IN THE
INDIANA SUPREME COURT
CASE NO. 23S-OR-00302

STATE OF INDIANA ON THE RELATION OF RICHARD ALLEN, Relator, v. THE CARROL CIRCUIT COURT and THE HONORABLE FRANCES G. GULL, SPECIAL JUDGE Respondents.	Case No. 08C01-2210-MR-000001

BRIEF OF *AMICI CURIAE* THE MEDIA COALITION

The Indiana Broadcasters Association ("IBA"), the Hoosier State Press Association ("HSPA"), American Broadcasting Companies, Inc. d/b/a ABC News ("ABC"), E.W. Scripps Company d/b/a WRTV ("Scripps"), Gannett Satellite Information Network, LLC d/b/a the Indianapolis Star ("Gannett"), Nexstar Media Inc. d/b/a WXIN/WTTV ("Nexstar"), and TEGNA Inc. d/b/a WTHR ("TEGNA") (collectively, the "Media Coalition"), by counsel, submit this Brief of Amici Curiae in support of Relator Richard Allen's Verified Petition for Writ of Mandamus and Prohibition ("Petition").

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I. INTRODUCTION

> "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."
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> – *Richmond Newsp., Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

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Amici respectfully urge the Supreme Court to grant the Petition because the status quo threatens key democratic values and trust in the criminal justice system. In seeking public access, *amici* act as "surrogates for the public." *Richmond Newsp., Inc. v. Virginia*, 448 U.S. 555, 573 (1980). The United States Supreme Court has aptly explained the media's important role:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975). The trial court's orders, which exclude judicial records from public access without process—or remove them from the CCS altogether—significantly restrain the media's newsgathering activities regarding a matter of the utmost public importance. If the trial court's handling of judicial records stands, the media cannot serve its pivotal role in democratic society, and the public will remain in the dark. *Amici* respectfully request that the Court grant the Petition.[1]

[1] The Media Coalition acknowledges that the trial court ordered that certain documents be made public on the docket per its order issued on November 14, 2023. While the order resolves some of the access concerns stated in the Petition, the order does not resolve all the concerns, and it appears that the mere filing of the Petition spurred the order. The Petition remains important in ensuring

II. ARGUMENT

A. The Trial Court's Handling of Court Records Is Contrary to Indiana Public Policy Favoring Open Government and the Indiana and United States Constitutions Protecting Access Rights.

Correction of the trial court's errors is necessary to ensure government transparency and accountability—which is especially critical in criminal matters. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (explaining that the press is "the handmaiden of effective judicial administration, especially in the criminal field" and a "guard against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

Consistent with these principles, the General Assembly expressly recognizes Indiana's "public policy . . . that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1 (further explaining that the Access to Public Records Act will be "liberally construed to implement this policy" and that the burden for nondisclosure falls on the public agency). Access to Court Records Rule 6 likewise "presume[s] . . . openness and requires compelling evidence to overcome this presumption." Commentary to Rule 6.

Apart from well-reasoned policy considerations, the public interest in accessing judicial records has constitutional dimensions. The media, as representatives of the public, are presumptively entitled to judicial documents and proceedings under the First and Fourteenth Amendments to the United States Constitution. *See, e.g., Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 11–12 (1986); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("It is

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complete adherence to the access rules, as well as to address the issues that remain unresolved by the order.

clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents").

The Indiana Constitution similarly (and perhaps more so) protects public access and key newsgathering activities. *See* Ind. Const. Article 1, Section 9 ("No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatsoever[.]"); *Mishler v. MAC Systems, Inc.*, 771 N.E.2d 92, 97 (Ind. Ct. App. 2002) (recognizing that the Indiana Constitution "more jealously protects freedom of speech guarantees than does the United States Constitution"). In light of Indiana's constitutional protection of the free interchange of ideas, this Court has assumed that a "material burden" on newsgathering ability could violate the Indiana Constitution. *In re WTHR-TV*, 693 N.E.2d 1, 15–16 (Ind. 1998).

Considering Indiana's policy favoring public access and the constitutional implications of restricting access to judicial records, the public's and media's interest in accessing judicial records is not something to be taken lightly. In disregarding the Access to Court Records Rules and Trial Rules, the trial court has improperly restrained—or outright prevented—the public's and the media's access.

B. The Trial Court's Violations of the ACR and Trial Rules Significantly Undermine the Public's Access Rights and the Media's Newsgathering Function.

As explained in the Petition, the trial court improperly removed publicly-filed documents from the CCS and excluded others from public access. (Petition, pp. 17–20.) *Amici* expound upon the troubling implications for the public and the media.

First, the trial court's removal of filings from the CCS is never allowed, and for good reason. The trial court lacks any authority to remove filings from the docket. This is true even if

the trial court deems a filing improper. Even improper filings are public record—and the trial court's finding of impropriety does not strip the filing of its public importance. The *Franks* Memorandum in this case is a key example. *Franks* filings attack probable cause affidavits by asserting that the preparing officer misled the court regarding the existence of probable cause. *See Franks v. Delaware*, 438 U.S. 154 (1978). A criminal defendant's attack on the foundation of his arrest, even if (somehow) improper, is newsworthy and deserving of publication. Unilateral erasure of filings from the public record erases history.

Second, the parties cannot just agree to exclude public records from public access. The ACR Rules expressly prohibit that. ACR Rule 5, *Commentary*; *see also Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)."). Instead, for requests to prohibit public access to records "that otherwise would be publicly accessible," notice and a public hearing are required. ACR Rule 6(B), (C). The public hearing provides necessary sunshine; its absence cloaks the judicial process in secrecy. The public hearing also ensures that the presumption of access has been overcome before a record is excluded. This process ensures that matters of public concern stay public unless extraordinary circumstances warrant otherwise. *See Citizens First Nat. Bank.,* 178 F.3d at 944 (holding that the court improperly delegated its duty to determine whether records should be sealed to the parties, explaining that "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding."). The public concern is especially acute here, where the improperly excluded records are from one of the most high-profile criminal cases in Indiana history.

Third, the trial court's decision to upload public documents to a zip file online, rather than making them publicly accessible on the CCS, is a woefully inadequate substitute. As explained in the Petition, the 118 documents in the zip file were filed over several months; each document in the zip file is dated 6-27-2023; and the filenames have no clear identifying information. (Petition, pp. 4–5.) Even if the files were labeled clearly and organized chronologically, however, that would still be insufficient. As "an official record of the trial court," the CCS is where the public goes to get information about cases and to view court records. T.R. 77(B). A central and consistent repository, rather than a piecemeal approach (i.e., some records are located at X, others are located at Y), fosters meaningful public access. *See also* Rush, Loretta (C.J.), "Online access to courts is one way to improve accessibility," INDIANA CAPITAL CHRONICLE (August 28, 2023)[2] (citing MyCase as an example of an online portal that "fosters a more efficient and transparent legal system"). The trial court should be required to make the 118 documents publicly available on the CCS itself.

C. Granting the Petition Would Serve the Significant Public Interest in This Case, and Denying It Would Have Adverse Consequences.

The significant and legitimate public interest in this case is undeniable. Already, the trial court has received numerous requests for access to judicial records and for cameras in the courtroom. The public interest in this case is not going away anytime soon. Unless the Petition is granted, the integrity of the judicial system is at risk. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 587 (1976) (stating that "[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges" and "free

[2] *Available at* https://indianacapitalchronicle.com/2023/08/28/online-access-to-courts/.

and robust reporting, criticism, and debate can . . . subject[ ] [the criminal justice system] to the cleansing efforts of exposure and public accountability") (Brennan, J., concurring).

The history leading to Relator's arrest, coupled with the nature of the underlying alleged crimes (the murder of two children), underscores the need for transparency. *See Matter of T.B.*, 895 N.E.2d 321, 342 (Ind. Ct. App. 2008) ("[T]he death of any child is a matter of the keenest public interest[.]") (internal quotations omitted). The Delphi community and the broader public deserve access. Even if access to every judicial record is not ultimately granted, the ACR Rules must be followed to protect the public's trust in the system and to ensure fair proceedings. *See Cox Broad. Corp.*, 420 U.S. at 495 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."). Granting the Petition would facilitate key newsgathering activities, ensure that access and process prevail, and promote the public confidence in our judicial system.

CONCLUSION

Amici respectfully request that the Court grant Relator Richard Allen's Verified Petition for Writ of Mandamus and Prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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