No. 20070330

IN THE SUPREME COURT FOR THE
STATE OF NORTH DAKOTA

FORUM COMMUNICATIONS COMPANY,

PETITIONER,

v.

THE HONORABLE LAWRENCE E. JAHNKE,
JUDGE OF THE DISTRICT COURT,
NORTHEAST CENTRAL JUDICIAL DISTRICT,

RESPONDENT.

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press ("the Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970. The Reporters Committee files this Brief along with its Motion for Leave to File Brief of *Amicus Curiae* and respectfully requests that this Court grant its Motion.

The interest of *Amicus* in this case is in ensuring the right of both the media, and, more importantly, the public, to bear witness to judicial records, as required under the First Amendment, U.S. CONST., AMEND I, and interpreted by the U.S. Supreme Court and this Court. Court records are presumed to be open for public review unless and until a court makes *specific* findings that those records should be kept secret. Safeguards requiring particular findings ensure that courts will not disregard the public's right to access records kept by courts. Journalists rely on access to these records to disseminate their contents to the public, acting as "surrogates for the public." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

The underlying case in this action, *State of North Dakota, by and through the North Dakota State Board of Higher Education and the University of North Dakota v. National Collegiate Athletic Association* ("*UND v. NCAA*"), is a high-profile case of great interest to the public both inside and outside the borders of North Dakota.

Further, as state entities, the UND parties are acting directly on behalf of the public. The public not only has an interest in this case, the public *is* this case.

This ruling, if allowed to stand, essentially allows courts throughout North Dakota to blatantly disregard the safeguards and processes set forth to ensure that the public's interest is represented and protected when a court considers closing off access to public court records. The district court here disregarded the longstanding jurisprudence and legislation that provide the public with its fundamental right of access to judicial branch records. This Court's action — or inaction — will undoubtedly go beyond the court system in North Dakota to influence judges and courts in other states across the nation as sixteen other institutions of higher education address this same issue. It is imperative that this Court reiterate the gravity with which a court should act when weighing whether it should seal court records.

We respectfully ask that this Court find that the district court failed to properly issue findings of fact that the records in the underlying case should have been sealed, in contradiction to the constitutional precedent and administrative rules it is bound to follow, and issue a supervisory writ to the courts in this state affirming the requirements they must follow when closing court records or proceedings, as set forth in North Dakota Supreme Court Administrative Rule 41, Section 6.

ARGUMENT

I. Sound Public Policy Requires Open Access to Court Records.

Courts have consistently noted that access to courts and court records is important for public education, public trust, and the integrity of the court system. In the criminal justice context, the U.S. Supreme Court has repeatedly ruled in favor of

open court proceedings because it has recognized that public faith in judicial institutions requires openness. Thus, in *Richmond Newspapers*, the U.S. Supreme Court established that the public and the press have a First Amendment right to attend criminal trials. 448 U.S. at 580. Later, the Court noted in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), that there are numerous public policy reasons supporting open judicial proceedings. "[Access allows] the public to participate in and serve as a check upon the judicial process — an essential component of our structure of self government." 457 U.S. at 606. Public scrutiny also promotes fairness by operating as a restraint on possible abuses of judicial power, as well as providing a safeguard against "any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270 (1984).

Openness also enhances public confidence in judicial proceedings. In *Press-Enterprise Co. v. Superior Court* ("*Press Enterprise I*"), 464 U.S. 501 (1984), the U.S. Supreme Court extended the public's First Amendment right of judicial access to include criminal jury voir dire, explaining that "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that the standards of fairness are being observed" through the attendance of the media and public to "give[] assurance that established procedures are being followed and that deviations will become known." 464 U.S. at 509.

The presumptive right of access extends beyond judicial proceedings to court documents as well. Many courts, including this one, have affirmed that right. In *State v. O'Connell*, this Court carefully considered whether courts must make court records available to the public for inspection. 151 N.W.2d 758 (N.D. 1967). Expressing the

importance of a court's need to "operate a competent tribunal and to safeguard and protect its records," this Court held that "it is the right of the public to inspect the records of judicial proceedings after such proceedings are completed and entered in the docket of the court." *Id*. at 763.

Courts have long recognized these crucial rights for the public to bear witness to judicial institutions and the important decisions they make, shaping our nation's jurisprudence. Here, the University of North Dakota case is one in which the public has a heightened interest and has been intently following, eagerly attempting to witness each court dispute as it occurs.[1] This high-profile case involves a major state

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[1] Media coverage of this case included both local and national media outlets. *See, e.g.*, Nick Coleman, *How many times must the Sioux tell UND no? One more, apparently*, STAR TRIBUNE, Nov. 17, 2007, available at http://www.startribune.com/357/story/1556936.html; Amy Dalrymple, *FCC fights sealing of documents*, THE FORUM, Nov. 9, 2007, available at https://secure.forumcomm.com/dickinson/articles/index.cfm?page=purchase&id=12721&CFID=66377029&CFTOKEN=21941332&jsessionid=8830f99363572c157342FCC; David Dodds, *Judge keeps UND nickname and logo files sealed*, GRAND FORKS HERALD, Oct. 23, 2007, *available at* http://www.grandforksherald.com/articles/index.cfm?id=54748§ion=news; Steve Weisberg, *North Dakota granted three years to get permission for mascot*, USA TODAY, Oct. 26, 2007, *available at* http://www.usatoday.com/sports/college/2007-10-26-north-dakota-mascot_N.htm; *Pick your battles*, DAILY TARGUM, NOV. 1, 2007, available at http://media.www.dailytargum.com/media/storage/paper168/news/2007/11/01/Opinions/Pick-Your.Battles-3070097.shtml.

university's agreement with the governing body of the collegiate athletics in the country; it concerns allegations of racial insensitivity by a state entity; and the effects of this case could easily spread far beyond North Dakota to states where cases may arise concerning one of the sixteen higher education institutions facing similar sanctions. The public and the media doubtless have an interest in observing court action on these matters that are so clearly matters of public interest and — as far as they involve state actors, as here — matters concerning the public directly.

While keeping the media out of a public debate might have political and emotional appeal to a court that finds media interest to be inconvenient, irritating, or even, "divisive," it is simply not allowed under the law. The lower court expressly singled out its purpose to restrict access to the *media* — not to the public as a whole — in its refusal to unseal court records. Opinion of Oct. 22 at 1 (hereinafter "Op."). While the ends are the same — the public as a whole is also prevented from accessing these records — the direct disdain for the press was made known in specifying them as the observer whose access the court intended to restrict. The U.S. Supreme Court has noted the importance of open access to court records and the function of the press as a conduit of that information from the government to the public, calling journalists the "surrogates for the public," *Richmond Newspapers*, 448 U.S. at 573. Closed proceedings and records, the U.S. Supreme Court wrote, inhibit the "crucial prophylactic aspects of the administration of justice" and lead to distrust of the judicial system if, for example, the outcome is unexpected and the reasons for it are hidden from public view. *Id. at* 571.

To allow court records in this important case to be sealed from public access not only undermines the longstanding pillars of public policy that keep our nation functioning by allowing the public to access court documents, but disregards the great public interest — and stake — in the proceedings in this case. This Court should recognize that prohibiting access to such records is against public policy and grant Petitioner's request for a supervisory writ to make a clear statement that the law in North Dakota requires public access to court records.

II. The District Court's Orders are Contrary to Law and Should Not Stand.

In its orders restricting access to records in the underlying case, the district court failed to follow both constitutional law and North Dakota court rules, ordering the sealing of court records without making the required findings. This Court has held that courts in North Dakota cannot issue sealing orders without meeting the test of strict constitutional scrutiny, *State v. Klem*, 438 N.W.2d 798, 801 (N.D. 1984). It further reiterated those principles through N.D. Sup. Ct. Admin R. 41, Sec. 6. To prohibit access, the rule requires a court to specifically find an overriding interest, ensure that the closure is no broader than necessary, consider reasonable alternatives, and use the least restrictive means in the closure. *Id*. at Sec. 6(a). In a dismissive portion of the order addressing this test, the district court simply stated in only a few sentences that its overriding interest is to "encourage a continuing dialogue concerning settlement without unnecessary distraction" and it stressed the cost of the lawsuit — at more than $2 million — as a factor in its determination of the need to close access and foster a settlement. Op. at 2. This cursory and conclusory "analysis" makes no findings and can hardly be the application of the strict constitutional

scrutiny this Court, not to mention the U.S. Supreme Court, had in mind. Furthermore, the wholesale sealing of all filings can in no way satisfy the administrative rules requirement that any closure be no broader than necessary. N.D. Sup. Ct. Admin. R. 41, Sec. 6(a)(4).

The district court should have allowed public access to these important court records, which concern a matter of great public interest and importance; however, if the court believed closure was proper, it needed to follow the procedure put in place to safeguard the public's First Amendment right to access court records. It did not. This Court should find it necessary to issue a supervisory writ to ensure that such strict constitutional scrutiny and compliance with state court rules is strictly adhered to in future court closure cases.

A. U.S. Supreme Court Precedent and Precedent of This Court Affirm the Presumption that Court Records Must Remain Open Absent Proper Findings.

This Court specifically acknowledged the issue of the importance and presumption of access to court records when it adopted its Administrative Rule 41 in 1996. N.D. Sup. Ct. Admin. R. 41. The rule provides that "every member of the public will have access to court records." *Id*. In Section 6, the rule expressly sets forth the steps to be followed if a party or a court wishes to seal court records. Requiring what is essentially strict constitutional scrutiny, Rule 41 requires a court to make *specific findings* that an overriding interest occurs in prohibiting access; ensure that the closure is *no broader than necessary*; consider reasonable alternatives to closure; and, finally, use the *least restrictive means* in the closure. *Id*. at Sec. 6(a) (emphasis added). Without these particularized findings on the record, no closure in a North

Dakota court can stand. In discussing the rule while preparing to amend it in 2005, members of this Court's Joint Procedure Committee again reiterated the importance of undergoing proper procedure when sealing court records. The minutes of that meeting state that one committee member discussed those guidelines specifically, stating that "the rule provides protections against unjustified sealing of records." N.D. Sup. Ct. Joint Procedure Committee Meeting Minutes of Sept. 22-23, 2005 at 8.

This Court has long been of the belief that the public has the right to view and inspect records created or held by the courts. Three decades before adoption of this rule, this Court looked at the issue of access to court records and held that the common law grants a right of public access to such documents. *State v. O'Connell*, 151 N.W.2d 758 (N.D. 1967). That belief is in line with the holdings of the U.S. Supreme Court, which has long upheld the presumption of public access to court records, and has led jurisdictions across the country to presume open access to court records. *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (stating there is a longstanding presumption in the common law that the public may inspect judicial records); *Associated Press v. United States* ("*DeLorean*"), 705 F.2d 1143 (9th Cir. 1983) (finding a First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. Fed'l Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (noting First Amendment and common law rights of access to records); *United States v. Myers* ("*In re Nat'l Broadcasting Co.*"), 635 F.2d 945 (2d

Cir. 1980) (strong presumption of a right of access); *State v. O'Connell*, 151 N.W.2d 758, 763 (N.D. 1967) (right to inspect records of judicial proceedings); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system); *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337 (Cal. Ct. App. 1999) (right of access to court records).

Courts also recognize that under certain circumstances, it is not in the best interest to release certain records to the public. However, prior to closure, courts must expressly safeguard due process rights by requiring specific findings. In *Richmond Newspapers*, the U.S. Supreme Court recognized the constitutional right of due process and established procedures that courts must follow before denying public access to criminal proceedings. 448 U.S. at 580-81. Other courts have since adopted similar principles finding that due process requirements must be met before a court may limit public access to court proceedings or documents. *See, e.g.*, *United States v. Cojab*, 996 F.2d 1404 (2d Cir. 1993); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Commonwealth v. Angiulo*, 615 N.E.2d 15 (Mass. 1993); *State ex rel. Nat'l Broadcasting Co., Inc., v. Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990). Those same due process procedures have also been applied by federal appellate courts to cases where judges have issued sealing orders. It is clear that sealing orders should not be issued absent evidence of a compelling need for the order and a finding that no less restrictive alternative is available. Federal courts have consistently stricken sealing orders in both criminal and civil cases that fail to meet that strict level of constitutional scrutiny. *See, e.g.*, *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249

(4th Cir. 1988); *In re Knight Publ'g Co.*, 743 F.2d 231 (4th Cir. 1984). In cases where sealing orders are permitted, the court must undergo the strictest scrutiny. *See United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997) (affirming a sealing order stating that the district court had "made adequate findings to support its orders" and "narrowly tailored those orders to the compelling interests at stake").

This Court has spoken clearly and decisively on the issue of public access to court records both on its interpretation of the common law and then through its own rules, agreeing on the presumption of openness unless specific steps are taken to show why records may be sealed. In addition, this Court should also be mindful of the directive on openness set forth by the U.S. Supreme Court for public access to court information.

B. The District Court Failed to Make Proper Findings to Justify Closure of Records.

The specific findings required both constitutionally and by N.D. Sup. Ct . Admin. R. 41 were not made by the district court in the underlying case and, as such, the court's closure of records in the case was improper, contrary to law, and cannot stand.[2]

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[2] Although a settlement was reached in this case as of Oct. 26, 2007, the underlying sealing orders of Sept. 14, 2007 and Oct. 22, 2007 remain contrary to law as they were issued without proper findings of fact required by N.D. Sup. Ct. Admin R. 41. Regardless, making the records public after the fact is insufficient to protect the public's right to access court records.

As set forth above, any court seeking to seal court records or otherwise close access to judicial proceedings in a civil case in North Dakota may do so only when adhering to the due process mandates of constitutional law. *See Klem*, 438 N.W.2d at 801 (closure must be "essential to preserve higher values and [be] narrowly tailored to that interest"). This Court further chose to mandate due process protection through Administrative Rule 41. In this case, the district court blatantly disregarded Rule 41 and seemingly without justification found that the court records should be sealed to aid reaching a settlement without the "unnecessary distraction" presumably caused by the "divisive" media reports. Op at 2.

Under Rule 41, a court must first find an "overriding interest" in closure. Here, the district court stated its overriding interest was to "encourage a continuing dialogue concerning settlement without unnecessary distraction." *Id*. The district court's determination that the interest in a settlement in this case may well have been an appropriate interest in closure of the court records; however, the district court simply announced this rationale as its overriding interest without making the requisite findings required by Rule 41. The rule requires a court to "articulate this interest along with specific findings sufficient to allow a reviewing court to determine whether the closure order was properly entered." N.D. Sup. Ct. Admin. R. 41, Sec. 6(a)(3). Here, the district court discussed what was, in its view, the effect of media coverage hampering the settlement in the case, but supported that view with no evidence or findings in the record. The opinion stated that the court determined that sealing filings would aid in the settlement discussions, but did not discuss how that would aid in reaching a settlement, nor did it cite specific media reports or any other

findings that showed the media reports were the cause of either delayed or failed settlement attempts. The judge may have found national media interest in this case to be distasteful, but merely claiming there is an overriding interest in closure without clear findings of fact simply does not meet the requirements of the rule.

Rule 41 also requires that a closure be "no broader than necessary to protect the articulated interest, and that a court must "consider reasonable alternatives to closure, such as redaction or partial closure" and requires, again, that a court make "findings adequate to support the closure." N.D. Sup. Ct. Admin. R. 41, Sec. 6(a)(4). Here, the district court considered no alternatives to a complete prohibition of access, nor did it address the need for full closure to protect its stated interest in settlement beyond the unsupported conclusion that "divisive" media reports were the cause of failed settlement attempts. There was no finding that complete secrecy was necessary, or even warranted, to "protect the articulated interest" and support closure. The district court again disregarded these important protections provided under Rule 41 in its refusal to provide access to the records in the underlying case.

Finally, the rule requires that a court "use the least restrictive means" in the closure. N.D. Sup. Ct. Admin. R. 41, Sec. 6(a)(5). Not only was a blanket closure of access to court files far from the "least restrictive" manner the district court could have employed to protect its stated interest in fostering a settlement in the underlying case, but the district court did not even consider less restrictive means than the one it employed. That blatant disregard, yet again, for the requirements of Rule 41 cannot stand.

C. A Supervisory Writ Must Issue to Ensure Proper Procedure for Closure of Court Records in Future Cases.

Although the parties in the underlying case have reached a settlement and the district court has dismissed this case, the implications of the earlier sealing orders and their blatant violations of Rule 41 require this Court to act so that North Dakota courts do not continue to disregard the rule and create their own standards when issuing future sealing orders. As this Court well knows, having implemented Rule 41 in the first place, the rule serves an important purpose in ensuring due process protection is afforded to the public when sealing access to court documents or proceedings. For a court to simply conclude that its own rationale is sufficient to warrant closure without adhering to the requirements set forth by the U.S. Supreme Court and the rules promulgated by this Court surely cannot be acceptable practice and must not stand. To prevent courts from acting so cavalierly in the future, this Court must address this matter. Issuance of a supervisory writ to the courts of North Dakota is the proper and appropriate vehicle in which to do so. We respectfully request this Court to take original jurisdiction of this matter to reverse the district court's denial of the Petitioner's motion to unseal the records in this case.

CONCLUSION

Access to court records is a long-held right both under the First Amendment and common law, and recognized in state and federal courts and protected through various laws and rules such as the North Dakota Supreme Court's Administrative Rule 41, Section 6, which requires courts to make specific findings before they can close off public access to their records. The district court simply failed to make the findings required by that rule. We respectfully ask this Court to recognize the importance of its Administrative Rule 41 in mandating that all courts, including the District Court of Grand Forks County, North Dakota, adhere to the requirements of the rule and appropriately provide the public with due process safeguards to accessing court records required by the First Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2007, I caused to be served, by U.S. mail, an original and seven copies of the Brief of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Petitioner to the Clerk of the Supreme Court; I further certify that on November 20, 2007, I sent an identical copy of that Brief, electronically, to the Clerk of the Supreme Court; and I further certify that on November 20, 2007, I served one copy of the foregoing Brief, by U.S. mail, first class, postage prepaid, to:

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