IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD REILLY, as Administrator Of the Estate of Veronique Aundrea Henry	:	
V.	:	**1:18-cv-01803** **Magistrate Judge Carlson**
YORK COUNTY	:	

MEMORANDUM OF LAW IN SUPPORT OF THE *YORK DAILY RECORD*'S MOTION TO INTERVENE AND UNSEAL

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MEMORANDUM OF LAW IN SUPPORT OF THE *YORK DAILY RECORD*'S MOTION TO INTERVENE AND UNSEAL

PRELIMINARY STATEMENT

York County Prison and its medical contractor PrimeCare Medical, Inc. ("PrimeCare" and, together, "Defendants") have been repeatedly sued in recent years for allegedly failing to provide adequate medical care to inmates.[1] Plaintiff-intervenor *York Daily Record* and other news outlets have reported on these criticisms, including allegations of "woefully inadequate" mental health care,[2] "deliberate indifference" to

[1] *See, e.g.*, *Palmer v. York Cnty.*, No. 1:20-CV-00539, 2021 WL 674244, at *1–3 (M.D. Pa. Feb. 22, 2021); *Hengst v. PrimeCare Med., Inc.*, No. 3:20-CV-02023, 2021 WL 8084627, at *1–5 (M.D. Pa. Dec. 17, 2021); *Henry v. York Cnty.*, No. 3:21-CV-247, 2022 WL 696469, at *1 (M.D. Pa. Mar. 8, 2022); *Ornstein v. Warden*, No. 3:18-CV-02042, 2021 WL 4290180, at *1 (M.D. Pa. Sept. 21, 2021); *Dortch v. Sload*, No. CV 3:17-0492, 2018 WL 3727264, at *1 (M.D. Pa. Aug. 6, 2018); *Eddington v. York Cnty. Prison*, No. CV 3:17-1666, 2018 WL 3676908, at *2–4 (M.D. Pa. Aug. 2, 2018).

[2] Rick Lee, *Scathing Report Alleges Substandard Mental Health Care at York County Prison*, YORK DAILY RECORD (May 8, 2017), https://www.ydr.com/story/news/2017/05/08/scathing-report-alleges-substandard-mental-health-care-york-county-prison/101435244/ (noting report by human rights advocates found the mental health care an inmate received was "woefully inadequate") [hereinafter Lee, *Scathing Report*].

suicidal inmates,[3] and, most notably, a large number of suicide attempts.[4] Between 2012 and 2017 alone, the *York Daily Record* reported fifty attempted suicides and three successful suicides in York County Prison, including the suicide of Veronique Aundrea Henry that is at the center of this lawsuit.[5]

While Henry's Estate alleged in this suit that Defendants acted with "deliberate indifference" by failing to adequately evaluate and supervise Henry's mental health conditions, these allegations were never tested at trial because this suit settled. To shed further light on this matter of deep public concern, the *York Daily Record* sought information regarding the settlement through a Right to Know Law ("RTKL") request to York County. While the County released the settlement agreement between York County Prison and Henry's Estate, it did not provide access to the settlement between the Estate and PrimeCare. The *York Daily Record* therefore seeks to intervene to move to unseal the full settlement, including the agreement between the Estate and PrimeCare, and any amended agreement and related records sealed on the docket. *See* Dkt. Nos. 89, 92-93.

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[3] Rick Lee, *Federal Suit Alleges "Deliberate Indifference" to Suicidal Inmates at York County Prison*, YORK DAILY RECORD (Sept. 22, 2018), https://www.ydr.com/story/news/2018/09/21/inmate-suicide-york-county-prison-veronique-henry-paul-henry-federal-complaint/1383504002/ [hereinafter Lee, *Deliberate Indifference*].

[4] *Id.*

[5] *See id.*

Although PrimeCare is a private company, York County pays the company millions of dollars to be the exclusive provider of medical, dental, and mental health services at York County Prison.[6] As such, PrimeCare's prison activities are matters of significant public concern. This inherently public information has been kept under seal for over a year. The sealing, which was ordered without any party asserting a good cause basis and without any on-the-record findings of fact, flies in the face of the First Amendment and common law's requirements concerning court access. In stark contrast, a newspaper reported in June on PrimeCare's $750,000 settlement in another suit involving a Bucks County inmate who, like Henry, died shortly after he was incarcerated.[7] The *York Daily Record* therefore respectfully seeks permission to intervene to vindicate the public and press's First Amendment and common law rights to access the settlement records at issue here.

PROCEDURAL HISTORY

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[6] PrimeCare has also contracted with numerous other Pennsylvania counties that have likewise been hit with federal lawsuits concerning prison medical care. *See* Joshua Vaughn, *Lack of medical care led to death of 19-year-old in Pa. jail, mom says in lawsuit*, PENNLIVE (Dec. 13, 2021), https://www.pennlive.com/news/2021/12/lack-of-medical-care-led-to-death-of-19-year-old-in-pa-jail-mom-says-in-lawsuit.html.

[7] *See* Jo Ciavaglia, Family of Bucks man who died in jail to receive $1M in settlement with county, medical provider, BUCKS COUNTY COURIER TIMES (Jun. 27, 2022), https://www.buckscountycouriertimes.com/story/news/special-reports/2022/06/28/bucks-county-jail-settlement-frederick-adami-opiate-withdrawal-crime-healthcare-primecare/65360556007/.

Richard Reilly, as Administrator of Henry's Estate, filed a wrongful death action in this court in September 2018. The defendants included York County, PrimeCare, the Board of Inspectors of the York County Prison and various individual defendants. The last docket entry in this case reflects the April 6, 2021 disbursement of settlement funds upon the Court's approval.

FACTUAL BACKGROUND

a. The Wrongful Death Suit

The *York Daily Record*, a news outlet dedicated to covering news "in and about York County,"[8] has continually reported in recent years on the quality of medical and mental health care administered at York County Prison by private medical contractor PrimeCare.[9] Of particular interest to the *York Daily Record* are the inmate deaths allegedly resulting from Defendants' deficient care, including the death of Veronique Henry.[10]

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[8] *See About the York Daily Record/Sunday News*, YORK DAILY RECORD, https://static.ydr.com/about/ (last visited May 25, 2022).

[9] *See, e.g.*, Lee, *Scathing Report*, *supra* note 2; Gordon Rago, *Murder Suspect Dies in Prison*, YORK DAILY RECORD (Sept. 15, 2016), https://www.ydr.com/story/news/crime/2016/09/15/murder-suspect-dies-prison-apparent-suicide/90418734/.

[10] *See, e.g.*, Dylan Segelbaum, *York County Pays $5,000 to Settle Federal Lawsuit Over Suicide of Woman in Custody*, York Daily Record (Apr. 12, 2021), https://www.ydr.com/story/news/watchdog/2021/04/12/york-county-releases-settlement-lawsuit-prisoner-suicide-right-to-know-law-request/7187397002/; Teresa Boeckel, *York County Prison Warden, Emergency Services Director to Retire*, York Daily Record (Dec. 17, 2016), https://www.ydr.com/story/news/2016/12/17/york-

Henry died shortly after she and her husband were arrested in 2016 in connection with a double homicide.[11] While in York County Prison's custody, corrections officers "strongly felt that Henry should be placed on suicide watch."[12] However, "[h]ealth care workers at PrimeCare Medical determined that she was not a suicide risk." *Id.* One day after her arrest, Henry committed suicide. *Id.*

In September 2018, the administrator of Henry's Estate brought this suit against Defendants. *See* Compl. at ¶¶ 2–14.[13] He alleged that PrimeCare and York County Prison officials were aware of numerous facts indicating that Henry was a suicide risk. Henry, for example, had a known "mental health condition," Compl. ¶ 27, and had a "history of drug or alcohol abuse," *id.* at ¶ 50. He further alleged that Defendants acted "with deliberate indifference" by failing "to take steps to ensure that [Henry] received the necessary care and treatment with a psychiatric specialist or other mental health provider" and failing to place Henry on suicide watch "[d]espite numerous signs that Ms. Henry had a particular vulnerability to suicide." *See id.* at ¶¶ 60, 73-74.

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county-prison-warden-emergency-services-director-retire/95535358/#:~:text=Three%20longtime%20York%20County%20administrators,will%20be%20retiring%20in%20January; Lee, *Deliberate Indifference*, *supra* note 3.

[11] *See* Rago, *supra* note 9.

[12] *See* Dylan Segelbaum, *Federal Judge Approves Settlement in Lawsuit Over Woman's Suicide at York County Prison*, YORK DAILY RECORD (Mar. 25, 2021).

[13] *See* Dkt. No. 76.

The parties reached a settlement, and in March 2021 the administrator filed a motion for leave to file the petition for Court Order of Settlement under seal. *See* Dkt. No. 89. The motion contained no justification for sealing. The next day, the Court issued a one-sentence order granting the motion to seal, Dkt. No. 90, and separately issued an order finding "that this settlement is a fair and just resolution of this case[.]" Dkt. No. 91. The administrator filed a second motion to seal a "First Motion for Order for Settlement" two weeks later, *see* Dkt. No. 92, which was granted that same day. *See* Dkt. No. 93.

b. News Outlets' Attempts to Access the Settlement Records

Because Henry's suicide is a matter of public concern, the *York Daily Record* sought more information regarding this case. The *York Daily Record* received a copy of a portion of the settlement through a RTKL request to York County, which is attached as Ex. A. This agreement revealed that York County Prison settled with Henry's Estate for $5,000, but made no mention of PrimeCare or any related settlement. *See id.*

Another news outlet, the *York Dispatch*, also filed a RTKL request with York County seeking the settlement agreements. *See York Dispatch v. York County*, OOR No. AP 2021-0873, at *1 (Jul. 26, 2021), *available at* https://www.openrecords.pa.gov/Appeals/DocketGetFile.cfm?id=72016. The County provided the settlement agreement between York County and the Estate and denied the request for any agreement involving PrimeCare. *See id.* at *2. On appeal to

the Office of Open Records ("OOR"), the County said it did not have records related to an agreement involving PrimeCare and argued that any such agreement is not subject to the RTKL because PrimeCare is not a government entity. *See id.* at *2, *4. The OOR agreed that because the agreement was filed under seal and made between private parties, it was not subject to the RTKL. *Id.* at *5–6. Because of the public's inability to gain access to the full settlement, it is unclear what the terms of PrimeCare's settlement with the Estate were.

While PrimeCare, a corporation based in Harrisburg, Pennsylvania, is indeed a private company, it also performs a governmental function as the primary provider of York County Prison inmates' "medical treatment, dental care and mental health care."[14] As of September 2021, York County had paid PrimeCare $7.2 million under a contract that began in October 2016. *Id.* In July 2021, York County voted to renew the contract until September 2022, however, amid pushback, this renewal fell through. *Id.* Since October 2021, Defendants have been operating under a month-to-month service agreement. *See, e.g., id.*

Because of PrimeCare's near-exclusive role as medical provider at York County Prison, PrimeCare's settlement is a matter of significant public concern. PrimeCare is

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[14] *See* Brandon Addeo, *County Prison's Medical Contract Expires Amid Negotiations with PrimeCare*, YORK DISPATCH (Oct. 6, 2021), https://www.yorkdispatch.com/story/news/local/2021/10/06/county-prisons-medical-contract-expires-amid-negotiations-primecare/5951341001/.

one of the largest jail medical providers in Pennsylvania, with a track record of paying "millions to settle lawsuits levied against them in federal courts in recent years," including "more than $850,000" to a Berks County Prison inmate who alleged inadequate care led to her leg's amputation and $190,000 to the family of another suicide victim in Northampton County Prison.[15] For this reason, the *York Daily Record* seeks permission to intervene in this suit for the limited purpose of seeking the unsealing of the full settlement agreement and related settlement records sealed at the conclusion of the case. *See* Dkt. Nos. 89, 92-93.

QUESTION PRESENTED

Whether the Court should allow the York Daily Record to intervene for the purpose of unsealing settlement records related to York County Prison's medical contractor?

Suggested answer: Yes.

ARGUMENT

This Court should grant the *York Daily Record*'s motion to intervene and unseal for the following reasons. First, the *York Daily Record* has standing to intervene in this proceeding. *See* Dkt. Nos. 89, 92-93. Second, both the First Amendment and common law rights of access entitle the public and the press to access filed settlement agreements.

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[15] *See* Joshua Vaughn, *Lack of medical care led to death of 19-year-old in Pa. jail, mom says in lawsuit*, PENNLIVE (Dec. 13, 2021), https://www.pennlive.com/news/2021/12/lack-of-medical-care-led-to-death-of-19-year-old-in-pa-jail-mom-says-in-lawsuit.html.

Third, the disputed settlement agreement, amended agreement and related records filed at the conclusion of the case were improperly sealed, with no party making the requisite factual showing of good cause. Therefore, the *York Daily Record*'s motion to intervene and unseal should be granted.

I. THE *YORK DAILY RECORD* HAS STANDING TO INTERVENE

The *York Daily Record* seeks to intervene in this proceeding to vindicate the public's constitutional and common law rights to access judicial records. Third parties have standing to intervene and challenge the improper sealing of judicial records. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994). This intervention is permissible "even after the underlying dispute between the parties has long been settled." *See id.* at 779. Accordingly, the *York Daily Record* has the right to intervene for the limited purpose of seeking a modification of the improvidently granted sealing order.

II. THE FIRST AMENDMENT AND COMMON LAW RIGHTS OF ACCESS APPLY TO THE DISPUTED SETTLEMENT RECORDS

Both the United States Supreme Court and Third Circuit recognize First Amendment and common law rights of access to judicial proceedings and their records. When evaluating these rights, courts generally conduct a two-step inquiry: determining first whether the right attaches to the document or proceeding at issue, and, if so, whether the strong presumption of openness is overridden in a particular case. *See Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 13 (1986).

It is well established that both rights of access apply to judicial records. The Third Circuit has explicitly found that settlement agreements filed with a court are judicial records under the common law. Further, experience and logic counsel that the First Amendment right of access also extends to settlement agreements. Thus, because the settlement records sought here are judicial records filed with the Court, both the common law and First Amendment rights of access attach to the settlement records.

a. First Amendment Right of Access

The First Amendment right of access was first recognized over forty years ago when the Supreme Court held that news outlets have a First Amendment right of access to criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). The Third Circuit has since extended this right to civil proceedings and their records. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).[16] While neither the Supreme Court nor the Third Circuit have held that there is a First Amendment right to access settlement agreements, such a holding is compelled by the Supreme Court's experience and logic test, which determines whether the First Amendment right of access attaches to a judicial proceeding or document. *See Press-Enter. Co.*, 478 U.S. at 8.

1. The Experience Prong

[16] Every circuit to examine the issue has done the same. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014); *Newman v. Graddick*, 696 F.2d 796, 801–02 (11th Cir. 1983).

The first prong of the Supreme Court's test asks 'whether the place and process have historically been open to the press.'" *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019) (quoting *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 429 (3d Cir. 2016)). The longstanding history of public settlement agreements and similar judicial records in the Third Circuit and other federal courts satisfies this prong.

While the Third Circuit has never directly addressed whether the First Amendment right of access applies to settlement agreements, *see, e.g., In re Avandia*, 924 F.3d at 675-76, 679, settlement agreements fall neatly within the Third Circuit's parameters for finding such a right. The Third Circuit has previously held that the right applies to civil proceedings and transcripts, *see Publicker*, 733 F.2d at 1066, 1070, and has subsequently extended the right to civil judicial records. *See, e.g.*, *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991). Any document "filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings" is a judicial record. *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001). Because settlement agreements filed with a court are judicial records, they, too, should be entitled to a First Amendment right of access.

Indeed, the Third Circuit has relatedly extended the First Amendment right of access in the criminal context to "plea hearings and . . . documents related to those hearings." *See United States v. Thomas*, 905 F.3d 276, 282 (3d Cir. 2018). In doing so, the

Court relied on a sister circuit's precedent for the proposition that "[j]ust as there exists a first amendment right of access in the context of criminal trials, it should exist in the context of the means by which most criminal prosecutions are resolved, the plea agreement." *Id.* (quoting *Oregonian Publishing Co. v. U.S. District Court for the District of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990)). That logic extending the right of access to plea agreements in the criminal context applies with equal force to settlement agreements in the civil context that resolve most civil cases. Thus, implicit in the Third Circuit's precedent finding a First Amendment right to access civil judicial records and an analogous right to access criminal plea agreements is the conclusion that the right should also extend to settlement agreements.

The experience prong does not just "look to the particular practice of any one jurisdiction, but instead to the experience in that type or kind of hearing throughout the United States." *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (internal quotations omitted). Courts throughout the United States have trended towards finding a right to access court-filed settlement agreements under the common law. *See, e.g.*, *Sec. & Exch. Comm'n v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) ("Once a settlement agreement is filed in district court, it becomes a judicial record."); *Calderon v. SG of Raleigh*, No. 5:09-CV-00218-BR, 2010 WL 1994854, at *1 (E.D.N.C. May 18, 2010) (same); *Lin v. Comprehensive Health Mgmt., Inc.*, No. 08 Civ. 6519(PKC), 2009 WL 2223063, at *1 (S.D.N.Y. July 23, 2009) (same). And, in a case with analogous claims of

substandard health care to those alleged here, the Second Circuit relied on the experience of courts around the country in finding that the First Amendment right of access applied to the reports of monitors appointed pursuant to settlements in institutional-change litigation. *United States v. Erie Cnty., N.Y.,* 763 F.3d 235, 241–42 (2d Cir. 2014). Thus, both Third Circuit and nationwide precedent demonstrates that settlement agreements "have historically been open to the press." *In re Avandia Mktg.*, 924 F.3d at 673. Accordingly, the experience prong supports finding a First Amendment right to access settlement agreements.

2. The Logic Prong

The second prong "evaluates 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (internal quotation marks omitted). "Disclosure of settlement documents" in particular "serves as a check on the integrity of the judicial process." *Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986). Public access to settlement agreements "furthers several societal interests" in the same way that access to plea agreements does, including by "promoting the 'public perception of fairness'" and "'public scrutiny'" over "'the judicial process.'" *See Thomas*, 905 F.3d at 282. Therefore, logic counsels that, in a time where our courts have become a system of settlements as opposed to trials, these settlements must be made public.

Third Circuit precedent, experience, and logic all counsel in favor of finding a First Amendment right to access settlement agreements. Therefore, this Court should find that the First Amendment right of access attaches to the settlement records.

b. Common Law Right of Access

The common law right of access likewise attaches to the settlement records. Under the common law right of access, there is a "strong presumption of openness" of judicial proceedings. *In re Avandia Mktg.*, 924 F.3d at 672. "Antedat[ing] the Constitution," its "purpose is to promote[] public confidence in the judicial system[.]" *LEAP Sys., Inc. v. Moneytrax, Inc.*, 638 F.3d 216, 220 (3d Cir. 2011) (internal quotation marks omitted). This presumption of openness extends beyond judicial proceedings to judicial records. *Id.*

Whether the right of access attaches to a document depends on whether it is a "judicial record." *In re Cendant Corp.*, 260 F.3d at 192. If a document is "filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings," then this "clearly establishes" that it is a judicial record. *Id.* Therefore, it is undisputed that a settlement agreement filed in a judicial proceeding is a judicial record subject to the common law right's strong presumption of openness. *See LEAP Sys., Inc.*, 638 F.3d at 220 ("'[T]he court's approval of a settlement . . . are matters which the public has the right to know about and evaluate.' Thus, 'settlement

documents can become part of the public component of a trial . . . when a settlement is filed with a district court.'" (quoting *Rittenhouse*, 800 F.2d at 344).

Here, the *York Daily Record* seeks access to the improperly sealed settlement records. As judicial records, the common law right of access attaches to them and they are subject to a strong presumption of openness.

III. THE SETTLEMENT RECORDS SHOULD BE UNSEALED BECAUSE NO PARTY HAS OVERCOME THE HIGH BURDEN TO JUSTIFY SEALING IT

While the right of access "is not absolute," *LEAP Sys., Inc.*, 638 F.3d at 221, once either the First Amendment or common law rights of access attach to a document, a party bears the burden of demonstrating why a document should nonetheless be sealed. *See Rittenhouse*, 800 F.2d at 344. The record on sealing here is sparse: the Estate put forth no evidence in moving to seal, nor did PrimeCare or any other party provide any evidence at all that would outweigh the strong interest of the public in access. Therefore, the parties certainly cannot satisfy the First Amendment's high bar to justify sealing the agreement. Indeed, the parties cannot even satisfy the lower standard required under the common law right of access. Therefore, the sealing order was improvidently granted and should be lifted.

If the First Amendment right of access attaches to a judicial document, as it does here, the proponent of sealing must satisfy strict scrutiny. *In re Avandia*, 924 F.3d at 673. Therefore, the party seeking closure must demonstrate "an overriding interest [in

closure] based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (internal quotations omitted).

The common law standard, although less stringent, still imposes a heavy burden on the party opposed to disclosure "to show that the interest in secrecy outweighs the presumption" of openness. *See Rittenhouse*, 800 F.2d at 344. The parties cannot satisfy even the lower standard demanded by the common law right of access, so they certainly fail to overcome the presumption of openness under both the common law and First Amendment rights of access.

To overcome both rights of access, a court "must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled." *In re Avandia*, 924 F.3d at 671. The court must "articulate 'the compelling, countervailing interests to be protected,' make 'specific findings on the record,' and 'provide[] an opportunity for interested third parties to be heard.'" *Id.* at 672–73. "[S]pecificity is essential" and "[b]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *In re Cendant Corp.*, 260 F.3d at 194.

Here, there is no evidence that this Court found an overriding interest in closure existed prior to sealing the initial settlement agreement. The motion to seal provides no explanation for sealing. *See* Dkt. No. 89. Similarly, the one-sentence sealing order contains no discussion of any consideration that influenced sealing. Dkt. No. 90. With

respect to the subsequent sealing of the amended agreement and related settlement records, no sealing order has been publicly filed. *See* Dkt. Nos. 92-93.

Even if this Court had articulated findings on the record, none would be sufficient to justify closure, because the public interest in access overrides any arguments to justify sealing. In balancing the countervailing interests at stake in sealing, the Third Circuit recognizes a number of factors to consider, including two that are particularly relevant here: (1) "whether a party benefitting from the order of confidentiality is a public entity or official"; and (2) "whether the case involves issues important to the public." *In re Avandia*, 924 F.3d at 671.

Here, the *York Daily Record* is not seeking settlement records between private parties. *Compare LEAP Sys., Inc.*, 638 F.3d at 222–23 (holding that privacy interest in sealing outweighed public's interest in openness in part because "[t]he parties are private entities" and "their dispute has no impact on the safety and health of the public") *with In re Cendant Corp.*, 260 F.3d at 194 (applying a heightened level of scrutiny because members of the public were parties to the action). Rather, it is seeking settlement records between York County, its contractor—PrimeCare—and a deceased prison inmate's estate. This case therefore implicates matters of significant public concern.

Although PrimeCare is a private company, by acting as the exclusive medical care provider to York County Prison, it is performing a governmental function. *See Buehl v. Off. of Open Recs.*, 6 A.3d 27, 30 (Pa. Commw. Ct. 2010) (noting that providing

commissary services to a prison is a governmental function subject to the RTKL). PrimeCare's actions here impact public tax expenditures and the health and safety of incarcerated individuals. Because the settlement records were sealed, questions remain concerning PrimeCare's portion of the settlement as it continues to serve as the prison's health care contractor. Because the *York Daily Record* seeks access to the settlement records to shed further light on this matter of significant public concern, the public interest factors weigh heavily in favor of disclosure.

No mitigating factors support sealing here. While PrimeCare could attempt to argue that the settlement agreement contains "sensitive" information, this argument fails. "[S]ensitive" business information does not generally qualify as an overriding interest in confidentiality. *See Publicker,* 733 F.2d at 1074. While a court may seal business information "that might harm a litigant's competitive standing," this harm must amount to more than "[m]ere embarrassment." *In re Avandia*, 924 F.3d at 679. No tangible harm of unsealing could exist for PrimeCare that would amount to more than mere embarrassment.

To justify sealing, PrimeCare would also need to establish that unsealing would result in a *current* harm, more than a year after the settlement, because "even if the initial sealing . . . was justified," a court "should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail."' *Miller v. Indiana Hosp.*, 16 F.3d 549, 551-52 (3d Cir. 1994). To the extent that

there is any genuinely confidential information in the records, the Court should redact that information rather than seal their entirety.

Thus, the settlement agreement's sealing can withstand neither strict scrutiny nor the common law's less stringent standard. The Court's sealing order with respect to the initial petition and agreement articulates no on-the-record findings from which a reviewing court can conduct an adequate review. *See* Dkt. No. 90. And no subsequent sealing order exists with respect to the amended agreement and related documents filed shortly thereafter. No party has demonstrated an overriding interest in sealing. And, even if a party articulates some post-hoc interest in confidentiality, sealing is not a solution that is narrowly tailored to accommodate any such interest. Because both the First Amendment and common law rights of access mandate that these settlement records be accessible to the public, the *York Daily Record* requests permission to intervene and seek unsealing to vindicate these rights.

CONCLUSION

For the forgoing reasons, the *York Daily Record* requests permission to intervene for the limited purpose of seeking the unsealing of the settlement agreements and related records in Dkt. Nos. 89, 92 & 93. Should this Court decline to release these records, the *York Daily Record* requests that the Court make findings on the record explaining why the settlement records do not fall within the First Amendment and common law rights of access.

Date: July 5, 2022

Respectfully submitted,

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[17] Clinic student Ashley Stamegna drafted portions of this brief. The Clinic is housed within Cornell Law School and Cornell University. Nothing in this brief should be construed to represent the views of these institutions, if any.

CERTIFICATE OF WORD COUNT COMPLIANCE

I, Paula Knudsen Burke, Esq., certify that the foregoing brief complies with the word-count limit of Local Rule 7.8(b)(2) and contains 4,491 words. In making this count, I have relied upon the word count feature of Microsoft Word, which was used to prepare this brief.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the above Memorandum of Law via the District Court's Electronic Filing System and via electronic mail on July 5, 2022 to counsel of record as follows:

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