979. The Court has also treated broad assertions of privilege as obstructive to the purpose of discovery. In *Doe*, the Court rejected the defendant blood center's assertion of physician-patient privilege on behalf of a deceased blood donor, finding that the privilege does not apply to blood donors. 117 Wn.2d at 779. Similarly, in *Lowy*, the Court rejected the defendant hospital's assertion of statutory privilege as a justification for not complying with the plaintiff's discovery requests, holding that "[s]tatutory privileges in derogation of both common law and constitutional principles favoring broad discovery in the pursuit of truth must be narrowly construed." 174 Wn.2d at 789-90; *see also Jafar v. Webb*, 177 Wn.2d 520,

523, 303 P.3d 1042 (2013) (holding that GR 34 requires the waiver of any fees required of indigent litigants).

The District urges this Court to adopt an unprecedented attorney-client privilege rule that undermines the fundamental right of access to the courts under Article 1, Section 10 of the Washington Constitution. The District's proposed extension of the attorney-client privilege rule to *former* employees "who *may* possess . . . relevant information . . . needed to advise the client" is boundless by its own terms. Am. Pet'r's. Br. at 17 (emphasis added). The limitless scope of the District's proposed new rule is particularly troubling where attorney-client privilege is asserted, as it is here, to obstruct discovery in litigation seeking to hold a government actor accountable.

"The attorney-client privilege is a narrow privilege and protects only 'communications and advice between attorney and client;' it does not protect documents that are prepared for some other purpose than communicating with an attorney." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) (quoting *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981)). The District proposes that attorney-client privilege be extended to communications its attorneys have with any and all of their client's *former employees* — this goes far beyond the purposes of the attorney-client privilege. "'The attorney-client

privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery.'" *Dreiling v. Jain*, 151 Wn.2d 900, 918, 93 P.3d 861 (2004) (quoting *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997)). There is no such threat of compulsory discovery here.

Indeed, "[b]ecause the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists." *Dietz*, 131 Wn.2d at 843. To ensure that the attorney-client privilege serves its intended purpose, this Court has recognized that the inquiry begins with a determination of the *existence* of an attorney-client relationship. "An attorney's bare claim of the privilege is not dispositive." *Id.* at 851. Rather, the burden of proving the existence of an attorney-client relationship (and thus, the applicability of the attorney-client privilege) rests squarely on the client himself. *Id.* at 844. If an attorney-client relationship cannot be established by an attorney's bare assertion, it certainly cannot be established by the assertion of an interested party's attorneys. The clear parameters for the establishment of the attorney-client relationship set forth by this Court ensure that the

assertion of the attendant privilege does not impede access to justice through the courts by inappropriately circumscribing discovery.

In addition, in any case involving government entities, the power dynamic is skewed. An individual seeking justice through the courts by bringing a claim against a government entity is fighting a litigant with immense resources to ably defend itself. The District's proposed new attorney-client privilege rule would enable government entity defendants to engage in unfair litigation tactics that disadvantage plaintiffs who are entitled under our state's Constitution and civil court rules to rely upon discovery to develop and establish their claims.

While "[i]t is essential that lawyers representing our public agencies work with a certain degree of privacy free from unnecessary intrusion, in order to assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare legal theories, and plan strategy without undue interference," *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 748-49, 174 P.3d 60 (2007), these considerations are not at issue in the present matter. The District's investigator obtained statements from the former employee coaches soon after the Newmans filed suit. The District's attorneys then later claimed to represent the former employee coaches for the sole purposes of the Newmans' lawsuit and the former employee coaches' depositions. The District's self-serving proposed

attorney-client privilege rule serves only to obstruct the Newmans' ability to obtain justice through the court system.

B. The District's Proposed Expansion of the Attorney-Client Privilege Rule to Former Employees of Government Entities Conflicts with State Public Policies

1. The District's proposed attorney-client privilege rule ignores state public policy supporting governmental liability, especially when a school district's duty to protect student athletes is involved.

Washington has a long history of subjecting government entities to liability for tortious conduct, RCW 4.96.010, because it is an essential component of holding the government accountable when it engages in wrongdoing. The District ignores the fact that it is a *public school district* with particular obligations to its students. *See Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968 (1988) (striking down school district release form on the grounds that it violated Washington's public policy).

In *Wagenblast*, this Court explained that a school district's requirement that students sign a release from negligence liability when engaging in interscholastic athletics violated our state's public policy because "[c]learly then, interscholastic sports in Washington are extensively regulated, and are a fit subject for such regulation[; and] . . . under any rational view of the subject, interscholastic sports in public

schools are a matter of public importance in this jurisdiction." *Id.* at 863-54.

Furthermore, the *Wagenblast* Court recognized the important public interest at stake when a school district is sued for breaching its duty to protect student athletes:

> A school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in its custody from such dangers. This duty extends to students engaged in interscholastic sports. As a natural incident to the relationship of a student athlete and his or her coach, the student athlete is usually placed under the coach's considerable degree of control. The student is thus subject to the risk that the school district or its agent will breach this duty of care.

Id. at 856 (footnotes omitted). Subjecting school districts to tort liability is not only good public policy, but also policy Washington has explicitly adopted by statute:

> By act of the territorial Legislature of 1869, school districts were made liable for their acts of negligence. At the 1917 session of the State Legislature, a bill to absolutely immunize school districts from negligence passed the Senate, but the bill which was ultimately enacted that year was a compromise; that compromise barred actions against school districts for noncontractual acts or omissions relating to any park, playground, field house, athletic apparatus or appliance or manual training equipment. This compromise statute, in turn, was repealed some years later—by the 1967 Legislature. Thus, since territorial days, the State Legislature has generally followed a policy of holding school districts accountable for their negligence.

Id. at 858 (footnotes omitted). *See also* RCW 4.08.120 (stating school districts are liable for the tortious acts or omissions of its officers, agents, or servants, according to the ordinarily rules of tort law).

2. The District's proposed new attorney-client privilege rule contravenes state public policies in favor of government transparency and accountability.

The District's position also ignores the fact that it is a *government entity* with particular obligations to the public. Washington has strong public policies protecting the public's right to observe and to know what the government is doing, as evidenced by the plain language of the Public Records Act ("PRA"), Chapter 42.56 RCW and the Open Public Meetings Act ("OPMA"), Chapter 42.30 RCW. Both the PRA and the OPMA declare:

> The people of this state do not yield their sovereignty to the agencies [that] serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.56.030; RCW 42.30.010. The PRA and the OPMA are important statutory schemes that enable Washington residents to hold government actors accountable. *See Livingston v. Cedeno*, 164 Wn.2d 46, 52, 186 P.3d 1055 (2008) ("The primary purpose of the public records act is to provide broad access to public records to ensure government accountability.");

Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1086 (9th Cir. 2003) ("[T]he OPMA is a comprehensive statute, the purpose of which is to ensure that governmental actions take place in public."). Accordingly, exemptions from disclosure under these laws should be narrowly construed. *See* RCW 42.56.030 ("This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected."); RCW 42.30.910 ("The purposes of this chapter are hereby declared remedial and shall be liberally construed.").

This Court has repeatedly affirmed the important public interests served by the PRA and OPMA by construing exemptions to these statutes narrowly in favor of public disclosure and observation. For example, in *Resident Action Council v. Seattle Housing Authority*, the Court ordered the disclosure of housing authority grievance hearing decisions with personal information about welfare recipients redacted, finding that "the records remain subject to disclosure insofar as redaction can render all exemptions inapplicable." 177 Wn.2d 417, 440, 327 P.3d 600 (2013), *as amended on denial of rehr'g* (Jan. 10, 2014). Similarly, in *Miller v. City of Tacoma*, the Court held that secret balloting during a closed, executive session of the city council violated the OPMA because the council took an "action" within the meaning of the OPMA and subject to public

observation, and no exemption from the OPMA applied. 138 Wn.2d 318, 328, 979 P.2d 429 (1999).

Against this backdrop, the District's proposed new attorney-client privilege rule for government entities conflicts with Washington's strong public policies in favor of government transparency. If the Court were to accept the District's proposal, it would approve the concealment of wide swaths of discoverable evidence in litigation. The District's proposed attorney-client privilege rule would thus interfere with the important accountability function of litigation against government entities. *See, e.g.*, *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010); *Wagenblast*, 110 Wn.2d 845.

Further, the District's proposed attorney-client rule would directly frustrate the broad purposes of state statutory schemes intended to ensure government accountability. The controversy exemption of the PRA incorporates the attorney-client privilege. *See Hangartner*, 151 Wn.2d at 452; *Soter*, 162 Wn.2d at 739. Adoption of the District's proposed extension of the attorney-client privilege rule to former government employee witnesses would contradict the PRA, as the District's proposed rule would enable government entities to withhold more information from the public than the current attorney-client privilege properly permits.

Finally, state law encourages and protects state government employee whistleblowers. *See* Chapter 42.40 RCW. The District's proposed attorney-client privilege rule would gag whistleblowers who are no longer employed by the government agency in question and prevent improper governmental actions from coming to light, contrary to the important accountability function served by the whistleblower protection statute. The Court therefore should reject the District's arguments since they are neither supported by established state precedent nor by significant Washington public policies.

V. CONCLUSION

Washington's Constitution guarantees the fundamental right to access the courts, and this Court has consistently construed statutes and court rules to enable the public to exercise that right. Contrary to protecting that right, the District's unprecedented proposed attorney-client privilege rule would restrict access to the courts. The District's proposal also conflicts with our state's strong public policies ensuring government transparency and accountability. For the foregoing reasons and the reasons stated in Respondents' Brief, *amicus* respectfully requests that the Court affirm the trial court's order denying the District's motion for protective order.

Respectfully submitted this 2nd day of October, 2015.

By:

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CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2015, I caused to be served the foregoing *Motion for Leave to File Amicus Curiae Brief* and *Brief of Amicus Curiae American Civil Liberties Union of Washington* to the parties below, in the manner noted:

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Good afternoon,

Attached for filing in Case No. 90194-5, *Newman v. Highland School District*, are the following documents:

- Motion for Leave to File *Amicus Curiae* Brief of American Civil Liberties Union of Washington
- Brief of *Amicus Curiae* American Civil Liberties Union of Washington
- Certificate of Service

The documents are filed by Margaret Chen, WSBA No. 46156 (mchen@aclu-wa.org, 206-624-2184). Counsel for Petitioner and Respondents have previously agreed to service by email in this case and are copied above.

Sincerely,
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