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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

HENRY HODGES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 22-1440-III
	§	
LISA HELTON, *et al.,*	§	
	§	
Defendants.	§	

REPLY IN SUPPORT OF MOTION OF THE NASHVILLE BANNER TO INTERVENE FOR THE LIMITED PURPOSE OF UNSEALING SEALED RECORD DOCUMENTS

I. INTRODUCTION

The Nashville Banner has moved to unseal all sealed record documents in this action unless the Defendants met their burden of demonstrating why public access to this Court's judicial records should be denied. In Response, the Defendants have failed to identify—let alone satisfy—the proper standard that governs sealing determinations, which the Defendants erroneously conflate with the more forgiving standard that governs protective orders. The Defendants' remaining opposition to unsealing—which: (1) incorrectly asserts that a stay precludes this Court from unsealing sealed documents; (2) relies on public records exclusions that have no bearing on the propriety of sealing determinations; and (3) otherwise fails to meet the heavy burden that would justify sealing of any document filed in this litigation—fare no better. Accordingly, the Nashville Banner's motion should be granted, and the sealed documents that have been filed in the record of this action should be unsealed.

II. ARGUMENT

A. Because The Nashville Banner's limited intervention is appropriate under "firmly established" law, and because the Defendants do not contest it, limited intervention should be granted.

Tennessee law is in accord "with those federal and state courts in other jurisdictions which have routinely found that third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records." *See Ballard v. Herzke*, 924 S.W.2d 652, 657 (Tenn. 1996) (collecting cases). *See also Kocher v. Bearden*, 546 S.W.3d 78, 84 (Tenn. Ct. App. 2017) ("*Ballard* and other Tennessee cases have 'firmly establishe[d] the right of the public, including the media, to intervene in court proceedings for the purpose of attending the proceedings, or for the purpose of petitioning the Court to unseal documents and allow public inspection of them.'") (quoting *Knoxville News–Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998)). With this context in mind, the Defendants "concede . . . that Tennessee law supports [the Nashville Banner's] right to intervene for purposes of challenging the seal on the judicial records at issue." *See In re Est. of Thompson*, 636 S.W.3d 1, 10 (Tenn. Ct. App. 2021). *See also* Defs.' Consolidated Resp. at 1 ("Defendants wish to make clear that they do not oppose intervenors' ability to appear as third parties in this lawsuit"); *id.* at 1, n.1 ("Defendants do not oppose Intervenors' Motions to Intervene and respond herein to the merits of the opposition."). Accordingly, the Nashville Banner should be permitted to intervene for the limited purpose of unsealing the sealed record documents in this action.

B. The Court's stay order has no bearing on whether record documents should be unsealed.

The Defendants insist that "[t]he stay ordered by the Court on December 12, 2022

mandates a complete pause of the entire legal proceeding before this Court." *See* Defs.' Consolidated Resp. at 2. With respect to the Nashville Banner's motion to unseal, however, the Defendants are wrong.

Tenn. Code Ann. § 41-21-806(c)'s stay concerns "the proceeding **with respect to the claim** . . . ." *Id.* (emphasis added). The question of whether sealed record documents should be unsealed is unrelated to the merits of any "claim" in this case, though. *Id.* Indeed, the Nashville Banner is permitted to intervene in this action for the limited purpose of seeking document unsealing precisely *because* the sealing question presented by its motion "is collateral to, and does not have any bearing on, the primary issue" in this case. *See Ballard*, 924 S.W.2d at 657.

Moreover, the Defendants appear to be under the impression that sealing disputes can only be adjudicated while a proceeding is pending, and that because this proceeding is stayed, the Nashville Banner's motion to unseal must be stayed, too. The opposite is true, though. Thus, sealing disputes may be (and commonly are) presented even after litigation has concluded. *See, e.g., Kocher*, 546 S.W.3d at 84–85 ("The Kocher–Bearden case was already settled. Durham sought to intervene only for the limited purpose of modifying the agreed order to gain access to the documents in the record. We discern no undue delay or prejudice to the adjudication of the rights of the original parties if intervention is permitted under the circumstances of this case. We therefore reverse the trial court's decision denying Durham's motion to intervene."); *In re Est. of Thompson*, 636 S.W.3d at 10 ("nothing suggests that the probate cases would be unduly delayed by Appellant's intervention, seeing as resolution of the matters within the actions continued despite Appellant's efforts to unseal the records. Further, the documents that remain under seal pertain to disputes that have already been settled . . . ."). Indeed, a central

justification for the strong presumption of openness is to enable the public to scrutinize previous judicial decisions—including, for instance, a stay order—so as to enable "the public . . . to assess for itself the merits of judicial decisions." *See Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016). *See also Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.").

In all cases, however—and regardless of the status of proceedings (whether stayed, settled, or otherwise)—a "sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain." *See In re Cendant* Corp., 260 F.3d 183, 196 (3d Cir. 2001). Indeed, an order staying the underlying proceedings arguably provides even *stronger* justification for unsealing, given that documents that are unsealed while a stay is in effect cannot plausibly affect or compromise the proceeding through publicity. As such, the Defendants' claim that the Court's stay of the merits of this action also stays the public's and the media's "right of access to proceedings and documents[,]" *see Ballard*, 924 S.W.2d at 661, is badly wrong, and the Nashville Banner's motion to unseal may be adjudicated.

C. Whether a document is properly subject to a protective order is irrelevant to whether it should be unsealed after being filed and placed in the court record.

"[T]here is a 'stark difference' between protective orders and orders to seal documents." *E.G.O. Elektro-Geratbau GmbH v. Ceramaspeed, Inc.*, No. 3:14-CV-61-TAV-CCS, 2016 WL 8577657, at *1 (E.D. Tenn. Oct. 13, 2016) (quoting *Shane Grp., Inc.*,

825 F.3d at 305. *See also Lee v. Tinerella*, No. 1:17-CV-797, 2019 WL 356706, at *1 (W.D. Mich. Jan. 29, 2019) ("In *Shane Group, Inc.*, the Sixth Circuit emphasized that there is a 'stark difference' between the 'compelling reasons' standard applicable to requests to seal court records at an 'adjudication stage' and the much lower 'good cause' standard for a protective order during discovery"). In particular, "[u]nlike information merely exchanged between the parties, '[t]he public has a strong interest in obtaining the information contained in the court record.'" *Shane Grp., Inc.*, 825 F.3d at 305 (quoting *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180).

Given this reality, the Tennessee Court of Appeals recently explained that sealing determinations are subject to "more rigorous requirements" than protective order determinations. *See In re Est. of Thompson*, 636 S.W.3d at 5–6 ("A document will not be filed under seal in this court based solely on the stipulation of the parties or on a party's designation of the document as confidential pursuant to a protective order. . . . the Protective Order does not satisfy the more rigorous requirements to seal court records that are within the purview of 'public records,' meaning the information and documents on file with the clerk of the court."). This distinction matters a great deal, because the Defendants have wrongly treated the sealing issues raised by the Nashville Banner and the protective order issues raised by other litigants as if they are the same—even going so far as to characterize the Nashville Banner's motion as an "opposition to Defendants' motion for protective order." *See* Defs.' Consolidated Resp. at 1. As such, in response to the Nashville Banner's motion to *unseal*, the Defendants claim that they have met their burden of demonstrating why "three specific categories of materials *should be subject to the requested Protective Order*." *Id.* at 7 (emphasis added).

The sealing issues raised by the Nashville Banner are not the same as other

litigants' protective order disputes, though, because "[a]t the adjudication stage, [] very different considerations apply." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982). As the Sixth Circuit has explained:

> **The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record.** *Baxter*, 297 F.3d at 545. Unlike information merely exchanged between the parties, "[t]he public has a strong interest in obtaining the information contained in the court record." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983). That interest rests on several grounds. Sometimes, the public's interest is focused primarily upon the litigation's result—whether a right does or does not exist, or a statute is or is not constitutional. In other cases—including "antitrust" cases, *id.* at 1179—the public's interest is focused not only on the result, but also on the conduct giving rise to the case. In those cases, "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* And in any of these cases, the public is entitled to assess for itself the merits of judicial decisions. Thus, "[t]he public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions." *Id.* at 1181; *see also, e.g., Baxter*, 297 F.3d at 546.

Shane Grp., Inc., 825 F.3d at 305 (emphasis added).

Consequently, sufficient justification for a protective order is not the same as—or even similar to—sufficient justification for a sealing order. *See, e.g., Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017) ("Although a district court may enter a protective order during discovery upon a showing of 'good cause,' Fed. R. Civ. P. 26(c)(1), 'there is a stark difference between so-called "protective orders" ... and orders to seal court records.'") (quoting *Shane Grp., Inc.*, 825 F.3d at 305). *See also Lee v. Tinerella*, No. 1:17-CV-797, 2019 WL 356706, at *1 (W.D. Mich. Jan. 29, 2019) ("'Very different considerations apply' at the adjudication stage and the line 'is crossed when the parties place material in the court record.' Judicial records are presumptively open to public inspection.") (quoting *Shane Grp., Inc.*, 825 F.3d at 305). Accordingly, whether the Defendants can meet their burden of demonstrating that a document is properly

subject to a protective order is irrelevant to whether it should be unsealed after being filed in the court record.

D. <u>All of the Plaintiff's sealed medical records should be unsealed.</u>

During the Court's December 12, 2022 hearing in this case, the Court explained that it had issued, sua sponte, its November 4, 2022 *Order to File All Medical Records and Documents [Containing] Medical Information Under Seal* in order to safeguard the confidentiality of the Plaintiff's medical records and protect the Plaintiff from public exposure of a sensitive area of his body. Since that time, though, the Plaintiff has filed notice with the Court that he is "waiving all privacy and [HIPAA] protections" and "requests records and exhibits regarding his custody and treatment, including medical treat[ment], be open to the public." *See* Pl.'s Status Update to Court at 2, ¶ 5 (Dec. 5, 2022). Accordingly, there is no remaining justification for sealing the Plaintiff's medical records, and they should be unsealed.

In response, the Defendants do not appear to contest the point. Specifically, they respond that "Defendants would not oppose any order that would unseal Plaintiff's medical records, so long as Defendants are given time to briefly review those records to ascertain whether they include any other categories of protected information, such as personally identifying information of medical providers." *See* Defs.' Consolidated Resp. at 1.

With due respect to the Defendants, the purpose of the Court's briefing period and its order resetting the hearing on the Nashville Banner's motion to unseal was to afford the Defendants—the proponents of sealing—the time and opportunity to identify, with specificity, any records or portions of records that they contend merit sealing. Indeed, as the proponents of sealing, the Defendants have had this burden all along. *Cf. Baugh v.*

United Parcel Serv., Inc., No. M2012-00197-COA-R3CV, 2012 WL 6697384, at *7 (Tenn. Ct. App. Dec. 21, 2012) ("the reasons for sealing judicial records must be 'compelling', with the burden for demonstrating the compelling reason placed on the party seeking to prevent public access to the records."). At the time of sealing, though—and still today—the Defendants apparently still have not reviewed the medical records at issue to ascertain whether they warrant sealing for reasons other than protecting the Plaintiff's medical information. Accordingly, the Defendants having failed to satisfy their burden either in the first instance or in their responsive briefing, all of the Plaintiff's medical records should be unsealed.

E. <u>All sealed audio records should be unsealed.</u>

During the Court's December 12, 2022 hearing, the Court indicated that at least one video file that was filed under seal in this action did not actually show video footage, and that only the audio was accessible. An audio recording alone would not even plausibly affect the Defendants' professed security concerns about video footage depicting "the location of windows, doors, and other points of ingress and egress not externally visible, the layout and interconnectedness of the units, and the layout of the overall facility," though. *See* Ex. A to Mot. for Protective Order, at ¶ 6 (Dec. 5, 2022). Nor have the Defendants advanced any justification—let alone a compelling justification—for maintaining audio records under seal. Accordingly, all sealed audio records should be unsealed.

F. <u>All sealed written records should be unsealed.</u>

As noted above, the Defendants' professed security concerns relate specifically to video footage depicting "the location of windows, doors, and other points of ingress and

egress not externally visible, the layout and interconnectedness of the units, and the layout of the overall facility," though. *See* Ex. A to Mot. for Protective Order, at ¶ 6 (Dec. 5, 2022). However, the docket reflects that the Defendants have filed under seal abundant *written* records, too, including a Declaration of Dr. Kent Colburn (filed November 18, 2022), a Response in Opposition to Plaintiff's Motion for Clarification of Court Record (filed December 1, 2022), several written exhibits relating to a Response in Opposition to Motion to Compel (filed December 2, 2022), and a Supplemental Brief in Support of Defendants' Response in Opposition to Plaintiff's Motion for Temporary Injunction with Exhibits A–N (filed December 12, 2022). Ernest Lewis's Declaration—the only record evidence that the Defendants have introduced to support sealing of any document—also does not purport to address these sealed written records or assert that they pose any security concern if disclosed. Neither have the Defendants introduced any additional evidence in their Response that purports to identify any justification for sealing such records, either in whole or in part. Accordingly, all sealed written records should be unsealed.

G. <u>All remaining records should be unsealed as well, because the Defendants' arguments in support of sealing are unpersuasive, and the Defendants' vague and conclusory allegations about security concerns are unbelievable.</u>

"'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *See In re NHC--Nashville Fire Litig.*, 293 S.W.3d 547, 560 (Tenn. Ct. App. 2008) (quoting *State v. Drake*, 701 S.W.2d 604, 607–08 (Tenn. 1985) (in turn quoting *Press–Enter. Co. v. Superior Court*, 464 U.S. 501, 506 (1984)). "The interest is to be articulated along with findings specific enough that a reviewing court can

determine whether the closure order was properly entered.'" *Id.*

Further, "[t]he burden for unsealing a court record does not fall to the party seeking access to the record; rather, the proponent of the seal must demonstrate that the seal is necessary to preserve a compelling interest." *In re Est. of Thompson*, 636 S.W.3d at 19, n.16 (citing *Baugh*, 2012 WL 6697384, at *7). Put another way: "the reasons for sealing judicial records must be 'compelling', with the burden for demonstrating the compelling reason placed on the party seeking to prevent public access to the records." *Baugh*, 2012 WL 6697384, at *7 (citing *In re NHC*, 293 S.W.3d at 567). As such, "conclusory allegations of injury" are insufficient "to overcome the presumption in favor of public access." *In re Se. Milk Antitrust Litig.*, 666 F. Supp. 2d 908, 915 (E.D. Tenn. 2009). *Cf. Ballard*, 924 S.W.2d at 658 ("Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order.").

With this context in mind, all sealed record documents filed in this case should be unsealed, because the Defendants' arguments in support of sealing are unpersuasive, and the Defendants' vague and conclusory allegations about security concerns are unbelievable. Several reasons support this conclusion.

First, the Defendants have erroneously conflated the standards that govern protective orders and sealing orders. *See* Defs.' Consolidated Resp. at 7. As such, the Defendants have not even attempted to satisfy the "more rigorous" requirements that apply to sealing determinations. *See In re Est. of Thompson*, 636 S.W.3d at 5–6 ("A document will not be filed under seal in this court based solely on the stipulation of the parties or on a party's designation of the document as confidential pursuant to a protective order. . . . the Protective Order does not satisfy the more rigorous requirements

to seal court records that are within the purview of 'public records,' meaning the information and documents on file with the clerk of the court.").

Specifically, the Defendants contend that they "have demonstrated why these three specific categories of materials should be subject **to the requested Protective Order**." *See* Defs.' Consolidated Resp. at 7 (emphasis added). Whether various materials should be governed by the Defendants' requested protective order is definitionally irrelevant to whether—after being filed on the public docket—they should remain sealed, though. *See Shane Grp., Inc.*, 825 F.3d at 305 ("[u]nlike information merely exchanged between the parties, '[t]he public has a strong interest in obtaining the information contained in the court record.'") (quoting *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180). *See also In re NHC*, 293 S.W.3d at 573 (referring to the protective order "good cause" standard that governs "unfiled discovery"). Accordingly, having failed even to identify the correct standard that governs sealing determinations, the Defendants have also failed even to attempt to meet it.

Second, the Defendants erroneously assert that public records law controls sealing determinations. Specifically, the Defendants contend that "[t]he Tennessee General Assembly has categorically established a 'legitimate need for privacy or confidentiality' of" certain materials by providing that specified materials are not open for public inspection under applicable public records law. *See* Defs.' Consolidated Resp. at 7–8.

Whether a document is subject to disclosure under public records law is a fundamentally different question than whether a document filed in a court of this state should be maintained under seal, though. Indeed, public records statutes and the common law right of access to judicial proceedings do not even serve the same function. Only the latter is designed to enable the public to assess for itself the merits of judicial

decisions. *See, e.g., Doe by Doe v. Brentwood Acad. Inc.,* 578 S.W.3d 50, 55 (Tenn. Ct. App. 2018) ("The foregoing reasoning also comports with a fundamental reason for open courts, which is 'the public is entitled to assess for itself the merits of judicial decisions.'") (quoting *Shane Grp., Inc.*, 825 F.3d at 305). Accordingly, Tennessee public records exclusions have no bearing on whether there is an "overriding interest" in sealing a document that is "based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *See In re NHC*, 293 S.W.3d at 560 (cleaned up).

Further, the Defendants' cited public records law actually supports the opposite conclusion than the one the Defendants advance. Specifically, Tenn. Code Ann. § 10-7-504(m)(1)(E) provides that a court shall issue appropriate protective orders regarding specified materials "when necessary[.]" *Id.* Thus, setting aside this impermissible legislative encroachment upon an exclusive judicial function—and additionally setting aside the fact that Tenn. Code Ann. § 10-7-504(m)(1)(E) does not speak to sealing determinations—Tenn. Code Ann. § 10-7-504(m)(1)(E) itself reflects an assumption that protective orders will *not* always be "necessary," and that protective orders should only issue under circumstances when a court has made a specific determination that they are.

Third, the Defendants contend that they have met the burden necessary to obtain a protective order through the Declaration of Ernest Lewis. *See* Defs.' Consolidated Resp. at 9. That one-page, seven-paragraph Declaration does not purport to demonstrate "on a document-by-document, line-by-line basis that specific information in the court record meets the demanding requirements for a seal[,]" though. *See Shane Grp., Inc.*, 825 F.3d at 308.

Further, vague and conclusory claims to the effect that "the disclosure of any such

photographs, videos, or other recordings could pose a severe security risk to both inmates and staff at RMSI should they be publicly disclosed[,]" *see* Ex. A to Mot. for Protective Order, at ¶ 7 (Dec. 5, 2022), are nowhere near sufficient to satisfy the Defendants' burden here. As importantly: The Defendants' claims are also provably untrustworthy. By way of example, as the Plaintiff explained in a recent filing:

> **The Information Covered by Defendants' Proposed Protective Order is Already Public.**
>
> Defendants have already publicly disclosed the very same details about RMSI that they claim will cause safety and security concerns if disclosed by Mr. Hodges. TDOC owns a public YouTube page in which TDOC has posted numerous videos depicting the inside and outside of their prisons, including RMSI. *See* B. Leonard Dec. at 2. Any member of the public with access to the Internet can view the videos on TDOC's YouTube page without a subscription, username or password. *Id.* In a public video on TDOC's YouTube page showcasing a "Day in the Life [of a] TN Correction Officer," available at Day in the Life: TN Correctional Officer – YouTube, TDOC displays a variety of information about RMSI, including, inter alia, security procedures for entry into the prison, the inside of central control, layouts of the prison and individual units, keys and labelled location of the keys, video footage showing the location of multiple security cameras, inside the pods, including photos of security camera placements inside the pods, sallyports and gates, a view from inside central control showing the security procedure for entry from central control onto the compound and the doors leading to the compound, a control center with multiple bullet proof vests, schematics of cells, and live security cameras, the low side showing multiple doorways, including in and out of the medical unit, and the entire security perimeter of the institution showing the layout of the gates and the prison. *See id.* at 2-3. By contrast, Defendants seek to prevent Plaintiff from publicly disclosing photographs or videos that depict "the application of security restraints or other security techniques," "the location of windows, doors, and other points of ingress and egress not externally visible at RMSI," "the layout and interconnectedness of the units," and "the layout of the overall facility." However, this is the exact same information that is readily available on TDOC's own social media account to any member of the public with access to the internet.

See Pl.'s Opp. to Defs.' Mot. for Protective Order at 6–7 (Dec. 7, 2022).

In response, the Defendants acknowledge the existence of "a YouTube marketing video published several years ago that shows portions of the inside of the prison[.]" *See*

Defs.' Consolidated Resp. at 13. They also do not appear to dispute that the video depicts several items that their Declarant has sworn "could pose a severe security risk" to the facility if disclosed. *See* Ex. A to Mot. for Protective Order, at ¶ 7 (Dec. 5, 2022). And while the Defendants note that disclosure of any recording segment "could not, by statutory law, operate as a waiver of the confidentiality of the rest of the video" under applicable public records law, *see* Defs.' Consolidated Resp. at 13, statutory public records law has no application here. Instead, the question is whether sealing "is necessary to preserve a compelling interest." *In re Est. of Thompson*, 636 S.W.3d at 19, n.16 (citing *Baugh*, 2012 WL 6697384, at *7). Thus, by publishing a publicly available video that depicts precisely the matters that the Defendants have professed would pose a grave security risk if disclosed, the Defendants have demonstrated that their Declarant's claims regarding the "severe security risk" that would result from public disclosure are overstated at best, and manufactured at worst. *See* Ex. A to Mot. for Protective Order, at ¶¶ 6–7 (Dec. 5, 2022).

There are other reasons to suspect that the Declarant's claims are grossly overstated, too. By way of example: in addition to the many inmates who observe the facility every day, thousands—possibly tens of thousands—of visitors to RMSI, including visitors to its death row, have been permitted to view "the location of windows, doors, and other points of ingress and egress not externally visible, the layout and interconnectedness of the units, and the layout of the overall facility." *See* Ex. A to Mot. for Protective Order, at ¶ 6 (Dec. 5, 2022). None of the security concerns that the Declarant professes to be concerned about appears to have transpired as a result, though. Further, redacting portions of videos that depict specific security concerns would seem to be an easy solution to the Defendants' asserted worries, though no mention or offer of

narrow redaction appears anywhere in the Defendants' briefing. Further still, the movant can only presume that any number of still images in the videos do *not* depict "the location of windows, doors, and other points of ingress and egress not externally visible, the layout and interconnectedness of the units, and the layout of the overall facility[.]" *See* Ex. A to Mot. for Protective Order, at ¶ 6 (Dec. 5, 2022). The Defendants nonetheless insist that they "cannot and will not consent to ***any*** public disclosure of information" in the sealed videos at issue, all of which they assert—without corresponding evidence—affects "the security of" the TDOC's facilities. Defs.' Consolidated Resp. at 1.

The Defendants know full well that the videos depict quite a bit more than professed security concerns, though. Indeed, the Defendants themselves have discussed and described the videos' contents on the record in this case in substantial detail, contending that:

> [W]hat they show is that there were guards who were calm and took care of Mr. Hodges when he was being very vulgar towards female officers, disrespecting the officers. They put him in restraints and psychiatrist were ordered to be done for his own protection. And when he needed to be cleaned up, he was cleaned up. They replaced his mat. Even if they -- even if he hurled verbal assaults at them.

See **Ex. 1** (Transcript Excerpt from Dec. 12, 2022 Proceedings), at 4:20–5:3.

Given that the Plaintiff's counsel provided a starkly different description of what the videos at issue depict, the public is entitled to examine the video records that the Defendants themselves have characterized and described at length during this proceeding in order to determine, among other things, whether state officials are being truthful. That is a substantial reason for the presumption of public access in the first place. *See Shane Grp., Inc.*, 825 F.3d at 305 ("the public's interest is focused not only on the result, but also on the conduct giving rise to the case."). It is also a genuine concern, given state officials'

history of being something less than truthful, particularly with respect to prison issues. *See, e.g., Friedmann v. Parker*, 573 F. Supp. 3d 1221, 1226, n.2 (M.D. Tenn. 2021) ("In the Answer to the Complaint, Defendants deny that two cells are 'known or referred to as … "iron man" cells,' that 'Unit 1 has "iron man" cells,' and that Mr. Friedmann's 'cell is an "iron man" cell.' (Doc. No. 16 ¶¶ 18, 41). This is remarkable given Defendants' own exhibits contain a TDOC report signed by multiple Defendants that describes Mr. Friedmann's cell as 'an iron man cell.' (Doc. No. 15-4 at 15). The Court resolves 'disputed' facts in Mr. Friedmann's favor where **the record contradicts Defendants' denials. The Court warns Defendants there may be repercussions for future blatant factual misrepresentations presented to it.** *See* Fed. R. Civ. P. 11.") (emphasis added); Josh Keefe and Melissa Brown, *Tennessee executed two inmates by lethal injection since 2018. It didn't follow its own rules in either one*, THE TENNESSEAN (May 25, 2022), https://www.tennessean.com/story/news/investigations/2022/05/26/tennessee-death-row-lethal-injection-protocol-problems-independent-review-gov-bill-lee/9806784002/ ("after withdrawing key defense documents on May 6, just days after Lee's announcement, Tennessee Attorney General Herbert Slatery informed the court the state 'will correct any inaccuracies and misstatements once the truth has been ascertained.'"); Mem. and Order, *Hughes v. Board of Parole*, No. 21-618-II (Davidson Co. Chancery Ct. Nov. 22, 2021) (noting "Respondent's inconsistent positions regarding Petitioner's [release eligibility date] in the Administrative Record and in pleadings and arguments filed with and made to the Court" and that "[n]either [TDOC] witness could testify regarding Respondent's inconsistent positions" on the matter).

For all of these reasons, the proper remedy remains straightforward. Specifically, to the extent that this Court determines that sealing is appropriate as to any document, it

should order the Defendants to identify "page by page, or line by line," what, specifically, they contend merits sealing within a given video and why. *See In re FCA US LLC Monostable Elec. Gearshift Litig.*, 377 F. Supp. 3d 779, 784 (E.D. Mich. 2019). Thereafter, upon scrutinizing the Defendants' claims and comparing them to the underlying documents, this Court should order unsealed every line of every page—and every second of every video—regarding which sealing proponents fail to make the showing necessary to support sealing with specific evidence. In the absence of such specific evidence, though—which remains unfurnished to date—all remaining records should be unsealed.

III. CONCLUSION

"As the Supreme Court of the United States has recently stated, if citizens 'must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.'" *See Recipient of Final Expunction Ord. in McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, 645 S.W.3d 160, 173 (Tenn. 2022) (quoting *Niz-Chavez v. Garland*, 209 L. Ed. 2d 433, 141 S. Ct. 1474, 1486 (2021)). Here, the government itself has benefited from the strict application of procedural rules, having secured a recent stay of proceedings despite substantial indication that exhausting administrative remedies would be futile.

With this context in mind, it "cannot be too much to expect" the government to satisfy its burden of justifying the continued sealing of sealed record documents. *See id.* Having been afforded a full and fair opportunity to meet that burden, though, the Defendants have failed to do so, they have misconstrued the relevant standard, and they have made no effort to demonstrate on a document-by-document, page-by-page basis why sealing is appropriate. Given that failure, this Court should permit the Nashville Banner's intervention and order that the sealed documents filed in this action be

unsealed, either in whole or in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 14th day of December, 2022, a copy of the foregoing was served via the Court's e-filing system, via email, or via USPS mail, postage prepaid, upon:

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