BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

IN RE: REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Petitioners, v. FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Respondents.	Docket No.: 2226123 2226123-OSAH-GMCC-PL-60-Howells

BRIEF OF AMICUS CURIAE
THE GEORGIA FIRST AMENDMENT FOUNDATION

The Georgia First Amendment Foundation respectfully submits this brief as a friend of the Court and requests that the Court deny the pending Joint Motion to Seal, which contends that the Hope Act requires the sealing of the entire record in this case.

There are many laws in Georgia that include an expressly defined process for sealing court records. The Hope Act is not one of them. In fact, the Hope Act outlines several types of

records that are expressly public, and places conditions on the information that it deems confidential. For this reason, a blanket seal cannot be applied to the record.

In the absence of a statutory process within the Hope Act for sealing court records, the movants must meet the standards of Uniform Superior Court Rule 21. Rule 21 and related jurisprudence do not support granting this Motion, as movants are required to show that they will suffer special, out-of-the-ordinary harm, as opposed to harm that would occur in a typical lawsuit. Finally, any harm that the movants might suffer must compete in a balancing test with the public interest—which is unparalleled in this case concerning the allocation of taxpayer monies and a new, potentially controversial, trending topic in Georgia's legal landscape.

Interest of Amicus Curiae

The Georgia First Amendment Foundation advocates for the rights of citizens, journalists, and public servants to gather information about the operation and performance of government institutions. GFAF is a nonpartisan, nonprofit coalition. Along with the majority of coalitions in other states, it is a member of the National Freedom of Information Coalition, and it is the only nonprofit organization in the state of Georgia dedicated to advancing access to public information. Its members and leadership include some of Georgia's finest journalists, media organizations, attorneys, and citizens.

For almost thirty years, GFAF has helped journalists access public information as they carry out their constitutional function. Part of this important mission includes supporting access to public information, including access to court records. Without access to information of public interest, the press cannot fulfill its obligation to inform the public. The Georgia First Amendment Foundation is inimitably positioned to provide this Court with a comprehensive public interest

perspective not supplied by any other party to this case, and to demonstrate that both the public and the press will be best served by keeping these records unsealed.

ARGUMENT

I. Georgia's Longstanding Presumption of Access

> "In the State of Georgia, the public and the press have traditionally enjoyed a right of access to court records. Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reason. Like a candle, court records hidden under a bushel make scant contribution to their purpose."

Atlanta Journal v. Long, 369 S.E.2d 755 (Ga. 1988).

The presumption of access to court records is grounded in both common law and rule. *Merch. L. Firm, P.C. v. Emerson,* 800 S.E.2d 557, 561 (Ga. 2017) (reconsideration denied) ("The right of access to court records under court rule is coextensive with the common law right of access to court proceedings.") "The aim of this presumption is to ensure that the public will continue to enjoy its traditional right of access to judicial records, except in cases of clear necessity. To this end, the presumptive right of access includes pre-judgment records in civil cases, and begins when a judicial document is filed." *Atlanta Journal v. Long*, 258 Ga. 410, 413–14 (1988). This presumption may be overridden only "in cases of clear necessity." *Id.* at 413.

In the event that a law does not expressly provide for sealing court records, Rule 21 sets forth specific and stringent procedures that must be followed before court records may be sealed.[1] *See In re Motion of the Atlanta Journal-Constitution*, 271 Ga. 436, 437 (1999) ("…courts may restrict or prohibit access to court records only if they do so in compliance with the requirements of Rule 21.").

[1] Administrative Rule of Procedure 616-1-2-.02(3) provides that this Court may refer to the Uniform Rules for the Superior Courts to resolve procedural questions that are not addressed by the APA, other applicable law, or the Administrative Rules of Procedure.

Rule 21 and its interpretive case law is an important subset of the overarching rule that the courts must be open to the public eye. As the Georgia Supreme Court declared: "This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a *sine qua non* of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society." *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 578 (1982). The public's ability to access court records is "an essential component of our system of justice" and "is instrumental in securing the integrity of the process." *F.T.C. v. AbbVie Prod. LLC,* 713 F.3d 54, 62 (11th Cir. 2013) (quoting *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304, 1311 (11th Cir.2001) (per curiam)).

This enduring principle is at its most vulnerable when court records are being sealed, which is why Georgia courts have robust procedures for ensuring that the public's interest is carefully considered and weighed against any private interest.

II. There is No Mechanism to Seal Court Records Within the Hope Act

There is no language in the Hope Act that contemplates filing court records under seal. O.C.G.A. § 16-12-220(a). Had the legislature intended to create a process by which court records could be sealed—it could have easily done so, as it has done many times before.

For example, the Taxpayer Protection Against False Claims Act expressly states that complaints "shall be filed in camera and under seal," and "shall remain under seal for at least 60 days." O.C.G.A. § 23-3-122 (b)(2). Likewise, when a record pertaining to the disposition of a child in juvenile court is "filed in a superior or state court or admitted into evidence in a superior or state court proceeding, it shall be filed under seal." O.C.G.A. § 15-11-703. When a witness testifies before a Grand Jury pursuant to a grant of immunity, the original transcript "shall be

filed under seal..." O.C.G.A. § 15-12-83. A reference list that identifies each item of redacted information on a court filing "shall be filed under seal…." O.C.G.A. § 15-10-54 (g). When an individual is convicted of an offense and sentenced as a direct result of the defendant being the victim of an offense of trafficking, the individual may file a petition to vacate such conviction. O.C.G.A. § 17-10-21(a). Those petitions "shall be filed under seal." O.C.G.A. § 17-10-21(b). Similarly, a petition to examine court records and department records relating to adoption "shall be filed under seal." O.C.G.A. § 19-8-23 (effective July 1, 2022).

In all of the above examples, court record sealing measures were adopted to protect vulnerable witnesses to dangerous crimes, victims of sex trafficking, or minor adoptees. Here, the greatest risk associated with disclosure is potential embarrassment for a government agency or the potential disclosure of trade secret information, which is already protected by another statute. There is no security concern that would merit a blanket seal— and accordingly, the Legislature has intentionally refrained from implementing that advanced level of protection.

The fact that the Legislature intended to grant protection to some of these records in one context does not require the conclusion that the Legislature intended to protect all of these records in all contexts. The Hope Act states that "[a]ll working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part…shall be confidential data…." O.C.G.A. § 16-12-220 (a) (emphasis added). Even if the Legislature had drafted a mechanism into the statute for sealing court records, there would be many documents in the court record that would defy the definition of "confidential information." For example, during discovery, information might be produced by a third party that was not "produced by, obtained by, or disclosed to" the commission pursuant to any of the activities enumerated in O.C.G.A. § 16-12-210. Such information would not be

confidential. O.C.G.A. § 16-12-220 (a). Pleadings, motions, responses, rulings, judgments, transcripts, and orders are all court records that might not necessarily include the "confidential information" contemplated by O.C.G.A. § 16-12-220 (a); *see also Undisclosed LLC v. State*, 302 Ga. 418, 430–31 (2017) (describing what constitutes a "court record"). And, to the extent that any court filings might contain the "information published in an official commission report," or "any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission," all of that information is expressly public under the Hope Act. *Id*.

Contrary to the assertions in the Joint Motion to Seal, there is no support within the Hope Act for sealing the entire record. As such, the proper analysis should consider the interest of the public and lead with a presumption of access.

III. Trade Secrets Can Be Protected Without Infringing the Public Interest

To the extent that the movants are attempting to protect commercial trade secrets, the protection of trade secret information falls under a separate statute with its own rigorous standards that should be applied to each record for which the trade secret protection is being sought. *See* O.C.G.A. § 10–1–761(4); *see also Smith v. Mid–State Nurses,* 403 S.E.2d 789 (Ga. 1991) (holding that commercial information is not a trade secret unless it meets the demanding standards of the Trade Secret Act). The correct approach would be for these parties to identify which of these records would reveal information that would qualify as a trade secret, such that this Honorable Court might then proceed in conformity with Rule 21. The result of this process would be that a small portion of these records might be sealed or redacted, assuming all other requirements are met.[2] *See* Ga. Unif. Super. Ct. R. 21.1 (stating that the order sealing the records

[2] If it is unclear whether a record is exempt in whole or in part from disclosure by law or privilege, this Court may exercise its discretion to order *in camera* review. *See, e.g., St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,* 746 S.E.2d 98, 108 (Ga. 2013).

must "specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation."); *see also Atlanta Journal v. Long*, 258 Ga. 410, 414 (1988) (holding that to seal a court document, the moving party must show a prospect of harm that "differs in degree or kind from that of parties in other civil suits.").

But rather than using the preexisting process to protect their trade secret information, instead, movants attempt to rewrite the Hope Act to include a device for sealing this record in its entirety—which allows them to proceed without conducting any review or analysis of the individual subject records. This maneuver will not comport with the decades-long tapestry of jurisprudence in Georgia that leans in favor of keeping court records unsealed.

IV. Significant Public Interest

Medical cannabis laws are of high public interest within this state and across the nation. [3] For the estimated 22,000 healthcare patients who are eligible for care under this law, the performance of the commission and its contractors is paramount. Georgia taxpayers have a legitimate interest in reviewing state government's stewardship of their money. And in order for the press to inform the public, it must be afforded access to every court record that is not properly exempt from access.

This significant public interest should be considered prior to any sealing of these records. "An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest." Rule 21.1-21.2; *see Atlanta Journal v. Long*, 258 Ga. 410, 413 (1988). The trial court must "weigh the harm to the privacy interest of that party from not sealing the pre-judgment documents against

[3] Russel, Dale, *Critics question why Georgia Access to Medical Cannabis Commission is exempt from Open Records*, Fox 5 Atlanta, October 7, 2021, available at: https://www.fox5atlanta.com/news/many-question-why-georgia-cannabis-commission-is-exempt-from-open-records.amp (last accessed July 3, 2022).

the harm to the public interest from sealing the documents. Before sealing the documents, the court must conclude that the former clearly outweighs the latter." *Id.* at 414 (emphasis added).

Ultimately, the future of medical cannabis and the laws surrounding it rests on the shoulders of Georgia's taxpayers, who, through their duly elected representatives, are the sovereigns of this state. It is the duty of the press to inform them:

> From the free flow of numerous ideas the sovereign ultimately chooses some, eliminates others, and directs the course of the state. Without the free flow of these ideas the state loses direction.
>
> The press plays a peculiar role in this process because it is through the press the ideas are reported to the sovereign. There is no other effective way to report to the sovereign than through the press. If the sovereign was an individual rather than the people collectively, it would be possible to employ special agents to gather ideas and facts from all sources and bring them to the sovereign. Obviously, this cannot be done effectively other than by means of mass communications when the sovereign is the mass of persons called the people. The sovereign has determined it is in the best interest of all that it receive these ideas.

Vaughn v. State, 381 S.E.2d 30, 32 (Ga. 1989) (Gregory, J., dissenting). The press obtains this information by inspection of court records, such as the ones at issue here. The interest of the press *is* the interest of the public.

It cannot be said that because this case concerns the financial or commercial information of private entities, that it is not also of public interest. Through misconduct or alleged misconduct, a private entity can become a legitimate public interest. *See Macon Tel. Pub. Co. v. Tatum,* 436 S.E.2d 655, 657 (Ga. 1993) (holding that a private citizen became "the object of a legitimate public interest" due to her misconduct, such that the newspaper could publish facts about her, including her name).

> The Georgia Constitution guarantees the freedom of the press. A free press is necessary to permit public scrutiny on the conduct of government and to ensure that government operates openly, fairly, and honestly. In first recognizing the right to privacy, this court noted that the right is unquestionably limited by the right to speak and print. For example, we held in *Waters* that the publication of photographs of a murder victim did

> not violate her mother's right to privacy since, where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy.

Tatum, 436 S.E.2d at 657 (internal citations and quotations omitted). By voluntarily applying for and receiving a license to perform a contracted government function, these private companies have taken on the corresponding responsibility of a higher standard of scrutiny. Their actions are now of legitimate public interest, especially considering the serious allegations that have emerged relating to their participation in the bidding process. While the movants may have an interest in keeping some information in the record sealed, it is in the best interest of the press—and in the best interest of the entire state—that these court records remain open and available to inspection.

Accordingly, the Foundation requests that this Honorable Court deny the pending Joint Motion to Seal, and that it subject any future requests for sealing to the rigorous process outlined by Rule 21, duly considering the strong public interest in favor of keeping the entire record open.

Respectfully submitted this 8th day of July, 2022.

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