No. 20-13932

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RANDALL CALLAHAN, *et al.*

Plaintiffs-Appellees,

v.

UNITED NETWORK FOR ORGAN SHARING,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
Case No. 1:19-cv-01783-AT

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 7 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned certifies that, in addition to the persons listed in the certificate of interested persons filed by the parties, the following persons (amici curiae, their parent corporations, publicly held corporations that own 10% or more of the stock, and their counsel) are known to have an interest in the outcome of this case:

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3. Anderson, Christopher D. (witness in the district court)
4. Azar, Alex M., in his official capacity as Secretary of the United States Department of Health & Human Services (Defendant)
5. Barnes-Jewish Hospital, a wholly owned subsidiary of BJC Health System d/b/a BJC HealthCare (Plaintiff-Appellee)
6. Becker, Yolanda T. (Former President, UNOS/OPTN Board of Directors; declarant in the district court)
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38. Johnson, Maryl (Immediate Past President, OPTN/UNOS Board of Directors)

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59. Seaman, Candice (Plaintiff-Appellee)

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65. Society of Professional Journalists (Amicus Curiae)

66. Somsak, Joyce (declarant in the district court)

67. Suber, Sean H. (Counsel for Defendant-Appellant United Network for Organ Sharing)

68. Syracuse University (Amicus Curiae The Tully Center for Free Speech is a subsidiary of Syracuse University)

69. Taylor, Ryan M. (affiant in the district court)

70. Taylor, William R. (Counsel for Plaintiffs-Appellees)

71. Totenberg, Judge Amy (U.S. District Judge for the Northern District of Georgia)

72. Townsend, Katie (Counsel for Amicus Curiae the Reporters Committee for Freedom of the Press)

73. Tully Center for Free Speech (Amicus Curiae)

74. United Network for Organ Sharing (Defendant-Appellant)

75. U.S. Department of Health & Human Services through Alex M. Azar II in his official capacity as Secretary (Defendant)

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77. University of Iowa (Plaintiff-Appellee)

78. University of Kansas Hospital Authority d/b/a The University of Kansas Health System (Plaintiff-Appellee)

79. University of Kentucky (Plaintiff-Appellee)

80. University of Michigan, The Regents of (Plaintiff-Appellee)

81. University of Virginia, Rector and Visitors of (Plaintiff-Appellee)

82. Vanderbilt University Medical Center (Plaintiff-Appellee)

83. Virginia Commonwealth University Health System Authority (Plaintiff-Appellee)

84. Walsh, Robert (declarant in the district court)

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Amici curiae are not publicly-held corporations, do not issue stock, and do not have a parent corporation except as indicated above.

Dated: January 27, 2021

/s/ Katie Townsend
Katie Townsend
Counsel of Record for Amici Curiae

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press and seven other media organizations (collectively, "amici"), by and through undersigned counsel, respectfully submit this brief as amici curiae in support of Plaintiffs-Appellees. Amici are the Reporters Committee for Freedom of the Press, The Media Institute, National Freedom of Information Coalition, National Press Photographers Association, The NewsGuild - CWA, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech.

Amici are organizations dedicated to defending the First Amendment freedoms and newsgathering rights of journalists and news organizations.[1] Journalists and news outlets frequently rely on access to court records to report news about specific court cases and the functioning of the judicial system throughout the United States. Accordingly, amici have a strong interest in ensuring that the Court correctly interprets and applies its longstanding precedent concerning what constitutes a "judicial record" to which the qualified common law right of access applies and when that right of access is overcome.

Defendant-Appellant United Network for Organ Sharing ("UNOS") argues that the presumption of access applies only to materials "integral to the judicial resolution of the merits," Br. of Defendant-Appellant ("Def. Br.") at 25–26, and

[1] Full descriptions of the amici are included below as Appendix A.

that the common law right of access is overcome when a party acts with an "improper" purpose in seeking or filing records, Def. Br. at 51–56. Amici write to explain that these arguments are contrary to this Court's precedent and, if accepted by this Court, would imperil the ability of the news media to provide the public with timely, meaningful reporting on judicial proceedings.

SOURCE OF AUTHORITY TO FILE

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

RULE 29(a)(4)(E) STATEMENT

Amici declare that: (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) no person, other than amici, their members and their counsel, contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUES ADDRESSED BY AMICI

1. Whether the district court correctly held that a brief submitted by Plaintiffs-Appellees in support of their motion for preliminary injunction and exhibits attached to the brief constitute judicial records to which the public's qualified common law right of access apply.

2. Whether the district court properly acted within its discretion when it held that UNOS failed to make a specific showing of good cause necessary to overcome the common law right of access to portions of the records and therefore ordered them unsealed.

SUMMARY OF ARGUMENT

This Court has long recognized the public's qualified right to access judicial records in civil cases under the common law, including material "filed in connection with any substantive pretrial motion, unrelated to discovery." *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007); *see also Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001). Under this Court's precedent, "[t]he common law right of access may be overcome by a showing of good cause, which requires 'balanc[ing] the asserted right of access against the other party's interest in keeping the information confidential.'" *Id.* at 1246 (quoting *Chi. Tribune Co.*, 263 F.3d at 1309).

In this case, the Court is asked to determine whether a supplemental brief filed in support of Plaintiffs-Appellees' motion for preliminary injunction and exhibits attached to that brief (collectively, the "Records") are "judicial records" to which the qualified common law right of access attaches and, if so, whether the district court abused its discretion in concluding that the right had not been overcome.

This Court should affirm the district court's order granting in part Plaintiffs-Appellees' motion to unseal the Records. In accordance with this Court's longstanding precedent, the district court held that the Records were subject to the qualified common law right of access and found further that the right of access had

not been overcome with respect to some portions of the Records.[2] *Callahan v. U.S. Dep't of Health & Human Servs.*, No. 1:19-CV-1783-AT, 2020 WL 6336129, at *2–4 (N.D. Ga. Sept. 29, 2020) (hereinafter, the "Unsealing Order").

UNOS argues that the district court applied the wrong standard in determining that the Records were judicial records subject to the qualified common law right of access. Def. Br. at 51. Specifically, UNOS contends that this Court's decision in *Commissioner, Alabama Department of Corrections v. Advance Local Media, LLC*, 918 F.3d 1161 (11th Cir. 2019), "made clear" that the presumption of access applies only to materials "integral to the judicial resolution of the merits." Def. Br. at 25, 33. But UNOS fundamentally misconstrues the Court's holding. *Advance Local Media* addressed an inapposite question unique to the factual circumstances of that case—specifically, whether certain material *not filed* with the district court may nevertheless be subject to the common law presumption of access if it is "integral to the judicial resolution of the merits." 918 F.3d at 1167 (citation omitted).

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[2] The district court had previously temporarily permitted the Records to be filed under seal. *Callahan v. U.S. Dep't of Health & Human Servs.*, No. 1:19-CV-1783-AT, 2019 WL 9093996, at *1 (N.D. Ga. Dec. 18, 2019) (restricting access to the parties and the district court "for the time being," pending the court's review of the filings). The district court's Unsealing Order unsealed some portions of the Records, while allowing other portions to remain redacted. Unsealing Order at *4.

No such circumstances exist here. Plaintiffs-Appellees filed the Records with the district court in connection with their motion for preliminary injunction. Thus, as material "filed in connection with any substantive pretrial motion, unrelated to discovery," the Records are judicial records subject to the qualified common law right of access. *Romero*, 480 F.3d at 1245.

Adopting UNOS's erroneous interpretation of judicial records would imperil the news media's ability to timely report on civil lawsuits of significant interest to the public. The public's right of access to judicial records applies contemporaneously with their filing. *See Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (finding, in evaluating the right of access to judicial records under the First Amendment and the common law, that "the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"). And journalists regularly rely on contemporaneous access to judicial records to inform the public about ongoing litigation, often well prior to the court rendering a decision. If, as UNOS erroneously argues, only documents found to be "integral to the judicial resolution of the merits" of a matter were subject to the presumptive right of access—a determination that may be impossible to make at the time a document is filed—the public's right of contemporaneous access to judicial records would be stymied. This Court's well-established rule that "a document's status as a judicial record" is *not* "dependent upon whether it

played a discernible role in the resolution of the case," but rather, on "the type of filing it accompanie[s]," *F.T.C. v. AbbVie Prods., LLC*, 713 F.3d 54, 64 (11th Cir. 2013), in contrast, is consistent with and protects the public's right of contemporaneous access to judicial records.

UNOS also argues that even if the common law right of access applies to the Records, it has been overcome because, it claims, Plaintiffs-Appellees' motives for filing the Records were "improper." Def. Br. at 5–6, 53. However, even if UNOS's allegations regarding Plaintiffs-Appellees' motives are true, they do not demonstrate good cause necessary to overcome the public's common law right of access. This Court has repeatedly rejected attempts to deny the press and public access to a judicial record as a means of punishing a party for its allegedly improper conduct.

For these reasons, amici urge the Court to affirm the district court's holding that the Records are judicial records to which the qualified common law right of access applies and its order unsealing portions of the Records.

ARGUMENT

I. The qualified common law right of access to judicial records applies to records filed in connection with pretrial motions unrelated to discovery.

An "essential component of our system of justice," the common law right of access to judicial proceedings is "instrumental in securing the integrity of the [judicial] process." *Chi. Tribune Co.*, 263 F.3d at 1311 (citing *Richmond*

Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–74 (1980)). In addition to the right to attend judicial proceedings, the common law right of access also extends to the "right to inspect and copy judicial records." *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)).

This Court has long held that material "filed in connection with [non-discovery] pretrial motions that require judicial resolution of the merits" are judicial records subject to the common law right of access. *Chi. Tribune Co.*, 263 F.3d at 1312; *see also AbbVie Prods.*, 713 F.3d at 63 (recognizing that the "presumption of public access" applies to materials that are filed with the court to "invoke 'judicial resolution of the merits.'" (quoting *Chi. Tribune Co.*, 263 F.3d at 1312)).

A motion—and the materials filed in connection therewith—need not be dispositive for the common law right of access to apply. *Romero*, 480 F.3d at 1246 ("A motion that is presented to the court to invoke its powers or affect its decisions, whether or not characterized as dispositive, is subject to the public right of access." (internal quotations marks and citations omitted)). Thus, material "filed in connection with *any* substantive pretrial motion, unrelated to discovery, is subject to the common law right of access." *Id.* at 1245 (emphasis added).

A. The Court's decision in *Advance Local Media* does not address application of the common law right of access to substantive pretrial motions and materials filed with them.

In 2019, this Court expanded the common law presumption of access to include certain materials *not* formally filed with a court. *See Advance Local Media*, 918 F.3d at 1167. In *Advance Local Media*, the Court held that a document that was never filed with the district court was a judicial record because it was "integral to the judicial resolution of the merits," and therefore "part of the court proceedings in the case." *Id.* (internal quotation marks and citations omitted).

UNOS argues that, under *Advance Local Media*, a document—whether filed or unfiled—is a judicial record only if the document is "'integral to the judicial resolution of the merits.'" Def. Br. at 25–26 (quoting *Advance Local Media*, 918 F.3d at 1165, 1167). UNOS mischaracterizes this Court's holding in *Advance Local Media*—which *extends* the presumptive common law right of access to certain *unfiled* materials—in an attempt to transform it into a blanket rule which would significantly narrow the long-settled application of the common law right of access. *See Chi. Tribune Co.*, 263 F.3d at 1312.

UNOS's assertion that *Advance Local Media* "clarified the test" with respect to material filed with the court is wrong. Def. Br. at 33. Rather, the Court addressed the separate and distinct question of whether materials *not* formally filed with the district court are nevertheless subject to the presumptive right of access.

Advance Local Media, 918 F.3d at 1167. Nowhere in its decision did the Court reverse, narrow, or otherwise "clarif[y]" its prior holdings so as to require materials *filed* with the court be found to be "integral to the judicial resolution of the merits" in order for the presumptive right of access to apply. As the Court in *Advance Local Media* explained: "The specific language in *AbbVie Products* and *Chicago Tribune* regarding materials *filed* with motions to the court . . . does not clearly apply to the facts before us" because, "unlike in *AbbVie Products* and *Chicago Tribune*, the Intervenors are seeking access to materials that did not accompany motions filed in the district court." *Advance Local Media*, 918 F.3d at 1167 (emphasis in original).

In expanding the qualified right of access to certain unfiled materials in *Advance Local Media*, the Court in no way limited or narrowed application of the presumption of access to "material filed in connection with any substantive pretrial motion, unrelated to discovery." *Romero*, 480 F.3d 1245. Rather, in keeping with the Court's precedent which "attempt[s] to apply 'a more refined approach' that accounts for 'the tradition favoring access,'" *Advance Local Media*, 918 F.3d at 1168 (quoting *Chi. Tribune Co.*, 263 F.3d at 1312), the Court held that, in certain circumstances where unfiled material is, *inter alia*, "unambiguously integral to the court's resolution of the substantive motions," the common law right of access may extend to such unfiled materials. *Id.* ("This appeal arose under a unique set of

circumstances, and thus we keep our holding narrow in comporting with our own precedent.").

Here, the Records were filed in connection with a substantive pretrial motion unrelated to discovery: Plaintiffs-Appellees' motion for preliminary injunction. As such, they fall squarely within the definition of judicial records to which the presumptive common law right of public access applies. *See Romero*, 480 F.3d at 1245. The Court's holding in *Advance Local Media* is inapposite, and UNOS's reliance on it to argue that the Records are not judicial records is without merit.

B. This Court and other courts have held that the presumption of access is derived from a document's status as a record filed with the court.

UNOS further asserts that "this Court and its sister circuits agree that even if a document is filed on the docket, it is not a judicial record subject to the presumption of public access *unless*—at a minimum—it played a role in the court's decision." Def. Br. at 38 (emphasis in original); *see also id.* at 26 (contending that for the presumptive right of access to apply, "[t]he document must help the public understand why the court made the decisions it did").

UNOS is wrong. Indeed, this Court previously rejected a nearly identical argument in *AbbVie Products*. There, the appellant argued that because the district court "did not rely on" an exhibit filed with the district court "or cite it" in its decision, "the public [did] not need to have access to the document to understand" the court's decision. 713 F.3d at 63. Therefore, the appellant argued, the common

law right of access should not apply to the exhibit. *Id.* In dismissing this argument as "unavailing," the Court clarified that *Chicago Tribune* did not "adopt an *ad hoc* standard that a document's status as a judicial record is dependent upon whether it played a discernible role in the resolution of the case," or require that the Court locate the exhibit "on a continuum . . . by, for instance, counting the number of times the district court cited it while deciding a motion to dismiss." *Id.* at 63–64. Rather, "whether a document is a judicial record" turns on "the type of filing it accompanie[s]." *Id.* And, as *Chicago Tribune* made clear, materials accompanying "pretrial motions that require judicial resolution of the merits," constitute judicial records to which the presumptive right of access applies. *Chi. Tribune Co.*, 263 F.3d at 1312.

This Court is not alone in holding that the common law presumption of access is derived from a document's status as a record filed with the court and not from the role that it plays in the court's ultimate decision. *See, e.g.*, *League of Women Voters of United States v. Newby*, 963 F.3d 130, 136 (D.C. Cir. 2020) ("[E]very part of every brief filed to influence a judicial decision qualifies as a 'judicial record.'"); *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019) (finding that "briefs . . . filed with the court, *as well as any reports or exhibits that accompan[y] those filings*, are the sort of records that would help the public 'assess for itself the merits of judicial decisions' . . . [and] are therefore

subject to the strong presumption in favor of openness." (emphasis added) (citation omitted)); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993) (holding that the common law right of access applies "to all material filed in connection with non-discovery pretrial motions").[3]

The Court's established precedent is consistent with that of other federal courts of appeals and makes clear that materials "filed in connection with any substantive pretrial motion, unrelated to discovery," are judicial records to which the qualified right of access applies, regardless of whether those materials play a discernible role in the court's decision. *Romero*, 480 F.3d at 1245.

[3] UNOS also cites *North Jersey Media Group Inc. v. United States*, 836 F.3d 421 (3d Cir. 2016) in support of its argument that the Records are not judicial records. Def. Br. at 35–36. In *New Jersey Media Group*, the Third Circuit considered whether the common law right of access applied to an unfiled letter emailed to a district court judge by one of the defendants' alleged co-conspirators in support of the defense. The Third Circuit found that the letter would be "properly categorized as pretrial discovery" because the district court "was merely the passive repository of the letter and needed to do nothing with it." *Id.* at 435–36. Accordingly, the Third Circuit concluded that it was not subject to the presumptive right of access applicable to nondiscovery pretrial motions under *Leucadia*. *Id.* at 436. Thus, the Third Circuit's decision was consistent with that court's approach, explained in *Leucadia*, that the common law right of access applies "to all material filed in connection with nondiscovery pretrial motions." 998 F.2d at 165.

C. Restricting the public's presumptive right of access to material found to be "integral to the judicial resolution of the merits" would imperil the news media's ability to report on litigation of significant public interest.

The U.S. Supreme Court has long recognized that the press plays a vital role in facilitating public monitoring of the judicial system, acknowledging that "[w]hile media representatives enjoy the same right of access as the public," they often "function[] as surrogates for the public" by, for example, attending proceedings, reviewing court documents, and reporting on judicial matters to the public at large. *Richmond Newspapers*, 448 U.S. at 573. As surrogates for the public, journalists and news organizations regularly seek access to sealed judicial records to inform the public about ongoing litigation as it is being litigated, often well before the court renders a decision. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 114 (2d Cir. 2006) (explaining that a newspaper moved to intervene to obtain "immediate" access to sealed judicial records in a civil lawsuit). And the public benefits when news reports can reference, quote from, and even hyperlink to court documents when reporting about cases as they are being litigated. *See generally* Toni Locy, *Covering America's Courts* (2013).

The public's right of access to judicial records applies contemporaneously with their filing. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) (analyzing the public's right of access to judicial records under the First Amendment and finding a qualified right of "timely access" to newly filed

nonconfidential civil complaints that attaches when the complaint is filed); *Pub. Citizen*, 749 F.3d at 272 (evaluating the right of access to judicial records under the First Amendment and the common law and finding that "the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"); *see also United States v. Ellis*, 90 F.3d 447, 449 (11th Cir. 1996) (recognizing an "interest in protecting the press's ability to cover contemporaneously judicial proceedings"). UNOS's restrictive definition of what constitutes a judicial record ignores—and is wholly inconsistent with—the contemporaneous nature of the right of access, as the question of whether or not a document is "integral to the judicial resolution of the merits" would not be conclusively determined until after the court had rendered its decision. Such a limited definition of "judicial records" would imperil the ability of journalists and news organizations to provide timely, meaningful coverage of ongoing civil litigation.

Moreover, UNOS's approach would significantly impair the ability of the press and the public to identify and access judicial records. Taken to its logical conclusion, if only those documents "integral to the judicial resolution of the merits" are subject to the common law right of access, the press and the public would have no way of knowing whether any document was subject to the right of access absent an express statement by the court that it considered that document in

making its decision—an absurd result which strikes at the heart of the public oversight function underlying the access right. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 667 (D.C. Cir. 2017) ("A brief (or part of a brief) can affect a court's decisionmaking process even if the court's opinion never quotes or cites it."). Such a holding would discourage efforts by the press and the public to move to seek access to sealed records due to the inherent uncertainty as to whether the presumptive right of access might apply to any given document, absent an express statement of reliance on a document by a court.

Finally, the public's ability to review the information a court did *not* consider in making its decision is as crucial to the public oversight function as its ability to review information the court *did* consider. *See Lugosch*, 435 F.3d at 123. Limiting the common law right of access to only those documents "integral to the judicial resolution of the merits" could preclude access to documents that a court should have considered but did not. *See Metlife*, 865 F.3d at 668 ("Without access to the sealed materials, it is impossible to know which parts of those materials persuaded the court and which failed to do so (and why).").

This Court previously recognized the value of clarity offered by the "bright-line rule" established in *Chicago Tribune*: "a simple rule to apply" which "does not involve locating the exhibit on a continuum." *AbbVie Prods.*, 713 F.3d at 64. Such a "bright-line rule" is consistent with the policy underlying the access right

and ensures the news media's ability to report on ongoing civil litigation matters of significant public interest.

II. A party's motive in filing a judicial record is irrelevant to whether the public's qualified common law right of access to that record is overcome.

Finally, UNOS alleges that Plaintiffs-Appellees' motives for seeking discovery of and filing the Records were "improper." Def. Br. at 5–6. Accordingly, UNOS argues that even if the presumptive right of access applies to the Records, "any interest the public has in seeing" the Records is undermined by Plaintiffs-Appellees' alleged bad faith. *Id.* at 53.

As a preliminary matter, the district court found no evidence of "malice" on the part of Plaintiffs-Appellees in seeking discovery of the Records. Unsealing Order at *4. But even if UNOS's allegations were true, this Court has repeatedly rejected attempts to deny the public's qualified right of access to a judicial record as a means of "punishing" a party for its allegedly improper conduct.

For example, in *Romero*, this Court reversed a district court order denying a freelance journalist's motion to unseal judicial records. 480 F.3d at 1247. The district court denied the motion to unseal because, among other things, it found that "allowing the public access to the documents would vindicate improper motives of the plaintiffs' lawyers." *Id.* Although ultimately concluding that the lawyers' actions were not improper, this Court held that "even if the plaintiffs' lawyers

should have been punished," denying the public access to judicial records and proceedings would not be a proper sanction. *Id.*

Similarly, in *AbbVie Products*, this Court rejected the appellant's request that the Court create an exception to the common law right of access to judicial records for "confidential, previously sealed documents." 713 F.3d at 64. The appellant argued that this would prevent parties, and specifically, the appellee, from "exploit[ing] the public access doctrine by obtaining highly confidential commercial documents through . . . discovery . . . attaching them as exhibits to pleadings, and then seeking to publicly reveal those documents." *Id.* Once again, the Court found the argument unavailing and refused to implement a categorical exception to the qualified public right of access, finding that "insofar as this potential for abuse does exist . . . there are already sufficient remedies to address it," including actions for wrongful civil proceedings, motions to strike under Federal Rule of Civil Procedure 12(f), professional sanctions, and monetary sanctions under Federal Rule of Civil Procedure 11. *Id.*

In sum, UNOS's call to deny the public its qualified right of access to the Records as a means to punish those "who would attempt to use a court's docket as a tool to embarrass and silence those who disagree with them," Def. Br. at 7, must fail. "Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case." *Brown v. Advantage Eng'g, Inc.*, 960

F.2d 1013, 1016 (11th Cir. 1992). Where, as here, "the rights of the public, an absent third party, . . . are at stake," *id.*, courts must safeguard those rights. Courts have a variety of options at their disposal to sanction and discourage a party's improper conduct; they need not, and indeed cannot, deprive the press and public of access to judicial records under the common law.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the district court's Unsealing Order.

Dated: January 27, 2021

Respectfully submitted,

/s/ Katie Townsend

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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

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.

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

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and

administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

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

The News Guild - CWA is a labor organization representing more than 25,000 employees of newspapers, newsmagazines, news services and other media enterprises. Guild representation comprises, in the main, 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 500,000 men and women in both private and public sectors.

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

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

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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 4,777 words, as determined by the Microsoft Word program used to prepare it.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: January 27, 2021

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CERTIFICATE OF SERVICE

I certify that on January 27, 2021, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. Plaintiffs-Appellees and Defendant-Appellant are registered CM/ECF users, and service upon them will be accomplished by the appellate CM/ECF system.

Dated: January 27, 2021

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