NO. COA17-1368

TWELFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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JOHN DOE, by and through his GAL, DOE, JANE Plaintiff, v. DOE, JOHN, Defendants. In Re: *The Fayetteville Observer*	)	From Cumberland County No. 16 CVS 8021

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BRIEF OF *AMICI CURIAE*

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BRIEF OF *AMICI CURIAE*

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The *amici* listed below, through their counsel and pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure and this court's order of 8 January 2018, hereby submit their brief *amicus curiae* in support of *The Fayetteville Observer*.

The *amici,* their respective principal places of business, and their interests in open government are:

- **The North Carolina Open Government Coalition** ("the NCOGC"), a North Carolina not-for-profit corporation located at Elon University. The

NCOGC's members include a wide array of organizations interested in ensuring and enhancing the public's access to government activities, records and proceedings, including proceedings of the state's trial and appellate courts.

- **The Reporters Committee for Freedom of the Press,** an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media by, among other things, providing *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.
- **The Associated Press** ("AP"), a New York not-for-profit corporation and news cooperative owned by its 1,500 U.S. member newspapers, magazines, broadcasters, cable news services and internet content providers across the nation. The AP covers news all 100 North Carolina counties, including criminal and civil proceedings in the state's courts.
- **Capitol Broadcasting Company, Incorporated** ("CBC"), a North Carolina corporation located in Wake County. Among other things, CBC owns and operates three television stations in North Carolina, including WRAL-TV, which provides broadcast and online coverage of news about Raleigh and the surrounding area, including Cumberland County.
- **The News and Observer Publishing Company,** a North Carolina corporation located in Raleigh that publishes *The News & Observer*, a

general interest newspaper distributed throughout the surrounding area of North Carolina and published online at www.newsobserver.com.

- **WTVD Television LLC,** a Delaware corporation headquartered in Durham that owns and operates WTVD ABC 11, which gathers and disseminates news in 23 counties North Carolina, including extensive coverage of Cumberland County.
- **The Charlotte Observer Publishing Company**, a Delaware corporation that publishes *The Charlotte Observer*, a general interest newspaper distributed throughout the area surrounding Mecklenburg county and published online at www.charlotteobserver.com.
- **WBTV, LLC ("WBTV"),** a Delaware limited liability company whose principal place of business is in Mecklenburg County. WBTV covers news in greater Charlotte and the surrounding areas of North Carolina and South Carolina and also disseminates its news coverage at www.wbtv.com.
- **WUNC, LLC,** a North Carolina not-for-profit corporation located in Orange County. WUNC operates North Carolina Public Radio, an affiliate of National Public Radio, at 91.5 FM from Chapel Hill; at 88.9 FM from Manteo; at 91.9 from Fayetteville; at 91.1 from Welcome; and at 90.9 FM from Rocky Mount. The station, which also streams online 24 hours a day, provides extensive national and local news coverage, including information about courts throughout North Carolina.

- **The Pilot, LLC,** a North Carolina corporation located in Southern Pines that publishes *The Pilot,* a twice-weekly newspaper and www.thepilot.com, both of which provide coverage of news in Moore County and the surrounding area, including Cumberland County.

ARGUMENT: WHY THIS COURT SHOULD UNSEAL THE RECORD IN THIS CASE

This bizarre and apparently unprecedented case, in which a Superior Court judge has thrown a blanket of secrecy over every facet of a civil case, presents this court with serious constitutional issues under both Article I, § 18 of the North Carolina Constitution, which decrees that "[a]ll courts shall be open," and the First Amendment to the United States Constitution. Without corrective action by this court, the trial court's wholesale sealing of an action acknowledged to arise out of the alleged sexual abuse of minor children threatens to erode public confidence in our judicial system and opens the door for conspiratorial litigants and counsel, with the acquiescence of a sympathetic or feckless judge, to convert our courts into secret chambers where issues of significant public interest and concern are resolved in darkness.

I. THE TRIAL COURT'S OVERLY BROAD SEALING ORDERS VIOLATE THE NORTH CAROLINA AND UNITED STATES CONSTITUTIONS.

Article I, §18 of our state constitution creates a strong presumption in favor of public access to civil court records and proceedings that is overcome only when closure is *required* to protect a significant countervailing *public* interest. *Virmani v. Presbyterian Health Services Corp.,* 350 N.C. 449, 475-477, 515 S.E.2d 675, 693

(1999). See also *State v. Burney,* 302 N.C. 529, 537, 276 S.E.2d 693, 698 (1981); *In re Nowell,* 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977); *In re Edens,* 290 N.C. 299, 306, 226 S.E.2d 5, 9–10 (1976); *Raper v. Berrier,* 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957).[1] The First Amendment to the United States Constitution creates a parallel federal right of *public* access to civil court records. *Co. Doe v. Pub. Citizen,* 749 F.3d 246 (4th. Cir. 2014); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 980 P.2d 337 (Cal. 1999). Although neither right is absolute, their constitutional origins create strong presumptions that cannot lightly be overridden, and then only by the need to protect a significant *public* interest.

Amici have found no reported North Carolina case, and few from other jurisdictions, involving a sealing order as sweeping as those entered by the trial judge in this case. Here *everything* in the case file — including the docket entries, the identities of the parties and their counsel, the identity of the court-appointed guardian *ad litem,* and even the sealing orders themselves — was concealed from public view until the *Observer* sought access on behalf of the public.[2] Even now the scant record discloses nothing about the case except the identities of the attorneys and the limited information embodied in the trial court's order entered on August 2, 2017. R pp 9-12.

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[1] A thorough historical analysis of Article I, §18 authored by Judge (now Chief Judge) Linda McGee is at *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App 629, 637-641, 493 S.E.2d 310,316-318 (1997).

[2] The court file is so thoroughly submerged in secrecy that a motion to partially dismiss the *Observer's* appeal was filed in this Court on behalf of a party identified only as "Appellee."

That order — the only public filing in the case — makes no mention of the public's constitutional rights of access vigorously asserted by the *Observer* in its motion for access (R pp 2-8) and at the hearing on that motion. T pp 3-8. Similarly, the order identifies no *public* interest that overrides those rights, although the judge may have intended to give them lip service by citing a series of asserted *State* interests that purportedly compelled both his prior sealing orders and his denial of the *Observer's* motion. *Amici* acknowledge that some of the cited interests — such as protecting the identities of the minor plaintiffs — could justify limited and targeted redactions to specific portions of the file, but the trial court's findings and conclusions do not (and could not) support sealing of the *entire* file. Indeed, *amici* respectfully submit that under both the state and federal constitutions a trial judge is *never* authorized to seal a court file so thoroughly as to effectively conceal its very existence.

Appellees (whomever they are) may argue that wholesale sealing is necessary because the court found that the identities of the minor plaintiffs and "innocent third parties" are "inextricably interwoven" with the pleadings and "ancillary documents," but *amici* cannot imagine how this can be so. How, for example, could the identities of the defendant, of the court-appointed guardian *ad litem,* and even of the parties' attorneys, be "inextricably interwoven" with the identities of the

minor plaintiffs or of the undisclosed persons who constitute the court's mysterious category of "innocent third parties?"[3]

Amici acknowledge that information identifying the minor plaintiffs likely is contained in the pleadings and the documents referred to by the trial judge as "ancillary documents," including the court-approved settlements. Experience teaches, however, that it is equally likely that the identifying information is not so "inextricable" as to utterly defy redaction, which would have been far less Draconian (and less constitutionally offensive) than sealing the entire file. Presumably the trial court could either have released copies of the documents with the redacted information blacked out or directed the parties to submit redacted, public versions of their filings. *Amici* respectfully urge this court, in conducting its *de novo* review of the record, to consider whether the trial court entertained redaction as a less onerous alternative to complete closure and, if not, to remand this case for redaction in accordance with this court's direction in order to render the sealing, if any, as narrow as possible.

II. THIS COURT PREVIOUSLY HAS VACATED ORDERS SEALING A CIVIL ACTION FILED ON BEHALF OF MINOR PLAINTIFFS.

In an unreported 2001 order this court responded to a newspaper's Petition for a Writ of Mandamus by summarily vacating a series of sealing and closure orders entered by a Superior Court judge in a Wake County civil case entitled *Jane Doe and Mary Doe v. Willie Donald White, et al.*, 98 CVS 14693. (Pursuant to Rule

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[3] Like the Appellant, *amici* have no interest in obtaining or disseminating the identities of the minor plaintiffs.

28(d) of the Rules of Appellate Procedure, this court's order, and the Superior Court's order on remand, are Exhibits 1 and 2 in the attached appendix.) *Amici* respectfully urge this court, for the reasons outlined in the trial judge's detailed order on remand, to take similar corrective action in this case.

III. COURTS IN OTHER JURISDICTIONS HAVE CONDEMNED AND CORRECTED ORDERS SEALING ENTIRE COURT FILES.

Although the sealing orders at issue in this case are, to *amici*'s knowledge, unprecedented in North Carolina, appellate courts in other states have not hesitated to undo similar orders. *Amici* respectfully invite this court's attention to the following cases.

In *Hartford Courant v. Pellegrino,* 380 F.3d 83, 90–96 (2d Cir. 2004), the Second Circuit engaged in an extensive discussion of the First Amendment right of access to judicial proceedings and records and held that the public has a presumptive right of access to inspect docket sheets in civil cases. The case arose after Connecticut newspapers learned that the state courts had adjudicated thousands of court cases in secret, including some whose very existence was unknown to the public. *Id.* at 86. Certain cases were considered so confidential that "no information [was] to be released or disclosed to the public, including the docket number and case caption," and these cases were not allowed to appear on any calendars. *Id.* at 87. The newspapers' reporting suggested that many of the sealed cases "may have been sealed simply at the behest of prominent individuals who were parties." *Id.* at 86 (citing a *Hartford Courant* article that stated: "[J]udges have selectively sealed divorce, paternity and other cases involving fellow judges,

celebrities and wealthy CEOs that, for most people would play out in full view of the public . . . .").

Following the revelation of the existence of these totally sealed cases, several newspapers brought suit in federal court to gain access to the docket sheets in the sealed cases, arguing that "the longstanding Connecticut state court practice of sealing certain docket sheets, as well as entire case files, violated their right of access to judicial proceedings and documents established under the First Amendment." *Id.* at 85. In holding that there is a qualified First Amendment right of access to court dockets, the Second Circuit emphasized the importance of public access to both civil and criminal cases, writing:

> [T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible. In this respect, 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.

Pellegrino, 380 F.3d at 93.

On remand, the parties agreed to have the matter transferred to a Connecticut Superior Court judge to rule on the merits of any and all motions, including motions by the newspapers to intervene and obtain access to dockets and other records. *In re Sealing Litig. Reference Numbers 101-140*, 2007 WL 969925, at *1 (Conn. Super. Ct. Feb. 16, 2007). In the resulting state court decision, the court unsealed all or part of the dockets in all but one of the 40 cases it considered.[4] *Id.* at *7-14. Among other things, the court found that "[t]here must be a strong social

[4] The one exception was a juvenile matter, which was sealed by statute. *Id.* at *12.

interest in concealing the identity of the [party]." *Id.* at 4 (quoting *Vargas v. Doe*, 96 Conn. App. 399 (2006)).

State courts in Connecticut, Illinois and Wyoming also have rejected wholesale sealing of judicial records to protect the privacy interests of minors.

In *Black v. REDACTED*, No. FA064007232S, 2007 WL 1321729 (Conn. Super. Ct. Apr. 19, 2007), the court denied the request of a 16-year-old boy to seal all judicial documents related to an application for a restraining order brought by his former girlfriend's father after the application was dismissed. The court held that an order to seal the entire case would be overly broad but agreed that the boy's name could be redacted to protect a minor child's substantial privacy interests because the accusations in the application had not been substantiated. *Black*, 2007 WL 1321729, at *2–*3.

In *A.P. v. M.E.E.*, 821 N.E.2d 1238 (Ill. App. 2004), the Appellate Court of Illinois, in response to an application by the *Chicago Tribune,* set aside a trial court's wholesale sealing order maintaining the confidentiality of all documents filed with the trial court in two related cases regarding multiple trusts created by a prominent family. *A.P. v. M.E.E.*, 821 N.E.2d 1238 (Ill. App. 2004). The two cases involved the interests of certain minor and unborn beneficiaries, and whether they should be added to a confidential settlement which had been negotiated and signed by adult family members. The trial court allowed the parties to file their complaints under seal and later entered an agreed protective order that maintained confidentiality of all documents filed with the court and required the parties to file

all documents under seal. Subsequently, the *Tribune* was allowed to intervene for the limited purpose of challenging the sealing of the court files, but its motions to unseal were denied. The appellate court recognized the importance of protecting the interests of the minors named in the cases but concluded that redaction—not wholesale sealing—was appropriate. The court stated that "redacting the names of the adult and minor beneficiaries could serve to protect the minors' privacy interests without resorting to the overly broad measure of sealing entire documents or concealing the identities of other adult parties." *Id.* at 1253.

In *Circuit Court of Eighth Judicial Dist. v. Lee Newspapers*, 332 P.3d 523 (Wyo. 2014), a Wyoming trial court entirely sealed, and denied the existence of, the file in a criminal case in which the defendant was charged with sexual abuse of a minor. Several news organizations, who knew about the case because of an AMBER Alert for the victim, challenged the sealing order. The Supreme Court of Wyoming held that the circuit court violated the First Amendment right of access to judicial proceedings by sealing the record without publicly articulating any compelling reason for doing so. "This Court," the opinion said, "has been unable to locate any case in which protecting the identity of a person accused of sexual assault constituted a compelling interest." *Lee Newspapers*, 332 P.3d at 531. The court also opined that "Redacting a case file may pose a higher risk of mistake, but that does not warrant a complete abridgment of the public's First Amendment right of access by sealing case files wholesale." *Id.* at 532.

Taken together, these cases indicate a strong disapproval by courts across the country of total sealing of civil court cases. As the Second Circuit recognized in *Pellegrino*, completely sealing cases, including docket sheets, frustrates the ability of the press and the public to exercise their First Amendment rights of access. *See Pellegrino*, 380 F.3d at 93–94. After all, the public cannot assert a right of access to a judicial proceeding that it does not even know exists.

Finally, some states have taken steps to revise their rules of procedure to prevent the wholesale sealing of judicial records. News coverage of Connecticut's "dual-docketing" system that was at issue in *Pellegrino* resulted in public scrutiny and changes to the Connecticut Superior Court's "Practice Book" rules to require public notice of sealing and to eliminate cases in which no information is to be released or disclosed to the public. *See* Conn. Practice Book §§ 11–20(c)–(e), 11–20A (2004).

Similarly, in response to news reports that exposed the practice of "supersealing" in which entire civil case dockets were hidden from the public, Florida's Supreme Court issued new rules prohibiting the practice. Among other things, the new rules prohibited docket numbers from being confidential and required sealing orders to be made public. *In re Amendments to Florida Rule of Judicial Administration 2.420-Sealing of Court Records and Dockets*, 954 So.2d 16 (Mem) (Fl. 2007)(per curiam). Florida's high court acknowledged that hidden cases were "clearly offensive" to the public's constitutional right of access to court records

and the practice "undermine[d] public trust and confidence in our courts." *Id.* at 17, 24.

IV. WHOLESALE SEALING ORDERS UNDERMINE PUBLIC CONFIDENCE IN OUR COURTS AND IN THE INTEGRITY OF THE JUDICIARY.

The sealed file in this case sends a clear message that prominent lawyers can collaborate to invoke a court's authority and obtain its protection for their clients while hiding from public view matters of significant public interest and concern. The minimal public record strongly suggests that the trial court sealed this case file for the very reason the request to seal it should have been rejected — i.e., because it involves the payment of money to resolve and settle allegations that the defendant sexually abused children. *Amici* have no doubt that if this court allows this case to be disposed of in complete secrecy, others surely will follow, and each one will chip away at the public's confidence in the integrity of North Carolina's judicial system. As the Supreme Court has said, "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, Inc. v. Virginia,* 488 U.S. 555, 572 (1980).

CONCLUSION

For the reasons set forth above, *amici* respectfully urge this court to vacate the trial court's overbroad sealing orders and to take such other corrective action as

it may determine to be appropriate or necessary upon its review of the sealed record.

Respectfully submitted this the 19th day of February, 2018.

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

Pursuant to Rule 28(j)(2) of the Rules of Appellate Procedure, I hereby certify that the foregoing brief contains fewer than 3,750 words exclusive of the portions exempted from the word count limit by Rule 28(j)(1).

Hugh Stevens by MAT

Hugh Stevens

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served by depositing a true and complete copy thereof with the United States Postal Service, first-class postage prepaid, addressed to:

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