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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

HENRY HODGES, Plaintiff, v. LISA HELTON, in her official capacity as Tennessee's Interim Commissioner of Correction and DR. KENNETH WILLIAMS, in his official capacity as Assistant Commissioner of Clinical Services, Chief Medical Officer Tennessee Department of Correction, Defendants.	No. 22-1440-III

REPLY OF THE ASSOCIATED PRESS IN SUPPORT OF ITS MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Proposed Intervenor the Associated Press ("AP") hereby files this reply in opposition to Defendants' Consolidated Response to Intervenors' Opposition to Defendants' Motion to Intervene ("Defendants' Response") and in support of its Motion to Intervene for the Limited Purpose of Opposing Defendants' Motion for Protective Order ("AP's Motion").

Argument

I. The Court should grant AP's unopposed request to intervene.

Defendants have now changed their position on AP's intervention and no longer oppose it. Defs.' Resp. at 1 n.1. Given the undisputed case law and the parties' now-agreement, the Court should grant AP's request to intervene for the limited purpose of opposing Defendants' Motion for Protective Order.

II. Defendants' stay argument is nonsensical.

As an initial matter, as pointed out by the Nashville Banner, the stay granted by the Court only stays the proceedings "with respect to the claim." Banner's Reply at 3 (quoting Tenn. Code Ann. § 41-21-806(c)). Defendants' requested protective order and sealing request as well as AP's Motion to Intervene are not part of Plaintiff's claim, but instead are "collateral to, and do[] not have any bearing on, the primary issue." *Ballard v. Herzke*, 924 S.W.2d 652, 657 (Tenn. 1996).

Moreover, at this point in the litigation, there is no protective order that bars public disclosure of any discovery exchanged between the parties. Further, while there are two orders sealing court records, both are limited to sealing Plaintiff's medical information.[1] Plaintiff has since withdrawn his request to seal his medical information and Proposed Intervenor the Nashville Banner (the "Banner") has

[1] Nov. 2, 2022 Agreed Order on Defs.' Mot. for Leave to File Records Under Seal at 1; Nov. 4, 2022 Order to File All Medical Records and Documents Pertaining to Medical Information Under Seal.

moved to have those judicial records unsealed.[2] Regardless of the outcome of the Banner's Motion, however, the parties' continued filing of documents that have nothing to do with Plaintiff's medical information under seal is improper; there is no sealing order permitting them to do so.

Defendants sought a protective order to prohibit Plaintiff from publicly disclosing the following materials produced in discovery: (1) video, presumably of Plaintiff, at Riverbend Maximum Security Institute ("RMSI"), (2) Tennessee Department of Correction ("TDOC") internal affairs reports, and (3) unit logs from RMSI. Defs.' Resp. at 7. Defendants' proposed protective order would also require these same materials, if filed with the Court, to be filed under seal. Defs.' Motion for Protective Order ("Defs.' Mot.") at 4.

Based on the arguments at Monday's hearing and the public docket, it appears that both parties have been filing materials that are likely the subject of Defendants' Motion under seal without any order permitting them to do so. For example, on December 12, Defendants filed all of their Supplemental Brief in Support of Defendants' Response in Opposition to Plaintiff's Motion for Temporary Injunction—including all 14 exhibits—under seal. It does not appear that the Court's prior sealing orders—which, again, pertain only to Plaintiff's medical information—justify this extremely broad sealing. Instead, it appears that some, if not all, of the sealed documents are ones implicated by Defendants' Motion. To be

[2] AP agrees with the Banner that the judicial documents sealed so far in this case, including those sealed pursuant to these two sealing orders, should be unsealed.

clear, if Defendants' Motion is not decided these records must be unsealed because there is no applicable sealing order. In other words, if the Court agrees with Defendants that the stay requires that Defendants' Motion not be heard or decided, then Plaintiff is free to do what he chooses with the materials he has received in discovery, including publicly disclosing them, and the Court should, sua sponte[3] if necessary, unseal all the sealed judicial records filed to date in this case because there either is no applicable sealing order or, as the Banner has argued, the sealing order should be rescinded in light of Plaintiff's withdrawal of his objection to public disclosure of his medical information.

In any event, access pursuant to the public's common law and constitutional rights cannot be "stayed"; and the issues before the Court are ripe for (and require) a decision. The right of access to judicial records is a contemporaneous one and delayed access – which would be the result of adopting Defendants' stay position – is tantamount to denial of the right. *See Doe v. Pub. Citizen*, 749 F.3d 246, 272–73 (4th Cir. 2014) ("Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we take this opportunity to underscore the caution of our precedent and emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies. 'Each passing day may constitute a separate and cognizable infringement of the First Amendment.' A district court therefore

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[3] Dealing with sealing issues sua sponte is entirely proper. *Beauchamp v. Fed. Home Loan Mortg. Corp.*, 658 F. App'x 202, 207 (6th Cir. 2016) (unpublished); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1176 (6th Cir. 1983).

must make on-the-record findings required . . . and act on a sealing request as expeditiously as possible." (internal citations omitted));[4] *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 113, 126 (2d Cir. 2006) (reversing district court's decision holding motion to intervene to unseal in abeyance until dispositive motion was decided because "holding the intervention motion in abeyance was a delay that was effectively a denial of any right to contemporaneous access"); *In re NHC*, 293 S.W.3d 547, 567 (Tenn. Ct. App. 2008) ("[I]deally, the determination of whether documents will be filed under seal is made at the time of filing or before. We . . . recognize the newspaper's legitimate interest in timely access to judicial records.").

Just as these important rights are not extinguished when a case ends, they also are not suspended when a stay is put in place. For example, in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the Third Circuit reversed a district court's decision denying intervention in a settled case, noting that "the majority of courts . . . have allowed intervention by parties for the limited purpose of modifying a confidentiality or protective order even after the underlying dispute between the parties has been settled" and that there was, at the time, a "growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated." *Id.* at 779; *see also, e.g.*, *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1103 (9th Cir. 1999); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir.

[4] Cases from outside Tennessee's courts and unpublished Tennessee cases are attached as Exhibit A, unless they were previously provided to the Court by AP.

1998) (noting with approval the "growing consensus . . . that intervention to challenge confidentiality orders may take place long after a case has been terminated" (quoting *Pansy*, 23 F.3d at 779)); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 471 (9th Cir. 1992) (affirming grant of motion to intervene filed four years after entry of challenged protective order and two years after parties settled); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (permitting intervention to challenge confidentiality order three years after settlement); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 785 (1st Cir. 1988) (collecting cases and stating that "[n]umerous courts have allowed third parties to intervene in cases . . . involving delays measured in years rather than weeks").

The same is true when a stay is in place. To rule otherwise would force the public and press to be kept in the dark pending an order lifting the stay, and since "court records often provide important, sometimes the only, bases or explanations for a court's decision," such a lack of transparency would be particularly troubling in this case, which involves alleged government mistreatment of a mentally ill death-row inmate. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177. As such, Defendants' Motion, AP's Motion, and the Banner's Motion should be heard and decided by the Court.

III. The statutory provisions cited by Defendants are not dispositive and are insufficient to justify the relief Defendants seek.

A. The TPRA exemptions cited by Defendants are not dispositive.

Defendants' Response boldly claims that "[t]he Tennessee General Assembly has unequivocally determined the records TDOC asks this Court to protect are confidential and not subject to view by the public because they go to the heart of the security of institutions the State has a responsibility to protect" and that "[t]hrough Tenn. Code Ann. § 10-7-504, the General Assembly has outlined the specific manner in which these materials can be exchanged by parties in civil litigation, but it has expressly prohibited their public disclosure."[5] Defs.' Resp. at 1–2. But, contrary to Defendants' suggestion, these statutory provisions do not end the inquiry.

As a threshold matter, Tennessee statutes that make records exempt from disclosure under the Tennessee Public Records Act ("TPRA") are not dispositive of the questions before the Court—especially the sealing question, which implicates federal and state constitutional rights. In fact, the U.S. Supreme Court has struck

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[5] A component of Defendants' arguments on the applicability of the provisions of Tenn. Code Ann. § 10-7-504 is that "shall means shall." Defs.' Resp. at 9 (citation omitted). But this argument ignores the nuanced approach the Tennessee Supreme Court has taken with respect to how to interpret "shall" in Tennessee statutes. *See Myers v. Amisub (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012) ("To determine whether the use of the word 'shall' in a statute is mandatory or merely directory, we look to see whether the prescribed mode of action is of the essence of the thing to be accomplished." (citation and internal quotation marks omitted)); *see also Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 555 (Tenn. 2013) (holding that "shall" is directory rather than mandatory in permitting substantial compliance, rather than strict compliance, where plaintiff's HIPAA authorization form did not meet criteria in the statute).

down a statute as unconstitutional that mandated closure of a courtroom when a minor sexual assault victim was testifying. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–08 (1982). The Court held that "as compelling as [the] interest [in safeguarding the physical and psychological well-being of a minor] is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." *Id.* Instead, it held that a trial court must "determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608. This case-by-case "approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest," and, then, only to the extent necessary. *Id.* at 609. Moreover, such a rule may also be unconstitutional under the separation of powers doctrine. *See Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020) (finding that Tennessee statute that stripped courts of their discretion to grant certain protective orders was unconstitutional under separation of powers clause of the Tennessee Constitution). In any event, as set forth below, the specific TPRA exemptions cited by Defendants do not justify the relief sought by their Motion.

B. Tenn. Code Ann. § 10-7-504(m) is inapplicable to most—if not all—of the records Defendants seek to protect from public disclosure.

In their Response, Defendants raise—for the first time—a new basis for the protective order they seek: Tenn. Code Ann. § 10-7-504(m), which generally exempts from disclosure under the TPRA "'[i]nformation and records that are directly related

to the security of any government building." This provision does not support Defendants' position.

Preliminarily, Tenn. Code Ann. § 10-7-504(m) provides that "[i]nformation and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection." The phrase "directly related to" is critical. If the information and records are indirectly related to the security of a government building or tangentially related to it, then subsection 504(m) is inapplicable. *See NCAA v. Associated Press*, 18 So. 3d 1201, 1210–11 (Fla. Dist. Ct. App. 2009) (drawing distinction between records that are directly related to a student, which are exempt education records under FERPA, and records that are indirectly or tangentially related to students, like those alleging misconduct by university staff, which are not exempt education records under FERPA).

For example, a handheld camera used by a CERT team does not directly relate to the security of RMSI, but instead directly relates to the actions of the CERT team[6], much like a body camera does for police officers; it only indirectly or tangentially relates to the security of the building. As such, Tenn. Code Ann. § 10-7-504(m) would not apply to videos from handheld cameras, including those of the CERT teams, among other things. *See* Defs.' Mot. at 2 (explaining that "Defendants have produced to Plaintiff's counsel video footage from security cameras inside the

[6] It is AP's understanding that CERT stands for Correctional Emergency Response Team.

prison *and handheld cameras operated by security staff*" (emphasis added)); Defs.' Reply to Pl.'s Resp. in Opp'n to Defs.' Mot. for Protective Order, Ex. B (email from Kelley Henry to Steven Griffin explaining that "[t]he hand held videos do not show the placement of cameras"); Defs.' Mot., Ex. A ¶ 4 (declaring that video at issue includes "handheld video").

Defendants specifically claim that Tenn. Code Ann. § 10-7-504(m)(1)(C)–(E) applies to the materials sought to be kept from the public. Subparagraphs (C)–(D) of that section simply do not fit the descriptions provided by the parties of the materials at issue. Presumably, the materials Defendants have or will provide to Plaintiff in discovery are not "[a]ssessments of security vulnerability" at RMSI. Tenn. Code Ann. § 10-7-504(m)(1)(C). Similarly, the materials do not "identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by" the prison. Tenn. Code Ann. § 10-7-504(m)(1)(D). According to the declaration of Associate Warden of Security at RMSI, Ernest Lewis, filed in support of Defendants' Motion, the surveillance and handheld video at issue "depict the mental health infirmary cells and Unit 2 of RMSI." Defs.' Mot., Ex. A ¶ 4. It is hard to imagine how those materials would satisfy the requirements of these two provisions. For example, images or recordings from a single room like a mental health infirmary cell, presumably with four walls and a door, have nothing to do with prison security except in the very broadest sense of the word. And since Tenn. Code Ann. § 10-7-

504(m) is part of the TPRA, it "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d).

The third and final subparagraph cited by Defendants, Tenn. Code Ann. § 10-7-504(m)(1)(E), is limited to "[s]urveillance recordings," and includes a specific carve-out for segments of surveillance recordings "when they include an act or incident involving public safety or security or possible criminal activity," which are specifically excepted and available to the public under the TPRA.

Just as handheld video does not directly relate to the security of RMSI, it also does not qualify as a surveillance recording because its purpose is not to surveil the inmates at RMSI, but instead to record the activities of CERT teams. This plain language understanding of the phrase "surveillance recordings" is reinforced by Defendants' own witness, Associate Warden Lewis, who said in his declaration that "I have reviewed and am familiar with the *surveillance and handheld* video at issue in this motion." Defs.' Mot., Ex. A ¶ 4 (emphasis added). As such, Tenn. Code Ann. § 10-7-504(m)(1)(E) does not apply to videos, photographs, or other recordings derived from handheld equipment.

Moreover, and in any event, the exception to Tenn. Code Ann. § 10-7-504(m)(1)(E), which specifically permits public access to segments of surveillance recordings "when they include an act or incident involving public safety or security or possible criminal activity," applies here. Based on the allegations made by

Plaintiff, at least some portions of the photographs, videos, or other recordings at issue in this case include "possible criminal activity."[7]

The language the General Assembly chose is important. The statute does *not* provide for release of segments showing criminal activity that has been proven beyond a reasonable doubt, or even where there is probable cause to believe that a crime has occurred. Rather, it requires only "possible criminal activity," a very low threshold, to permit public access. In this case, Plaintiff alleges that he was mistreated by RMSI personnel in violation of his constitutional rights, including his right to be free from cruel and unusual punishment. The actions alleged in Plaintiff's complaint could amount to possible criminal activity under Tenn. Code Ann. §§ 39-16-402–403 and other criminal statutes.

Tenn. Code Ann. § 39-16-402 describes the crime of "official misconduct":

> (a) A public servant commits an offense who, with intent . . . to harm another, intentionally or knowingly: (1) Commits an act relating to the public servant's office or employment that constitutes an unauthorized exercise of official power; (2) Commits an act under color of office or employment that exceeds the public servant's official power; (3) Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the public servant's office or employment; [or] (4) Violates a law relating to the public servant's office or employment[.]

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[7] In their Response, Defendants omitted this portion of the provision when quoting Tenn. Code Ann. § 10-7-504(m)(1)(E). In fact, despite this language specifically permitting public access to some surveillance footage, Defendants falsely state that "the General Assembly did not leave wide open *any occasions* on which the statutory mandate of confidentiality for these records may be overridden." Defs.' Resp. at 8 (emphasis added). This is incorrect, as made plain by the language of Tenn. Code Ann. § 10-7-504(m)(1)(E) discussed above.

The Sentencing Commission comments explain that "[t]his section provides a generic offense for public servants who abuse their offices for improper purposes." *Id.*

In the same vein, Tenn. Code Ann. § 39-16-403 describes the crime of "official oppression":

> (a) A public servant acting under color of office or employment commits an offense who: (1) Intentionally subjects another to mistreatment . . . when the public servant knows the conduct is unlawful; or (2) Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity, when the public servant knows the conduct is unlawful.

The Sentencing Commission comments describe this provision as "designed to punish public servants who intentionally use their offices to violate citizen's rights." *Id.*

Based on what AP knows from the pleadings in this case, it seems likely that at least some of the photographs, videos, or other recordings contain "possible criminal activity" under one or more of these provisions (and maybe others) and, therefore, are not exempt, even under the TPRA, from disclosure.

C. Tenn. Code Ann. § 10-7-504(a)(8) includes key caveats that undermine Defendants' arguments.

As previously discussed, no Tennessee statute, including Tenn. Code Ann. § 10-7-504(a)(8), is dispositive of the issues before the Court, especially the sealing questions. Defendants argue that Tenn. Code Ann. § 10-7-504(a)(8), which makes "[a]ll investigative records and reports of the internal affairs division of the department of correction" exempt from the TPRA, supports Defendants' Motion, but

Defendants failed to apprise the Court of a key caveat that belies Defendants' position.

Tenn. Code Ann. § 10-7-504(a)(8) provides that "[t]he release of reports and records shall be in accordance with the Tennessee Rules of Civil Procedure" and "[t]he information contained in such records and reports shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." In other words, the plain language of Tenn. Code Ann. § 10-7-504(a)(8) contemplates public access to such materials, pursuant to a court order, including when such materials are filed with a court in connection with litigation. And Defendants have not put forward even a scintilla of evidence to show that release of the internal affairs' investigative records and reports at issue here would threaten prison security.

IV. Defendants have not offered any additional explanation or justification for how the materials at issue would, in fact, harm prison security.

Defendants did nothing in their Response to address AP's argument that the evidence they proffered is insufficient to support the protective order they have sought. Instead, Defendants continue to offer only "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning." AP's Mem. in Supp. of Mot. to Intervene ("AP's Mem.") at 5 (quoting *Ballard*, 924 S.W.2d at 658). Such conclusory assertions are insufficient to carry Defendants' burden.

Defendants' proffered declaration of Associate Warden Lewis merely says that the identified categories of discovery material "would all pose a severe security risk if publicly disclosed" and that "[t]he 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." AP's Mem. at 5 (quoting Defs.' Mot., Ex. A ¶¶ 6–7) (emphasis added in AP's Motion).

This is similar to the reasoning rejected in *Watts v. United States*, No. 20-147-DLB-EBA, 2021 WL 3272199 (E.D. Ky. July 29, 2021). In *Watts*, "the United States provided a one-sentence justification for sealing its Motion to Dismiss brief and the accompanying attachment: 'they contain information regarding the security of the prison and operations thereof that should not be released to the general public.'" *Id.* at *3. The court held that "[t]his justification is 'brief, perfunctory, and patently inadequate,' and without further explanation, the Court would not be justified in granting the Motion to Seal." *Id.* (quoting *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 306 (6th Cir. 2016)). This Court should likewise deny Defendants' Motion.

Counsel's attempt to buttress Associate Warden Lewis' declaration with their own elaboration, Defs.' Resp. at 9, is unavailing because it is well-settled that argument of counsel is not evidence. *See, e.g*, *Perkins v. Sadler*, 826 S.W.2d 439, 443 (Tenn. Ct. App. 1991) (explaining that jury was properly instructed that "arguments of counsel are not evidence").

Defendants' arguments fall far short of the specificity required for the relief they seek and Defendants' Motion should be denied.

V. Defendants' prophylactic approach goes too far.

Defendants' position is essentially that any video, photograph or other recording of the inside of RMSI (or even the unit logs)—regardless of what it shows, or what is happening in it—threatens prison security so much that it is not safe for it to be viewed by members of the public. To support this extreme proposition, Defendants cite to a number of unpublished federal district court decisions. Defs.' Resp. at 10–12. But Defendants' flawed logic, if accepted, would undermine the public's understanding of all prison-related litigation. Instead, the Court should follow the reasoning of the court in *Evans v. Mallory*, No. 08-12725, 2009 WL 2900718 (E.D. Mich. Sept. 2, 2009).

In *Evans v. Mallory*, the district court in an excessive force civil rights case brought by a prisoner against a prison guard overruled a magistrate's report and recommendation that, among other things, the silent still frame video of the incident should be sealed. *Id.* at *1, 4. The court explained that "[t]he only reason offered for sealing the CD is the defendant's conclusory allegation that sealing is necessary to 'maintain the security of the prison facility,'" but that "[a] review of the still clips in this case, however, reveals no cause for a security concern." *Id.* at *3. "Certainly every detail of prison life need not be on display for public consumption. But when there is a claim that prisoner abuse has occurred, there can be little justification for concealing key evidence that exposes the wrongdoer or vindicates the accused personnel." *Id.* at *4. The same is true here.

While prison security, in the abstract, may be an important interest, the devil is in the details. That's why courts require specificity when a party seeks a protective or sealing order in litigation, and why judicial review of the documents sought to be sealed is critical to deciding if the requested closure does, in fact, serve the alleged compelling interest and is no broader than necessary to protect that interest. *See State v. Drake*, 701 S.W.2d 604, 607–08 (Tenn. 1985) (holding that when a closure order is sought the party seeking it "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to [closure] and it must make findings adequate to support the closure" (citation omitted)). Defendants have not carried their burden to show that public disclosure of all of the identified categories of discovery material should be prohibited, including sealing if it is filed with the Court.

VI. Defendants are not entitled to deference.

Defendants also claim to be entitled to deference on their Motion based on an entirely different line of cases with no relationship to protective orders or sealing orders. *See* Defs.' Resp. at 10 (quoting *Hayes v. State*, 424 F. App'x 546, 554 (6th Cir. 2011) (discussing compelling interest in prison security generally and deference due to prison officials in context of Religious Land Use and Institutionalized Persons Act of 2000 case). Given the important common law and constitutional interests of the public that are at stake in Defendants' Motion, the government is not entitled to any deference.

VII. Defendants' Response displays a fundamental lack of understanding of the role of the press, and the public's interest in prison-related litigation.

Defendants brazenly and erroneously claim that "Intervenors have not proffered any justification for weighing public disclosure over public safety." Defs.' Resp. at 13. This statement ignores arguments made by AP in its Memorandum of Law and the importance of government oversight by the public and the press. Moreover, there is significant public interest in the public dissemination of information about this case. Defendants' dismissive approach does not change this fact.

On pages 6 and 7 of AP's Memorandum of Law, AP explains that when the party that would benefit from the requested protective order is a public official or entity and the information relates to a matter of public concern, these facts weigh against issuance of a protective order. AP's Mem. at 6–7 (citing *Ballard*, 924 S.W.2d at 658). And AP explained how this case, which concerns allegations of the Defendants' mistreatment of a mentally ill death-row inmate, is undoubtedly one of significant public interest. *Id*. Defendants ignore that "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Shane Grp.*, 825 F.3d at 305 (citation omitted).

The Tennessee Supreme Court has explained the importance of transparency in our judicial system: "The public's right to access provides public scrutiny over the court system which serves to (1) promote community respect for the rule of law, (2)

provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Ballard*, 924 S.W.2d at 661 (citation omitted). The Sixth Circuit also has explained, among other things, in regard to court transparency that "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980)). And "[i]n civil cases, as much as in criminal matters, '[t]he resolution of private disputes frequently involves issues and remedies affecting third parties or the general public,' and secrecy serves only to 'insulate[ ] the participants, mask[ ] impropriety, obscur[e] incompetence, and conceal[ ] corruption.'" *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) (quoting *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179). These judicial statements demonstrate the importance of transparency in litigation, generally, and are fully applicable to the case at hand.

Members of the press, including AP and the Banner, among many others, also play a critical role in government oversight, including of both the penal and judicial systems. As the Supreme Court has explained "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Similarly, in *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966), the Supreme Court noted that "the press

serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."

Finally, Defendants' Response ignores the fact that "[n]ews delayed is news denied. To be useful to the public, news events must be reported when they occur." *State ex rel. Miami Herald Publ'g Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560, 609 (1976) (noting that "delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the press seeks to disseminate," and placing extra scrutiny on "[d]elays imposed by governmental authority"); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("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."). Defendants would have the Court keep a host of records sealed, away from the press and public, without an opportunity for members of the public to argue for access because of the stay. Such a ruling would turn a blind eye to the important common law and constitutional rights of AP, the Banner, and Tennesseans who rely on their reporting to stay informed.

CONCLUSION

For the reasons set forth in AP's Motion to Intervene, supporting Memorandum of Law, and this Reply, Defendants' Motion for Protective Order should be denied.

Respectfully submitted,

/s/ Paul R. McAdoo
Paul R. McAdoo (BPR No. 034066)
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
6688 Nolensville Rd., Suite 108-20
Brentwood, TN 37027
Phone: 615.823.3633
Facsimile: 202.795.9310
pmcadoo@rcfp.org

Counsel for Proposed Intervenor AP

CERTIFICATE OF SERVICE

The undersigned certifies that on December 15, 2022, a true and correct copy of the foregoing was served by email, as agreed by the parties:

Dean S. Atyia,
John R. Glover,
Steven J. Griffin,
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
Tel: (615) 741-8726
dean.atyia@ag.tn.gov
john.glover@ag.tn.gov
steven.griffin@ag.tn.gov

Kelly J. Henry
Richard L. Tennent
Amy D. Harwell
Federal Public Defender for the
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203
Tel: (615) 736-5047
Kelley_Henry@fd.org
Richard_Tennent@fd.org
Amy_Harwell@fd.org

Robin Nunn
Justin Weitz
Michelle Arra
Emily Ahdieh

Daniel A. Horwitz
Lindsay Smith
Melissa K. Dix

Morgan Lewis & Backius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
Tel: 202-739-3000
robin.nunn@morganlewis.com
justin.weitz@morganlewis.com
michelle.arra@morganlewis.com
emily.ahdieh@morganlewis.com

Horwitz Law, PLLC
4016 Westlaw Drive
Nashville, TN 37209
Tel. 615-739-2888
daniel@horwitz.law
lindsday@horwitz.law
melissa@horwitz.law

s/ Paul R. McAdoo
Counsel for Proposed Intervenor AP