IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

JULIE SLIVKA, Plaintiff, v. THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE PIKES PEAK REGION and CARLOS LOZANO, Defendants.	Case No. 1:19-cv-00313 Magistrate Judge Kathleen M. Tafoya

Objection to Motion for Restricted Access

Eugene Volokh submits this objection to defendant YMCA's Motion for Restricted Access. "Any person may file an objection to the motion to restrict no later than three court business days after posting." D.C.COLO.LCivR 7.2(d). According to the "Recently Filed Motions to Restrict" page on the District's web site, http://www.cod.uscourts.gov/Seal.aspx, the motion was posted on June 20, 2019, and the deadline for this objection is today, June 25, 2019.

Volokh is a professor at UCLA School of Law, and publishes a blog at the Reason Magazine site, http://reason.com/volokh, where he often writes about First Amendment matters. (He is filing this motion solely in his personal capacity, as is customary for professors, and not on behalf of UCLA.) He learned about the case through a Bloomberg Law search yesterday evening for recent federal court filings related to prior restraints; this pointed him to the YMCA's Motion for Gag Order, and led him to also see the Motion for Restricted Access. He would like to write about the case,

including about both motions, but would be limited in doing so if access were restricted and case documents were thus effectively sealed (whether entirely or partly).

Volokh also asks that, if the Court does seal parts or all of the case, it inform Volokh whether this sealing order prevents him from publishing copies of those documents that he has already downloaded while the motion for restricted access was pending. Volokh has researched whether such sealing orders preclude authors—including those who are members of the media but also members of the bar, as he is—from writing about material that they had lawfully downloaded before it was sealed; but he has not been able to find a clear answer.

Florida Star v. B.J.F., 491 U.S. 524, 536 (1989), suggests that he would not be bound by such an order: That case holds that members of the media have a First Amendment right to publish government records that they had lawfully obtained, even when state law expressly says otherwise, and when the records had been erroneously released to them. It follows that the right would be even clearer when the records had been properly released (by being posted on PACER before any restricted access was imposed) but the government later sought to recall them using a restricted access order. But *Florida Star* does not speak to whether the same rule applies to writers who, though not involved as lawyers in the underlying litigation, are nonetheless members of the bar. He would like to clearly understand what his obligations are, in the event that the Court does seal parts or all of the case.

I. The public has a presumptive right to access all the documents in the file

"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). "[S]ecret court proceedings are anathema to a free society." *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo. 1996).

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, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality op.); *id.* at 585 (Brennan, J., concurring in the judgment), 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 (3d 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 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.

A. "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). This includes paragraphs 18, 19, 63-67, and 69, which are directly germane to the plaintiff's theory of the case.

Perhaps those allegations are false; perhaps they are true; but in any event the public is entitled to see them, so that it can monitor the proceedings in the public's courts. "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).

Moreover, the Complaint was already posted, with no redactions, by Colorado Public Radio, linked to from its story at http://www.cpr.org/news/story/lawsuit-

alleges-colorado-springs-ymca-ignored-sexual-assault-created-inappropriate; see http://www.cpr.org/sites/default/files/original_ymca_lawsuit.pdf. Any attempt to seal the Complaint would thus be futile, for the reasons given in *Gunn v. WCA Logistics, LLC*, No. 13-cv-02197-WJM-MEH, 2016 WL 7868827, *1 (D. Colo. Jan. 12, 2016) (some citations omitted):

> The documents at issue in Defendants' motion were not filed under restriction. . . . Only [weeks later] did Defendants seek to restrict the documents. Because Defendants failed to avail themselves of the protections provided by the District's local rules in filing [the document], any claim to confidentiality has been waived. The cat has already been let out of the bag. *Cf. Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n.11 (2d Cir. 2004) ("Once the cat is out of the bag, the ball game is over.") . . . . After-the-fact sealing should not generally be permitted. *See id.* at 144 (". . . We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again.").

B. The right of access also extends to defendant's motion to strike and motion for gag order. 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"). Such documents would be "materials that formed the basis of the parties' dispute and the district court's resolution," and they must therefore be publicly available. *Baxter Int'l Inc. v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002).

The motion to strike qualifies under this test, because it seeks to affect what parts of the Complaint are allowed to form the basis of plaintiff's case. The motion for a gag order likewise qualifies, because it seeks to affect whether this Court will impose a prior restraint, thus restricting the First Amendment rights both of the parties and

of the public. "[E]njoining speech harms listeners as well as speakers," *McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir 2015), and the public is entitled to know what basis is being offered for imposing such harm on it (even when such harm is found to be legally justified).

C. Likewise, the right of access applies to any order the court may issue (despite defendant's request that the court seal "any subsequent Order of this Court detailing those offending paragraphs," Def. Motion for Restricted Access 5). The Court "need[s] to provide a proper, publicly available explanation of the Court's decision." *Bellwether Community Credit Union v. Chipotle Mexican Grill, Inc.*, 353 F. Supp. 3d 1070, 1078 n.1 (D. Colo. 2018) (citing D.C.COLO.LCivR 7.2). "[I]t should go without saying that the judge's opinions and orders belong in the public domain." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). "There is a particularly strong presumption of public access to [judicial] decisions as well as to the briefs and documents submitted in relation thereto. The Court's decisions are adjudications—direct exercises of judicial power the reasoning and substantive effect of which the public has an important interest in scrutinizing." *Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998).

Indeed, the defendant's own motion shows the dangers posed by attempts to seal even narrow categories of information. The defendant seems to particularly care about sealing "paragraphs 18, 19, 63-67, and 69" of the Complaint. Def. Motion for Restricted Access 5. But to make even that modest redaction work would apparently also require sealing the motions that discuss those paragraphs, as well as any court

order that discusses them. *Id.* And indeed the defendant's objections lead it to ask the court to seal "the entirety of these proceedings." *Id.* Applying the normal strong presumption of open access to all record documents would avoid such snowballing sealing.

II. Defendant's desire to protect its reputation, and to avoid tainting the jury pool, does not 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). Any part seeking to seal judicial records "must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process"—a "heavy burden" to meet. *Helm v. Kansas*, 656 F.3d 1277, 1292-93 (10th Cir. 2011).

Defendant has not discharged this burden. "[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). "Courts have held that injury to one's reputation and potential embarrassment generally do not outweigh the strong presumption of public access attaching to judicial documents." *Parson v. Farley*, 352 F. Supp. 3d 1141 (N.D. Okla. 2018). "[T]he personal desire of witnesses to be protected against the disclosure of information relevant to

judicial proceedings 'cannot be accommodated by the courts without seriously undermining the tradition of an open justice system,'" *Huddleson v. City of Pueblo, Colo.*, 270 F.R.D. 635, 639 (D. Colo. 2010); and the same logic applies to parties as well as witnesses. *See also, e.g.*, *In re Neal*, 461 F.3d 1048, 1054 (8th Cir. 2006) ("[I]njury or potential injury to reputation is not enough to deny public access to court documents."); *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). Indeed, the same reputational arguments for secrecy could be made by defendants in a wide range of other intentional tort cases. And of course some criminal defendants might prefer to 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.

The same is true of the interest in preventing any possible "taint [to] the prospective jury pool," Motion for Restricted Access 4. This risk exists in any case in which a jury trial may eventually occur—which is to say any suit at common law seeking damages of over $20. U.S. Const. amend. VII. To allow such a justification would turn the strong presumption of public access into a rule of routine sealing.

And even if the taint-avoiding justification were to apply only in cases that are likely to draw media attention, that would mean that the public would lose access to the very cases that most arouse the public's interest. Yet "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of public access." *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 229, 305 (6th Cir. 2016).

Conclusion

The public has a First Amendment and common-law right to access the court record in this case, including the Complaint, all motions, and all orders. Without these materials, the public readers cannot fully analyze the controversy in this case. And the defendant's desire to protect their reputations and prevent prospective jurors from hearing about the case cannot justify the seal. For these reasons, Volokh asks that access to the file not be restricted.

Respectfully submitted,

Eugene Volokh

Eugene Volokh, pro se

CERTIFICATE OF SERVICE

I certify that on June 25, 2019, I served this material by ECF on:

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Eugene Volokh

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