CV 19-929

IN THE SUPREME COURT OF ARKANSAS

JENNIFER JONES, in her official capacity as Clerk of the District Court of Benton County, Arkansas, Bentonville Division — APPELLANT and CROSS-APPELLEE

v. — Case No. CV 19-929

PROFESSIONAL BACKGROUND SCREENING ASSOCIATION, INC., — APPELLEE and CROSS-APPELLANT

On Appeal from the Circuit Court of Pulaski County

The Honorable Chris Piazza, Circuit Judge

AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 24 MEDIA ORGANIZATIONS BRIEF IN SUPPORT OF APPELLEE/CROSS-APPELLANT

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee") and Arkansas Broadcasters Association, Arkansas Press Association, Arkansas Times, The Associated Press, The Center for Investigative Reporting (d/b/a Reveal), Gannett Co., Inc., Gray Media Group, Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Little Rock Sun Community Newspaper, The Media Institute, MPA - The Association of Magazine Media, The MuckRock Foundation, National Freedom of Information Coalition, National Newspaper Association, National Press Photographers Association, The News Leaders Association, Online News Association, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, TEGNA Inc., Tully Center for Free Speech, and WEHCO Media, Inc. Lead amicus, the Reporters Committee for Freedom of the Press, is an unincorporated, nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation,

amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.[1]

Amici are news organizations and organizations that advocate on behalf of journalists and the press. Amici, or the news outlets and reporters they represent, frequently rely upon access to court records in criminal cases to report on matters of public concern. Although the request for court records at issue in this case was made by a company that conducts background screening checks, the Court's decision could affect the ability of the public and press to access judicial records. Accordingly, amici have a strong interest in the outcome of this case and in ensuring the courts correctly apply Arkansas Supreme Court Administrative Order No. 19 ("Order 19"), the Arkansas Freedom of Information Act, and the First Amendment and common law rights of access to facilitate the public's right of access to criminal court records. Amici write to highlight the importance of access to criminal-court records to the news media and, in turn, the public, and to urge the Court to interpret Order 19 consistent with its plain language and in accordance with the First Amendment; specifically, amici urge the Court to hold that the records at issue are not "compiled information" within the meaning of Order 19.

[1] Full descriptions of the other amici are included as Appendix A to this brief.

SUMMARY OF THE ARGUMENT

Public access to judicial proceedings and court records plays a crucial role in ensuring the integrity, fairness, and transparency of our criminal justice system. Members of the news media, relying on such access, use court records in criminal cases to report on specific cases of public interest and to inform the public about the workings of the judicial system as a whole. Countless important news stories from journalists in Arkansas and around the country have relied on access to court records in criminal cases to, among other things, report on ongoing criminal matters involving government officials and to investigate allegations of misconduct in individual cases.

In Arkansas, four provisions of law work in harmony to ensure public access to court records: Order 19, the Arkansas Freedom of Information Act ("FOIA"), the public's presumptive First Amendment right of access, and the public's presumptive common law right of access. The trial court determined that a request for existing court records related to an individual is governed by FOIA, not Order 19. *See* Admin. Order No. 19 at § I.A. Because PBSA has fully addressed the applicability of FOIA to court records in their brief, Combined Appellee's Resp. to Appellant's Br. and Br. of Cross Appellant at 48–55 (hereinafter "PBSA Br."), amici do not discuss this issue. Amici write instead to emphasize the public's

separate and independent rights of access to court records under the First Amendment and common law.

Order 19 is intended to promote the accessibility of court records. Admin. Order No. 19 at § I.B.1. However, Appellant-Cross-Appellee Jennifer Jones's ("Jones") interpretation of Order 19's definition of "compiled information,"[2] if accepted by this Court, could severely hamper journalists' ability to access court records. Order 19's provisions impose burdensome costs and require acceptance of a licensing agreement that limits what "compiled information" licensees may distribute. Under Jones's proffered interpretation of Order 19, those provisions would apply to court records to which the public has a presumptive right of access under both the common law and First Amendment, including docket sheets, charging instruments, and documents reflecting the disposition of criminal charges.[3] And, if applied to these records, Order 19's restrictions on the

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[2] Order 19 defines "compiled information" as "information that is derived from the selection, aggregation or reformulation of information from more than one court record." Admin. Order No. 19 § III(A)(10).

[3] The request at issue in this case sought "all court records which relate to" a specific individual. (R 210, 360.). Appellee-Cross-Appellant Professional Background Screener's Association ("PBSA") has explained that, in the past, the

accessibility and use of "compiled information" would be inconsistent with the constitutional right of access. In order to avoid a conflict between Order 19 and the public's First Amendment right of access to judicial records, this Court should interpret Order 19 according to its plain language and hold that its definition of "compiled information" does not apply to the records at issue here.

For the reasons stated herein and in PBSA's brief, this Court should affirm the circuit court's entry of partial summary judgment for PBSA and reverse the trial court's entry of partial summary judgment for Jones.

District Court of Benton County, Arkansas, Bentonville Division (the "Bentonville Division") provided docket sheets in response to requests by background screening company Courthouse Concepts and that "any response would have been sufficient so long as it included the actual charging instrument and the judgment for each charge or included other records that contained information about the charges brought and their disposition." Combined Appellee's Resp. to Appellant's Br. and Br. of Cross Appellant at 26 (hereinafter "PBSA Br."). Accordingly, amici focus their analysis on access to docket sheets, charging instruments, and documents reflecting the disposition of criminal charges.

ARGUMENT[*]

I. Journalists rely on access to criminal court records, including docket sheets, charging instruments, and documents reflecting the disposition of criminal charges, to report on matters of public concern.

"One of the basic principles of a democracy is the people have a right to know what is done in their courts." *Ark. Dep't of Human Serv. v. Hardy*, 316 Ark. 119, 123, 871 S.W.2d 352, 355 (1994) ("*Hardy*"). And press and public access to criminal proceedings, in particular, is "essential . . . [to] maintaining public confidence in the administration of justice." *Richmond Newspapers*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring); *see also Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982) ("Public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process").

"Correlative of this principal [of public access to courts] is the vital function of the press to subject the judicial process to extensive public scrutiny and

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[*] Pursuant to Ark. Sup. Ct. R. 4-6(c), amici state that no counsel for a party authored the brief in whole or in part; no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief or otherwise collaborated in the preparation or submission of the brief; and no person or entity, other than the amicus curiae, its members, or its counsel, made such monetary contribution to the brief or collaborated in its preparation.

comment." *Hardy*, 316 Ark. at 123, 871 S.W.2d at 355. The press plays a key role in ensuring public oversight of the judicial system. Because members of the public cannot attend every court proceeding or read every court document themselves, they necessarily rely on the news media, acting as "surrogates" for the public, to keep them informed. *Richmond Newspapers*, 448 U.S. at 573. "[F]ree and robust reporting" about criminal cases thus "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system[.]" *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976).

Access to court documents, including docket sheets, charging instruments, and documents reflecting the disposition of criminal cases, is essential to the news media's ability to report on ongoing criminal cases of public interest. Access to docket sheets is particularly important, as it allows journalists to keep track of filings, hearings, and other proceedings for purposes of their reporting. In contrast, denying public access to criminal dockets "mak[es] it harder for . . . journalists . . . to keep tabs on ongoing cases or to verify the outcome of old ones." Todd Wallack, *Courts Cut Online Access to Criminal Cases*, The Boston Globe (July 13, 2016, 9:03 PM), https://perma.cc/S76W-ZL95.

In addition, a public docket is an essential precursor to the news media's and the public's ability to assert their rights of access to closed court proceedings and sealed court documents. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93

(2d Cir. 2004) (stating that "docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment"). Without access to docket sheets, the public and press are less able to oppose closure and sealing because they may not know when closed hearings have been scheduled, or that sealed documents exist.

Journalists also rely on access to court records such as charging instruments and documents that reflect the outcome in a criminal case to report on specific criminal matters and the justice system more broadly. Such court records provide journalists with a reliable source of information, allowing them to better understand the facts of a case, including the nature and grounds of criminal charges brought against a defendant, so that they can accurately convey that information to the public. For example, in 2019 the *Texarkana Gazette* reported on the contents of an indictment charging "a lawyer of duping clients in Wake Village, Texas, and Miller County, Arkansas, out of hundreds of thousands of dollars." Lynn LaRowe, *Lawyer Accused of Scamming Residents | David Krueger Indicted, Under Suspension by State Bar*, Texarkana Gazette (Nov. 23, 2019), https://perma.cc/FS6Z-B2E4. The article used the indictment to report details about the defendant's scheme to defraud clients and the criminal charges against him to the communities the defendant allegedly targeted. *Id.*

Court records reflecting criminal charges and the dispositions of criminal cases also provide information that allows news organizations and the public to hold public figures accountable. For example, indictments undergirded reporting in 1999 about charges of racketeering, mail fraud and money laundering against ten people, including two Arkansas state senators, two former Arkansas state senators, two former Arkansas state department of education officials and several lawyers and associates of the legislators. David Firestone, *Arkansas Lawmakers Indicted in Vast Corruption Case*, N.Y. Times (Apr. 28, 1999), https://perma.cc/3XBL-FJWX. According to the news report, the indictments revealed that "the scope of charges were greater than any subsequent news accounts had indicated." *Id.* More recently, in 2018, the *Arkansas Democrat-Gazette* created a timeline based on "plea agreements, indictments, emails, texts and other federal court records" that showed how a political corruption probe in Arkansas that began in the summer of 2014 and resulted in the convictions of five former Arkansas lawmakers was carried out. Lisa Hammersly, *Corruption Scandal Ensnares 5 Ex-Lawmakers in Arkansas, So Far*, Ark. Democrat-Gazette (Nov. 4, 2018), https://perma.cc/XGK7-B9G5.

Criminal court records can also help the press identify and report on potential injustices or errors in individual cases. For example, the controversial convictions of three teenagers in 1994 for the murders of three boys in West

Memphis, Arkansas, has been the subject of extensive reporting that has relied heavily upon court records. In 2007, members of the news media cited court filings to report on new evidence brought to light by the defense that cast doubt on the convictions of the defendants, who became known as the "West Memphis 3." *See* Shaila Dewan, *Defense Offers New Evidence in a Murder Case That Shocked Arkansas*, N.Y. Times (Oct. 30, 2007), https://perma.cc/44RM-KNJ5 (citing evidence and arguments from "court filings"); Joe Stumpe, *Affidavit and DNA Crucial in Appeal of '93 Conviction*, N.Y. Times (Sept. 28, 2010), https://perma.cc/6RKU-2RTK (reporting information from a sworn affidavit originally filed under seal). The three men were freed from prison after entering an Alford plea in 2011. Mara Leveritt, *FLASH: West Memphis 3 Freed in Plea Bargain*, Ark. Times (Aug. 19, 2011), https://perma.cc/FFA2-XXQN.

In short, public access to criminal court records—including docket sheets, charging instruments, and records reflecting the disposition of criminal cases—is essential to reporting that informs the public about criminal cases and the criminal justice system as a whole.

II. There is a First Amendment and common law right of access to judicial records in criminal cases, including docket sheets, charging instruments, and documents reflecting the disposition of a criminal case.

A. The public has a First Amendment and common law right of access to criminal case proceedings and documents.

As this Court has recognized, "the press and the general public have a constitutional right of access to criminal trials under the First Amendment, made applicable to the states through the Fourteenth Amendment." *Mitchell v. State*, 2019 Ark. 67, at 6, 567 S.W.3d 838, 841 (citing *Presley v. Georgia*, 558 U.S. 209 (2010)). This Court has previously relied upon longstanding U.S. Supreme Court precedent in applying that First Amendment right of access to trials and other proceedings in criminal matters. *See Ark. Television Co. v. Tedder*, 281 Ark. 152, 156, 662 S.W.2d 174, 176 (1983) (recognizing a right of access to a pretrial suppression hearing and stating that the U.S. Supreme Court's reasoning in cases recognizing a First Amendment right of access to criminal trials "applies with similar force to pretrial as well as trial proceedings") (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980)); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 610–11 (1982) (finding statute closing court to public during testimony by minor victims of sex crimes violates First Amendment right of access)); *see also Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) (*Press-Enterprise II*) (First Amendment right of access to preliminary hearings in criminal

cases); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 509 (1984) (*Press-Enterprise I*) (First Amendment right of access to *voir dire*).

The U.S. Supreme Court and this Court have also recognized a right of access to judicial records under common law. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *Ark. Best Corp. v. Gen. Elec. Capital Corp.*, 317 Ark. 238, 247, 248, 878 S.W.2d 708, 712, 713 (1994) (assuming a common law right of access in holding that settlement must be unsealed). Although neither the U.S. Supreme Court nor this Court has had occasion to address whether the First Amendment right of access also applies to judicial records in criminal cases, the U.S. Supreme Court has held that the right of access extends, at a minimum, to transcripts of certain criminal proceedings. *See Press-Enterprise II,* 478 U.S. at 13; *Press-Enterprise I*, 464 U.S. at 509. Moreover, federal courts of appeals, including the Eighth Circuit, have overwhelmingly recognized that the First Amendment right of access extends to judicial documents in criminal cases. *See United States v. DeJournett*, 817 F.3d 479, 485 (6th Cir. 2016) (plea agreements); *In re Copley Press, Inc.*, 518 F.3d 1022, 1026–27 (9th Cir. 2008) (plea agreement); *In re Associated Press*, 172 F. App'x 1, 3 (4th Cir. 2006) (records filed "in connection with criminal proceedings"); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028–30 (11th Cir. 2005) (plea colloquies, sentencing memoranda, and downward departure motions); *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st

Cir. 2002) (right applies to "documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings"); *United States v. Ladd*, 218 F.3d 701, 704-06 (7th Cir. 2000) (records disclosing names of unindicted coconspirators whose statements were admitted into evidence); *Wash. Post v. Robinson*, 935 F.2d 282, 287–88 (D.C. Cir. 1991) (plea agreement); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (records of plea hearing); *United States v. Edwards*, 823 F.2d 111, 118 (5th Cir. 1987) (transcript of midtrial questioning of jurors); *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) (indictments); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983) (transcript of a contempt proceeding).[4]

The Eighth Circuit in *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983), explained that the "public interest" in access is particularly strong in criminal cases. The Eighth Circuit held that the First

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[4] The Tenth Circuit has not specifically resolved whether a qualified First Amendment right of access to criminal court records exists. *See United States v. McVeigh*, 119 F.3d 806, 811–12 (10th Cir. 1997) (discussing that many federal circuit courts have determined the First Amendment requires press access to at least some court documents, but reiterating that the Tenth Circuit has not yet decided the issue).

Amendment right of access applies to documents forming "an integral part" of criminal proceedings—even those not part of a criminal trial. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573–74 (8th Cir. 1988) (holding that the First Amendment right of access applies to affidavits filed in support of search warrant applications).

Under this Court's precedent, in determining whether the First Amendment right of access attaches to particular proceedings or records, Arkansas courts are guided by the U.S. Supreme Court's analysis in *Press Enterprise II*. *Kelley v. Johnson*, 2016 Ark. 268, at 25, 496 S.W.3d 346, 362. The U.S. Supreme Court's decision in *Press Enterprise II* identified two "complementary" factors for courts to consider: experience and logic, *i.e.*, (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Press Enterprise II*, 478 U.S. at 8. Access plays a positive role when, for example, it enhances the integrity and fairness of the judicial process. *See id.* at 11. When the qualified First Amendment right of access attaches, it can 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." *Press Enterprise I*, 464 U.S. at 510.

B. The First Amendment right of access attaches to the court records at issue in this case.

Both history and logic demonstrate that docket sheets, charging instruments, and documents reflecting the disposition of a criminal case are subject to the First Amendment presumption of access.

This Court has long recognized that the tradition of American "jurisprudence . . . favors a policy of maximum public access to proceedings and records of judicial tribunals." *Hardy*, 316 Ark. at 123, 871 S.W.2d at 355 (reversing lower court's sealing of final court order in paternity case); *see also Ark. Best Corp.*, 317 Ark. at 247, 248, 878 S.W.2d at 712, 713 (1994) (stating that "there is nothing new about the strong right of public access to court records"); *Ark. Television Co.*, 281 Ark. at 156, 662 S.W.2d at 176 (citing "a tradition in our case law of open judicial proceedings" and "a legislative mandate of openness dating back to the Revised Statutes"). Moreover, this Court has remarked on the positive role public access plays in the judicial system. In *Hardy*, the Court stated that access to court records safeguards "the vital function of the press to subject the judicial process to extensive public scrutiny and comment." 316 Ark. at 123, 871 S.W.2d at 355. Demarcating records as "secret . . . could defeat this synergy of the peoples' right and the press's function, especially in cases in which the State is a party," which of course includes criminal cases. *Id.*

Several federal courts of appeals have expressly held that the public's First Amendment right of access extends to docket sheets. *See Doe v. Public Citizen*, 749 F.3d 246, 268–69 (4th Cir. 2014) (holding that the "public and press enjoy a presumptive" First Amendment right of access to docket sheets in both criminal and civil proceedings); *Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp., Inc.*, 565 F. App'x 477, 490 (6th Cir. 2012) ("The First Amendment access right extends to court dockets, records, pleadings, and exhibits[.]"); *Pellegrino*, 380 F.3d at 93–94 (holding that docket sheets in civil and criminal proceedings "enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them"); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (holding that maintenance of a dual-docketing system, with both a public and sealed docket, is "an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings").

In addition, the Third Circuit has expressly held that the First Amendment presumption applies to charging instruments. *Smith*, 776 F.2d at 1112 (3d Cir. 1985) (holding that indictments are subject to both the First Amendment and common law presumptions of access); *see also In re Reporters Comm. for Freedom of the Press to Unseal Crim. Prosecution of Assange*, 357 F. Supp. 3d 528, 534 (E.D. Va. 2019) (holding that "charging documents are a quintessential example" of the type of judicial document accorded a qualified common law and

First Amendment right of access). Amici is not aware of any federal court of appeals case holding that the First Amendment right of access does *not* apply to indictments, which reflect the charges against an individual.

And, finally, numerous federal courts of appeals have applied the First Amendment presumption of access to records reflecting the disposition of cases, including plea and sentencing documents. *See, e.g.*, *DeJournett*, 817 F.3d at 484 (finding First Amendment right of access to plea agreements); *United States v. Doe*, 356 F. App'x 488, 489 (2d Cir. 2009) (approving lower court's application of the First Amendment right of access to sentencing proceeding and transcript); *In re Copley Press, Inc.*, 518 F.3d at 1027 (finding First Amendment right of access attaches to "plea colloquy transcripts"); *Ochoa-Vasquez*, 428 F.3d at 1030 (finding a First Amendment right of access to plea colloquies, sentencing memoranda, and downward departure motions); *Robinson*, 935 F.2d at 288 (extending First Amendment right of access to "plea agreements and related documents"); *Haller*, 837 F.2d at 87 (recognizing a First Amendment right of access to plea hearings and plea agreements).

In sum, as the weight of this authority demonstrates, both experience and logic make clear that the First Amendment right to access attaches to criminal court records and, in particular, to docket sheets, charging instruments, and records of criminal case dispositions. Accordingly, for the reasons discussed in more

detail below, amici agree with PBSA that Jones' proffered interpretation of Order 19 is incompatible with the public's First Amendment right of access to court records. *See* PBSA Br. at 59–70.

III. The Court should construe Order 19 according to its plain language to avoid a conflict with the First Amendment right of access.

As an initial matter, amici agree with PBSA that the plain language of Order 19's definition of "compiled information" does not encompass existing court records related to an individual. *See* PBSA Br. at 38–47. In addition, amici urge the Court to interpret Order 19's provisions for "compiled information" as inapplicable to existing court records related to an individual in order to avoid conflict with the First Amendment right of access to judicial records. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (noting that "when deciding which of two plausible statutory constructions to adopt," courts should choose the one that does not "raise a multitude of constitutional problems").

Order 19 and the Compiled Records License Agreement maintained by the Administrative Office of the Courts (the "AOC License Agreement") place certain restrictions on the accessibility and use of "compiled information" that are inconsistent with the First Amendment right of access. As a result, treating requests for access to existing judicial records related to an individual—such as a docket sheet, charging instrument, or documents reflecting the disposition of a

criminal case—as requests for "compiled information" would burden or conflict with the exercise of First Amendment rights in three significant ways.

First, Order 19 and the AOC License Agreement impose significant costs on those who request "compiled information." Order 19 provides that requesters of "compiled information" may incur costs including "personnel time, the costs [of the] medium [of] reproduction, supplies, equipment, and maintenance, and including the actual costs of mailing or transmitting the records by facsimile or other electronic means." Admin. Order No. 19 at § VI(B)(2). The AOC License Agreement requires requesters of compiled information pertaining to specific individuals to pay additional fees: a $1,000 "Account Setup Fee," a $200 "Monthly Transactional Update Fee," and $5,000 "Performance Bond." Compiled Records License Agreement, Ark. Admin. Office of the Courts, Attachment A, https://www.arcourts.gov/sites/default/files/formatted-files/05_COMPILED_RECORDS_LICENSE_AGREEMENT_0_0.pdf (last visited June 8, 2020) [hereinafter "AOC License Agreement"].[5]

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[5] The Bentonville Division has created its own Compiled Records License Agreement that requires payment of only a fee of $35.00 per hour after the first hour. (RP 252.) Nevertheless, even this lower fee will burden the public's and the press's exercise of their First Amendment right of access to court records.

These costs could prove prohibitive for members of the news media, especially independent journalists, freelancers, and smaller news organizations, seeking court records related to specific individuals for newsgathering and reporting purposes. *See e.g.*, Alexis C. Madrigal, *Local News Is Dying, and Americans Have No Idea*, The Atlantic (Mar. 26, 2019), https://perma.cc/54GD-C6Q8 (discussing the "financial crisis" of the news industry, increasing layoffs in newsrooms, and the transition of news media to a subscriber-based method to bring in income); *see also* Penelope Muse Abernathy, *The Expanding News Desert*, UNC Hussman School of Journalism and Media, https://perma.cc/L5QF-9MNH (last visited Mar. 20, 2020) (mapping diminishing local newspapers); Newspapers Fact Sheet, Pew Research Center (July 9, 2019), https://perma.cc/CUA9-AP5S (graphing the shrinking revenue and employment numbers in newspaper industry). As far back as 1906, courts have recognized the financial burden that high fees impose on publishers. *See Ex parte Brown*, 78 N.E. 553, 559 (Ind. 1906) (interpreting statute governing fees for court records narrowly to permit West Publishing Company to obtain and publish court opinions at a reduced cost where the statutorily mandated cost would have been prohibitive). If the Court accepts Jones' interpretation of "compiled information," high costs for access to court records needed for routine reporting could undermine journalists' ability to fulfill

their constitution role as surrogates for the public. *See Richmond Newspapers*, 448 U.S. at 573.

Second, the AOC License Agreement requires licensees to receive government permission to publish certain information. Specifically, licensees of compiled records must agree to "NOT provide personal identifying information to customers, subscribers, or other persons without the express written permission of [the Arkansas Administrative Office of the Courts] or a court order." AOC License Agreement at § V.A.2 (capitalization in original). A licensee who violates this or other duties under the AOC License Agreement must pay liquidated damages. *Id.* at § V.B.3. The prohibition on publication of identifying information absent AOC approval would have an outsized effect on the news media, since news reports about criminal proceedings frequently report the names of criminal defendants and others involved in the proceedings, such as witnesses.

Moreover, existing judicial records related to an individual—such as a docket sheet, charging instrument, or documents reflecting the disposition of a criminal case—are subject to a constitutional presumption of public access. *See supra* Section II. Accordingly, the government cannot, consistently with the First Amendment, condition access on an agreement not to publish identifying information in those records.

The First Amendment forbids punishing publication of truthful information from publicly accessible court records. *See Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 98 (1979) (striking down a statute sanctioning newspapers that failed to receive written consent of judges prior to publishing the names of juvenile defendants); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (holding that the First Amendment does not permit a state to extend a cause of action for the accurate publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and are themselves open to public inspection); *see also Florida Star v. B.J.F.,* 491 U.S. 524, 526–27 (1989) (holding that a newspaper could not be penalized for publishing the name of a rape victim, in contravention of a state statute, where a reporter had learned the name through a publicly accessible police report). Just as the First Amendment prohibits the government from punishing publication of information from publicly accessible court records, it cannot condition access to those records on an agreement not to publish information from them or punish publication by compelling payment of liquidated damages. Because the records at issue in this case are all subject to the First Amendment right of access, the public cannot be required to agree not to publish identifying information from them, subject to a penalty of liquidated damages, in order to obtain them.

Third, the License Agreement also demands that licensees "return" or "destroy" the information obtained at the termination of the Agreement. AOC License Agreement at § VI.H. Requiring members of the public and press to return or destroy court records to which they have a presumptive First Amendment right of access is inconsistent with that right. *See Krause v. Rhodes*, 671 F.2d 212, 216–17 (6th Cir. 1982) (citing "emanations from the First Amendment such as the public's right to know" in affirming lower court's refusal to order return, and therefore potential destruction, of discovery materials from civil litigation related to the 1970 Kent State shootings already made public); *Gambrell v. Weber Carpet, Inc.*, No. 10-2131-KHV, 2011 WL 3518172, at *1 (D. Kan. Aug. 11, 2011) (rejecting parties' request that court "either destroy or return" settlement documents because common law right of access outweighed parties' interest in confidentiality).

In short, Order 19's restrictions on "compiled information," if applied to court records that are subject to the First Amendment right of access, could conflict with that right. To avoid a potential constitutional conflict, this Court should interpret the definition of "compiled information" in accordance with its plain language and hold that it does not include existing court records from criminal cases related to individuals such as docket sheets, charging instruments, and records of disposition.

CONCLUSION

For the foregoing reasons, the Court should uphold the lower court's granting of summary judgment in favor of the PBSA, and reverse the lower court's denial of summary judgment in part.

Respectfully submitted,

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APPENDIX A
Description of Amici

The Arkansas Broadcasters Association is the leading trade association for Arkansas broadcasters. Our membership is comprised of radio and television broadcasters and associate members across the state. With our partners we educate our members and the public about the opportunities available through the efforts of free, over-the-air broadcast operations. ABA provides technical, regulatory, and advocacy support to our members as well as offering continuing professional enrichment opportunities designed to keep Arkansas broadcasters at the forefront of the industry.

The Arkansas Press Association was founded in 1873 to serve the newspapers of Arkansas. Currently, there are 102 newspapers that are members of the APA, 73 weeklies, seven semi-weeklies, 20 dailies and two free newspapers. Additionally, the press association has more than 120 Associate Members including suppliers, manufacturers, educators, individuals and media organizations. The APA, whose motto is "Free Press, Free People," is the oldest professional association in the state. The primary function of APA is to serve its member newspapers by providing information and training opportunities to allow them to grow, develop and compete in the marketplace. APA serves the public by helping protect basic freedoms of press, speech and the Freedom of Information Act (FOIA).

The Arkansas Times LLC is a city magazine and website covering Arkansas news, politics and culture. Arktimes.com is the second most highly trafficked news site in the state.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

Gray Media Group, Inc. currently owns and/or operates television stations and leading digital properties in 93 television markets that collectively reach approximately 24 percent of US television households. Over calendar year 2019,

Gray's stations were ranked first in 68 markets, and first or second in 86 markets, as calculated by Comscore's audience measurement service. The television markets for KAIT (Jonesboro, Arkansas); KFVS (Cape Girardeau, Missouri); KNOE (Monroe, Louisiana); KSLA (Shreveport, Louisiana) and WMC (Memphis, Tennessee) fall entirely or partially within the state of Arkansas.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Little Rock Sun was founded in November 1885 by Dr. Julian Talbot Bailey. Today, it is the only Black weekly newspaper in Arkansas with Statewide distribution and readership of 500,000. The Sun's International section connects Blacks in the Diaspora with offices in Paris, France, Kumasi, Ghana and Johannesburg, South Africa. As the leading Black publication in the Southeast, the

Little Rock Sun litigates numerous issues asserting its First Amendment standing as the Vanguard Voice of the Community.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The MuckRock Foundation is a 501(c)(3) non-profit organization. Founded in 2010 to broaden access, understanding, and support for public records, our tools, training, and resources serve over 3,000 newsrooms around the world and reach 80 million people each month. Through our open source

transparency tools, including MuckRock, DocumentCloud, and oTranscribe, we work to broaden engagement and understanding of how our democracy works.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

National Newspaper Association is a 2,000 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

TEGNA Inc. owns or services (through shared service agreements or other similar agreements) 46 television stations in 38 markets, including KTHV (Little Rock) and KFSM (Ft. Smith-Fayetteville).

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

WEHCO Media, Inc. is a privately owned communications company with interests in newspaper publishing, cable television, and digital services. WEHCO Media, Inc. has been family owned since its founding in 1909. It operates daily and weekly newspapers, magazines, and cable television companies in six states,

including the Arkansas Democrat Gazette and several other daily newspapers in Arkansas.

Certificate of Service

I hereby certify that on this 8th day of June, 2020, I electronically filed the foregoing via the eFlex electronic filing system, which shall send notification of the filing to any participants. I also certify that I will serve a paper copy of the brief within five calendar days upon the following:

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Certificate of Compliance with Administrative Order 19 and Word-Count Limitation

I hereby certify that the foregoing Brief complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

Further, the undersigned states that the foregoing Brief contains 6584 words in conformity with the word count limitation identified in Rule 4-2(d)(3).

Identification of paper documents not in PDF format: The following original paper documents are not in PDF format and are not included in the PDF document(s) filed with the Court: None.

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