IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

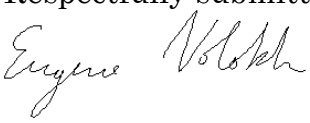
CARL PARSON, Plaintiff, v. DON FARLEY, Defendant.	Case No. 16-cv-423-JED-TLW Judge John E. Dowdell Magistrate Judge Jodi F. Jane

Motion of Eugene Volokh
(1) to Intervene and (2) Unseal Record Documents, (3) to File Via CM/ECF, and (4) to Consider This Motion on an Expedited Basis

Eugene Volokh moves to intervene in this case for the limited purpose of unsealing parts of the record, especially the document on which this lawsuit is based—the Letter attached to the plaintiff's complaint, which was sealed in the state proceeding before this case was removed to this Court. He asks for permission to file future documents via CM/ECF. Finally, he requests expedited consideration of this motion, because the plaintiff is running for the Oklahoma House of Representatives in the June 26, 2018 primary, and the voters should have an opportunity to evaluate the merits of his lawsuit. The Motion is supported by the attached Memorandum.

Pro se defendant, whom Volokh reached by telephone, stated that he consents to this motion. Volokh has been unable to reach counsel for plaintiff.

Respectfully submitted,



Eugene Volokh, pro se
Scott & Cyan Banister
First Amendment Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Memorandum

When a political candidate is publicly criticized, and responds with a libel lawsuit, members of the public naturally have an interest in learning more about the case. Is the claim legitimate, or not? Is the alleged libel best characterized as an opinion or a factual assertion? If it is a factual assertion, is there evidence to support the assertion? If plaintiff is asking for an injunction suppressing the defendant's future speech, is the request justified?

In nearly every libel case litigated in this country, citizens—and journalists who write to inform citizens—can begin to answer these questions by reading the open court record. But in this case, the public cannot effectively analyze any of these questions because the sealing order blocks access to the speech that underlies the case.

Of course, the primary responsibility for answering these questions belongs to this Court and a future jury. But as *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), makes clear, the public need not blindly trust judicial processes based on secret records. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572. "A result considered untoward may undermine public confidence, and where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* at 571. This is true not just of access to in-person proceedings, but also of access to court records. *See* Section II below. And access is particularly important in this

case because the plaintiff is running again for the Oklahoma House of Representatives (as he had been when the allegedly libelous statement was made in 2016), and he will be on the ballot in the June 26 primary.[1]

Proposed intervenor Eugene Volokh is a law professor who writes for the Volokh Conspiracy, a prominent legal blog hosted by Reason Magazine (http://www.reason.com/volokh). He would like to have access to the full record in this case so that both he and members of the public may better understand (1) the plaintiff's allegations that the defendant had libeled him, (2) the basis for the plaintiff's apparent request for the extraordinary remedy of "order[ing the Defendant] to refrain from any further statements about the Plaintiff,"[2] (3) the defendant's arguments for why he should prevail, which appear to be set forth in his motion to dismiss or for summary judgment, ECF No. 46, and (4) the full basis for this Court's Apr. 3, 2018 order, ECF No. 56, rejecting the defendant's sealed motions to compel, ECF No. 47. And Volokh anticipates that members of the public may be interested in just what allegations would prompt a candidate for office to try to suppress citizen speech, by punishing the speech with a damages award and forbidding future speech using an apparently extremely broad proposed injunction. Volokh therefore seeks the unsealing of

1. The April 16, 2016 Letter, which was attached as an exhibit to the May 23, 2016 Complaint (State Court Petition/Complaint, ECF No. 2-1, Exh. 1), and, if

---

[1] Oklahoma State Election Board, Upcoming Elections (last modified May 21, 2018), https://www.ok.gov/elections/Election_Info/Upcoming_Elections/index.html; Oklahoma State Election Board, Candidate Filings 2018 (last modified Apr. 16, 2018), https://www.ok.gov/elections/support/ok_filing_2018.html#REP.

[2] Notice of Removal from Rogers County, ECF No. 2, Exh. 2: Petition, at ¶ 32.

it is different from the Letter, the defendant's publication about the plaintiff, attached as an exhibit to the July 26, 2016 Motion to Dismiss (Defendant's Motion to Dismiss, Exh. A, ECF No. 11-1).

2. The defendant's Jan. 12, 2018 motion to dismiss (Defendant's Motion to Dismiss, Motion for Summary Judgment, ECF No. 46).
3. The plaintiff's affidavit, attached as an exhibit to his response to the motion to dismiss (Plaintiff's Response, Exh. A, ECF No. 50).
4. The defendant's Jan. 12, 2018 motion to compel (Defendant's Motion to Compel, ECF No. 47).

The public has a common law and constitutional right to access these records; the Letter is the basis for the complaint, and the other sealed filings articulate the parties' competing legal and factual arguments.

Volokh also asks that this Court allow him to file any future documents, if necessary, via CM/ECF. And, in light of the upcoming primary election, Volokh requests expedited consideration of this Motion. (The order in this case was entered by the state court before this case was removed; but this Court of course has the authority to unseal the documents that are now in its file. *See, e.g.*, *Mattingly v. Humana Health Plan, Inc.*, 2016 WL 9344095, *3 (S.D. Ohio May 3, 2016) (so doing).)

I. A motion to intervene is the proper tool for third parties to challenge a sealing order, and Volokh has Article III standing to intervene

"The courts have widely recognized that the correct procedure for a nonparty to challenge a protective order is through intervention for that purpose." *United Nuclear Corp v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). The same is true of

sealing orders. "[P]ermissive intervention under Rule 24(b) is an appropriate procedural vehicle for non-parties seeking access to judicial records in civil cases." *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015); *see also, e.g., SanMedica International v. Amazon Inc.*, 2015 WL 668022, *2 (D. Utah Nov. 2, 2015).

And Volokh has standing to intervene to unseal records, just as Harvard law professor Rebecca Tushnet was found to have such standing to intervene to unseal records in *SanMedica*. Were it not for the sealing order, Volokh would be able to "gather information" from the full and unredacted version of the complaint and "disseminate [his] opinion on it through [his] blog." *Id.* at *3. This "is a sufficient allegation of injury in fact," *id.*, and it also shows redressability, because unsealing the document would "make information public and redress [Volokh's] First Amendment injury," *id.* at *4—since the letter in the complaint "would be made public *if* the court granted [his] Motion to Unseal," Volokh's "injury is likely redressed by a favorable decision." *Id.*

Because this is a case seeking the unsealing of a document, rather than seeking to vacate a protective order, *Young v. Glanz*, 2018 WL 1588026 (N.D. Okla. Mar. 31, 2018) is not on point. When an intervenor challenges a protective order that restricts the speech of the parties, lifting the order might not redress the intervenor's injury: Perhaps none of the parties would want to talk to the intervenor even in the absence of the order. Indeed, that was the basis for this Court's decision in *Young*—the intervenors did not show redressability, partly because they did not offer evidence of a "party's willingness to disseminate" the materials to them. *Id.* at *7.

But here, Volokh is seeking access to the court record. An order lifting the seal would redress his inability to access certain documents, because he would get the documents directly from the court file, regardless of the parties' preferences. *SanMedica*, 2015 WL 668022, *4.

II. The public has a presumptive right to access the Letter, the defendant's motions, and the plaintiff's affidavit attached to his response to one of those motions

"A party seeking to file court records under seal must overcome a presumption, long supported by courts, that the public has a common-law right of access to judicial records." *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.,* 663 F.3d 1124, 1135 (10th Cir. 2011). In addition to this common-law right of access, there is also a First Amendment right of access to court documents in civil proceedings. The Supreme Court has expressly held that there is a First Amendment right of access to criminal trials, *Richmond Newspapers*, 448 U.S. at 573, and courts have concluded that "the justifications for access to the criminal courtroom apply as well to the civil trial." *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1178 (6th Cir. 1983). "[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings." *Westmoreland v. Columbia Broad. Sys. Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *see also Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("the policy reasons for granting public access to criminal proceedings apply to civil proceedings as well"). "Public access to civil trials also provides information leading to a better understanding of the operation of government as well

as confidence in and respect for our judicial system." *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 (3rd Cir. 1984). This right extends to "pretrial court records" as much as to trial proceedings. *Mokhiber v. Davis*, 537 A.2d 1100, 1119 (D.C. Cir. 1988); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) ("there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 56 (D. N.J. 1991) ("[p]ublic access to court records is protected by both the common law and the First Amendment"). The Tenth Circuit has not yet ruled on whether such a First Amendment right of access exists in civil cases, *see United States v. Pickard*, 733 F.3d 1297, 1302 n.4 (10th Cir. 2013), but the body of precedents from other circuits—indeed, the view of every circuit that has passed judgment on the question—counsels in favor of recognizing such a right.

In any event, whether under the common-law right of access or under the First Amendment right of access, Volokh is entitled to access to the documents in this case. "Parties should not routinely or reflexively seek to seal materials upon which they predicate their arguments for relief, particularly dispositive relief." *Lucero v. Sandia Corporation*, 495 Fed. Appx. 903, 911 (10th Cir. 2012). A complaint, by definition, is material on which parties predicate their arguments for relief, Fed. R. Civ. P. 8(a), and the sealed Letter was attached to the complaint. Without the Letter, the plaintiff's libel claim would not exist. "A complaint, which initiates judicial proceedings, is the cornerstone of every case, the very architecture of the lawsuit, and access to the complaint is almost always necessary if the public is to understand a court's decision,"

FTC v. Abbvie Prods. LLC, 713 F.3d 54, 62 (11th Cir. 2013)—and the Letter, as the basis for the supposed entitlement to relief in this case, is a key part of that cornerstone.

The right of access also extends to defendant's motion to dismiss, plaintiff's affidavit attached in his response to that motion, and likely to defendant's motion to compel.[3] When exhibits or other documents "directly bear on a dispositive issue," "a strong presumption of public access applies." *Fish v. Kobach*, 2017 WL 4422645, *5 (D. Kan. Oct. 5, 2017) (so holding as to "exhibits at issue in this case [that] were attached to the motion for summary judgment"). The documents here offer the public an opportunity to understand the plaintiff's and defendant's versions of events, and to understand the court's decisions to deny the motions to dismiss and compel. They are "materials that formed the basis of the parties' dispute and the district court's resolution," and the presumption of openness therefore applies to them. *Baxter Int'l Inc. v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002).

The nature of the plaintiff's request for relief strengthens the presumption of access. The plaintiff is apparently requesting a permanent injunction that would order the defendant "to refrain from any further statements about the [p]laintiff."[4]

Such an injunction would almost always be improper: "[A]n injunction must be specific about the acts that it prohibits," and may prohibit, at most, unprotected

---

[3] Plaintiff's Response to Motion to Dismiss, Ex. A, ECF No. 50; Defendant's Motion to Dismiss, Motion for Summary Judgment, ECF No. 46; Defendant's Motion to Compel, ECF No. 47.

[4] Notice of Removal from Rogers County, ECF No. 7, Ex. 2: State Court Petition/Complaint, at ¶ 32.

speech, such as libelous statements. *McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015). Indeed, the Seventh Circuit in *McCarthy* reversed an injunction precisely because of its "excessive breadth," given "that it order[ed] [defendant] to take down his website, which would prevent him from posting any nondefamatory messages on his blog; it would thus enjoin lawful speech." *Id.* at 461-62. But even if this Court may ultimately decide to craft a narrower injunction, the plaintiff's request heightens the public's interest in seeing what could possibly lead a candidate for public office to seek such a drastic remedy.

"[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Because of this, "an injunction against speech harms not just the speakers but also the listeners." *McCarthy*, 810 F.3d at 462. The voters in the plaintiff's district, who have a First Amendment right to listen to criticism about their political candidates, would be especially harmed by such an injunction. And this strengthens the presumption of openness because "mistakes in civil proceedings may be more likely to inflict costs upon third parties"—here, interference with their First Amendment rights to consider allegations about political candidates—"therefore meriting even more scrutiny." *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). "If the charge is proven accurate, the public should have access to that information; if the charge [is] unfounded, the public

should be made aware of that fact as well." *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1128 (Colo. App. 1996).

III. Plaintiff's claimed injury to his name and reputation are not sufficient interests to overcome the presumption of openness

Before the public's First Amendment right of access may be infringed, "it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982). Even under the somewhat less demanding test applicable to the common-law right of access, "the public's right of access . . . is presumed paramount." *Ramirez v. Bravo's Holding Co.,* 1996 WL 507238, *1 (D. Kan. Aug. 22, 1996), and anyone supporting the sealing of a case "must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process." *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011).

Such an interest has not been articulated here. "[A]n effort to avoid embarrassment or harm to the reputation of parties . . . is certainly not a compelling reason to grant a confidentiality order." *Daines v. Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993). "[I]njury or potential injury to reputation is not enough to deny public access to court documents." *In re Neal*, 461 F.3d 1048, 1054 (8th Cir. 2006); *see also Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) ("We are unaware . . . of any case in which a court has found a . . . bare allegation of reputational harm to be a compelling interest sufficient to defeat the public's First Amendment right of access. Conversely, every case we have located has reached the opposite result under the less-demanding common-law standard."); *In re Southeastern Milk Antitrust Litigation*, 666 F. Supp.

2d 908, 915 (E.D. Tenn. 2009) ("neither harm to reputation . . . nor conclusory allegations of injury are sufficient to overcome the presumption in favor of public access").

Part of the reason why reputational harm does not justify a seal is that the danger of reputational harm is commonplace in court proceedings—yet "the asserted interests for sealing cannot be generic interests that would apply with equal force to every case." *United States v. Apperson*, 642 F. App'x 892, 903 (10th Cir. 2016). It is true that, if the allegedly libelous statements are included in public court documents, the media might report on those statements when reporting on the case, and this might further injure the plaintiff's reputation. But that is equally true in "every case," except perhaps in the few where the libels had already been very broadly publicized.

Under plaintiff's theory that "he would be irreparably harmed by additional publication of the Letter and its contents but for" the sealing order,[5] virtually all libel cases would be litigated with the key underlying allegations kept secret. If reputational concerns justified secrecy, any defamation plaintiff could demand secrecy, which would leave the public in the dark as to just why courts are being asked to restrict speech.

Indeed, the same reputational arguments for secrecy could be made not just by libel plaintiffs, but by defendants in a wide range of other intentional tort cases, who might seek to seal plaintiffs' allegations for fear of "irreparabl[e] harm[]" to the defendants' reputations. And of course some criminal defendants might then prefer to

[5] Application to File Under Seal Certain Documents, *Parson v. Farley*, No. CJ-2016-198, ¶ 7 (Okla. Dist. May 23, 2016).

have all the allegations against them being tried in secret as well. Yet the First Amendment and common-law rights of access to court records forbid that.

IV. This motion should be considered on an expedited basis, because of the impending June 26 primary, in which plaintiff is on the ballot

Volokh requests that this Motion be considered quickly because the state legislative primary election is scheduled for June 26, and the plaintiff will be on the ballot as the incumbent's only challenger. Residents of Oklahoma's 8th House District, especially, have a right to access the Letter and other sealed documents because those documents may help them determine whether or not they want to vote for the plaintiff. And Volokh has an interest in disseminating information about the case in a timely fashion, while it is especially newsworthy. (His plan is to write about it on his blog at the Reason Magazine site, and also alert local media as soon as his article is published.)

"The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distributors*, 24 F.3d at 897. And "any First Amendment infringement that occurs with each passing day is irreparable"—"delay itself is a final decision." *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1329, 1330 (1975); *see also, e.g., Travelers Prop. Cas. Co. of Am. v. Las Vegas Township Constables Office*, 2013 WL 3975664, *11 (D. Nev. Aug. 1, 2013) (granting—one day after filing—an emergency application to intervene and unseal filed by a media entity covering ongoing pretrial proceedings).

Volokh would have filed this motion sooner had he known about the sealing order or this lawsuit, but he did not learn of the case or the sealing order until late in the evening Tuesday, May 29, when he ran a Bloomberg Law query and this case appeared in the search results. Declaration of Eugene Volokh, ¶ 4. He then realized on the morning of Friday, June 1 that plaintiff is running again in the 2018 primaries, and that there is therefore an urgent need to get the documents unsealed. *Id.* at ¶ 5. He then submitted the motion to this court by next-day delivery on Monday, June 4.

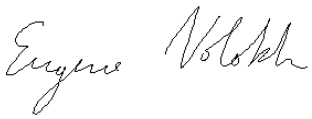
V. Volokh requests permission to file electronically

Volokh is representing himself *pro se.* He is not a member of the Oklahoma bar or the bar of this Court, and therefore cannot register for ECF filing without a suitable court order. *See* E-mail from Elizabeth Wilson to Volokh, June 1, 2018, Declaration of Eugene Volokh, Exh. A. Volokh is, however, a member of the California bar, has an ECF account, and has previously been granted permission to file via ECF in Districts where he is not a bar member. *See* Decision and Order on Motion to Intervene; Order to the Clerk, *Barrow v. Living Word Church,* No. 3:14-cv-341 (S.D. Ohio 2016) (granting request to file electronically); Motion of Eugene Volokh to Intervene and to Unseal Record, *Doe v. Does*, No. 1:16-cv-07359 (N.D. Ill. 2016) (filed via ECF following the granting of such a request, which was not specifically noted in the record). He therefore requests that this Court allow him to register for this District's ECF system, since that would make matters more convenient for this Court and the parties, as well as for him.

Conclusion

Volokh has a First Amendment and common-law right to access the court record in this case, which includes the Letter, the defendant's motion to dismiss, the plaintiff's affidavit attached to the response to that motion, and the defendant's motion to compel.[6] Without these materials, Volokh and Volokh's readers cannot fully analyze the controversy in this case. And the plaintiff's desire to conceal the allegations against him cannot justify the seal. For these reasons, Volokh asks that the sealing order be promptly lifted.

Respectfully submitted,



Eugene Volokh, pro se

[6] State Court Petition/Complaint, ECF No. 2-1, Exh. 1; Defendant's Motion to Dismiss, Motion for Summary Judgment, ECF No. 46; Plaintiff's Response to Motion to Dismiss, Exh. A, ECF No. 50; Defendant's Motion to Compel, ECF No. 47.

CERTIFICATE OF SERVICE

I certify that on June 4, 2018, I sent this material by next-day UPS to:

Wilfred K Wright, Jr.
Wright Law
P.O. Box 982
Claremore, OK 74017
(918) 341-1923
Counsel for Plaintiff Carl Parson

William R Higgins
Higgins Law PC
P.O. Box 1267
Claremore, OK 74018
(918) 341-2131
Counsel for Plaintiff Carl Parson

Don Farley
P.O. Box 2423
Sapulpa, OK 74067
(251) 604-1755
Pro Se Defendant

Eugene Volokh, pro se