20210244
FILED DECEMBER 23, 2021
CLERK OF THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Energy Transfer, LP and Dakota Access, LLC, Plaintiffs-Appellants, v. North Dakota Private Investigative and Security Board and Tigerswan, LLC, Defendants-Appellants.	**SUPREME COURT NO. 20210244** Case No. 08-2020-CV-03049

BRIEF OF *AMICI CURIAE* NORTH DAKOTA NEWSPAPER ASSOCIATION, HPR, LLC, AND FIRST LOOK INSTITUTE, INC. IN SUPPORT OF RESPONDENT NORTH DAKOTA PRIVATE INVESTIGATIVE SECURITY BOARD AND AFFIRMANCE

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TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES

Paragraph

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY OF AMICI CURIAE

[¶1] Amici curiae are the North Dakota Newspaper Association, Inc., HPR, LLC, publisher of the *High Plains Reader*, and First Look Institute, Inc., publisher of *The Intercept* and *Field of Vision.*

[¶2] Amicus North Dakota Newspaper Association ("NDNA") is a nonprofit domestic corporation representing the state's 85 newspapers. The North Dakota Newspaper Association was founded in 1885 to support and advocate for all North Dakota newspapers. NDNA is dedicated to preserving and advancing North Dakota newspapers' ability to document history in real-time and serve as both representations of their communities and guardians of the people. In keeping with that goal, NDNA represents its members and the public in legislative and judicial proceedings—protecting the public's right-to-know through open public meetings and open public records.

[¶3] Amicus HPR, LLC is a domestic business limited liability news company doing business as the *High Plains Reader*, an independent news, arts, and entertainment publication serving Fargo, West Fargo, and Moorhead. In its 26th year, the *High Plains Reader* strives to provide in-depth investigative journalism to local communities in the Fargo region.

[¶4] Amicus First Look Institute, Inc. ("FL") is a nonprofit American news organization headquartered in Manhattan, New York. FL owns and operates several journalistic outlets, including *The Intercept*, an award-winning, nationally recognized news organization with a reputation for holding power to account. *The Intercept*'s in-depth investigations focus on politics, national security, crime and justice, surveillance, corruption, the environment, science, technology, and the media.

[¶5] FL is currently litigating a related action under the North Dakota Open Records Act. That case is currently pending before the Honorable Judge Cynthia M. Feland in the South Central Judicial District Court of Burleigh County. *Energy Transfer LP et al. v. N.D. Priv. Investigative and Sec. Bd. et al.*, Case No. 08-2020-CV-02788 (consolidated as to common issues of law and fact with *First Look Institute, Inc. v. N.D. Priv. Investigative and Sec. Bd.*, Case No. 08-2020-CV-03093 (S. Central. Jud. Dist. Ct. N.D.)) (the "Feland Action").

STATEMENT OF INTEREST OF AMICI CURIAE

[¶6] Amici file this brief in support of Defendant-Appellee North Dakota Private Investigative and Security Board (the "Board") and affirmance. On October 30, 2021, the Board issued a written order denying Plaintiff-Appellants Energy Transfer LP's and Dakota Access, LLC's (collectively "ET") Petition to Intervene in the Board's settled administrative action (OAH File No. 20190070, the "Administrative Action") against TigerSwan, LLC. Order, N.D. Priv. Investigative & Sec. Bd. (Oct. 30, 2021).[1] ET sought to intervene for the sole purpose of obtaining a protective order that would prevent the Board from releasing non-exempt, non-confidential discovery documents (the "Disputed Documents") under the North Dakota Open Records Act and require it to destroy all copies of documents in its possession. Appellant Br. [Dkt. 13] at ¶ 20. ET, the Board, TigerSwan, and FL are currently litigating Open Records issues pertaining to the same Disputed Documents in the Feland Action. That case is already at the merits stage; all four parties filed and argued motions for summary judgement and/or other dispositive motions. Feland Action, Case No. 08-2020-CV-02788, Dkt. 219, 230, 231, 249, 264, 267, 268, 317, 318, 322, 330, 334, 337, 345, 347, 349.

[¶7] Amici are members of the news media committed to defending the North Dakota Open Records Act and write to emphasize the danger this case poses to those who seek public records. The Open Records Act is a vital newsgathering tool used by news organizations and journalists to hold public officials to account. Amici have a direct interest in ensuring that powerful corporations cannot undermine the Open Records Act or impede journalists' and news organizations' use thereof.

[1] *See* Appellant App. [Dkt. 12] at 56-58.

Likewise, they have an interest in ensuring that media entities need not fight litigants in multiple cases just to access public records.

[¶8] Amicus FL filed a request under the North Dakota Open Records Act for the Disputed Documents. FL has a good faith basis to believe that all or most of the Disputed Documents are non-confidential, non-exempt public records and that it has the right to access such records under the Open Records Act. ET's exclusive motivation in bringing this appeal is to re-open a closed matter to obtain an order that would frustrate FL's rights under the Open Records Act and render meaningless more than a year of litigation concerning access to the Disputed Documents. *See* Dkt. 13 at ¶ 20. As such, reopening the Administrative Action to allow ET to seek a such an order would force FL to move to intervene in the Administrative Action to protect its rights to the documents. This would increase FL's legal costs and further delay its access to records to which it is entitled under the North Dakota Open Records Act. FL is therefore directly interested in this matter.

[¶9] Amici urge the court to protect journalists' ability to use the Open Records Act to inform their communities about matters of public concern and affirm the District Court's dismissal of ET's Administrative Appeal.

STATEMENT OF FUNDING AND AUTHORSHIP

[¶10] No party's counsel authored any part of this brief. No party, party's counsel, person, or entity other than the amici curiae, their members, or their counsel contributed money toward the authorship or production of this brief.

ARGUMENT

[¶11] The Open Records Act "protects the right of the public to access and inspect government records[,]" *State v. M.J.W.*, 2020 ND 183, ¶ 6, 947 N.W.2d 906, 908 (N.D. 2020), undergirding "the right of the public and community at large to be informed of matters of public concern." *Forum Pub. Co. v. Fargo,* 391 N.W. 2d 169, 171 (N.D. 1986). Access to public records provides "a means for citizens to know 'what the Government is up to[,]' and is "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). *See also Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 495 (1975) (Government transparency is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.")

[¶12] The news media's ability to report on government activities "assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The news media relies on the Open Records Act to perform its "special and constitutionally recognized role in informing and educating the public[]" about governmental affairs. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781 (1978).

[¶13] Granting ET's Petition to Intervene in the now-closed Administrative Action would undermine the Open Records Act and the press' ability to use the Act to report on government activities. ET seeks to intervene for the sole purpose of securing a protective order that would prevent the State from disclosing non-exempt, non-

confidential Open Records in response to lawful requests under the Open Records Act. Dkt. 13 at ¶ 20. This would plainly contravene Article XI, Section 6 of the North Dakota constitution and the Open Records Act, N.D.C.C. § 44-04-18; ET is not entitled to such a protective order. Given that the Open Records Act bars the only relief it seeks, the Court should affirm the District Court's June 23, 2021 Order [Dkt. 67] (the "Order") and July 2, 2021 Judgement [Dkt. 72] (the "Judgement") dismissing ET's Administrative Appeal, Case No. 08-2020-CV-03049.

[¶14] Moreover, administrative standing should not extend to a party seeking to intervene in a matter for the sole purpose of securing an order that would deny public access to agency records while simultaneously pursuing identical relief in a separate civil case. Permitting duplicative litigation in this context would impinge the public's right to government information under the Open Records Act. Requestors seeking to protect their right to access the records would need to intervene in multiple lawsuits to do so. Legal fees alone would render this prohibitively expensive for most local news organizations and members of the public. Further, assuming that these records would remain unavailable throughout the pendency of the litigation, commencing proceedings before a second tribunal would further delay the public's access to the records, impinging their right to timely access. Affirming the Order would prevent the costs and delay associated with duplicative proceedings from undermining the rights of the press and public under Article XI, Section 6 of the North Dakota constitution and the Open Records Act.

I. THE OPEN RECORDS ACT APPLIES TO THE DISPUTED DOCUMENTS AND PRECLUDES INTERVENTION.

[¶15] The only relief ET seeks in this case directly contravenes the Open Records Act and Article XI, Section 6 of the North Dakota constitution. Dkt. 13 at ¶ 20. The Administrative Law Judge cannot grant that relief without allowing private

contracts to preempt controlling law. Contracts—whether between two private entities or one private entity and the State—can never abrogate the public's rights under the Open Records Act. As such, the Court should affirm the District Court's ruling that the "Board's conclusion of law that it could not provide the relief requested by Appellants is supported by the Boards findings of fact and further supported by the open records laws and record retention laws." Order at ¶ 31.

A. The Disputed Documents Are Public Records Not Categorically Exempt Or Confidential under Any State Statute.

[¶16] The Disputed Documents are public records and presumptively open to the public under the Open Records Act. Under the North Dakota Constitution: "Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records[.]" N.D. Const., Art. XI, Sec. 6*; see also* N.D.C.C. § 44-04-18 ("Except as otherwise specifically provided by law, all records of a public entity are public records[.]") These provisions apply to all State documents of "some official import" or that are "rationally related" to "legitimate" state business. *See Grand Forks v. Grand Forks Herald*, 307 N.W.2d 572, 578 (N.D. 1981); *N. States Power Co. v. N.D. Pub. Serv. Comm'n*, 502 N.W. 2d 240, 247-48 (N.D. 1993).

[¶17] The Open Records Act has "expansive" applicability. *Grand Forks Herald,* 307 N.W.2d at 577-78. The term "records" means: "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business." N.D.C.C. § 44-

04-17.1(16). The Disputed Documents—obtained by the Board during official proceedings conducted pursuant to its statutory responsibilities—satisfy the broad definition of a "record" under N.D.C.C. § 44-04-17.1(16). The fact that the Board now possesses the records, which are rationally related to the Board's official business, renders them public records. *See* N.D. Const, Art. XI, Sec. 6; N.D.C.C. § 44-04-18. ET's claim that it "owns" the records is irrelevant. "[P]ossession of records, rather than ownership, is the touchstone for application of the open records law." N.D. AG Op., No. 2000-09, 2000 N.D. AG LEXIS 11, at *7 (Feb. 28, 2000).

[¶18] It is undisputed that the Board possesses a digital copy of the requested records. The Board obtained the records "in connection with" official public business, namely, in response to a discovery order by the Administrative Law Judge in the Administrative Action. This Administrative Action involved the Board's efforts to enforce investigative or private security licensure requirements. There is no factual dispute that the Board's action was a legitimate use of the Board's powers. *See* N.D.C.C. § 43-30-04 ("The board shall establish by rule the qualifications and procedures for classifying, qualifying, licensing, bonding, and regulating persons providing private investigative and security services, including armed security personnel.")

[¶19] The Disputed Documents are public records presumptively open to the public under the Open Records Act. The press and public are therefore entitled to access these records unless a specific statute renders them confidential or exempt. "[B]ecause open-records law provides that governmental records are to be open to the public 'Except as otherwise specifically provided by law,' an exception to the open-records law may not be implied. In order that a record may be excepted from the open-records law the Legislature must specifically address the status of that type of

record -- e.g., statements that a certain type of record is confidential or that it is not open to the public." *Hovet v. Hebron Pub. Sch. Dist*., 419 N.W.2d 189, 191 (N.D. 1988); *see also N. States Power Co.*, 502 N.W. 2d at 243 (explaining that if an entity felt that the open records law as written "adversely affect[ed its] vital business interests[,]" its remedy was with the legislature, not the courts).

B. A Private Entity's Interest in Agency Records Does Not Trump The Public's Rights under The Open Records Act and Article XI, Section 6 of The North Dakota Constitution.

[¶20] Rather than work with the Board to identify documents subject to specific statutory exemptions, ET has repeatedly argued that its private contract with TigerSwan somehow places the Disputed Documents outside the scope of the Open Records Act. The Open Records Act cannot be limited by a contract of the public entity possessing the documents or by a private entity.[2] *See, e.g.*, *N. States Power Co.*, 502 N.W.2d at 248 ("The PSC's prior unchallenged practice of granting trade secret protection to this type of information did not constitute a promise that the information would never be disclosed. It is fundamental that an agency of state government or its officials generally cannot bind the state by an act that violates the law."); N.D. AG Op., No. 2017-O-01, 2017 N.D. AG LEXIS 2, at *3 (Mar. 10, 2017) ("Open records law cannot be limited by policy or contract, rather, limitations and exemptions must be expressly provided by 'law.'")); N.D. AG Op., No. 2005-O-06, 2005 N.D. AG LEXIS 20, at *10-11 (May 11, 2005) (opining that Confidentiality and Non-

[2] Furthermore, even the contract between TigerSwan and ET recognizes that any expectation of confidentiality must yield to a legal request by a regulatory agency. *See* Professional Services Agreement ¶ 11.1, Dkt. 12 at 42-43 ("Confidential Information shall *not* include information which...is required to be disclosed by law, rule, regulation, legal process, or order of any court or government body having jurisdiction over the same.") (emphasis added).

Circumvention Agreement that purported to bar disclosure could not be sole basis for withholding record from the public).

[¶21] When there is limited North Dakota case law on point, Florida case law is persuasive because "Florida open records and meetings laws…are very similar to those in North Dakota." N.D. AG Op., No. 2001-O-11, 2001 N.D. AG LEXIS 45, at *10 (Sept. 13, 2001). Florida appellate courts have directly addressed the question of whether private contractual provisions can exempt presumptively public records from disclosure and are unequivocal that "a private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential. Neither the desire for nor the expectation of non-disclosure is determinative." *Sepro Corp. v. Fla. Dep't of Envtl. Prot.*, 839 So. 2d 781, 784 (Fla. Dist. Ct. App. 2003)*; see also NCAA v. AP*, 18 So. 3d, 1201, 1208-09 (Fla. Dist. Ct. App. 2009) ("The right to examine these records is a right belonging to the public; it cannot be bargained away[.]")

[¶22] Allowing corporations to shield documents from public view by contract would exacerbate the problem the Legislature specifically sought to prevent in enacting the open records laws. If businesses could achieve secrecy-by-agreement for records in the possession of the government, every private-party contract confidentiality clause could qualify for exemption, shielding caches of records otherwise declared public by the Legislature.

[¶23] Governments frequently interact with private parties, and a great deal of this conduct goes to the heart of governmental oversight functions that are of great public concern. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979) (observing relationship between regulatory oversight over private entities and "concern about secrecy in government and abuse of power.") Allowing private entities to exempt

their documents from disclosure should government ever take possession of them would impair the North Dakota Legislature's goal of transparency. Thus, while the question of whether TigerSwan produced the documents in violation of a contract may be an appropriate question for a private contractual dispute between ET and TigerSwan, it does not entitle ET to a protective order that would otherwise violate the Open Records Act.

[¶24] The Court should therefore affirm the District Court's ruling that the "Board's conclusion of law that it could not provide the relief requested by Appellants is supported by the Boards findings of fact and further supported by the open records laws and record retention laws." Order at ¶31.

II. A PARTY LOSES STANDING TO APPEAL A DENIAL OF ITS PETITION TO INTERVENE IN AN ADMINISTRATIVE ACTION FOR THE PURPOSE OF BLOCKING PUBLIC ACCESS TO OPEN RECORDS ONCE THAT PARTY HAS INITIATED A SEPARATE CIVIL SUIT SEEKING IDENTICAL RELIEF.

[¶25] ET cannot prevail on the merits because the Open Records Act bars the relief it seeks. Unfortunately, if allowed to intervene, ET—and similarly situated litigants in future cases—will likely be able to delay public release of the records under the Open Records Act until *both* cases are complete. *See* Feland Action, Case No. 08-2020-CV-02788, Dkt. 54, 102. Worse, by forcing any party seeking the records to pay attorneys to litigate multiple cases, duplicative litigation may stymy the rights of the press and public to access agency documents under the Open Records Act and Article XI, Section 6 of the North Dakota Constitution.

[¶26] Standing doctrine can and should prevent these kinds of abusive litigation tactics. "The question of standing focuses upon whether the litigant is entitled to have the court decide the merits of the dispute. It is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society."

State v. Carpenter, 301 N.W.2d 106, 107 (N.D. 1980). A party cannot have standing to appeal an administrative decision unless it was "factually aggrieved" by that decision. *Shark v. U.S. W. Communs.,* 545 N.W.2d 194, 198 (N.D. 1996); *Washburn Pub. Sch. Dist. v. State Bd. of Pub. Sch. Educ*., 338 N.W.2d 664, 667 (N.D. 1983).

[¶27] The Court should affirm the District Court's holding that ET cannot have been factually aggrieved given that it is already litigating identical issues pertaining to the Disputed Documents in the Feland Action. Order at ¶¶ 26-27. Reversing that holding would seriously impair the rights of the press and public under the Open Records Act. ET would not be factually aggrieved if only permitted to pursue its claims before one tribunal, but Open Records requestors certainly would be if effectively required to litigate two or more cases. At a time when financial pressures are rendering news organizations less able to litigate public records cases,[3] requiring news organizations to litigate *multiple* lawsuits to access public records may mean that important stories go unreported. If that happens, government transparency and democratic discourse will suffer.

A. ET Is Not Factually Aggrieved by Its Inability to Participate in The Administrative Action.

[¶28] A party cannot establish standing to appeal an administrative ruling if they can show only a "remote and speculative" possibility of future injury rather than a concrete injury-in-fact. *Shark*, 545 N.W.2d at 199-200. *See also Vickery v. N.D. Workers Comp. Bureau*, 545 N.W.2d 781, 783 (N.D. 1996) ("The potential to be aggrieved is not the equivalent of being aggrieved in fact."). A "'Nominal, formal, or technical interest in the action' will not suffice.…Rather, a party is factually aggrieved only 'if a decision has enlarged or diminished that party's interest.'"

[3] Knight Found., "In Defense of The First Amendment," (April 21, 2016), https://knightfoundation.org/reports/defense-first-amendment/.

Vickery, 545 N.W.2d at 783 (internal citations omitted) (quoting *Assoc. Gen. Contractors v. Laborers Local No. 580*, 278 N.W.2d 393, 397 (N.D. 1979); *Washburn Pub. Sch. Dist.*, 338 N.W.2d at 667). "In other words, a party must gain or lose something to be aggrieved." *Minn-Kota Ag Prods. v. N.D. Pub. Serv. Comm'n*, 2020 ND 12, ¶ 16, 938 N.W.2d 118, 125 (N.D. 2020).

[¶29] ET does not and cannot explain how the Board's denial of its Petition to Intervene in the Administrative Action "enlarged or diminished" its rights to the relief it seeks with respect to the Disputed Documents. ET incorrectly claims that "the fact that another case is pending does not mean that Energy Transfer was not factually aggrieved; it cannot be disputed that Energy Transfer had a right to intervene in the Administrative Action and was denied that right." Dkt. 13 at ¶ 41. Even if the later is true, this is precisely the kind of purely "formal" interest that cannot establish injury-in-fact.

[¶30] The sole allegation that could support a finding that ET was factually aggrieved is ET's claim that "[T]he Board is attempting to use the District Court's dismissal of this appeal to obtain dismissal of that case without adjudication of the merits." *Id.* at n.5. But this claim is wholly unsupported by the record in the Feland Action, as ET, FL, and the Board have each *already filed, briefed, and argued motions for summary judgement* in that case.[4] Case No. 08-2020-CV-02788, Dkt. 230, 231, 249, 264, 267, 268, 317, 318, 322, 330, 334, 337, 345, 347, 349. This Court has "often recognized that summary judgment is a procedural device for promptly resolving a case *on the merits." State v. Eight Ball Trucking, Inc*., 2019 ND 102, ¶ 10, 925 N.W.2d 411, 415 (N.D. 2019) (emphasis added). *Accord, e.g., Markgraf v.*

[4] TigerSwan also filed a "Motion to Enforce Agreement with Board, Return of All Materials to ET, and Dismiss Case," which it characterized as a dispositive motion. Feland Action, Case No. 08-2020-CV-02788, Dkt. 219.

Welker, 2015 ND 303, ¶ 10, 873 N.W.2d 26, 31 (N.D. 2015); *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754, 757 (2012); *Wenco v. EOG Res., Inc.*, 2012 ND 219, ¶ 8, 822 N.W.2d 701, 704 (N.D. 2012); *Cmty. Credit Union v. Homelvig*, 487 N.W.2d 602, 603 (N.D. 1992). As such, this is not a plausible explanation for how ET's inability to intervene in the Administrative Action either "enlarged or diminished" its claimed right to control the records. The Court should therefore disregard it.

[¶31] The only other interest ET might have in litigating identical issues before two different tribunals is its interest in getting two bites at the proverbial apple: namely, two tries to get the outcome it wants. No party has the right to do this. Litigation is not a video game; parties are not entitled to multiple lives and do-overs. Denying ET's Petition to Intervene therefore did not diminish whatever claim it may have to control the Disputed Documents, nor its ability to vindicate that claim. As the District Court aptly put it, "Appellants simply have no interest in the underlying administrative action in this case." Order at ¶¶ 26-27.

[¶32] ET argues that it should not need to demonstrate injury-in-fact in order to intervene in this action, and that the District Order erred by holding it to established administrative standing rules. Dkt. 13 at ¶¶ 37-39. As set forth below, Section II(B), *supra*, permitting ET to reopen this matter could seriously chill statutory and constitutional rights to access government records. These serious harms make clear that disregarding established standing doctrine is wholly inappropriate where, as here, doing so threatens rights of the press and public to agency records under the Open Records Act and Article XI, Section 6 of the North Dakota constitution.

B. Duplicative Proceedings Would Impair Rights of Press and Public under Open Records Act and Article XI, Section 6 of The North Dakota Constitution.

[¶33] Holding that a party can have standing to seek a court order barring public access to open records before multiple tribunals would chill access to public records under the Open Records Act and Article XI, Section 6 of the North Dakota constitution. Local news media relies on records obtained under the Open Records Act to perform its constitutionally recognized role of informing the community about governmental affairs. North Dakotans rely on the information that news organizations provide. A 2020 survey found that 86 percent of North Dakota adults regularly read newspapers.[5] Yet that has not protected North Dakota publications from the financial pressures plaguing the news industry nationwide.[6] As a result, the cost of litigating access to public records before multiple tribunals may prove unsustainable for news outlets, no matter how important the information may be.

[¶34] If a party seeking to obstruct access to agency records is permitted to do so before multiple tribunals simultaneously, news organizations attempting to access the records would need to participate in each proceeding to protect their rights to the documents. This would likely multiply the attorney's hours, and consequently legal fees, associated with seeking access to the records. Thus, allowing duplicative

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[5] North Dakota Newspaper Association, "Survey Shows Strong Readership in State," N.D. Newspaper Ass'n (Nov. 5, 2020), https://www.ndna.com/news/survey-shows-strong-readership-in-state/.

[6] *See, e.g,* Kristen Hare, "Here Are The Newsroom Layoffs, Furloughs And Closures That Happened During The Coronavirus Pandemic," Poynter (Nov. 30, 2021), https://www.poynter.org/business-work/2021/here-are-the-newsroom-layoffs-furloughs-and-closures-caused-by-the-coronavirus/; Sarah Elmquist Squires, "Speaking Out: Legislation Is Crucial to The Future Of Local Journalism in North Dakota," *Bismarck Tribune* (May 18, 2021), https://bismarcktribune.com/opinion/columnists/speaking-out-legislation-is-crucial-to-the-future-of-local-journalism-in-north-dakota/article_238e2e1e-adec-5346-90f9-43cd10e295d2.html.

litigation in this context would impose on news organizations a new financial burden at a time when they are least able to afford it.

[¶35] Local and regional news outlets face well-documented existential financial pressures. Between 2005 and 2020, U.S. newspapers' total advertising revenue fell over 82 percent, from $49.4 billion to an estimated $8.8 billion.[7] During that same period, the number of journalists employed by American newspapers fell by 57 percent. And since 2005, roughly 2,200 local newspapers have shuttered completely.[8] North Dakota has shared in this decline. In 2016, the North Dakota Newspaper Association listed 90 member newspapers.[9] Today that number is 85.[10]

[¶36] As news organizations struggle to keep the lights on, public records litigation is a luxury many simply cannot afford. Most news organizations are less likely to sue for access to public records today than they were 30 years ago.[11] Nearly two-thirds of newspaper editors surveyed in 2015 reported that the news industry was less able litigate First Amendment-adjacent issues such as access to government records; 90 percent of these editors believed this was due to financial constraints.[12] For the first time in 2019, lawyers who responded to the National Freedom of

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[7] Pew Research Center, "Newspaper Fact Sheet," (June 29, 2021), https://www.pewresearch.org/journalism/fact-sheet/newspapers/.
[8] Whitney Joiner, et al., "Since 2005, About 2,200 Local Newspapers across America Have Closed. Here Are Some of The Stories in Danger of Being Lost – as Told by Local Journalists." Wash. Post Mag. (Nov. 30, 2021), https://www.washingtonpost.com/magazine/interactive/2021/local-news-deserts-expanding/?itid=sf_lifestyle-magazine.
[9] N.D. Newspaper Assn., *N.D. Media Guide*, 10 (2016).
[10] N.D. Newspaper Assn., *N.D. Media Guide*, 10 (2021).
[11] David Cuillier, "Mapping The Civic Data Universe," at 3, Knight Found. (Mar. 2020), https://knightfoundation.org/wp-content/uploads/2020/03/Civic-Data-Universe_FINAL.pdf.
[12] Knight Found., *supra*, n.3.

Information Coalition's Open Government Survey reported representing more private citizens than newspapers in public records cases.[13]

[¶37] At a time when open records litigation may already be cost-prohibitive for many news organizations, permitting duplicative litigation in this space will only compound the problem. Duplicative litigation would therefore likely force news organizations to choose between forgoing the records and cutting reporting costs elsewhere, perhaps by covering fewer city council meetings or shifting resources away from investigative reporting. In either case, coverage suffers. This does not just hurt newspapers and reporters—it hurts the communities they serve, too.

[¶38] Studies show that a decline in local news coverage results in less effective government. For example, studies have found that a dearth of reporting on government deals correlates with increased municipal bond costs, and that when the number of journalists covering a community falls, so too does voter turnout and the competitiveness of local elections.[14] Inadequate local coverage is also correlated with increased levels of partisanship and corruption.[15]

[¶39] The importance of local news coverage militates against expanding procedural doctrines in a way that would undermine community reporting unless a

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[13] Nat'l Freedom of Info. Coal., "News Release – Biennial Open Government Survey Reveals Big Challenges," (Mar. 13, 2020), https://www.nfoic.org/blogs/news-release-biennial-open-government-survey-reveals-big-challenges/.

[14] Clara Hendrickson, "Local Journalism in Crisis" at 6, Brookings Inst. (Nov. 2019), https://www.brookings.edu/wp-content/uploads/2019/11/Local-Journalism-in-Crisis.pdf.

[15] Vicktor Pickard, "Journalism's Market Failure Is A Crisis for Democracy," Harvard Business Review (Mar. 12, 2020), https://hbr.org/2020/03/journalisms-market-failure-is-a-crisis-for-democracy; Joshua P. Barr, et al., "Want to Reduce Political Polarization? Save Your Local Newspaper," Neiman Lab (Feb. 11, 2019), https://www.niemanlab.org/2019/02/want-to-reduce-political-polarization-save-your-local-newspaper/; Joshua Darr, "Local News Coverage Is Declining — And That Could Be Bad For American Politics," FiveThirtyEight (Jun. 2, 2021), https://fivethirtyeight.com/features/local-news-coverage-is-declining-and-that-could-be-bad-for-american-politics/.

weighty countervailing interest justifies doing so. ET has articulated no such interest. The Could should therefore affirm the District Court's holding that ET lacks standing to appeal from the Board's denial of its Petition to Intervene. Order at ¶ 27.

CONCLUSION

[¶40] For the forgoing reasons, Amici urge this Court to affirm the decision of the District Court in full.

Dated this 20th day of December, 2021.

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Certificate of Compliance

The undersigned, as attorneys for the amici in this matter and authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with a plain, roman type stile in size 12-font and that the brief totals 19 pages.

Dated this 20th day of December, 2021.

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