Supreme Court of Ohio Clerk of Court - Filed February 05, 2021 - Case No. 2021-0169

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. EUGENE VOLOKH,	:	Original action no. _____
Relator,	:	**MEMORANDUM IN SUPPORT OF WRITS OF MANDAMUS AND PROHIBITION**
v.	:	
HON. MEGAN E. SHANAHAN, Judge, Hamilton County Common Pleas Court	:	
Respondent.	:	

Jeffrey M. Nye (0082247)
STAGNARO, SABA
& PATTERSON, CO., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
513.533.6714
513.533.2999 – fax
jmn@sspfirm.com
Counsel of record for Relator Eugene Volokh

INTRODUCTION AND FACTS

This brief is Relator Eugene Volokh's memorandum in support of his petition for writs of mandamus and prohibition. The Court should summarily grant the writs because Respondent, a Hamilton County Common Pleas judge, has restricted access to court records in violation of Sup.R. 45 and the First Amendment.

The facts are drawn from the complaint, which is supported by the affidavit of Relator's counsel, Jeffrey Nye, and its exhibits. Those exhibits are primarily court records and transcripts of court proceedings before Respondent.

"M.R." is a Cincinnati police officer. While he was on duty at Cincinnati City Hall in the summer of 2020, in the midst of nationwide protests following the death of George Floyd at the hands of a police officer in Minnesota, M.R. was doing what he says was crowd control for "a loud, unruly crowd of people that were anti-police and urging City Council to defund the police." *See* Nye Affidavit Exhibit A (M.R.'s complaint) at ¶17.

On that day several Ohio citizens witnessed M.R. make what they contend were white-supremacist hand gestures to the crowd. They publicized these allegations, as well as other criticisms of M.R.'s fitness for service as a police officer, in several for a and formats, including (according to M.R.'s complaint) by contemporaneously alerting Cincinnati City Council in the public-comment portion of its meeting that day, by publishing their allegations on social media, and by filing formal complaints with the

Citizen Complaint Authority (a governmental or quasi-governmental body that was established in 2003 pursuant to an agreement between the City of Cincinnati and the Department of Justice, for the purpose of receiving and investigating complaints regarding the performance of Cincinnati police officers). *See* Nye Affidavit Exhibit A (M.R.'s complaint) at ¶1, 16 (M.R. was public official, on-duty and acting in official capacity); ¶19-20 (identifying gestures); ¶26, 29, 54 (alleging social-media statements); ¶35 (speaking before City Council committee); ¶42, 49 (identifying complaints to Citizen Complaint Authority); ¶45, 51 ("[Citizen Complaint Authority] complaints are public records.").

On July 22, 2020 M.R. sued several named Ohio citizens and twenty John Does in the Hamilton County Common Pleas Court, alleging (among other things) that their criticisms of his performance as a police officer, including their allegations that he made white-supremacist hand gestures while on duty at City Hall, constituted defamation. *See* Nye Affidavit Exhibit A (M.R.'s complaint). On the same day he filed his complaint, M.R. also filed a motion for leave to file an affidavit under seal and for leave to proceed under a pseudonym. *See* Nye Affidavit Exhibit B (motion).

M.R.'s case was assigned to Respondent on the day it was filed. Respondent conducted an ex parte oral argument on M.R.'s motion that same day. Neither M.R. nor Respondent gave, or attempted to give, notice to any defendants of either the motion to restrict public access, or the argument on that motion. Respondent did not require M.R.

or any other witness to testify at the argument. *See* Nye Affidavit Exhibit C (transcript of July 22 oral argument).

Respondent nevertheless granted, ex parte, M.R.'s motion on the same day the case was filed, and issued an order (the "Original Sealing Order") that restricted public access to both M.R.'s affidavit and his name. The Original Sealing Order does not contain any of the findings that Sup.R. 45(E) requires courts to make before restricting public access to court records, and did not use the least restrictive means available to restrict public access to court records. *See* Nye Affidavit Exhibit D (Original Sealing Order).

For nearly three weeks following the issuance of the Original Sealing Order, and apparently through the inadvertence of an unknown person, the *entire* record of M.R.'s case was restricted from public access. *See* Nye Affidavit at ¶6. During that time Respondent issued an order (the "Prior Restraint") providing that the defendants were "enjoined from publicizing, through social media or other channels, [M.R.'s] personal identifying information." *See* Nye Affidavit at ¶7. Also during the time that the entire record was sealed, the *Cincinnati Enquirer* and Relator Volokh each learned about the case and separately moved Respondent to restore public access to all court records. *See* Nye Affidavit at ¶8 and Exhibit E (Volokh's motion, including supplement to motion). Respondent initially scheduled a hearing on the motion to unseal for September 1. *See* Nye Affidavit at ¶9.

In mid-August 2020, M.R.'s identity was widely reported in national and local media. *See* Nye Affidavit at ¶10 and Exhibit F (*Newsweek* article identifying M.R.; redacted).

Also in mid-August, the defendants in M.R.'s case appealed the Prior Restraint to the First District Court of Appeals, and Respondent then canceled the hearing on Volokh's motion to unseal the record. *See* Nye Affidavit at ¶11-12.

With Respondent having canceled the hearing on the motion to unseal, Volokh (together with the *Cincinnati Enquirer*) filed a petition for writs of mandamus and prohibition in the First District Court of Appeals, seeking to restore public access to the court records in M.R.'s case. *See* Nye Affidavit Exhibit G (the "First District Petition").

After the First District Petition was filed, Respondent scheduled a new oral argument on Volokh's motion to unseal. That argument was conducted on September 16. *See* Nye Affidavit at ¶14-15 and Exhibit H (transcript of argument). As with the July 22 hearing, Respondent did not take any evidence M.R. to present any or any other witness to testify at the argument. Respondent did permit M.R.'s counsel to play a video that purportedly depicted M.R., but did not admit the video into evidence. *See id.* at 61:24-25 ("It's not in the record. I did not admit that.").

Notwithstanding the absence of evidence, Respondent announced at the conclusion of the argument that she would continue to allow M.R. to proceed under a pseudonym, and that she would only *partially* restore public access to M.R.'s affidavit.

As justification for her decision to allow M.R.'s identity to remain sealed, Respondent stated in part that "There is no public interest being hindered at this point as has been repeatedly pointed out by allowing the officer to proceed in this case under a pseudonym. There is no public interest being hindered." *See* Nye Affidavit Exhibit H at 72:13-18. Respondent was referencing the fact that M.R.'s identity was widely known and reported, and was reasoning, incorrectly, that the fact that M.R.'s identity was known was a justification for continuing to restrict public access to court records showing his identity.

Respondent additionally stated, despite taking no evidence on the issue, that "there is real world evidence of actual risk of harm" to M.R. Explaining that statement, Respondent said, "The current climate in this country, the current climate in this city provides that clear evidence of actual risk of harm to this officer and his family." *See* Nye Affidavit Exhibit H at 72:19-24.

Respondent directed the parties (i.e., not Relator Volokh) to participate in a meet-and-confer with Respondent the following week to determine precisely what portions of M.R.'s affidavit would be restored to public access.

After the oral argument on Volokh's motion, but before the meet-and-confer, M.R.'s counsel appeared in open court in a different case (in which M.R.'s counsel was representing M.R.'s spouse) and publicly revealed M.R.'s identity. *See* Nye Affidavit Exhibit I (redacted transcript of M.R.'s spouse's proceeding).

The following week, Respondent conducted the meet-and-confer with M.R.'s counsel and one of the defendants' counsel in chambers, and issued the Second Sealing Order. *See* Nye Affidavit at ¶17 and Exhibit J (Second Sealing Order).

The Second Sealing Order (like the Original Sealing Order) does not and cannot contain findings that comply with Sup.R. 45, and does not use the least restrictive means available to restrict public access. Because Respondent did not take any evidence before entering the Second Sealing Order, as a matter of law Respondent cannot possibly have determined (as Sup.R. 45 requires) by clear and convincing evidence that the presumption of allowing public access to court records is outweighed by a higher interest. To the extent that Respondent relied on M.R.'s affidavit (she did not cite it either at the oral argument or in the Second Sealing Order), that affidavit does not contain any evidence which would justify restricting public access to either the affidavit or M.R.'s name (*see* Nye Affidavit Exhibit K)—and even if it arguably did, M.R. was not subjected to cross-examination about it. To the extent that Respondent relied on nebulous concerns about "The current climate in this country, [and] the current climate in this city" (as stated at the oral argument) or on claims that police officers generally or M.R. specifically are at risk of serious physical harm (as the Second Sealing Order says at 1-2) there is no such evidence in the record.

Shortly after entering the Second Sealing Order, Respondent moved to dismiss the First District Petition. The First District granted that motion. *See* Nye Affidavit

Exhibit L. Volokh has appealed that decision as of right to this Court, in case 2021-0136. *See* Affidavit ¶20.

ARGUMENT

Respondents orders do not comply with Sup.R. 45 and violate the common-law and constitutional rights of public access to court records. Volokh is entitled to a writ of mandamus under Sup.R. 47(B) and to a writ of prohibition under the First Amendment and Ohio Constitution.

1. Volokh is entitled to a writ of mandamus that compels Respondent to restore public access to the court records.

A writ of mandamus directing Respondent to unseal M.R.'s identity and affidavit should issue because Volokh has a clear legal right to the records, Respondent has a clear legal duty to unseal them, and Volokh has no adequate remedy in the ordinary course of law. *See State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, at ¶11 (elements of mandamus).

A. Volokh—and the public—has a clear legal right to know the identity of the public-official plaintiff, and to see the evidence on which he based his request for an unconstitutional prior restraint.

Open courts are a critical component of a functioning democracy. Public access to the courts "gives assurance that established procedures are being followed and that deviations will become known." *State ex rel. The Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶16, quoting *Press-Enterprise Co. v. Superior Court*

(1984), 464 U.S. 501, 508 ("*Press-Enterprise I*"). As a result, "Court records are presumed open to public access." Sup.R. 45(A).

This Superintendence Rule is a codification of the fundamental right of public access to courts that is found in the common law. *See, e.g., In re T.R.* (1990), 52 Ohio St.3d 6, 16 n.9 (observing that traditionally civil actions involving adults "are presumptively open to the public" at common law); *Doe v. Megless*, 654 F. 3d 404, 408 (CA3 2011) ("One of the essential qualities of a Court of Justice is that its proceedings should be public.") (internal markup omitted); *Woyt v. Woyt*, 12th Dist. Cuyahoga nos. Nos. 107312, 107321, and 107322, 2019-Ohio-3758, ¶67. ("It should only be in the rarest of circumstances that a court seals a case from public scrutiny. When a litigant brings his or her grievance before a court, that person must recognize that our system generally demands the record of its resolution be available for review.").

That right of public access to the courts is also enshrined in the First Amendment to the US Constitution. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 US 1, 8-9 (1986) ("*Press-Enterprise II*") (finding that a constitutional right of access presumptively attaches to any proceedings or documents that "experience and logic" show to have been historically open); *Cincinnati Gas and Elec. Co. v. General Elec. Co.*, 854 F. 2d 900, 906 (CA6 1988) ("the touchstone of the recognized right to access" judicial proceedings under the First Amendment is whether the court's "coercive powers" are "exercise[d]").

That right is also enshrined in the Ohio Constitution and in the rules promulgated by this Court. *See* OHIO CONST., Sec. 16, Art. I ("All courts shall be open . . . ."); *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 423-424 (the Ohio Bill of Rights' "'open courts' mandate[was] inspired by a profound distrust of secret judicial proceedings. Indeed, it is often said that justice cannot survive behind walls of silence. . . . Democracy blooms where the public is informed and stagnates where secrecy prevails.") (Celebrezze, C.J., concurring); Civ.R. 10(A) ("Every pleading shall contain a caption setting forth . . . the title of the action . . . . In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties."); *Doe v. Bruner*, 12th Dist. Clinton no. CA2011-07-013, 2012-Ohio-761, ¶5 (Civ.R. 10(A), like its federal counterpart, "demonstrates the principle that judicial proceedings, civil as well as criminal, are to be conducted in public.") (internal markup omitted).

The right of access extends to documents filed with the court, *see* Sup.R. 44(B) (defining "court records" as including "case documents," which in turn includes "information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits"), but the right is not *limited* to accessing filed documents. It also extends to the identity of parties. *See Megless*, 654 F.3d at 408 ("Identifying the parties to the proceeding is an important dimension of

publicness. The people have a right to know who is using their courts. . . . A plaintiff's use of a pseudonym runs afoul of the public's common law right of access to judicial proceedings.") (internal markup and citations omitted). *See also State ex rel. Cincinnati Enquirer v. Hunter*, 1st Dist. Hamilton no. C-130072, 2013-Ohio-4459, ¶20 (the public has a clear legal right to access court records, "including the full names of" parties to court proceedings, "not just the initials").

The right of access exists at all stages of the proceedings, *see State ex rel. The Repository v. Unger*, 28 Ohio St.3d 418, 421 (1986) (while most public-access cases discuss the right to access "trials," "we hold that the right to a public trial pursuant to the United States and Ohio Constitutions extends to pretrial proceedings."), and for both criminal and civil cases. *See id.* at 425 (concurring opinion of Celebrezze, C.J.).

The right of access also exists simultaneously with the proceedings, not merely retrospectively. As the federal Fourth Circuit Court of Appeals explained in *Doe v. Public Citizen*, 749 F. 3d 246, 272 (CA4 2014), "The public's interest in monitoring the work of the courts is subverted when a court delays making a determination on a sealing request while allowing litigation to proceed [secretly]." That court explained that "Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents," it was important to "underscore . . . and emphasize that the public and press generally have a c*ontemporaneous right of access to court documents and proceedings*." *Id.* (emphasis added). Other courts have said that each day

that case documents remain unavailable is, in effect, "a separate and cognizable infringement of the First Amendment." *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (CA7 1994) (superseded on other grounds by FRCP 5).

The right to know the identity of litigants is especially important when the litigant is a public official, as M.R. is, *see Soke v. The Plain Dealer* (1994), 69 Ohio St.3d 395, 397 ("police officers are public officials"), and when the litigation relates to the public official's performance of his official duties (as M.R.'s litigation does; see Nye Affidavit Exhibit A (M.R.'s complaint) at ¶1, 16). *See Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (there exists, and the First Amendment protects, "the paramount public interest in a free flow of information to the people concerning public officials, their servants." The public has not just a right but an obligation to monitor how public officials operate public institutions, *see Doe v. Public Citizen*, 749 F.3d at 271 ("Indeed, the public has a strong interest in monitoring not only functions of the courts but also the positions that its elected officials and government agencies take in litigation."), and that includes both the public court system and police officers, both of which dispense justice in the public's name.

That interest extends to how a public official conducts litigation, and conducts himself in litigation (including but not only his truthfulness in sworn statements), *see Soke* at 398, and the First Amendment interests do not abate "merely because an official's private reputation, as well as his public reputation," may be affected. *Garrison*

at 77. *See also id.* ("Few personal attributes [of a public official] are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."); *Unger*, 28 Ohio St.3d at 424 (Celebrezze, C.J., concurring) (litigation "should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed").

Every one of these factors shows that Relator Volokh (and the public as a whole) has a clear legal right to access these court records. They are *presumptively* open to the public. *See* Sup.R. 45(A). They are also *traditionally* open to the public, *see In re T.R.*, 52 Ohio St.3d at 16 n.9 and *Doe v. Megless*, 654 F. 3d at 408-409 (discussing "the traditional rule of openness"), and "experience and logic," *Press-Enterprise II*, 478 U.S. at 9, dictate that the public have access to records and proceedings that have historically been open. The public has a right to know when the courts exercise "coercive power" in the public's name, *Cincinnati Gas and Elec.*, 854 F. 2d at 906, and in M.R.'s case Respondent exercised perhaps the ultimate coercive power available in civil proceedings—a prior restraint. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 609 (1976) (Brennan, J., concurring in reversal of prior restraint) ("Prior restraints fall on speech with a brutality and a finality all their own."). The sealing of the court records impedes the public's

right and duty to "monitor" the courts and public officials—to know the parties (and especially the public officials) who are using the court system, what they are using it for, what evidence supports their claims, and whether justice is being appropriately administered. *See Public Citizen* at 271; *Garrison* at 77; *Unger* at 424.

If the public has a clear legal right to access the names of *juveniles* who are *involuntarily subjected* to the coercive power of a court, *Hunter* at ¶20, then it also has a clear legal right access the name of a *public official* who *voluntarily invokes* and attempts to use (and in this case, has in fact used) the coercive power of a court to impose an unconstitutional prior restraint on private citizens.

The first element of the mandamus test is satisfied.

B. Respondent has a clear legal duty to unseal the records.

Public access to the records never should have been restricted in the first place, and Respondent has a clear legal duty to restore public access to them.

i. The records were sealed without notice and without evidence, in violation of Sup.R. 45(E).

When a party moves to restrict public access to a court record, "The court shall give notice of the motion or order to all parties in the case." Sup.R. 45(E)(1). The court may grant the motion only if it "finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest." Sup.R. 45(E)(2). The court must consider whether public policy is served by restricting public access, whether any law exempts the document or information from public access, and

whether other factors (such as "risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process") support restriction of access. Sup.R. 45(E)(2)(a)-(c). "Clear and convincing" evidence does not require proof beyond a reasonable doubt, but it is more than a preponderance. The standard is not met if the evidence on an issue is "evenly balanced." *State ex rel. Ware v. Giavasis*, Slip Op. no. 2020-Ohio-5453, ¶32.

The standard also cannot be met, by definition, if no evidence at all is presented. Arguments or statements of counsel are not evidence. *See, e.g., State v. Frazier* (1995), 73 Ohio St.3d 323, 338 ("It is well settled that statements made by counsel in opening statements and closing arguments are not evidence."). A court's failure to follow the procedures for sealing a court record renders the order sealing the court record void, and the court record remains subject to public access. *See State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶37 (holding that an order sealing bill of particulars was invalid because evidence cited in trial court's order did not support court's conclusion that the presumption of public access was overcome by a higher interest).

Respondent did not comply with Sup.R. 45's requirements when entering either the Original Sealing Order or the Second Sealing Order, and those orders are therefore void.

To begin with, notwithstanding Sup.R. 45(E)(1)'s command that "The court shall give notice of the motion or order to all parties in the case," Respondent did not give notice (and, so far as the record in M.R.'s case reflects, did not attempt to give notice) to any defendant before considering the motion. Instead, Respondent conducted an ex parte oral argument at which only M.R.'s counsel was present. *See* Nye Affidavit at ¶4 and Exhibit C.

Next, Respondent did not require M.R. to present any evidence before she entered either the Original Sealing Order or the Second Sealing Order. She relied exclusively on the statements of M.R.'s counsel, which are not evidence.

Third, while the Original Sealing Order and the Second Sealing Order give no indication that Respondent relied on M.R.'s affidavit, even assuming that Respondent did rely on it, that would have been unlawful. Sup.R. 45(E)(2) requires proof by clear and convincing evidence. M.R.'s affidavit is hearsay and no exception applies, and thus is not admissible evidence in a hearing to restrict public access to court records. *See* Evid.R. 101(A) (Evidence Rules apply in all proceedings unless otherwise provided); 801(C) (definition of hearsay); 802 (hearsay not admissible). Because it is not admissible in evidence, as a matter of law it cannot constitute clear and convincing evidence.

Fourth, even if M.R.'s affidavit were admissible, and even if Respondent relied on it, the affidavit does not contain clear and convincing evidence establishing any ground for restricting public access to any court record or information. The affidavit

merely identifies M.R. as a police officer, states some general information about his job, and identifies several statements of the defendants (some of which were made in governmental proceedings, and some on social media) that had been made about a month earlier, on June 24 or 25. M.R.'s affidavit does not appear to identify any threats or risk of harm, other than a generalized statement that he (like many or perhaps most police officers) had previously arrested unidentified "violent felons." *See* Nye Affidavit at Exhibit K (partially redacted M.R. affidavit). In addition, at least some of the information in M.R.'s affidavit is misleading or inaccurate (something which may had been revealed if Respondent had required M.R. to present testimony and if M.R. had been cross-examined). For example, even though M.R. makes a conclusory statement in ¶5 of his affidavit that he "ha[s] taken steps to maintain confidentiality regarding my . . . birth name [and] residence address" (he does not say what those steps are), M.R.'s real name is available from Cincinnati Police records and the Citizen Complaint Authority complaints that M.R. himself specifically itemized in his complaint, and as of January 29, 2021, M.R.'s residence address is publicly available through the county auditor's web site under his real name. (M.R. does not appear to have requested the removal of his name from those records under R.C. 319.28(B)(1), nor has he placed the property in trust or and LLC, so far as those records reflect.) *See* Nye Affidavit at ¶19.

ii. There are no facts which would warrant M.R.'s use of a pseudonym.

When the information sought to be restricted from public access is a party's identity, courts generally consider four factors drawn primarily from federal case law. They are: "(1) whether the plaintiffs seeking anonymity are suing to challenge governmental activity; (2) whether prosecution of the suit will compel the plaintiffs to disclose information 'of the utmost intimacy'; (3) whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and (4) whether the plaintiffs are children." *Doe v. Bruner*, 12th Dist. Clinton no. CA2011-07-013, 2012-Ohio-761, ¶7 (quoting *Doe v. Porter*, 370 F.3d 558, 560 (CA6 2004), which in turn was citing *Doe v. Stegall*, 653 F.2d 180, 185– 186 (CA5 1981)).

Even if the arguments that M.R.'s counsel presented to Respondent were evidence, they do not establish any of the *Bruner* factors favoring pseudonymity (which factors are drawn from federal Sixth Circuit case law). The third and fourth *Bruner* factors—whether the plaintiff is a child, and whether the litigation requires disclosure of the plaintiff's intent to violate the law (and thus risk criminal prosecution)—do not require discussion here. The others, while not satisfied, illustrate just how unsupportable M.R.'s claim for pseudonymity is.

M.R. is not "seeking to challenge governmental activity." *See Bruner* at ¶7. The plaintiff in *Doe v. Porter*, 370 F.3d 558, 560 (CA6 2004) was granted pseudonymity when he was challenging a school-prayer policy in a highly religious community, which

created the risk of religious discrimination, and there were actual threats of physical violence directly against the plaintiff in the record. M.R.'s case is nearly the opposite; he is not attempting to use the courts to speak truth to power to the government. M.R. is a public official—the living embodiment of the government—seeking to use the courts to punish private critics of his on-the-job conduct as a public official. That weighs against a pseudonym. *See Bruner* at ¶9 ("In fact, in cases where plaintiffs are challenging the actions of a private individual, courts have reasoned that this weighs towards disclosure [of the plaintiff's name] because of the reputation and credibility concerns that a lawsuit implies for an individual defendant."); *Doe v. Indiana Black Expo., Inc.*, 923 F.Supp. 137, 141 (S.D. Ind. 1996) ("Basic fairness requires that where a plaintiff makes such accusations publicly, he should stand behind those accusations and the defendants should be able to defend themselves").

Prosecution of the suit under his real name will not "compel the plaintiff[] to disclose information 'of the utmost intimacy.'" *See Bruner* at ¶7. Case law interpreting this factor makes clear that matters of "utmost intimacy" are in fact limited to matters that are even more intimate than one might expect. Among things catalogued as not being sufficient to warrant a pseudonym were allegations that the plaintiff was a sexual abuser, allegations that the plaintiff was a victim of sexual abuse, and allegations that the plaintiff had been infected with HIV by the defendant, *see Bruner* at ¶10; allegations that the plaintiff was an exotic dancer (unbeknownst to family, friends, and

community), *see DeAngelis v. Nat'l Entertainment Grp.*, 2019 U.S. Dist. LEXIS 36420, at *6-9 (S.D. Ohio, Mar. 7, 2019); allegations that the case would involve photographic evidence of genitalia, which would reveal the plaintiff to be homosexual, *see Doe v. Franklin County*, 2013 U.S. Dist. LEXIS 134843, at *2-3; and allegations that the FBI knowingly produced inaccurate investigatory information to a regulatory authority in a professional disciplinary proceeding, *see Doe v. F.B.I.*, 218 F.R.D. 256 (D. Colo. 2003). Even allegations of a "clear pattern of abuse" involving children are not sufficient to grant pseudonymity to a movant. *See Woyt*, 2019-Ohio-3758, at ¶12, 68.

What all these cases have in common is their demand for "real-world evidence" from the plaintiff; "generalized fears regarding the contention that" the plaintiff's "safety is at risk" is not enough, *DeAngelis* at *9, and neither is a "generalized notion that [the plaintiff] would be exposed to public ridicule or harassment." *Franklin County* at *7.

Again, M.R.'s claims are nearly the polar opposite of matters of "utmost intimacy." A public official's performance of his official duties, and that official's use of the court system to punish criticism of his performance of his official duties, are among the paradigmatic examples of matters of public interest, not "utmost intimacy." *See* discussion of *Soke*, *Garrison*, *Public Citizen*, and *Unger*, supra Part 1(A). This is particularly true where the public official is the plaintiff rather than the defendant. *See Doe v. F.B.I.*, at 218 F.R.D. at 259 ("By initiating an action for damages based on the FBI's

disclosure of Plaintiffs confidential File, Plaintiff has chosen to bring a private matter into the public eye."). M.R. made the choice to seek redress in the public court system. The resolution of that dispute must be public, and cannot be had under a pseudonym.

iii. The Original Sealing Order does not shift the burden of proof for the Second Sealing Order.

Respondent may argue that she does not have a clear legal duty to restore public access to the records because Volokh has not satisfied Sup.R. 45(F)(2). That rule provides that once public access to court records has been restricted under Sup.R. 45(E), access can only be restored upon a showing (by clear and convincing evidence) of changed circumstances.

That argument would be wrong for at least two reasons.

One is that by its terms Sup.R. 45(F) only applies when public access has been restricted "pursuant to division (E) of this rule." As discussed in part 1(B)(i) of this brief, Respondent did not comply with Sup.R. 45(E)'s requirements of giving notice, taking evidence, weighing the itemized factors, and making findings based on clear and convincing evidence. Public access therefore was not restricted "pursuant to division (E)" of Sup.R. 45, and thus Volokh does not have the burden of showing "that the presumption of allowing public access is no longer outweighed by a higher interest." To hold that Sup.R. 45(F) applies even when a court record is sealed in defiance of (rather than in compliance with) Sup.R. 45(E) would effectively invert the burden of proof, and

turn the common-law and constitutional presumption of public access, as protected by this Court's rules, into a presumption of sealing. It would be an empty promise.

The other is that there is indeed clear and convincing evidence of changed circumstances, especially with respect to M.R.'s identity. After the issuance of the Original Sealing Order and before the Second Sealing Order, M.R.'s name was discovered and reported by multiple journalists. *See* Nye Affidavit Exhibit F (August 18, 2020 *Newsweek* article). Not only that, but those reporters did so largely by using the clues in M.R.'s own complaint, including the Citizen Complaint Authority records that he itemized by date of filing, identity of complainant, and subject matter. *See* Nye Affidavit Exhibit A (M.R. complaint) at ¶42-43 (quoting complaint against M.R. by Terhas White) and ¶48-49 (quoting complaint against M.R. by Alissa Gilley). M.R. even helpfully pointed out that complaints filed with the Citizen Complaint Authority "are public records." *Id.* at ¶45, 51. Learning M.R.'s real name was as simple as making public-records requests of the Citizen Complaint Authority for complaints filed by White and Gilley on June 25, 2020. Respondent actually knew that M.R.'s identity was widely known; it was discussed at the oral argument on the motion to unseal, and Respondent actually used it as a justification for *not* restoring public access to M.R.'s name—she said that the fact that the name was known meant that "no public interest [is] being hindered" by allowing him to use a pseudonym. *See* Nye Affidavit Exhibit H at 72:13-18. And in addition, we now know that just two days after the oral argument,

and three days before Respondent issued the Second Sealing Order, M.R.'s own counsel was publicly identifying M.R. as the plaintiff by his real name. *See* Nye Affidavit Exhibit I at 4:1-5:14.

The fact that M.R.'s identity has been publicly revealed weighs strongly in favor of restoring public access to the court records: "the plaintiff's interest in anonymity is weaker where anonymity has already been compromised." *Doe v. Del Rio*, 241 F.R.D. 154, 158 (S.D.N.Y. 2006). *See also, e.g., Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (CA2 2008) ("whether the plaintiff's identity has thus far been kept confidential" is a factor to consider in deciding whether to permit pseudonymity; lack of confidentiality weighs against pseudonymity); *Doe v. Megless*, 654 F.3d at 409-410 ("The factors in favor of anonymity included: (1) the extent to which the identity of the litigant has been kept confidential . . . . Addressing each factor in order, first, has the identity of the litigant been kept confidential? At no point has Doe's identity been confidential"; explaining that public knowledge of Doe's identity weighs in favor of restoring public access); *Doe G v. Dep't of Corr.*, 410 P.3d 1156, 1164 (Wash. 2018) ("None of the cases relied on by the Court of Appeals allowing parties to proceed in pseudonym involved parties whose names and association to their respective crimes were already public record."); *Bruner* at ¶19 (concurrence) ("Until the Ohio Supreme Court sets down a protocol or guidelines for the courts of this state to use when dealing with a request to proceed under a pseudonym, I would suggest . . . [that] in reaching its decision, the court

consider . . . the extent to which the identity of the litigant has previously been kept confidential," among other things).

That principle should apply with even greater force when the plaintiff himself is responsible for the disclosure of his identity, as M.R. is here—M.R.'s own complaint identified public records from which his identity could be ascertained, and his own counsel publicly revealed his identity. To allow a party, and especially a public official suing over citizens' criticism of his official conduct, to proceed under a pseudonym even though his real name is known, would make the court system complicit in disinforming the public.

In sum, Sup.R. 45(F) does not apply, but even if it did, the circumstances warranted the restoration of public access.

C. Volokh has no adequate remedy at law.

The final element of the mandamus analysis is the absence of an adequate remedy at law. "An adequate remedy at law is one that is 'complete, beneficial, and speedy.'" *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, ¶10.

No remedy other than mandamus is adequate to protect the public's fundamental right to *contemporaneous* access to court records. To the extent that any other remedy even existed, it would not be complete, beneficial, or speedy, because "the public benefits attendant with open proceedings are compromised by delayed disclosure of documents." *Public Citizen*, 749 F. 3d at 272.

The Superintendence Rules themselves recognize that someone in Volokh's position has no adequate remedy at law, and that is why they expressly authorize the pursuit of mandamus relief: Sup.R. 47(B) says that any "person aggrieved" by the failure to comply with Sup.R. 45 may pursue relief through mandamus. There literally is no other way under the law—and thus no adequate remedy at law—to get the records at all, much less to get them in a timely fashion.

The Superintendence Rules do not have an exhaustion requirement—i.e., they do not require relators like Volokh to first seek relief from the court that restricted public access. (Such an interpretation of Sup.R. 45(F) would render Sup.R. 47(B) superfluous.) But Volokh sought relief from Respondent anyway. He filed a motion to unseal (and supplemented it) in the first few weeks of the case. *See* Nye Affidavit Exhibit E. He presented legal arguments to Respondent, pointed out to Respondent that she had not taken any evidence or otherwise complied with Sup.R. 45(E), and asked her to restore public access. *See* Nye Affidavit Exhibit E (motion to unseal) and H (transcript of argument on that motion). She refused, in all but the most limited sense; she did partially restore access to M.R.'s affidavit, but Respondent did not restore access to any of the affidavit's exhibits, did not require M.R. to proceed under his real name, and did not modify the Original Sealing Order. And not only that, but Respondent also justified her decision based on nonexistent evidence and a complete reversal of legal presumptions. (The fact that Volokh pursued this and was denied relief directly from

Respondent is one of the things that sets him apart from the relator (the *Enquirer*) in case no. 2021-0047. Volokh does not belief that this is a legally relevant distinction—but if the Court does, then the fact that both Volokh and the *Enquirer* have sought relief as relators cures any defect that either petition may have.)

If a *party* to M.R.'s case had presented the arguments that Volokh did, and had been denied effective relief like Volokh was, then that party may have had an adequate remedy at law through a direct appeal. *See, e.g., State ex rel. Armengau v. French*, 10th Dist. Franklin no. 16AP-357, 2017-Ohio-373, ¶15 (holding that a *party* who is aggrieved by a sealing order has an adequate remedy through direct appeal, and so may not pursue mandamus).[1] But because Volokh was *not* a party, he lacked standing to appeal Respondent's Second Sealing Order. *See, e.g., State v. L.F. [Christopher Hicks, Appellant]*, 12th Dist. Clermont no. CA2019-02-017, 2020-Ohio-968, ¶18 (holding that Hicks, who was "a person aggrieved by a decision of a court to restrict access to court records" but was not a party, "must challenge that decision by pursuing an original action in mandamus, not by filing an appeal"). Because Volokh could not have appealed the Second Sealing Order, he lacked an adequate remedy at law.

Because Volokh had and has no other way to obtain the court records, he lacks an adequate remedy at law, and is entitled to a writ of mandamus.

[1] The party would only have an adequate remedy if such an order were immediately appealable. Volokh submits that it would be, because it would be a "final order" under the definition of R.C. 2505.02(B)(1) or (B)(4). But the Court need not decide that question in this case.

2. Volokh is entitled to a writ of prohibition that prevents Respondent from restricting public access in violation of the First Amendment and Ohio Constitution.

The Court should issue a writ of prohibition because Respondent has exercised judicial power by restricting public access to the court records, the exercise of that power is unauthorized by law, and denying the writ would result in an injury for which there is no adequate remedy at law. *See State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, at ¶12 (elements of prohibition).

As set forth above, Respondent unlawfully issued both the Original Sealing Order and the Second Sealing Order in violation of Sup.R. 45(E), and thereby restricted access to court records to which Volokh and the public have common-law and constitutional rights of contemporaneous access. Volokh and the public have no adequate remedy at law to seek review and reversal or vacature of these orders. The Court should therefore issue a writ of prohibition enjoining Respondent from enforcing them.

CONCLUSION

Relator Volokh respectfully requests that the Court issue writs of mandamus and prohibition to Respondent, directing her to restore public access to all court records in M.R.'s case, and prohibiting her from enforcing the orders that restrict public access to court records.

Respectfully submitted,

/s/ Jeffrey M. Nye
Jeffrey M. Nye (0082247)
Stagnaro, Saba & Patterson, Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
513.533.6714, fax 513.533.2999
jmn@sspfirm.com
Counsel for Relator Eugene Volokh