No. 23-129

In The
Supreme Court of the United States

EDDIE TARDY,

Petitioner,

v.

CORRECTIONS CORPORATION OF AMERICA,
nka CORECIVIC, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE S. EBNER
Counsel of Record
HANNAH S. MARCLEY
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The subject of this appeal—a proposed intervenor's Article III standing to seek access to sealed or otherwise protected judicial records—implicates ALF's overarching interest in the rule of law and civil justice. Our nation's long tradition of judicial transparency, including affording the public access to court records in the absence of a strong reason for

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[1] Petitioner's and Respondents' counsel were provided timely notice in accordance with Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

denying access, cannot be upheld unless standing to seek access is broadly construed.

SUMMARY OF ARGUMENT

The Court should grant certiorari to resolve the three-way inter-circuit conflict regarding what showing, if any, a proposed intervenor (or other third-party) must make to have standing to seek the unsealing of particular court records. *See* Pet. at 16-21 (discussing various circuits' conflicting, inconsistent, or differing views).

The Fourth and Eleventh Circuits' broad view of standing for seeking access to sealed or otherwise protected court records, *see id.* at 16-18, aligns with this Court's case law, particularly *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), and *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). *See also* Pet. at 18-19 (discussing First and Third Circuit case law regarding standing to seek modification of protective orders so that court records can be accessed). State courts also have adopted a broad view of standing in allowing individuals to enforce their rights to access documents, including court records, under state public records laws.

The Sixth Circuit's holding that a proposed intervenor has standing only if they have suffered "adverse effects" from the denial of access turns standing on its head. As Circuit Judge Gibbons explained in her persuasive dissent, App. 12a-13a, no Supreme Court case, including, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2012), requires an adverse

effects showing to have standing to seek access to court records.

The Sixth Circuit panel majority erred in basing its opinion on an inapposite snippet from *TransUnion*. In so doing, the panel majority's "analysis fails to heed the Supreme Court's decisions in *Public Citizen* [and] *Akins*." *Id.* 10a (Gibbons, J., dissenting). Both *Public Citizen* and *Akins* hold, albeit in a different context, that denial of access to public records is a type of "informational injury" that confers Article III standing to sue. *See id.* at 10a-11a.

The Sixth Circuit's "adverse effects" test makes no sense. A proposed intervenor (or other third-party) who hopes to persuade a district court to unseal particular documents, including on the ground that they were improperly or unnecessarily sealed, cannot demonstrate personal adverse effects from denial of access without first reviewing the documents themselves. For this reason, predicating standing to seek access on a showing of adverse effects from denial of access would result in a finding of no standing in virtually every case.

ARGUMENT

The Court Should Grant Review and Hold That the Public Interest In Judicial Transparency Confers Standing Upon An Intervenor Who Seeks Access To Sealed Documents

A. Standing to seek access is fundamental to judicial transparency

This case is about transparency within the judicial branch. Unlike the political branches, the federal judiciary, composed of judges with lifetime appointments, is only *indirectly* accountable to the public. This makes the need for judicial transparency particularly important.

Indeed, "[t]ransparency is essential for the proper functioning of any judicial system." David S. Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 839 (2017). Judicial transparency is intertwined with "the First Amendment's mission of securing meaningful public control over the process of governance." *Press-Enterprise Co. v. Super. Ct. of Calif.,* 464 U.S. 501, 519, (1984); *see also id.* at 508 (the First Amendment creates a "presumption of openness" for court proceedings).

Sealing court records is the opposite of judicial transparency. Although there are many legitimate reasons to seal particular records, the public interest in judicial transparency compels the conclusion that interested individuals have Article III standing to

attempt to persuade a court that sealed documents should be unsealed.

There can be no judicial transparency if members of the public such as Petitioner lack standing to intervene (or sue separately) for the limited purpose of seeking unsealing or other access to sealed documents. The Petitioner's asserted compelling reason for inspecting the sealed documents at issue here, *see* Pet. at 10, underscores the fundamental unfairness of denying standing.

Citing *Public Citizen* and *Akins*, Circuit Judge Gibbons' dissent from the Sixth Circuit panel majority opinion explains that denial of access "is all that Article III requires where a litigant seeks to vindicate a statutory right of public access to information." App. 11a. "[T]here is no reason to apply a more demanding standard to litigants seeking to vindicate the public's common-law right of access to judicial records." *Id.*; *see id.* 4a (majority opinion) ("Our precedent has long recognized a common-law right of public access to court records."); *see also Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.")

The question presented here concerns standing to intervene to seek access to sealed documents. Whether the documents at issue were improperly or unnecessarily sealed, and whether they should be unsealed, are separate questions that only can be

addressed if a proposed intervenor has standing to raise them and argue their case to the court. Denying standing is functionally equivalent to prejudging the merits of the sealing issue, and thus, keeping the proposed intervenor and the public in the dark.

B. State case law on standing to sue under public records statutes is instructive

Every state has enacted some form of public-access-to-records statute. State courts have consistently held, either expressly or implicitly, that denial of access is all that is needed to confer standing upon an individual who seeks the aid of a court in vindicating their rights under these state public records laws. *See, e.g.*, *Kleven v. City of Des Moines*, 44 P.3d 887 (Wash. Ct. App. 2002) (recognizing that Wash. Rev. Code § 42.56.550(1), which grants judicial review to "any person having been denied the opportunity to inspect or copy a public record," confers standing upon the requester); *Shopo v. Soc. of Pro. Journalists*, 927 P. 2d 386 (Haw. 1996) (interpreting Haw. Rev. Stat. § 92F-15 to mean that constructive denial of a request for public records affords the requester standing to sue); *Atty. Grievance Comm'n v. Abell*, 448 A.2d 916 (Md. 1982) (applying Md. Code Ann., Gen. Prov. § 4-362(a), which states that "[t]he person . . . denied access to a public record may file a complaint.").

Some state cases involve access to court records. They provide a useful analogy as to why a federal rule of decision should be no different for a proposed

intervenor who seeks to unseal federal district court records.

For example, in *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993), several individuals sought intervention under an Alabama public records statute, Ala. Code 1975, § 36-12-40, to unseal the record of a case that had been entirely sealed at the parties' request after they reached a settlement. The proposed intervenors wanted to use the trial transcript in a similar case against one of the defendants, but the state trial court denied intervention. On appeal, addressing the question of intervention, the Alabama Supreme Court observed that "[u]nless intervention is liberally applied to third parties seeking access to previously sealed records, the common law presumption in favor of the public's right of access to judicial records will be abrogated." *Id.* at 1014. Because the litigants had jointly agreed to seal the record, the individuals seeking access had to represent their own interests—and more broadly, the public interest in judicial transparency—which would not have been possible if they lacked standing.

Holland v. Eads also illustrates the important difference between allowing intervention—which implicitly includes standing to intervene—and the merits of whether sealed documents should be unsealed. Indeed, the state supreme court's opinion in *Eads* finds that "the intervenors have not met their burden of showing why the sealed records no longer need to be sealed." *Id.* at 1017. In other words, having standing to seek access to sealed documents is

different than the question of whether access to the documents should be afforded.

These and numerous other state court cases consistently recognize that individuals denied access to documents under state public records laws have standing to seek relief from the courts. They constitute strong precedent that the public interest in judicial transparency is best served by broadly construing standing so that individuals who are denied access to public records, including court records, have an avenue of judicial redress.

C. Standing to seek access should not depend upon a showing of personal adverse effects from denial of access

The Sixth Circuit majority opinion holds that "to have standing, a plaintiff claiming an informational injury must have suffered adverse effects from the denial of access to information." App. 5a. In reaching this conclusion, the majority "relies upon a single sentence from *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2012)." *Id.* 12a (Gibbons, J., dissenting); *see TransUnion*, 141 S. Ct. at 2214 ("An asserted informational injury that causes no adverse effects cannot satisfy Article III.").

Judge Gibbons explained in her dissent that "*TransUnion* is a credit-reporting case in which the plaintiffs argued that they received their personal information in the wrong format rather than a case in which a litigant sought to vindicate a right of access to

information to which the public was entitled." App. 13a (citation omitted). Further, Judge Gibbons emphasized that "shortly before the sentence on which the majority relies, *TransUnion* distinguished *Public Citizen* and *Akins* on the grounds that 'those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information.'" *Id.* (quoting *TransUnion*, 141 S. Ct. at 2214). "At best, *TransUnion* is ambiguous as to whether its adverse-effects requirement applies to 'public-disclosure or sunshine laws,' as recently noted by another court addressing the issue of standing in such a context." *Id.* (citing *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 938 (5th Cir. 2022)).

The Court should grant review not only to address the important question of whether the public's interest in judicial transparency and/or denial of access confers standing upon a proposed intervenor who seeks the unsealing of documents, but also to clarify the scope and application of *TransUnion*'s sentence (quoted above) about the relationship among informational injury, adverse effects, and Article III standing.[2]

More specifically, the Court should hold, or at least clarify, that a showing of adverse effects from denial

[2] The "informational injury" standing issue in *Acheson Hotels, LLC v. Laufer*, No. 22-429, *cert. granted* Mar. 27, 2023—whether a serial Internet "tester" has standing to sue under the Americans With Disabilities Act—does not involve access to judicial records and is very different than the question presented here.

of access to sealed judicial records is *not* required for a proposed intervenor to have standing to seek unsealing.

By analogy, "Supreme Court 'decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records' to establish standing." *Maloney v. Murphy*, 984 F.3d 50, 60 (D.C. Cir. 2020) (quoting *Public Citizen*, 491 U.S. at 449). "'[T]he requester's circumstances—why he wants the information, what he plans to do with it, what *harm he suffered* from the failure to disclose— are *irrelevant to his standing*.'" *Id.* (quoting *Zivotofsky ex rel. Ari Z. v. Sec. of State*, 444 F.3d 614, 617 (D.C. Cir. 2006)) (emphasis added); *see also Public Citizen v. FTC*, 869 F.2d 1541, 1548 (D.C. Cir. 1989) ("Plaintiffs who bring actions under the Freedom of Information Act also clearly have standing merely by virtue of the fact that they have been denied information they have requested"); Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez?* 96 N.Y.U. L. Rev. 269, 270-273 (2021) (explaining that a broad reading of *TransUnion* undermines standing for requesters who are denied records under the Freedom of Information Act).

Requiring an individual to demonstrate that they have "suffered adverse effects from the denial of access," App. 5a, to establish standing to seek access to court records also defies common sense. Without first seeing the documents for which access is sought,

a proposed intervenor cannot demonstrate that they have suffered (or will suffer) adverse effects from denial of access. Here, the Petitioner cannot demonstrate that he has suffered adverse effects from the sealing of the documents he seeks to unseal—documents that may or may not help him establish Respondents' alleged culpability for his son's death—without first reviewing the documents. The Court should not require individuals to possess clairvoyance to have standing to seek the unsealing of court records.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE S. EBNER

Counsel of Record
HANNAH S. MARCLEY
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

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