IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. EUGENE VOLOKH, **Relator-appellant,** **v.** **HON. MEGAN E. SHANAHAN, Judge, Hamilton County Common Pleas Court,** **Respondent-appellee.**	**Supreme Court case no. 2021-0136** **Appeal of right from the First District Court of Appeals, Hamilton County, case no. C-200302**

BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal as of right from the First District's dismissal of Relator-appellant Eugene Volokh's petition for writs of mandamus and prohibition under Sup.R. 47(B). Volokh sought to compel the respondent-appellee judge to provide access to court records, and to prohibit the judge from enforcing a sealing order that was entered in violation of Sup.R. 45(E) and the First Amendment. The First District dismissed that petition in a summary order, without an opinion.

The First District erred when it relied on materials outside the pleadings to conclude that the case was moot. It should have disregarded those materials entirely—but if it considered them, it should have concluded at most that only a small portion of the case was potentially moot. Alternatively, even if the case was moot, the court should have applied one or more of the exceptions to the mootness doctrine and reached the merits of the case.

This Court should reverse the First District's dismissal of the case. It should then review this case "as if the action been filed originally in this court." *State ex rel. Thomas v. Nestor*, Slip Opinion no. 2021-Ohio-672, ¶7 (cleaned up). It should consolidate this case with cases 2021-0047 and 2021-0169 (Volokh's motion to consolidate was filed on February 23, 2021). And it should issue writs of mandamus and prohibition that: (1) direct Respondent to vacate her sealing order; (2) order Respondent to require the public official who is the plaintiff in the underlying case ("M.R.") to file his complaint

under his real name; (3) restore public access to the entirety of M.R.'s affidavit; and (4) bar Respondent from enforcing her unconstitutional Sealing Order.

STATEMENT OF THE CASE AND FACTS

The following facts are drawn from the mandamus petition filed in the First District (R. 1 (Supp. Vol I at 1-37)) unless otherwise noted.

On July 22, 2020, a Cincinnati police officer filed a complaint in Hamilton County under the pseudonym "M.R.," and at the same time filed a Motion for Leave to File Affidavit Under Seal and to Proceed Under a Pseudonym. R. 1 at ¶5-6 (Supp. Vol I at 4-5) and Ex. A-B (Supp. Vol I at 17-32) (M.R.'s complaint).

The case was assigned to Respondent. R. 1 at ¶7 (Supp. Vol I at 5). Respondent did not hold an evidentiary hearing and did not consider any evidence (beyond M.R.'s hearsay affidavit), R. 1 at ¶8 (Supp. Vol I at 5), but nevertheless granted the Motion to Seal and issued the "Sealing Order" the same day that the complaint was filed. *See* R. 1 at ¶7 (Supp. Vol I at 5); Sealing Order at 1 (Appx 2). The Sealing Order does not contain any of the findings required by Sup.R. 45(E), merely reciting that the "Court finds such Motion well taken and grants same." R. 1 at ¶9 (Supp. Vol I at 5) and Ex. C (Supp. Vol I at 33); Appx 2. The Sealing Order permits M.R to proceed under a pseudonym—i.e., it restricts public access to M.R.'s name—and permitted M.R. to file his affidavit under seal. *Id.*

Relator Volokh learned about the case shortly thereafter, and filed (and later supplemented) a motion to unseal the record, specifically asking Respondent to restore public access to both M.R.'s actual name and his entire affidavit. R. 1 at ¶12, 14 (Supp. Vol I at 5-6). Volokh argued that the Sealing Order violated his and the public's rights of access to court records, as protected by the First Amendment, the Ohio Constitution, and the Rules of Superintendence. Respondent initially set a date for oral argument on the motion to unseal, but vacated it prior to the argument date. R. 1 at ¶15 (Supp. Vol I at 6).

At the time the mandamus petition was filed in the First District on August 31, 2020, Volokh's motion to unseal remained pending, but had not been re-set for an argument, and the Sealing Order remained in effect. R. 1 at ¶17-18 (Supp. Vol I at 6).[1]

Respondent moved to dismiss the mandamus petition on September 30, 2020. R. 14 (Supp. Vol I at 38-308). That motion was based in part on the contention that the petition was moot, and in particular that it had been mooted by an order that Respondent had entered three weeks *after* the petition had been filed. That order (which the parties have come to refer to as the "Second Sealing Order") is not in the pleadings.

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[1] Volokh had a co-relator (the publisher of the *Cincinnati Enquirer*) in the First District. *See* R. 1 at ¶1 (Supp. Vol I at 4). The *Enquirer* withdrew its motion to unseal prior to the mandamus petition being filed. *See* R. 1 at ¶16 (Supp. Vol I at 6). The *Enquirer* has not filed a direct appeal of the dismissal of the mandamus petition but, like Volokh, has filed an original mandamus action in this Court relating to the Second Sealing Order. *See* case no. 2020-0047.

Instead, it was attached to the motion to dismiss. *See* R. 14 at Ex. 16 (Supp. Vol I at 294-295). (In fact, of the *nineteen* exhibits attached to the motion to dismiss, only *one* of them—the original Sealing Order—is in the pleadings.) Respondent argued that the Second Sealing Order rendered the petition moot because "Respondent ha[d] performed the act that Relator[] demand[ed]." R. 14 at 7 (Supp. Vol I at 44). In reality, the Second Sealing Order did not restore public access to M.R.'s real name at all, and only partially restored public access to M.R.'s affidavit. *See* R. 14 at Ex. 16 (Supp. Vol I at 294-295).

Volokh opposed the motion, arguing both that the appellate court could not rely on matters outside the pleadings to decide a motion to dismiss, *see* R. 18 at 1-4 (Supp. Vol I at 309-12), and that even if the matter outside the pleadings were considered, Volokh was still entitled to relief. *See* R. 18 at 4-15 (Supp. Vol I at 312-323).

The First District granted the motion to dismiss in an order without opinion, saying only that the Sealing Order "is no longer in effect and has been superseded by an amended order" (i.e., the Second Sealing Order) and that "The petition is accordingly dismissed as moot." R. 20 (Appx 1).

This direct appeal timely followed. R. 21.

ARGUMENT

I. Proposition of law no. 1: A case cannot be dismissed as moot based on an order that post-dates a petition for writs, unless that order forecloses all the relief sought in the petition.

The First District erred by dismissing the petition as moot. While a Rule 12 motion can be granted based on documents outside the pleadings if those documents establish that the case is moot, that is only proper if the documents establish that the case is *fully* moot. A case is only fully moot when something happens that makes it impossible for the court to grant the requested relief, such as when the respondent does the act that the petition seeks to compel her to do. Here, the documents on which Respondent relied below established, at most, that Respondent *partially* did *one* of the four things that Volokh's petition sought to compel. The case therefore was not moot and should not have been dismissed. And alternatively, if the case *were* moot, then one or more mootness exceptions applied. This Court therefore should reverse the First District's dismissal.

A. To be properly considered under Rule 12, documents outside the pleadings must establish that a case is fully moot.

As a general rule it is improper to decide a Rule 12 motion based on documents outside the complaint or petition. *See Ames v. Summit County Court of Common Pleas*, 159 Ohio St.3d 47, 2020-Ohio-354, ¶5. Because documents that did not exist at the time a complaint or petition was filed are, by definition, not in the complaint or petition, it generally is inappropriate to dismiss a complaint or petition based on documents that

did not exist at the time the complaint or petition was filed. This Court has recognized only limited exceptions to that rule, but one such exception exists for events subsequent to the filing of the complaint petition that render the case moot. *Id.*

A case is moot when something happens that makes it impossible for the court to grant the requested relief, such as when the respondent does the act that the petition seeks to compel her to do. *See, e.g., State ex rel. Democratic Party v. LaRose*, 159 Ohio St.3d 277, 2020-Ohio-1253, ¶5-6 ("In its complaint, the Libertarian Party first asks for an order requiring the secretary of state to rescind Directive 2020-06. The secretary of state's own action rescinding that directive— along with the General Assembly's action voiding it— clearly renders this aspect of the Libertarian Party's complaint moot.")

This Court has applied the mootness exception carefully, and has only used it to dismiss cases when the documents outside the pleadings definitively establish that it is impossible to grant *any* of the relief requested by the petition. For example, in *State ex rel. Everhart v. McIntosh*, 115 Ohio St. 3d 195, 2007-Ohio-4798, the relator sought to prohibit a judge from proceeding in the common pleas court while an interlocutory appeal was pending. The respondent moved to dismiss on the ground that the court of appeals had dismissed that interlocutory appeal after the petition for writ of prohibition was filed, rendering the petition moot. That motion was granted, and this Court affirmed, saying that "It is appropriate for us to take judicial notice of the dismissal entry in deciding whether dismissal of Everhart's prohibition claim was warranted." *Id.*

at ¶9-10. But the dismissal entry in *Everhart* definitively terminated the case on which Everhart's prohibition claim was based, *id.* at ¶4; the factual predicate for the alleged right to prohibition no longer existed.

Other decisions granting motions to dismiss cases as moot based on documents outside the pleadings follow this same fact pattern. *See, e.g., State ex rel. Nelson v. Russo* (2000), 89 Ohio St.3d 227, 228 (dismissal proper where document outside pleadings established that respondent had done precisely what the relator sought to compel with the writ of mandamus and procedendo); *Pewitt v. Lorain Correctional Inst.* (1992), 64 Ohio St.3d 470, 472 (dismissal of petition for writ of habeas corpus appropriate where document outside pleadings established that relator had been released from custody; case was mooted because court could not order petitioner's release since he was not in custody).

On the other hand, the Court has declined to use this mootness exception to dismiss cases when the documents outside the pleadings show that even *some* relief is still available. For example, in *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 581, this Court held that a case was only *partially* mooted where documents post-dating the pleadings established that *some* records had been produced. The Court held that the respondent's argument for dismissal of the rest of the case "erroneously relie[d] on evidentiary material attached to his motion." The Court denied that aspect of the motion, reached the merits, and issued the writ.

The mootness exception to the rule against considering documents outside the complaint when deciding motions to dismiss thus must be applied sparingly, and only if the documents outside the complaint definitively establish that the case is moot—i.e., that it is impossible for the court to grant *all* the requested relief.

B. The documents attached to Respondent's Rule 12 motion did not establish that this case was fully moot, and the case was improperly dismissed.

This case is not moot, so the court below was not permitted to rely on documents outside the complaint to decide the motion to dismiss.

Volokh's petition sought four specific types of relief: (1) the "immediate[] vacat[ure] of [the] July 22, 2020 Sealing Order"; (2) an order directing "M.R. to file his complaint under his real name"; (3) an order "allow[ing] public access to M.R.'s affidavit"; and (4) an order barring Respondent from enforcing the unconstitutional Sealing Order. *See* R. 1 at ad damnum (Supp. Vol I at 14). In order for case to be dismissed as moot under the exception to the prohibition on using documents outside the complaint to decide motions to dismiss, the documents attached to Respondent's motion had to show that intervening events had made it impossible for the First District to grant all of that relief.

The documents do not establish that.

First, the July 22, 2020 Sealing Order has never been vacated. The Second Sealing Order is attached to Respondent's motion to dismiss (R. 14) as Exhibit 16 (Supp. Vol I at

294-95).[2] Nowhere does it state that the original Sealing Order is vacated. Nor does it *implicitly* vacate the original Sealing Order (except, perhaps, insofar as it *partially* restores public access to M.R.'s affidavit—on which more below). Quite to the contrary, the Second Sealing Order expressly provides that the original Sealing Order will remain in place with regard to restricting public access to M.R.'s actual name: it states that "the use of a pseudonym *shall continue* to be permitted" in the case. *See* Second Sealing Order, R. 14, Ex. 16 at 2 (Supp. Vol I at 295) (emphasis added). This aspect of the case therefore cannot have been mooted.

Second, Respondent has never entered an order directing M.R. to file his complaint under his real name. No such order is alleged by the complaint to exist, and no such order is attached to Respondent's motion to dismiss. This aspect of the case therefore cannot have been mooted.

Third, the Second Sealing Order only *partially* restored public access to M.R.'s affidavit. M.R.'s name, all or part of two paragraphs, and all five exhibits to the affidavit are redacted (i.e., restricted from public access). *See* R. 14, Ex. 16 (Supp. Vol I at 294-95) (Second Sealing Order) and Ex. 17 (Supp. Vol I at 296-99) (redacted affidavit of M.R.). It is true that the First District could not have ordered Respondent to restore public access to those portions of the affidavit which were, by the time of the dismissal, available to

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[2] Respondent does not contend that any other order vacated the original Sealing Order.

the public—but there was still very much a live controversy as to the remainder of the affidavit, and that aspect of the case was not moot. Furthermore, even with respect to the portion of the affidavit to which public access was restored, one or more exceptions to the mootness doctrine applies; see below.

Fourth, no court has ever issued an order barring Respondent from enforcing the unconstitutional original Sealing Order, nor from enforcing any substantially similar unconstitutional orders. That aspect of the case therefore cannot have been mooted.

Because none of the documents attached to the motion to dismiss established that it was impossible to award relief to Volokh, the case was improperly dismissed as moot.

C. Alternatively, review is available under a the "capable of repetition yet evading review" exception, the "great public interest" exception, or the "voluntary cessation" exception to mootness.

Even if Volokh's petition *were* moot, the First District should have applied (and this Court should apply) one or more of several mootness exceptions.

Moot issues may be reviewed if the issue presented is capable of repetition, yet evading review. *In re Huffer from Circleville High School* (1989), 47 Ohio St.3d 12, paragraph one of syllabus.[3] Moot issues may also be reviewed "if a case involves a

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[3] In point of fact, in the syllabus of *Huffer* this Court characterized an issue that was "capable of repetition yet evading review" as being "not moot." But the more common formulation is to describe an issue that fits that description as being an *exception* to the

matter of public or great general interest." *Id.* at 14. And an otherwise moot issue may be reviewed if the basis for the alleged mootness is the "voluntary cessation of [the] challenged conduct" by the party who asserts mootness. *Knox v. Service Employee's Int'l Union*, 132 S. Ct. 2277, 2287 (2012).

These three exceptions are closely related. The "capable of repetition, yet evading review" exception is well settled in American law, but it was first used by this Court in another case involving public access to the courts. In *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 419-420, this Court held that it was appropriate to review a court-closure order even after the orders had been terminated. The reasons were that the short duration of such orders would usually prevent them from being reviewed on appeal before their expiration, and that similar orders were likely to reoccur. *Id.*

The "public or great general interest" exception—which is particularly applicable when a case presents "a debatable constitutional question"—recognizes that even when a case is "moot as to the parties," it may not be "moot as to the public." *Wallace v. Univ. Hosps. of Cleveland* (1961), 171 Ohio St. 487, 489. This Court has applied that doctrine in an appeal relating to the enforceability of a zoning regulation, even after the plaintiff sold the property and the new owner did not challenge the regulation; the Court

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rule that moot issues or cases should be dismissed. *See, e.g., State ex rel. Beacon Journal Publ'g Co. v. Donaldson* (1992), 63 Ohio St.3d 173, 175 (describing the rule as an exception that permits review of an "otherwise moot case"). Either way, the issue is reviewable.

concluded that the issue sufficiently affected the public at large, and not just the parties, that it could and should still hear and decide the case. *See Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 31.

The voluntary cessation doctrine permits review of an otherwise-moot case "because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* at 2287.

All three of these doctrines apply here. An essential component of Respondent's mootness argument is her assertion that the original Sealing Order (R. 1, Ex. C (Supp. Vol I at 33); Appx 2) was only in place for less than two months—from July 22 to September 21. The thesis of her motion to dismiss is her contention that the order was not in effect long enough to be reviewed before it was replaced by another order. Allowing review of orders that fit that description is the entire purpose of *Unger*'s "capable of repetition yet evading review" doctrine. *See also, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (CA6 1996), 221-222 ("successive injunctive orders" prohibiting publication of information, each lasting only a short duration, "fall within the well-recognized exception to mootness for wrongs that are 'capable of repetition, yet evading review.'").

This case squarely presents issues of great public interest. Volokh's petition seeks to restore public access to public court records, which is, per *Unger,* an issue of public importance with constitutional dimensions—but the public interest does not end there.

The case in which Volokh seeks to restore public access also involves a plaintiff, M.R., who is a public official. The public official's claims are based on citizens' criticism of his official on-duty conduct. The public official has sought and obtained an unconstitutional prior restraint against the defendants. There are currently four separate cases pending in this Court over either the unconstitutional prior restraint or the unconstitutional restriction on public access to court records. Even if Respondent's issuance of the Second Sealing Order made the case moot as to the parties, the case is not "moot as to the public," which has the right—and responsibility—to know what happens in its public courtrooms, especially when public officials are the litigants.

This case is also tailor-made for the voluntary-cessation doctrine. Respondent's argument in favor of mootness amounts to a contention that even if the original Sealing Order was procedurally and constitutionally deficient, her own conduct in issuing the Second Sealing Order prohibits both the First District and this Court's review of the original Sealing Order. But assuming arguendo that this is an accurate characterization of the sealing orders, what Respondent describes is actually her own alleged voluntary cessation of the original Sealing Order. In *Knox v. SEIU*, the Supreme Court observed that while the respondent initially defended its conduct, after certiorari was granted it refunded the mandatory fee at issue, then claimed mootness. The Court said that "Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye," and held that mootness did not prevent review.

Knox, 132 S. Ct. at 2287. That principle applies equally here. Respondent's issuance of the Second Sealing Order, followed just nine days later by her motion to dismiss on mootness grounds, appear designed to insulate the original Sealing Order from review. This Court, like the *Knox* Court, should not take the bait.

In addition, *Knox* observed that since the respondent "continue[d] to defend the legality of the . . . fee, it is not clear why the [respondent] would necessarily refrain from collecting similar fees in the future." *Id.*

That line from the *Knox* decision may as well have been describing Respondent's conduct here. Respondent not only issued the Second Sealing Order in an effort to moot the case, but issued it in a way that made it every bit as procedurally and constitutionally deficient as the original Sealing Order.

This is illustrated by a document that is not in the pleadings, but which Respondent attached to her motion to dismiss—namely, the transcript of the oral argument on Volokh's motion to unseal. *See* R. 14 at Ex. 15 (Supp. Vol I at 205-93). In her motion to dismiss, Respondent contended that this transcript established not only that the Second Sealing Order superseded the original Sealing Order, but also that the Second Sealing Order was properly entered under the Superintendence Rules and constitutionally valid.

Nothing could be further from the truth. That transcript conclusively establishes that the procedure by which the Second Sealing Order was produced was every bit as

defective as the procedure used to produce the original Sealing Order. In particular, with respect to both orders, Respondent did not require M.R. to present evidence in support of his request to restrict public access to court records; did not subject M.R. to cross-examination by other parties and did not question him herself; and did not receive any admissible evidence that could even potentially satisfy the requirement for restricting public access to court records.[4]

The fact that Respondent relies on this transcript in support of her mootness argument neatly ties together all three exceptions to the mootness doctrine.

If Respondent—or any judge—could moot a petition seeking a writ of mandamus to compel public access to court records by simply issuing another procedurally and constitutionally deficient sealing order, then no sealing order will ever be reviewable, and the constitutional right of public access to court records is meaningless. It is a right without a remedy; it is "a command with no sanction, a brutem [sic] fulmen, i.e., no law at all." *Gregory v. Flowers* (1972), 32 Ohio St. 2d 48, 56. If

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[4] At the oral argument, M.R.'s counsel attempted to introduce into evidence two videos (over objections based on authenticity, admissibility, and hearsay; see R. 14 Ex. 15 at 49:15-50:1 (Supp. Vol II at 537-38)), which Respondent initially viewed—but then M.R.'s counsel objected to the admission into evidence of his *own proffered video* (see *id.* at 58:3-5 (Supp. Vol II at 546), asking to blur portions of the video he had just played in open court), at which point Respondent announced an intent to consider it as "demonstrative evidence" only (see *id.* at 58:16-18 (Supp. Vol II at 546)) though it was unclear what she meant by this; and then Respondent ultimately concluded "It's not in the record. I did not admit that." (*id.* at 61:24-25 (Supp. Vol II at 549)). No other evidence was even offered.

that is all it takes to avoid review of a sealing order, then before long the Second Sealing Order will be replaced by a Third Sealing Order, and the Third replaced by a Fourth.

It would be impossible for any relator like Volokh or any member of the public (whose rights Volokh seeks to vindicate in this action) to obtain meaningful review of unconstitutional action. That precisely is why we have the "capable of repetition yet evading review" doctrine, why we have the "voluntary cessation" exception to mootness, and why courts can review otherwise moot matters of "great public interest" (especially when they present a constitutional question).

The case is not moot, but even if it is, one or more of the mootness exceptions applies, and Respondent's sealing orders are appropriately reviewed. This Court should adopt the first proposition of law, hold that the documents attached to Respondent's motion did not establish that the case was fully moot (or alternatively hold that one or more mootness exception applies), and reverse the First District's order dismissing the case.

II. Proposition of law no. 2: A public official may not use a pseudonym or sealed evidence to sue citizens over their criticism of his official on-duty conduct, and a writ of mandamus and prohibition are available to restore public access to the official's identity and evidence.

Having reversed the First District's dismissal of Volokh's petition, this Court should review this case "as if the action had been filed originally in this court." *State ex rel. Thomas v. Nestor*, Slip Opinion no. 2021-Ohio-672, ¶7 (cleaned up). The Court then

should consolidate this case with cases 2021-0047 and 2021-0169 (Volokh already filed a motion to consolidate in all three cases on February 23); it should hold that a public official may not use a pseudonym or sealed evidence to sue citizens over their criticism of his official on-duty conduct; and it should issue the writs of mandamus and prohibition sought in Volokh's petition.

A. A note to the reader about passages that also appear in other briefs in related cases.

The issues presented by this case are very closely related, and in many instances identical, to the issues presented in those other actions—particularly case 2021-0169. That case is the original action filed by Volokh (as relator) against Respondent, in which Volokh seeks writs of mandamus and prohibition with respect to the Second Sealing Order. Both that case and the *Cincinnati Enquirer*'s original action (case 2021-0047) each have a memorandum in support of the writs (in which the relators explain why the writs should issue), a motion to dismiss for failure to state a claim (in which Respondent argues that the writs should not issue), and a memorandum in opposition to the motion to dismiss (in which the relators rebut the Respondent's arguments). Those briefs are functionally equivalent, in nearly all respects, to an appellant's merits brief, an appellee's merit brief, and a reply brief in a typical appeal.

The principal difference between this case and the other two cases is that the petition in this case was filed in August 2020, which was only about a month after the underlying "M.R." case was filed. But the petitions in the other cases were filed in early

2021, several months after the "M.R." case was filed. The petitions in the other two cases therefore contain much more factual information than it was possible for this petition to contain. For that reason (and because the First District did not issue a merits decision below), merits briefing in this case—other than the mootness arguments above—would in large part be either duplicative or less detailed than the briefing in the other cases (especially case 2021-0169, which involves the exact same parties).

And yet because the cases have not been consolidated, Volokh believes that he is required to re-raise the same arguments in this brief (to the extent the factual record of this case permits).

In an effort to prevent the Court from needlessly duplicating effort, for the remainder of this brief Volokh has marked sections that also appeared in his briefs in case 2021-0169 with an asterisk footnote (*). The Court may wish to skip those sections if it has recently read the briefing in case 2021-0169. Sections that are not marked with an asterisk footnote may be similar, but are not substantially identical, to sections from the other case; in the main these sections are shorter because they reference only to the more limited factual record in this case.

B. 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).

1. 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*, 464 U.S. 501 (1984), 508 ("*Press-Enterprise I*"). As a result, "Court records are presumed open to public access." Sup.R. 45(A) (Appx 7).

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[*] This paragraph appears in Volokh's memorandum in support of writs, filed Feb. 5, 2021, in case 2021-0169, at page 8 (Supp. Vol II at 333).

[*] Except for some modifications in record citations, this section—up to the next bold heading—appears in Volokh's memorandum in support of writs, filed Feb. 5, 2021, in case 2021-0169, beginning at page 8 (Supp. Vol II at 333) and ending at page 14 (Supp. Vol II at 339).

[*] 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

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[*] *Ibid.*

[*] *Ibid.*

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

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[*] *Ibid.*

[*] *Ibid.*

"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

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[*] *Ibid.*

[*] *Ibid.*

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 R. 1 at ¶5 (Supp. Vol I at 4) and Ex. A's ¶1, 16 (Supp. Vol I at 18-19) (M.R.'s allegation that he was on-duty police officer). *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,

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[*] *Ibid.*

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

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[*] *Ibid.*

[*] *Ibid.*

to the public. *See* Sup.R. 45(A) (Appx 7). 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

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[*] *Ibid.*

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.

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

Respondent should not have restricted public access to the records in M.R.'s case by issuing the original Sealing Order, and Respondent has a clear legal duty to restore public access to those records.

a. 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) (Appx 8). 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) (Appx 8). 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)

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[*] These paragraphs appear in Volokh's memorandum in support of writs, filed Feb. 5, 2021, in case 2021-0169, on pages 14-15 (Supp. Vol II at 339-40).

(Appx 8). "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 the original Sealing Order, and that order is therefore void. Respondent did not require M.R. to present any evidence before she entered the original Sealing Order. R. 1 at ¶8, ¶34-35 (Supp. Vol I at 5, 9). And while the Sealing Order gave no indication that

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[*] *Ibid.*

Respondent relied on M.R.'s affidavit, *see* Appx 2, even assuming that Respondent did rely on it, that would have been unlawful. Sup.R. 45(E)(2) (Appx 8) 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.

b. 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.

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[*] Except for some modifications to internal cross-references, this section—up to the next bold heading—appears in Volokh's memorandum in support of writs, filed Feb. 5, 2021, in case 2021-0169, beginning at page 18 (Supp. Vol II at 343) and ending at page 21 (Supp. Vol II at 346).

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

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[*] *Ibid.*

[*] *Ibid.*

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

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[*] *Ibid.*

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*. This is particularly true where the public official is the plaintiff rather than the defendant. *See Doe v. F.B.I.*, 218 F.R.D. at 259 ("By initiating an action for damages based on the FBI's disclosure of Plaintiffs [sic] confidential File, Plaintiff has chosen to bring a private matter into the public eye.").

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[*] *Ibid.*
[*] *Ibid.*

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.

The court records should not have been sealed, and Respondent has a clear legal duty to restore public access to them.

3. 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) (Appx 11) says that any "person aggrieved" by the failure to comply with Sup.R. 45 may pursue relief through mandamus. There

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[*] This passage appears in Volokh's memorandum in support of writs, filed Feb. 5, 2021, in case 2021-0169, at pages 24-25 (Supp. Vol II at 349-50).
[*] *Ibid.*
[*] *Ibid.*

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.

[*] It is true that Volokh also sought relief directly from Respondent, having filed (and supplemented) a motion to unseal earlier in the case. *See* R. 1 at ¶12, 14 (Supp. Vol I at 5-6). But at the time the petition was filed, Respondent had canceled the only hearing or argument she had set on that motion, *see* R. 1 at ¶15 (Supp. Vol I at 6), and it was unclear whether or when Volokh would be heard on his request (to say nothing of whether it would be granted). 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.) Volokh cannot be in a worse position, for having voluntarily given Respondent a chance to vacate her orders, than he would have been if he had availed himself of the Sup.R. 47(B) remedy straightaway. If the Court were to hold that the act of filing a motion to unseal in the trial court eliminated the ability to seek mandamus, it would create a set of perverse incentives. If an aggrieved person did seek relief from the trial court, that judge could simply cancel the hearing and leave that person in limbo (as Volokh was when the mandamus petition was filed), and that person would have no recourse in mandamus under Sup.R. 47(B).

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[*] *Ibid.*

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.

C. 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 the original 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 the original Sealing Order. The Court should therefore issue a writ of prohibition enjoining Respondent from enforcing them.

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[*] This passage appears in Volokh's memorandum in support of writs, filed Feb. 5, 2021, in case 2021-0169, at page 27 (Supp. Vol II at 352).
[*] *Ibid.*

CONCLUSION

This Court should reverse the First District's order dismissing the case as moot. It should then consolidate this action with cases 2021-0047 and 2021-0169, and issue the requested writs of mandamus and prohibition.

Respectfully submitted,

/s/ Jeffrey M. Nye
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CERTIFICATE OF SERVICE

I certify under that a copy of the foregoing was served on counsel for all parties by email on the date of filing.

/s/ Jeffrey M. Nye
Jeffrey M. Nye

Appendix

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE EX REL. THE CINCINNATI ENQUIRER,

APPEAL NO. C-200318

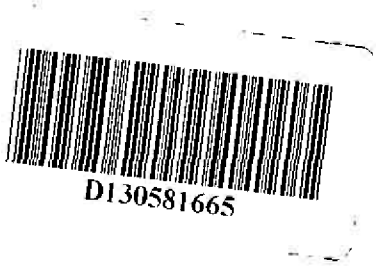
Petitioner,

vs.

ENTRY GRANTING MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS/PROHIBITION

HON. MEGAN SHANAHAN,

Respondent.



This cause came on to be considered upon the motion of the Respondent to dismiss the petition for a writ of mandamus/prohibition as moot, and upon the response thereto.

The motion is well taken and is granted. The petitioner asks the Court to invalidate the trial court's order regarding public access that was issued on July 22, 2020. That order is no longer in effect and has been superseded by an amended order. The petition is accordingly dismissed as moot.

To The Clerk:

Enter upon the Journal of the Court on DEC 16 2020 **per order of the Court.**

By: _____ **(Copy sent to counsel)**
Presiding Judge

dis-ss4.doc

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

M.R., a Cincinnati Police Officer

v.

Julie Niesen, et al.,

Defendants.

Case No. A2002596

Judge Shanahan

ENTRY GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE AFFIDAVIT UNDER SEAL AND PROCEED UNDER A PSEUDONYM

Upon Motion of Plaintiff for Leave to file Affidavit Under Seal and Proceed Under a Pseudonym, this Court finds such Motion well taken and grants the same.

IT IS HEREBY ORDERED that subject to further hearing that Plaintiff be permitted to proceed using initials and to file his affidavit under seal.

JUDGE

7/22/20
DATE

Copies to all counsel and parties of record.

RULE 44. Court Records - Definitions.

In addition to the applicability of these rules as described in Sup. R. 1, Sup. R. 44 through 47 apply to the Supreme Court.

As used in Sup. R. 44 through 47:

(A) "Actual cost" means the cost of depleted supplies; records storage media costs; actual mailing and alternative delivery costs, or other transmitting costs; and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(B) "Court record" means both a case document and an administrative document, regardless of physical form or characteristic, manner of creation, or method of storage.

(C)(1) "Case document" means a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in division (C)(2) of this rule.

(2) The term "case document" does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document to which public access has been restricted pursuant to division (E) of Sup. R. 45;

(d) Except as relevant to the juvenile's prosecution later as an adult, a juvenile's previous disposition in abuse, neglect, and dependency cases, juvenile civil commitment files, post-adjudicatory residential treatment facility reports, and post-adjudicatory releases of a juvenile's social history;

(e) Notes, drafts, recommendations, advice, and research of judicial officers and court staff;

(f) Forms containing personal identifiers, as defined in division (H) of this rule, submitted or filed pursuant to division (D)(2) of Sup. R. 45;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;

(h) In a court of common pleas or a division thereof with domestic relations or juvenile jurisdiction, the following documents, including but not limited to those prepared pursuant to R.C. 2151.281, 3105.171(E)(3), and 3109.04 and Sup.R. 48:

(i) Health care documents, including but not limited to-physical health, psychological health, psychiatric health, mental health, and counseling documents;

(ii) Drug and alcohol use assessments and pre-disposition treatment facility reports;

(iii) Guardian ad litem reports, including collateral source documents attached to or filed with the reports;

(iv) Home investigation reports, including collateral source documents attached to or filed with the reports;

(v) Child custody evaluations and reports, including collateral source documents attached to or filed with the reports;

(vi) Domestic violence risk assessments;

(vii) Supervised parenting time or companionship or visitation records and reports, including exchange records and reports;

(viii) Financial disclosure statements regarding property, debt, taxes, income, and expenses, including collateral source documents attached to or filed with records and statements;

(ix) Asset appraisals and evaluations.

(D) "Case file" means the compendium of case documents in a judicial action or proceeding.

(E) "File" means to deposit a document with a clerk of court, upon the occurrence of which the clerk time or date stamps and dockets the document.

(F) "Submit" means to deliver a document to the custody of a court for consideration by the court.

(G)(1) "Administrative document" means a document and information in a document created, received, or maintained by a court that serves to record the administrative, fiscal, personnel, or management functions, policies, decisions, procedures, operations,

organization, or other activities of the court, subject to the exclusions in division (G)(2) of this rule.

(2) The term "administrative document" does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law, or as set forth in the Rules for the Government of the Bar;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document describing the type or level of security in a court facility, including a court security plan and a court security review conducted by a local court, the local court's designee, or the Supreme Court;

(d) An administrative or technical security record-keeping document or information;

(e) Test questions, scoring keys, and licensing, certification, or court-employment examination documents before the examination is administered or if the same examination is to be administered again;

(f) Computer programs, computer codes, computer filing systems, and other software owned by a court or entrusted to it;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;

(h) Data feeds by and between courts when using the Ohio Courts Network.

(H) "Personal identifiers" means social security numbers, except for the last four digits; financial account numbers, including but not limited to debit card, charge card, and credit card numbers; employer and employee identification numbers; and a juvenile's name in an abuse, neglect, or dependency case, except for the juvenile's initials or a generic abbreviation such as "CV" for "child victim."

(I) "Public access" means both direct access and remote access.

(J) "Direct access" means the ability of any person to inspect and obtain a copy of a court record at all reasonable times during regular business hours at the place where the record is made available.

(K) "Remote access" means the ability of any person to electronically search, inspect, and copy a court record at a location other than the place where the record is made available.

(L) "Bulk distribution" means the distribution of a compilation of information from more than one court record.

(M)(1) "New compilation" means a collection of information obtained through the selection, aggregation, or reformulation of information from more than one court record.

(2) The term "new compilation" does not include a collection of information produced by a computer system that is already programmed to provide the requested output.

RULE 45. Court Records – Public Access.

(A) Presumption of public access

Court records are presumed open to public access.

(B) Direct access

(1) A court or clerk of court shall make a court record available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time.

(2) Except for a request for bulk distribution pursuant to Sup. R. 46, a court or clerk of court shall permit a requestor to have a court record duplicated upon paper, upon the same medium upon which the court or clerk keeps it, or upon any other medium the court or clerk determines it can be reasonably duplicated as an integral part of its normal operations.

(3) A court or clerk of court shall mail, transmit, or deliver copies of a requested court record to the requestor within a reasonable time from the request, provided the court or clerk may adopt a policy allowing it to limit the number of court records it will mail, transmit, or deliver per month, unless the requestor certifies in writing that the requestor does not intend to use or forward the records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include news reporting, the gathering of information to assist citizens in the understanding of court activities, or nonprofit educational research.

(4) A court or clerk of court may charge its actual costs incurred in responding to a request for direct access to a court record. The court or clerk may require a deposit of the estimated actual costs.

(C) Remote access

(1) A court or clerk of court may offer remote access to a court record. If a court or clerk offers remote access to a court record and the record is also available by direct access, the version of the record available through remote access shall be identical to the version of the record available by direct access, provided the court or clerk may exclude an exhibit or attachment that is part of the record if the court or clerk includes notice that the exhibit or attachment exists and is available by direct access.

(2) Nothing in division (C)(1) of this rule shall be interpreted as requiring a court or clerk of court offering remote access to a case document in a case file to offer remote access to other case documents in that case file.

(3) Nothing in division (C)(1) of this rule shall be interpreted as prohibiting a court or clerk of court from making available on a website any court record that exists only in electronic form, including an on-line journal or register of actions.

(D) Omission of personal identifiers prior to submission or filing

(1) When submitting a case document to a court or filing a case document with a clerk of court, a party to a judicial action or proceeding shall omit personal identifiers from the document.

(2) When personal identifiers are omitted from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule, the party shall submit or file that information on a separate form. The court or clerk may provide a standard form for parties to use. Redacted or omitted personal identifiers shall be provided to the court or clerk upon request or a party to the judicial action or proceeding upon motion.

(3) The responsibility for omitting personal identifiers from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule shall rest solely with the party. The court or clerk is not required to review the case document to confirm that the party has omitted personal identifiers, and shall not refuse to accept or file the document on that basis.

(E) Restricting public access to a case document

(1) Any party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document. Additionally, the court may restrict public access to the information in the case document or, if necessary, the entire document upon its own order. The court shall give notice of the motion or order to all parties in the case. The court may schedule a hearing on the motion.

(2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:

(a) Whether public policy is served by restricting public access;

(b) Whether any state, federal, or common law exempts the document or information from public access;

(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

(3) When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:

(a) Redacting the information rather than limiting public access to the entire document;

(b) Restricting remote access to either the document or the information while maintaining its direct access;

(c) Restricting public access to either the document or the information for a specific period of time;

(d) Using a generic title or description for the document or the information in a case management system or register of actions;

(e) Using initials or other identifier for the parties' proper names.

(4) If a court orders the redaction of information in a case document pursuant to this division, a redacted version of the document shall be filed in the case file along with a copy of the court's order. If a court orders that the entire case document be restricted from public access, a copy of the court's order shall be filed in the case file. A journal entry shall reflect the court's order. Case documents ordered restricted from public access or information in documents ordered redacted shall not be available for public access and shall be maintained separately in the case file.

(F) Obtaining access to a case document that has been granted restricted public access

(1) Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion.

(2) A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

RULE 46. Court Records - Bulk Distribution.

(A) Requests for bulk distribution and new compilations

(1) Bulk distribution

(a) Any person, upon request, shall receive bulk distribution of information in court records, provided that the bulk distribution does not require creation of a new compilation. The court or clerk of court shall permit the requestor to choose that the bulk distribution be provided upon paper, upon the same medium upon which the court or clerk keeps the information, or upon any other medium the court or clerk determines it can be reasonably duplicated as an integral part of its normal operations, unless the choice requires a new compilation.

(b) The bulk distribution shall include a time or date stamp indicating the compilation date. A person who receives a bulk distribution of information in court records for redistribution shall keep the information current and delete inaccurate, sealed, or expunged information in accordance with Sup. R. 26.

(2) New compilation

(a) A court or clerk of court may create a new compilation customized for the convenience of a person who requests a bulk distribution of information in court records.

(b) In determining whether to create a new compilation, a court or clerk of court may consider if creating the new compilation is an appropriate use of its available resources and is consistent with the principles of public access.

(c) If a court or clerk of court chooses to create a new compilation, it may require personnel costs in addition to actual costs. The court or the clerk may require a deposit of the estimated actual and personnel costs to create the new compilation.

(d) A court or clerk of court shall maintain a copy and provide public access to any new compilation. After recouping the personnel costs to create the new compilation from the original requestor, the court or clerk may later assess only actual costs.

(B) Contracts with providers of information technology support

A court or clerk of court that contracts with a provider of information technology support to gather, store, or make accessible court records shall require the provider to comply with requirements of Sup. R. 44 through 47, agree to protect the confidentiality of the records, notify the court or clerk of court of all bulk distribution and new compilation requests, including its own, and acknowledge that it has no ownership or proprietary rights to the records.

RULE 47. Court Records – Application, Remedies, and Liability.

(A) Application

(1) The provisions of Sup.R. 44 through 47 requiring redaction or omission of information in case documents or restricting public access to case documents shall apply only to case documents in actions commenced on or after July 1, 2009. Access to case documents in actions commenced prior to July 1, 2009, shall be governed by federal and state law.

(2) The provisions of Sup.R. 44 through 47 restricting public access to administrative documents shall apply to all documents regardless of when created.

(3) The provisions of Sup.R. 44(C)(2)(h) restricting public access to certain case documents of a court of common pleas or a division thereof with domestic relations or juvenile jurisdiction shall apply only to case documents in actions commenced on or after January 1, 2016.

(B) Denial of public access - remedy

A person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731. of the Revised Code.

(C) Liability and immunity

Sup. R. 44 through 47 do not affect any immunity or defense to which a court, court agency, clerk of court, or their employees may be entitled under section 9.86 or Chapter 2744. of the Revised Code.

(D) Review

Sup. R. 44 through 47 shall be subject to periodic review by the Commission on the Rules of Superintendence.