No. 85656

District Court Case No. A-19-792978

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTHCARE SERVICES, INC.; UMR, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; AND HEALTH PLAN OF NEVADA, INC,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE,

Respondents,

and

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; AND CRUM STEFANKO AND JONES, LTD.,

Respondents/Real Parties in Interest.

MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Margaret A. McLetchie
Nevada Bar No. 10931
MCLETCHIE LAW
602 South Tenth Street
Las Vegas, NV 89101
(702) 728-5300
Counsel of Record for Amicus Curiae

Pursuant to NRAP 29(c), the Reporters Committee for Freedom of the Press (the "Reporters Committee") and 23 media organizations (collectively, "amici") move for leave to file the attached proposed brief of amici curiae in support of Part VI of the brief of respondents Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., and Crum, Stefanko & Jones, Ltd. d/b/a Ruby Crest Emergency Physicians (collectively, "TeamHealth").[1]

Lead amicus the Reporters Committee was founded by journalists and media lawyers in 1970, when the nation's press 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 Reporters Committee frequently serves as amicus curiae in cases that concern issues of importance to journalists and news media, including access to judicial records. *See, e.g.*, Brief of Amicus Curiae the Reporters Committee for Freedom of the Press in Support of Petition for Writ of Mandamus or Other Extraordinary Writ, *In Re Civil Beat Law Center For The Public Interest, Inc.*, No. 23-70023 (9th Cir. filed Feb. 7, 2023), https://perma.cc/7XL7-NT7M; Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 28 Media

[1] A disclosure statement for amici is included in the attached proposed amicus brief, pursuant to NRAP 26.1. A comprehensive list of amici is annexed hereto as Appendix A.

Organizations in Support of Plaintiffs-Appellees Seeking Affirmance, *Courthouse News Service v. Gabel*, No. 21-3098 (2d Cir. filed July 12, 2022), https://perma.cc/QD8N-KWL6. Additional proposed amici curiae are prominent news publishers and professional and trade groups. As members of the news media and other organizations that defend the rights of journalists, amici have a strong interest in ensuring that judicial records are accessible to members of the press and public, as guaranteed by the First Amendment, common law, and Nevada's Rules Governing Sealing and Redacting Court Records ("SRCR").

The proposed brief will aid the Court in resolving this case by providing a unique industry-wide perspective not currently represented by the parties on the importance of access to judicial records and proceedings for members of the press and, in turn, the public. The brief will further explain that the public has a strong presumptive right of access to the trial exhibits and transcripts at issue in this case, and that the presumption of access cannot be overcome because these specific records were made part of the public record in open court during the highly publicized trial.

Petitioners, Respondents and Real Parties in Interest have not consented to the filing of this brief.

For these reasons, amici respectfully request leave to file the attached proposed amici curiae brief in support of Part VI of the brief of respondents Fremont

Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., and Crum, Stefanko & Jones, Ltd. d/b/a Ruby Crest Emergency Physicians (collectively, "TeamHealth").

Dated: September 19, 2023

Respectfully submitted,

/s/ Margaret A. McLetchie

Margaret A. McLetchie
Nevada Bar No. 10931
MCLETCHIE LAW
602 South Tenth Street
Las Vegas, NV 89101
(702) 728-5300
maggie@nvlitigation.com
Counsel of Record for Amici Curiae

APPENDIX A: DESCRIPTION OF ADDITIONAL AMICI CURIAE

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.

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.

Courthouse News Service is a California-based legal news service that publishes a daily news website with a focus on politics and law. The news service also publishes daily reports on new civil actions and appellate rulings in both state and federal courts throughout the nation. Subscribers to the daily reports include law firms, universities, corporations, governmental institutions, and a wide range of media including newspapers, television stations and cable news services.

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 is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets, including stations KTNV and KMCC in Las Vegas. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Scripps News, as well as popular entertainment brands ION, Bounce, Grit, Laff and Court TV Mystery. The company is the longtime steward of the Scripps National Spelling Bee.

First Amendment Coalition ("FAC") 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. FAC advances this purpose by working to improve governmental compliance with state and federal open government laws. FAC's activities include free legal consultations on access to public records and First Amendment issues, educational programs, legislative oversight of California bills affecting access to government records and free speech,

and public advocacy, including extensive litigation and appellate work. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, activists, and ordinary citizens.

Forbes Media LLC is the publisher of Forbes Magazine as well as an array of investment newsletters and the leading business news website, Forbes.com. Forbes has been covering American and global business since 1917.

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 — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The Institute for Nonprofit News is a nonprofit charitable organization that provides education and business support services to our nonprofit member organizations and promotes the value and benefit of public service and investigative journalism.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation.

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 ("NFOIC") 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 Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

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 Nevada Open Government Coalition ("NOGC") is a nonprofit, nonpartisan organization supporting democratic government accountability through transparency. The diverse coalition educates, advocates, and empowers civic engagement in Nevada through increased access to government information processes, and public understanding of public records laws, open meetings laws, and other issues related to open government. NOGC also testifies and advocates on

NPRA and other transparency issues, including regarding law enforcement, in front of the Nevada Legislature and other governmental bodies.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper's circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

Pro Publica, Inc. ("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.

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 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 SERVICE

I, Margaret A. McLetchie, hereby certify that the foregoing Motion of the Reporters Committee for Freedom of the Press and 23 Media Organizations for Leave to File Amicus Curiae Brief in Support of Respondents was e-filed and served on all registered parties to the Supreme Court's electronic filing system, pursuant to NRCP 5(b)(2)(E) and 25(b).

Dated: September 19, 2023

/s/ Margaret A. McLetchie
Margaret A. McLetchie
Counsel of Record for Amicus Curiae

PROPOSED AMICUS BRIEF

No. 85656

District Court Case No. A-19-792978

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTH CARE SERVICES, INC.; UMR, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; AND HEALTH PLAN OF NEVADA, INC,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE,

Respondents,

and

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C.; AND CRUM STEFANKO AND JONES, LTD.,

Respondents/Real Parties in Interest.

[PROPOSED] BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENTS

Margaret A. McLetchie
Nevada Bar No. 10931
MCLETCHIE LAW
602 South Tenth Street
Las Vegas, NV 89101
(702) 728-5300
Counsel of Record for Amicus Curiae

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

Dow Jones & Company, Inc. ("Dow Jones") is an indirect subsidiary of News Corporation, a publicly held company. Ruby Newco, LLC, an indirect subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. News Preferred Holdings, Inc., a subsidiary of News Corporation, is the direct

parent of Ruby Newco, LLC. No publicly traded corporation currently owns ten percent or more of the stock of Dow Jones.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Forbes Media LLC is a privately owned company and no publicly held corporation owns 10% or more of its stock.

Freedom of the Press Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of the organization.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

Gray Media Group, Inc. is owned by Gray Television, Inc. Gray Television, Inc. is a publicly-traded corporation and no entity holds 10% or more of its equity.

The Institute for Nonprofit News is a 501(c)(3) non-stock corporation with no parent corporation.

News + Media Capital Group LLC is the parent of Las Vegas Review-Journal, Inc. No public corporation holds 10% or more of the stock of Las Vegas Review-Journal, Inc.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

The National Freedom of Information Coalition is a nonprofit organization that has not issued any shares or debt securities to the public, and has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The Nevada Open Government Coalition (NOGC) is a Nevada Nonprofit Corporation that has no parent company and issues no stock.

News/Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Pro Publica, Inc. (‘‘ProPublica’’) is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Seattle Times Company: The McClatchy Company, LLC owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

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

Amici are represented by McLetchie Law.

Dated: September 19, 2023

/s/ Margaret A. McLetchie
Margaret A. McLetchie
Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

IDENTITY AND INTERESTS OF AMICI CURIAE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF xi

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Judicial Proceedings and Records are Presumptively Public Under the Common Law and the First Amendment. 3

A. Openness Is a Bedrock Principle of Our Justice System. 3

B. The First Amendment Guarantees The Press, Including The Public, a Presumptive Right of Contemporaneous Access to Judicial Records. 4

C. The Common Law Guarantees the Press and Public a Presumptive Right of Access to Judicial Records. 7

D. The SRCR Guarantee the Press and Public a Presumptive Right of Access to Judicial Records 8

II. The Public's Presumptive Right of Access Attaches to the Trial Exhibits and Transcripts at Issue. 10

III. There Can Be No Compelling Interest in Sealing the Court Records at Issue Because They Were Made Public at Trial. 12

A. There Is No Compelling Interest in Sealing or Redacting Trial Exhibits Admitted into Evidence at a Public Trial and Transcripts of Testimony Given in Open Court. 12

B. Court Records that Have Become Public Cannot Properly Be Sealed or Redacted as Trade Secrets. 18

C. The Parties' Protective Order Is an Improper Basis for Sealing Already-Public Court Records. 22

D. There Is a Particularly Strong Public Interest in Access to the Court Records in this Case. 25

CONCLUSION 29
CERTIFICATE OF SERVICE 30
CERTIFICATE OF COMPLIANCE 31

TABLE OF AUTHORITIES

Page(s):

Cases:

Apple, Inc. v. Samsung Elecs. Co.,
No. 11-cv-1846, 2012 WL 4936595 (N.D. Cal. Oct. 17, 2012) 18

C & C Prod., Inc. v. Messick,
700 F.2d 635 (11th Cir. 1983).....13

Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.,
No. 09-290, 2013 WL 1336204 (W.D. Pa. Mar. 29, 2013) .....*passim*

Constand v. Cosby,
833 F.3d 405 (3d Cir. 2016).....12

Cooke v. Town of Colorado City,
No. 10-cv-8105, 2013 WL 3155411 (D. Ariz. June 20, 2013) 19

Courthouse News Serv. v. Planet,
947 F.3d 581 (9th Cir. 2020).....4, 6, 7

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975) 13

Dees v. Cnty. of San Diego,
302 F. Supp. 3d 1168 (S.D. Cal. 2017) 14

Dees v. Cnty. of San Diego,
960 F.3d 1145 (9th Cir. 2020).....14

Del Papa v. Steffen,
112 Nev. 369, 915 P.2d 245 (1996) 1, 4, 5

Fleming v. Escort, Inc.,
No. 09-cv-105, 2013 WL 1290418 (D. Idaho Mar. 27, 2013).....15, 19, 20

Flores v. U.S. Immigr. & Customs Enf't,
No. 18-cv-5139, 2018 WL 5825314 (W.D. Wash. Nov. 7, 2018).....13

Gambale v. Deutsche Bank AG,
377 F.3d 133 (2d Cir. 2004).....1, 12, 25

Globe Newspaper Co. v. Superior Court of Norfolk Cnty.,
457 U.S. 596 (1982) .....*passim*

Howard v. State,
128 Nev. 736, 291 P.3d 137 (2012) .....*passim*

In re Bard IVC Filters Prod. Liab. Litig.,
No. 15-mdl-2641, 2019 WL 186644 (D. Ariz. Jan. 14, 2019).....11, 14, 17, 23

In re Charlotte Observer,
921 F.2d 47 (4th Cir. 1990).....12

In re Cont'l Illinois Sec. Litig.,
732 F.2d 1302 (7th Cir. 1984).....23

In re Copley Press, Inc.,
518 F.3d 1022 (9th Cir. 2008).....13

In re Google Inc. Gmail Litig.,
No. 13-md-2430, 2014 WL 10537440 (N.D. Cal. Aug. 6, 2014).....14, 18, 20

In re Knight Pub. Co.,
743 F.2d 231 (4th Cir. 1984).....13

In re Nat'l Consumer Mortg.,
512 B.R. 639 (D. Nev. 2014).....14, 19, 23

JetSmarter Inc. v. Benson,
No. 17-62541-CIV-MORENO/SELTZER, 2018 WL 2709864
(S.D. Fla. Apr. 6, 2018).....21

Jones v. Nev. Comm'n on Jud. Discipline,
130 Nev. 99, 318 P.3d 1078 (2014) 9, 24

June Med. Servs., L.L.C. v. Phillips,
22 F.4th 512 (5th Cir. 2022).....12

Kamakana v. City & Cnty. of Honolulu,
447 F.3d 1172 (9th Cir. 2006).....8

L.V. Rev.-J. v. Eighth Jud. Dist. Ct.,
134 Nev. 40, 412 P.3d 23 (2018).....7, 12

Landmark Commc'ns, Inc. v. Virginia,
435 U.S. 829 (1978) 4

Level 3 Commc'ns, LLC v. Limelight Networks, Inc.,
611 F. Supp. 2d 572 (E.D. Va. 2009).....11, 17, 23

Oregonian Pub. Co. v. U.S. Dist. Ct. for Dist. of Or.,
920 F.2d 1462 (9th Cir. 1990).....6

Paddock v. Nev. Property 1, LLC,
No. 12A668412, 2017 WL 5496268 (Eighth Jud. Dist. Ct. Oct. 23, 2017).....5, 23

Pfizer, Inc. v. Teva Pharms. USA, Inc.,
No. 08-cv-1331, 2010 WL 2710566 (D.N.J. July 7, 2010).....15, 20

Phillips v. C.R. Bard, Inc.,
No. 12-cv-344, 2015 WL 3485039 (D. Nev. June 1, 2015).....14

Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for the Dist. Of Ariz.,
156 F.3d 940 (9th Cir. 1998).....6, 13

Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.,
464 U.S. 501 (1984) 3, 6, 21

Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.,
478 U.S. 1 (1986) 5, 6

Rambus, Inc. v. Infineon Techs. AG,
No. Civ.A. 3:00CV524, 2005 WL 1081337 (E.D. Va. May 6, 2005) 24

Saini v. Int'l Game Tech.,
434 F. Supp. 2d 913 (D. Nev. 2006) 21

Signature Mgmt. Team, LLC v. Doe,
876 F.3d 831 (6th Cir. 2017).....25

Stephens Media, LLC v. Eighth Jud. Dist. Ct.,
125 Nev. 849, 221 P.3d 1240 (2009) .....*passim*

Steve Dimopoulos, LLC v. Harris Law Firm, LLP,
No. A-21-828630-C, 2022 WL 18584792 (Nev. Dist. Ct. Oct. 10, 2022) .23, 24

The Fla. Star v. B.J.F.,
491 U.S. 524 (1989) 13

TriQuint Semiconductor, Inc. v. Avago Techs. Ltd.,
No. 09-cv-1531, 2012 WL 1432519 (D. Ariz. Apr. 25, 2012) 14, 19

Uncle B's Bakery, Inc. v. O'Rourke,
920 F. Supp. 1405 (N.D. Iowa 1996) 21

United States v. Carpentier,
526 F. Supp. 292 (E.D.N.Y. 1981).....17

United States v. Graham,
257 F.3d 143 (2d Cir. 2001) 11

United States v. Martin,
746 F.2d 964 (3d Cir. 1984) 11

United States v. Posner,
594 F. Supp. 930 (S.D. Fla. 1984).....17

Va. Dep't of State Police v. Wash. Post,
386 F.3d 567 (4th Cir. 2004) 12, 13

Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nev.,
798 F.2d 1289 (9th Cir. 1986) 20

Wash. Post v. Robinson,
935 F.2d 282 (D.C. Cir. 1991).....13

Weiss v. Allstate Ins. Co.,
No. 06-cv-3774, 2007 WL 2377119 (E.D. La. Aug. 16, 2007) 24

Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,
529 F. Supp. 866 (E.D. Pa. 1981).....21

Statutes

NRS 1.090 9

NRS 47.130(b) 27

NRS 600A.030(5) 20

SRCR 1(3) 8

SRCR 2(2) 11

SRCR 2(2)(b). 9

SRCR 3(4); ..... *passim*

SRCR 3(5) 10

SRCR 3(6), ... 9

Other Authorities

Abelson, *supra*; Paige Minemyer, *Moody's: The Industrywide Implications of UnitedHealth's Spat with TeamHealth*, Fierce Healthcare (Sept. 4, 2019) 28

Another Setback for UnitedHealthcare Insurance Company in Nevada Trial Just Days After $60 Million Punitive Verdict, Nat'l L. Rev. (Jan. 31, 2022) 27

Brendan Pierson, *UnitedHealthcare Underpaid TeamHealth Provide[r]s - Nevada Jury*, Reuters (Nov. 30, 2021) 26

Bruce Tomaso & Natalie Posgate, *UnitedHealthcare Hit with $60M Punitive Verdict in Nevada Suit by ER doctors — Updated*, Tex. Lawbook (Dec. 7, 2021) 26

Jeff Lagasse, *UnitedHealthcare Loses Another Lawsuit to TeamHealth in Billing Fight*, Healthcare Finance News (Dec. 5, 2022) 27

Ken Ritter, *Nevada Jury Says Health Insurer Shorted ER Docs*, L.V. Rev.-J. (Dec. 1, 2021) 26, 28

Leigh Page, *Income Could Plunge for Out-of-Network Doctors*, Medscape (Jan. 27, 2023) 28

Mark Vandevelde, *Bitter Medicine: Private Equity Moves into Hospital ERs*, Fin. Times (Dec. 20, 2022) 28

Paige Minemyer, *Florida Panel Hands TeamHealth a Win in Its Ongoing Battle with UnitedHealthcare*, Fierce Healthcare (Dec. 1, 2022) 27

Paige Minemyer, *Jury: UnitedHealth Must Pay TeamHealth $60M in Damages in Nevada Case*, Fierce Healthcare (Dec. 8, 2021) 26

Rebecca Pifer, *UnitedHealthcare to Appeal After Jury Awards TeamHealth $60M in Damages*, Healthcare Dive (Nov. 30, 2021).....26

Reed Abelson, *Doctors Accuse UnitedHealthcare of Stifling Competition*, N.Y. Times (Apr. 4, 2021) 27

Samantha Gerencir & Andrew Goldfarb, *In Nevada, Jury Finds Against United Healthcare's Efforts to Underpay for Emergency Medical Services and Generate Profits for Itself*, JD Supra (Nov. 21, 2023).....27, 28

Subrina Hudson, *United Healthcare Owes $60M to ER Doctors, Jury Rules*, L.V. Rev.-J. (Dec. 7, 2021).....26

Rules

NRCP 26(c)(1) 22

NRCP 77(b).....9

IDENTITY AND INTERESTS OF AMICI CURIAE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Pursuant to NRAP 29, the Reporters Committee for Freedom of the Press (the "Reporters Committee") has filed a motion for leave to file this amicus curiae brief in support of Part VI of the brief of respondents Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., and Crum, Stefanko & Jones, Ltd. d/b/a Ruby Crest Emergency Physicians (collectively, "TeamHealth").

Lead amicus the Reporters Committee is an unincorporated nonprofit association 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. Other amici are prominent news publishers, professional organizations, and trade groups. A supplemental statement of the identities and interests of amici is included as Appendix A to amici's motion for leave to file this amici curiae brief.

As news organizations and other organizations that defend the First Amendment and newsgathering rights of the news media, amici have a strong interest in ensuring that judicial records are accessible to members of the press and public, as guaranteed by the First Amendment, common law, and Nevada's Rules Governing Sealing and Redacting Court Records ("SRCR").

SUMMARY OF ARGUMENT

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion). For this reason, press and public access to judicial proceedings and records has long been recognized as a fundamental component of our judicial system—one necessary to ensure both fairness and the appearance of fairness that is so important to public trust in the judicial process, particularly in the criminal context. *Id.* at 567–74.

The First Amendment, common law, and SRCR guarantee the press and public a presumptive right to inspect judicial records, which cannot be overcome absent compelling interests necessitating closure. *See id.*; *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 249 (1996); SRCR 1(3). And there can be no compelling interest in sealing judicial records that have already become public—regardless of whether those records were subject to a protective order or contain alleged trade secrets. In such cases, "[t]he genie is out of the bottle," and courts "have not the means to put the genie back." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004).

Here, Petitioners (collectively, "United") seek to retroactively seal already-public trial exhibits and transcripts, claiming they are trade secrets and subject to the

parties' stipulated protective order. (*See generally* Petition for Writ of Mandamus ("Petition").) As the trial court correctly recognized in denying United's motion to seal, these records have already become public and cannot now, consistent with the public's right of access, be sealed. (15 PA 3665-66.)[1] The exhibits were admitted into evidence without being sealed and the transcripts consist of testimony given in open court—all at a well-attended, high-profile trial that was livestreamed and reported on extensively in the press. (*See* 1 PA 52–68; 2 PA 340; 12 PA 2800, 2988.) Even if the exhibits and transcripts had contained confidential information, that information has long since been made public. Although the public nature of the exhibits and testimony should resolve this case, it is worth noting the public's and the press's interest in access to these records is significant, as the proceedings below involved the (often-obscure) workings of the U.S. health insurance system and resulted in a nearly $63 million verdict against one of the nation's largest health insurers.

For the reasons herein, amici respectfully urge the Court to deny the Petition for Writ of Mandamus.

[1] Appendix citations are formatted as follows: ([Vol.] [Appendix] [Page(s)]). Thus, (15 PA 3665-66) corresponds to Volume 15 of Petitioner's Appendix, pp. 3665-66.

ARGUMENT

I. Judicial Proceedings and Records are Presumptively Public Under the Common Law and the First Amendment.

A. Openness Is a Bedrock Principle of Our Justice System.

"Openness and transparency are the cornerstones of an effective, functioning judicial system." *Howard v. State*, 128 Nev. 736, 740, 291 P.3d 137, 139 (2012) (quoting *Richmond Newspapers*, 448 U.S. at 573). "Safeguarding those cornerstones requires public access not only to judicial proceedings but also to an equally important aspect of the judicial process—judicial records and documents." *Id.*

Said to predate the Constitution itself, the public's right to observe judicial proceedings and inspect judicial records is "an indispensable attribute" of our judicial system, *Richmond Newspapers*, 448 U.S. at 569, and one "firmly rooted in American jurisprudence," *Stephens Media, LLC v. Eighth Jud. Dist. Ct.*, 125 Nev. 849, 859, 221 P.3d 1240, 1247 (2009).

Openness serves critically important values. It acts as "an effective restraint on possible abuse of judicial power," *Richmond Newspapers*, 448 U.S. at 596 (citation and internal quotation marks omitted), and "gives assurance that established procedures are being followed and that deviations will become known," *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984). "Openness promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding,

distrust, and disrespect for the courts." *Steffen*, 915 P.2d at 249 (citing *Richmond Newspapers*, 448 U.S. at 569). Access informs the public about "[t]he operations of the courts and the judicial conduct of judges," which "are matters of utmost public concern." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

Members of the press, who serve "as a proxy for the public" when they report on newsworthy court cases, *Stephens Media*, 221 P.3d at 1248, rely on contemporaneous access to court records and proceedings to help "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court of Norfolk Cnty.*, 457 U.S. 596, 606 (1982). Timely access to judicial records is essential if reporting is "to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation's court systems." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020). When journalists are denied timely access to court records, the public loses.

B. The First Amendment Guarantees the Press, Including the Public, a Presumptive Right of Contemporaneous Access to Judicial Records.

The right of "public access to judicial records and documents stems from three sources: constitutional law, statutory law, and common law." *Howard*, 291 P.3d at 140.

First, as a matter of constitutional law, courts look to two complementary and related considerations in determining whether the qualified First Amendment right of access attaches to a proceeding or document. *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986). These are "experience"—"whether the place and process have historically been open to the press and general public"—and "logic"—"whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

This Court has recognized a First Amendment right of access to civil proceedings, *Steffen*, 915 P.2d at 248 (citing *Richmond Newspapers*, 448 U.S. at 580 n.17), and to judicial records in criminal proceedings, *Stephens Media*, 221 P.3d at 1245. Although this Court has yet to expressly hold that the constitutional access right attaches to judicial records in civil cases, the reasoning of its prior decisions fully applies to such records—access to which "is grounded in logic and plays an integral role in the administration of justice" by "promot[ing] public scrutiny of the judicial process." *Id.*, 221 P.3d at 1248. Moreover, Nevada trial courts have squarely recognized application of the constitutional right of access to judicial records in the civil context. *See Paddock v. Nev. Property 1, LLC*, No. 12A668412, 2017 WL 5496268, at *3 (Eighth Jud. Dist. Ct. Oct. 23, 2017) ("[t]he First Amendment . . . protection extends to public records, i.e. those in the court file" in a civil case). So

holding is in keeping with a "nationwide consensus," including "every [federal court of appeals] to consider the issue." *Planet*, 947 F.3d at 594.

Where the First Amendment right of access applies, closure or sealing is permissible "only if the district court identifies a countervailing interest to public access and demonstrates, by specific findings, that closure is necessary and narrowly tailored to serve a higher interest." *Stephens Media*, 221 P.3d at 1245. Procedurally, the First Amendment also requires that "(1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections," including sufficient notice; "and (2) the reasons supporting closure must be articulated in findings" that "include a discussion of the interests at stake, the applicable constitutional principles and the reasons for rejecting alternatives, if any, to closure." *Oregonian Pub. Co. v. U.S. Dist. Ct. for Dist. of Or.*, 920 F.2d 1462, 1466 (9th Cir. 1990) (citations omitted); *see also Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for the Dist. Of Ariz.*, 156 F.3d 940, 949 (9th Cir. 1998) ("[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible."). The findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510; *see also Press-Enterprise II*, 478 U.S. at 10. Because "a necessary corollary of the right to access is a right to

timely access," even temporary closures must comport with these rigorous requirements. *Planet*, 947 F.3d at 594–95.

Adherence to the constitutional requirement that courts make sealing decisions "on a case-by-case" basis is essential to "ensur[ing] that the constitutional right of the press and public to gain access to" judicial records and proceedings "will not be restricted except where necessary. . . " *Globe Newspaper Co*., 457 U.S. at 607–08, 609 (invalidating as unconstitutional because it did not provide for case-by-case analysis a state law that mandated closure of proceedings during the testimony of minors who were victims of sexual abuse). Here, as discussed below, there is no compelling interest in sealing information that has become public. *See L.V. Rev.-J. v. Eighth Jud. Dist. Ct.*, 134 Nev. 40, 45, 412 P.3d 23, 27 (2018).

C. The Common Law Guarantees the Press and Public a Presumptive Right of Access to Judicial Records.

In addition to the presumptive right of access guaranteed by the First Amendment, the common law separately provides for the public a presumptive "right to inspect and copy public records, including judicial records and documents." *Howard*, 291 P.3d at 141 (citing *Warner Commc'ns, Inc*., 435 U.S. at 597). The common law right applies to a broad range of judicial records—*i.e.*, "records and documents filed in [a] court." *Id.* at 142 (applying presumption to "[a] motion and all documents related to the motion").

Under the common law, courts begin with an "acute awareness of the presumption favoring public access to judicial records and documents." *Id.* at 141. "[T]his presumption may be abridged only where the public right of access is outweighed by a significant competing interest," and where "the party seeking to seal a record or document carries the burden of demonstrating sufficient grounds for denying access." *Id.* at 142. Procedurally, the proponent of closure must file and serve a motion that describes the requested sealing, the basis for the request, the duration of the proposed closure, and why less restrictive alternatives are insufficient. *Id.* at 143.

If the court finds a compelling reason to seal or redact judicial records, it must "articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (internal quotation marks and citation omitted). As under the First Amendment, courts must make particularized, case-by-case sealing decisions. *Id.*

D. The SRCR Guarantee the Press and Public a Presumptive Right of Access to Judicial Records.

Consistent with the requirements of the First Amendment, the SRCR codify the presumption of access applicable in civil matters, guaranteeing that "[a]ll court records in civil actions are available to the public, except as otherwise provided in these rules or by statute." SRCR 1(3); *see also Howard*, 291 P.3d at 143 (stating, with respect to the SRCR, "[w]e take direction not only from the federal courts but

also our own rules"); NRS 1.090 ("[t]he sitting of every court of justice shall be public except as otherwise provided by law[.]"); NRCP 77(b) ("[e]very trial on the merits must be conducted in open court[.]").

The SRCR define "court record" broadly to mean "[a]ny document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding" and "[a]ny index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding." SRCR 2(2)(b).

Under the SRCR, a court may not seal or redact a court record unless it first "makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record." SRCR 3(4); *see also Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 109, 318 P.3d 1078, 1085 (2014) (applying this rule); *Howard*, 291 P.3d at 143 (same). Such determinations *must* be made by the court; "the parties' agreement alone does not constitute a sufficient basis for the court to seal or redact court records." SRCR 3(4). Courts "may," but need not, seal records where a compelling interest in closure is found. *Id.* If a court determines that access restrictions are justified by an overriding, compelling interest, "the court shall use the least restrictive means and duration" possible, SRCR 3(6), and may not seal an

entire record "when reasonable redaction will adequately resolve the issues," SRCR 3(5)(b).

Although the SRCR offer examples of compelling interests in closure, including "protect[ing] intellectual proprietary or property interests such as trade secrets" and "further[ing] . . . a protective order," these are not categorical exclusions. SRCR 3(4)(g). Rather, courts must weigh these interests on a "specific" case-by-case basis. SRCR 3(4). Any contrary interpretation of the SRCR as providing for automatic, categorical sealing of court records would violate the First Amendment. As the U.S. Supreme Court has made clear, even if there is a compelling interest that could frequently justify sealing a certain type of information, the Constitution does not support "a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." *Globe Newspaper Co.*, 457 U.S. at 607–08; *see also Stephens Media*, 221 P.3d at 1249 ("the more appropriate approach is to apply a balancing test on a case-by-case basis.").

II. The Public's Presumptive Right of Access Attaches to the Trial Exhibits and Transcripts at Issue.

The strong, presumptive right of access to court records indisputably attaches to the documents at issue in this case: exhibits admitted into evidence at trial and transcripts of testimony given at trial. Indeed, United appears to recognize that these

records are presumptively public in the first instance, even as it incorrectly argues that presumption has been overcome. (*See* Petition at 30–31.)

These documents plainly fit the SRCR's definition of a "court record" as "[a]ny . . . exhibit" or "official record of [] proceedings" created or maintained by a court in connection with a judicial proceeding. SRCR 2(2). Under the First Amendment and common law, too, "[c]ase law clearly recognizes that transcripts of court proceedings" as well as "exhibits presented in open court constitute judicial records for purposes of the public right of access," including "exhibits that are not openly displayed or discussed in court, but are admitted into evidence." *In re Bard IVC Filters Prod. Liab. Litig.*, No. 15-mdl-2641, 2019 WL 186644, at *2–3 & n.3 (D. Ariz. Jan. 14, 2019); *see also, e.g.*, *Warner Commc'ns*, 435 U.S. at 599 (assuming trial exhibits were subject to common law right of access); *United States v. Graham*, 257 F.3d 143, 153 (2d Cir. 2001) (trial exhibits); *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984) (same); *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. 09-290, 2013 WL 1336204, at *6 (W.D. Pa. Mar. 29, 2013) (trial transcripts and exhibits); *Level 3 Commc'ns, LLC v. Limelight Networks, Inc*., 611 F. Supp. 2d 572, 589 (E.D. Va. 2009) ("The First Amendment public right of access to these exhibits sprang into existence upon their being offered into evidence for the jury's consideration at trial[.]").

III. There Can Be No Compelling Interest in Sealing the Court Records at Issue Because They Were Made Public at Trial.

Because the presumptive right of access attaches to the court records at issue, sealing or redacting them is permissible only on the basis of case-specific findings that a compelling interest necessitates closure. There can be no such interest here. These records have *already* been placed in the public domain. That the records were subject to the parties' protective order, or that United alleges they contain trade secrets, cannot change this result.

A. There Is No Compelling Interest in Sealing or Redacting Trial Exhibits Admitted into Evidence at a Public Trial and Transcripts of Testimony Given in Open Court.

There can be no countervailing—let alone compelling—interest served by sealing or redacting information that is already public. "Once announced to the world, the information lost its secret characteristic" and cannot properly be sealed. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 580 (4th Cir. 2004) (quoting *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990)); *see also L.V. Rev.-J.*, 412 P.3d at 27 (finding privacy interests failed to justify bar on disseminating record that was "already in the public domain"). Courts do not "have the power, even were [they] of the mind to use it if [they] had, to make what has thus become public private again." *Gambale*, 377 F.3d at 144; *see also June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 520–21 (5th Cir. 2022) ("Publicly available information cannot be sealed."); *Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) ("public disclosure

cannot be undone"); *In re Copley Press, Inc*., 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."); *Wash. Post v. Robinson*, 935 F.2d 282, 291–92 (D.C. Cir. 1991); *C & C Prod., Inc. v. Messick*, 700 F.2d 635, 637 (11th Cir. 1983). Simply put, "if a document becomes part of the public record, the public has access to it, and the press may report its contents." *Phoenix Newspapers*, 156 F.3d at 949; *see also The Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989) ("Once government has placed such information in the public domain, 'reliance must rest upon the judgment of those who decide what to publish or broadcast.'") (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975)).

For that reason, courts routinely deny sealing requests when "the public has already had access to the information contained in the records." *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (citing *Warner Commc'ns, Inc.*, 435 U.S. at 597–608); *see, e.g.*, *Va. Dep't of State Police*, 386 F.3d at 579–80 (affirming unsealing of "information [that] has already become a matter of public knowledge"); *Robinson*, 935 F.2d at 291–92 (holding that information that "was already within the public knowledge" should not be sealed); *Flores v. U.S. Immigr. & Customs Enf't*, No. 18-cv-5139, 2018 WL 5825314, at *3 (W.D. Wash. Nov. 7, 2018) (rejecting sealing of publicly filed documents where "there is no longer a *presumption* to public

access to the documents [d]efendants request the Court seal—there *is* public access").

And courts have rejected, specifically, requests to seal exhibits that have been admitted into evidence without seal at trial and transcripts of testimony given in open court. *See, e.g.*, *In re Bard IVC Filters Prod. Liab. Litig.*, 2019 WL 186644, at *2 n.3; *In re Nat'l Consumer Mortg.*, 512 B.R. 639, 642 (D. Nev. 2014) (unsealing exhibit that "was admitted into evidence before the jury in open court during the trial"); *Dees v. Cnty. of San Diego*, 302 F. Supp. 3d 1168, 1173 n.1 (S.D. Cal. 2017), *aff'd in part, rev'd in part on other grounds*, 960 F.3d 1145 (9th Cir. 2020) (denying motion to seal trial transcripts and exhibits where "information in the documents became part of the public record during trial"); *Phillips v. C.R. Bard, Inc.*, No. 12-cv-344, 2015 WL 3485039, at *2 (D. Nev. June 1, 2015) (denying sealing request where "[d]efendants have waived the issue because [d]efendants made no motion to seal the exhibits or testimony at the public trial."); *In re Google Inc. Gmail Litig.*, No. 13-md-2430, 2014 WL 10537440, at *6 (N.D. Cal. Aug. 6, 2014) ("the Court will not permit an ex post facto redaction of statements made in open court in the transcript"); *TriQuint Semiconductor, Inc. v. Avago Techs. Ltd.*, No. 09-cv-1531, 2012 WL 1432519, at *7 (D. Ariz. Apr. 25, 2012) (denying request to redact trial transcript and noting that "whatever interests the party seeking to seal court records may have at one time claimed in maintaining the confidentiality of the information

disclosed in open court would appear to have already given way to the public's interest of understanding the judicial process" (internal quotation marks and citation omitted)); *Carnegie Mellon Univ.*, 2013 WL 1336204, at *5 (denying request to seal trial exhibits, and noting that "[p]revious public disclosure of information in open court . . . operates to waive any right to seal judicial records containing such information"); *Fleming v. Escort, Inc.*, No. 09-cv-105, 2013 WL 1290418, at *4 (D. Idaho Mar. 27, 2013); *Pfizer, Inc. v. Teva Pharms. USA, Inc*., No. 08-cv-1331, 2010 WL 2710566, at *4 (D.N.J. July 7, 2010) (rejecting parties' "*ex post facto* application to seal" trial transcript, as "[o]nce a hearing is conducted in open court, information placed on the record is just that: information that is *on the record*").

Here, as the trial court correctly found, there can be no compelling interest in sealing the already-public trial exhibits and transcripts at issue. (15 PA 3665–66.) The disputed exhibits were all admitted into evidence at trial without seal and the testimony at issue was given in open court, as United admits. (*See* Petition at 14–15, 22–23.) The courtroom was open and members of the press were present. (*See* 2 PA 340 (court stating, "I would like to point out that there is media in the room").) Indeed, two media organizations received judicial approval to broadcast the proceedings (1 PA 52–68), and the court publicly livestreamed the trial, with attendance at times nearing the BlueJeans platform's 200-person capacity. (*See* 12 PA 2988 (chart of daily online attendance at trial); *id.* at 2800 (court stating, "[w]e

have 198 people on BlueJeans. The capacity is 200, just to let you know.").) The trial exhibits were discussed and testified about extensively and shown to the jury. (*See, e.g.*, 5 PA 1040–61 (testimony of John Haben discussing, in detail, exhibits DX5499 and DX4569, now subject to sealing motion); *id.* at 1070–109 (same, as to P073, P096, P473, and P025).) Accordingly, the trial court properly denied United's motion to seal "[a]ny trial exhibit that a party used or referred to during the parties' opening or closing statements" and "[a]ny page of any trial exhibit that was shown to the jury." (15 PA 3665–66.)

Contrary to United's argument that this ruling was based on the trial court's "own personal standards" (Petition at 38), the trial court correctly applied the aforementioned standards used by courts nationwide—and required by the First Amendment and common law—in denying motions to retroactively seal public trial exhibits and transcripts. The trial court also correctly applied the SRCR, which prohibit courts from sealing records absent case-specific "compelling privacy or safety interests that outweigh the public interest in access," SRCR 3(4), because, as discussed, there is no compelling interest that would justify sealing already-public records. As the trial court aptly stated, "if it gets admitted it's in the public domain," and must stay there. (1 PA 240.)

United also argues that "the public has no meaningful interest in" access to the portions of the trial exhibits that "w[ere] never presented to the jury or discussed

in front of the jury." (Petition at 35–36.) But these pages, too, are public and must remain so: exhibits admitted into evidence without seal "become, 'simply by virtue of that event,' judicial records subject to the public right of access." *In re Bard IVC Filters Prod. Liab. Litig.*, 2019 WL 186644, at *3 (quoting *Level 3 Commc'ns*, 611 F. Supp. 2d at 589); *see also, e.g.*, *Carnegie Mellon Univ.*, 2013 WL 1336204, at *5 (denying sealing request where, "[e]ven if the materials were not shown for the jury's consideration, the slides remain part of the judicial trial record"); *United States v. Posner*, 594 F. Supp. 930, 935 (S.D. Fla. 1984) (rejecting distinction between parts of documents "testified to at the trial and those that were only offered into evidence" since "[o]nce . . . admitted into evidence, they became part of the public record and entered the public domain"); *United States v. Carpentier*, 526 F. Supp. 292, 295 (E.D.N.Y. 1981) ("that the tapes were not played at the hearing . . . is not dispositive in light of the fact that, by the admission of the tapes into evidence without seal, they became part of the public record").

Moreover, the jury had access to—and was instructed to consider—*all* admitted exhibits during its deliberations. (*See* 12 PA 2787 (court instructing jury, "[t]he evidence which you are to consider in this case consists of the testimony of the witnesses [and] the exhibits"), 2797 (court instructing jury, "[d]uring your deliberations you will have all of the exhibits which were admitted into evidence")); *cf. In re Bard IVC Filters Prod. Liab. Litig.*, 2019 WL 186644, at *3 (noting that

"the jurors . . . were specifically instructed that the evidence they were to consider included the exhibits admitted into evidence," which "were provided to the jurors in the jury room during deliberations . . . including information not displayed or discussed in the courtroom".) Thus, the public has not just a meaningful, but a powerful interest, in access to those records.

In sum, this Court should reject United's attempt to retroactively seal trial exhibits and transcripts that have long since entered the public domain. Any other result would severely undermine the right of access and burden courts with the impossible task of making already-public documents secret again.

B. Court Records that Have Become Public Cannot Properly Be Sealed or Redacted as Trade Secrets.

United argues that, despite the disputed records' use in open court at trial, they should now be sealed or redacted because they contain trade secrets. (Petition at 43–62.) Yet these records are not secret, for the reasons detailed above, and there can be no compelling interest in attempting to make them secret now.

Courts have rejected similar attempts to seal judicial records containing alleged trade secrets that have been publicly docketed or disclosed in open court. In such cases, "what once may have been trade secret no longer will be," erasing any compelling interest in sealing. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846, 2012 WL 4936595, at *5 (N.D. Cal. Oct. 17, 2012); *see also In re Google Inc. Gmail Litig.*, 2014 WL 10537440, at *5 ("material that has been publicly disclosed cannot

be protected" as trade secret); *In re Nat'l Consumer Mortg.*, 512 B.R. at 642 (granting motion to unseal exhibit containing alleged trade secrets which "already has been publicly released" at trial); *Carnegie Mellon Univ.*, 2013 WL 1336204, at *8 ("Even if this information once constituted 'trade secrets,' the public disclosure . . . does not allow it to be defined as such currently."); *Cooke v. Town of Colorado City*, No. 10-cv-8105, 2013 WL 3155411, at *2 (D. Ariz. June 20, 2013) (as to "previously publicly disclosed records," "there can be no good cause or compelling reasons to keep such non-existent 'secrets'"); *Fleming*, 2013 WL 1290418, at *4 (denying motion to redact alleged trade secrets in transcript where "the matters were discussed on the record during the public trial"); *TriQuint Semiconductor, Inc.*, 2012 WL 1432519, at *7 (same, and noting that "the parties have already voluntarily 'let the cat out of the bag,' and this Court is unwilling, let alone able, to undo what is already done").

Here, whether or not the records at issue contained genuine trade secrets in the first instance—a largely erroneous claim, as the trial court held, given their age and publicly available contents (15 PA 3665–67)—they lost any claim to protectable trade secret status when they became public at trial. The exhibits were not sealed, the courtroom was open, and the proceedings were livestreamed. (12 PA 2800, 2988.) As United admits, its "trade secrets . . . can only remain protected if sealed." (Petition at 45.) Yet United also states that it "did not move to close the courtroom

whenever a confidential document was raised," however much it may now wish it had. (*Id.* at 42); *cf. Pfizer, Inc*., 2010 WL 2710566, at *4 ("Of course, should the parties feel that disclosure of non-public, trade secret information cannot be avoided, they should raise the need for closure when it arises, not after disclosure has occurred."); *In re Google Inc. Gmail Litig.*, 2014 WL 10537440, at *6 (rejecting sealing of alleged trade secrets in trial transcript where "the parties did not request closure of the courtroom"); *Fleming*, 2013 WL 1290418, at *4 (same). Nor was "sensitive information [] 'blurted out' at trial" inadvertently; United "purposely introduced the financial [and other allegedly secret] information as part of its trial strategy." *Fleming*, 2013 WL 1290418, at *4. In short, there can be no compelling interest in retroactively sealing these records—alleged trade secrets or not.

None of the cases United cites (*see* Petition at 43–45) are to the contrary. They involve information that has in fact been kept confidential—a core element of trade-secret law (*see* NRS 600A.030(5))—and they either do not arise in the court-access context, or do not stand for the proposition that publicly disclosed records containing alleged trade secrets can later be sealed. *See, e.g.*, *Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nev.*, 798 F.2d 1289, 1295 (9th Cir. 1986) (reversing order denying press access to trial exhibits, and listing trade secrets as example of interest in closure, in case that did not involve alleged trade secrets); *JetSmarter Inc. v. Benson*, No. 17-62541-CIV-MORENO/SELTZER, 2018 WL 2709864 , at *8 (S.D. Fla. Apr. 6,

2018) (addressing employer-employee confidentiality agreement); *Saini v. Int'l Game Tech*., 434 F. Supp. 2d 913, 921 (D. Nev. 2006) (same); *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405, 1438 (N.D. Iowa 1996) (same); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co*., 529 F. Supp. 866, 898, 905–07 (E.D. Pa. 1981) (finding trial transcripts and exhibits are presumptively public and granting access to records "introduced, discussed, and considered at great length" at hearings that "w[ere] open to the public," but not to unfiled discovery or to raw economic data submitted under seal which "[wa]s not material referred to at a hearing").

United also misreads the SRCR, arguing that "under SRCR 3(4)(g), if information is a trade secret, then it must be sealed even if it is part of a court record." (Petition at 43.) To the contrary, the public's presumptive right of access applies to all judicial records and can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510 (addressing constitutional access right); *see also Howard*, 291 P.3d at 142 ("[T]his presumption may be abridged only where the public right of access is outweighed by a significant competing interest," under common law). This analysis must be conducted case-by-case. Although the presence of genuine trade secrets might justify redactions in some cases, such closure cannot be, consistent with the Constitution or common law,

mandatory or automatic. *See, e.g., Globe Newspaper Co*., 457 U.S. at 607–08; *see also Stephens Media*, 221 P.3d at 1249.

The SRCR cannot abridge the public's constitutional right of access. Nor, under a correct reading of the rules, do they purport to. Instead, the SRCR provide that "protect[ing] . . . trade secrets" can be a compelling interest in closure but require courts to weigh these interests on a "specific" case-by-case basis, and state that they "may," but need not, seal records where a compelling interest in closure is found. SRCR 3(4). In these specific circumstances, where the court records at issue have all been placed in the public record, there can be no compelling interest in sealing them on the grounds that they contain trade secrets.

C. The Parties' Protective Order Is an Improper Basis for Sealing Already-Public Court Records.

United also argues that the records at issue should be sealed because they are subject to the parties' protective order. (Petition at 33–38.) The Court should reject this attempt to blur the important distinction between court records and unfiled discovery materials. While a trial court may enter a protective order applicable to unfiled discovery based on a finding of "good cause," NRCP 26(c)(1), once discovery becomes part of the court record, the stronger presumption of access attaches, requiring "compelling privacy or safety interests that outweigh the public interest in access" to seal them, not "the parties' agreement alone," *Steve Dimopoulos, LLC v. Harris Law Firm, LLP*, No. A-21-828630-C, 2022 WL

18584792, at *1 (Nev. Dist. Ct. Oct. 10, 2022) (citations omitted); *see Kamakana*, 447 F.3d at 1179 ("The 'compelling reasons' standard is invoked even if the dispositive motion, or its attachments, were previously filed under seal or protective order."); *In re Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1312 (7th Cir. 1984); *Paddock*, 2017 WL 5496268, at *3; *see also In re Nat'l Consumer Mortg., LLC*, 512 B.R. at 641 (cited in Petition at 16, 25, 37) ("while discovery may have proceeded pursuant to a protective order, this matter has now been tried before a jury to a verdict in open court" and applying "the strong presumption" of access);

Once discovery materials have been filed or made public at trial, including through their use as unsealed trial exhibits, no countervailing compelling interest can overcome the strong presumption of public access. *See In re Cont'l Illinois Sec. Litig.*, 732 F.2d at 1312 (finding that the presumption of access applicable to a report "admitted into evidence while under a protective order" was not overcome, noting "[t]here is little interest in the confidentiality of documents which have been publicly discussed by their custodian"); *In re Bard IVC Filters Prod. Liab. Litig.*, 2019 WL 186644, at *4 ("even in cases where protective orders arguably could apply to trial exhibits, courts hold that admission of the exhibits into evidence waives coverage of the protective order"); *Level 3 Commc'ns*, 611 F. Supp. 2d at 589 (finding right of access to exhibits "entered by courts into evidence in the course of hearings or trial, whatever the materials' origins or pre-trial confidentiality status" under a protective

order was not overcome); *Weiss v. Allstate Ins. Co*., No. 06-cv-3774, 2007 WL 2377119, at *3 (E.D. La. Aug. 16, 2007) ("admission into evidence of confidential documents precludes an *ex post* invocation of confidentiality provisions set forth in a previously entered protective order"); *Rambus, Inc. v. Infineon Techs. AG*, No. Civ.A. 3:00CV524, 2005 WL 1081337, at *3 (E.D. Va. May 6, 2005) (finding that unlike "previously sealed documents," "documents that already had been displayed in open court" were "effectively stripped . . . of any protection under the protection order"); *Jones*, 318 P.3d at 1085.

United notes that the SRCR lists "further[ing] . . . a protective order" as an interest that can support closure and argues that the records remain subject to the parties' protective order. (Petition at 33 (quoting SRCR 3(4)(b)).) However, again, the SRCR also requires courts to assess the interests in sealing on a "specific" case-by-case basis and not based on the parties' private agreements. SRCR 3(4); *see also Steve Dimopoulos, LLC*, 2022 WL 18584792, at *1 (denying motion to seal court records under SRCR where party failed to show compelling interest in sealing "aside from the parties' Confidentiality Agreement and Protective Order"). The First Amendment, too, requires a case-specific analysis and requires courts to reject mandatory, categorical closure rules. *See Globe Newspaper Co*., 457 U.S. at 607–08. Here, the trial court correctly followed these rules and—consistent with the decisions of other courts nationwide—correctly rejected United's motion to seal

exhibits subject to a protective order *after* they were admitted into evidence unsealed at trial. (15 PA 3665–66.) "[H]owever confidential" these documents "may have been beforehand, subsequent to publication [they were] confidential no longer." *Gambale*, 377 F.3d at 144.[2] United's arguments to the contrary are incorrect as a matter of law and, if accepted by this Court, would permit private litigants to sign away the public's right of access to court records through stipulated protective orders.

D. There Is a Particularly Strong Public Interest in Access to the Court Records in this Case.

Separate and apart from the black letter law set forth above instructing that an exhibit admitted in open court cannot thereafter be sealed, there is a strong public interest in access to the court records at issue. *See* SRCR 3(4) (directing courts to consider "the public interest in access to the court record"); *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017) ("the greater the public interest in the

[2] United also misconstrues the protective order itself. (Petition at 33–38.) The protective order does not—and could not—require the trial court to seal trial exhibits containing material designated as confidential in discovery. Instead, the protective order requires the parties to file a sealing motion before seeking to introduce documents subject to the protective order at trial, and provides that the trial court "may take such measures, as it deems appropriate, to protect the claimed confidential nature of the document or information sought to be admitted" when ruling on such motions. (1 PA 15.) Nowhere does the protective order state the trial court must later seal exhibits admitted into evidence at trial. And of course, such an order would be wholly inconsistent with the public's right of access and this Court's authority.

litigation's subject matter, the greater the showing necessary to overcome the presumption of access") (internal quotation marks and citation omitted).

The weeks-long jury trial below was held in open court and publicly livestreamed to an audience that strained the platform's 200-person capacity. (12 PA 2988.) Three media organizations filed requests to broadcast the trial, two of which were granted. (1 PA 52–68.) Members of the media attended the trial (2 PA 340), and reported on it throughout, particularly when the jury awarded TeamHealth $60 million in punitive damages and $2.65 million in compensatory damages. *See* Paige Minemyer, *Jury: UnitedHealth Must Pay TeamHealth $60M in Damages in Nevada Case*, Fierce Healthcare (Dec. 8, 2021), https://perma.cc/P9HG-CUBD; Subrina Hudson, *United Healthcare Owes $60M to ER Doctors, Jury Rules*, L.V. Rev.-J. (Dec. 7, 2021), https://perma.cc/GQH2-MCCK; Bruce Tomaso & Natalie Posgate, *UnitedHealthcare Hit with $60M Punitive Verdict in Nevada Suit by ER doctors — Updated*, Tex. Lawbook (Dec. 7, 2021), https://perma.cc/22HA-DRS8; Ken Ritter, *Nevada Jury Says Health Insurer Shorted ER Docs*, L.V. Rev.-J. (Dec. 1, 2021), https://perma.cc/C422-3K9X; Rebecca Pifer, *UnitedHealthcare to Appeal After Jury Awards TeamHealth $60M in Damages*, Healthcare Dive (Nov. 30, 2021), https://perma.cc/L3H2-6TG4; Brendan Pierson, *UnitedHealthcare Underpaid TeamHealth Provide[r]s - Nevada Jury*, Reuters (Nov. 30, 2021), https://perma.cc/RW2V-BJAD; Samantha Gerencir & Andrew Goldfarb, *In Nevada,*

Jury Finds Against United Healthcare's Efforts to Underpay for Emergency Medical Services and Generate Profits for Itself, JD Supra (Nov. 21, 2023), https://perma.cc/99QT-H79C; *cf. Carnegie Mellon Univ.*, 2013 WL 1336204, at *7 (finding the public's "strong interest in the subject matter of this trial" was "particularly true here where the jurors' deliberations resulted in a large verdict which, in turn, has resulted in a variety of media attention").[3]

The news media continues to report on these proceedings and on other litigation between TeamHealth and United around the country. *See, e.g.*, Jeff Lagasse, *UnitedHealthcare Loses Another Lawsuit to TeamHealth in Billing Fight*, Healthcare Finance News (Dec. 5, 2022), https://perma.cc/XJ2B-J3EL; Paige Minemyer, *Florida Panel Hands TeamHealth a Win in Its Ongoing Battle with UnitedHealthcare*, Fierce Healthcare (Dec. 1, 2022), https://perma.cc/UNB6-X4N7; *Another Setback for UnitedHealthcare Insurance Company in Nevada Trial Just Days After $60 Million Punitive Verdict*, Nat'l L. Rev. (Jan. 31, 2022), https://perma.cc/KEH5-4FFY; Reed Abelson, *Doctors Accuse UnitedHealthcare of Stifling Competition*, N.Y. Times (Apr. 4, 2021), https://perma.cc/98J9-FXMF.

[3] The Court may take judicial notice of the fact of this reporting, as a matter "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(b).

The persistent public interest in the trial is unsurprising. Health care costs—an issue of widespread public concern—are at the core of this case. As one report put it, the case "tells us more about the American healthcare system—both how it works and what is wrong with it—than a decade's worth of governmental reports and hearings," and "offers a revealing window into the 'black box' process by which reimbursement rates are set and the enormous power of United Healthcare." Gerencir & Goldfarb, *supra*.

And, as news reporting has highlighted, United's reimbursement rates and the litigation over them may have industry-wide effects, including on patients' emergency-room bills. *See* Leigh Page, *Income Could Plunge for Out-of-Network Doctors*, Medscape (Jan. 27, 2023), https://perma.cc/D6JH-E2P3; Mark Vandevelde, *Bitter Medicine: Private Equity Moves into Hospital ERs*, Fin. Times (Dec. 20, 2022), https://perma.cc/X3Q6-9SNT; Abelson, *supra*; Paige Minemyer, *Moody's: The Industrywide Implications of UnitedHealth's Spat with TeamHealth*, Fierce Healthcare (Sept. 4, 2019), https://perma.cc/MXU3-KVUL. Moreover, United is itself of public interest given that it is one of the country's largest health insurers, with "tens of millions of insurance policyholders in the U.S." Ritter, *supra*.

United improperly disregards the powerful public interest in this litigation and the records at issue, claiming access is unnecessary because TeamHealth only wants disclosure to boost its business and its position in related litigation. (Petition at 26–

27.) Yet these proceedings are not only of interest to the litigants—they are of significant, legitimate concern to the press and public at large. These interests further militate against granting United's Petition.

CONCLUSION

For the foregoing reasons, amici urge the Court to deny the Petition for Writ of Mandamus.

Dated: September 19, 2023

Respectfully submitted,

/s/ Margaret A. McLetchie
Margaret A. McLetchie
Nevada Bar No. 10931
MCLETCHIE LAW
602 South Tenth Street
Las Vegas, NV 89101
(702) 728-5300
maggie@nvlitigation.com
Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I, Margaret A. McLetchie, hereby certify that the foregoing Proposed Brief of Amicus Curiae was e-filed and served on all registered parties to the Supreme Court's electronic filing system, pursuant to NRCP 5(b)(2)(E) and 25(b).

Dated: September 19, 2023

/s/ Margaret A. McLetchie
Margaret A. McLetchie
Counsel of Record for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.73 and 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,999 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of September, 2023.

/s/ Margaret A. McLetchie
Margaret A. McLetchie
Counsel of Record for Amici Curiae