

Nos. 20-16416, 20-16538, 20-16826

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WILL EVANS; THE CENTER FOR INVESTIGATIVE REPORTING,
Plaintiffs-Appellees / Cross-Appellants,

SYNOPSISYS, INC.,
Intervenor-Appellant / Cross-Appellee,

v.

U.S. DEPARTMENT OF LABOR,
Defendant-Appellee / Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of California, Oakland Division
Civil Case No. 4:19-cv-01843 (Honorable Kandis A. Westmore)

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 33 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLEES / CROSS-APPELLANTS
WILL EVANS AND THE CENTER FOR INVESTIGATIVE REPORTING
URGING AFFIRMANCE IN PART AND REVERSAL IN PART**

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Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the “Reporters Committee”), ALM Media, LLC, The Associated Press, The Atlantic Monthly Group LLC, BuzzFeed, California News Publishers Association, The Center for Public Integrity, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, First Look Institute, Inc., Freedom of the Press Foundation, Gannett Co., Inc., International Documentary Association, Investigative Reporting Workshop at American University, The McClatchy Company, LLC, The Media Institute, Mother Jones, MPA - The Association of Magazine Media, National Freedom of Information Coalition, National Journal Group LLC, National Newspaper Association, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech. A supplemental statement of identity and interest of amici curiae is included below as Appendix A.

Amici file this brief in support of Plaintiffs-Appellees / Cross-Appellants Will Evans and the Center for Investigative Reporting (“CIR”) (collectively, “Plaintiffs”). As journalists, news organizations, and advocates for the

newsgathering rights of the news media, amici frequently rely on the Freedom of Information Act (“FOIA” or the “Act”), 5 U.S.C. § 552, to report on matters of public interest and to shed light on the activities of government.

Amici write to emphasize that prompt release of agency records is both required by FOIA and essential to journalists and news organizations. Amici have a strong interest in ensuring that courts safeguard FOIA’s promise of prompt, meaningful disclosure of agency records to members of the public. All too familiar with the injurious delays that often accompany the process of obtaining records under the Act, amici are deeply concerned that those delays will only increase if courts permit untimely intervention by third parties in FOIA litigation. Eleventh-hour intervention—like Synopsys, Inc. (“Synopsys”) has attempted in this case—derails efforts to obtain agency records in a timely manner, and infringes the public’s right to know about the activities of government.

Accordingly, for the reasons herein, amici urge the Court to affirm the district court’s order denying Synopsys’s motion for leave to intervene in part, and reverse the district court’s order granting Synopsys’s motion for leave to intervene in part.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs, Intervenor-Appellant / Cross-Appellee Synopsys, Inc., and Defendant-Appellee / Cross-Appellant Department of Labor consent to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

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

Amici declare that:

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

BACKGROUND AND SUMMARY OF THE ARGUMENT

Plaintiffs sought the release of EEO-1 reports from the Department of Labor (“DOL”) under the Freedom of Information Act (“FOIA” or the “Act”), 5 U.S.C. § 552. *See Ctr. for Investigative Reporting v. Dep’t of Labor (“CIR”),* 424 F. Supp. 3d 771 (N.D. Cal. 2019). EEO-1 reports, also known as employment diversity reports, are annual reports reflecting anonymized demographic data of employees submitted to DOL by certain companies that contract with the federal government. *See id.* at 773–74.

On December 10, 2019, after considering Plaintiffs’ and DOL’s cross-motions for summary judgment, the district court below issued an order (the “Order”) requiring DOL to disclose to Plaintiffs the requested EEO-1 reports, concluding that they are not commercial in nature and cannot be withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *CIR*, 424 F. Supp. 3d. at 779. DOL did not appeal the district court’s Order. Pls.’ Opp’n to Proposed Intervenor’s Mot. to Intervene (“Pls.’ Opp’n”), at 7, *Ctr. for Investigative Reporting v. Dep’t of Labor*, No. 4:19-cv-01843-KAW (N.D. Cal. Mar. 10, 2020), ECF No. 64. The Order, and DOL’s decision to forego an appeal, should have been the end of the matter; Plaintiffs should have obtained the requested records from DOL immediately.

Yet, on January 30, 2020—nearly two months after the district court entered its Order—one of the companies whose EEO-1 report would be disclosed,

Synopsys, moved to intervene pursuant to Federal Rules of Civil Procedure 24(a) and 24(b)¹ to seek reconsideration of the Order and to appeal. ER-FA47.² The district court denied Synopsys’s motion to intervene for the purpose of seeking reconsideration of the Order. ER-FA1–FA9.³ However, it granted Synopsys’s motion to intervene pursuant to Rule 24(a) for the purpose of appealing the Order to this Court. *Id.*

In reaching its decision, the district court concluded that Synopsys’s motion to intervene was timely only “as to seeking party status to appeal,” and not for purposes of seeking reconsideration of the Order. ER-FA6–FA7. While the district court correctly denied as untimely Synopsys’s motion for leave to intervene for the purpose of seeking reconsideration of the Order, it erred in concluding Synopsys had a right to intervene for the purpose of appealing the Order. Amici agree with Plaintiffs that, under the law of this Circuit, the district court should have denied Synopsys’s motion for leave to intervene in its entirety, and that its determination that Synopsys’s motion to intervene was timely for purposes of appeal was an abuse of discretion. *See* Corrected Br. for Pl.-Appellees/Cross-

¹ All references to “Rules” herein are to the Federal Rules of Civil Procedure, unless otherwise stated.

² Synopsys, Inc.’s Excerpts of Record Vol. II (ER-FA22–FA244), ECF No. 28-2.

³ Synopsys, Inc.’s Excerpts of Record Vol. I (ER-FA1–FA21), ECF No. 28-1.

Appellants the Ctr. for Investigative Reporting & Will Evans (“CIR’s Br.”), at 24–25, ECF No. 45; *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 921–22 (9th Cir. 2004) (affirming district court’s denial of a third-party motion to intervene “at an advanced stage of the litigation,” because, *inter alia*, the third party “was keenly aware of the litigation throughout its lifespan”).

The district court should have denied Synopsys’s motion for leave to intervene in its entirety not only under the clear standards governing intervention in this Circuit, but also because late intervention contravenes a key purpose of FOIA: ensuring the prompt disclosure of agency records to the public. *See, e.g.*, 5 U.S.C. § 552(a)(6)(A)(i). Synopsys is the *only* entity objecting to release of the records Plaintiffs seek, CIR’s Br. at 13; its appeal is the sole barrier to Plaintiffs’ access to records that will shed light on the diversity of employees in workplaces that contract with the federal government—records Plaintiffs requested years ago. Contrary to the district court’s Order, ER-FA5, Plaintiffs *are* prejudiced by Synopsys’s untimely intervention. As the Act recognizes, journalists require prompt access to government records to report on matters of public interest in a timely manner. *See, e.g.*, 5 U.S.C. § 552(a)(6)(E).

Accordingly, amici respectfully urge this Court to affirm the district court’s order denying Synopsys’s motion for leave to intervene in part, and reverse the district court’s order granting Synopsys’s motion for leave to intervene in part.

ARGUMENT

I. Late intervention contravenes FOIA’s purpose to provide the public with timely access to agency records.

A. FOIA mandates prompt disclosure of agency records upon request.

Congress passed FOIA in 1966 “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). FOIA not only creates a presumption of disclosure of records, *see id.*, but also establishes a “requirement of prompt disclosure.” *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979) (emphasis added). In most instances, FOIA requires agencies to provide a final determination in response to a FOIA request within twenty working days of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

Eight years after its passage, Congress amended FOIA to include specific administrative procedures and penalties designed to foster expeditious disclosure of records to requesters. *See* Pub. L. No. 93-502, 88 Stat. 1561 (Nov. 21, 1974) (requiring, *inter alia*, that agencies proactively and “promptly” publish certain final opinions, orders, and statements of policy and interpretation; that agencies “promptly” disclose records after making a determination to do so; and that agencies respond to administrative appeals within twenty business days). The legislative history of the 1974 amendments demonstrates that timeliness of record

disclosures was the key aim of those amendments. *See, e.g.*, Joint Committee Print, 94th Cong., 1st Sess., *Freedom of Information Act & Amendments of 1974*, 10, 125 (Apr. 22, 1975) (explaining that the amendments sought to “achieve the prompt handling of requests” and “to reach the goal of more efficient, prompt, and full disclosure of information” because “delay[s] . . . frequently ha[ve] negated the basic purpose of the [A]ct”).

More recent amendments to the Act demonstrate Congress’s continued commitment to mitigating pernicious delays to public access to records. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 10, 121 Stat. 2524, 2530 (Dec. 31, 2007) (mandating designation of FOIA Public Liaisons who will “assist[] in reducing delays [and] increasing transparency”); 153 Cong. Rec. H16788-01 (Dec. 18, 2007) (“We need more certain deadlines and stronger penalties [in order to] make[] . . . headway in reducing FOIA delays.”) (statement of Representative Waxman); 153 Cong. Rec. S15701-04 (Dec. 14, 2007) (explaining that “the OPEN Government Act will help to reverse the troubling trends of excessive delays and lax FOIA compliance in our government and help to restore the public’s trust in their government”) (statement of Senator Leahy).

Executive branch agencies bear primary responsibility for implementing Congress’s clear intent that FOIA be an effective statutory mechanism for the public to timely obtain agency records. And executive branch directives relevant

to the disclosure of records originally obtained by the agency from third parties can help facilitate timely responses to FOIA requests at the administrative stage of the FOIA process. Those directives, as explained below, paved the way for Synopsys to have timely intervened in this case—as opposed to moving to intervene only after the district court issued its ruling.

- B. Executive Order 12,600 and related agency regulations require early notification to entities who submit certain records to the government that the Act may require be disclosed.

Executive Order 12,600, issued by President Reagan in 1987, and associated agency regulations are intended to minimize delay in the disclosure of public records that may contain material exempt from release under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), to the greatest extent practicable. In particular, Executive Order 12,600 establishes the procedure for notifying entities that have submitted “confidential commercial information”⁴ to the government when that information becomes the subject of a FOIA request. Exec. Order No. 12,600, 52 Fed. Reg. 23781 (June 23, 1987) (“EO 12,600”). Executive Order 12,600 “is based upon the principle that business submitters are entitled to such notification and an

⁴ Executive Order 12,600 defines “confidential commercial information” as “records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.”

opportunity to object to disclosure before an agency makes a possible disclosure determination.” U.S. Dep’t of Justice, *FOIA Update: Executive Order on Business Data Issued* (1987), <https://perma.cc/RD5W-2S7L>.

Executive Order 12,600 requires agencies subject to FOIA to give notice to third parties at the administrative stage of the FOIA process—prior to potential litigation—once the agencies determine that they may be required to disclose such records in response to a FOIA request. *See* EO 12,600. The U.S. Department of Justice’s contemporaneous explanation of Executive Order 12,600 emphasized the importance of timely notification: “As a general rule, *once an agency receives a FOIA request* encompassing designated information, it will be obligated under its regulations to notify the submitter and to afford ‘a reasonable period of time’ in which the submitter may object to disclosure of any or all portions of the information.” *FOIA Update: Executive Order on Business Data Issued, supra* (emphasis added).

This mandate is mirrored in DOL’s FOIA regulations. *See* 29 C.F.R. § 70.26 (requiring DOL, in accordance with EO 12,600, to “provide a submitter with prompt written notice of a FOIA request that seeks its confidential commercial information”). Here, DOL adhered to 29 C.F.R. § 70.26 when, after receiving Plaintiffs’ FOIA request, it identified thirty-six of the fifty-five companies named in the request as federal contractors for which it had responsive records, notified

those thirty-six companies—including Synopsys—of the FOIA request, and provided them thirty days from receipt of that notification to object in writing to disclosure of their EEO-1 data.⁵ *CIR*, 424 F. Supp. 3d at 774. Synopsys—which objected to the release of the requested records in response to DOL’s notification—was thus well aware of Plaintiffs’ FOIA request, ER-FA49, and of the instant litigation from the time it was initiated by Plaintiffs, Pls.’ Opp’n at 2. As such, Synopsys had notice and ample opportunity to intervene at the outset of this litigation to assert its interest in the confidentiality of the records Plaintiffs requested.

II. Early intervention—when intervention is permitted at all—is the norm in FOIA cases.

When third parties seek to intervene in FOIA cases, courts ordinarily permit their intervention in the early stages of litigation. *See, e.g.*, Unopposed Mot. to Intervene & Statement of Points & Auths. in Supp. of Taylor Energy Co. LLC’s Mot. to Intervene, *Waterkeepers Alliance v. Coast Guard*, No. 1:13-cv-00289-RMC (D.D.C. Apr. 22, 2013), ECF No. 9 (intervenor moved to intervene at the outset of the case); Unopposed Mot. to Intervene, *Pub. Citizen v. Dep’t of Health*

⁵ After those thirty days elapsed, DOL sent a second notice to the companies who had not objected within the initial thirty days, and informed them that if they failed to object, their EEO-1 data would be released to Plaintiffs. *CIR*, 424 F. Supp. 3d at 774.

& Human Servs., No. 1:11-cv-01681-BAH (D.D.C. Nov. 15, 2011), ECF No. 6 (intervenors moved to intervene two weeks after the defendant filed its answer); Mot. to Intervene, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, No. 1:99-cv-01759-GK (D.D.C. Aug. 10, 1999), ECF Nos. 5–6 (intervenors moved to intervene within two weeks of the defendant filing its answer); Unopposed Mot. for Leave to Intervene, *In Def. of Animals v. Dep't of Agric.*, No. 1:02-cv-00557-RWR (D.D.C. June 13, 2002), ECF No. 7 (intervenor moved to intervene six weeks after the defendant filed its answer and six months before summary judgment briefing).

Third parties that move to intervene in litigation concerning the application of Exemption 4 to agency records often do so as early as possible. Early intervention is critical because, in the third party's view, the agency “do[es] not adequately represent [its] interests” even if “the intervenor and the government entity involved in the litigation frequently may agree on a legal position or course of action.” *100Reporters LLC v. Dep't of Justice*, 307 F.R.D. 269, 279 (D.D.C. 2014) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)).

Accordingly, even when—unlike in this case—a third party does *not* receive notice of the potential disclosure of possible confidential commercial information

until litigation commences,⁶ it generally moves to intervene as early as possible in order to assert its interests in a timely manner. *Compare, e.g., 100Reporters LLC*, 307 F.R.D. at 274 (“The DOJ did not notify Siemens . . . regarding 100Reporters’ FOIA request during the pendency of the proceedings before the agency. Instead, Siemens first became aware of the FOIA request when it learned of 100Reporters’ lawsuit[.]” (internal citations omitted)), *with* Mot. to Intervene by Siemens Aktiengesellschaft, *100Reporters LLC v. Dep’t of Justice*, No. 1:14-cv-01264-RC (D.D.C. Oct. 20, 2014), ECF No. 13 (demonstrating that Siemens moved to intervene within one week of the defendant filing its answer).

Here, Synopsys had ample notice of both Plaintiffs’ FOIA request and the instant litigation. *See supra* pp. 9–12; Pls.’ Opp’n at 7 (“Proposed Intervenor has been on notice of the litigation for at least eight months[.]”). Thus, Synopsys’s lament that it “should have been permitted to litigate the merits in the district court,” Opening Br. of Intervenor-Appellant Synopsys, Inc. (“Synopsys’s Br.”), at 46, ECF No. 5, is unconvincing. Synopsys *could* have easily moved to intervene at the outset of the case; it chose not to because, presumably, it determined that DOL

⁶ Executive Order 12,600 requires that “[w]henver a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency’s procedures shall require that the submitter be promptly notified.” EO 12,600, § 6.

adequately represented its interests and “there was no need” to do so. *Id.* at 48 (acknowledging that “DOL was defending nondisclosure” in the district court). That its initial judgment failed to generate the outcome it desired— withholding of the records—does not justify Synopsys’s belated intervention attempt after the district court’s Order. The Court should not allow third parties to stand idly by as agencies defend their interests throughout FOIA litigation, only to intervene *after* the district court orders agency records be disclosed.

Synopsys’s arguments also ignore the established law of this Circuit making clear that intervention should be denied once litigation has reached an advanced stage, *especially* post-judgment. CIR’s Br. at 26–28, 31–33. And this Circuit is by no means an outlier in prohibiting intervention after a final ruling. *See, e.g., United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986) (“[P]ost-judgment intervention . . . is generally disfavored because it usually creates delay and prejudice to existing parties[.]”); *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 115–16 (8th Cir. 1976) (agreeing with a district court’s “deni[al] of a] post-judgment motion to intervene as untimely, noting that intervention after entry of judgment should be permitted only in rare instances,” and explaining that the “general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner”); *Mich. Ass’n for Retarded Citizens v. Smith*,

657 F.2d 102, 105 (6th Cir. 1981) (holding that the district court did not abuse its discretion in denying labor union’s motion to intervene which came twenty months after commencement of litigation and one month after entry of district court’s opinion); *see also* 7C Charles Alan Wright & Arthur R. Miller et al., Federal Practice & Procedure § 1916 (3d ed. 2007) (“There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant. Motions for intervention after judgment ordinarily fail to meet this exacting standard and are denied.”).

Because the law of this Circuit—supported by the decisions of other federal courts of appeals across the country—counsels against late intervention, this Court should hold that the district court below properly denied Synopsys’s motion for intervention to seek reconsideration of its Order, but abused its discretion by determining that Synopsys’s motion to intervene for the purpose of pursuing an appeal was timely.

III. Delays in obtaining access to agency records under FOIA—including delays caused by late intervention—contravene the Act and harm the public interest.

Despite FOIA’s mandate of prompt disclosure, FOIA requesters, including members of the news media, often face significant delays in obtaining records under the Act. As a 2016 congressional report entitled *FOIA Is Broken* recounted, “[t]he power of FOIA as a research and transparency tool is fading” because

“[e]xcessive delays . . . undermine its value.” *See, e.g.*, Staff of H.R. Comm. on Oversight and Gov’t Reform, 114th Cong., *FOIA Is Broken: A Report* ii (Jan. 2016), <https://perma.cc/5AMZ-Y9CA>. The report explained that some “[m]embers of the media” had completely abandoned FOIA as a newsgathering tool “because delays . . . made the request process wholly useless for reporting to the public.” Indeed, the report concludes that the “biggest barrier” to the efficacy of FOIA is delay. *Id.* at ii, 34–39.

Because delay, unfortunately, has become an endemic feature of the FOIA process, journalists and news organizations often must resort to litigation to secure a more timely response to their FOIA requests. *See, e.g.*, Ben Geman & National Journal, *The New York Times, Vice News Slam Obama Administration Over FOIA Delays*, *The Atlantic* (June 1, 2015), <https://perma.cc/J6EU-YV3H> (noting that *The New York Times* filed eight FOIA lawsuits in 2014 in response to “‘unacceptable delay’ by agencies served with records requests”); *see also CIR*, 424 F. Supp. 3d at 775 (noting that Plaintiffs initiated the instant suit after DOL’s “delay [in] issuing a final response”); *News Reporters Drive Growth in Media FOIA Litigation*, *The FOIA Project* (Jan. 9, 2017), <https://perma.cc/U7SB-MBA7>.

Permitting late intervention by third parties in FOIA litigation would exacerbate the delays that push journalists to litigate FOIA cases in the first place. This is because late, post-judgment intervention—by giving third parties a second

bite at the apple—requires courts to rule on the same issue again, and requires requesters to litigate appeals that would otherwise not be pursued. *See United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996) (explaining how “[p]ermitting the movants to enter this litigation” in order “to relitigate an issue that the [c]ourt already decided” “would prolong and complicate the case, to the detriment of those parties that have been part of the litigation from the outset” (citation omitted)).

The delays that post-judgment intervention cause are especially acute in FOIA cases because “information [obtained through FOIA] is often useful only if it is timely.” *Gilmore v. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (quoting H.R. Rep. No. 93-876 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271). And such delays prejudice journalists and news outlets that request public records, in particular, because “[t]he peculiar value of news is in the spreading of it while it is fresh[.]” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918); *see also Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”). For example, Plaintiffs seek diversity reports in order to report on a matter of pressing public concern: diversity within the workforce of federal contractors and within the technology sector.

Issues concerning diversity among employees of federal contractors are currently the subject of political discussion and debate. Late last year, then-President Trump issued an executive order prohibiting certain workplace diversity trainings at federal agencies and contractors. Melissa Block, *Agencies, Contractors Suspend Diversity Training To Avoid Violating Trump Order*, NPR (Oct. 30, 2020), <https://perma.cc/D79K-SPXM>. But President Biden has indicated that he would prioritize diversity and protections for protected classes employed by federal contractors, including, for example, by “barring federal contractors from anti-LGBTQ job discrimination.” David Crary & Elana Schor, *Biden plans swift moves to protect and advance LGBTQ rights*, Associated Press (Nov. 28, 2020), <https://bit.ly/33NDaDu>. The records Plaintiffs seek will help Plaintiffs inform the public about the diversity of certain federal contractors’ workforces, thereby informing the public’s evaluation of these proposed government policies.

Moreover, using anonymized statistics from the Center for Employment Equity at the University of Massachusetts-Amherst, CIR has reported specifically about the lack of diversity within the technology sector. *See, e.g.,* Sinduja Rangarajan, *Here’s the clearest picture of Silicon Valley’s diversity yet: It’s bad. But some companies are doing less bad*, Reveal (June 25, 2018), <https://perma.cc/NW6C-E4QB> (“Ten large technology companies in Silicon Valley did not employ a single black woman in 2016. Three had no black

employees at all. Six did not have a single female executive.”). Such reporting informs an ongoing public debate about the causes of and responses to the lack of representation of women, people of color, and other individuals from underrepresented demographics at technology companies. Indeed, recent news stories about the firing of Dr. Timnit Gebru, a former Google employee, have shed light on concerns about institutional racism and low retention rates of Black women in the technology industry. *See, e.g.*, James Clayton, *Timnit Gebru: Google and big tech are ‘institutionally racist’*, BBC (Dec. 14, 2020), <https://perma.cc/SWU8-LCXB>.

The records that Plaintiffs seek are key to their ability to provide the public with meaningful reporting about newsworthy subjects. The district court is therefore mistaken that Plaintiffs are not prejudiced by Synopsys’s late intervention because they “now have all other requested EEO-1 reports in their possession, so there is nothing stopping them from reporting on the other 35 federal contractors.” ER-FA5. Plaintiffs seek to report on the EEO-1 reports of the *widest* possible spectrum of technology companies to help the public assess issues concerning the diversity of federal contractors’ workforces and in the technology sector. Synopsys’s diversity reports are critical to that effort.

Further, the district court below erred in concluding that the delays posed by Synopsys’s intervention “would be similar to what it would have been had the

Government appealed the December 10, 2019 order itself.” *Id.* DOL’s decision not to appeal the district court’s judgment should have marked the end of the matter. Synopsys should not be allowed to prolong this litigation through intervention and an appeal to this Court.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the district court’s order denying in part Synopsys’s motion to intervene and reverse the district court’s order granting in part Synopsys’s motion to intervene.

Respectfully submitted,

/s/ Katie Townsend

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Dated: February 3, 2021
Washington, D.C.

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.

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including *The American Lawyer*, *The National Law Journal*, *New York Law Journal* and *Corporate Counsel*, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for example, has been published in northern California since 1877; *New York Law Journal* was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers

include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Atlantic Monthly Group LLC is the publisher of *The Atlantic* and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, *The Atlantic* continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

The Center for Public Integrity was founded in 1989 by Charles Lewis. We are one of the country's oldest and largest nonpartisan, nonprofit investigative news organizations and winner of the 2014 Pulitzer Prize for investigative journalism.

Dow Jones & Company is the world's leading provider of news and business information. Through *The Wall Street Journal*, *Barron's*, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps 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 Institute, Inc. is a non-profit digital media venture that produces *The Intercept*, a digital magazine focused on national security reporting. First Look Institute operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Freedom of the Press Foundation (FPF) is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including building privacy-preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam—together with the iconic USA TODAY—reach an estimated digital audience of 140 million each month.

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, based at 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 McClatchy Company, LLC is a publisher of iconic brands such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The Charlotte Observer*, *The (Raleigh) News & Observer*, and the *Fort Worth Star-Telegram*. McClatchy operates media companies in 30 U.S. markets in 16 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, California.

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.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

MPA – The Association of Magazine Media (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include 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 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.

National Journal Group LLC is the privately held publisher of *National Journal*. Founded in 1969, *National Journal*'s award-winning journalism covers political and public policy issues at the federal, state, and local levels, and its government affairs, advocacy communications, and policy research specialists serve government affairs professionals with the intelligence and tools they need to navigate the world of policy and politics.

National Newspaper Association is a 2,000-member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

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.

National Public Radio, Inc. (NPR) is a non-profit multimedia organization and the leading provider of non-commercial news, information, and entertainment programming to the American public. NPR's fact-based, independent journalism

helps the public stay on top of breaking news, follow the most critical stories of the day, and track complex issues over the long term. NPR reaches approximately 60 million people each week on broadcast radio, podcasts, NPR apps, NPR.org, and YouTube video content. NPR distributes its radio broadcasts through more than 1,000 non-commercial, independently operated radio stations, licensed to more than 260 NPR members and numerous other NPR-affiliated entities.

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

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

ProPublica is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

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.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

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.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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