IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

In re NHC-Nashville Fire Litigation	)	**COURT OF APPEALS NO.: M2007-00192-COA-R3-CV**

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; TENNESSEE ASSOCIATION OF BROADCASTERS; THE TENNESSEE COALITION FOR OPEN GOVERNMENT; THE TENNESSEE PRESS ASSOCIATION; AND THE ASSOCIATED PRESS IN SUPPORT OF THE RULE 11 APPEAL OF INTERVENOR-APPELLANT GANNETT SATELLITE INFORMATION NETWORK, INC., D/B/A *THE TENNESSEAN*

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Amici The Reporters Committee for Freedom of the Press, Tennessee Association of Broadcasters, The Tennessee Coalition for Open Government, The Tennessee Press Association, and The Associated Press ("Amici") respectfully urge the Court to exercise Rule 11 review of this case in order to safeguard the public's right to prompt access to judicial records – a tradition firmly rooted in our nation's history and set forth under the First Amendment, the common law, and Tennessee state law.

INTEREST OF AMICI

As explained in the concurrently-filed motion for leave to file a brief *amici curiae*, 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 Tennessee Association of Broadcasters ("TAB") is a voluntary association of radio and television broadcast stations located in Tennessee, organized and existing as a not-for-profit Tennessee corporation. Its purpose includes promoting a high standard of public service among Tennessee broadcast stations, fostering cooperation with governmental agencies in all matters pertaining to national defense and public welfare, and encouraging customs and practices in the best interest of the broadcasting industry and the public it serves. Broadcasters, as federal licensees, are required to serve the public interest; 47 U.S.C. §303(f); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 599 (3rd Cir.), *cert. denied*, 327 U.S. 779 (1945) ("broadcasting station must operate in the public interest and must be deemed to be a 'trustee' for the public").

The Tennessee Coalition for Open Government ("TCOG") is a non-partisan alliance of media, citizen and professional groups working to educate Tennesseans about their right to know about the affairs of their government as set out in the state constitution and the state's "sunshine" and public records laws. It seeks to keep citizens, media and public officials informed about developments and threats to these laws – with an understanding that the best way to preserve and improve access to public business is through research and education. TCOG's purpose is to serve as a clearinghouse of information on problems and solutions in the "open government" arena and at the state and local level. TCOG is a not-for-profit Tennessee corporation.

The Tennessee Press Association ("TPA") is the trade association of Tennessee's daily and non-daily newspapers, and it is the parent organization of Tennessee Press Service and Tennessee Press Association Foundation. It was founded in 1870-71 for the purpose of creating a unified voice for the newspaper industry of Tennessee.

The Associated Press ("AP") is the world's largest source of independent news and information. AP gathers and distributes news of local, national and international importance to more than 15,000 newspapers, broadcast stations and other news outlets in all media across the United States and throughout the world. AP operates 243 bureaus and offices worldwide, including four in Tennessee. AP is a New York not-for-profit membership corporation. It has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

This case concerns the circumstances under which Tennessee courts can seal court records filed in connection with a motion for summary judgment. Amici and affiliated journalists frequently rely on the constitutional, statutory, and common-law guarantees of public access to the courts. In addition, Amici often have participated in legal and legislative efforts to ensure that this nation's presumption of access to court proceedings and records is honored. Amici

respectfully submit that their experience will assist this Court in understanding both the issues presented in this case and the significance of this case.

SUMMARY OF ARGUMENT

Court records, including discovery documents filed with the court, are presumed to be open for public review. Courts across the country have concluded that, because the presumption of access to court records "is of constitutional magnitude," *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984), judicial documents may be sealed only "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *In re New York Times Co.*, 828 F.2d 110, 116 (2nd Cir. 1987) (internal quotations omitted). The First Amendment and common law require "immediate access" to judicial documents. The access inquiry cannot be postponed until after documents are filed under seal, and it *certainly* cannot be delayed for months for the convenience of the parties or the court. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2nd Cir. 2006).

Tennessee courts have long recognized this heavy constitutional presumption in favor of openness. More than two decades ago this Court ruled that the constitutional interest in access "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985) (citation omitted); *see also Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996) (Tennessee "public records law is essentially a codification of the public access doctrine").

Nearly all the documents at issue in this case were ultimately released, but only months after they were filed. *In re NHC-Nashville Fire Litigation*, 2008 WL 4966671 at *6 (Tenn. Ct.

App. Nov. 21, 2008). While access to these now-released documents may no longer be an issue, Amici urge this Court to accept review of the court of appeals opinion that approved a blanket protective order covering all discovery documents filed in connection with a dispositive motion. The opinion was a departure from this Court's jurisprudence, constitutional imperatives, and the national consensus on this issue.

The secrecy below would be problematic in any case. But it is especially egregious in light of the public policy issues involved in this case, which deals with a horrendous nursing home fire that resulted in at least sixteen deaths, many injuries, and lawsuits on behalf of 32 victims. *In re NHC-Nashville Fire Litigation*, 2008 WL 4966671 at *15 (Tenn. Ct. App. Nov. 21, 2008). This is far from "a situation in which media intervention serves only voyeuristic purposes … or in which [a] third party seeks to further its own interests." *Id.* at *20 n.27. Rather, the overbroad protective order below impeded coverage that was "focused on improving the safety of nursing homes to prevent such tragedies in the future." *Id.* at *1. It is difficult to imagine a court order more antithetical to the American tradition of open records than a blanket order keeping secret information vital to the safety of some of Tennessee's most vulnerable citizens.

Such a departure from the American tradition of public access has not been authorized by this Court, and Amici respectfully suggest that it *could* not be authorized while remaining consistent with well-established federal access doctrine.[1] Amici urge this Court to accept review and reiterate that documents filed in support of dispositive motions are presumptively open to the public and may be sealed only *after* a rigorous constitutional test is met.

[1] Just as this Court is supreme in its exposition of Tennessee law, "the federal judiciary is supreme in the exposition of the law of the [United States] Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Thus, "[s]tate courts must defer to the federal courts' exposition of federal constitutional law." *State v. Garza*, 77 P.3d 347, 372 (Wash. 2003) (Sanders, J., concurring).

ARGUMENT

I. Discovery filed in connection with a dispositive motion may not be sealed until *after* the rigorous constitutional standard for closure is met.

A. The First Amendment creates a presumptive right of access to court proceedings and records, based on an "unbroken, uncontradicted history" of openness.

Nearly 30 years ago, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), the U.S. Supreme Court established a presumptive right of access to criminal proceedings. Since that time, this Court and many others have applied the same reasoning to recognize a right of access to civil proceedings and records.

The public and press have a presumptive First Amendment right of access to proceedings in criminal cases. *See, e.g.*, *id.* at 573 (plurality opinion) ("we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice"). The right is based on the "unbroken, uncontradicted history" of public criminal proceedings in Anglo-American law and the positive contribution of openness toward the historical function of the proceedings. *Id.* Among other benefits, the public's ability to observe criminal proceedings enhances the legitimacy of verdicts, fosters both fairness and the appearance of fairness, and guards against abuse. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982). Accordingly, for almost three decades it has been clear that a judge may close proceedings in a criminal case only after making specific, on-the-record findings that "closure is essential to preserve higher values [than the public's right of access] and is narrowly tailored to serve that

interest." *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984).

Many courts subsequently have recognized a public right of access to proceedings and documents in civil cases, though they have differed on the origin and scope of the right. *See, e.g.*, *King v. Jowers*, 12 S.W. 3d 410, 412 n.2 (Tenn. 1999) (presumption of access applied to civil proceedings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (First Amendment and common law limit judicial discretion to seal documents in civil litigation); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3rd Cir. 1984) ("the First Amendment does secure a right of access to civil proceedings"); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2nd Cir. 1984) ("the First Amendment does secure to the public and to the press a right of access to civil proceedings"); *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999) ("every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials").

Access to civil court *records* is also protected by the First Amendment. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179 (strong presumption of access to civil court records); *see also The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86, 93 (2nd Cir. 2004); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (constitutional right of access to "documents filed in connection with a summary judgment motion in a civil case"); *In re Continental Illinois Securities Litigation*, 732 F.2d at 1308 (presumption of access to evidence supporting dispositive motion in civil case "is of constitutional magnitude"); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994) (assuming both a First Amendment and a common law right of access to civil litigation documents); *Associated*

Press v. U.S. Dist. Court for Cent. Dist. of California, 705 F.2d 1143, 1145 (9th Cir. 1983) ("*DeLorean*") (First Amendment right of access to court records). This right to court records is "not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state." *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) (quotation omitted).

B. The constitutional presumption of openness extends to pretrial discovery when it is filed in support of a dispositive motion.

Public access to court files is nowhere more vital than in the case of records that are submitted in connection with a motion. Courts across the country have concluded that once discovery documents are filed – and particularly if they are filed in support of a dispositive motion – a constitutional presumption of access applies. *See Rushford*, 846 F.2d at 253 (a "rigorous First Amendment standard should … apply to documents filed in connection with a summary judgment motion in a civil case"); *Virginia Dept. of State Police v. Wash. Post*, 386 F.3d 567, 578 (4th Cir. 2004) ("the public has a right of access under the First Amendment" to documents filed in connection with a summary judgment motion); *Stone v. University of Maryland Medical System*, 948 F.2d 128, 131 (4th Cir. 1991) (recognizing a constitutional access right to medical review materials that "have been filed with and considered by a court in connection with a dispositive motion like a motion for summary judgment").

The Second Circuit agreed in *Lugosch*, 435 F.3d at 124. The court noted the longstanding right of access to summary judgment *proceedings*, and reasoned that the same right must "apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access." *Id.* (quotations omitted). It thus "conclude[d] that there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion." *Id.*; *see also In re Continental Illinois Securities Litigation*,

732 F.2d at 1309, 1313 (finding that "the presumption of access applies to the hearings held and evidence introduced in connection with [a] motion to terminate" in part because of the "important first amendment interests that cut in favor of disclosure"); *Joy v. North*, 692 F.2d 880, 893 (2nd Cir. 1982) ("[a]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny …. Indeed, any other rule might well create serious constitutional issues.").[2]

It is irrelevant to the constitutional analysis whether the party seeking to keep documents under seal, or the opposing party, filed the documents. *See Lugosch*, 435 F.3d at 122 (refusing to "distinguish between the moving and opposing party in concluding that there is a presumption of access to documents submitted to the court at summary judgment," because all parties are "assumed to have supported their papers with admissible evidence and non-frivolous arguments"). It is also irrelevant whether the court actually relied on the sealed documents in making its decision, because "[i]f the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision … documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision." *Id.* at 123 (quoting *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 43 (C.D. Cal. 1984) (italics in original)).

[2] Courts are not completely unanimous in recognizing a constitutional right to access summary judgment documents. *See In re The Reporters Committee for Freedom of The Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) (declining to recognize access right to filed discovery before final judgment). But this early decision is an outlier and has been sharply criticized. *See, e.g., NBC Subsidiary, Inc.*, 980 P.2d at 366 n.43 ("courts in subsequent decisions have declined to follow the reasoning and approach of the *Reporters Committee* decision with regard to documents filed in connection with a summary judgment motion"). Moreover, any uncertainty only highlights the need for this Court to accept review and clarify the standard in Tennessee.

C. Summary judgment documents can be sealed only in "rare" cases where the court finds "that closure is essential to preserve higher values and is narrowly tailored to serve that interest."

A "rigorous First Amendment standard" applies to documents filed in connection with a summary judgment motion in a civil case. Therefore, a court may not limit public access to them without showing "that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." *Rushford*, 846 F.2d at 253; *see also Lugosch*, 435 F.3d at 124.

In *State v. Drake*, this Court described the rigorous constitutional test that governs denial of access to presumptively open proceedings, finding that it "must be applied in Tennessee when a closure or other restrictive order is sought." *Drake*, 701 S.W.2d at 608. *Drake* found that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 607 (quoting *Press-Enterprise I*, 464 U.S. at 506). *Drake* added that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. *Such circumstances will be rare*, however, and the balance of interests must be struck with special care." *Id.* (emphasis added) (quoting *Waller v. Georgia*, 467 U.S. 39, 44 (1984)).

Agreement of the parties is no substitute for the review required by *Press-Enterprise* and *Drake*. "[E]ven if no voice is heard in opposition to a motion for closure, it is the duty of the trial judge to require the movant to advance an overriding interest that is likely to be prejudiced, consider reasonable alternatives to closing the proceedings, tailor any closure order so that it is

no broader than necessary to protect that interest, and make findings adequate to support the closure." *Id.* at 608.

Applying these same constitutional standards, courts consistently have vacated sealing orders in both criminal and civil cases that fail to meet strict constitutional scrutiny. *See, e.g.*, *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 511 (1st Cir. 1989); *Rushford*, 846 F.2d at 254; *cf. United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997) (affirming a sealing order because the district court "made adequate findings to support its orders" and "narrowly tailored those orders to the compelling interests at stake").

In this case, the procedures laid out by *Press-Enterprise* and adopted by *Drake* were ignored in their entirety. The court below instead preemptively sealed all documents, only to release most of them several months later and after the motion at issue had been decided. Such summary procedures were not authorized by *Drake* or any other decision of this Court. Indeed, Amici respectfully submit that these procedures *could not* be authorized by the Court without violating the well-established First Amendment principles described above.

II. Discovery records filed in connection with a dispositive motion also are subject to a particularly strong common-law presumption of access, which can be overcome only by showing a "compelling" interest in secrecy.

In addition to ignoring the constitutional prerequisites to sealing summary judgment records, the decision below repudiates the common-law presumption of access to discovery materials filed in connection with a dispositive motion. *See, e.g. Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003); *Rushford*, 846 F.2d at 252.

The U.S. Supreme Court has recognized a common law presumption of public access to court records. *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 US 589, 597 (1978) (finding a common law right of access to judicial records). This Court agreed in *Ballard*, noting that

"there exists in this country a general right to inspect and copy public records and documents, including judicial records and documents." *Ballard*, 924 S.W.2d at 661.

In particular, discovery documents filed in connection with a request for court action are presumed open. *See, e.g., F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the [common-law] presumption of public access applies"); *Citizens F.N.B., Princeton v. Cincinnati Ins.*, 178 F.3d 943, 946 (7th Cir. 1999) ("Most cases endorse a presumption of public access to discovery materials").

The common-law presumption of access is *particularly* strong with regard to documents filed in connection with a dispositive motion. *See, e.g., Foltz* , 331 F.3d at 1135-36 (because "summary judgment adjudicates substantive rights and serves as a substitute for trial," the "presumption of access is not rebutted where … documents subject to a protective order are filed under seal as attachments to a dispositive motion"); *Rushford*, 846 F.2d at 252 (4th Cir. 1988) ("[b]ecause summary judgment adjudicates substantive rights and serves as a substitute for a trial" common-law presumption of access applies to "documents filed in connection with a summary judgment motion in a civil case"); *Lugosch*, 435 F.3d at 121 ("documents submitted to a court for its consideration in a summary judgment motion are – as a matter of law – judicial documents to which a strong presumption of access attaches"); *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) ("the unbroken string of authorities … leaves little doubt" that "the federal common law right of public access extends to materials submitted in connection with motions for summary judgment in civil cases prior to judgment").

Even the court below acknowledged that "there must be a compelling reason to seal judicial records filed in connection with a dispositive motion, especially on an issue of public safety, and … the burden for showing such a compelling reason is on the party who seeks to prevent public access to the public records." *In re NHC-Nashville Fire Litigation*, 2008 WL 4966671 at *16 (Tenn. Ct. App. Nov. 21, 2008) (citations omitted). But rather than require a compelling justification *before* sealing the records, the court relied on *Ballard v. Herzke* to justify a blanket sealing order.

As the court below noted, *Ballard* allowed trial courts to seal filed discovery if they find "good cause" based on specific showing that "disclosure will result in a clearly defined injury to the party seeking closure." *In re NHC-Nashville Fire Litigation*, 2008 WL 4966671 at *12 (Tenn. Ct. App. Nov. 21, 2008) (quoting *Ballard*, 924 S.W.2d at 658). But in applying this "good cause" standard, *Ballard* explicitly confined itself to raw discovery, noting that "[a]lthough pretrial depositions and interrogatories generally are not considered to be public components of a civil trial, in Tennessee, discovery responses are required, absent a trial court order or local rule, to be filed with the clerk of the Court." *Ballard*, 924 S.W.2d at 661-62 (citation and footnote omitted). It did not speak to the proper procedure when the documents at issue are "public components of a civil trial," which many courts have found documents attached to a dispositive motion to be. *See supra*, Section 1.B. The *Ballard* decision *did not* say that all filed discovery may be sealed with nothing more than a bare finding of 'good cause,' and it *could not* say this while remaining consistent with the many cases that subject requests to seal summary judgment records to strict scrutiny.

III. The First Amendment and common law both require "immediate," "contemporaneous" access to discovery filed in connection with a dispositive motion.

The court below found no abuse of discretion in the trial court's four-month delay in deciding whether to unseal the summary judgment records.[3] But such a delay is impermissible under both the First Amendment and common-law standards because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Faced with a situation *identical* to this one, the Second Circuit in *Lugosch*, 435 F.3d at 126, ordered "immediate access" to discovery materials. There, as here, "[n]ewspapers sought access to certain documents filed under seal in connection with the defendants' motion for summary judgment." *Id.* at 113. The trial court held the motion in abeyance for several months, waiting until it could rule on the underlying summary judgment motion. *Id*. On appeal, the Second Circuit found "that the district court erred in holding the motion in abeyance because the contested documents are judicial documents to which a presumption of immediate access applies under both the common law and the First Amendment." *Id.* The court remanded to allow the trial court to apply the constitutional test for closure, but added that "[w]e take this opportunity to emphasize that the district court must make its findings quickly. Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found." *Id.* at 126.

[3] As *The Tennessean*'s brief makes clear, the court below also applied an impermissibly deferential standard of review. *See* Brief of Intervenor-Appellant Gannett Satellite Information Network, Inc., D/B/A *The Tennessean*, at 8-9. But the trial court's order should have been vacated under even an abuse of discretion standard because, as a matter of law, the public has a strong presumption of immediate access. *See Lugosch*, 435 F.3d at 121.

Whether recognizing a constitutional or common-law right of access, many other courts have agreed that "access should be immediate and contemporaneous" because "[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment." *Grove Fresh Distrib., Inc.*, 24 F.3d at 897 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *see also In re Continental Illinois Securities Litigation*, 732 F.2d at 1310 ("the presumption of access normally involves a right of *contemporaneous access*") (italics in original); *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 664 (3rd Cir. 1991) (finding that "the public interest encompasses the public's ability to make a contemporaneous review of the basis of an important decision of the district court").

In the case at bar, both the trial court and the appellate court shrugged off a months-long delay in deciding whether the summary judgment records were properly sealed. The trial court ultimately released most of the documents, but only months later. Indeed, the court waited until after the motion to which they were related was decided. *Cf. In re Coordinated Pretrial Proceedings*, 101 F.R.D. at 43 ("for the presumptive right to be suspended or nonexistent until after the judge has ruled on a motion, would be to impair the important interest in contemporaneous review by the public of judicial performance"). The Court should accept review to clarify that such delays, which gut the right of public access in the name of administrative convenience, are unacceptable.

CONCLUSION

This case, in which the public has been a witness to a horrible disaster that led to at least sixteen deaths, provides a textbook example of the importance of openness in litigation. The public has a right to know why this tragic fire occurred and what steps are being taken to ensure that it does not happen again. The records of this litigation directly address both of these issues.

To allow parties to this case to unilaterally determine that the public has no interest in or right to the documents the court used in deciding summary judgment – even if most are ultimately released after the fact – flies in the face of the law and public policy.

It may well be that, as the trial court ultimately decided, a few of the documents filed in connection with the summary judgment motion could properly be sealed. Even if this is the case, however, the First Amendment's procedural safeguards for public access should not and cannot be ignored, and public access must not be put off until it is convenient for the parties and the trial court. Without this Court's intervention, courts in Tennessee will continue to misconstrue the law of access to documents filed in support of a dispositive motion. Were this to happen, the Tennessee courts, allowing actions to be "routinely dismissed on the basis of secret documents," *Joy*, 692 F.2d at 893, would fall out of step with the nationwide consensus in favor of access to these important court records.

Amici respectfully ask this Court to exercise Rule 11 review in order to ensure that the public will continue to trust its government to provide it with vital public safety information.

Respectfully submitted,

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