No. 19-3551

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio A. Philip Randolph Institute, *et al.*,
Plaintiff-Appellees,

v.

Larry Obhof, *et al.*,
Defendants,

Republican National Committee, *et al.*,
Appellants.

Appeal from the U.S. District Court for the Southern District of Ohio at Cincinnati
in *OAPRI v. Householder*, No. 1:18-cv-00357-TSB-KNM-MHW

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
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I certify that on _____ 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.

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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.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Reporters Committee for Freedom of the Press ("Reporters Committee"). The Reporters Committee is an unincorporated nonprofit association. Leading journalists and media lawyers founded the Reporters Committee 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.

Journalists require access to court records to report on cases of public concern and to facilitate effective public oversight of the judicial system. As representatives of the news media, the Reporters Committee has a strong interest in ensuring that courts safeguard the public's constitutional and common law rights of access to judicial documents. The Reporters Committee is therefore concerned by Appellants' post-hoc attempt to seal court records that were publicly docketed, used as exhibits at a public trial, and then relied upon in the lower court's public opinion. Amicus emphasizes the public's First Amendment and common law right of access to these court records. Although amicus is nonpartisan and takes no position on redistricting, the press and public have a particularly strong interest in obtaining information about voting issues, to facilitate democratic debate. Amicus

also notes that a decision reversing the district court's production order could not prevent journalists who previously obtained the relevant documents from publishing them. The press's First Amendment rights therefore leave no effective remedy available in this case. Appellants' prayer for relief comes too late, and amicus urges this Court to reject it.

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

Amicus states 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 amicus, its members or its counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment and common law create a strong presumption in favor of public access to court records. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983). The public's qualified right of access to court records builds on the Supreme Court's decisions protecting public access to trials. Access to records is a necessary corollary to the long history of open courtrooms, because "court records often provide important, sometimes the only, bases or explanations for a court's decision." *Id.* at 1177.

Under this Court's precedents, the strength of the right of access to court documents depends on the stage of litigation. *See Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299 (6th Cir. 2016); *see also Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589 (6th Cir. 2016). There is a "stark difference" between protective orders during discovery and sealing orders during adjudication, the latter of which are much more strongly disfavored. *Shane Grp.*, 825 F.3d at 305. "Unlike information merely exchanged between the parties, the public has a strong interest in obtaining the information contained in the court record." *Id.* (internal quotation marks omitted). Only the "most compelling reasons" can overcome that presumption. *Id.*

Although this appeal concerns 446 documents that Appellants disclosed on January 4, 2019, this brief pertains to only 61 of them, as well as Adam Kincaid's

deposition on January 31, 2019. *See* Appellees' Br. at 5–9. Because Appellees designated this subset of the materials in question as trial exhibits and Appellants did not seek to have them filed under seal in the district court, these documents became judicial records subject to the First Amendment and common law rights of access. *Id.* at 8–9, 16–17. These records were then used in a public trial and relied upon in the lower court's extensive public opinion. These materials have entered the public sphere, and they cannot simply be clawed back.

Additionally, the right of access is particularly strong when a case centers on a matter of public concern. This Court has held that the right of access to court documents matters most when the public has an interest in not only a court's ultimate decision, but also in the evidence and records that led to that result. *Shane Grp.*, 825 F.3d at 305. "[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Id.* (*citing Brown & Williamson*, 710 F.2d at 1179). In this case, the public's interest in the underlying evidence and records is particularly strong—likely even stronger than its interest in the decision. The Supreme Court's holding in *Rucho v. Common Cause* that partisan gerrymandering claims raise nonjusticiable political questions renders the district court's ruling in this case insignificant. 139 S. Ct. 2484 (2019). But the evidence and records assembled continue to carry paramount importance. In *Rucho*, Chief Justice Roberts left it to the political process and the

state courts to address partisan gerrymandering, and these records are essential to informing that ongoing conversation. *Id.* at 2507–08. The public's right of access is thus at its peak in this case and cannot be overcome, especially retroactively. Courts have generally declined to seal court records once they have already been disclosed to the public.

Even if this Court were to find that Appellants' associational interests overcome the right of access (and that, contrary to Appellees' arguments, Appellants have not waived their associational claim), no effective remedy is available in this case. The 61 documents and Kincaid deposition have been publicly available for months and were discussed in open court. The press has provided extensive coverage of this case, including public references to the 61 documents and deposition testimony at issue here.

The First Amendment protects journalists' right to publish this information. To the extent that reporters learned the contents of these documents from attending the trial, they have a First Amendment right to publish what they observed. *See Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308 (1977); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976). And to the extent that journalists have already lawfully obtained these documents in another way, they cannot be prevented from publishing them. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001). Any restriction on journalists' ability to publish this information would be an unconstitutional

prior restraint. *See Cty. Sec. Agency v. Ohio Dep't Commerce*, 296 F.3d 477 (6th Cir. 2002).

ARGUMENT

As this Court suggested in denying Appellants' previous interlocutory appeal in this case, third parties aggrieved by a discovery order have the "long-recognized option" to "defy the disclosure orders and incur appealable contempt citations." *Ohio A. Philip Randolph Inst. v. LaRose*, 761 F. App'x 506, 511 (6th Cir. 2019). Appellants chose not to do so. Instead, when Appellees designated 61 documents and substantial portions of Kincaid's deposition as trial exhibits, Appellants explicitly declined to request that these documents be filed under seal. Appellees' Br. at 8–9 & Exhibit F. The materials thus became part of the public record in this case, subject to the constitutional and common law right of access. That right is especially strong here, given the press and public's substantial interest in informing political debate about partisan gerrymandering. Appellants cannot make the demanding showing necessary to deprive the public and press of access to these court records. Further, to the extent that the press is already in possession of these materials, journalists have a constitutional right to continue publishing them free from any prior restraints this Court may impose. For all these reasons, the genie cannot be put back into its bottle. The district court's production orders therefore should not be disturbed.

I. The First Amendment and common law create a strong presumption in favor of public access to court records.

A. The right of access covers records in civil cases, which must be open to ensure the proper functioning of the judicial system.

As the United States Supreme Court has recognized, open trials are essential to safeguarding the judicial process. Openness promotes "public acceptance of both the process and its results." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570–71 (1980). The public trial provides an important check in our system of self-government, providing an effective restraint on potential abuse of judicial power. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). "Without access to the proceedings, the public cannot analyze and critique the reasoning of the court." *Brown & Williamson*, 710 F.2d at 1178. Openness promotes both fairness and the appearance of fairness. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"); *see also Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*"). Public trials also provide "community catharsis" by permitting the public to observe the administration of justice. *Richmond Newspapers*, 448 U.S. at 571; *Press-Enterprise I*, 464 U.S. at 508–09. And public access safeguards the integrity of the fact-finding process. *Globe Newspaper Co.*, 457 U.S. at 606. For all these reasons, the First Amendment protects the public's access to trials, as a matter of logic and experience. *Richmond Newspapers*, 448 U.S. at 580.

This right of access to trials is just as critical in civil cases as in criminal ones. As this Court has recognized, "Civil cases frequently involve issues crucial to the public." *Brown & Williamson*, 710 F.2d at 1179. And in "either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.*; *see also Hartford Courant v. Pellegrino,* 380 F.3d 83, 91 (2d Cir. 2004) (collecting cases from several circuits extending the right of access to civil cases).

The right of access also attaches to documents filed during trial, including exhibits entered into evidence. *See Brown & Williamson*, 710 F.2d at 1177. Indeed, access to court records serves many of the same functions as access to the court proceedings themselves, safeguarding the fact-finding process and inspiring public confidence in the judicial process. At a more basic level, access to trial would be quite meaningless without the corollary ability to use supporting documents to make sense of the proceedings. *Id.* (observing that "court records often provide important, sometimes the only, bases or explanations for a court's decision"); *see also Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (quoting *Globe Newspaper Co.*, 457 U.S. at 606) (finding that court records "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning"). In sum, public access to judicial records "serves to promote trustworthiness of the judicial

process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Littlejohn v. Bic Corp.*, 851 F.2d 673 (3d Cir. 1988); *see also Pellegrino,* 380 F.3d at 91–92 (collecting cases extending the right of access to court records).

This Court's opinions have stressed that public access to court records is most important once a case has moved past discovery and entered the adjudication stage. *Shane Grp.*, 825 F.3d at 305. Documents associated with the public phases of a court proceeding, especially the trial, are presumptively open and only the "most compelling reasons" can overcome that presumption. *Id.*; *see also Rudd Equipment*, 834 F.3d at 593. In *Shane Group*, this Court applied the presumption of openness to pleadings, motions for class certification, evidentiary motions, and exhibits accompanying filings. *See Shane Grp.*, 825 F.3d at 304–05; *see also In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019).

The 61 documents and the Kincaid deposition that Appellees filed on the public docket and used as trial exhibits in this case fall within the presumption of openness. Appellants did not seek to have these materials filed under seal. The documents were utilized during an eight-day public trial, and, as the Appellees argue in their brief, were essential to several of the dispositive findings in the district court's 301-page opinion. Appellees' Br. at 10–13. As Appellees persuasively argue, several crucial facts were discovered "in the January 4

documents and nowhere else" and "would not have been presented to the district court had Appellants succeeded in their efforts to shield this and other critical evidence from disclosure." Appellees' Br. at 11. Access to these materials is essential to the press's ability to cover this litigation and the public's ability to understand it. The First Amendment and common law therefore grant the public a presumptive right to access these materials.

B. The right of access is particularly strong in cases that center on matters of public concern.

Under this Court's precedents, the right of access applies "with extra strength" when cases carry important implications for the public. *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 939. "[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Shane Grp.*, 825 F.3d at 305 (*citing Brown & Williamson*, 710 F.2d at 1179). Often in such cases, "the public's interest is focused not only on the result, but also on the conduct giving rise to the case." *Id.*

That interest is especially strong here. Following the Supreme Court's decision in *Rucho v. Common Cause* that partisan gerrymandering presents a nonjusticiable political question, the outcome of the trial in this case no longer carries legal significance. 139 S. Ct. at 2508. But the "conduct giving rise to the case" is still of paramount importance to the political process that will now decide what, if anything, is to be done about alleged partisan gerrymandering, in Ohio and

across the country. As Chief Justice Roberts wrote in *Rucho*, the Court's decision neither "condone[d] excessive partisan gerrymandering" nor "condemn[ed] complaints about districting to echo into a void." *Id.* at 2507–08. Rather, the Chief Justice pointed to state court rulings, state constitutional amendments, and congressional and state legislative action as avenues for ensuring fairer districting. *Id.*; *see also* Scott Bland & Steven Shepard, *The Nationwide Battle Over Gerrymandering Is Far from Over*, Politico (June 27, 2019), https://perma.cc/5M9R-5SUS. Last year, Ohio voters passed a referendum to reform the state's redistricting process, joining similar efforts in many other states. *See* Jessie Balmert, *Ohio Voters Just Approved Issue 1 to Curb Gerrymandering in Congress*, Cincinnati Enquirer (May 8, 2018), https://perma.cc/G2SK-UAMM. The fact-finding processes in cases like this one created rich sets of records that should be available to inform policymakers as they make decisions about possible solutions to alleged partisan gerrymandering going forward. But that is only possible if the right of the public and press to access these important court records is ensured.

This case received in-depth press coverage in Ohio and across the country, serving as a flashpoint for the ongoing national debate about partisan gerrymandering. Much of this coverage referenced the role that the Republican National Committee, National Republican Congressional Committee, and Kincaid played in drawing Ohio's maps, as revealed by the documents they now seek to

shield from public view. *See, e.g.*, Rich Exner, *Federal Judges Toss Out Ohio's Congressional Map as Illegal Gerrymander*, Cleveland.com (May 3, 2019), https://perma.cc/URU6-U9A3 (putting the district court's ruling in the context of the Cleveland Plain-Dealer's previous investigative reporting on gerrymandering in Ohio, including Kincaid's role); Karen Kasler, *Gerrymandering in Ohio: How Did We End Up Here?*, WOSU Public Media (May 10, 2019), https://perma.cc/LEQ3-Y3NA; Kevin Koeninger, *GOP Gerrymandering Trial Kicks Off in Ohio*, Courthouse News Serv. (Mar. 4, 2019), https://perma.cc/4933-UAW5 (referencing emails obtained in the January 4 disclosures labeling certain areas of Ohio "dog meat voting territory"); S.M., *A Court Says Ohio's Congressional Map Is Unconstitutional*, The Economist (May 8, 2019), https://perma.cc/ECW4-JURP (explaining how Ohio's districts were "tweaked and polished" with the help of "Republican consultants"); Steven Shepard, *Ohio Congressional Map Tossed Out for Partisan Gerrymandering*, Politico (May 3, 2019), https://perma.cc/TP8A-NATY.

Given the intense public interest in the substance of this case, the right of access applies with "extra strength."

C. Once publicly filed, court documents cannot be retroactively sealed, and parties seeking to rebut the presumption of openness will be deemed to have waived their rights to confidentiality.

This Court previously declined to exercise jurisdiction in this case under the collateral order doctrine, in part because Appellants had "alternative avenues" through which to contest the district court's disclosure order. *LaRose*, 761 F. App'x at 511. The Court's opinion listed the options for third parties seeking to contest a production order. They can ask the district court to certify an appeal. They can seek mandamus relief. Or they have the "long-recognized option" to "defy the disclosure orders and incur appealable contempt citations." *Id.* Conspicuously absent from this menu is what the Appellants actually did. They disclosed the documents, submitted to the deposition, and then did not even seek to have the materials filed under seal at trial, where they became an integral part of the proceeding and the district court's ultimate decision.

The reason that this course of action was not among the options provided in this Court's previous opinion is obvious: the First Amendment and common law right of access is qualified, but it is not temporary. The presumption in favor of access can be rebutted by a countervailing interest, for instance a concern for protecting trade secrets or privacy, but the time for rebutting the presumption is before the documents are disclosed and become part of the court record. After the

case has concluded on the merits and much of the disputed information has been publicly disclosed, it is too late to attempt to overcome the right of access.

Because these materials were publicly filed in open court, with no motion to seal, there is no interest that can justify their retroactive sealing. "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Accordingly, members of the news media and the public are free to report whatever occurs in open court. *Estes v. Texas*, 381 U.S. 532, 541–42 (1965).

Courts around the country routinely reject attempts to seal evidence that was admitted at an open proceeding. For instance, the Third Circuit rejected a defendant's argument that public disclosure of exhibits introduced into evidence at trial could be prohibited because the defendant had relied upon a promise of confidentiality in a protective order governing discovery. *Littlejohn*, 851 F.2d at 680. The Court noted that the defendant had failed to raise the issue of confidentiality when the defendant became aware, before trial, of the plaintiff's intent to use confidential documents at trial and failed to object when the exhibits were mentioned during trial or entered into evidence. *Id.* The Court concluded, "It is well established that the release of information in open court 'is a publication of that information and, if no effort is made to limit its disclosure, operates as a

waiver of any rights a party had to restrict its future use.'" *Id.* (quoting *Nat'l Polymer Prods. v. Borg-Warner Corp.*, 641 F.2d 41, 412 (6th Cir. 1981)).

Other federal courts, including in this circuit, have similarly rejected attempts to retroactively seal records that have been introduced into evidence or otherwise used at a public trial. *See, e.g.*, *Dickey's Barbecue Pit, Inc. v. Neighbors*, Civil Action No. 4:14-cv-484, 2015 WL 13466613, at *3 (E.D. Tex. June 5, 2015) (stating that "[t]he court will not allow exhibits that have already been made part of the public record to remain sealed"); *Vance v. Wilson*, Civil Action No. 6:10-00300-HRW, 2011 WL 3794380, at *1 (E.D. Ky. Aug. 25, 2011) (declining to retroactively seal its opinion in part because the same information appeared in other documents available in the public docket); *Weiss v. Allstate Ins. Co.*, Civil Action No. 06-3774, 2007 WL 2377119, at *5 (E.D. La. Aug. 16, 2007) (declining to place under seal exhibits that "were made a part of the public record at trial, nearly four months ago, without objection by any party"); *Rambus, Inc. v. Infineon Techs. AG*, Civil Action Number 3:00CV524, 2005 WL 1081337, at *3 (E.D. Va. May 6, 2005) (finding that the common law right of access to demonstrative exhibits was not overcome when exhibits were used at a hearing and tendered to the court for use in deciding dispositive motions).

Here, the Appellants sent an email explicitly declining to request that the 61 documents and Kincaid's deposition be filed under seal. Appellees' Br. at 8–9.

That evidence was then used at trial and relied upon in the court's opinion. The First Amendment and common law right of access attached, and Appellants waived their opportunity to rebut it. The time for overcoming the presumption of openness has passed.

II. No effective remedy is available to Appellants because journalists will remain free to publish information they obtained in open court or through other lawful means.

Even if this Court decides that Appellants have not waived their associational claim and that it overrides the right of access to judicial records, no effective remedy is available. These materials were posted on the public docket, discussed in open court, and referenced in the trial court's opinion. They have been publicly available for months. And the press has extensively covered this case, including disclosing information derived from the 61 documents and deposition testimony at issue here. Supreme Court precedents protect journalists' constitutional right to publish this information.

Reporters in attendance at the trial may have heard or observed things that revealed information from the January 4 disclosures or the Kincaid deposition. For instance, reporters were in the courtroom to hear attorney Robert Fram tell the jury about the email referring to a region of Ohio as "dog meat voting territory." *See* Kevin Koeninger, *GOP Gerrymandering Trial Kicks Off in Ohio*, Courthouse News Serv. (Mar. 4, 2019), https://perma.cc/4933-UAW5. Those who see and

hear what transpires in the courtroom can "report it with impunity." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (*quoting Harney*, 331 U.S. at 374). The press cannot be prohibited from "truthfully publishing information released to the public in official court records." *Okla. Publ'g Co.*, 430 U.S. at 310.

These documents were publicly filed, and reporters may have also obtained them through some other lawful means. So long as the reporters obtained the information lawfully, they can publish it regardless of the decision in this appeal. In *Bartnicki v. Vopper*, the Supreme Court held that journalists could not be prevented from broadcasting a tape recording of a telephone call, even where the recording was made illegally, so long as the reporter did not personally commit a crime. 532 U.S. at 535 (2001). What's more, any restriction on publication would be a prior restraint that could be imposed, if at all, only in "exceptional cases," of which this is not one. *See Near v. Minnesota*, 283 U.S. 697, 716 (1931); *N.Y. Times v. United States*, 403 U.S. 713, 715 (1971) (Black and Douglas, JJ., concurring) ("Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."). In *County Security Agency v. Ohio Department of Commerce*, this Court lifted a prior restraint on a journalist's publication of sensitive information obtained from a government agency, even

though the agency had reversed its policy of disclosing such information. 296 F.3d at 486–87.

The fact that journalists already in lawful possession of this material could not be prevented from publishing it only underscores that Appellants' attempt to reverse the production orders in this case comes far too late.

CONCLUSION

For the foregoing reasons, amicus urges this Court to deny Appellants the relief they seek.

Dated: September 20, 2019

Respectfully submitted,

/s/ Bruce D. Brown

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CERTIFICATE OF COMPLIANCE

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

1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,905 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

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Dated: September 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Brief of Amicus 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 September 20, 2019.

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.

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