Nos. 14-cv-1331, 14-cv-1387, 15-cv-585

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JULIANNA CAPLAN, *ET AL.*,
Appellants,

WP COMPANY LLC,
Appellant,

v.

DISTRICT OF COLUMBIA, *ET AL.*,
Appellees.

____

On appeal from the Superior Court of the District of Columbia, Civil Division
No. 2010 CA 6550 B (Hon. John M. Mott)

____

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 19 MEDIA ORGANIZATIONS[†] IN SUPPORT OF APPELLANT WP COMPANY LLC SEEKING REVERSAL

Gregg P. Leslie, Esq.* (D.C. Bar # 426092)
Bruce D. Brown, Esq.
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1250
Washington, D.C. 20005
(202) 795-9301

* *Counsel of Record for Amici Curiae*

[†] A full list of *amici* is reproduced on the next page

FULL LIST OF OF *AMICI CURIAE*

Reporters Committee for Freedom of the Press

American Society of News Editors

Association of Alternative Newsmedia

BuzzFeed

California Newspaper Publishers Association

The Center for Investigative Reporting

D.C. Open Government Coalition

Dow Jones & Company, Inc.

The E.W. Scripps Company

First Amendment Coalition

Investigative Reporting Workshop at American University

MediaNews Group, Inc.

The National Press Club

National Press Photographers Association

News Corp

Newspaper Association of America

North Jersey Media Group Inc.

Radio Television Digital News Association

The Seattle Times Company

Tully Center for Free Speech

<u>IDENTITY OF PARTIES AND *AMICI CURIAE*</u>
<u>AND DISCLOSURE STATEMENT</u>

Pursuant to Court of Appeals Rules 29(c) and 28(a)(2)(B)-(C), *amici curiae* provide the following list of parties and *amici* in this appellate proceeding and a disclosure statement for each *amici*.

<u>Appellants</u>:

JULIANNA CAPLAN and GREG CAPLAN
Counsel: Gregory S. Smith
Law Offices of Gregory S. Smith
913 East Capitol Street SE
Washington, DC 20003

WP COMPANY LLC
Counsel: Kevin T. Baine and A. Joshua Podoll
Williams & Connolly LLP
725 12th Street NW
Washington, DC 20005

<u>Appellee</u>:

DISTRICT OF COLUMBIA
Counsel: Loren L. AliKhan, Keith D. Parsons, and Bradford C. Patrick
Office of the Solicitor General
Office of the Attorney General
One Judiciary Square
441 4th Street NW, Ste. 600 South
Washington, DC 20001

<u>*Amici curiae*</u>:

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Counsel: Bruce D. Brown and Gregg P. Leslie
1156 15th St NW, Ste. 1250
Washington, DC 20005
Disclosure: The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

AMERICAN SOCIETY OF NEWS EDITORS
Counsel: Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Disclosure: American Society of News Editors is a private, non-stock corporation that has no parent.

ASSOCIATION OF ALTERNATIVE NEWSMEDIA
Counsel: Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Disclosure: Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

BUZZFEED
Counsel: Allison Lucas, General Counsel and EVP Legal
200 Fifth Avenue, 8th Floor
New York, NY 10010
Disclosure: BuzzFeed Inc. is a privately owned company, with no public companies that own 10% or more of its stock.

CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
Counsel: Jim Ewert, General Counsel
2000 O Street, Suite 120
Sacramento, California 95811
Disclosure: California Newspaper Publishers Association is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California.

THE CENTER FOR INVESTIGATIVE REPORTING
Counsel: Judy Alexander, Chief Legal Counsel
2302 Bobcat Trail
Soquel, CA 95073
Disclosure: The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

D.C. OPEN GOVERNMENT COALITION
Counsel: Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209

Disclosure: The D.C. Open Government Coalition is a tax-exempt, nonprofit 501(c)(3) corporation, that it has no parent corporations or subsidiaries, and that no publicly held company has a ten percent or greater ownership interest (such as stock or partnership shares) in amicus.

DOW JONES & COMPANY, INC.
Counsel: Mark H. Jackson, Jason P. Conti, and Jacob P. Goldstein
1211 Avenue of the Americas
New York, NY 10036
Disclosure: Dow Jones is a Delaware corporation with its principal place of business in New York. News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones. Ruby Newco, LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company directly owns 10% or more of the stock of Dow Jones.

THE E.W. SCRIPPS COMPANY
Counsel: David M. Giles, Vice President/Deputy General Counsel
312 Walnut St., Suite 2800
Cincinnati, OH 45202
Disclosure: The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

FIRST AMENDMENT COALITION
Counsel: Peter Scheer
534 Fourth St., Suite B
San Rafael, CA 94901
Disclosure: First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

INVESTIGATIVE REPORTING WORKSHOP AT AMERICAN UNIVERSITY
Disclosure: The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

MEDIANEWS GROUP, INC.
Counsel: David S. Bralow, General Counsel
448 Lincoln Highway
Fairless Hills, PA 19030
Disclosure: MediaNews Group, Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

THE NATIONAL PRESS CLUB
Counsel: Charles D. Tobin
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006
Disclosure: The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
Counsel: Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
Disclosure: National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

NEWS CORP
Counsel: Mark H. Jackson
1211 Avenue of the Americas
New York, NY 10036
Disclosure: News Corporation has no parent company and no publicly held company owns 10% or more of its shares.

NEWSPAPER ASSOCIATION OF AMERICA
Counsel: Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Disclosure: Newspaper Association of America is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

NORTH JERSEY MEDIA GROUP INC.
Counsel: Jennifer A. Borg, General Counsel
1 Garret Mountain Plaza
Woodland Park, NJ 07424
Disclosure: North Jersey Media Group Inc. is a privately held company owned solely by Macromedia Incorporated, also a privately held company.

RADIO TELEVISION DIGITAL NEWS ASSOCIATION
Counsel: Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006

Disclosure: Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

THE SEATTLE TIMES COMPANY
Counsel: Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Disclosure: The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

TULLY CENTER FOR FREE SPEECH
Disclosure: The Tully Center for Free Speech is a subsidiary of Syracuse University.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici file this brief in support of appellant WP Company LLC (hereinafter, "The Washington Post" or "the Post"), and write separately both to emphasize the importance of public access to civil proceedings and records, generally, and to urge this Court to recognize the public's constitutional right of access to civil proceedings and records, including summary judgment materials.

The news media have a strong interest in uncovering and reporting on allegations of misconduct by government agencies and employees. Indeed, the public relies on the news media, like The Washington Post, to fulfill their role as government watchdogs. The allegations in this case against the District of Columbia Child and Family Services Agency ("Family Services Agency") are serious, and the press and the public are entitled to have access to the legal arguments and the evidence that convinced the Superior Court to terminate the Caplans' claims before trial. Because the Family Services Agency was created to protect children, the public has a heightened interest in ensuring that it conducts its business fairly, professionally, and legally. For these reasons, the Post and all members of the news media have a powerful interest in accessing the summary judgment materials filed in this case.

In addition, the press has a broad interest in preserving and vindicating their rights of access to courts, court records, and judicial opinions. Such access is necessary for the news media to inform the public about legal disputes of public interest and concern, like this one, and to monitor the conduct of the judiciary and litigants. As diverse media organizations and advocacy groups, *amici* bring a distinct perspective to this issue that draws upon their extensive experience litigating access issues, and will aid the Court in resolving this appeal.

A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

SOURCE OF AUTHORITY TO FILE

Amici file this brief with consent of all parties, pursuant to Court of Appeals Rule 29(a).

SUMMARY OF ARGUMENT

The importance of this appeal extends far beyond the dispute between the parties. This case presents a crucial question of court access: whether summary judgment records in a civil suit, alleging malfeasance by a government agency and government employees, may be placed wholly under seal, along with the judicial opinion terminating the plaintiffs' claims, despite the fact that the details of the case were widely reported by news outlets and contained in public pleadings. *Amici* agree with The Washington Post that maintaining a seal on the materials at issue here violates both the common law and First Amendment rights of access to judicial records.

Federal circuit courts and state high courts have widely held that the First Amendment right of access applies to civil proceedings and records. Twenty-seven years ago, as constitutional access law was developing rapidly, this Court recognized a common law right of access to "documents, such as motions and oppositions, that the parties submitted to the court for decision but the court placed under seal," but declined to find a First Amendment right of access to the filings. *Mokhiber v. Davis*, 537 A.2d 1100, 1102–03 (D.C. 1988). Since that time, however, a broad consensus has been reached in favor of a First Amendment right of access to civil matters, generally, and this Court should apply the First Amendment standard to the summary judgment filings in this case. Both "experience" and "logic" dictate that summary judgment materials be open and available to the public. For the reasons discussed herein, these records are subject to a constitutional presumption of access, and, absent countervailing interests of the highest order and a solution no more restrictive than necessary to address those interests, should be unsealed.

Openness in civil matters provides many benefits to the judiciary and to the public, just as it does in the criminal context. Such openness reduces the appearance of partiality or bias in the judiciary, promotes public confidence in the courts, allows for public scrutiny of the court system and its participants, educates the public about judicial proceedings, and disseminates information about matters of public interest and concern. Openness is particularly important when the government and its employees are parties to the litigation, and the lawsuit alleges malfeasance on the part of those tasked with protecting the District of Columbia's children.

Although this case stems from allegations of child abuse, it implicates different interests than an ordinary juvenile or neglect case, because a family court judge has already determined that the allegations of abuse are without support, the details of the case have been widely reported and are available in public pleadings, and the parents of the children oppose sealing the records. Because courts should conduct an individualized inquiry when determining sealing issues, rather than categorically or reflexively sealing documents that relate to minors, these factors should weigh heavily in favor of unsealing.

Amici are not privy to the contents of the summary judgment materials at issue. However, given the strong interests weighing in favor of disclosure, it is unlikely that such extensive sealing of these documents—or any sealing at all—is necessary to protect any compelling interest. To the extent this Court finds that sealing some portion of these materials is necessitated by a compelling, overriding interest, any restriction on public access must be narrowly tailored, under either the common law or First Amendment standard, and therefore limited redactions should be ordered, rather than wholesale sealing.

For these reasons, *amici* respectfully urge this Court to reverse the Superior Court and unseal the summary judgment filings and judicial opinion, as requested by The Washington Post.

ARGUMENT

I. The right of access to civil proceedings and records serves important public interests, including facilitating the fair administration of justice and educating the public regarding matters of public concern.

Openness is a hallmark of the American justice system because it gives "assurance" that "proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). As the U.S. Supreme Court has explained,

> [t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.

Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). Secrecy breeds distrust of the court system and shields judicial officers, litigants, and other participants from outside scrutiny. *See id.* at 509; *see also In re Oliver*, 333 U.S. 257, 271 (1948) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. These principles apply to civil proceedings and records as surely as they do to criminal cases.

Openness and transparency in the courts cannot be achieved without access to civil proceedings and records. The majority of matters filed in the District of Columbia Superior Court are civil. In 2014, approximately 47,300 new cases were filed in the Civil Division, compared with roughly 20,300 Criminal Division matters, and the Superior Court disposed of more than twice as many civil matters (50,244) as it did criminal matters (20,911). District of Columbia Courts Statistical Summary 2014, at 4 (2015), *available at* http://goo.gl/GdJco3,

archived at http://perma.cc/5573-5PYR (hereinafter, "Statistical Summary"). Access to civil proceedings and records is necessary to monitor the performance of the courts, to build public confidence in the judiciary, and to assess the administration of justice in individual cases.

Access to civil proceedings and records is also "an indispensable predicate to free expression about the workings of government," *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014), because it facilitates public debate about both the courts and the substance of the disputes being litigated, which frequently involve matters of significant public interest. Because lawsuits by citizens against government agencies or officials are civil in nature, civil suits provide a wealth of information about the workings of government and public officials—including allegations of misconduct, discrimination, or other illegal activity—and invite public scrutiny and debate. Civil matters adjudicate immensely important issues, ranging from core democratic rights, such as "the right of the people of the District to legislate through the initiative process," *see Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 92 (D.C. 2010), to individual claims of wrongful termination against public employers, *see Bryant v. D.C.*, 102 A.3d 264, 266 (D.C. 2014); *see also, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (segregated schools); *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265 (1978) (affirmative action). Access to civil proceedings and records is a vital component of newsgathering designed to educate the public and enrich discussion about matters of public importance.

II. Preserving access to summary judgment records is particularly important because courts use summary judgment as a mechanism to terminate or vindicate litigants' substantive rights without a trial.

Civil trials have traditionally been open to the public. *See Richmond Newspapers*, 448 U.S. at 580 n.17 (Berger, C.J.) ("historically both civil and criminal trials have been presumptively open"). Since 1975, however, courts have seen an increase in both summary judgment filings and the percentage of cases terminated by summary judgment, indicating that a

large number of civil cases, like their criminal counterparts, never reach trial. *See generally* Joe S. Cecil, et al., *Trends in Summary Judgment Practice: 1975–2000* (2007). Accordingly, civil litigants' rights are being adjudicated without the public ever having the opportunity to attend an open trial. Because the right of access helps to ensure the fair adjudication of legal claims, and because summary judgment can terminate or vindicate litigants' rights without trial, the right of access to dispositive motions must be as strong as the right of access to trials.[1] *See Mokhiber v. Davis*, 537 A.2d 1100, 1102–03 (D.C. 1988) (holding that the press and the public enjoy a right of access "to view documents, such as motions and oppositions, that the parties submitted to the court for decision but the court placed under seal"); *see also Lugosch v. Pyramid Co. of Onandaga*, 435 F.3d 110, 121 (2d Cir. 2006) ("summary judgment is an adjudication, and '[a]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny'") (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case.").

This Court recognized an analogous principle in *In re Access to Jury Questionnaires*, 37 A.3d 879, 885–86 (D.C. 2012). In that case, this Court held that the First Amendment right of access applied to written *voir dire* questionnaires just as it did to in-court *voir dire*, reasoning that the questionnaires simply streamlined the process, eliminating the need for a lengthy in-

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[1] While summary judgment may not be a "substitute for a trial" in all respects, *see Morgan v. Am. Univ.*, 534 A.2d 323, 327 (D.C. 1987) ("it exists as a mechanism to decide whether there exists any truly disputed material facts"), summary judgment practice shares elements in common with trials. For example, the parties present evidence and make legal arguments, and a neutral adjudicator determines whether parties have met certain evidentiary burdens. If the summary judgment mechanism did not exist, claims would have to proceed to trial and such showings would have to be made in open court.

court proceeding that historically had been open to the public. *Id.* Here, the same is true: summary judgment briefing and judicial opinions granting summary judgment eliminate the need for claims to be adjudicated in open court. The same First Amendment right of access should apply to the written materials as to the in-court proceeding that would have resulted, but for the written motion practice. Other courts, including the D.C. Circuit, have recognized this principle in still other contexts. *See United States v. El-Sayegh*, 131 F.3d 158, 160–61 (D.C. Cir. 1997) (stating that because plea agreements eliminate the need for trial, which are traditionally open to the public, the First Amendment right of access applies to plea agreements).

A seminal study by the Federal Judicial Center found that the number of cases in which a summary judgment motion was filed increased from 12 percent in 1975 to 17 percent in 1986, and the number has held steady around 19 percent since. Cecil, *supra*, at 1. The percentage of cases terminated by summary judgment nearly doubled from 1975 to 2000, rising from 3.7 percent of cases to 7.8 percent in 2000. *Id.* at 9. Other studies, focusing on different districts or types of cases, found that courts grant summary judgment motions at even higher rates. For example, one study found that the summary judgment grant rate in employment discrimination cases across 78 federal district courts in 2006 was 73 percent. Brooke D. Coleman, *Summary Judgment: What We Think We Know versus What We Ought to Know*, 43 Loy. U. Chi. L.J. 705, 710 (2012).

In the District of Columbia court system, far more civil matters are decided through motion practice than at trial. Last year, 713 civil actions were disposed of by dispositive motion, compared with 161 actions disposed of by judgment after a jury or non-jury trial (excluding landlord and tenant and small claims matters). *See* Statistical Summary, *supra*, at 10. To ensure meaningful openness of the court system and to serve the public interests associated with

transparency, the press and the public must have a strong right of access to civil summary judgment materials filed in District of Columbia courts.

Some of the most high-profile U.S. Supreme Court cases in recent terms originally were resolved on summary judgment by the trial courts. *See, e.g.*, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (voting rights); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Affordable Care Act); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (First Amendment and violent video games); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 322 (2010) (corporate political speech). These cases have had a profound effect on the shape of the law, the operation of government and business, and the public. The impact of these cases belies any contention that there is somehow a lesser public interest in access to civil cases than criminal cases.[2]

III. The First Amendment creates a presumptive right of access to civil proceedings and documents.

Federal circuits are in widespread agreement that the First Amendment right of access extends to civil proceedings and records. *See N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2011) ("we have concluded that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records . . . . Significantly, all the other circuits that have considered the issue have come to the same conclusion."). The Second and Fourth Circuits have expressly held that

[2] In *Mokhiber*, this Court stated that "civil litigation generally deals not with the coercive power of the state exercised against an individual in satisfaction of a wrong to the public-at-large, but, rather, concerns disputes between private parties," and that civil litigation is "one of a number of acceptable dispute resolution mechanisms" between two "sparring" parties. *Mokhiber*, 537 A.2d at 1108. This case, like many civil cases, *does* involve the coercive power of the state exercised against an individual, and the District of Columbia Superior Court is a forum of dispute resolution provided by the government, funded with public money. Therefore, the public has a significant interest in monitoring this case, and, as explained above, the business of District of Columbia courts generally.

the First Amendment right of access applies to summary judgment filings. *See Lugosch*, 435 F.3d at 124 ("there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion"); *Company Doe v. Pub. Citizen*, 749 F.3d 246, 267, 269 (4th Cir. 2014) (holding that the "First Amendment right of access extends to a judicial opinion ruling on a summary judgment motion," as well to cross-motions for summary judgment and materials relied upon by the court in adjudicating the motions) (citing *Rushford*, 846 F.2d at 252–53). The Seventh Circuit also applied a First Amendment access standard in the context of a motion to terminate, because the motion "result[ed] in the dismissal of claims" and was properly characterized as a "hybrid summary judgment motion." *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308–09 (7th Cir. 1984) (explaining that "the policy reasons for granting public access to criminal proceedings apply to civil cases as well").

Other circuit courts generally recognize the First Amendment right of access to civil proceedings and records. *See Courthouse News Service*, 750 F.3d at 786 (acknowledging the First Amendment right of access "to civil proceedings and associated records and documents"); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 n.11 (6th Cir. 2002) (stating that all federal circuits that have addressed the issue, including the Sixth Circuit, have found a First Amendment right of access to civil proceedings); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) ("We hold that the First Amendment does secure a right of access to civil proceedings."); *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) (stating, in the context of a civil case, that "there is a First Amendment interest in information produced at trial that warrants full protection"); *see also In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) (finding a First Amendment right of access to a contempt hearing); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (finding a First Amendment right of access to

"civil trials which pertain to the release or incarceration of prisoners and the conditions of their confinement"). Although some of these cases address access to civil proceedings, rather than dispositive civil filings, it would make little sense to recognize a right of access to civil courts and then limit that right to the trial phase of a civil proceeding, something which occurs in a minority of civil cases. *See United States v. Alcantara*, 396 F.3d 189, 198–99 (2d Cir. 1995) (using this logic to find a First Amendment right of access to plea agreements in criminal cases, citing *In re The Herald Co.*, 734 F.2d 93, 98 (2d Cir.1984)).

In addition, several state high courts have recognized a First Amendment right of access in civil cases. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 361 (Cal. 1999) ("the First Amendment provides a right of access to ordinary civil trials and proceedings"); *Del Papa v. Steffen*, 915 P.2d 245, 248 (Nev. 1996) (recognizing the First Amendment right of access to criminal and civil judicial proceedings, because they have been "traditionally open to the public"); *Rapid City Journal v. Delaney*, 804 N.W.2d 388, 395 (S.D. 2011) ("the First Amendment affords the media and public a qualified right of access to civil trials"); *N.J. Div. of Youth & Family Servs.* v. J.B., 576 A.2d 261, 269 (N.J. 1990) ("There is an expectation based in history and the first amendment, and embodied in our Court Rules, . . . that civil trials and proceedings will be open to the public."); *In re T.R.*, 556 N.E.2d 439, 446 (Ohio 1990) (stating that the First Amendment "experience and logic" test governs "public access to all court proceedings").

Other state high courts have grounded the right of access to civil court proceedings and records in *state* constitutional provisions, using a standard identical or substantially similar to the First Amendment test. *See Associated Press v. New Hampshire*, 888 A.2d 1236, 1248 (N.H. 2005) (adopting "the United States Supreme Court's experience and logic test for determining

whether the State constitutional right of access applies to certain court proceedings," and finding that the presumption of access attaches in domestic relations proceedings and to related documents relevant to the court's adjudicatory function); *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 520 S.E.2d 186, 191–92 (W. Va. 1999) (holding that the state constitution guarantees a qualified right of access to civil court proceedings and court records, which may be overcome only by "compelling" reasons).

In 1988, this Court applied a common law right of access to certain civil documents, including "motions and oppositions[] that the parties submitted to the court for decision," *Mokhiber*, 537 A.2d at 1102–03, but declined to recognize a First Amendment right of access, stating that it was "constrained" by U.S. Supreme Court precedent that grounded such a right in the common law and not in the constitution. *Id.* at 1108. The Court indicated that it was proceeding with caution because the area of access law, at that time, was changing rapidly. *Id.* ("the constitutionalization of the right to pretrial records could freeze the law in this area of only recent first amendment development"). Twenty-seven years later, however, a broad consensus now exists in favor of a constitutional right of access to civil matters, generally. *See, e.g.*, *Courthouse News Service*, 750 F.3d at 786 ("federal courts of appeals have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents"); *NBC Subsidiary*, 980 P.2d at 802 ("we have not found a single lower court case holding that generally there is no First Amendment right of access to civil proceedings"). *Amici* respectfully urge the Court to join the other state high courts and all federal circuit courts that have found a First Amendment right of access to civil proceedings and records, generally, and to summary judgment materials in particular. *See, e.g.*, *Lugosch*, 435 F.3d at 124; *Rushford*, 846 F.2d at 253; *Company Doe*, 749 F.3d at 269.

A qualified First Amendment right of access attaches to civil proceedings and records, including summary judgment filings, because these proceedings and records meet the U.S. Supreme Court's "experience and logic" test. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986) ("*Press-Enterprise II*") (directing lower courts to examine whether "the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question"). They satisfy the experience prong, because, as discussed above, civil trials have historically been open to the public, *Richmond Newspapers*, 448 U.S. at 580 n.17, as have civil records, *see Mokhiber*, 537 A.2d at 1110 ("the public has traditionally enjoyed the right to inspect court documents"); *Ex parte Drawbaugh*, 2 App. D.C. 404, 406–07 (1894) ("any limitation of the right to copy a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions") (quotation marks omitted). Because summary judgment filings and judicial opinions adjudicate litigants' claims that otherwise would have been tested at trial, these dispositive filings should be treated the same as a civil trial for purposes of the First Amendment and the tradition of openness.

Summary judgment filings also satisfy the logic prong because the policies underlying access to criminal cases also apply to civil cases: to discourage partiality or bias in the judiciary, to promote public confidence in the courts, to encourage public scrutiny of litigants and other participants, to educate the public about judicial proceedings, and to disseminate information about matters of public concern. *See Mokhiber*, 537 A.2d at 1110; *see also supra*, Part I; *In re Continental Ill. Secs. Litig.*, 732 F.2d at 1308–09 ("the policy reasons for granting public access to criminal proceedings apply to civil cases as well"); *Petition of Keene Sentinel*, 612 A.2d 911, 915 (N.H. 1992) ("These constitutional provisions make no explicit distinction between civil and

criminal records, and none can reasonably be implied."); *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1408 (D.C. Cir. 1996) ("courts are public institutions that best serve the public when they do their business openly and in full view") (quotation marks omitted). The First Amendment "does not distinguish between criminal and civil proceedings; nor does it distinguish among branches of government. Rather, it protects the public against the government's 'arbitrary interference with access to important information.'" *N.Y. Civil Liberties Union*, 684 F.3d at 298 (quoting *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring)). Therefore, the First Amendment right of access presumptively applies to civil proceedings and records, including summary judgment filings.

Because the First Amendment right of access applies, the presumption of 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. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[3] *Press-Enterprise II*, 487 U.S. at 9–10.

If this Court were to find that the common law right of access does not compel disclosure of the summary judgment filings and opinion—and *amici* agree with The Washington Post that the common law right of access *does* compel disclosure here—this Court must address the First Amendment implications of sealing these records. *Amici* respectfully urge the Court to hold that

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[3] Even under a common law right of access, any closure order must be narrowly tailored. Under the common law, a court may "bar disclosure only when the specific interests favoring secrecy outweigh the general and specific interests favoring disclosure." *Mokhiber*, 537 A.2d at 1108. A sealing order that is not narrowly tailored bars public disclosure of information without proper justification. For example, if interests favoring secrecy would justify sealing only a portion of a document, but the entire document is sealed, the non-sensitive information is withheld from the public without an overriding interest to justify keeping *that information* under seal. Therefore, in such a case, the order sealing the non-sensitive information does not meet the common law standard for sealing as to that information.

the First Amendment right of access applies to summary judgment filings and the resulting judicial opinion.

IV. This lawsuit implicates core justifications for court access, because it alleges misconduct by a government agency designed to protect District children.

Openness is particularly important when civil litigation concerns the alleged misconduct of a government agency, such as the District of Columbia Child and Family Services Agency and its employees, who are tasked with protecting the District's children, as the Caplans' lawsuit claims. The Caplans alleged in their complaint both negligent and malicious acts by government employees, including constitutional violations, in which the public has a significant interest. Moreover, the facts of this case are discussed in the complaint, which was not filed under seal and is publicly available, and widely disseminated in newspaper articles, television broadcasts, blogs, books, and other media,[4] further reducing the necessity for (and efficacy of) sealing. *See Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (declining to seal court documents because the information to be protected was "already within the public knowledge"). Even the Caplans, who have the strongest interest in protecting the interests of their children, opposed the District's motion to file documents under seal, and want the documents to be available to the public. Any countervailing interests in secrecy must be compelling if they are to outweigh these weighty interests favoring disclosure.

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[4] *See* Marc Fisher, *A Case of a Family Services Job Well Done, or Overdone?*, The Washington Post, Feb. 24, 2008, http://wapo.st/1PRVtZx, *archived at* http://perma.cc/X82Y-SFVJ; Editorial, *False Choices*, The Washington Post, Feb. 28, 2008, http://wapo.st/1FYHMXv, *archived at* http://perma.cc/NZ3G-49DZ; Hans Bader, *Presumed Guilty of Child Abuse*, POINT OF LAW (Feb. 28, 2008, 11:00 A.M.), http://goo.gl/OZRRWZ, *archived at* http://perma.cc/YS7W-NBKV; *Anderson Cooper 360* (CNN television broadcast Feb. 17, 2011) (transcript available at http://www.cnn.com/TRANSCRIPTS/1102/17/acd.01.html), *archived at* http://perma.cc/7DBK-FPXP ; Petula Dvorak, *In D.C., unwarranted child abuse suspicions lead to a case with no end*, The Washington Post, June 13, 2013, http://wapo.st/1KBfCzM, *archived at* http://perma.cc/NCZ8-B4SV; Deborah Tuerkheimer, FLAWED CONVICTION: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE 152 (2014).

The public interest in this case does not depend on a finding of misconduct by the government agency. To the contrary, if the Caplans' allegations are without factual support, the public has an interest in knowing which of their allegations are unfounded and where the evidentiary gaps lie. If the Caplans' claims fail on legal grounds, the public has an interest in knowing what conduct the law tolerates from government employees. The public also has an interest in full disclosure of why and how the Family Services Agency took the protective measures it did in the Caplan case.

This case does not implicate the same privacy interests that may be present in other neglect or juvenile proceedings. Here, the Caplans' children are *not* victims of child abuse, according to the Family Court Operations Division, so they would not be susceptible to any deleterious effects of disclosure of abuse accusations, as might be the case in other neglect proceedings. A family court judge has already determined that there was no probable cause to believe that the allegations of child abuse were true and there were no reasonable grounds to believe that N.C. was abused. The very purpose of the underlying lawsuit—filed in the Civil Division, not the Family Court Operations Division—is to seek redress for alleged misconduct by a government agency relating to *unfounded* allegations of child abuse. Thus, the focus of the litigation is on the workings of government, with significant emphasis on conduct that occurred well after the children were returned to the Caplan home, and the public has a compelling interest in court access where the action involves the government. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) ("The public's interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official."). Moreover, as explained above, the details of this case are already public knowledge.

These factors strongly favor disclosure in this case, despite the fact that the suit stems from allegations of child abuse.

To be clear, simply because a case involves children or involves allegations of child abuse does not mean that interests in secrecy outweigh the interest in public disclosure. To the contrary, where an entity tasked with protecting children is accused of wrongdoing, the public has a heightened interest in disclosure. *Cf. Associated Press*, 888 A.2d at 1248 ("The importance of matters regarding children and families only heightens the need for openness and public accountability . . . ."). For example, when the Equal Employment Opportunity Commission ("EEOC") sued the National Children's Center ("the Center"), a nonprofit organization that provides services to children with developmental challenges, on charges of sexual harassment, the parties settled the suit, and the Center sought to keep the consent decree under seal, arguing that disclosure might affect its funding sources. *Equal Emp't Opportunity Comm'n*, 98 F.3d at 1410. The EEOC opposed sealing, and the D.C. Circuit ruled that

> the nature of the services provided by the [National Children's] Center as well as the Center's receipt of public funding cuts against rather than in favor of sealing the record. The public should be able to learn how the money it has contributed to a charitable organization is being spent. Moreover, because the Center provides services to children and the alleged misconduct by the Center's staff in this case was of a sexual nature, the public interest in disclosure is compelling.

Id. Similarly, here, the public has a strong interest in the alleged misconduct by the Family Services Agency *because* the agency provides services to children and because it consumes public funds. The Family Services Agency and its employees should not be permitted to use the Caplan children, who were removed from their home without adequate evidence of abuse, according to a family court judge,[5] as a shield to deflect public scrutiny of alleged malfeasance.

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[5] *See* J.A. 27–28.

Other courts that have faced sealing or closure questions in matters involving children similarly reject a categorical or reflexive approach and rather balance the interests of each particular case. *See N.J. Div. of Youth Servs.*, 576 A.2d at 127 (stating that, while the state has an interest in protecting victims of child abuse from the embarrassment of testifying in open court, closure is not "a mandatory rule" and "the court must balance the public's right of access . . . against the State's interest in protecting children from the possible detrimental effects of revealing to the public allegations and evidence relating to parental neglect and abuse"); *Jaufre ex rel. Jaufre v. Taylor*, 351 F. Supp. 2d 514, 518–19 (E.D. La. 2005) (unsealing in significant part court records relating to the corporal punishment of a child at a public school because the case involved "allegations of abuse by a public official, and the public and other parents have an interest in learning how school officials address that issue"); *T.K. v. Waterbury Bd. of Educ.*, No. 303-cv-1747, 2003 WL 22909433, at *1 (D. Conn. Oct. 19, 2003) (rejecting a motion to seal the record in a civil action challenging "the appropriateness of minor child's special education program," stating that "a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need") (quotation marks omitted); *Doe v. Methacton Sch. Dist.*, 878 F. Supp. 40, 41, 43 (E.D. Pa. 1995) (unsealing the court record after conducting a balancing test in a case involving the sexual molestation of a young girl by her school teacher, over the objection of the victim's parents, in part because the incident had been so widely reported); *see also Press-Enterprise II*, 478 U.S. at 9–10 (discussing the access analysis, generally, which depends on the particular circumstances of each case).

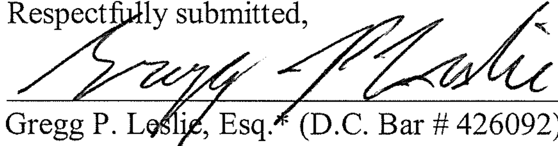
In this case, under either the common law or First Amendment standard, the District and the court must clear a high bar to justify sealing of summary judgment materials and the opinion that terminated the Caplans' claims, because there is such a strong interest in public disclosure in

this matter. To the extent that the District has met these demanding standards, the proper course of action would be to protect any sensitive information with limited redactions, rather than wholesale sealing of the motion papers, including legal arguments, that do not implicate the need for secrecy.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court reverse the Superior Court and direct the Superior Court to enter an order unsealing the summary judgment papers and opinion.

Respectfully submitted,



Gregg P. Leslie, Esq.* (D.C. Bar # 426092)
Bruce D. Brown, Esq.
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1250
Washington, D.C. 20005
(202) 795-9301
bbrown@rcfp.org

**Counsel of Record for Amici Curiae*

Dated: June 15, 2015
Washington, D.C.

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend and preserve 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 Act litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The **California Newspaper Publishers Association** ("CNPA") is a nonprofit trade association representing the interests of nearly 850 daily, weekly and student newspapers throughout California. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of information concerning government institutions in order for newspapers to fulfill their constitutional role in our democratic society and to advance the interest of all Californians in the transparency of government operations.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

The **D.C. Open Government Coalition** is a non-profit organization founded in 2009 that is dedicated to enhancing governmental transparency and freedom of information in the District of Columbia. Among the directors of the Coalition are individuals who have been involved for over fifteen years in advocating through the District's legislative process for greater government transparency, litigating to enforce the District's Freedom of Information Act, and advising individuals seeking access to city government records.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with more than 1,800 journalists in nearly fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The **Investigative Reporting Workshop**, a project of 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.

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

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 approximately 7,000 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.

News Corp is a global, diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses across a range of media, including: news and information services, digital real estate services, book publishing, digital education, and sports programming and pay-TV distribution.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members

account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

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 Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

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.

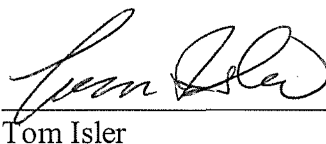
CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Court of Appeals Rule 26(d), on the 15th day of June, 2015, I caused a copy of the foregoing Brief of Amici Curiae to be served via e-mail and first-class mail on:

Gregory S. Smith, Esq.
913 East Capitol Street SE
Washington DC 20003
gregsmithlaw@verizon.net

Kevin T. Baine, Esq.
Joshua Podoll, Esq.
WILLIAMS & CONNOLLY
725 12th Street NW
Washington DC 20005
apodoll@wc.com
kbaine@wc.com

Loren L. AliKhan
Office of the Solicitor General
Office of the Attorney General
One Judiciary Square
441 4th Street NW, Ste. 600 South
Washington, DC 20001
loren.alikhan@dc.gov



Tom Isler