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## MEMORANDUM IN SUPPORT

The Cincinnati Enquirer, a Division of Gannett GP Media, Inc. (“the Enquirer”), submits this Memorandum in Support of its Motion to Unseal Records.

### **I. STATEMENT OF FACTS**

Case No. A2002596 was recently filed in the Common Pleas Court for Hamilton County, Ohio. It is impossible to tell from the public docket when the case was filed, the identity of the parties, or even the assigned judge. Presumably, an unknown judge issued an undisclosed order sealing the case in its entirety. But that is speculation, as the docket reveals nothing.

### **II. ARGUMENT**

“Court records are presumed open to public access.”<sup>1</sup> Under Sup.R. 44(B), “court records,” includes “case documents,” which are defined as follows:

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 \* \* \*.<sup>2</sup>

Under Ohio Rule of Superintendence 45(E), 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 . . . (a) [w]hether public policy is served by restricting public access; (b) whether any state, federal or common law exempts the document or information from public

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<sup>1</sup> Sup. R. 45(A).

<sup>2</sup> Sup. R. 44(C)(1).

access; *and* (c) whether factors that support restriction of public access exist, including risk of injury to persons....”<sup>3</sup>

Moreover, if a court decides to restrict access to a case document, under Sup. R. 45(E)(3), it must do so in the least restrictive means possible:

- (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 \* \* \*.<sup>4</sup>

In addition to the Rules of Superintendence, the First Amendment to the United States Constitution guarantees the public and press a coextensive right of access to court proceedings.<sup>5</sup> This right of access can only be overcome if the court makes specific findings, on the record, demonstrating that closure is necessary to preserve higher values and that the closure order is narrowly tailored to achieve that interest.<sup>6</sup>

Assuming an order was issued in this case, it is improper for a host of reasons.

First, the Superintendence Rules, by their very terms, do not permit a blanket order sealing all records in a case. Rule 45(E)(2), which sets out the process for restricting access to information in a case document, provides clearly that the court must consider the issue on a document by document basis. The pertinent text of Rule 45(E)(2) provides: “A court shall

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<sup>3</sup> Sup. R. 45(E) (emphasis added).

<sup>4</sup> Sup. R. 44(C)(1) (emphasis added).

<sup>5</sup> *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180,

¶15.

<sup>6</sup> *Id.* at ¶17

restrict public access to information in a case document or, if necessary, the entire document...” (emphasis added) The rule is drafted in the singular, not the plural. A court can only restrict access to a case document by considering the specific document. A blanket order - which by its very nature restricts access to current and yet to be filed case documents - violates Rule 45(E)(2).

Second, Rule 45(E)(3) requires that the Court use the least restrictive means when entering an order restricting access to a case document. The rule sets out five methods the court may use to minimize the impact on the public’s right of access, including redacting specific information.

There is no indication that the unknown judge gave **any** consideration to any less restrictive methods here. The order seals every word of every case document. It is hard to imagine how a court could be less compliant with the Superintendence Rules.

Finally, the Court failed to comply with the dictates of the United States Constitution in issuing the orders. There is no indication the Court conducted an evidentiary hearing, nor did it make on the record findings identifying any higher value that compelled the entry of the order. The Court apparently made no inquiry, nor any finding that the blanket sealing order constituted the least restrictive means for achieving the protection of any higher value.

### **III. CONCLUSION**

This Court should vacate any order sealing the Court Records in this case and make the Court Records available to the public.

Respectfully submitted,

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### **PRAECIPE FOR SERVICE**

TO THE CLERK:

Please serve a copy of the Motion and Memorandum in Support on the parties to Case No. A2002596 via ordinary United States Mail.

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