

COURT OF APPEALS
STATE OF NEW YORK

THE EMPIRE CENTER FOR NEW YORK
STATE POLICY, A Project of the Manhattan
Institute for Policy Research, Inc.,

Petitioner-Appellant,

-against-

NEW YORK CITY POLICE PENSION
FUND,

Respondent-Respondent.

New York County Clerk's
Index No.: 105839/10

Appellate Division,
First Department No. 2011/5315

**BRIEF OF *AMICI CURIAE* THE ALBANY TIMES UNION, THE
CITIZEN, THE BUFFALO NEWS, GANNETT CO., INC., THE HEARST
CORPORATION, THE NEW YORK DAILY NEWS, THE NEW YORK
NEWS PUBLISHERS ASSOCIATION, THE NEW YORK POST, THE NEW
YORK PRESS ASSOCIATION, THE NEW YORK TIMES COMPANY,
NEWSDAY LLC., AND THE OBSERVER-DISPATCH, IN SUPPORT OF
PETITIONER-APPELLANT EMPIRE CENTER FOR NEW YORK STATE
POLICY'S MOTION FOR LEAVE TO APPEAL**

Statement of Identity and Interest of *Amici Curiae*

Amici are news organizations who support the application for leave to appeal in this case because their newsgathering and reporting on government pensions and related topics threatens to be adversely affected by the decision in this case. *Amici* include national and regional news organizations, as well as trade associations representing newspapers in New York that regularly gather and disseminate news and information to the public in a variety of media or otherwise support and defend

efforts to do so. *Amici* regularly investigate and report to the public on government spending and frequently rely on open records laws in New York and across the country to observe, analyze, and scrutinize the operation and use of pension funds. In particular, *Amici* use the data at issue in this case, that is, the names of retirees who receive taxpayer-funded pensions (as distinct from their beneficiaries), to fulfill the press's role as watchdogs of government. To that end, *Amici* have an ongoing stake in ensuring open access to pensioner names and in preventing government entities from shielding the use of public funds from review and scrutiny.

The following is a description of each *Amici* organization:

The Albany Times Union is a leading newspaper in Upstate New York. The newspaper is wholly-owned by Hearst Corporation and operates the timesunion.com website. It covers federal, state, and local governments and is widely respected for its focus on watchdog reporting, particularly on state government and politics.

The Buffalo News, Inc. publishes, distributes and sells a daily newspaper throughout the eight counties of Western New York as well as operates several news- and information-related web sites. The Buffalo News covers federal, state and local governments on a daily basis.

The Citizen is a daily newspaper based in Auburn in central New York covering news and information in all or parts of three counties through its print edition and website, auburnpub.com. It is owned by Davenport, Iowa-based Lee Enterprises Incorporated.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, the Press & Sun-Bulletin in Binghamton, the Star-Gazette in Elmira, The Ithaca Journal, the Poughkeepsie Journal, the Rochester Democrat and Chronicle, and The Journal News in Westchester County, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S., including WGRZ-TV in Buffalo. Gannett's TV stations reach more than 21 million households. Each of Gannett's daily newspapers and TV stations operate Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst owns and operates fifteen daily newspapers, including the Albany Times Union in New York, twenty-nine television stations, and two radio stations in geographically diverse U.S. markets.

The New York Daily News is the fourth largest newspaper in the country, with an average combined print and digital circulation of more than 601,000 on weekdays and more than 666,000 on Sundays; its website, nydailynews.com, averages over 160 million page views per month. The paper covers New York State government and politics on a daily basis.

The New York Post, established by Alexander Hamilton in 1801, is the nation's oldest, continuously-published daily newspaper. The newspaper, one of the largest in the United States, has a weekday daily circulation of more than 500,000. The Post is published and distributed primarily in the New York metropolitan area.

The New York Press Association is the trade association representing the more than 800 daily, weekly, ethnic, business and alternative newspapers published throughout the State of New York. NYPA owns, as its wholly-owned subsidiary, the New York Press Service, a for-profit newspaper advertising placement service, and the New York Press Association Foundation, a fully-charitable not-for-profit organization that funds print journalism internships and training programs at colleges and universities across the state.

The New York Publishers Association is a trade association representing the newspapers of New York State.

The New York Times Company is the publisher of The New York Times and 17 other newspapers. It also operates more than 50 Web sites. Through its newsroom in New York and its Albany bureau, The Times covers state and local government in New York on a daily basis.

Newsday LLC is the publisher of a daily newspaper and related Internet sites serving Long Island.

The Observer-Dispatch is published by GateHouse Media, Inc. (“GHS”), one of the largest publishers of locally-based print and online media in the United States as measured by its 79 daily publications. GHS currently serves local audiences of approximately 10 million per week across 21 states through hundreds of community publications and local websites.

Corporate Disclosure Statements of *Amici*

The Albany Times Union (the “Times Union”) is a wholly-owned subsidiary of the Hearst Corporation, (“Hearst”), a Delaware corporation privately held by The Hearst Family Trust. The Times Union has no other subsidiaries or affiliates.

The Buffalo News, Inc is a wholly owned subsidiary of OBH, Inc. OBH, Inc. is a wholly owned subsidiary of Berkshire Hathaway, Inc. Neither The Buffalo News, Inc. nor its immediate parent OBH, Inc. are publicly traded companies. Berkshire Hathaway, Inc. is publicly traded.

The Citizen is owned by Davenport, Iowa-based Lee Enterprises Incorporated. Lee Enterprises, Inc. is a publicly traded corporation with no parent company. No publicly held company holds ten percent (10%) of Lee Enterprises, Inc.

Gannett Co., Inc. is a publicly traded company. Gannett has no parent and none of its subsidiaries or affiliates are publicly owned.

Hearst Corporation, a Delaware corporation, is privately held by The Hearst Family Trust and has no other parent. None of Hearst's subsidiaries or affiliates is publicly held, with the exception of the following companies, in which Hearst and/or its subsidiaries own minority interests: MediaNews Group, Inc., Fimilac SA (owner of Fitch Group, Inc.), Local.com, drugstore.com, and Sirius Satellite Radio, Inc.

Daily News, L.P. publishes the New York Daily News. It is a limited partnership with no subsidiaries, the general partner of which is New DN Co., a privately held corporation.

The New York News Publishers Association has no parent, subsidiaries or affiliates.

The New York Post is published by NYP Holdings, Inc., which is the parent of NYP Realty Corp., and is, in turn, a wholly owned subsidiary of News America, Inc., whose parent company, News Corporation, is a publicly traded company.

The New York Press Association has no parent, subsidiaries or affiliates.

The New York Times Company, a publicly traded company, has no parent company and no publicly traded affiliates or subsidiaries. No publicly held corporation owns 10 percent or more of its stock.

Newsday LLC is a limited liability company, the ultimate parent of which is Cablevision Systems Corporation, a publicly traded company.

The Observer-Dispatch is published by GHS, which has no parent company. Fortress Investment Group LLC ("Fortress"), a publicly traded company, owns approximately 39.6 percent of GHS stock. Other than Fortress, no other publicly traded company owns 10 percent or more of GHS stock.

Summary of Argument

Public access to pensioner names has repeatedly led to exposure of fraud and waste in pension systems, the revelation of which has resulted in constructive public dialogue and change to the ways in which pensions are administered. It has thus furthered the fundamental policy objective behind New York's Freedom of Information Law ("FOIL"), which is to foster a fully-informed electorate, particularly in the area of public spending, to ensure that the citizens of New York are able to capably supervise the handling of taxpayer funds by their public servants and engage in effective self-government.

As demonstrated below, journalists have long collected retiree names and used them effectively to uncover waste, fraud, and misuse of pension funds, and to provide taxpayers with important information on the use of their money. Historically, the press has used pensioner names in conjunction with other pension data to provide the public with analysis of the distribution and use of a significant amount of taxpayer money. Through the use of these names, the press has revealed pension fraud and abuse on both the systemic and individual level. Access to specific names has enabled journalists to identify individual cases – like the fireman who retired on a full disability pension because of lung problems yet continued to compete as a triathlete – and systematic problems – like the LIRR's

routine grant of disability pensions, to 97% of retirees in one year alone – that would otherwise go undetected without the ability to identify and track plan participants. Abuses such as these could not have been told without access to pensioner names and may go undetected in the future if the decision in this case is allowed to stand.

This Court should grant Petitioner’s petition and overturn the Appellate Division’s Order, which allows pension funds to conceal from the taxpayers who fund them basic and essential information that lies at the core of the press’s watchdog role investigating pension expenditures.

Argument

Amici fully support the legal and policy arguments presented by Petitioner-Appellant, the Empire Center for New York State Policy (“Empire Center”), which establish solid ground for granting leave to appeal the Appellate Division’s plainly erroneous order permitting pension funds to withhold the names of retired public servants who receive taxpayer-funded pensions. The Appellate Division’s ruling is clearly wrong on every level – it is inconsistent with the language of FOIL and the canons of statutory construction, decades of precedent, and public policy. Moreover, it is a ruling that stems from concerns without basis. The New York City Police Pension Fund (the “Fund”)’s argument that disclosure of former

officers' names poses a safety risk is unproven, hypothetical, and speculative, without any factual basis at all. However, the harm that will result if the Order below is not corrected is demonstrable and real. It is demonstrated through past news reports of pension fraud and waste that can no longer be told without access to pension recipient names. It is demonstrated in the unprecedented denial of routine FOIL requests for pensioner names in the short time since the Appellate Division's decision.

Amici write separately to illustrate in concrete terms the public harm that would result if that order is left to stand – harm measured in news reports of abuse, waste and fraud that could no longer be told because information essential to those reports is no longer publicly available. The importance of pensioners' names to the press's investigatory work and its decades-long use as a key piece of data in monitoring the use of public funds at both the individual and systemic level cannot be overstated. Access to these names has not only allowed the press to uncover pension fraud, the resulting news stories have led to positive change in pension system supervision.

Given the budget crises at all levels of government, it is more critical now than ever that the public maintain access to this essential pension data, which lies at the foundation of effective public fiscal oversight. Enormous amounts of money

are funneled into pension funds every year,¹ and ever-more frequent news reports on the misuse of these funds, discussed *infra*, demonstrate the need for public access to this information. Without the news media's collection and analysis of pensioner names, the public would be unable to discover corruption related to pension funds, informatively participate in debate surrounding the use of pension funds, oversee the use of such funds, and perform year-to-year comparisons of data.

Public Policy Behind New York Freedom of Information Law

FOIL (Pub. Off. Law Sec. 87, *et seq.*) is an indispensable tool for the press to perform its investigatory work and fulfill its role as the public's watchdog. The statute was "enacted in furtherance of the public's vested and inherent 'right to know,' [and] affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of government activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers."

Capital Newspapers v. Burns, 67 N.Y.2d 562, 566 (1986) (quoting *Matter of Fink*

¹ See New York's Exploding Pension Costs, Report of the Empire Center for New York State Policy, Dec. 7, 2010, *available at* <http://www.empirecenter.org/Special-Reports/2010/12/pensionexplosion120710.cfm> (describing hundreds of billions of dollars involved in New York state and local pension funds).

v. Lefkowitz, 47 N.Y.2d 567, 571 (NY 1979)). This purpose is thwarted by the Appellate Division's unprecedented order barring access to the names of pensioners, which casts a curtain over the functioning of pension funds that utilize billions of dollars of taxpayer money each year. *See infra* pp. 13-19. Such lack of transparency contravenes FOIL's central purpose of enabling access to public records so that corruption and abuse in the workings of government may be uncovered.

Media's Use of Pensioner Name Data

Access to the names of pensioners is an essential instrument in the media's efforts to analyze and distill pension data. It is necessary to compare data year-over-year, to analyze individual pension payouts to public servants, and to expose systemic abuse. The following news reports provide poignant, concrete examples of how the media² has used pensioner names in order to discover and expose abuse of pension systems:

- New York City fireman who received a disability pension of three-quarters pay, \$86,000 per year, for "bronchial asthma" while he regularly trained and competed in the top of his age group as an elite triathlete. *See* Carl

² Academic researchers have also used pension names in the study of pension fund abuse. *See* Sylvester J. Schieber, "Political Economy of Public Sector Retirement Plans," *Journal of Pension Economics and Finance*, Cambridge University Press, p.5 (2011) (relying on data in New York Times article exposing former police officers who draw pensions in excess of their salaries).

Campanile, “86G Disability Pension for Marathon Man,” NY Post,

available at

[http://www.nypost.com/p/news/local/paid_for_no_wheezin_jbt34b3pBFo4v](http://www.nypost.com/p/news/local/paid_for_no_wheezin_jbt34b3pBFo4vbmWHn1DGO)

[bmWHn1DGO](http://www.nypost.com/p/news/local/paid_for_no_wheezin_jbt34b3pBFo4vbmWHn1DGO) (July 6, 2010). Without access to the name of this pension

recipient, journalists would have been unable to connect the dots from the

individual’s large pension award to his frequent participation in races. It is

that very connection which forms the basis of the story’s impact. Such fraud

would go undetected under a regime that allows pension funds to withhold

pensioner names under FOIL.

- As many as 97 percent of Long Island Railroad (“LIRR”) career employees

in one year applied for and received disability payments, often immediately

after retirement. *See* Walt Bogdanich, “A Disability Epidemic Among a

Railroad’s Employees,” New York Times, *available at*

<http://www.nytimes.com/2008/09/21/nyregion/21lirr.html?pagewanted=all>

(September 20, 2008). Through gaining access to pension data, including

individual pensioner names, the New York Times exposed a system which

allowed the routine payment of disability benefits to former employees. The

Railroad Retirement Board, the federal agency that pays the claims, granted

payments at a rate three to four times higher than the average railroad and

significantly higher than comparable railroads serving the New York City area.

The newspaper discovered dozens of these pension recipients on the golf course, despite being classified as occupationally disabled. Without the individual names of pensioners, the New York Times would have been unable to uncover such abuses and the public would have remained uninformed about a system that has paid a quarter of a billion dollars in federal disability money to LIRR employees since 2000. In fact, not even the LIRR could ferret out such information, as it was told by the Railroad Retirement Board that the number of disabilities among former LIRR workers was typical in the industry. Not until the New York Times requested the individual pension data and analyzed the numbers were the anomalies exposed.

The pension data discovered by the New York Times through FOIL requests for pension recipient names and other information was not just significant to New York taxpayers. Although the Retirement Board “is funded through taxes on railroads and their workers . . . Social Security had to contribute \$3.6 billion [in 2007] to cover expenses.” *Id.* The newspaper’s discovery of the waste reached every taxpayer in America, and such revelation would not have been possible had the pension fund been

permitted to withhold recipient names and pension information. The unearthing of the pension data led to state and federal investigations into the pension fund and the arrest of the LIRR's pension fund manager and nearly a dozen others associated with the scheme. *See* William K. Rashbaum and Mosi Secret, "11 Charged in L.I.R.R. Disability Fraud Plot," New York Times, *available at* <http://www.nytimes.com/2011/10/28/nyregion/charges-in-lirr-disability-scheme.html?ref=longislandrailroad> (October 27, 2011); Duff Wilson, "Ex-Manager Charged in L.I.R.R. Disability Probe," New York Times, *available at* <http://www.nytimes.com/2008/11/18/nyregion/18lirr.html?ref=longislandrailroad> (November 17, 2008).

Due to the media's efforts in exposing the LIRR pension scandal, the Attorney General of New York obtained an agreement with the railroad in which LIRR would appoint an independent examiner and implement additional reforms to address the abuses uncovered by the New York Times. *See* Office of the Attorney General Press Release, *available at* http://www.ag.ny.gov/media_center/2010/mar/mar22a_10.html (March 22, 2010).

The collection of individual pensioner names not only allows the press to uncover pension fund scandal and abuse, but also permits the press to report on controversial, yet lawful, pension payouts to individuals with important public influence, such as public figures and elected officials. In the following news articles the media used pension name data to:

- Inform voters that at least 25 incumbents or candidates in the 2011 election were able to collect salaries on top of pensions under a provision of New York state law, sums that often soar into the six-figures. *See* Jonathan Bandler, “Dozens on Lower Hudson Valley Ballots Would Qualify for Salary Plus Public Pension,” *The Journal News*, *available at* <http://www.lohud.com/article/99999999/WATCHDOG/399990152/Dozens-Lower-Hudson-Valley-ballots-would-qualify-salary-plus-public-pension> (September 10, 2007). This type of pension data is fundamental to taxpayers’ and voters’ ability to make informed decisions regarding government workers and candidates. *See also*, “Judges collect pension and regular pay, and it's perfectly legal,” *The Journal News*, *available at*, <http://pqasb.pqarchiver.com/lohud/access/1899286431.html?FMT=ABS&FMTS=ABS:FT&date=Nov+12%2C+2009&author=Jonathan+B>

andler&pub=The+Journal+News&edition=&startpage=A.1&desc=Judges+collect+pension+and+regular+pay%2C+and+it%27s+perfectly+legal (November 12, 2009) (naming state judges who make over \$200,000 per year in combined salary and pension benefits).

- Expose the increase in six-figure pensions for the administration of former Westchester County Executive Andrew Spano. *See* Jonathan Bandler and Gerald McKinstry, “Six Figure Pension Club Grows After Retirement Incentives, Spano’s Departure,” *The Journal News*, *available at* <http://www.lohud.com/article/99999999/WATCHDOG/399990160/Six-figure-pension-club-grows-after-retirement-incentives-Spano-s-departure> (October 9, 2011).
- Inform taxpayers that a former police officer would receive a \$183,000 pension. *See* Jonathan Bandler, “Ex-cop To Get \$183G a Year After Pension Error is Found,” *The Journal News*, *available at* <http://www.lohud.com/apps/pbcs.dll/article?AID=2011111280313> (November 28, 2011);
- Inform taxpayers of skyrocketing retirement pay for individual public servants and teachers. *See* Joseph Spector, “Retirements Surge for Stateworkers, Teachers,” *Democrat and Chronicle*, *available at*,

<http://www.democratandchronicle.com/article/2011016/NEWS01/110160333/Retirements-surge-New-York-state-workers-teachers>.

- Uncover retired police officers and firefighters who receive pensions in excess of their base pay. Since pensions are often calculated based on salary from the final three years worked, employees grossly increase overtime during those years to receive pensions higher than their base salary. *See* Jonathan Bandler, “Public Workers Enjoy Golden Nest Eggs,” *The Journal News*, *available at*, [http://www.lohud.com/article/99999999/WATCHDOG/105040010/P](http://www.lohud.com/article/99999999/WATCHDOG/105040010/Public-workers-enjoy-golden-nest-eggs)[ublic-workers-enjoy-golden-nest-eggs](#) (May 11, 2010).

These stories represent only a small sample of the ways in which the media uses pensioner names in conjunction with other pension data to provide the public with information regarding the use of public funds and expose fraud and waste throughout system. Without access to the names, taxpayers would be unable to track how and where billions of their dollars are spent.

The Aftermath of the First Department’s Decision

Since the Appellate Division’s Order was issued, pension funds and local governments across state have begun refusing to release the names of pension recipients, making oversight of the systems and detection of potential abuses impossible. *See, e.g.*, Danny Hakim, “City Pension Funds Refuse to Release

Recipients' Names," The New York Times, July 20, 2011 ("the names of retired city employees, when linked to pension amounts, were in the past analyzed by policy groups and news organizations seeking to detect potential pension abuses or to understand the growth of pension spending"); Chuck Bennett, "Cop pensions stay undercover: court," New York Post, Oct. 19, 2011 (As a result of the Supreme Court's ruling, "other pension funds, including the New York City Employees Retirement System and teachers pension fund . . . began withholding the names of their members."); Jacob Gershman, "Appeals Court Blocks Access to Police Pension Data," The Wall Street Journal, Oct. 18, 2011 ("After the denial in the city police fund case, administrators of other city pension funds, including the largest one, the New York City Employee Retirement System, stopped releasing the names of people collecting pensions.").

This pattern of nondisclosure has already begun to starve the media of an essential ingredient for its work in providing the public with important information that allows citizens to make informed decisions regarding their government. If the practice of nondisclosure is allowed to continue, the public will lose an essential window on the expenditure of large sums of public funds.

Conclusion

For all the reasons set forth here and in Petitioner-Appellant's Brief, this Court should grant Empire Center leave to appeal.

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Respectfully submitted,



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