Nos. 18-3839, 18-3860

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

HD MEDIA COMPANY, LLC, and
THE W.P. COMPANY, LLC, dba THE WASHINGTON POST,

Intervenors-Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; DRUG ENFORCEMENT ADMINISTRATION,

Interested Parties-Appellees,

and

DISTRIBUTOR DEFENDANTS; MANUFACTURING DEFENDANTS; CHAIN PHARMACY DEFENDANTS,

Defendants-Appellees.

Appeal from the
U.S. District Court for the Northern District of Ohio in
In re National Prescription Opiate Litigation, No. 1:17-MD-2804

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANTS SEEKING REVERSAL

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.
Caitlin Vogus, Esq.
Sarah Matthews, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300

Additional amici counsel listed in Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-3839 18-3860 Case Name: In re Nat'l Prescrip. Opiate Litigation

Name of counsel: Bruce D. Brown, Esq.

Pursuant to 6th Cir. R. 26.1, 35 media organizations listed below*
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 13, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Bruce D. Brown
Reporters Committee
1156 15th St, Ste 1020 Washington DC

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

*The Reporters Committee for Freedom of the Press
Advance Publications, Inc.
American Society of News Editors
The Associated Press
Associated Press Media Editors
Association of Alternative Newsmedia
Association of American Publishers, Inc.
Boston Globe Media Partners, LLC
BuzzFeed
California News Publishers Association
Californians Aware
The Center for Investigative Reporting
Digital First Media
The E.W. Scripps Company
First Look Media Works, Inc.
Gannett Co., Inc.
Gizmodo Media Group, LLC
Inter American Press Association
International Documentary Assn.
Investigative Reporting Program
Investigative Reporting Workshop at American University
The McClatchy Company
The Media Institute
MPA – The Association of Magazine Media
National Press Photographers Association
The NewsGuild - CWA
Ohio Coalition for Open Government
Online News Association
Pennsylvania NewsMedia Association
POLITICO LLC
Reporters Without Borders
The Seattle Times Company
Society of Professional Journalists
Tribune Publishing Company
Tully Center for Free Speech

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-3839 18-3860 Case Name: In re: Nat'l Prescrip. Opiate Litigation

Name of counsel: Bruce D. Brown, Esq.

Pursuant to 6th Cir. R. 26.1, CBS Broadcasting Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

CBS Broadcasting Inc. is an indirect wholly owned subsidiary of CBS Corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 13, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Bruce D. Brown
Reporters Committee
1156 15th St, Ste 1020 Washington DC

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-3839 18-3860 Case Name: In re: Nat'l Prescrip. Opiate Litigation

Name of counsel: Bruce D. Brown, Esq.

Pursuant to 6th Cir. R. 26.1, Dow Jones & Company, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 13, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Bruce D. Brown
Reporters Committee
1156 15th St, Ste 1020 Washington DC

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, Association of American Publishers, Inc., Boston Globe Media Partners, LLC, BuzzFeed, California News Publishers Association, Californians Aware, CBS Broadcasting Inc., The Center for Investigative Reporting, Digital First Media, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Gizmodo Media Group, LLC, Inter American Press Association, International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, The NewsGuild - CWA, Ohio Coalition for Open Government, Online News Association, Pennsylvania NewsMedia Association, POLITICO LLC, Reporters Without Borders, The Seattle Times Company, Society of Professional Journalists, Tribune Publishing Company, and Tully Center for Free Speech (collectively, "*amici*").

Amici file this brief in support of Intervenors-Appellants HD Media Company LLC and The W.P. Company, LLC, doing business as The Washington Post. The Reporters Committee for Freedom of the Press is an unincorporated

nonprofit association. The Reporters Committee was 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.

As members or representatives of the news media, *amici* have a strong interest in safeguarding both the public's federal constitutional and common law rights of access to judicial proceedings and related documents and the public's rights of access to government records and information under state law.

It is vital that district courts properly apply the correct legal standards when imposing any limitation on these rights. Courts must not issue restrictive protective orders or permit parties to file documents under seal absent sufficient justification. And they must consider not only the public's interest, but also the public's rights under state law to access government records and information, before entering orders that limit public access. This is particularly important in cases such as this, involving matters of immense public interest and concern. *Amici* submit this brief to emphasize the impact that protective orders and sealing orders like those entered by the district court below have on members of the news media and the public.

SOURCE OF AUTHORITY TO FILE

Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This appeal concerns a matter of paramount importance: whether the largest public health lawsuit of our time, which seeks to end the prescription opioid epidemic, will be litigated in secret. Approximately 1,300 mostly governmental entities—including at least six states and hundreds of cities, counties, and Native American tribes—have sued pharmaceutical manufacturers, distributors, and pharmacies for their role in what is widely understood to be a national crisis. This multi-district litigation could result in the payment of billions of dollars in damages to government entities and impact the lives of millions of Americans.

Yet despite the clear public importance of this litigation, the district court below issued a protective order barring the plaintiffs from disclosing key historical data that they received from the federal Drug Enforcement Administration ("DEA") regarding the number of opiate doses sold in each county, by company and year, from 2006 through 2014. A West Virginia state court has already permitted the release of much of this data for West Virginia, so the public knows its value: it illuminates the depth and magnitude of the prescription drug crisis; indeed, if the West Virginia data is any indication, this data could show a dramatic increase in opioid prescriptions during this time. Moreover, since a federal government agency collected this data, it also reveals much about the government. The data could make clear the federal government's awareness of the over-

prescription problem and its failure to effectively address it. Put simply, disclosure of this data would not only enable the public to better understand the national opioid crisis and the proceedings in these cases, but it is also necessary for the public to hold their elected officials accountable.

In entering the protective order, the district court abused its discretion by failing to consider the public interest in disclosure at all, even though it is difficult to imagine a case of greater importance to the public. This matter involves hundreds of *public entities*, representing *millions* of Americans across the country, seeking to put an end to the *deadliest* drug crisis in American history.[1] As this Court—and many others—have long recognized, courts cannot ignore the public interest when issuing protective orders, particularly in cases like this one that involve government entities and matters of public health and safety. *See, e.g.*, *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 164 (6th Cir. 1987); *Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005).

The district court also erroneously concluded that this data is not a public record, without giving any consideration to how relevant state statutes define that term. Thus, the district court erred by entering a protective order without considering that it broadly deprives millions of Americans of their statutory rights

[1] Josh Katz, *Short Answers to Hard Questions About the Opioid Crisis*, N.Y. Times (Aug. 10, 2017), https://www.nytimes.com/interactive/2017/08/03/upshot/opioid-drug-overdose-epidemic.html.

to obtain this data under state public records laws. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791–92 (3d Cir. 1994). This ruling also offends basic federalism principles by ignoring the fact that hundreds of state and local entities that are plaintiffs in this litigation *want* to disclose this data to their citizens.

Relying on this unsound protective order, the district court then permitted rampant sealing and over-redaction of court records containing the data at issue, including many of the complaints filed by public entities. The district court routinely rubber-stamped these sealing requests, without engaging in any analysis or giving the public an opportunity to object, in violation of the long-established First Amendment and common law rights of access to court records. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1176 (6th Cir. 1983).

As a result of the district court's protective order and sealing orders, a veil of secrecy shrouds this important litigation, depriving citizens across the country of their right to observe the district court's handling of these proceedings and the government entities' efforts on their behalf. For the reasons set forth herein, *amici* urge this Court to reverse.

ARGUMENT

For centuries, openness has been considered an "indispensable" element of the American judicial system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597 (1980); *Brown & Williamson*, 710 F.2d at 1178. "[B]oth civil and

criminal trials are presumptively open proceedings and open records are fundamental to our system of law." *Meyer Goldberg*, 823 F.2d at 163 (citing *Brown & Williamson*, 710 F.2d at 1177–79).

As the Supreme Court has recognized, secrecy breeds "distrust" of the judicial system and its ability to adjudicate matters fairly, *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966); it also "insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption," *Brown & Williamson*, 710 F.2d at 1179. The benefits of an open and transparent legal system, on the other hand, are manifold, both to the parties and the public. Openness gives "assurance that the 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*, 448 U.S. at 569.

The need for openness is particularly compelling in civil cases of a public nature—for example, where public entities or private individuals file suit to vindicate the rights or interests of a broad segment of the public, to obtain information for the benefit of the public, or to "expos[e] the need for governmental action or correction." *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975). "Such revelations should not be kept from the public." *Id.*

I. Generally, protective orders require a showing of "good cause," while orders sealing court records require "compelling reasons."

Parties frequently seek to protect disclosures they make during discovery by requesting the entry of a protective order under Federal Rule of Civil Procedure 26(c).[2] Under Rule 26(c), courts may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c)(1). Although district courts have discretion when issuing protective orders, that discretion "is limited by the careful dictates" of Rule 26 and "'circumscribed by a long-established legal tradition' which values public access to court proceedings." *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996), *opinion clarified* (May 8, 1996) (vacating protective order) (quoting *Brown & Williamson*, 710 F.2d at 1177).

To justify a protective order, the party seeking it must establish one of Rule 26(c)(1)'s enumerated harms "with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012) (citations omitted); 8A Wright & Miller, Fed. Prac. & Proc. Civ. § 2043 n.9 (3d ed.) ("Those who seek to avoid disclosure of commercial information by a protective order bear a heavy burden of

[2] Hon. Karen L. Stevenson, *A Protective Order Doesn't Guarantee Sealing*, ABA Section of Litigation (Feb. 1, 2017), https://qa.americanbar.org/publications/litigation-news/practice-points/a-protective-order-doesnt-guarantee-sealing.html.

demonstrating that disclosure will work a clearly defined and very serious injury.").

Even when a protective order is properly entered, it cannot justify the automatic sealing of documents governed by the order that are later filed with the court. Stevenson, *supra* n.2. While a district court may enter a protective order applicable to discovery based on a finding of "good cause," a request to seal a court record triggers a distinct and more rigorous analysis. *Shane Grp. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016). "Only the most compelling reasons can justify non-disclosure of judicial records." *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017) (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). And even if compelling reasons exist, sealing "must be narrowly tailored to serve that reason" and supported by specific, on-the-record judicial findings to enable appellate review. *Id.* (citing *Shane Grp.*, 825 F.3d at 305–06). In short, a protective order does not justify sealing "from public view materials that the parties have chosen to place *in the court record*." *Shane Grp.*, 825 F.3d at 305.

II. A district court's analysis of "good cause" must take into account the public interest in disclosure.

Courts must consider the public interest in permitting a party to disclose discovery material to the public before entering a protective order that would shield that material from public view. The Court recognized this principle in

Meyer Goldberg, where it held that "only compelling reasons" could justify an initial denial "or continued denial" of access to discovery materials involving possible evidence of anti-competitive conduct that was covered by a protective order. 823 F.2d at 164. There, a third party sought to intervene and vacate the protective order so it could obtain discovery materials to use as evidence in another lawsuit involving alleged price-fixing by the defendants. *Id.* at 161. The district court denied the third party's motion, even though only the defendants opposed it. *Id.* This Court reversed. Pointing to the public interest in prosecuting anti-competitive conduct and the fact that the record did not reflect the district court's "consideration of the strong underlying tradition of open records," the Court remanded the matter back to the district court. *Id.* at 164.

Courts have likewise recognized that the public interest in access must be considered when determining whether parties may file court documents under seal. *See, e.g.*, *Signature Mgmt. Team*, 876 F.3d at 836 ("[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access."); *Brown & Williamson*, 710 F.2d at 1180. This Court has also recognized in the sealing context that courts should consider whether government entities or conduct are involved and whether the case concerns public health or safety. *Brown & Williamson*, 710 F.2d at 1180–81; *see also FTC v. Standard Fin. Mngmt. Corp.,* 830 F.2d 404, 412 (1st Cir.1987)

(threshold for sealing was elevated because case involved government agency and matters of public concern). In *Brown & Williamson*, this Court vacated the district court's order sealing court records based on a confidentiality agreement between cigarette companies and the Federal Trade Commission ("FTC"), pointing out that the public had a strong interest in the case, which concerned the health of citizens and the accurate tar and nicotine content in various cigarette brands. 710 F.2d at 1180–81. The Court also found that the public had an interest in knowing how the FTC, a government agency, had responded to allegations that it erred in its testing of cigarettes. *Id.*

Other Circuits have also applied these same principles in the protective order context. In *Pansy*, for example, the Third Circuit adopted a balancing test that expressly recognizes public interest as a relevant factor in determining "good cause." 23 F.3d at 787–88. In *Pansy*, a newspaper sought access under a state public records law to a settlement agreement entered into between a Pennsylvania borough and its former police chief in a civil rights action. *Id*. at 776. The settlement agreement was not filed with the court but was subject to a confidentiality order, so the borough refused to disclose it. *Id.* The district court denied the newspaper's motion to intervene as well as its motion to vacate or modify the confidentiality order. *Id*. at 776–77. The Third Circuit reversed, holding that "'good cause' must be demonstrated to justify the [protective] order."

Id. at 786. The Court recognized that the public interest in access to the settlement agreement was "particularly legitimate" given that at least one of the parties was a public entity, explaining that whether "disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public." *Id.* at 786–87 (citations omitted). The Third Circuit recognized several relevant factors in the "good cause" analysis that, when present, all favor disclosure: whether "confidentiality is being sought over information important to public health and safety," "whether a party benefiting from the order of confidentiality is a public entity or official," and "whether the case involves issues important to the public." *Id*. at 787–88.

The Third Circuit has reaffirmed *Pansy* on numerous occasions. *See, e.g.*, *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (affirming denial of protective order restricting public disclosure of discovery related to allegations that defendant trust company engaged in fraud, since "public policy considerations strongly militated against judicial sanctioning" of broad confidentiality agreement between parties); *Shingara*, 420 F.3d at 308 (remanding and requiring district court to vacate protective order that prevented disclosure of discovery materials in lawsuit brought by public employee against government agency for retaliation, clarifying that "a court always must consider the public interest when deciding whether to impose a protective order"). The Ninth and

Federal Circuits have adopted the *Pansy/Glenmede* analysis as well. *See, e.g.*, *In re Roman Catholic Archbishop*, 661 F.3d 417, 424 (9th Cir. 2011); *In re Posco*, 794 F.3d 1372, 1377 (Fed. Cir. 2015) (district court should have addressed "considerations pertinent under [Rule 26] as articulated in *Pansy*," among others).

Although the First Circuit has not weighed in on *Pansy*'s multi-factor test, it has recognized that courts should consider the public interest when determining whether to modify a protective order. *See Pub. Citizen v. Liggett Grp.*, 858 F.2d 775, 792 (1st Cir. 1988) (affirming modification of protective order covering discovery materials sought by public health organizations in case against tobacco company, where public interest "favored allowing counsel to make those particular documents public").

Not only have federal courts of appeals widely recognized a need for transparency with respect to documents exchanged in discovery in cases of public concern, but numerous state legislatures and state courts across the country have as well. Responding to a rise in confidentiality orders and secret settlement agreements, "more than twenty jurisdictions have adopted legal restrictions on the use of sealing and protective orders in civil litigation," 1 Lee Levine, et al., *Newsgathering and the Law*, § 6.01[1]–[2] (4th ed. 2013), particularly in matters involving public entities and health and safety issues or other matters of public concern.

Texas was one of the first states to adopt sweeping reforms with a rule declaring that all court records "are presumed to be open to the general public," including unfiled discovery materials "concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government[.]" Tex. R. Civ. P. 76a(2)(c). Shortly after the Texas Supreme Court promulgated this rule, Florida enacted its Sunshine in Litigation Act that prohibits courts from entering any order that authorizes the concealment of "a public hazard," "any information concerning a public hazard," or "any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard." Fla. Stat. § 69.081(3). The law also states that any agreement to conceal such hazards are unenforceable as against public policy. *Id.* at § 69.081(4). Louisiana has adopted similar legislation. La. Code Civ. P. Ann. art. 1426 (C)–(D).

This Court should make clear that when a district court evaluates whether "good cause" exists to support a protective order governing discovery, it must consider the public interest in disclosure, particularly in cases, like this one, involving public entities and matters of health and safety. Where, as here, there is a strong public interest in openness, courts should only approve a protective order where truly compelling reasons require it.

III. Disclosure of the ARCOS data would shed light not only on this litigation, but on a national health epidemic and the government's response to it.

As an initial matter, the district court failed to make any finding of good cause in its protective order.[3] After Appellants challenged this order, the district court erred as a matter of law by failing to consider the public interest in disclosure of the ARCOS data. It dismissed the issue out of hand, noting only that "courts have approved protective orders in cases involving matters of great public interest." Opinion and Order, Dkt. Ent. 800 at PageID # 18976.[4] The district court's lack of analysis is incommensurate with the public importance of this

[3] In the order compelling the DEA to produce the ARCOS data, the district court summarily noted that a protective order previously entered on March 6, 2018, would cover the data. Order Regarding ARCOS Data, Dkt. Ent. 233, PageID # 1125. That protective order did not make any finding of good cause. Protective Order Re: DEA's ARCOS/DADS DATABASE, Dkt. Ent. 167, PageID # 937–43.

[4] The Court cited *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984), and *Courier Journal v. Marshall*, 828 F.2d 361, 366–67 (6th Cir. 1987), both of which are readily distinguishable from this case. *See* HD Media Opening Brief 22–23 (distinguishing *Seattle Times*). In *Courier Journal*, this Court denied a petition for a writ of mandamus (not an appeal like this), finding that "the extraordinary circumstances" necessary were not present. 828 F.2d at 367. The Court declined to vacate a protective order that prevented disclosure of a membership list of Ku Klux Klan members, reasoning that this could subject people with "no discoverable connection" to the lawsuit to "ostracism and retaliation based on past political associations[.]" *Id.* at 364. The Court sought to protect privacy and associational rights—which are not present here—and stressed that whether Klansmen were on the police force (the public interest asserted) was only "a marginal issue" in the case. *Id.* at 367. Here, by contrast, the ARCOS data plays a central role in this litigation, as set forth above.

litigation. Approximately 1,300 public entities—representing more than 46 million Americans—have sued drug manufacturers, distributors, and pharmacies for their role in the opioid crisis. The plaintiffs allege deceptive and fraudulent practices, nuisance, and racketeering, among other things, and could force the defendants to pay billions of dollars in damages to mitigate the devastation wrought by opioid abuse in their communities.[5]

The opioid epidemic has had a catastrophic effect on public health and safety; it has been recognized as the "deadliest drug crisis in American history."[6] "Drug overdoses are the leading cause of death for Americans under 50, and deaths are rising faster than ever, primarily because of opioids."[7] From 1999 to 2016, the age-adjusted rate of drug overdose deaths in the United States more than tripled.[8] In 2016, opioid overdoses killed more people than guns or car accidents—more than 130 people each day.[9] If the amount of opioids prescribed per year were

---

[5] *See* Jared S. Hopkins & Andrew M. Harris, *One Man's $50 Billion Vendetta Against Opioids*, Bloomberg (July 23, 2018), https://www.bloomberg.com/news/features/2018-07-23/lawyer-paul-farrell-s-50-billion-vendetta-against-opioids.

[6] Katz, *supra* n.1.

[7] *Id.*

[8] Holly Hedegaard, et al., *Drug Overdose Deaths in the United States, 1999–2016*, National Center for Health Statistics, CDC (Dec. 2017), https://www.cdc.gov/nchs/products/databriefs/db294.htm.

[9] Katz, *supra* n.1; CNN Library, *Opioid Crisis Fast Facts*, CNN (Nov. 5, 2018), https://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html.

averaged out over each person residing in the United States, everyone would receive at least a two-week supply.[10] According to a recent survey, rural Americans reported that the biggest problem facing their local community was opioid and other drug abuse.[11] Clearly, this litigation addresses public health and safety matters of the utmost public interest and concern.

The ARCOS data at issue here plays a key role in this litigation, revealing the history and magnitude of opioid over-prescription between 2006 and 2014, the role of specific distributors, manufacturers, and pharmacies, the geographic areas most affected by the crisis, and—if the West Virginia ARCOS data is any indication—a dramatic increase in opioid prescriptions during at least part of this time.[12] The importance of this data to the litigation is reflected by the fact that

---

[10] Katz, *supra* n.1.

[11] Danielle Kurtzleben, *Poll: Rural Americans Rattled By Opioid Epidemic; Many Want Government Help*, NPR (Oct. 17, 2018), https://www.npr.org/2018/10/17/656515170/poll-rural-americans-rattled-by-opioid-epidemic-many-want-government-help.

[12] The Washington Post's Opening Brief at 5 explains:

> ARCOS is the automated, comprehensive drug reporting system which monitors the flow of certain controlled substances, including opioids, from their point of manufacture through their distribution channels and ultimately to pharmacies where they are sold. . . . ARCOS Data shows the number of doses distributed in each county by each company each year. For example, in Cabell County, West Virginia, where ARCOS Data has already been publicly released, records show that Cardinal Health

numerous complaints and briefing reference it (and are therefore filed under seal). Moreover, this data—collected by the DEA—could indicate that the government has long had information showing an over-prescription problem and failed to sufficiently address it.

Public disclosure of the ARCOS data will enable citizens to understand this litigation and properly hold government agencies and officials accountable. It will also allow for "community catharsis," which "can only occur if the public can watch and participate." *Brown & Williamson*, 710 F.2d at 1179.

IV. The district court's protective order improperly frustrates the public's right of access to the ARCOS data under state law without considering this impact or federalism principles.

The district court's protective order should also be reversed because it improperly strips millions of Americans of their rights under state public records laws, without any consideration of this fact. Courts have recognized that a "strong presumption tilts the scales heavily against" granting or maintaining a protective order if it is likely that the information would otherwise be accessible under freedom of information laws. *Pansy*, 23 F.3d at 791–92 (stating that "it would be unusual" if, on remand, the district court found a protective order sealing a

---

> sent 526,700 doses in 2007 and more than twice that – 1,139,260 doses – a mere three years later in 2010 when the county's population was 96,319.

settlement agreement between a public entity and official justified); *see also Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 931 (5th Cir. 1996) (adopting reasoning set forth in *Pansy*); *Ford v. City of Huntsville*, 242 F.3d 235, 242 (5th Cir. 2001) (same). In other words, where a protective order would prevent a government entity from complying with its disclosure obligations, rendering useless freedom of information laws, a court may enter it in only the rarest of circumstances, if at all.

Accordingly, if a government entity is a party to litigation, a district court abuses its discretion if it enters a "protective, sealing or other confidentiality order" without considering its effect on the government entity's obligations to disclose public records under state law. *Pansy*, 23 F.3d at 791; *Davis*, 78 F.3d at 931; *Ford*, 242 F.3d at 242. To the extent such an order is even permissible under these circumstances, it requires "compelling reasons," *Davis*, 78 F.3d at 931; *Ford*, 242 F.3d at 242, must be "narrowly drawn" to avoid interfering with the public's right to obtain government records beyond what is necessary, and explain "the extent to which the order is intended to alter those rights." *Pansy*, 23 F.3d at 791.

Here, the district court—citing no authority and engaging in no analysis, whatsoever—simply concluded that the public records laws of the various states did not apply: "the ARCOS data is not a record generated by the Counties that are, or may be, subject to state public records requests. . . . The data does not

transmogrify into a public record merely because it has been disclosed privately to the parties in this civil litigation." Opinion and Order, Dkt. Ent. 800, PageID 18981. But as Appellants demonstrate, this is simply not true. Many states, including Ohio and West Virginia, where Appellants filed their public records requests, define public records broadly to include this information. *See* Wash. Post Opening Br. 34–36; HD Media Opening Br. 16–18.

By effectively nullifying the rights of millions of Americans to obtain ARCOS data under their own state's public records laws, the court overstepped its bounds and flouted long-established principles of federalism, particularly since hundreds of public entities that are parties to this litigation *want* to disclose this information.[13] *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (recognizing that states are "independent sovereigns" and that courts "start with the assumption that the historic police powers of the States were not to be superseded" by federal law absent a "clear and manifest purpose of Congress"). *Amici* recognize that the

[13] *See* MDL Plaintiffs Br. Favoring Disclosure Re: Public Record Requests, Dkt. Ent. 719, PageID # 16549. Indeed, this puts states and municipalities in an untenable position, for they cannot agree to evade their obligations under the public records laws. *See, e.g.*, *State ex rel. Findlay Publ'g Co. v. Hancock Cty. Bd. of Commrs.*, 684 N.E.2d 1222, 1225 (Ohio 1997) ("A public entity cannot enter into enforceable promises of confidentiality regarding public records.").

district court has an interest in the efficient management of a case of this magnitude and encouraging settlement. But "[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws." *Pansy*, 23 F.3d at 792. "[A]ccess to information prevents governmental abuse and helps secure freedom, and . . . ultimately, government must answer to its citizens." *Id.*

V. The district court erred by authorizing the blanket sealing of court records based on its flawed protective order.

Relying on its defective protective order, the district court erroneously rubber-stamped numerous motions to file court records containing data subject to the protective order under seal. It routinely granted motions to file complaints under seal, as well as motions to dismiss and related briefing, without engaging in any analysis, simply pointing to the protective order, another confidentiality order, and/or a case management order issued during discovery, sometimes just stamping the sealing request "motion granted."[14] The district court even granted motions to

[14] *See, e.g.*, Orders, Dkt. Ents. 262, 406, 409, 471, 516, 634, PageID # 1251–53, 5402–03, 5413–14, 5910–11, 11250–51, 15174 (granting motions to file complaints under seal in 16 cases); Order, Dkt. Ent. 656, PageID # 15938 (granting government's motion to file its brief opposing disclosure of ARCOS data without making any findings, merely stating "motion granted" at top of motion); Order, Dkt. No. 723, PageID # 16570 (granting plaintiff's motion to seal omnibus memorandum in opposition to defendants' motion to dismiss under seal, simply

seal court filings the day they were filed or shortly thereafter, depriving the public of any meaningful opportunity to oppose sealing. *See, e.g.*, Motion to File Am. Compl. Under Seal, Dkt. Ent. 404, PageID # 5348 (filed and granted on May 9, 2018, *see* Order, Dkt. Ent. 406, PageID # 5402); Motion to File Motion to Dismiss Memo. Under Seal, Dkt. 912, PageID # 20880 (filed and granted August 31, 2018, *see* Order, Dkt. Ent. 915, PageID # 20889). As a result, large swaths of the record in this case of critical public importance remain hidden from public view.

This Court has repeatedly admonished district courts for precisely this type of disregard for the public's rights of access to court records. In *Shane Group*, the Court rejected similar attempts to seal the public record based on perfunctory, one-sentence justifications. 825 F.3d at 306–07. "The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public." *Procter & Gamble Co*., 78 F.3d at 227; *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).").

---

because the document will contain "confidential information" subject to the case management and protective order); Order, Dkt. No. 849, PageID # 20290 (granting plaintiff's motion to seal opposition to motion to dismiss, simply stating "Motion granted"); Order, Dkt. Ent. 915, PageID # 20889 (granting motion to seal motion to dismiss brief with "Motion granted. It is so ordered" stamp).

Furthermore, "[t]he importance of the rights involved and interests served by those rights require that the public and press be given an opportunity to respond before being denied their presumptive right of access to judicial records." *In re Knoxville News-Sentinel*, 723 F.2d at 475. Accordingly, a motion to seal should be made "sufficiently in advance of any hearing on or disposition" of the motion to afford the public a meaningful opportunity to respond. *Id*. at 475–76; *Meyer Goldberg*, 823 F.2d at 163 (stressing "importance of affording interested persons a reasonable opportunity to be heard *before sealing* a court record").

Given the district court's clear abuse of discretion in permitting the sealing of court records based on the protective order, without engaging in any analysis, this Court should not only vacate the protective order but all sealing orders that rely on it.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the district court and vacate its protective order and those sealing orders that rely on it.

Dated: November 13, 2018

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown
Counsel of Record
Katie Townsend, Esq.
Caitlin Vogus, Esq.
Sarah Matthews, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, DC 20005
bbrown@rcfp.org
(202) 795-9300
*Additional counsel for *amici* are listed in Appendix A.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of *amici curiae* complies with:

1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,337 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and

2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: November 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system on November 13, 2018.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bruce D. Brown
Bruce D. Brown
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

APPENDIX A

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Richard A. Bernstein
ADVANCE Legal
One World Trade Center
New York, NY 10007
Counsel for Advance Publications, Inc.

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for Association of Alternative Newsmedia

Jonathan Bloom
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Counsel for The Association of American Publishers, Inc.

Dan Krockmalnic
Boston Globe Media Partners, LLC
1 Exchange Place
Boston, MA 02109
617-929-7157

Nabiha Syed
Vice President, Associate General Counsel
BuzzFeed
111 East 18th Street, 13th Floor
New York, NY 10003

Jim Ewert, General Counsel
Nikki Moore, Legal Counsel
California News Publishers Association
2701 K St.
Sacramento, CA 95816

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

Gayle C. Sproul
CBS Broadcasting Inc.
Senior Vice President/Associate General Counsel
51 West 52nd Street, NY, NY 10019
212.975.3095
gayle.sproul@cbs.com

D. Victoria Baranetsky
General Counsel
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Marshall W. Anstandig
Senior Vice President, General Counsel and Secretary
Digital First Media
4 North 2nd Street, Suite 800
San Jose, CA 95113
manstandig@bayareanewsgroup.com
1-408-920-5784

James Chadwick
Counsel for MediaNews Group Inc. dba Digital First Media LLC
Sheppard Mullin Richter & Hampton LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600

Jason P. Conti
Jacob P. Goldstein
Dow Jones & Company, Inc.
1211 Avenue of the Americas
New York, NY 10036
Counsel for Dow Jones & Company, Inc.

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Lynn Oberlander
Executive Vice President and General Counsel
Gizmodo Media Group, LLC
114 Fifth Avenue, Second Floor
New York, NY 10011
646-214-7898
(347)453-8111
lynn.oberlander@gizmodomedia.com

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for The Media Institute

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Ste. 610
Washington, DC 20036

Mickey H. Osterreicher
120 Hooper Street
Athens, GA 30602
Counsel for National Press Photographers Association

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW

Suite 712
Washington, DC 20036
Counsel for The News Guild – CWA

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association

Melissa Bevan Melewsky
PA ID # 91886
Pennsylvania NewsMedia Association
3899 North Front Street
Harrisburg, PA 17110
(717) 703-3048

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Karen H. Flax
VP/Deputy General Counsel
Tribune Publishing Company
160 North Stetson Avenue
Chicago, Illinois 60601