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Hamilton County, Ohio
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STATE OF OHIO EX REL THE CINCINNATI ENQUIRER
vs.
HON MEGAN E SHANAHAN

C 2000318

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VERIFY RECORD

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY

STATE OF OHIO, *ex rel.*	:	
THE CINCINNATI ENQUIRER	:	
A Division of Gannett GP Media, Inc.	:	**Case No.**
312 Elm Street	:	
Cincinnati, OH 45202	:	
	:	**Original Action in Mandamus**
and	:	**and Prohibition**
	:	
STATE OF OHIO, *ex rel.*	:	
EUGENE VOLOKH	:	**COMPLAINT FOR WRIT OF**
UCLA School of Law	:	**MANDAMUS AND**
385 Charles E. Young Drive East	:	**PROHIBITION**
Los Angeles, CA, 90095	:	
	:	
Relators,	:	
vs.	:	
	:	
HON. MEGAN E. SHANAHAN,	:	
Judge, Common Pleas Court of Hamilton	:	
County	:	
Hamilton County Courthouse	:	
1000 Main Street	:	
Room 560	:	
Cincinnati, OH 45202	:	
	:	
Respondent.	:	

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COUNSEL FOR RELATOR EUGENE VOLOKH

For their Complaint for Writ of Mandamus and Prohibition against the Honorable Megan E. Shanahan, Judge of the Common Pleas Court of Hamilton County, Ohio ("Respondent"), Petitioners The Cincinnati Enquirer, a Division of Gannett GP Media, Inc. ("The Enquirer") and Eugene Volokh (together the "Relators") state as follows:

The Parties

1. The Enquirer operates and does business as *The Cincinnati Enquirer*, a newspaper of general circulation in the Cincinnati, Ohio metropolitan area.

2. Volokh is a Professor of Law at the UCLA School of Law, and is a First Amendment scholar and lawyer, and the founder and a coauthor of the blog The Volokh Conspiracy. Volokh Conspiracy is presently hosted at Reason Magazine (http://reason.com/volokh) and was hosted from 2014 to 2017 at the Washington Post.

3. Respondent is a judge of the Common Pleas Court of Hamilton County, Ohio ("HCCCP").

4. Respondent, in her capacity as a judge of the HCCCP, is a "court" within the meaning of Sup.R. 45(B), and a "court of common pleas" within the meaning of Sup.R. 1(A).

Background

5. On July 22, 2020, a Cincinnati police officer filed a complaint in the HCCCP under the pseudonym "M.R." against five named defendants, and "John Does #1-20," asserting multiple tort claims, including claims for false light invasion of privacy and defamation arising out statements allegedly made by the defendants on social media and in complaints filed with the Cincinnati Citizens Complaint Authority ("CCA") (hereinafter "Underlying Action"). A copy of the complaint is attached hereto as **Exhibit A**.

6. In conjunction with the filing of his complaint, M.R. filed a Motion for Leave to File Affidavit Under Seal and to Proceed Under a Pseudonym ("Motion to Seal") pursuant to Sup.R. 45(E). A copy of the Motion to Seal is attached hereto as **Exhibit B**.

7. The Underlying Action was assigned to Respondent, who granted the Motion to Seal on July 22, 2020 ("Sealing Order"). A copy of the Sealing Order is attached hereto as **Exhibit C**.

8. Upon information and belief, Respondent did not hold an evidentiary hearing or otherwise consider any evidence beyond M.R.'s affidavit, which remains sealed and inaccessible to the public.

9. 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."

10. The Enquirer, knowing only the case number, filed a motion to unseal the record on July 27, 2020.

11. The following day counsel for M.R. sent The Enquirer's counsel a copy of the pseudonymous complaint, the Motion to Seal, and the Sealing Order, via email.

12. Volokh filed a motion to unseal the record on August 5, 2020.

13. On August 10, 2020, upon learning that the Hamilton County Clerk of Court ("Clerk") had sealed the entire record in error based on the Sealing Order, Respondent directed the Clerk to unseal the record, except for M.R.'s affidavit, and

except for the portion of the Sealing Order permitting M.R. to proceed under that pseudonym.

14. Volokh filed a supplement to his motion to unseal the record on August 13, 2020.

15. Although Respondent initially set a hearing on Relators' motions to unseal, she advised the parties via an email from her staff on August 21, 2020, that the hearing was canceled. A copy of the notice cancelling this hearing is attached hereto as **Exhibit D**.

16. The Enquirer filed a notice withdrawing its Motion to Unseal on August 27, 2020 without a ruling from Respondent.

17. Volokh's motion remains pending, but is not scheduled for a hearing.

18. To date, the Court's Sealing Order permitting M.R. to proceed pseudonymously, and restricting public access to his affidavit, remains in effect.

COUNT I – Mandamus

19. The Ohio Rules of Superintendence apply to all courts of common pleas in the State of Ohio. Sup.R. 1(A).

20. The First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment to the United States Constitution, gives the public a presumptive right of access to court documents filed in a civil case. *See Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) (citing *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir.

1983)). *See also State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (recognizing First Amendment right of access to documents filed in criminal proceedings).

21. "A plaintiff's use of a pseudonym 'runs afoul of the public's common law right of access to judicial proceedings.'" *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (citation omitted); *see also In re Sealed Case*, No. 19-1216, 2020 WL 4873248, *2 (D.C. Cir. Aug. 20, 2020); *Doe v. Public Citizen*, 749 F.3d 246, 273 (4th Cir. 2014).

22. Consistent with the First Amendment, Superintendence Rule 45(A) provides that "[c]ourt records are presumed open to public access."

23. A "court record" includes "a case document . . . regardless of physical form or characteristic, manner of creation, or method of storage." Sup.R. 44(B).

24. Both a complaint and affidavit filed with the clerk of court in a civil action constitute "a document or information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding." Thus, M.R.'s name, and his affidavit, each constitute a "case document" within the meaning of Sup.R. 44(C)(1).

25. An affidavit of the kind at issue here is not exempt from public disclosure under state, federal, or the common law, and does not otherwise fall within any of the exceptions set forth in Sup.R. 44(C)(2)(b), (d)-(h).

26. Rule 10(A) of the Ohio Rules of Civil Procedure provides that "[i]n the complaint the title of the action shall include the names and addresses of all the parties."

27. Under the Superintendence Rules, a court may only restrict public access to a "case document" or information in a case document if the court complies with the requirements of Sup.R. 45(E).

28. Before restricting public access, a court must find "by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest," upon consideration of the factors set forth in Sup.R. 45(E)(2)(a)-(c).

29. "When restricting public access to a case document . . . the court shall use the least restrictive means available." Sup.R. 45(E)(3).

30. An order restricting access to the entirety of a case document "shall be filed in the case file," and "[a] journal entry shall reflect the court's order."

31. Under the First Amendment, "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *Rudd Equip. Co., Inc.*, 834 F.3d at 593.

32. To determine whether a record was appropriately sealed, a court should consider "among other things, the competing interests of the defendant's right to a fair trial, the privacy rights of participants or third parties, trade secrets, and national security." *Id.* at 593.

33. In evaluating a request by a plaintiff to proceed pseudonymously for purposes of the First Amendment, courts consider "(1) whether the plaintiff[] seeking anonymity [is] suing to challenge governmental activity; (2) whether prosecution of the suit will compel the plaintiff[] to disclose information of the utmost intimacy; (3) whether the litigation compels plaintiff[] to disclose an intention to violate the law,

thereby risking criminal prosecution; and (4) whether the plaintiff[] [is a] child[].” *Doe v. Bruner*, 12th Dist. Clinton No. CA2011-07-013, 2012-Ohio-761, ¶ 7 (internal quotations omitted). *See also Doe v. McKesson*, 322 F.R.D. 456 (M.D. La. 2017), *aff'd*, 945 F.3d 818 (5th Cir. 2019).

34. Upon information and belief, Respondent did not conduct an evidentiary hearing prior to rendering the Sealing Order, and thus, did not have any evidence before her other than M.R.'s affidavit.

35. As such, Respondent could not have found by clear and convincing evidence that the presumption of public access to M.R.'s name, and his affidavit, was outweighed by a higher interest, upon consideration of the factors set forth in Sup.R. 45(E)(2)(a)-(c).

36. A court's failure to follow the procedures for sealing a case document or information therein renders the order sealing the document void, and the court record remains subject to public access. *See State ex rel. Vindicator Printing Co. v. Wolff* (“*Wolff*”), 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 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).

37. A court's order must include findings justifying the order to seal to allow a court to review the court's bases and evidentiary support for restricting public access. *See Wolff* at ¶ 34 (noting that trial judge failed to cite in his order “any additional

evidence to support the sealing of the record). *See also Rudd Equip. Co., Inc.*, 834 F.3d at 596 (requiring court to set forth "specific findings and conclusions which justify nondisclosure to the public" (internal quotations omitted)).

38. Respondent's Sealing Order does not provide any rationale or justification for granting the Motion to Seal, or insight into why Respondent found "by clear and convincing evidence" that the Sup.R. 45(E) standard was met. The Sealing Order therefore fails to satisfy the requirements of *Wolff*.

39. Further, Respondent did not make any finding in the Sealing Order that allowing M.R. to proceed pseudonymously (i.e., redacting his name from the complaint) or restricting access to the entirety of the affidavit, were the least restrictive means available, or that Respondent considered the alternatives set forth in Sup.R. 45(E)(3)(a)-(e).

40. Likewise, Respondent's Sealing Order does not contain any findings or conclusions that would permit this Court to review the rationale for her order restricting access to M.R.'s name and his affidavit for purposes of the First Amendment.

41. Because the Court did not follow the proper procedures for allowing M.R. to proceed under a pseudonym, and for sealing the M.R. affidavit under either Sup.R. 45(E) or the First Amendment, the M.R. affidavit remains a "court record" subject to public access under Sup.R. 45(A) and the First Amendment, and M.R. must file a complaint in his own name.

42. In addition to the facial invalidity of the Sealing Order, there are no facts or circumstances under which it would have been appropriate for Respondent to restrict access to M.R.'s name or his affidavit under Sup.R. 45(E) or the First Amendment.

43. M.R. is a Cincinnati police officer and therefore a "public figure" under Ohio law. *Soke v. The Plain Dealer*, 632 N.E.2d 1282, 1284 (Ohio 1994) ("The United States Supreme Court has repeatedly recognized that police officers are public officials.").

44. As a public official, M.R.'s interest in hiding his identity from the public, while using public resources to obtain private relief, is non-existent, particularly when weighed against the public's interest in knowing the identity of the plaintiff in this case, and the sworn allegations he has relied on to seek an order restraining the speech of private citizens. This is especially so when the allegations in the complaint concern the performance of his official duties.

45. Further, from the allegations made by M.R. in his complaint, Relators believe (with near certainty) they have identified M.R. through the defendants' social media postings, and CCA complaints M.R. referenced in his own complaint, but cannot conclusively tie him to the Underlying Action without a public filing in his real name.

46. Superintendence Rule 47(B) provides that any person aggrieved by the failure of a court to comply with the requirements Sup.R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731 of the Revised Code.

47. Further, the Ohio Supreme Court has held that mandamus is the appropriate mechanism by which to obtain access to court records under the First Amendment. *Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 49 ("we have held that mandamus is the proper remedy when a right of access is predicated on a constitutional challenge").

48. Relators are aggrieved by Respondent's failure to comply with Sup.R. 45(E) when it restricted public access to M.R.'s affidavit, and permitted M.R. to file a complaint under a pseudonym.

49. Relators also challenge the Sealing Order on constitutional grounds, thus making mandamus an appropriate remedy.

50. Under the Ohio Supreme Court's decision in *Wolff* and the First Amendment, Respondent has a clear legal duty to direct M.R. to file a complaint under his real name and allow access to his affidavit.

51. Accordingly, Relators are entitled to a writ of mandamus pursuant to Sup.R. 47(B) and the First Amendment compelling Respondent to direct M.R. to file a complaint under his own name and to provide public access to his affidavit.

COUNT II - Prohibition

52. Relators incorporate the preceding allegations as if fully incorporated here.

53. A writ of prohibition may issue to bar a judge from enforcing an order sealing court records where the court failed to make the findings required by Sup.R.

45(E). *See Wolff* at ¶¶ 38-40 (issuing writ of prohibition, in addition to mandamus, where defendants failed to submit "clear and convincing evidence to support the court's sealing orders").

54. To establish entitlement to a writ of prohibition, a relator must demonstrate that (1) a judge is about to exercise his or her judicial power, (2) the exercise of that power is clearly unauthorized by law, and (3) the denial of the writ will cause injury for which there is no adequate remedy in the ordinary course of law. *State ex rel. Cincinnati Enquirer v. Oda*, 12th Dist. Warren No. CA2017-08-130, 2018-Ohio-704, ¶ 10.

55. When restricting public access to a case document, Sup.R. 45(E) requires a court to find by clear and convincing evidence that the presumption of public access to case document sealed is outweighed by a higher interest, and that restricting public access to the entire case document is the least restrictive means available.

56. A sealing order that fails to comply with these requirements is unauthorized as a matter of law, and thus enforceable. *See Wolff*.

57. Respondent's Sealing Order failed to comply with the requirements of Sup.R. 45(E) and the First Amendment, and thus, is unauthorized and unenforceable as a matter of law.

58. Accordingly, Relators are entitled to a writ of prohibition barring Respondent from enforcing the Sealing Order.

WHEREFORE, Relators respectfully request:

A. that the Court issue a writ of mandamus to Respondent Judge Megan Shanahan directing her to immediately vacate her July 22, 2020 Sealing Order; order M.R. to file his complaint under his real name; and allow public access to M.R.'s affidavit;

B. that the Court issue a writ of prohibition to Respondent Judge Megan Shanahan barring her from enforcing the Sealing Order; and

C. all other relief that is just and equitable.

Dated: August 31, 2020

Respectfully submitted,

Of Counsel:

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COUNSEL FOR RELATOR EUGENE VOLOKH

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a Summons along with a copy of this COMPLAINT FOR WRIT OF MANDAMUS AND PROHIBITION to the Respondent identified in the caption on page one via personal service.

/s/ John C. Greiner
John C. Greiner (0005551)

10500330.1
10507800.2

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

A 2 0 0 2 5 9 6

M.R., a Cincinnati Police Officer,
pleading under a pseudonym
c/o Gottesman & Associates, LLC
404 East 12th St., First Floor
Cincinnati, Ohio 45202

v.

Julie Niesen
1222 Republic, Apt. #3
Cincinnati, Ohio 45203,

James Noe
1418 Walnut Street
Cincinnati, Ohio 45202,

Terhas White
523 Oak St., Apt. 101
Cincinnati, Ohio 45219,

Alissa Gilley
3302 Ormond Ave.
Cincinnati, Ohio 45220,

Friends of Bones,
c/o Shawn Combs
4321 Beech Hill Avenue
Cincinnati, Ohio 45223,

and

John Does, #1-20
Addresses unknown,

Defendants.

Case No.

Judge

COMPLAINT FOR INJUNCTIVE RELIEF, COMPENSATORY, SPECIAL AND PUNITIVE DAMAGES WITH JURY DEMAND ENDORSE HEREON

Now comes the Plaintiff, through counsel, and for his Complaint against Defendants, states as follows:

Parties

1. Plaintiff, is a resident of Hamilton County, Ohio and a sworn member of the Cincinnati Police Department.

2. Defendant, Julie Niesen (hereinafter Niesen), is a resident of Hamilton County, Ohio.

3. Defendant, James Noe (hereinafter Noe), is a resident of Hamilton County, Ohio.

4. Defendant, Terhas White(hereinafter White), is a resident of Hamilton County, Ohio.

5. Defendant, Alissa Gilley (hereinafter Gilley), is a resident of Hamilton County, Ohio.

6. Defendant, Shawn Combs (hereinafter Combs), is a resident of Hamilton County, Ohio.

7. Defendant, Matthew Korte (hereinafter Korte), is a resident of Hamilton County, Ohio.

8. Defendant, Friends of Bones (hereinafter FOB), is an Ohio corporation that with its principal place of business in Hamilton County, Ohio.

Venue and Subject Matter and Personal Jurisdiction

9. Venue is proper in this Court pursuant to Civ. R. 3(c) because Defendants conducted activity that gave rise to the claims for relief in Hamilton County.

10. This Court has subject matter jurisdiction over this action pursuant to R.C. § 2305.01.

11. This Court has personal jurisdiction over the Defendants pursuant to R.C. §2307.382 because they have caused tortious injury by acts and/or omissions in this state.

Facts

12. Plaintiff is married and has young children.

13. As a Cincinnati police officer, Plaintiff has been assigned to the Dist 4. Violent Crime Squad, the Gang Unit and the SWAT team.

14. In those assignments, Plaintiff has been involved in the investigation and arrest of violent criminals, gang members and drug traffickers.

15. For his own safety and the safety of his family, Plaintiff has taken steps to maintain confidentiality regarding his personal identifying information such as his birth name, residence address, social security number, date of birth, names and ages of his wife and children, etc.

16. On June 24, 2020 during an open forum before the Budget and Finance Committee, Plaintiff was assigned to City Hall to provide police services including crowd control and security for City Council's chambers.

17. During the hearing, the hallway outside council's chambers was occupied by a loud, unruly crowd of people that were anti-police and urging City Council to defund the police.

18. The noise level in the hallway made spoken communication at conversational volume difficult or impossible.

19. One of the people in the crowd asked Plaintiff about the status of a police officer that had just left the scene and Plaintiff responded that the officer was "okay" by holding up his hand touching his thumb and index finger.

20. People in the crowd made the juvenile, unfounded, incorrect and hysterical claim that Plaintiff's innocuous "okay" gesture was a "white power" or "white supremacist" hand signal intended to intimidate people.

21. Plaintiff is not a racist or a white supremacist and any suggestion to the contrary is false.

22. The Defendants individually, or in concert with others, through their actions outlined below have tortiously violated Plaintiff's protected privacy interests by portraying Plaintiff in a false light, defamed Plaintiff and/or publicly disseminated Plaintiff's private personal identifying information and/or threatened to publish Plaintiff's personal identifying information.

23. The Defendants individually, or in concert with others, through their actions outlined below have conspired to file false reports regarding Plaintiff.

24. Defendants' conduct as herein described was malicious.

Allegations Specific to Niesen

25. On June 25, 2020 Niesen published a post on a social media platform, in which she portrayed Plaintiff falsely as a "white supremacist".

26. Niesen's false social media post garnered widespread public attention.

27. Niesen's false social media post has created a risk of harm to Plaintiff and his family.

28. Niesen's false social media post is serious enough to be highly offensive to a reasonable person.

Allegations Specific to Noe

29. On June 25, 2020 Noe published a false post on a social media platform in which he referred to Plaintiff as a limp-dicked POS [piece of shit] and claimed that Plaintiff was flashing the "white power symbols to Black speakers".

30. Noe included a deceptively edited photograph of the Plaintiff in his social media post to portray Plaintiff as a "white supremacist".

31. Noe has threatened to publicize Plaintiff's personal identifying information in his social media posts.

32. Noe's false social media post garnered widespread public attention.

33. Noe's false social media post has created a risk of harm to Plaintiff and his family.

34. Noe's false social media post is serious enough to be highly offensive to a reasonable person.

Allegations Specific to White

35. On June 24, 2020 White was present at City Hall to speak before the Budget and Finance Committee.

36. While at City Hall, White's behavior was erratic, overly-emotional and petulant.

37. White was disruptive and inappropriate including hysterical rants and screaming profanities.

38. For several minutes, White was focusing her vitriolic comments on a security guard.

39. After the security guard left, Plaintiff was assigned to provide security in the ground floor entrance area of City Hall.

40. White was seeking to create conflict and asking Plaintiff a series of questions.

41. When White asked about status of another officer, Plaintiff responded with the '"okay" gesture as described above.

42. On June 25, 2020 White filed a complaint with Citizen's Complaint Authority (CCA) regarding the Plaintiff.

43. Specifically, White falsely accused Plaintiff of using the "white power" hand signal in the course of his employment.

44. White's false complaint is serious enough to be highly offensive to a reasonable person.

45. CCA complaints are public records.

46. White's false complaint against Plaintiff harms his professional reputation and can be used as evidence of improper motive or intent in the event that Plaintiff is involved in a use of force or critical incident.

47. White published false social media posts that referred to Plaintiff as "a white supremacist kkkop" and "white supremacist piece of shit".

Allegations Specific to Gilley

48. On June 25, 2020 Gilley filed a complaint with the CCA regarding the Plaintiff.

49. Specifically, Gilley falsely accused Plaintiff of "throwing up a white supremacy hand-signal towards citizens of color" and being "a threat to me, my children and so many others".

50. Gilley's false complaint is serious enough to be highly offensive to a reasonable person.

51. CCA complaints are public records.

52. Gilley's false complaint against Plaintiff harms his professional reputation and can be used as evidence of improper motive or intent in the event that Plaintiff is involved in the future in a use of force or critical incident.

53. Gilley's false complaint is serious enough to be highly offensive to a reasonable person.

Allegations Specific to FOB

54. FOB has published social media posts regarding Plaintiff that are false and portray Plaintiff in a false light as a white supremacist.

55. An internet search using Plaintiff's name and a common internet search engine returns results of social media posts by FOB that falsely portray Plaintiff as a racist and/or white supremacist.

56. The false portrayal of Plaintiff by FOB as a racist and/or white supremacist has adversely affected Plaintiff's reputation and the well-being and peace of mind of mind of his wife and children.

57. FOB's false social media posts are serious enough to be highly offensive to a reasonable person.

First Cause of Action – False Light Invasion of Privacy

58. By portraying Plaintiff as a racist and/or white supremacist, Defendants have committed a false light invasion of Plaintiff's protected privacy interests as recognized in *Welling v. Weinfeld* (2007), 113 Ohio St.3d 464.

59. As a result of Defendant's tortious conduct, Plaintiff has sustained damage to his reputation and protected privacy interests, emotional distress and has otherwise been harmed.

60. Defendants acts described above were malicious

61. Defendants are liable to Plaintiff for compensatory, special and punitive damages in an amount in excess of $25,000 to be proven at trial

Second Cause of Action – Defamation

62. Defendants have made statements that they knew or should have known were false regarding Plaintiff including, but not limited to, statements that Plaintiff has made "white power" and/or white supremacist hand signals and/or that Plaintiff is racist and/or white supremacist.

63. As a result of Defendant's tortious conduct described above, Plaintiff has sustained damage to his reputation and protected privacy interests, emotional distress and has otherwise been harmed.

64. Defendants acts described above were malicious

65. Defendants are liable to Plaintiff for compensatory, special and punitive damages in an amount in excess of $25,000 to be proven at trial.

Third Cause of Action – R.C. §2307.60

66. Defendants, Gilley and White, have knowingly filed false reports with the CCA alleging that Plaintiff has engaged in misconduct in the performance of his duties including, but not limited to, threatening them, that Plaintiff is a racist and/or white supremacist, and/or that Plaintiff has used "white power" and/or "white supremacist" hand gestures.

67. Defendants, Gilley and White, are liable to Plaintiff pursuant to R.C. §2307.60 for compensatory, special and punitive damages and attorneys' fees making a false allegation against a peace officer in violation of §2921.15.

Fourth Cause of Action – Negligence/Recklessness

68. Defendants negligently and/or recklessly caused damage to Plaintiff's professional and personal reputation by publicly disseminating information that knew or should have known was false despite a duty to refrain from such conduct and actual knowledge that it was likely to cause substantial harm to Plaintiff's protected interests.

69. As a direct and proximate result of Defendants' negligence and/or recklessness, Plaintiff has sustained harm to his protected privacy interests, emotional distress and other harm.

70. Defendants are liable to Plaintiff for compensatory, special and punitive damages in an amount to be proven at trial, but believed to be in excess of $25,000.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, for compensatory, special and punitive damages, attorney's fees, costs of this action, injunctive relief and such other relief as this court deems just.

Respectfully submitted,

/s/ Zachary Gottesman
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/s/ Robert J. Thumann
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Praecipe

To the Clerk:

Please serve the Defendants by certified U.S. Mail at the addresses listed in the captions.

/s/ Zachary Gottesman
Zachary Gottesman (0058675)

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

M.R., a Cincinnati Police Officer

Plaintiff,

v.

Julie Niesen, et al.

Defendants.

Case No. A 2002596

Judge Shanahan

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

Plaintiff, by and through counsel, pursuant to Sup.R. 45 and Loc. Rs. 11(K)(4), 11(K)(5) and 34 of the Court of Common Pleas of Hamilton County, General Division, moves this Court for an order granting his Motion to File Affidavit Under Seal and Proceed under a Pseudonym. As alleged in Plaintiff's Complaint, Plaintiff has sustained damage to his reputation and protected privacy interests, emotional distress and the well-being of his family. To prevent further harm, Plaintiff moves this Court to grant his motion for reasons discussed in the attached memorandum.

Respectfully submitted,

/s/ Zachary Gottesman
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MEMORANDUM

Local Rule 34 provides that in accordance with Sup.R. 45 and this Court's Local Rules 11(K)(4) and 11(K)(5), a document may be filed under seal if there is a court order on the case docket. Further, Sup.R. 45(3)(e) states restricting public access to a case using the least restrictive means available includes "using initials or other identifier for the parties' proper names." Sup.R. 45(E) allows a party to file a motion to request the court to restrict public access to information in the document. Under Sup.R. 45(E)(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.

See also Local R. 11(K), which outlines similar factors for the Court to consider when deciding to seal a pleading.

Sup.R. 45(E)(2)(c) is directly applicable to the present case. The risk of further injury to Plaintiff and his family and release of personal identifiable information are obvious factors that favor restriction of public access to these proceedings. Plaintiff has already been threatened with publication of his personal identifiable information and it is more than reasonable to assume, given the current political and social climate, these

threats will increase if public access is not restricted in this case. Besides injury to Plaintiff and his family's privacy, there is a real threat of actual harm to Plaintiff's person. There has already been discussion between some of the Defendants as to Plaintiff's precise work shift and location.

Plaintiff has a constitutionally protected interest in maintaining the confidentiality regarding his personal identifying information as recognized in *Kallstrom v. City of Columbus* (C.A.6, 1998), 136 F.3d 1055, which was adopted by the Ohio Supreme Court in *State ex rel. Keller v. Cox,* 85 Ohio St.3d 279, 1999-Ohio-264, 707 N.E.2d 931, because the officers and their family members are at risk of serious physical harm, and possibly even death, due to their involvement in the shooting. Releasing their identities, Respondent contends, would violate their rights to due process under the Fourteenth Amendment.

In *Kallstrom,* the Sixth Circuit Court of Appeals held that the disclosure of police officers' personal information to criminal defense counsel implicated the officers' fundamental rights under the Due Process Clause. *Kallstrom,* 136 F.3d at 1060. In that case, three undercover Columbus police officers had been involved in an undercover investigation of a gang, which led to the prosecution of 41 gang members on drug-related charges. *Id.* at 1059. In the course of the prosecution, defense counsel had requested and had received from the city copies of the officers' personnel files. *Id.* The files contained the officers' personal information, including their home addresses, telephone numbers, drivers' licenses, bank account information, and family members' names. *Id.* The officers then brought an action against the city pursuant to Section 1983, Title 42, U.S. Code, because of the release of their information. *Id.* at 1059.

The district court in *Kallstrom* had entered final judgment for the city, determining that the officers did not have a constitutionally-protected interest in the release of their personal information by the government. On appeal, the Sixth Circuit reversed the district court's judgment and held that the officers' "interests do indeed implicate a fundamental liberty interest, specifically their interest in preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity." *Id.* at 1062. The Sixth Circuit stated, "it goes without saying that an individual's 'interest in preserving her life is one of constitutional dimension.' " *Id.* at 1063, quoting *Nishiyama v. Dickson Cty.* (C.A.6, 1987), 814 F.2d 277, 280 (en banc). The court saw "no reason to doubt that where disclosure of [the officers'] personal information may fall into the hands of persons likely to seek revenge upon the officers for their involvement in the [criminal] case, the City created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Id.*

The court carefully noted that not every release of an officers' private information would rise to a constitutional level, "[b]ut where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the magnitude of the liberty deprivation strips the very essence of personhood." *Id.* at 1064 (internal quotation marks, ellipses, and citation omitted).

After the *Kallstrom* court determined that the officers had a constitutionally-protected right in the nondisclosure of their personal information, the court applied the strict-scrutiny standard in determining whether the city's disclosure of the information was

narrowly tailored to serve a compelling public purpose. *Id.* In making this determination, the court assumed that the purpose behind the Act-to shed light on the state government by allowing citizens to access public records-rose to the level of a compelling public purpose. *Id.* at 1065. Nevertheless, the court determined that the release of the officers' personal information by the city did not narrowly serve that purpose. *Id.* In reaching this conclusion, the court reasoned that the requesting party could not have sought the officers' personal information "in order to shed light on the internal workings of the Columbus Police Department." *Id.* The Sixth Circuit then remanded the case in part to the district court.

A year after the release of the *Kallstrom* decision, the Ohio Supreme Court released its decision in *Keller,* which relied on *Kallstrom* to affirm the dismissal of a mandamus action brought pursuant to the Act. In *Keller,* a federal public defender had requested a police officer's personnel files containing that officer's family members' names, telephone numbers, medical and beneficiary information. *Keller,* 85 Ohio St.3d at 281. In affirming the denial of the requested writ, the supreme court reasoned that the officer's personal information "should not be available to a defendant who might use the information to achieve nefarious ends." *Id.* The court reasoned that the protection of the officer's constitutional rights, as recognized in *Kallstrom,* required such as result, and that "there must be a 'good sense' rule when such information about a law enforcement officer is sought by a defendant in a criminal case." *Id.* The court also noted that a defendant in a criminal case could still access information regarding an officer's job performance or discipline in internal affairs files. *Id.*

By granting this motion, the Court will not disturb the fairness of the adjudicatory process. On the contrary, if the Court does not grant this motion there will be ample opportunity for the media and unruly, quickly mobilized crowds to corrupt the adjudicatory process and effectively turn the proceedings into a circus. Moreover, it is in the interest of public safety that the Court grant this motion to quash false accusations and prevent further incitement to damage property and cause physical injury.

WHEREFORE, Plaintiff requests that this Court grant him leave to file a complaint under seal and proceed pseudonymously. A proposed order is attached for the Court's convenience.

Respectfully submitted,

/s/ Zachary Gottesman
Zachary Gottesman (0058675)

CERTIFICATE OF SERVICE

I certify that a copy of this motion is being served with a copy of the complaint herein.

/s/ Zachary Gottesman

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.

Ford, Darren W.

From: Kathleen E Hayes <KEHayes@cms.hamilton-co.org>
Sent: Friday, August 21, 2020 1:02 PM
To: Robert J.Thumann; Jennifer Kinsley; Ford, Darren W.; Greiner, John C.; Erik Laursen; Jeffrey M.Nye; Zachary Gottesman
Subject: M.R., a Cincinnati Police Officer v. Niesen, Case No. A2002596

Dear Counselors:

In light of the Notice of Appeal recently filed, the September 1, 2020 hearing scheduled before Judge Shanahan will not proceed.

Very truly yours,

Kathleen E. Hayes
Law Clerk to the Honorable Megan E. Shanahan

E-FILED 08/31/2020 11:56 AM / CONFIRMATION 979799 / C 2000318 / COURT OF APPEALS / IF

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY

STATE OF OHIO, *ex rel.*	:	
THE CINCINNATI ENQUIRER	:	
A Division of Gannett GP Media, Inc.	:	**Case No.**
312 Elm Street	:	
Cincinnati, OH 45202	:	
	:	**Original Action in Mandamus**
and	:	**and Prohibition**
	:	
STATE OF OHIO, *ex rel.*	:	
EUGENE VOLOKH	:	**MOTION FOR EXPEDITED**
UCLA School of Law	:	**REVIEW**
385 Charles E. Young Drive East	:	
Los Angeles, CA, 90095	:	
	:	
Relators,	:	
vs.	:	
	:	
HON. MEGAN E. SHANAHAN,	:	
Judge, Common Pleas Court of Hamilton County	:	
Hamilton County Courthouse	:	
1000 Main Street	:	
Room 560	:	
Cincinnati, OH 45202	:	
	:	
Respondent.	:	

Petitioners The Cincinnati Enquirer, a Division of Gannett GP Media, Inc. ("The Enquirer") and Eugene Volokh (together the "Relators") respectfully move this Court for expedited review of their Complaint for Writ of Mandamus and Prohibition against the Honorable Megan E. Shanahan, Judge of the Common Pleas Court of Hamilton County, Ohio ("Respondent"), filed contemporaneously with this Motion.

Relators' Complaint seeks to redress an injury to their and the public's presumptive right of access to court records guaranteed by the Ohio Rules of Superintendence, and the First

and Fourteenth Amendments to the United States Constitution. Each day that passes during which access to the judicial records and information sought by Relators is denied represents a serious, continuing, and irreparable injury to their constitutional rights. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Expedited review is therefore appropriate and necessary to prevent further injury.

Relators request that the Court direct Respondent to respond to Relators' Complaint within three (3) business days of service. A proposed order is attached.

Dated: August 31, 2020

Respectfully submitted,

/s/ John C. Greiner
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Darren W. Ford (0086449)
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COUNSEL FOR RELATOR EUGENE VOLOKH

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a Summons along with a copy of this MOTION FOR EXPEDITED REVIEW to the Respondent identified in the caption on page one via personal service.

/s/ John C. Greiner
John C. Greiner (0005551)

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