IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. THE CINCINNATI ENQUIRER, and STATE OF OHIO, ex rel. EUGENE VOLOKH,	:	Consolidated original actions	2021-0047 2021-0169
Relators,	:		
v.	:		
HON. MEGAN E. SHANAHAN,	:		
Respondent.	:		

MERIT BRIEF OF RELATOR EUGENE VOLOKH

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INTRODUCTION

This Court adopted Superintendence Rules 44 through 47 to "promote[] openness, transparency of process, and accountability." *State ex rel. Cincinnati v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, ¶14. Under those Rules, "Court records are presumed open to public access," Sup.R. 45(A) (Appx. 8), just as they are under the federal Constitution, the Ohio Constitution, and the common law.

By entering the two orders that are the subject of this original action, Respondent has permitted a public official—a police officer—to use a pseudonym and sealed evidence to sue private citizens for their criticism of his performance of his official duties. Worse still, Respondent granted to that police-officer plaintiff an ex parte unconstitutional prior restraint that prevented the citizen defendants from identifying him even outside the court records.

That is the antithesis of "openness, transparency of process, and accountability"—for both Respondent and the police officer. This case seeks a writ of mandamus that compels the Respondent, a common pleas judge, to restore public access to court records that show (1) the name of the police-officer plaintiff, and (2) the evidence that he used to obtain the prior restraint. This action also seeks a writ of prohibition that prevents the Respondent from enforcing unconstitutional sealing orders in the future.

STATEMENT OF FACTS[1]

In the early summer of 2020, as the nation reeled from the murder of George Floyd by a Minnesota police officer, hundreds of Ohioans gathered at Cincinnati City Hall to protest police brutality and to speak at a City Council committee hearing. *See* Agreed Statement of Facts at ¶2, Joint Exhibit 1 at ¶17.

"M.R." is a Cincinnati police officer, and he was on duty at City Hall that day. Several citizens in the crowd witnessed M.R. make what they contend (whether rightly or wrongly) were white-supremacist hand gestures to the crowd. The citizens publicized these allegations, as well as other criticisms of M.R.'s fitness for service as a police officer, in several fora and formats, including (according to M.R.) by contemporaneously alerting the Cincinnati City Council in the public-comment portion of its committee 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 U.S. Department of Justice, for the purpose of receiving and investigating complaints regarding the performance of Cincinnati police

[1] The facts are taken primarily from the Agreed Statement of Facts filed by the parties on May 18, 2021, and the Joint Exhibits filed with the Agreed Statement of Facts. The Joint Exhibits comprise 285 pages, which are stamped "Joint Evidence 001" through "Joint Evidence 285." Where possible, specific portions of the Joint Exhibits are indicated by using the paragraph numbers in those documents themselves. For other references, citation is made to the "Joint Evidence" page number.

officers). *See* Joint Exhibit 1 (M.R.'s complaint) at ¶1, 16 (M.R. was a public official, on-duty, and acting in his 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.").

About a month later, 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 generally* Joint Exhibit 1 (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* Agreed Statement of Facts at ¶3, Joint Exhibit 3 (motion).

Respondent conducted an ex parte oral argument on M.R.'s motion the same day it was filed. *See* Agreed Statement of Facts at ¶4. 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. *See* Joint Exhibit 14 (docket sheet) at Joint Evidence 285 (showing absence of docket notation that Respondent gave prior notice of hearing on motion to restrict public access). *See also* Joint Exhibit 3 (motion to restrict public access) at Joint Evidence 22 (certificate of service by M.R.'s counsel showing that M.R. did not

attempt to serve the motion until serving the complaint) and Joint Exhibit 14 (docket sheet) at Joint Evidence 285 (showing appointment of process servers and effort to serve only after entry of order restricting public access had been entered). Respondent did not require M.R. or any other witness to testify at the argument. *See* Joint Exhibit 4 (transcript of July 22 oral argument) at 1-8 (Joint Evidence 023-030) (showing absence of testimony from any witness).

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," Appx. 1) that restricted public access to both M.R.'s affidavit and his name. *See* Agreed Statement of Facts at ¶5 and Joint Exhibit 5 (Original Sealing Order) (Appx. 1). The Original Sealing Order does not contain any of the findings that Sup.R. 45(E) (Appx. 9-10) requires courts to make before restricting public access to court records, and it did not use the least restrictive means available to restrict public access to court records. *See* Joint Exhibit 5 (Original Sealing Order) (Appx. 1).

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* Agreed Statement of Facts at ¶6, 10.

During the time that the entire record was sealed, 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*

Joint Exhibit 14 (docket sheet) at Joint Evidence 285 (showing entry of "temporary restraining orders"); Respondent's Evidence at Shan. Sub. 29 (copy of Prior Restraint). The Prior Restraint is the subject of the jurisdictional appeal in case 2020-1131 that is pending before this Court.

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* Agreed Statement of Facts at ¶8 and Joint Exhibit 7 (*Enquirer* motion); Agreed Statement of Facts at ¶9 and Joint Exhibit 8 (Volokh motion, including supplement to motion). Respondent initially scheduled a hearing on the motion to unseal for September 1. *See* Agreed Statement of Facts at ¶11; Joint Exhibit 9 at 84-90 (Joint Evidence 125-131) (transcript of August 11, 2020 hearing).

In mid-August 2020, M.R.'s likely identity was widely reported in national and local media. *See* Respondent's Evidence at Shan. Sub. 323-330 (an article reporting M.R.'s likely identity).

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 that had been set for September 1. *See* Agreed Statement of Facts at ¶12-13. The *Enquirer* then withdrew its motion to unseal, though Volokh did not withdraw his. *See* Agreed Statement of Facts at ¶14.

With Respondent having canceled the hearing on the motion to unseal, Volokh and the *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* Agreed Statement of Facts at ¶15 and Joint Exhibit 10 (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* Agreed Statement of Facts at ¶16 and Joint Exhibit 11 (transcript of September 16 argument). As with the July 22 hearing, Respondent did not take any evidence at the hearing, and neither M.R. nor any other witness testified at the argument. *See generally* Joint Exhibit 11 (no witnesses sworn and no testimony taken; hearing was exclusively oral argument by counsel). Respondent *did* permit M.R.'s counsel to play a video that purportedly depicted M.R., but Respondent did not admit the video into evidence. *See* Joint Exhibit 11 at 48:19-50:9 (Joint Evidence 235-237) (M.R.'s counsel playing video excerpts), and at 61:24-25 (Joint Evidence 248) (Respondent: "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. *See* Agreed Statement of Facts at ¶17.

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* Joint Exhibit 11 at 72:13-18 (Joint Evidence 259). Respondent was referencing the fact that M.R.'s likely identity had been reported, and was reasoning, incorrectly, that the fact that M.R.'s identity was likely known was a justification for continuing to restrict public access to court records that definitively show 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* Joint Exhibit 11 at 72:19-24 (Joint Evidence 259).

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. *See* Agreed Statement of Facts at ¶17.

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* Volokh Exhibit 1

at 4:1-5:14 (redacted transcript of M.R.'s spouse's proceeding; M.R.'s counsel identifying himself as such and identifying M.R.).

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* Agreed Statement of Facts at ¶18 and Joint Exhibit 12 (Second Sealing Order) (Appx. 2).

The Second Sealing Order (like the Original Sealing Order) does not and cannot contain findings that comply with Sup.R. 45, and it 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* Agreed Statement of Facts at ¶18 and Joint Exhibit 13 (redacted M.R. affidavit[2])—and even if it arguably did, M.R. was not subjected to cross-examination

[2] M.R.'s unredacted affidavit is not in the record in these original actions, because—as a direct result of the Original Sealing Order and Second Sealing Order—the parties do not have access to it. The parties have jointly moved the Court either to direct the Clerk to supplement the record in these original actions with a copy of the unredacted affidavit from the jurisdictional appeal in case 2020-1131, or to take judicial notice of the contents

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, *see* Joint Exhibit 11 at 72:19-24 (Joint Evidence 259)) or on claims that police officers generally or M.R. specifically are at risk of serious physical harm (as the Second Sealing Order (Joint Exhibit 12) says at 1-2 (Joint Evidence 277-278 and Appx. 2-3), 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, concluding that the petition was moot. Volokh has appealed that decision as of right to this Court, and that matter is pending as case 2021-0136.

ARGUMENT

Proposition of law no. 1: A public official may not use a pseudonym or sealed evidence to sue citizens over their criticism of his official on-duty conduct, and writs of mandamus and prohibition are available to restore public access to the official's identity and evidence

Respondent's 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.

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of that affidavit from the record in that case. The Court has not yet ruled on that motion at the time this brief was submitted for filing.

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

This Court should issue a writ of mandamus directing Respondent to unseal M.R.'s identity and affidavit 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 he used to obtain an unconstitutional prior restraint.

i. Public access to court records is a foundational principle of the Republic, enshrined not only in the Superintendence Rules, but also the common law, the First Amendment, and the Ohio Constitution.

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) (Appx. 8).

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) (Appx. 4) (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).

ii. The public's right to access court records is especially important where a litigant is a public

official, and the litigation is about his official conduct.

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 Joint Exhibit 1 (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 the truthfulness of his 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) (Appx. 8). 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 (CA3 2011) (discussing "the traditional rule of openness"), and "experience and logic," *Press-Enterprise II*, 478 U.S. at 9, dictate that the public has 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 to 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. Sup.R. 45(E) has clear legal requirements for and limits on restricting public access.

A court may grant a motion to restrict public access to court records only if "the presumption of allowing public access is outweighed by a higher interest." Sup.R. 45(E)(2) (Appx. 9). A court considering such a motion must consider "[w]hether 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) (Appx. 9).

The Superintendence Rules dictate not only the substantive law governing restrictions on public access, but also the mandatory procedure. When a party moves to restrict public access to a court record, the court must give prior notice. *See* Sup.R. 45(E)(1) (Appx. 9) ("The court shall give notice of the motion or order to all parties in the case."). The court also may only restrict public access if the movant establishes the right to do so "by clear and convincing evidence." Sup.R. 45(E)(2) (Appx. 9).

"Clear and convincing" evidence does not require proof beyond a reasonable doubt, but it does require 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* 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.").

These are mandatory provisions. A court *shall* give notice, it *must* consider all the criteria, and it may seal only *if* and *after* the movant produces clear and convincing evidence. *See* Sup.R. 45(E)(1)-(2) (Appx. 9).

Which is to say that whether to limit the public's right to access court records is not a matter that is left to judicial discretion. "Judicial discretion" refers to the ability to manage affairs, usually procedural issues, that are governed by equitable considerations rather than legal rights. See BALLANTINE'S LAW DICT., 3d ed. (definition

of "discretion": "[t]he equitable decision of what is just and proper under the circumstances; the liberty or power of acting without other control than one's own judgment"); (definition of "discretion of court": the right of a court to "do[] or not do[] a thing, the doing of which cannot be demanded as an absolute right"). Matters governed by established legal principles, including constitutional principles, are *not* matters left to discretion.

Put differently, no judge has discretion to either violate the law or make an error of law—and that is true regardless of whether that law is the First Amendment's right of access to proceedings or documents, *see, e.g., Press-Enterprise II*, 478 US at 8-9 (discussing applicability of First Amendment to court proceedings), the common-law right of public access to court records, *see, e.g., In re T.R.*, 52 Ohio St.3d at 16 n.9 (observing that traditionally civil actions involving adults "are presumptively open to the public" at common law), Sup.R. 45(A)'s command that "Court records are presumed open to public access," or the procedures prescribed in Sup.R. 45(E). *See also, e.g., Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶13 ("When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.")

Quite to the contrary, "'[o]nly the most compelling reasons can justify nondisclosure of judicial records[,]'" and those reasons must be detailed by the court. *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (CA6 2016), quoting *In*

re Knoxville News-Sentinel Co., 723 F.2d 470, 476 (CA6 1983). Absent such compelling reasons, judges like Respondent have a clear legal duty to maintain public access to court records. This is particularly true when the plaintiff is a public official (as M.R., a police officer, is); when the complaint raises allegations concerning the public official in his performance of his official duties (as M.R.'s complaint does, when he alleges that he was on duty at Cincinnati City Hall; *see* Joint Exhibit 1); when the complaint raises other issues of public interest (such as the relationship between police and citizenry, conduct and political speech of protesters attending government meetings, and the content of formal complaints lodged with government agencies like the Citizen Complaint Authority—all of which M.R.'s complaint also does, *see id.*); and when the plaintiff's likely identity is already widely known *(see* Joint Exhibit 1 (M.R. complaint) at ¶42-43, ¶48-49 (quoting from CCA complaints that appear to reveal M.R.'s likely identity)*; see also* Joint Exhibit 11 at 72:13-18 (Joint Evidence 259) (Respondent referencing the reporting on M.R.'s likely identity).

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 a bill of particulars was invalid because evidence cited in the trial court's order did not support the court's conclusion that the presumption of public access was overcome by a higher interest).

ii. Respondent disregarded Sup.R. 45(E)'s requirements, and instead restricted public access to the court records without notice and without evidence.

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 docket in M.R.'s case reflects, did not attempt to give notice) to any defendant before considering the motion. Respondent also did not require M.R. to give notice. *See* Joint Exhibit 14 (docket sheet) at Joint Evidence 285 (showing absence of docket notation that Respondent gave prior notice of hearing on motion to restrict public access). *See also* Joint Exhibit 3 (motion to restrict public access) at Joint Evidence 22 (certificate of service by M.R.'s counsel showing that M.R. did not attempt serve the motion until serving the complaint) and Joint Exhibit 14 (docket sheet) at Joint Evidence 285 (showing appointment of process servers and M.R.'s effort to serve complaint only *after* entry of order restricting public access had been entered).

Instead, Respondent conducted an ex parte oral argument at which only M.R.'s counsel was present. *See* Agreed Statement of Facts at ¶4 and Joint Exhibit 4 (transcript).

Next, Respondent did not require M.R. to present *any* evidence before she entered either the Original Sealing Order or the Second Sealing Order. *See* Joint Exhibit

4 (transcript of July 22 ex parte oral argument) at 1-8 (Joint Evidence 023-030) (showing absence of testimony from any witness); Joint Exhibit 11 (transcript of September 16 oral argument) generally at 1-88 (Joint Evidence 188-275) (no witnesses called or sworn, no testimony presented, no evidence admitted). 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, assuming for the sake of argument 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—it is an out-of-court statement used (if at all) to prove the truth of the matters asserted in the document—and no exception applies, and thus the affidavit 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.

Respondent's protestations to the contrary, the record in this case (especially the transcripts of the July 22 ex parte hearing and the September 16 hearing on Volokh's motion to unseal) establishes that Respondent did not comply with either the procedural or substantive requirements of Sup.R. 45 before restricting public access to

the court records. Both the Original Sealing Order and the Second Sealing Order are therefore void.

iii. There are no facts which would warrant restricting public access to the court records in M.R.'s case.

Sup.R. 45(E)(2)(a) and (c) require consideration of whether public policy would be served by restricting public access, and whether certain case—or litigant—specific factors that support restriction of public access exist. The latter list includes "risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process." Sup.R. 45(E)(2)(c) (Appx. 9). Neither Respondent nor M.R. has ever contended that proprietary business information or public safety are at issue in M.R.'s case. They also have not contended that the fairness of the adjudicatory process is at issue—though in point of fact, M.R.'s use of a pseudonym *adversely* affects the fairness of the adjudicatory process by interfering with the public's right to supervise the courts and their public officials.[3] That leaves only "risk of injury to persons" and "individual privacy rights and interests."

The record does not support a conclusion that there was any risk of injury to persons that would justify restricting public access. It would be impossible for

[3] The sealing orders would negatively affect the fairness of the adjudicatory process even if M.R. were *not* a public official. *See 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").

Respondent to have made that conclusion—much less to have made it by clear and convincing evidence—because Respondent did not require M.R. to present and did not receive any evidence at all on that (or any other) issue.

That would be true even if M.R.'s affidavit were both admissible and actually relied on by Respondent. 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 that had been made about a month earlier, on June 24 or 25 (some in governmental proceedings, some on social media). M.R.'s affidavit does not identify any threats made in that month-long period. It does not identify or explain any risk of harm, and instead makes only a generalized statement that he (like many, or perhaps most, other police officers) had previously arrested unidentified "violent felons." *See* Joint Exhibit 13 (partially redacted M.R. affidavit) at ¶1-4, 21. The fact that a police offer had previously arrested "violent felons" is not evidence that requiring him to proceed under his real name would create a risk of injury. Respondent's reasoning on this point would create a blanket rule that no police officer would ever be required to use his or her real name in litigation.

Moreover (and again assuming only for sake of argument that M.R.'s affidavit were both admissible and actually considered by Respondent) anything more than the most perfunctory reading of M.R.'s affidavit shows that at least some of the information

in it is misleading or inaccurate—a fact which may have been revealed if Respondent had required M.R. to testify and if M.R. had been cross-examined. For example, even though M.R. made a conclusory statement in ¶5 of his affidavit (Joint Exhibit 13) that he "ha[s] taken steps to maintain confidentiality" about his identity (he does not say what those steps are), in fact M.R.'s real name is available from both Cincinnati Police records and the Citizen Complaint Authority complaints that M.R. himself specifically itemized. *See* Joint Exhibit 1 at ¶45, 51 (M.R. alleging that Citizen Complaint Authority complaints "are public records"). M.R. even alleged in his complaint (Joint Exhibit 1 at ¶42-43 and ¶48-49) the date the Citizen Complaint Authority reports were filed, who filed them, and their subject. M.R. even included quotes from them. This is the polar opposite of M.R.'s claim in his affidavit that he "ha[s] taken steps to maintain confidentiality" of his name—in truth he all but disclosed his identity by specifically describing public-record documents where his name could be found. Even if Respondent were entitled to rely on M.R.'s affidavit as evidence, therefore, its internal inconsistencies (and the inconsistencies between it and M.R.'s complaint) show that M.R. is an inherently unreliable affiant, and that affidavit could not be clear and convincing evidence of a risk of harm to persons that would justify a restriction on public access.

The final Sup.R. 45(E)(3) criterion is whether "individual privacy rights and interests" warrant a restriction on public access. When the information sought to be restricted from public access is a party's identity, courts generally look for the presence

of one of four factors that may warrant restriction. Those factors are drawn primarily from federal case law, including Sixth Circuit 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)).[4]

Respondent's failure to require M.R. to present evidence means that the record before her at the time the sealing orders were entered did not contain clear and convincing evidence that would warrant restrictions on public access.

The arguments of M.R.'s counsel are not evidence, but even if they were, they do not establish any of the *Bruner* factors favoring pseudonymity. 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

[4] This list is certainly non-exhaustive, but it *is* the generally prevailing list from the case law—and more importantly, if there is any other factor or scenario that warrants the use of a pseudonym in M.R.'s case, neither Respondent nor M.R. has ever identified it, nor how or by what evidence it was proven by M.R. before Respondent restricted public access.

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 a risk of religious discrimination, and the record in that case contained evidence of actual threats of physical violence against the plaintiff. M.R.'s case is nearly the opposite. He is not attempting to use the courts to challenge the government. M.R. is a public official—the living embodiment of the government—who is 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 [defendant], 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.")[5]; *Doe v. Indiana Black Expo., Inc.*, 923 F.Supp. 137, 141 (S.D. Ind. 1996) ("Basic fairness requires that where a

[5] *Bruner* also reinforces an earlier point. M.R.'s affidavit does not allege any actual facts regarding any threat of retaliation—but even if it did, the case law makes clear that the only threats of retaliation that might weigh in favor of anonymity or pseudonymity are threats of retaliation from the public *for filing the lawsuit*. *See Bruner* at ¶9 ("Moreover, Doe has not alleged he has suffered threats of retaliation for filing this suit."). Even if M.R.'s averment that he has arrested violent felons could be construed as somehow indicating that those felons had actually threatened him with physical harm, there is nothing to suggest that the reason those felons had done so was the fact that M.R. had filed his prior-restraint lawsuit.

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 M.R.'s real name also 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 that depicted genitalia and that revealed the plaintiff to be homosexual, *see Doe v. Franklin County*, 2013 U.S. Dist. LEXIS 134843 (S.D. Ohio no. 2:13-cv-00503), at *2-3 (Sept. 20, 2013); 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. "[G]eneralized 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 those 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)(i)-(ii). 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 Plaintiff's confidential File, Plaintiff has chosen to bring a private matter into the public eye."). And the events giving rise to M.R.'s complaint are among the most significant public-interest events in recent memory—massive public demonstrations nationwide, including in Ohio, sparked by the murder of a Black man (George Floyd) by a police officer in Minnesota.

M.R.'s affidavit, even if Respondent could and did consider it, does not establish either a risk of injury to persons or the existence of any individual privacy rights or interests that would justify restricting public access. M.R. made the choice to seek

redress in the public court system. The resolution of his dispute must be public, and it cannot be had under a pseudonym.

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

Respondent will 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) (Appx. 10). 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)(2) only applies when public access has been restricted "pursuant to division (E) of this rule." As discussed in parts 1(B)(i)-(ii) 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. The guarantee of public access to court records would be an empty promise.

A second reason is that even if Sup.R. 45(F) applies, 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 likely name was discovered and reported in the press. *See* Respondent's Evidence at Shan. Sub. 325-330 (Aug. 17, 2020 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 M.R.'s complaint itemized by date of filing, identity of complainant, and subject matter. *See* Joint Exhibit 1 (M.R. complaint) at ¶42-43 (quoting complaint against M.R. by Terhas White) and ¶48-49 (quoting CCA 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 likely identity was as simple as making public-records requests of the Citizen Complaint Authority for complaints filed by White and Gilley on June 25, 2020 and reporting out the findings—something that reporters apparently actually did. *See* Respondent's Evidence at Shan. Sub. 325-327 (news article quoting from a Citizen Complaint Authority complaint that matches the description in M.R.'s complaint). Respondent actually knew that M.R.'s probable 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 likely known meant that "no public interest [is] being hindered" by

allowing him to use a pseudonym. *See* Joint Exhibit 11 at 72:13-18 (Joint Evidence 259). And in addition, 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* Volokh Exhibit 1 at 4:1-5:14.

The fact that M.R.'s likely 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) ("the court [should]

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 citizens over their criticism of his official conduct, to proceed under a pseudonym even though his real name has likely been reported, would make the court system complicit in disinforming the public.

(Of course, it is possible that the reports of M.R.'s probable identity are incorrect—the articles (see Respondent's Evidence at Shan. Sub. 325-327) merely report the similarities between M.R.'s complaint and the reports filed with the Citizen Complaint Authority, and do not definitively say who M.R. is. The implication of the reports may be right, but without seeing the court records, Volokh and the public can't be certain—and they are entitled to be certain about which public officials are using the court system and what they are doing there. Plus, an incorrect report of M.R.'s identity would unfairly associate a different police officer with M.R. and his litigation—and that person would have a strong interest in the public knowing that he is *not* M.R.)

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 246 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* Agreed Statement of Facts at ¶9

and Joint Exhibit 8. 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 id.* and Joint Exhibit 11 (transcript of argument on that motion).

Respondent 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. If exhaustion were required in order to show that a relator lacks an adequate remedy at law, Volokh certainly met that requirement.[6]

If a *party* to M.R.'s case had presented the Sup.R. 45(F) 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

[6] This is one thing that distinguishes Volokh from the *Enquirer*, procedurally. Respondent may argue that the *Enquirer* is not entitled to mandamus in the consolidated case because the *Enquirer* did not seek Sup.R. 45(F) relief from Respondent. (Respondent has made that argument in earlier briefs.) Volokh does not believe that argument is correct; it has no textual support. But if the Court accepts that argument from Respondent as to the *Enquirer*, it only *reinforces* Volokh's right to the writ, because Volokh *did* seek Sup.R. 45(F) relief. Between Volokh and the *Enquirer*, at least one is (and, Volokh contends, both are) entitled to the writ

aggrieved by a sealing order has an adequate remedy through direct appeal, and so may not pursue mandamus).[7] 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.

Volokh's direct appeal (case no. 2021-0136) of the dismissal of the First District Petition also is not an adequate remedy, for at least three reasons. One is that the First District Petition pre-dated the Second Sealing Order, so any relief in the direct appeal will not give relief from that unconstitutional order. A second is that Respondent has argued in that case that if Volokh is entitled to any relief at all, it is only a reversal and remand to the First District. That argument is incorrect for the reasons addressed in Volokh's briefs in that case—but if the Court agrees with Respondent, that simply highlights the inadequacy of any other remedy. The First District petition challenges the constitutionality of an order that is already ten months old, and any relief that would

[7] 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.

come after remand would eviscerate the contemporaneous right to access court records. *See Public Citizen*, 749 F. 3d at 272. A third reason that the direct appeal is not an adequate remedy is simply that that argument is inconsistent with the text of Sup.R. 47(B). That rule says that any person aggrieved by a judge's failure to comply with Sup.R. 45(E) "may pursue an action in mandamus." There is nothing in that rule that says that an appeal of earlier mandamus case precludes a separate original action that challenges additional conduct and has an expanded record.[8]

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

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).

[8] Holding that the direct appeal is an adequate remedy would likely have the unintended consequence of encouraging future relators to always file in the Supreme Court when faced with a lower-court judge who is likely to issue serial orders like the ones at issue here. If they know that filing a petition in the court of appeals will require them to litigate all direct appeals to conclusion before filing new petitions for writs, they likely will opt to forego filing in the courts of appeals altogether, and instead file all mandamus actions directly in this Court.

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 vacatur 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,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was filed on all counsel of record by email on the date of filing.

/s/ Jeffrey M. Nye
Jeffrey M. Nye (0082247

Appendix

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.

Appx. 1
Original Sealing Order

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

M.R., a Cincinnati Police Officer,	:	Case No. A2002596
Plaintiff,	:	Judge Megan E. Shanahan
v.	:	**ORDER RESTRICTING PUBLIC ACCESS**
JULIE NIESEN, et al.,	:	
Defendants.	:	

This matter came before the Court for oral argument on September 16, 2020 on the Motion to Unseal filed August 5, 2020 by Eugene Volokh and filed separately on August 14, 2020 by several of the named defandants.

The Court finds by clear and convincing evidence that the presumption of allowing public access to the information in the document Plaintiff seeks to have filed under seal is outweighed by a higher interest after considering 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.

Specifically, the Court finds that factors supporting restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, and public safety. The plaintiff, a police officer, is involved in the apprehension of very violent and dangerous criminals. The officer's job duties expose the officer to physical harm. To require that a document with identifying information be available

to the public would further risk injury to the officer and others. In the current climate, with the uptick in violent acts being perpetrated against law enforcement both on-duty and off, active and retired, the Court finds there is a real and serious threat of physical harm. In the present case, one defendant has threatened, in writing, to publish the officer's personal identifying information and other information for the purpose of "doxing" the officer. The Court finds this to be a real and present threat.

The Court finds that the least restrictive means available at this time is to redact some of the information in the body of the affidavit rather than limiting public access to the entire document and to maintain the sealing of the exhibits attached to the affidavit to prevent the exposure of the officer's personal identifying information.

The Court further finds that the use of a pseudonym shall continue to be permitted to protect individual privacy rights and interests, and public safety for all of the above mentioned reasons.

9/21/20

Judge Megan E. Shanahan

ENTERED

SEP 21 2020

Appx. 3
Second Sealing Order

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.

CONSTITUTION ANNOTATED
Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

First Amendment

First Amendment Annotated

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
