**Case No. 18-31052**

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**SHANDELL MARIE BRADLEY, Tutrix on behalf of her minor child A J W,**

***Plaintiff – Appellee***

**V.**

**LOUIS M. ACKAL, Individually and in his official capacity; JUSTIN ORTIS, Individually and in his official capacity; XYZ DEPUTIES, Individually and in their official capacity; XYZ INSURANCE COMPANY, on behalf of Sheriffs Office Iberia Parish,**

***Defendants – Appellees***

**V.**

**CAPITAL CITY PRESS, L.L.C., doing business as *The Advocate*; KATC COMMUNICATIONS, L.L.C.,**

***Movants – Appellants***

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
The Honorable Patrick Hanna, U.S. Magistrate Judge
Case No. 6:15-cv-459

## BRIEF OF MOVANTS-APPELLANTS

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28.2.1, the number and style of this case is: No. 18-31052 *Shandell Bradley v. Louis Ackal*, et al USDC No. 6:15-cv-459, Western District of Louisiana.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Honorable Court may evaluate possible disqualification or recusal.

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## STATEMENT REGARDING ORAL ARGUMENT

This matter meets the standards for Oral Argument set by Federal Rule of Appellate Procedure 34(a)(2) in that it is not frivolous, and it involves important issues which relate to the application of the First Amendment and federal common law to a sealed settlement. The settlement is particularly of public interest as it implicates a high-profile death of a citizen in the custody of law enforcement, the public body's settlement of those claims, and the expenditure of public funds paid in settlement.

Movants-Appellants Capital City Press, L.L.C. d/b/a *The Advocate* and KATC Communications, Inc. respectfully request oral argument. The Movants-Appellants believe that oral argument will assist the Court in addressing the issues at hand.

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291 as to Capital City Press, L.L.C. and KATC Communications, Inc.'s appeal of the order and memorandum ruling denying their Motion to Vacate Order. ROA.1320.

The order appealed is a type of collateral order which are "conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Davis v. E. Baton Rouge Par. Sch. Bd*., 78 F.3d 920, 926 (5th Cir. 1996); *Henry v. Lake Charles Am. Press., L.L.C.,* 566 F.3d 164, 171 (5th Cir. 2009). As this Court found in *Davis,* an order may be appealable under the collateral order doctrine when it concerns First Amendment rights and raises "important and unsettled questions of law." *Id.*

Appellants aver that this matter concerns a collateral order that is substantially similar to other access cases that the Court has previously reviewed in *Davis*, *Henry*, and others. *See Vantage Health Plan, Inc., v. Willis-Knighton Medical Center,* No. 17-30867 (5th Cir. Jan. 9, 2019). Appellants timely and properly filed a Notice of Appeal as to the Memorandum Ruling and Order of the Court Below. ROA.1321. This appeal ensued.

## STATEMENT OF THE ISSUES

1. Whether the district court erred in sealing the amount of a settlement with a public body when it did not consider the effect of that seal order on the Louisiana Public Records Law or state open records statutes.
2. Whether the district court erred with respect to the First Amendment right of access in sealing the amount of a settlement with a public body entered into the record of the court.
3. Whether the district court erred with respect to the federal common law right of access in sealing the amount of a settlement with a public body entered into the record of the court.
4. Whether the district court erred in refusing to unseal the amount of a settlement with a public body that had been entered into the record of the court.
5. Whether the district court erred by ruling that the interests of a minor already protected from claimed financial predators outweighed the interests of the general public to learn the amount of its government's settling a high-profile case involving the death of a person in custody.

## STATEMENT OF THE CASE

The instant appeal involves complex issues of law overlying straightforward and tragic facts. The principal dispute in this case surrounds the death of Mr. Victor White, III, who died from apparent suicide with his hands cuffed behind his back in an Iberia Parish Sheriff patrol vehicle. Mr. White's heir filed the instant suit and subsequently settled with the Defendants during a Court-mandated settlement conference. After the conference, the Parties emerged, placed the amount of the settlement and certain terms on the record, and the Magistrate Judge below ordered that record sealed.

The sealed proceedings prohibited the Movants-Appellants from gaining access to the terms and amount of the settlement, which Appellants contend should properly be made public, since the settling party involved in the underlying dispute is a public body. Appellants are news outlets that reported on the events and subsequent legal case. Appellants intervened in the dispute solely to gain access to the sealed amount of a settlement paid from a public body. None of the relevant underlying facts to this appeal are in dispute, though the factual background informs of the public's interest in the underlying issues.

### I. UNDERLYING FACTS

The underlying facts of this matter take place in New Iberia, Louisiana, a community of less than 30,000 people in Iberia Parish, southeast of Lafayette, Louisiana. Defendant Louis Ackal is the elected Sheriff of Iberia Parish. On March

2, 2014, two African-American men – Victor White, III (hereinafter "White") and Isaiah Lewis – were walking home from a convenience store when they were stopped by a deputy from the Iberia Parish Sheriff's Office. ROA.258. The deputy had been called to the convenience store to follow up on a report of two men fighting in the parking lot. ROA.258. The deputy stopped White and Lewis and questioned them about the reported fight. ROA.27, 412, 258. There is no allegation that White and Lewis were involved with or were the individuals fighting in the parking lot.

The deputy, Justin Ortis (a named Defendant in this matter), proceeded to search the pair and allegedly found marijuana and cocaine in White's pockets. ROA.27-28, 258, 589. Lewis was free to go, but White was handcuffed behind his back, pat searched, and placed into the patrol car. ROA.28, 258, 589. White was transported to the police station nearby. Upon arrival, White allegedly protested that he did not want to go back to jail and then produced a gun and fatally shot himself. ROA.259, 589. Unusually, White remained handcuffed in the back of the Iberia Parish Sheriff patrol car at the time he allegedly shot himself. ROA.259, 589.

The Coroner's Report found that White died from an apparent "self-inflicted gunshot wound to the right chest." ROA.230. The Plaintiff, in the underlying suit, contended that White did not shoot himself given that he was handcuffed and had been patted down, but instead that he was fatally shot by deputies of the Iberia Parish Sheriff's Office. ROA.417, 424.

A Louisiana State Police News Release of March 3, 2014 states that the State Police "began investigating the death of 22 year old Victor White III of New Iberia after he was found deceased of an apparent self-inflicted gunshot wound." ROA.589. The investigation of the Louisiana State Police found that White had committed suicide by gunshot wound from a .25 caliber handgun that he owned and had not been detected during the pat down. ROA.271. Deputy Ortis later admitted that he did not conduct a proper pat-down. ROA.270.

In the months preceding White's death, several of Sheriff Ackal's deputies had pled guilty to excessive force and physical abuse of pre-trial detainees at the Iberia Parish jail in April 2011. ROA.888. Sheriff Ackal was ultimately indicted (but later acquitted) of related charges. ROA.590. Nevertheless, Ackal's office found itself amid a flood of controversy due to these developments, and White's death was a matter of significant interest to the citizens of Iberia Parish and the state.

## II. PROCEDURAL POSTURE

On February 27, 2015, the Plaintiff, Shandell Marie Bradley, on behalf of her minor child, identified as "AJW," filed suit against Sheriff Ackal, Deputy Justin Ortis, and others.[1] ROA.25. The Complaint alleges that the Defendants, police officers, violated Victor White, III's civil and constitutional rights preserved by the Fourth, Fourteenth, and Eighth Amendments to the U.S. Constitution. ROA.26.

[1] The other Defendants include "XYZ Deputies" and "XYZ Insurance." ROA.25.

The Complaint alleged a policy and practice of deliberate indifference, gross negligence, and "reckless disregard for the safety, security and constitutional statutory rights of the decedent." ROA.29-30. The Complaint alleged that the Defendants had battered White, leaving bruises, swollen lips, and other evidence of a beating. ROA.28. In full, the Complaint made claims from wrongful death (ROA.31) survival action (ROA.32), deprivation of familial relations (ROA.33), also alleged several state law claims for torts, negligent hiring, training and supervision, assault and battery, and other intentional torts (ROA.34-35). Underlying these allegations is the distinct implication, and later the outright claim, that White was "killed at the hands of Iberia Parish Sheriff's Deputies." ROA.417.

In short, the decedent's heir, his minor child, brought civil rights and excessive force claims in addition to a wrongful death and survival action under both federal and state law. The Complaint sought compensatory and exemplary damages. ROA.38-39. The Defendants issued general denials of these allegations. ROA.73.

In their Rule 26 disclosures, the Parties represented that the "Parties are willing to consent to trial by Magistrate Judge pursuant to 28 U.S.C. 636." ROA.93. On December 7, 2015, U.S. District Judge Rebecca F. Doherty issued an Order of Reference referring the matter to the Honorable Patrick J. Hanna, Magistrate Judge, "to conduct all further proceedings and the entry of judgment." ROA.118.

After some motion practice[2] and approaching a trial date, Magistrate Judge Hanna, acting as the trial judge in the Court Below, ordered the Parties to a settlement conference before Magistrate Judge Carol B. Whitehurst. ROA.1198. The settlement conference was held Thursday, March 15, 2018 (the "Settlement Conference") and the matter was settled. The settlement was read into the record and confirmed, including the terms of the settlement and the amount. ROA.1332. An order dismissing the case was entered March 15, 2018 by Judge Hanna. ROA.1212. The docket sheet reflects only a minute entry (the "Order") as follows:

> SEALED MINUTES for proceedings held before Magistrate Judge Carol B Whitehurst: SETTLEMENT CONFERENCE held on 3/15/2018. (Court Reporter: LCR, Lafayette - Courtroom 6) (crt,Alexander, E) (Entered: 03/15/2018) ROA.22

It is this Order sealing the Settlement Conference, and particularly the amount of the settlement paid, which forms the basis of Appellants' intervention.

## III. INTERVENTION

Appellants (hereinafter the "Appellants" or the "Media Entities") intervened after the Settlement Conference in order to seek vacatur of the Order. ROA.1213. In moving for intervention as a matter of right pursuant to Fed. R. Civ. P. 24, the Media Entities set forth that on June 15, 2018, John Simerman, an *Advocate* reporter had, via Louisiana's Public Records Law, obtained a copy of the Receipt and Release signed by the Parties. ROA.1216.

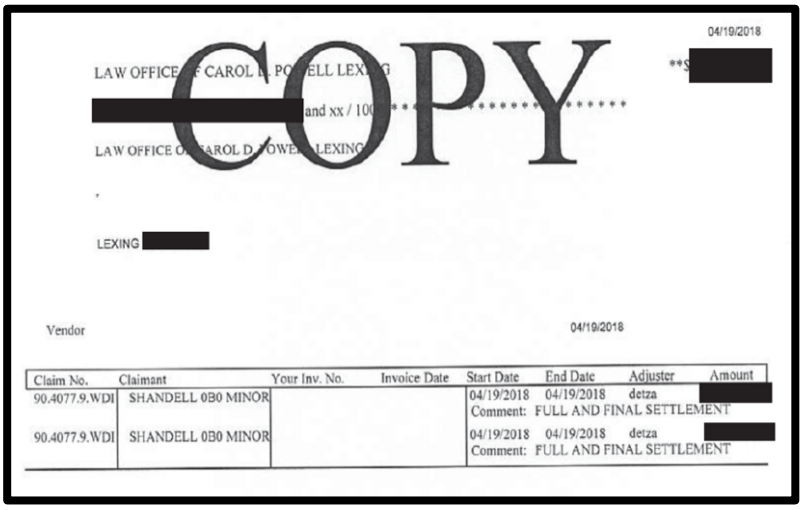
[2] Of note, the Defendants were successful in summarily dismissing the claims of White's parents, who had been named as additional Complainants. ROA.145.

The terms of the settlement, and particularly the amount paid to the Plaintiff on behalf of her minor child, the heir of White, were redacted pursuant to the Court's Order sealing the Settlement Conference. ROA.1217. The Media Entities sought expedited consideration of their Motion to Intervene due to the timeliness of the news, and followed along with a proposed Motion to Vacate the Order. ROA.1226.

In initially opposing the Media Entities' intervention, the Plaintiff argued that the settlement terms were to be kept confidential pursuant to the Settlement Conference, asserting an interest in protecting the minor child, AJW, from "notoriety and harassment that would surely follow if Movant reported the settlement amount." ROA.1247. The Plaintiff also advanced arguments that the intervention was not timely. ROA.1246. Oral argument was held on July 26, 2018. ROA.1251.

At oral argument, the Motion to Intervene was ultimately granted. ROA.1252. However, during the brief hearing, both the Motion to Intervene and the merits of the Motion to Vacate were broached as the Court Below specifically requested to know "what is it you want and why." ROA.1327. Argument was had relating to the First Amendment and common law rights of access to records of the amount paid to settle a controversial action against a public body. ROA.1328-1329. The controversy surrounding the underlying facts was advanced as a particular reason for public interest in the matter. The Court Below acknowledged both its interest in protecting the minor, but also that the issue "is very highly charged on other issues which is why it's a public interest for you [the Media Entities]." ROA.1331.

The Court requested further briefing on the merits of the Media Entities' Motion to Vacate. ROA.1335. Pursuant to that order, Appellants filed a Supplemental Memorandum in Support of their Motion to Vacate. ROA.1254.[3] In their briefing, Appellants provided a copy of the check stub its reporter had obtained with the amount redacted. ROA.1259.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LAW OFFICE OF CAROL D. POWELL LEXING

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LAW OFFICE OF CAROL D. POWELL LEXING

LEXING [redacted]

Vendor 04/19/2018

| Claim No. | Claimant | Your Inv. No. | Invoice Date | Start Date | End Date | Adjuster | Amount |
|---|---|---|---|---|---|---|---|
| 90.4077.9.WDI | SHANDELL 0B0 MINOR | | | 04/19/2018 | 04/19/2018 | detza | [redacted] |
| | | | | Comment: FULL AND FINAL SETTLEMENT | | | |
| 90.4077.9.WDI | SHANDELL 0B0 MINOR | | | 04/19/2018 | 04/19/2018 | detza | [redacted] |
| | | | | Comment: FULL AND FINAL SETTLEMENT | | | |

The Media Entities also clarified for the Court that they sought vacatur of the Settlement Conference order only as it relates to the amount of the settlement. ROA.1259. The Media Entities argued, *inter alia,* that the First Amendment (U.S. Const. amend. I) and common law rights of access to court records warranted vacatur of the Order as it relates to the amount of the settlement, not the name of the minor child. ROA.1259.

Furthermore, the Media Entities contended that there were more narrowly tailored ways to achieve protection of the minor, most notably a trust or Louisiana's

[3] This pleading incorporated the Movants' earlier Motion to Vacate Order and Memorandum in Support. ROA.1258 (Earlier Motion and Memorandum at ROA.1224-1236).

laws on tutorship. ROA.1262. The Media Entities also noted that the Court failed to follow the correct procedural steps in sealing the record. ROA.1262. In addition, the Court should have been required to take into account the effect of the sealing order on the Louisiana Public Records Law, which guarantees a right of access to settlement agreements and public dollars spent. ROA.1268.

In response, the Plaintiff primarily argued that the balancing of the interest of public disclosure against that of the minor's exposure to "unwanted attention and financial predators." ROA.1279. The Plaintiff argued disclosure of the amount would allow those interested to discover the minor's identity and harm the minor. ROA.1279.

To their credit, the Plaintiff conceded as correct and applicable much of the law cited in the Media Entities' brief relating to a presumption of disclosure, on-the-record findings being required, and particularly consideration of the effect of the Order on the state public records law. ROA.1278-80, 1283. The Plaintiff distinguished these cases by arguing that due to the unique situation of the case – the fact that the matter was not tried but settled – the interest should tip away from disclosure and toward confidentiality. ROA.1280-81.

## IV. RULING

On August 31, 2018, the Court Below issued a Memorandum Ruling (the "Ruling") denying the Media Entities' Motion to Vacate. ROA.1298. The Ruling itself acknowledges a presumption in favor of disclosure of records. ROA.1308. Yet,

the Court Below distinguished cases favoring disclosure as involving criminal proceedings, not civil, or involving settlement agreements physically filed into the record or required to receive approval by a court. ROA.1318. Ultimately, the Court Below's examination of the factors was reduced to an exploration of precedent on the disclosure of records in suits involving minors. ROA.1315. This was an issue the Court had requested briefing on and for which there was little precedent.

Another consideration the Court Below found important was the "chilling effect" on potential settlement negotiations in similar cases. ROA.1319. The Court did not discuss the Order's effect on the Louisiana Public Records Law, instead finding that the Louisiana Public Records Law "did not apply." ROA.1318. Finally, the Court found:

> [T]he interests to be balanced are, on one side, the child's privacy interest in being protected from financial predators or those who would harass the child simply because they know the amount received when the suit was settled, the protection of the judicial process in permitting orders to be sealed, and the chilling effect that the public's knowledge of the settlement amount might have on the settlement negotiations and jury deliberations in upcoming cases and, on the other side, the media's interest in releasing a sensational story regarding the amount of money paid to resolve this lawsuit …

The Court further found that the "minor child's privacy interest outweighs the public's right to know the amount paid to settle the case." ROA.1319. The Media Entities are therefore prohibited from obtaining the amount of the settlement paid in this matter. That amount is particularly relevant to the Media Entities given that the Defendant is a public official and the settlement paid was with public funds.

The Media Entities timely appealed. ROA.1321.

## SUMMARY OF THE ARGUMENT

The Court Below's Ruling sealing the amount of the settlement violates the public's right of access to Court records under the First Amendment to the United States Constitution and established federal common law. The Court Below erred by failing to take into account that the order sealing the settlement amount directly implicates state public records subject to inspection pursuant to Article 12, Section 3 of the Louisiana Constitution and the Louisiana Public Records Law, La. Rev. Stat. Ann. §§ 44:1 *et seq*.

Public records laws and the public's First Amendment and common law rights of access exist to allow citizens to examine the records of their courts and their government. The Court Below's proffered interest of financial predators attaching to a minor is not an overriding interest as it is not an actionable concern under the law. That interest, while noble, is in contrast to the reality of Ms. Bradley's control of her minor daughter's Property and more narrowly tailored options than wholesale sealing. The Court Below failed to properly balance the interests. For these reasons, the Court Below must be reversed and the Media Entities' Motion to Vacate should be granted.

# ARGUMENT

## I. THE STANDARD OF REVIEW

This matter should be reviewed *de novo* given the issues involved, the uniqueness of the question presented, and particularly the potential impact of the Court Below's Ruling on state open records laws.

The standard of review of matters such as these appears to turn on whether the law was correctly applied. This Circuit has held that mixed "constitutional and legal questions," invoke a *de novo* standard of review, while specific findings of fact are reviewed under the clearly erroneous standard. *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 174 (5th Cir. 2011) *quoting United States v. Brown (In re Times Picayune Publ'g. Corp.)*, 250 F.3d 907 (5th Cir. 2001).

In recent cases, this Court has found that *de novo* review applies to a question of whether the "common law provides the public with a qualified right of access to warrant materials." *United States v. Sealed Search Warrants*, 868 F.3d 385, 391 (5th Cir. 2017). *Cf. Belo Broadcasting Corp. v. Clark,* 654 F.2d 423, 431 (5th Cir. 1981) (finding abuse of discretion applied for common law access question). This Court has also found that the review of a district court's "decision to seal a judicial record" is subject to the abuse of discretion standard. *United States v. Holy Land Found. for Relief & Dev.,* 624 F.3d 685 (5th Cir. 2010).

Appellants submit that the relevant standard of review for this matter is *de novo* given the constitutional questions at hand. While the decision to seal may be

subject to abuse of discretion at times when the law is consistently applied, the exceptionality of the question presented, and particularly its application to state open records laws, warrants *de novo* review. In either event, however, the Ruling of the Court Below should not stand.

## II. INTERVENORS ONLY SEEK THE AMOUNT OF THE SETTLEMENT

There was some question at the Court Below as to what relief the Media Entities sought. The Media Entities made a state law public records request to Defendant Sheriff Ackal for the check at issue, and received the redacted check (ROA.1259). However, to state the obvious, this action was and is not a public records enforcement action pursuant to the Louisiana Public Records Law.

The Media Entities' Intervention sought to remedy the reality that the Order sealing the minutes of the Settlement Conference (hereinafter, the "Order") prevents the dissemination of what is otherwise unquestionably public information. There is no dispute that those minutes are a record of the Court and that the Settlement read into the record for the specific purpose of memorializing the settlement, and that the amount of the settlement "is in there," (the words of the Court Below). ROA.1332.

To that end, it is undisputed and in fact recognized by the Court Below that Defendant Ackal refused to provide the amount of the settlement paid to the Plaintiff, stating that he was under a Court Order to keep the terms of the settlement confidential. ROA.1304. The Media Entities intervened and asked the Court to

modify the Order and allow the amount of the settlement to be disclosed. ROA.1259. There is great public interest in this matter given the bevy of public controversy surrounding the Defendant, Sheriff Ackal, and his office. ROA.590. Appellants now ask this Court to reverse the Court Below and vacate the Order as it relates to the amount of the settlement at issue in this litigation.

## III. THE PUBLIC HAS A RIGHT OF ACCESS WHICH IS IMPAIRED BY THE TRIAL COURT'S SEAL ORDER

It is well established that the public enjoys a right of access to court proceedings and court documents, which has been preserved by both the First Amendment and the common law right of access, explored *infra.* This Circuit has held the presumption favoring access is real, and more than "a customary procedural formality." *Doe v. Stegall,* 653 F.2d 180, 185 (5th Cir. 1981). In the instant case, the Defendant agreed to settle claims arising from a controversial alleged deprivation of life and liberty. The public has a compelling interest in understanding what the public official paid to settle the alleged losses.[4]

This Circuit has stated that a district court "must use caution in exercising its discretion to place records under seal," and that discretion to seal the record should be exercised "charily." *United States v. Holy Land Found. For Relief & Dev.,* 624 F.3d 685, 689 (5th Cir. 2010). "The power to seal court records must be used

[4] *See, Miami Herald Pub. Co. v. Collazo*, 329 So. 2d 333 (Fla. Dist. Ct. App. 1976) (holding that the public's right to know the terms of a settlement agreement were particularly compelling because the case involved allegations of police misconduct).

sparingly in light of the public's right to access" and the decision "must be made in light of the "strong presumption that all trial proceedings should be subject to scrutiny by the public." *Id.* at 690 (*citing United States v. Ladd,* 218 F.3d 701, 704 (7th Cir. 2000)).

As a prefatory statement, Appellants advance that no matter the principle under which they are granted access to the settlement amount, the public is entitled to that amount. The Louisiana Public Records Law requires that the expenditure of public funds be the subject of public review. This Circuit has stated that before sealing a record, the sealing court must consider state open records laws. Furthermore, the First Amendment provides that the public's courthouse business should take place in the open. Finally, the common law right of access states that judicial records and documents are presumptively available for review. The Court Below failed to properly examine these interests and should be reversed.

## IV. THE COURT BELOW ERRED WHEN IT DID NOT TAKE LOUISIANA'S PUBLIC RECORDS LAW INTO ACCOUNT

Before reaching the First Amendment and common law rights of access generally, and as a threshold matter, the Ruling should be set aside because it fails to take into account the effect of the Order on the rights preserved by the Louisiana Public Records Law. Such consideration is missing both from the original March 15, 2018 Order, which contains no specific findings, and from the Ruling which the Media Entities now seek redress. The Court Below's failure to take this law into account is legal and reversible error.

Though both sides briefed the issue for the Court Below, the Ruling does not address the effect of the Order sealing the settlement on the Louisiana Public Records Law. The Ruling *does* state that the records of the Western District of Louisiana are not public records subject to the Public Records Law. ROA.1318. This was not the purpose of the Media Entities' Intervention. Conversely, it was undisputed at the Court Below and recognized by the Court itself that the Defendant Sheriff has refused to release the amount of the settlement paid to the Plaintiff, citing the Order. ROA.1303-4.

Had the Court Below taken the Louisiana Public Records Law into account in its Ruling, the result might have been much different. This failure to take into account the effect of the Order on the Louisiana Public Records Law should lead this Court to summarily vacate the Ruling.

### A. This Circuit Requires Consideration of the Effect of the Sealing Order on the Louisiana Public Records Law

This Court has clearly and soundly found that when considering an order of confidentiality, the reviewing court "should consider the effect of the order on state freedom of information laws." *Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 931 (5th Cir. 1996). In *Ford v. City of Huntsville,* the Fifth Circuit reversed the Southern District of Texas, finding that in entering a confidentiality order relating to a settlement agreement, the "district court gave no indication that it considered [the Texas Freedom of Information Act]" in addition to failing to explain the need for

confidentiality. 248 F.3d 235, 242 (5th Cir. 2001)

Both *Davis* and *Ford* find that there must be "compelling reasons" to allow for a protective, sealing, or confidentiality order. *Davis,* 78 F.3d at 931; *Ford,* 242 F.3d at 242. Furthermore, the Third Circuit decision in *Pansy v. Borough of Stroudsburg*, from which this Circuit drew this requirement of consideration of public records law, states that the restriction must be "narrowly drawn" to avoid interfering with the public's right of access to records beyond what is necessary and also explain why the "order is intended to alter those rights." 23 F.3d 772, 791 (3d Cir. 1994). The Ruling does neither of these.

*Davis* and *Ford* both relied heavily on Third Circuit rulings which find that "where a governmental entity is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of government records to the public under state and federal freedom of information laws" *Pansy,* 23 F.3d at 791. *Pansy* emphasized that when a public body is involved as a litigant and the matter involves a public concern it should be "a factor weighing against entering or maintaining an order of confidentiality." *Id.* at 788.

The Third Circuit has reaffirmed a "strong presumption against entering an order of confidentiality whose scope would prevent disclosure of information that would otherwise be accessible under a relevant freedom of information law." *E.E.O.C. v. Kronos Inc.*, 620 F.3d 287, 302 (3d Cir. 2010). The First Circuit and the Sixth Circuit have also found that the threshold for sealing is "elevated" when a

matter of public concern and a government agency are involved. *F.T.C. v. Standard Fin. Mgmt. Corp.,* 830 F.2d 404, 412 (1st Cir. 1987); *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1180 (6th Cir. 1983).

The Ruling at issue here very clearly does not consider the guarantees of the Louisiana Public Records Law, which has uniformly and universally held that settlement agreements – and particularly amounts paid in settlement by public bodies – are public records. These public records are readily and easily accessible by persons under the law – defined as any person of the age of majority. La. Rev. Stat. § 44:31. Because the Court Below's Ruling fails to consider the implications of the Louisiana Public Records Law, it must be reversed.

### B. The Louisiana Public Records Law Guarantees Access to Settlement Amounts

It is indisputable that the amount of the settlement paid in the underlying matter is a record subject to the Louisiana Public Records Law, and therefore must be made public. Article 12, Section 3 of the Louisiana Constitution provides that "[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law." The law further guarantees the public's right of access: "Except as otherwise provided in this Chapter or as otherwise specifically provided by law, and in accordance with the provisions of this Chapter, any person of the age of majority may inspect, copy, or reproduce any public record." La. Rev. Stat. Ann. § 44:31.

Louisiana's Public Records Law broadly and inclusively includes the Defendant Ackal, and his office (the Iberia Parish Sheriff's Office), as a "branch, department" or "office" subject to the law. La. Rev. Stat. Ann. § 44:1(A)(1). It furthermore defines as a "public record" any document "concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state." La. Rev. Stat. Ann. § 44:1(A)(2)(a). Therefore, it is indisputable (and in fact undisputed by the Plaintiffs at the Court Below) that the settlement check itself is a public record as defined by the law.

The Public Records Law provides a strong expression of the "fundamental" constitutional right to examine public documents:

> The right of the public to have access to public records is a fundamental right and is guaranteed by the constitution. . . . The provisions of the constitution must be construed liberally in favor of free and unrestricted access to the records, and that access can be denied only when a law, specifically and unequivocally, provides otherwise. Whenever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see.

*Capital City Press v. East Baton Rouge Parish Metropolitan Council*, 696 So. 2d 562, 564 (La. 1997), (quoting *Title Research Corp. v. Rausch*, 450 So. 2d 933 (La. 1984)).

The right being fundamental, the statutes providing for it "implement the inherent right of the public to be reasonably informed as to the manner, basis, and reasons upon which governmental affairs are conducted." *Trahan v. Larivee,* 365 So.2d 294, 298 (La. App. 3 Cir. 1978). Louisiana courts have consistently held that

the Public Records Law must be interpreted liberally to extend rather than restrict access to records. *Dutton v. Guste*, 395 So. 2d 683, 685 (La. 1981) (citing *Webb v. City of Shreveport*, 371 So. 2d 316 (La. App. 2 Cir. 1979)); *Bartels v. Roussel*, 303 So. 2d 833 (La. App. 1 Cir. 1974), *writ denied*, 307 So. 2d 372 (La. 1975).

The law seeks to "keep the public reasonably informed about how public bodies conduct their business and how the affairs of government are handled." *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So.3d 807, 817 (La. App. 1 Cir. 2008); The *Capital City Press* court particularly recognized that the law protects the public's right to know "about the operations of a public agency, … [and] in gaining information to evaluate the expenditure of public funds." *Id.* at 821. *See also Angelo Iafrate Const., LLC v. State DOTD,* 879 So. 2d 250, 261 (La. App. 1 Cir. 2004).

The Louisiana Supreme Court and state appellate courts have found that settlement agreements involving a public body are subject to full disclosure under the Public Records Law. *Dutton*, 395 So. 2d at 685; *see Times Picayune Pub. Corp. v. Board of Sup'rs of Louisiana State University*, 845 So. 2d 599 (La. App. 1 Cir. 2003). A public body's assurance of confidentiality cannot transform a public record into a nonpublic record and cannot be enforced. *See Treadway v. Jones*, 583 So. 2d 119, 122 (La. App. 4 Cir. 1991) ("An assurance of confidentiality ... is not sufficient to keep the proposals from being subject to the Public Records Law.").

The amount of the settlement is a record subject to the Louisiana Public

Records Law and reviewable by the public. The settlement itself was also required to be made part of a petition for authorization from the relevant state court before approval, further opening the settlement to public access as a pleading subject to the public records law and the general right of access to judicial records.[5] *Copeland v. Copeland*, 966 So. 2d 1040, 1045 (La. 2007). There are multiple avenues by which the public should be able to review the amount of the settlement in order to keep tabs on the spending of their government. The Ruling fails to properly take that consideration into account and should be reversed.

### C. The Court Below Erred in Failing to Consider the Effect of its Ruling on the Louisiana Public Records Law and Future Settlements

There is absolutely no exception from Louisiana's strong Public Records Law that would exempt the amount of the settlement at issue here from being disclosed. In fact, neither the Plaintiff nor the Defendants advanced such an argument at the Court Below. The only stated reason for denying the request for the amount of the settlement is the Court's Seal Order. The Ruling incorrectly fails to take into account the effect of the Order, and the Ruling, on the Appellants' (and general public's) state constitutional right to access records and therefore it should be reversed.

In failing to consider the impact of the order on the Louisiana Public Records

[5] It is also notable that in order to settle a case for a minor the minor's tutor (in this case, her mother) is *required* by Louisiana law to seek state district court approval of any settlement of a minor's interest in a claim. La. Code Civ. Proc. 4265. This approval must be sought from the relevant state court *prior* to confecting a settlement agreement. *Carter v. Fenner,* 136 F.3d 1000, 1008 (5th Cir. 1998). The approval is particularly relevant because the courts are "the final preventative from unrestrained and unwise compromise of the minor's interests." *Id.*

Law, the Court Below has inadvertently opened up an avenue for government actors to shield from the public the amount paid to settle lawsuits against public bodies for a whole host of issues that are commonly before federal courts. These suits include the benign personal injury to suits with varying degrees of unusual cases in the public interest: sexual harassment, civil rights, and political retaliation. This issues generally invoke the reporting of the Media Entities and their competitors, particularly on issues of public concern such as the matter before this Court.

If this matter had been a state court action and settled, the amount of the check would have undeniably been a public record according to decades of law, custom and jurisprudence, in addition to the clear provisions of the Louisiana Public Records Law. The fact that the matter is filed in federal court, and later settled there, should not produce a different outcome for the individuals who review government records. This Honorable Court should prevent this dangerous precedent from becoming communicable to other cases.

## V. THE COURT BELOW ERRED AS TO THE FIRST AMENDMENT RIGHT OF ACCESS

### A. The First Amendment Creates a Public Right of Access

The public's constitutional right of access to court proceedings is firmly established. *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 571 (1980); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 505–08 (1984). The Supreme Court has recognized that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co.* v. *Superior Court,*

457 U.S. 596, 604 (1982). These quotations and principles could not ring more true than in this matter, where the Media Entities seek access to do just that: report on government affairs.

The First Amendment right of access "has been understood to be stronger than its common law ancestor and counterpart." *United States v. Erie Cty., N.Y.,* 763 F.3d 235, 239 (2d Cir. 2014) (*Hartford Courant Co., v. Pellegrino,* 380 F.3d 83, 91 (2d Cir. 2004)). The First Amendment guarantees the public's right of access to both the civil and criminal court contexts.[6] *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981). It also applies to documents filed with the Court.[7] In *Craig v. Harney,* the Supreme Court famously stated "[w]hat transpires in the courtroom is public property."[8]

This Court in *Hearst Newspapers* found that to close a proceeding consistent with the First Amendment, the Supreme Court's "experience and logic" test applies:

> (1) whether the proceeding has historically been open to the public and press; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question."[9]

While the Fifth Circuit has not so specifically enunciated, other circuits have

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[6] *See Westmoreland v. CBS, Inc.* 752 F.2d 16, 23 (2d Cir. 1984); *In re Continental III Secs. Litig*., 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1178 (6th Cir. 1983); *Publicker Industrial v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Lugosch v. Pyramid Co*., 435 F.3d 110, 124 (2d Cir. 2006); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988).

[7] *In re Washington Post Co.,* 807 F.2d 383, 390 (4th Cir. 1986) *United States v. Kooistra,* 796 F.2d 1390, 1390 (11th Cir. 1986)

[8] *See also Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943, 945 (7th Cir. 1999) (noting that the public pays for the courts and has an interest in what goes on at all stages of a judicial proceeding on that basis alone).

[9] *In re Hearst Newspapers, L.L.C.,* 641 F.3d 168, 175 (5th Cir. 2011), *as revised* (June 9, 2011).

applied this same First Amendment right of access test to documents, substituting "proceeding" and "process" for "document." *See, e.g., United States v. Erie Cty., N.Y.,* 763 F.3d 235, 239 (2d Cir. 2014). The Fifth Circuit has implicitly found that the First Amendment right of access applies to documents. In *Doe v. Stegall*, this Circuit cited the First Amendment right of access as a consideration in reversing a Mississippi District Court's refusal to allow the plaintiffs to proceed anonymously. 653 F.2d 180, 185 (5th Cir. 1981); *see Doe v. Sante Fe Indep. Sch. Dist*., 933 F. Supp. 647, 650 (S.D. Tex. 1996) (finding right of access to civil trial pursuant to *Stegall*).

Pursuant to *Doe,* in addition to experience and logic, the First Amendment right of access applies in this Circuit to the amount of the settlement. The amount of the settlement is a record of the court to which any member of the public would normally have access. As the Court Below recognized, the amount of the settlement was read into the record of the Court following a successful Settlement Conference. ROA.1332. In addition, it was undisputed that the check (ROA.1259), was not provided to the Media Entities because of the Order. ROA.1304

### B. The Ruling and the Seal Order Violate the First Amendment

#### *i. The Amount of the Settlement is a Record of the Court Which Would Traditionally Be Open to the Public.*

The First Amendment right of access applies only if the "experience and logic" test is satisfied. *In re Hearst Newspapers, L.L.C.,* 641 F.3d 168, 175 (5th Cir. 2011), *as revised* (June 9, 2011). In satisfaction of this test, the Appellants submit

first that settlements themselves are often accessed, particularly when the agreement "involves public officials or parties of a public nature." *Marcus v. St. Tammany Parish School Bd.*, No. 95-3140, 1997 WL 313418 (E.D. La. June 9, 1997).

In the instant matter, the document in question, the amount of the settlement reached at the settlement conference, is traditionally open to the public. Traditionally, settlements with public bodies are available to the public under the Public Records Law of Louisiana, as argued *supra.* Under the common law right of access there is a presumption that the document is open to the public, as argued *infra*. There is great interest in the record sought – the amount of the settlement – because the Defendants are public actors. *See In re: Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 7 (D.D.C. 2013); C*ity of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So.3d 807, 817 (La. App. 1 Cir. 2008).

Notably, the Media Entities here are not seeking access to the actual Settlement Conference. The argument advanced is instead much more nuanced. The Parties emerged from the Settlement Conference and placed the terms of the settlement before the Court, which then issued an immediate "60-day" Order of Dismissal. ROA.22. This action of settlement and memorializing the terms of the settlement in the record of the Court, and using the power of the Court to ensure the Parties held to that settlement, invokes the public's right of access.

The action of dismissal would normally have been an action in open court, or a document or stipulation filed into the court record. There can be no dispute that

generally any member of the public would be free to access or watch such a dismissal in the average case. Any member of the public would furthermore be free to access a transcript of the proceeding. The sealed proceeding therefore is very clearly one to which the public normally enjoys a right of access.

Such access plays an undeniably positive role in determining the "expenditure of public funds." *Capital City Press,* 4 So.3d at 821. The interest Appellants have proffered to the Court Below and to this Court is that they seek to report on the expenditure of public funds to settle a lawsuit involving serious allegations against public officials. Government playing a role in the litigation has caused other Circuits to raise the bar on litigants seeking sealing orders due to the public interest therein. *See, e.g. Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *F.T.C. v. Standard Fin. Mgmt. Corp.,* 830 F.2d 404, 412 (1st Cir. 1987); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983).

If the First Amendment right of access applies, and Appellants aver that it does here, the reviewing court must find in "substantive findings made by the district court that closure is necessary to protect higher values and is narrowly tailored to serve such goals." *Hearst Newspapers,* 641 F.3d at 181. (citing *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984)). The Ruling of the Court Below does not appropriately find higher values or narrowly tailor its ruling, and therefore it must be reversed.

*ii. There is No Overriding Interest in Closure*

The reality in this case is that while the name of the minor child in this action is not listed in the public record, her mother's and father's names are well-known. Her mother, Shandell Bradley, has her name affixed to the caption. Her father, Victor White, is the man who lost his life at this climax of this tragedy, bringing about the minor's cause of action. The Media Entities have already stated they have no interest in publishing the minor's name, even though that name is available to them and any other inquirer. The Media Entities are interested only in the amount of the settlement. ROA.1219.

In its Ruling, the Court Below found that the "physical and psychological well-being of a minor is a compelling interest." ROA.1314 (*citing Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596, 607 (1982)). To support this proposition, the Court cited two cases which involved "sensitive information concerning a child's medical or psychological conditions, his school disciplinary records, or other similar topics from disclosure." ROA.1316.

The ruling does not separate between the First Amendment and common law rights of access advanced. The minor child's privacy and physical and psychological well-being is the only "overriding interest" that was characterized as "compelling" or "overriding" by the Court Below. Such an interest is not overriding or compelling in this case, however, because it is not an interest implicated by the relief sought.

The protection from financial predators is the only interest the Plaintiff sought

to bring to bear in the minor's interest. The Court also advanced that interest in its Ruling. However, that the child would be subject to financial predators is not actually an overriding interest as Louisiana law does not allow the child to administer her own property.

Louisiana's tutorship laws provide very strict rules and regulations as to the responsibility of parents to perform (or not perform) certain acts as tutor. By example, the parental authority includes the right to represent the child in Court or designate a tutor. La. Civ. Code Ann. art. 222. Each parent has the "right and obligation to administer the property of the child." La. Civ. Code Ann. art. 229. The parent is further charged to do so "as a prudent administrator" and may be *sued* for the failure to so act. *Id.*

In the instant case, as the minor child's father is unfortunately deceased, the minor's mother, Ms. Bradley, would be entitled to claim tutorship as the minor's natural tutor and administer her property. La. Civ. Code Ann. art. 250. Ms. Bradley is now required to act as the administrator of her Property, and required to apply to a court to "alienate or encumber the minor's property" § 6.1.Tutorship, 1A La. Civ. L. Treatise, Civ. Proc. - Special Proceed. § 6.1

Ms. Bradley is charged, according to the Louisiana law of tutorship and the Louisiana Code of Civil Procedure, to "take possession of, preserve, and administer the minor's property" and is required to do so "as a prudent administrator." La. Code Civ. Proc. Ann. art. 4262. She must exercise "judgment and care" in administering

said property. La. Code Civ. Proc. Ann. art. 4269. The Code of Civil Procedure enacts a significant and complicated system for the administration of a minor's property, including application to the Court to alienate it. La. Code Civ. Proc. Ann. art. 4270. It also provides for the creation of trusts.

Put simply, the concern that the child will be "quickly surrounded" by "snake-oil salesmen," as addressed by the Plaintiff in briefing, is a red herring. ROA.1279. Even if the child were so surrounded, the law would not allow her to order her mother, the prudent administrator, to dispense with the property to the salesman.

Ms. Bradley chose to avail herself of the United States District Court for the Western District of Louisiana. The use of that Court system invokes the public's rights of access. Those snake-oil salesmen surely know the name of Ms. Bradley, as she is the named Plaintiff in this matter. Moreover, these nefarious and nameless "salesmen" know that she has received a settlement; they merely do not know its precise amount. If Ms. Bradley were to violate her duties to her minor child (and there is no allegation that she is unfit or that such a duty would be breached), she would be subject to potential legal jeopardy.

But even if an interest in protection of the child from financial predators were overriding, wholesale sealing via the Order is not the most narrowly tailored way to achieve the interest of the minor's protection, as is required by the First Amendment. The Court Below's failure to properly and narrowly tailor its Ruling is error.

*iii. The Ruling is Not Narrowly Tailored*

Even assuming that protecting the child from predators due to the amount of the settlement was a "higher value," the Court's Order, which closes the settlement, is not "narrowly tailored to serve such goals." *Hearst Newspapers,* 641 F.3d at 181. Several more narrowly tailored options exist, including, but not limited to, the use of the state's tutorship laws already in effect and the use of a trust to protect the minor from unscrupulous adults.

In *Johnson v. Parchment School Dist.,* the Western District of Michigan suggested a narrowly tailored way to ensure protection from "financial predators," suggesting the "appointment of a guardian to conserve any award to the minors." *Johnson v. Parchment Sch. Dist.,* No. 1:03-CV-917, 2006 WL 1275066, at *3 (W.D. Mich. May 5, 2006). Appellants submit that a trust, or the simple use of the tutorship laws *already in effect* in Louisiana would serve the same ends as the Ruling's proffered concern.

In *Sante Fe Independent School Dist.,* a District Court in the Southern District of Texas examined a request to close a civil trial which involved a constitutional challenge to religious practices occurring in the school system. *Doe v. Sante Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996). In that case, the minor plaintiffs had proceeded using fictitious names and via a protective order keeping the children's identities a secret. *Id.* Approaching a trial on the damages, the Court examined whether or not the trial itself should be closed in full or in part.

Examining this Court's ruling in *Stegall* and other Circuits, the Court found that a limited closure of the trial in that matter was justified in order to protect the anonymity of the minor plaintiffs. However, those children's parents were not entitled to the same protection as "the Court is constrained by the First Amendment to tailor any restrictions to public access to proceedings as narrowly as possible." *Id.* at 652 n. 3. The Court also found that the closure of the trial during the minor children's portion should still include attendance of the media whom the Court "sincerely hopes … would feel equitably estopped" from publishing their "descriptions or other identifying characteristics." *Id.* at n.2.

Admittedly, *Sante Fe* is a complex matter. The decision, however, shows the lengths to which a Court must reach, consistent with the First Amendment, in order to satisfy the commands of the Constitution, this Circuit, and the U.S. Supreme Court. The Ruling in this matter does not reach that level.

In fact, the Ruling here fails to consider more narrow alternatives to achieve its goal of protecting the child from financial predators. More narrowly tailored options exist which would allow the minor to be "protected" from the claimed snake-oil salesmen and ensure the public's right of access. The most obvious of these is a trust—or to simply follow Louisiana's laws regarding the administration of minor property and of tutorship. The existence of there being more narrowly tailored options than wholesale public closure shows the reversible nature of the Seal Order.

## VI. THE COURT BELOW ERRED AS TO THE COMMON LAW RIGHT OF ACCESS

### A. The Federal Common Law Creates A Presumption of Access

In addition to the constitutional right of access guaranteed by the First Amendment, the public enjoys a well-established common law right of access to court proceedings that includes the right to inspect and copy judicial records. In *Nixon v. Warner Communications*, the U.S. Supreme Court stated that "it is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

While a significant amount of Supreme Court precedent focuses on criminal trials, the Supreme Court has recognized that the right to demand a public trial "is equally applicable to civil and criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15 (1979) *see Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984). The common law right of access is grounded in the democratic process itself and is "fundamental to a democratic state." *U.S. v. Mitchell,* 551 F.2d 1252, 1258 (D.C. Cir. 1976) *rev'd on other grounds sub nom*; *see also Boone v. City of Suffolk, Va.,* 79 F. Supp. 2d 603, 608 (E.D. Va. 1999).

This Court, like its sister circuits, has repeatedly recognized the common law right of access.[10] *SEC v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993). The *Van*

[10] *See United States vs. Sealed Search Warrants,* 868 F.3d 385 (5th Cir. 2017).

*Waeyenberghe* court found that while the common law right of access to judicial records is not absolute and courts may exercise discretion over their own files, "the district court's discretion to seal the record of judicial proceedings is to be exercised charily." *Id.* at 848; *citing Federal Savings & Loan Ins. Corp. v. Blain*, 808 F.2d 395 (5th Cir.1987).

In its Ruling, the Court Below did not differentiate between the First Amendment and common law rights, or expressly base its analysis on one or the other, although it appears to focus more on the common law. No matter which right applies, the Ruling should not stand. The Court Below did not appropriately consider the public's right of access in its Ruling, and therefore should be reversed.

### B. Settlement Agreements are Subject to the Common Law Right of Access

This Court has recognized that the common law right of access to judicial records and documents "furthers not only the interests of the outside public, but also the integrity of the judicial system itself." *United States v. Holy Land Found. For Relief & Dev.,* 624 F.3d 685, 690 (5th Cir. 2010) (*citing SEC v. Van Waeyenberghe,* 990 F.2d 845, 849-50 (5th Cir. 1993)).

*Van Waeyenberghe* found that when a settlement is filed in district court, "it becomes a judicial record" and that the public's common law right of access to court records extends to settlement agreements. 990 F. 2d at 849. The Court found that:

> The public's interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or

> official. If a settlement agreement involves public officials or parties of a public nature, such a factor weighs against entering or maintaining an order of confidentiality.

*Id*.; *quoting Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 784 (3d Cir. 1994).

Other circuits have found that greater the public's interest "in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983), *FTC v. Standard Fin. Mngmt Corp.*, 830 F.2d 404, 412 (1st Cir. 1987). Appellants submit that the amount of the settlement not only involves the expenditure of taxpayer dollars, it also may provide insight into the ultimate question that was never answered by a jury in this matter. The amount of the settlement paid by the Defendants may very well indicate the cost of defense or the concern of exposure, as the case may be.

In *Brown v. Advantage Engineering*, the Eleventh Circuit applied its earlier standard from *Wilson* to unseal a settlement document when confidentiality was not "necessitated by a compelling government interest, and is narrowly tailored to that interest." *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015–16 (11th Cir. 1992); *Wilson v. Am. Motors Corp*., 759 F.2d 1568, 1570 (11th Cir. 1985). In *Brown,* the Eleventh Circuit found "immaterial" that the "sealing of the record" was negotiated between the parties in settlement:

> Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances set forth by the district court in the record

> consistent with *Wilson,* the court file must remain accessible to the public.

*Brown*, 960 F.2d at 1016. *Leucadia, Inc. v. Applied Extrusions Technologies, Inc.*, 988 F.2d 157, 161-65 (3d Cir. 1993) (recognizing "a pervasive common law right to inspect and copy … judicial records and documents"). *See Bank of Am. Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs*., 800 F.2d 339 (3d Cir. 1986) (presumption of access to inspect and copy judicial records applied to a settlement agreement between a hotel developer and bank); *Mullins v City of Griffin*, 886 F. Supp. 21 (N.D. Ga. 1995) (order of confidentiality entered upon settlement of sexual-harassment case involving public employees vacated).

As this Court can see, numerous decisions of courts across this country and in this Circuit have found that settlement agreements are subject to the common law right of access when they are filed with the court. It follows that if the amount of a settlement is in the record of the court, those minutes and records are also subject to the same common law right of access.

Whether or not the common law right applies or that the settlement agreement is entitled to the presumption of access is not a point that the Plaintiff disputed nor that the Court Below distinguished in its Ruling. However, discussing the precedent in this area and the overall need for access is representative to this Court of the Court Below's failure to properly invoke the right of access as required by controlling precedent and persuasive facts.

### C. The Court Below Failed to Properly Invoke and Balance the Public's Right of Access

Given the facts and circumstances of this case, and the balancing of the interests, the Ruling incorrectly comes down on the side of an interest which should not be found to override the public's strong right of access to records. The jurisprudence of this Circuit required the reviewing Court Below to "balance the common law right of access against the interests favoring nondisclosure." *Van Waeyenberghe*, 990 F.2d at 848. Other Fifth Circuit Courts have found this test to require the Court to consider "relevant facts and circumstances of the particular case." *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 430 (5th Cir. 1981).

The Ruling itself does not meet this standard. The trial court here balanced "interests favoring non-disclosure:" the effect of public disclosure on other settlements, a concern about the judiciary's ability to control its own records, and the concern that the minor child will be sought after by financial predators, against the "media's interest in releasing a sensational story regarding the amount of money paid." ROA.1319.

The "media's interest in releasing a sensational story" casts a false narrative on the Media Entities' interest in this case, and more broadly on the media as a whole. The media is intervening, as it is wont to do, to preserve the public's right of access to public records. This right of access is preserved not only by the United States Constitution and the common law, but implicated via the Louisiana Public

Records Law, which, although briefed for the Court Below, was not taken into account as a factor favoring disclosure.

The media's interest here is to report on an interest of public concern, and to continue its role as a "handmaiden of effective judicial administration." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). This interest belies the media's role of reporting on the news and aiding the public in learning the workings of its government. The Media Entities admit that they intend to report on the amount of the settlement given the public interest. That reporting will serve the goals of informing the people about governmental affairs. It could inflame tempers. It could cause some to question their leaders. But it is vital.

That reporting will promote dialogue. It will help heal a wounded population. It will motivate change, and can reinforce good policy. The Media Entities submit that their reporting of the truth—the fact of this settlement amount—will join other thoughts and ideas and weave into a fabric of important dialogue for the citizens of Iberia Parish and the state. All of these results are the purpose of engaging in a free exchange of ideas in our society: the most information causes the best result.

However, the impairment of access due to the characterization of the media's interest in releasing a sensational story reveals a serious error of law and an abuse of discretion. Its effect is much greater than the claimed cause: the Ruling prevents the public from fully reviewing the facts of an issue which is of great public concern. The Ruling's bias against the marketplace of ideas should lead this Court to reverse.

### D. The Court Below's Interests Favoring Closure Are Suspect

It is notable that the only argument that the Plaintiff advanced in her brief that favored closure is that disclosure of the settlement amount:

> [W]ill expose the child beneficiary to unwanted attention and financial predators. This is putting it mildly; with the incentive of available money, the child will be quickly surrounded by a host of well-wishes, ranging from the sincere to the snake-oil salesman. ROA.1279.

The Court's proffered interests favoring closure include this interest and others, and are not overriding of the public's right of access. After a significant exploration of other issues, the Court Below's "Balancing the Interests" section of the Ruling (ROA.1319) states that the Court weighed:

1. The "child's privacy interest in being protected from financial predators or those who would harass the child simply because they know the amount received";

2. "Protection of the judicial process in permitting orders to be sealed;" and

3. The "chilling effect that the public's knowledge of the settlement amount might have on settlement negotiations and jury deliberations in upcoming settlement in upcoming similar cases."

The Court Below weighed these interests against the public's right to know, and, as explored above, the media's right to write a "sensational story" about the settlement. Appellants will address the Court Below's concerns in reverse order.

*i. There Is No "Chilling Effect" on Other Settlements*

The Court Below supplied its own theory that knowing the amount of the settlement in this matter would somehow affect other litigation against the Defendant Ackal as he is the subject of some public controversy. The Court found persuasive that Sheriff Ackal, was the subject of "recent criminal prosecution … himself" and other "civil cases" with "significant and volatile allegations" asserted. ROA.1318. Due to these factors, the Ruling found that public disclosure of the amount of the settlement at issue in this litigation "might have a chilling effect on potential settlement negotiations in the other cases." ROA.1319.

Notably, Defendant Sheriff Ackal did not oppose the Media Entities' Intervention or even file a brief on the Motion to Vacate. Such an interest is, of course, in the eye of the beholder. The Media Entities aver that this interest actually cuts in the opposite direction: public view of these settlements will assist other plaintiffs and other public entity defendants in valuing their choice to try or settle a matter. Furthermore, the particular facts of this case and the amount that was paid to settle it will inform other potential plaintiffs in similar matters the value of their potential claims. It may also inform citizens as to how the Defendants valued their exposure.

There was no relevant precedent that could be found relating to the Court Below's supplied interest in other settlements. In any event, the potential effect on other settlements cannot be an interest which outweighs the public's strong right of

access that has been advanced in the cases before this Circuit. Such an exception to the presumption of openness and this Court's ruling relating to settlement agreements in *SEC v. Van Waeyenberghe*, would absolutely swallow the rule of public access and should not be allowed to stand. 990 F.2d 845, 849 (5th Cir. 1993).

*ii. Sealing Does Not "Protect the Judicial Process"*

The Court also noted the protection of the "process in permitting orders to be sealed" was a concern. However, this concern was not elaborated upon other than to be listed as an interest upon which the Court ruled. The Media Entities agree that the precedent requires that courts be responsible for their own records. However, on its face, such an interest cannot be of itself a reason for closure.

This Court has found conclusively that public confidence in the same judicial process "cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Holy Land Found. For Relief & Dev.,* 624 F.3d 685, 690 (5th Cir. 2010); *citing In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir.2008).

To allow for the Court's own interest to justify closure is error. The Court's own interest in maintaining its records is certainly important, but to allow a Court's interest to outweigh the public's right to review records is to subject each and every case to closure.

*iii. The Child's Interest in Avoiding Financial Predators is Not Impaired and May Be Protected Through Existing Legal Means*

The Appellants reference and incorporate herein their earlier argument in support of First Amendment access to the amount of the settlement at issue in this appeal. That argument succinctly shows, employing the Louisiana Civil Code and the Code of Civil Procedure that there are narrowly tailored alternatives available to the Court that do not involve sealing. In fact, the proffered interest of "financial predators" is not a real interest: the minor cannot give away her property and her mother, who is the actual and legal administrator of that property, has her name on the cover of this Brief.

In truth, because a minor is involved, the Court and its officers, including the undersigned, should be on guard. The Media Entities have averred repeatedly in writing they are not interested in harming the minor's interest or sharing her name. The amount of the settlement is the only fact that is not readily discoverable to even the mildly trained eye. The fact that there was a settlement is well-known in this high-profile case. The minor is not legally capable of alienating the funds, and could quickly and easily be placed under the protection of a conservator or a trust without impugning the public's right of access.

The Media Entities submit that such an interest cannot outweigh the public's right to know the amount of a settlement paid by a public body. That the settlement was made following allegations of abuses and deprivation of human on the part of

the state **makes it even more in the public's interest** to know the amount paid in reparation. Understanding the government's weighing of interests here: trial versus settlement, will assist the people in understanding how those decisions are made with their tax dollars.

Finally, the claim of harm to the minor, as argued *supra* and incorporated herein by reference, disregards the realities of Ms. Bradley's role as natural tutor and several more narrowly tailored options. The Court Below did not properly take into account these laws and the Ruling's effect on the Media Entities ability to review public documents under the Public Records Law, as also argued *supra* and incorporated herein. Succinctly put, the Court Below's interests are laudable, but they were not built upon sterner stuff. The Constitution, the U.S. Supreme Court, and this Circuit should require more before impinging the public's right of access.

## VII. CONCLUSION

The U.S. District Court for the Western District of Louisiana erred when it denied the Media Entities' attempts to vacate the March 15, 2018 Settlement Conference Order as it relates to the amount of the settlement reached at that Settlement Conference. In its Ruling, the Court Below erred as a matter of law when it failed to consider the effects of the Order and its Ruling on the rights guaranteed via the Louisiana Public Records Law. It further erred in failing to distinguish between the First Amendment and common law rights of access to judicial records and documents. Finally, it erred by finding that the child's right to privacy, or to be

left alone by theoretical "financial predators," outweighed the public's right to know the truth about how much public money was paid to settle a matter of great public interest.

Movants-Appellants, Capital City Press, L.L.C. and KATC Communications, Inc., respectfully aver that the Court Below should be reversed and rendered in favor of Movants, vacating the Court Below's sealing of the amount of the settlement reached at the Settlement Conference of March 15, 2018.

Respectfully submitted, this 30th day of January, 2019.

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

| | |
|---|---|
| SHANDELL MARIE BRADLEY, Tutrix on behalf of her minor child, A J W,<br><br>*Plaintiff – Appellee*<br><br>v.<br><br>LOUIS M. ACKAL, Individually and in his official capacity; JUSTIN ORTIS, Individually and in his official capacity; XYZ DEPUTIES, Individually and in their official capacity; XYZ INSURANCE COMPANY, on behalf of Sheriffs Office Iberia Parish,<br><br>*Defendants – Appellees*<br><br>v.<br><br>CAPITAL CITY PRESS, L.L.C., doing business as The Advocate; KATC COMMUNICATIONS, L.L.C.,<br><br>*Movants – Appellants* | Case No. 18-31052 |

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of February, 2019, a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the typeface and volume limits of Fed. R. App. P. 32(a) and Local Rule 32.1.

1. This brief contains 11,135 words, excluding the sections exempted by Fed. R. App. P. 32(f) and Local Rule 32.2.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2017 in 14-point Times New Roman font for text and 12-point Times New Roman font for footnotes.

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