NO. 09-1037

IN THE SUPREME COURT OF TEXAS

In re Change to Win

No. 03-09-00561-CV in the Third Court of Appeals
No. D-1-GN-08-003359 in the 345th District Court of Travis County

BRIEF OF *AMICI CURIAE* Public Citizen, Inc., Texans for Public Justice, and Freedom of Information Foundation of Texas, IN SUPPORT OF CHANGE TO WIN'S PETITION FOR MANDAMUS

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INTEREST OF AMICI

Amici curiae are non-profit organizations that frequently seek information under the Texas Public Information Act (TPIA) and that represent the interests of consumers and citizens in promoting government and corporate accountability. *Amici* are particularly well qualified to assist the Court in understanding the substantial public interest in protecting TPIA requesters from abusive discovery practices that have a chilling effect on requesters enforcing their rights to public records in court and that threaten advocacy organizations' First Amendment rights.

Amicus Public Citizen is a consumer advocacy organization founded in 1971, with approximately 70,000 members nationwide; its sole office working specifically on state issues is located in Texas. Public Citizen frequently requests government records under the federal Freedom of Information Act (FOIA) and state open records laws, including the TPIA, as part of its research and advocacy work, and its members are concerned about the threat the lower court's ruling in this case poses to their rights under the TPIA and the First Amendment. Additionally, Public Citizen has substantial expertise in FOIA/open records law and in First Amendment law. To promote its interest in government transparency, Public Citizen represents itself and other organizations *pro bono* in FOIA cases in federal courts and in state open records cases in various jurisdictions across the country. As part of that effort, Public Citizen represented Change to Win *pro bono* in a Michigan Freedom of Information Act case, now dismissed, concerning a contract between Caremark and Ferris State University.

Amicus Texans for Public Justice (TPJ) is a non-partisan, not-for-profit Texas corporation established in Austin in 1997. It engages in research and advocacy focusing on corporate and government accountability. TPJ produces and disseminates numerous related research reports. Much of this research is informed by information obtained from government agencies under the authority of the TPIA.

Amicus Freedom of Information Foundation of Texas (FOIFT) is a non-profit Texas based organization representing a broad spectrum of Texas citizens concerned about the free flow of information and dedicated to open government. Since its founding in 1978, its mission has been to serve as a statewide clearinghouse of information on open government and First Amendment issues and to take action in the public interest on open government and First Amendment problems.

Amici affirm that this brief has been filed on their behalf and that they have not received nor will receive any fee for the preparation of the brief.

STATEMENT OF FACTS

This case arose from a Texas Public Information Act (TPIA) request made by Change to Win, a coalition of labor unions, to the Employee Retirement System of Texas (ERS) for a copy of the contract between ERS and its vendor, Caremark, a pharmacy benefit management company. (Pet. App. 2) ERS sought a decision by the Attorney General that the contract could be withheld from public scrutiny on the basis that it contained trade secrets, and the issue was briefed to the AG by Caremark. However, the AG ruled that the contract, a public record, was subject to mandatory disclosure under the TPIA. (Pet. App. 3) Although ERS did not challenge the AG's ruling, Caremark sued

the AG for declaratory and injunctive relief, requesting that the court enjoin the release to the public of its contract with ERS based on its claim that it contained trade secrets. (Pet. App. 4) Change to Win, as the requester, exercised its statutory right under TPIA to intervene in the lawsuit to protect its interest in the TPIA request and seek expedited release of a copy of the contract. (Pet. App. 5)

The parties' briefs correctly set out the detailed procedural history of the case. Relevant here, after a series of cross-discovery motions, the trial court, on August 24, 2009, ordered Change to Win to produce deposition testimony on five topics that focus on the particular identities of persons with whom Change to Win communicated about other Caremark contracts that Change to Win obtained in the past under the TPIA and under other states' open records laws. (Pet. App. 12)

After the trial court denied Change to Win's motion for reconsideration of the August 24, 2009 order on September 28, 2009 (Pet. App. 1), Change to Win filed a mandamus petition with the Third Court of Appeals on September 29, 2009, challenging the August 24, 2009 order, on the grounds that (1) the order improperly permitted discovery of Change to Win as a TPIA requestor, including, in particular, discovery of Change to Win's purpose in making the TPIA request and other open records requests, and (2) that the order infringed on Change to Win's First Amendment right to freely associate by compelling the disclosure of the identities of individuals and groups with whom it communicated and otherwise associated. The deposition went forward that same day, but Change to Win's counsel instructed the deponent not to answer questions identifying individuals to whom Change to Win communicated information regarding the

contracts or questions relating to Change to Win's purpose in making public information requests for those contracts. (Pet. App. 15) Subsequently, the Third Court of Appeals asked for briefing, but ultimately denied the mandamus petition. (Pet. App. 16) Change to Win filed the instant Petition for Mandamus in the Texas Supreme Court on December 16, 2009, and Caremark and the AG submitted response briefs on February 25, 2010.

In the interim, Caremark filed a motion for sanctions against Change to Win for its refusal to answer deposition questions at the September 29, 2009 deposition. (Caremark's Resp. App. 24) The trial court granted Caremark's motion in part, ruling that although Change to Win is not required to produce further information, Change to Win is barred from making certain arguments, including the arguments that previously-released contracts are in the public domain (and therefore not trade secrets) because of their dissemination by Change to Win and that the contracts are available on Change to Win's website. The court also ordered Change to Win to pay Caremark's legal fees for the second deposition and the sanctions motion. (Caremark's Resp. App. 26)

If this order stands, Change to Win effectively has two options: It must either reveal the names of its associates, coalition partners, and allies in its work on transparency in the pharmacy benefit management industry, even though the identity of the requester and purpose of the request are *irrelevant* to whether the records are exempt from disclosure; or it must forego using at trial evidence that Caremark's contracts are readily available to the public, including contracts obtained under the TPIA, although the public availability of the requested information is *relevant* to whether the records are exempt. This Hobson's choice poses a problem that warrants review by this Court.

SUMMARY OF ARGUMENT

The lower court's order threatens the core purpose of the TPIA because it requires a requester involved in a TPIA lawsuit to submit to deposition questioning on matters neither relevant to the nature of the records at issue nor to whether those records are exempt from disclosure. Specifically, the order requires a requester to answer questions about its motivation for making the request. Were this ruling correct, TPIA requesters who sue for public records could always be subjected to extensive discovery, which could be used as an instrument of harassment or to impose delay and costs on a party seeking access to public records. Moreover, those who request public records would be required to produce their own internal, non-public records to gain access to what should be public to any person.

In this case, the threat is even more severe because the requester is an organization. Under the lower court's ruling, an organizational requester will be compelled to produce testimony that reveals the names of members, associates, coalition partners, and allies, which would chill the exercise of its First Amendment right to free association. Especially because the discovery order does not concern relevant evidence, there is no compelling interest to outweigh this First Amendment concern.

ARGUMENT

I. The Allowance of Broad Discovery on a TPIA Requester Thwarts Access to Public Records and Frustrates the Goals of TPIA.

The Texas Public Information Act is at the heart of the state's democracy:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is

> the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. … The people insist on remaining informed so that they may retain control over the instruments they have created.

TEX. GOV'T CODE § 552.001. This Court is equally adamant: "The Legislature has amended the Act every session since 1973, but its purpose has remained the same…." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 355 (Tex. 2000). As such, TPIA "mandates a liberal construction to implement this policy and one favoring a request for information." *Id.* at 356 (citing TEX. GOV'T CODE § 552.001).

The lower court's discovery order in this TPIA case threatens this vital purpose, and this Court should grant Change to Win's petition because of the importance of this issue to all citizens of the State of Texas. The order requires Change to Win to respond to discovery that bears directly on Change to Win's motivations for making the TPIA request at issue and other requests under the TPIA and other state open records laws.[1] Yet both the statutory language and the decisions of this Court are clear: Neither the identity of the requester nor the purpose of the request is relevant to whether public records are subject to mandatory disclosure under the TPIA.

The statute states that "[t]he officer for public information and the officer's agent may not make an inquiry of a requester except to establish proper identification . . ." and that "[t]he officer for public information or the officer's agent shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the

[1] The details of the ordered discovery and analysis of how those topics would reveal only irrelevant motive and purpose information are discussed in depth in Relator's brief and the Respondent Attorney General's brief, and need not be re-analyzed here.

person on whose behalf the request is made, or the status of the individual as a member of the media." TEX. GOV'T CODE §§ 552.222(a), 552.223. Likewise, this Court has held: "We think the Act itself makes clear that the motives of the person requesting information are not to be considered in determining whether the information must be disclosed." *Indus. Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 674 (Tex. 1976).

Rather, the TPIA, like its federal counterpart and counterparts in other states, requires government bodies to produce public records "on application by *any* person" subject to enumerated exemptions.[2] TEX. GOV'T CODE § 552.221 (emphasis added). As a result, any discovery in a TPIA case is focused not on the requester, the requester's purposes, or potential or past use of the records or other records obtained from governmental bodies, but rather on the content and nature of the records themselves. When the government withholds a public record, the burden is on the government – the party that actually knows the content of the record – to prove that an exemption to disclosure applies. *City of Dallas v. Dallas Morning News, LP*, 281 S.W.3d 708, 713 (Tex. App.-Dallas 2009, no pet.); *Thomas v. Cornyn*, 71 S.W.3d 473, 488 (Tex. App.-

[2] *See, e.g., Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information."); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (holding that whether disclosure is required under federal FOIA "turn[s] on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested" (internal quotation and citation omitted)); *Abraham & Rose, PLC v. U.S.*, 138 F.3d 1075, 1079 (6th Cir. 1998) ("[T]he requester's intended use [for the records] is also irrelevant in a FOIA action."); *Union Leader Corp. v. City of Nashua*, 686 A.2d 310 (N.H. 1996) ("In Right-to-Know Law cases, the plaintiff's motives for seeking disclosure are irrelevant."); *Assoc. Tax Service, Inc. v. Fitzpatrick*, 372 S.E.2d 625 (Va. 1988) ("We conclude in light of the statutory language that the purpose or motivation behind a request is irrelevant to a citizen's entitlement to requested information."); *Cashel v. Smith*, 324 N.W.2d 336 (Mich. App. 1982) ("[A] rule which would permit denial of a request for information on grounds that the requester is 'idly or maliciously curious' is repugnant to the act. A person seeking information under the act is generally not required to divulge the reason for the request.").

Austin 2002, no. pet.). Accordingly, "[d]iscovery must be relevant to the subject matter involved in the pending action, and in the usual FOIA case, the government will be in possession of all such evidence." *Weisberg v. Webster*, 749 F.2d 864, 868 (D.C. Cir. 1984); *see City of Garland*, 22 S.W.3d at 360 (relying on FOIA jurisprudence to interpret Texas Public Information Act).

"For that reason, in the context of FOIA litigation, courts will guard against the use of discovery as an instrument of abuse . . . ." *Weisberg*, 749 F.2d at 868. Here, it is clear that discovery is being used as an "instrument of abuse" because the lower court's order requires Change to Win to respond to discovery that goes directly to the irrelevant issue of Change to Win's motivations in making the TPIA request at issue and other requests under the TPIA and other state open records laws. While it is not the governmental body itself, in this case, that opposes disclosure of the records and seeks discovery, the question under the TPIA of whether the records are subject to or exempt from mandatory disclosure is exactly the same. There is no basis for allowing a private party opposing disclosure under the TPIA broader discovery than is relevant in any other TPIA case. Because the discovery order in this case is in contravention of specific precedent of this Court and plainly-worded statutes, the lower court abused its discretion.

Were this type of discovery permissible, it would strongly discourage requesters from enforcing their rights under the TPIA in court. In any TPIA case, the party opposing disclosure could assert a so-called "need" for discovery concerning the requester's motives for making the request and activities related to the underlying subject-matter of the request. As a result, if the lower court's ruling were correct, every

TPIA case could involve burdensome discovery on the requester. Indeed, allowing the order to stand will encourage the party opposing disclosure to use discovery on these generally-applicable topics to harass the requester, lengthen the proceedings, and increase the cost of litigation. Requesters will be deterred from filing a lawsuit over a denial of a records request and will be less inclined to intervene in a suit brought by a private party against the Attorney General, such as this one, where the private party is attempting to prevent the Attorney General from releasing records. In short, requesters will be chilled from enforcing their rights under TPIA if broad discovery on motives and activities related to the request are allowed. The public at large is harmed when requesters are not able to enforce their rights effectively because, as TPIA itself states, government transparency is a public benefit.

Moreover, the lower court's order in this case would constitute a sea change. In the past, TPIA requesters would not have expected, as a matter of course, to be subjected to lengthy and costly discovery in order to access public records that are supposed to be freely and promptly available to *any* person on request. *See* TEX. GOV'T CODE § 552.221(a). And rightly so. The TPIA does not require a quid pro quo; that is, the plain language of the statute provides no basis for requiring requesters to reveal something about themselves as a prerequisite to obtaining information contained in government records. The lower court's order in this case flies in the face of the principles of open government embodied in the TPIA. *See* TEX. GOV'T CODE § 552.001. This kind of discovery, and its attendant delay and expense, also thwarts the TPIA's goal of *prompt* access to records. *See* TEX. GOV'T CODE § 552.221(a) ("An officer for public

information of a governmental body shall promptly produce public information . . . on application by any person . . . . '[P]romptly' means as soon as possible under the circumstances . . . without delay.").

In particular, organizations that frequently make TPIA requests or that may be engaged in years-long research and public education initiatives on an issue will be reluctant to go to court to challenge a denial under TPIA if their routine attempts to exercise their TPIA rights are made costly and burdensome, and their filing cabinets and inner workings opened for all to see as a result. Permitting this expensive and irrelevant discovery will not result in better justice or better government, but in greater secrecy regarding government business, including in particular transactions between governmental bodies and their vendors. This secrecy is to the detriment of Texas citizens and damages the American ideal of democratic government. This Court should grant Change to Win's petition so that it may decide the important question of the scope of allowable discovery on a TPIA requester.

II. The Chilling Effect of Discovery Orders is Particularly Strong for Organizational Requesters Because Their First Amendment Rights Are Threatened.

Forcing Change to Win to reveal its inner workings and communications is not only harassing and irrelevant, it also burdens Change to Win's right to freely associate under the First and Fourteenth Amendments to the United States Constitution. *See* U.S. CONST., amend. I, XIV. A court order, even if granted to a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); *Tarrant County Hosp. Dist.*

v. Hughes, 734 S.W.2d 675, 679 n.3 (Tex. App. – Fort Worth 1987, orig. proceeding, no pet.) ("A court order which compels or restricts pretrial discovery constitutes State action which is subject to constitutional limitations."). The First Amendment to the United States Constitution protects against the compelled disclosure of the names of people associated with organizations engaged in advocacy of particular beliefs, be they political, economic, religious or cultural. *NAACP v. Alabama*, 357 U.S. 449, 461-62 (1958); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375-82 (Tex. 1998).

Because of the nature of the rights at stake and the inability to undo a First Amendment violation, "[w]hen a discovery order violates First Amendment rights, the party seeking mandamus generally has no adequate remedy by appeal." *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d at 375 (citing *Tilton v. Moye*, 869 S.W.2d 955, 958 (Tex. 1994)). Moreover, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Tilton*, 869 S.W.2d at 956 (quoting *NAACP*, 357 U.S. at 460-61). Under the First Amendment's protection of free association, the Texas Supreme Court has reversed discovery orders on mandamus review that would have compelled production of the names of people who donated money to an organization and the names of individuals who espouse particular beliefs. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d at 375-82 (contributors); *Tilton v. Moye*, 869 S.W.2d at 956-57 (beliefs).

This Court has clearly stated that it must consider all of the circumstances to determine the likelihood that a court order compelling discovery would chill First Amendment rights:

> While there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question, it would be naive not to recognize that the disclosure of the identities of contributors . . . would subject at least some of them to *potential economic or political reprisals* of greater or lesser severity. . . . Disclosure or threat of disclosure well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected.

In re Bay Area Citizens Against Lawsuit Abuse, 983 S.W.2d at 377 (quoting *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968)). In *Pollard*, for example, the court found that disclosure of names associated with the Republican Party of Arkansas was likely to create a chilling effect because of the unpopularity of the party at the time and the inherent nature of party membership. *Id.* And while a record of past harassment or retribution *can* support a finding that protected associational rights are at stake, "such a factual record of violent past harassment is not the only situation in which courts have recognized a potential infringement on an association's First Amendment rights." *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d at 377. Rather, "it is the task of the court to evaluate the likelihood of any chilling effect." *Id.* (quoting *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Comm'n*, 593 F.2d 1102, 1118 (D.C. Cir. 1978).

The discovery topics on which the lower court ordered Change to Win to respond concern individual communications that would identify members, coalition partners, allies, and other individuals and groups with whom Change to Win associates with respect to its mission to increase transparency in the pharmacy benefits management industry and lower healthcare costs. Identifying the individuals with whom Change to

Win communicated about this mission would reveal the names of those with whom Change to Win collaborates to achieve its political goals. These goals are not uncontroversial; rather, they pit the interests of the public in affordable health care administered by accountable entities against the interests of one of the most politically powerful industries, the health care industry. Moreover, labor unions and their members, affiliates, and supporters have been the targets of industry reprisals and retribution throughout history. It is far from speculative for the court to find a likelihood of a chilling effect. *See Local 1814, Intern. Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) (concluding that the political circumstances were sufficient to support a likelihood of a chilling effect that would result from the compelled disclosure of union members' and political contributors' names).

Here, where the discovery ordered does not bear on the question in the case – whether the records are subject to mandatory release under TPIA – there is certainly no compelling interest in disclosure that would override the First Amendment concerns at stake. Indeed, the order would not clear even a lesser threshold. *See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 120 (3d Cir. 1987) (holding that despite a lack of specific evidence of past retribution, "in light of the absence of any legitimate interest asserted by the City to justify the inquiry, we conclude that the question would not even withstand a more relaxed scrutiny").

Discovery orders such as this one threaten the associational rights of individuals within organization. If Change to Win and organizations like it were forced to disclose

names of allies, members, and supporters in a routine TPIA case for public records, individuals would be less likely to associate with such organizations for fear that their affiliations and beliefs would be disclosed. This type of harm is precisely that which the First Amendment protects against. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d at 377 ("Under such circumstances, compelled disclosure of [the organization's] contributor lists may dissuade contributors and hinder [the organization's] and its contributors' ability to pursue collective advocacy of their beliefs.")

The chilling effect on First Amendment rights carries over also to discourage the enforcement of rights under TPIA in court. Organizations and community groups are often some of the most effective users of open records laws because they have the ability to conduct in-depth research and analysis based on the information they obtain and to disseminate the information to the public. Organizations dedicated to a particular cause, political belief, or advocacy goal will be strongly discouraged from exercising their rights under TPIA if their involvement in litigation – be it as a plaintiff suing over a request denial or an intervenor in a suit against the AG trying to defend the AG's decision to release records – would be grounds for private parties to discover the identities of other groups involved in their advocacy or organizing efforts. *See Tilton*, 869 S.W.2d at 957 (noting the chilling effect that discovery orders threatening associational rights would have on bringing cases and the importance of ensuring litigants unimpeded access to the courts). As a result, those in the best position to use FOIA to educate the public about government activities and policies would be impeded from doing so.

CONCLUSION

Amici curiae ask this Court to issue a Writ of Mandamus instructing the lower court to modify its August 24, 2009 Order requiring Change to Win to produce irrelevant deposition testimony and violating Change to Win's First Amendment associational rights.

Respectfully Submitted,

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