

18-2868

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIRGINIA L. GIUFFRE,
Plaintiff-Appellee,

v.

GHISLAINE MAXWELL,
Defendant-Appellee,

(Caption continued on inside cover)

On Appeal from the United States District Court for the Southern District of
New York

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 32 MEDIA
ORGANIZATIONS IN SUPPORT OF
INTERVENORS-APPELLANTS SEEKING REVERSAL**

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v.

SHARON CHURCHER, JEFFREY EPSTEIN,
Respondents,

JULIE BROWN, MIAMI HERALD MEDIA COMPANY,
Intervenors-Appellants.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Digital First Media, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Fox Television Stations, LLC, Gannett Co., Inc., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, New England First Amendment Coalition, The New York Times Company, Newsday LLC, The NewsGuild - CWA, NYP Holdings, Inc., Online News Association, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, Student Press Law Center, Tribune Publishing Company, Tully Center for Free Speech, Univision Communications Inc., and The Washington Post. A supplemental statement of identity and interest of *amici* is included below as Appendix A.¹

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local R 29.1(b), *amici* state as follows: (1) no party’s counsel authored this brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the *amici curiae*, their

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 representatives and members of the news media, *amici* have a strong interest in protecting the public’s First Amendment and common law rights of access to court documents. Members of the press regularly rely upon court documents to keep the public apprised of cases within the public interest, as well as to facilitate public monitoring of the judicial system. When courts fail to adequately consider the costs to the public interest in sealing court records, the ability of journalists to gather facts and keep the public apprised of actions of the judicial branch is threatened. *Amici* write in support of the Intervenors-Appellants Julie Brown and the Miami Herald (collectively, the “Miami Herald”) because the district court’s decision in this case seals court records in an overly broad manner,

members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

preventing the news media from accessing judicial records and informing the public about important litigation of community concern.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellee, Defendant-Appellee, and Intervenor-Appellants have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“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*, 448 U.S. 555, 573 (1980) (plurality opinion). For this reason, the public’s First Amendment and common law rights of access to judicial proceedings and records play a critical, fundamental part in ensuring public confidence in the judicial system. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“*Amodeo II*”). And public access, which is necessary to both the fairness of the judicial system and the public’s perception of its fairness, cannot be curtailed except where necessitated by compelling interests.

Where the First Amendment right of access applies, judicial documents may only be sealed if—and only to the extent that—an “overriding interest” overcomes the public’s strong, presumptive right of access. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 304 (2d Cir. 2012). Under the common law, judicial documents may only be sealed if “countervailing factors” outweigh the public’s interest in access. *Amodeo II*, 71 F.3d at 1050.

The Miami Herald seeks access to all of the documents filed under seal in this case, which include (1) discovery motions and their exhibits;² (2) the entire body of the Defendant’s motion for summary judgment and more than half of the order denying Defendant’s motion for summary judgment (the “Summary Judgment Documents”) and (3) parts of a motion to intervene and unseal filed by Alan Dershowitz and the order denying that motion. *See Giuffre v Maxwell*, Mem. of Law in Support of Proposed Intervenors Julie Brown and Miami Herald Media Company’s Mot. to Intervene and Unseal (filed Apr. 6, 2018), ECF No. 936 at 4–6.

The district court denied the Miami Herald’s motion to unseal, concluding that what it deemed the “Discovery Documents” were not subject to the common law or First Amendment presumptions of access; it held that those presumptions of access were applicable but overcome with respect to the Summary Judgment Documents.³ Sp.A.-27–28, 33–41. In denying the Miami Herald’s motion to

² Because the district court allowed the parties to file many documents under seal without first filing a motion to seal, *see* A.-265, it is difficult to determine the nature of all of the sealed documents in this case. In its brief, the Miami Herald has listed the sealed discovery documents that were identified in the record. *See* Br. and Special App. for Intervenors-Appellants at 14.

³ The district court’s opinion divides the documents the Miami Herald seeks to unseal into two categories: “Discovery Documents” and “Summary Judgment Judicial Documents.” Sp.A.-27–29. It did not address the partial sealing of Mr. Dershowitz’s motion to intervene and the order denying that motion. *See id.*

Despite the district court’s designation of the first category of documents as “Discovery Documents,” *amici* agree with the Miami Herald that these documents

unseal the Summary Judgment Documents, the district court severely undervalued the powerful public interest in this case and vastly overstated the asserted countervailing interests in favor of secrecy. Contrary to the district court's concern that public access to the Summary Judgment Documents will serve only to "promote scandal," access will provide the public and the press with information key to their understanding of this litigation, which relates to allegations of serial sexual assault and abuse of minors by convicted sex offender Jeffrey Epstein, and has implicated high-level public officials and public figures. The district court made only broad, general references to the protection of private information, including information about minor sexual abuse victims, to conclude that privacy interests in this case weighed heavily against the public's right of access.

are *not* merely unfiled discovery exchanged between the parties, but rather are documents that were filed in connection with discovery motions. *See* Br. and Special App. for Intervenors-Appellants at 18–19. *Amici* also agree with the Miami Herald that the district court erred in concluding that the Discovery Documents are not judicial records subject to the First Amendment and common law rights of access. *See id.* at 13–17. Because that issue has been fully addressed in the Miami Herald's opening brief, *id.*, and the previous *amici* brief filed by many of the same *amici* who join this brief, *see* Br. of *Amici Curiae* the Reporters Comm. for Freedom of the Press and 18 Media Organizations in Support of Intervenors Appellants, *Giuffre v. Maxwell*, No. 16-3945(L) at 10–14 (filed Sept. 20, 2017), ECF No. 106, *amici* do not address that issue in this brief. In addition, *amici* agree with the Miami Herald that the district court must engage in a document-by-document analysis of the Discovery Documents to ensure that any sealing is justified by a compelling interest and is narrowly tailored. *See* Br. and Special App. for Intervenors-Appellants at 26–27.

In addition, the district court’s ruling essentially delegated its authority to seal the Summary Judgment Documents to the parties’ judgment. Rather than conducting an independent review of the Summary Judgment Documents to determine whether or not compelling interests continue to justify sealing, the district court simply relied on the parties’ initial designation of portions of the Summary Judgment Documents as “confidential” to justify their continued sealing. And the district court completely failed to address the Miami Herald’s motion to unseal Mr. Dershowitz’s motion to intervene and the order denying that motion.

For the reasons set forth herein and in the Miami Herald’s brief, *amici* respectfully urge this Court to reverse the district court’s order.

ARGUMENT

I. Public access is an essential feature of our judicial system.

Openness of judicial proceedings “has long been recognized as an indispensable attribute” of the American justice system. *Richmond Newspapers, Inc.*, 448 U.S. at 569. “The notion that the public should have access to the proceedings and documents of courts is integral to our system of government.” *United States v. Erie Cty.*, 763 F.3d 235, 238–39 (2d Cir. 2014).

Access to judicial proceedings and documents “permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.” *Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596, 606 (1982). Indeed, as this Court has emphasized, the presumption of access to judicial records arises from “the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.” *Amodeo II*, 71 F.3d at 1048.

Public access to judicial proceedings and records allows the public to observe and monitor the workings of the federal judiciary. *Id.* It “provides judges with critical views of their work,” “deters arbitrary judicial behavior,” and promotes “confidence in the conscientiousness, reasonableness, [and] honesty of judicial proceedings.” *Id.* In order to effectively monitor the courts, the public requires information—information that is often found in judicial documents and brought to light by the press. *See id.* (“Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions”). Thus, public access to judicial documents “enhances both the basic fairness of” the judicial system “and the appearance of fairness so essential to public confidence in the system.” *Press-Enter. Co. v Superior Court*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”).

II. The district court erred in dismissing the significant public interest in access to the Summary Judgment Documents.

- A. Access will allow the public to evaluate the judicial system's handling of litigation related to sexual abuse and assault of minors, an issue of paramount public concern.

In denying the Miami Herald's motion to unseal, the district court closed its eyes to the particularly strong public interest in access to the Summary Judgment Documents. *See Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 143 (2d Cir. 2016) (finding that strong public interest in the subject of a case weighs against sealing documents related to the matter). Rather, the district court concluded that the Miami Herald had not identified a particular need for the Summary Judgment Documents and that unsealing would simply "promote scandal." Sp.A.-40. To the contrary, sexual assault and trafficking of minors, including the judicial system's handling of these issues, are squarely matters of public concern. Educating readers about these threats is not promoting scandal but providing knowledge that will enable the public to be better informed about risks in their own communities.

With the emergence of the "#MeToo Movement," public awareness of issues of sexual assault, abuse, and trafficking has only risen in recent years. Public attention to these issues has become so great that in 2017, *Time* magazine named "the silence breakers"—individuals who have spoken out after being victims of

sexual assault—its “Person of the Year.” Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME, <https://perma.cc/J5CU-69KC> (last visited Dec. 7, 2018). Many news outlets have brought to light allegations of sexual harassment and abuse in Hollywood, politics, the media, and other industries. See, e.g., Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. Times (Oct. 5, 2017), <https://perma.cc/B9KL-GH77>; Jane Mayer & Ronan Farrow, *Four Women Accuse New York’s Attorney General of Physical Abuse*, New Yorker (May 7, 2008), <https://perma.cc/3HLN-7F68>; Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, Variety (Nov. 29, 2017), <https://perma.cc/UFY7-NK4G>; Irene Plagianos & Kitty Greenwald, *Mario Batali Steps Away From Restaurant Empire Following Sexual Misconduct Allegations*, Eater (Dec. 11, 2017), <https://perma.cc/M96P-XD3Q>; Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. Times (Nov. 9, 2017), <https://perma.cc/9588-E5CQ>; Alexandra Berzon, Chris Kirkham, Elizabeth Bernstein & Kate O’Keefe, *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, Wall Street J. (Jan. 27, 2018), <https://perma.cc/DK92-YJBW>.

The public has a legitimate interest in examining how courts handle both criminal and civil cases related to sexual assault. For example, when college

student Brock Turner was convicted of sexually assaulting an unconscious woman and sentenced to only a few months in jail, news reports and the resulting public outcry led to calls to alter sentencing guidelines for sex-based crimes. *See* Travis M. Andrews, *Ex-Stanford swimmer Brock Turner leaves jail Friday but controversy still rages*, Wash. Post (Aug. 30, 2016), <https://perma.cc/7V9J-VBEW>. News reports used court records to examine the evidence against Turner, allowing the public to better understand—and criticize—how the criminal justice system handled his case. *See, e.g.*, Susan Svrluga, *'Did you rage?' In Stanford sexual assault case, court records shed new light*, Wash. Post (June 10, 2016), <https://perma.cc/C8F4-FKJA>; Ray Sanchez, *Stanford rape case: Inside the court documents*, CNN (June 11, 2016), <https://perma.cc/389Z-EU35>; Hannah Knowles, *Documents from Court, District Attorney reveal details in Brock Turner case*, Stanford Daily (June 10, 2016), <https://perma.cc/3C7R-57CW>.

Similarly, when comedian Bill Cosby was tried and convicted of three counts of aggravated indecent assault, the news media used court records to report arguments presented in the case, as well as how the judge ruled on various motions. Eric Levenson, *Bill Cosby's maximum sentence now 10 years after charges merged*, CNN (Sept. 24, 2018), <https://perma.cc/A7JY-J9Q6>; *see also* Eric Levenson, *Bill Cosby sentenced to 3 to 10 years in prison for sexual assault*, CNN (Sept. 26, 2018), <https://perma.cc/WQ82-7SBZ>. Some advocates for reform of

sexual violence laws lauded Cosby's sentencing as one that inspired confidence in the judicial system. *Id.*

In short, the press regularly uses court records to report on cases related to allegations of sexual assault, and such reporting allows "the public to participate in and serve as a check upon the judicial process." *Globe Newspaper Co.*, 457 U.S. at 606.

B. This case, in particular, relates to a matter that has been the subject of widespread reporting and is certainly a matter of public concern.

Not only does the public have a legitimate interest in the general subject matter of this dispute, *see* Section II.A., *supra*, the interest in this case and in its related judicial records is particularly acute due to the variety of public figures and public officials who are alleged to be connected to Jeffrey Epstein and his victims, such as President Donald Trump, former-President Bill Clinton, Prince Andrew, Duke of York, and Alan Dershowitz. *See, e.g.*, Jan Musgrave, *Will President Trump be used as witness in sex offender Epstein's case?*, Palm Beach Post (May 12, 2017), <https://perma.cc/GPA7-QRLR>; Josh Gerstein, *The one weird court case linking Trump, Clinton, and a billionaire pedophile*, Politico (May 14, 2017), <https://perma.cc/8D55-QGJU>; Josh Gerstein, *Woman who sued convicted billionaire over sex abuse levels claims at his friends*, Politico (Dec. 31, 2014), <https://perma.cc/QWC9-A2FF>; Tom Leonard, *Prince Andrew risks losing*

ambassador job as girl in underage sex case reveals meeting him, Daily Mail (Mar. 2, 2011), <http://dailym.ai/2wni8s1>; Alan Dershowitz, *Alan Dershowitz: 'I never had sex with Virginia Roberts'*, Miami Herald (Dec. 2, 2018), <https://perma.cc/HYW5-D2MM> (letter to the editor by Dershowitz in which he states that sealed court records “directly establishes [his] innocence”).

Here, the Miami Herald seeks access to court records so that it may continue its groundbreaking investigative reporting on the handling of Epstein’s criminal prosecution, as well as related civil litigation. *See* Br. and Special App. for Intervenors-Appellants at 4-5. Epstein’s plea deal, under which he pled guilty to state criminal charges and agreed to serve a 13-month sentence, continues to make headlines. David Von Drehle, *Jeffrey Epstein’s plea deal is a travesty. But we can still find justice*, Washington Post (Dec. 11, 2018), <https://perma.cc/RZR2-JCWE>; Conchita Sarnoff, *Jeffrey Epstein, Billionaire Pedophile, Goes Free*, Daily Beast (July 20, 2010), <https://perma.cc/HMC3-HQJG>. Recently, a group of legislators called for a Department of Justice probe into now-U.S. Secretary of Labor Alexander Acosta’s involvement in the deal, in his prior capacity as the U.S. Attorney for the Southern District of Florida. *See* Julie K. Brown et al, *Lawmakers issue call for investigation of serial sex abuser Jeffrey Epstein’s plea deal*, Miami Herald (Dec. 6, 2018), <https://perma.cc/H6ZB-D6Z2>; Julie K. Brown, *How a future Trump Cabinet member gave a serial sex abuser the deal of a lifetime*,

Miami Herald (Nov. 28, 2018), <https://perma.cc/GA2C-UW97>. Other litigation related to Epstein and his victims has been the subject of recent news reports as well. See Julie K. Brown & Caitlin Ostroff, *Epstein sex abuse victims press judge for decision on tossing his lenient plea deal*, Miami Herald, (Dec. 10, 2018), <https://perma.cc/7RL8-V5FL>; Patricia Mazzei, *Jeffrey Epstein Settles Lawsuit, Avoiding Testimony From Accusers in Sex Case*, N.Y. Times (Dec. 4, 2018), <https://nyti.ms/2zKIGro>.

These matters have received extensive coverage in the news media because they are of significant and legitimate interest to the public. Reporting related to the allegations against Epstein—which are central to this case—is not to “promote scandal” or misuse judicial records “to gratify private spite,” as the district court stated. Sp.A.-40. Nor is it an attempt to disseminate “reservoirs of libelous statements.” *Id.* Rather, coverage of this case builds public understanding of a major news story that implicates national conversations related to sexual assault, the actions of public officials and public figures, and the role of the courts in litigating these disputes. Access to the Summary Judgment Documents will further public monitoring of the judicial system in a case that is of paramount public interest.

- C. A strong presumption of access applies to a motion for summary judgment and documents filed in connection thereto, even when that motion is denied.

Amici agree with the Miami Herald that, in addition to giving short-shrift to the powerful public interest in this case, the district court erroneously concluded that under the common law the presumption of access to the Summary Judgment Documents “is less” because the ““district court *denied* the summary judgment motion.”” Sp.A.-34 (quoting *Amodeo II*, 71 F.3d at 1049); see Br. and Special App. for Intervenors-Appellants at 20–21.

In support of that conclusion, the district court quoted *Amodeo II*, which itself cited, in *dicta*, a partial concurrence and partial dissent from the D.C. Circuit’s decision in *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1342, n.3 (D.C. Cir. 1985). *Id.* (quoting *Amodeo II*, 71 F.3d at 1049). However, in *Lugosch v. Pyramid Co. of Onondaga*, this Court expressly rejected reliance on that *dicta* as “neither central to our holding nor a point of thorough analysis” in *Amodeo II*. 435 F.3d 110, 121 (2d Cir. 2006). Moreover, this Court in *Lugosch* also clarified that the presumption of access to motions for summary judgment and related documents “is of the highest [order]: ‘documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.’” *Id.* at 123 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Thus, the district court erred in attaching little weight to

the common law presumption of access to the Summary Judgment Documents because of the district court's denial of the motion. The public has just as great an interest in understanding why a court has denied a motion for summary judgment as it would in understanding why a court has granted such a motion.

The public also has a particularly strong interest in access to the entirety of the district court's opinion granting or denying a motion for summary judgment under both the First Amendment and the common law. *See Co. Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) ("The public has an interest in learning not only the evidence and records filed in connection with summary judgment proceedings but also the district court's decision ruling on a summary judgment motion and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible."). As this Court has observed, "Transparency is pivotal to public perception of the judiciary's legitimacy and independence. . . . Because the Constitution grants the judiciary 'neither force nor will, but merely judgment,' The Federalist No. 78 (Alexander Hamilton), courts must impede scrutiny of the exercise of that judgment only in the rarest of circumstances." *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008). Thus, "[i]n the top drawer of judicial records are documents authored or generated by the court itself in discharging its public duties, including opinions, orders, judgments, docket sheets,

and other information related to the court’s public functions” and “this drawer is hardly ever closed to the public.” *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008). As the United States Court of Appeals for the Seventh Circuit has explained:

What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification. The Supreme Court issues public opinions in all cases, even those said to involve state secrets. *See New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). A district court issued public opinions in a case dealing with construction plans for hydrogen bombs. *United States v. Progressive, Inc.*, 467 F.Supp. 990, *rehearing denied*, 486 F.Supp. 5 (W.D.Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir.1979). . . .

Hicklin Eng’g, L.C. v. Bartell, 439 F.3d 346, 348–49 (7th Cir. 2006), *abrogated on other grounds by RTP LLC v. ORIX Real Estate Capital, Inc.*, 827 F.3d 689, 692 (7th Cir. 2016). In other words, public access to judicial decisions, in particular, plays an especially important role in ensuring public trust in the judiciary.

III. Generalized privacy interests cannot support sealing.

The district court’s decision focused on “the privacy rights of individuals,” citing caselaw related to, *inter alia*, the Fourth Amendment, Freedom of

Information Act, and trade secrets. Sp.A.-16–19. But broad, general notions of privacy are not enough to demonstrate either a “higher value” that overcomes the First Amendment presumption of access, *see Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) (“*Press-Enterprise II*”), or a “substantial interest” that overcomes the common law presumption of access, *Under Seal v. Under Seal*, 273 F. Supp. 3d 460, 467 (S.D.N.Y. 2017).

The First Amendment right of access requires that judicial documents may be sealed only if and to the extent that “specific, on the record findings . . . demonstrat[e] that ‘closure is essential to preserve higher values[.]’” *Press-Enterprise II*, 478 U.S. at 13–14 (quoting *Press Enterprise I*, 464 U.S. at 510). “Broad and general findings” by the district court “are not sufficient to justify closure.” *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987).

As an initial matter, as the Miami Herald notes, the alleged victim of sexual abuse and trafficking in this case, Ms. Giuffre, who is now an adult, has advocated for unsealing all of the records in this case. *See* Br. and Special App. for Intervenors-Appellants at 22 (citing A.-428). In addition, the revelation of information related to sexual assault of minors does not automatically create a compelling interest that overcomes the First Amendment or common law rights of access, as the district court erroneously concluded. Sp.A.-38–40. For example, in *Globe Newspapers*, the Supreme Court struck down a Massachusetts statute that

automatically closed court proceedings during the testimony of minor victims of sexual offenses, concluding that whether the First Amendment presumption of access had been overcome must be determined on a case-by-case basis. 457 U.S. at 608–09.

Here, generalized privacy interests of the alleged victims and perpetrators of sexual abuse and trafficking cannot overcome the public’s strong interest in access.

IV. The district court failed to make an independent determination regarding the sealing of specific records.

This Court has made clear that it is “improper” for a district court “to delegate its authority” regarding the sealing of judicial records to litigants; a district court must “make its own redactions, supported by specific findings, after a careful review of all claims for and against access.” *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (“*Amodeo I*”). Here, the district court permitted the parties to make redactions to the Summary Judgment Documents based on the parties’ determinations as to what information should be kept from the press and the public. *See* Sp.A.-32 (stating that certain portions of the Summary Judgment Documents “reveal[] the substance of the evidence jointly deemed confidential by the parties. It was therefore redacted by the parties”). In denying the Miami Herald’s motion to unseal the Summary Judgment Documents, the district court simply accepted the parties’ decisions regarding redactions without any indication

that it had conducted an independent, particularized review of the propriety of those redactions. *See id.* at 33–35.

The First Amendment required the district court to evaluate each specific portion of the Summary Judgment Documents that the parties redacted to determine if the presumption of access was overcome. *See Press-Enterprise I*, 464 U.S. at 510 (stating that a lower court must articulate an overriding interest “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered”). There is no indication that the district court did so. The district court merely found that the Summary Judgment Documents, in general, discuss allegations of sexual assault and sexual trafficking of minors—a conclusory finding that does not justify keeping any specific portion of any document under seal.

In addition, the district court ignored the Miami Herald’s motion to unseal Mr. Dershowitz’s motion to intervene and the order denying that motion. Just as the district court was required to undertake an individualized analysis of the redactions to the Summary Judgment Documents that were made by the parties, it should also have considered whether an overriding or substantial interest justified sealing Mr. Dershowitz’s motion to intervene and the order denying that motion.

CONCLUSION

For the foregoing reasons and those set forth in the Miami Herald's brief, *amici curiae* urge this Court to reverse the district court's order denying access to judicial documents in this case.

Respectfully submitted,

/s/ Bruce D. Brown

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Washington, D.C.

CERTIFICATE OF COMPLIANCE

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

- 1) Complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,507 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) Complies with 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 in 14-point, Times New Roman font.

/s/ Bruce D. Brown

Bruce D. Brown

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THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: December 17, 2018
Washington, D.C.

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse

network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for approximately 110 alternative newspapers in North America. 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.

Digital First Media publishes the San Jose Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

Dow Jones & Company, Inc., is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world’s largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron’s; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

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 33 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.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28

stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 110 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

The Inter American Press Association (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

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

The Investigative Reporting Workshop, 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.

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

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in

all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the the editorial and online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing over 700,000 men and women in both private and public sectors.

The New York Post, owned by NYP Holdings, Inc., is the oldest continuously published daily newspaper in the United States, with the seventh largest circulation. It is published in print and online.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

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.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation’s oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal

national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

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

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

Tribune Publishing Company is one of the country’s leading media companies. The company’s daily newspapers include the Chicago Tribune, New York Daily News, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, the Virginian Pilot and Daily Press. Popular news and information websites, including www.chicagotribune.com,

complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

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.

Univision Communications Inc. (UCI) is the leading media company serving Hispanic America. UCI is a leading content creator in the U.S. and includes the Univision Network, UniMás and Univision Cable Networks. UCI also includes the Fusion Media Group, a division that serves young, diverse audiences, which includes cable networks and a collection of leading digital news sites including Gizmodo, Deadspin, The Root, Splinter and Jezebel.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

APPENDIX B

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on December 17, 2018.

Dated: December 17, 2018

By: /s/ Bruce D. Brown

Bruce D. Brown
Counsel for Amici Curiae