No. 10-3352

United States Court of Appeals
for the
Third Circuit

ARTHUR ALAN WOLK, ESQUIRE

Plaintiff-Appellant,

v.

WALTER K. OLSON, ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
THE HONORABLE MARY A. MCLAUGHLIN

RESPONSE OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 19 MEDIA ORGANIZATIONS IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION TO SEAL PORTIONS OF COURT FILINGS

Lucy A. Dalglish
Gregg P. Leslie
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press
** Additional counsel appearances listed on inside cover and page following*

* Additional *Amici* counsel:

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors and Association of Capitol Reporters and Editors

David H. Tomlin
THE ASSOCIATED PRESS
450 W. 33rd Street
New York, NY 10001

Jonathan Bloom
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Counsel for The Association of American Publishers, Inc.

David Ardia
CITIZEN MEDIA LAW PROJECT
Berkman Center for Internet & Society
23 Everett St., 2nd Floor
Cambridge, MA 02138

Anne B. Carroll
Vice President/Deputy General Counsel
DAILY NEWS, L.P.
450 W. 33rd St., 3rd Floor
New York, NY 10001

David M. Giles
Vice President/Deputy General Counsel
THE E.W. SCRIPPS CO.
312 Walnut St., Suite 2800
Cincinnati, OH 45202

Barbara W. Wall
Vice President/Senior Associate General Counsel
GANNETT CO., INC.
7950 Jones Branch Drive
McLean, VA 22107

Karole Morgan-Prager
Stephen J. Burns
THE MCCLATCHY CO.
2100 Q Street
Sacramento, CA 95816

George Freeman
David McCraw
Legal Counsel
THE NEW YORK TIMES CO.
620 Eighth Avenue
New York, NY 10018

René P. Milam
Vice President/ General Counsel
NEWSPAPER ASSOCIATION OF AMERICA
4401 Wilson Blvd., Suite 900
Arlington, VA 22203

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
Counsel for The Newspaper Guild – CWA

Jennifer Borg
General Counsel
NORTH JERSEY MEDIA GROUP INC.
P.O. Box 75
Hackensack, NJ 07602

Patricia A. Clark
Sabin, Bermant & Gould LLP
Four Times Square, 23rd Floor
New York, NY 10036
Counsel for The Patriot-News Co.

Teri L. Henning
Melissa Melewsky
Legal Counsel
PENNSYLVANIA NEWSPAPER ASSOCIATION
3899 N. Front Street
Harrisburg, PA 17110

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Bruce W. Sanford
Bruce D. Brown
Laurie A. Babinski
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Mark Hinueber
Vice President/General Counsel
STEPHENS MEDIA LLC
P.O. Box 70
Las Vegas, NV 891252

Eric N. Lieberman
James A. McLaughlin
Legal Counsel
THE WASHINGTON POST
1150 15th St., N.W.
Washington, DC 20071

Appellant voluntarily invoked the federal court system by filing the present lawsuit and present appeal. When interested parties sought to file *amicus* briefs in the appeal, he challenged their right to do so, publicly filing papers in this Court questioning the motivations of the *amici* and their fitness to participate in these proceedings. Now, appellant asks this Court to retroactively erase from the public record significant portions of his own filings, and to impose a veil of secrecy on these proceedings that has no place in an open court system – all because appellant takes issue with the fact that matters raised in his *own briefing* have become the source of public discussion.

There is no justifiable basis for retroactively sealing appellate briefing simply because a party dislikes the public disclosure of the contents. This Court has repeatedly acknowledged and upheld the strong presumption of public access to court records, which requires appellant here to demonstrate an overriding interest that would warrant removing the information contained in these documents from the public record. This heavy burden is one that appellant cannot overcome.

Amici respectfully request that this Court decline to adopt appellant's restrictive interpretation of the public's right to monitor and access court proceedings. Appellant's emergency motion to seal portions of the court filings should be denied, and those records temporarily sealed by court order on January 18, 2011, should be unsealed.

I. THE PUBLIC HAS A COMMON LAW RIGHT TO ACCESS THE PORTIONS OF THE JUDICIAL RECORDS APPELLANT SEEKS TO RETROACTIVELY SEAL.

It is well established in this Circuit that there exists a "pervasive common law right to inspect and copy public records and documents, including judicial records and documents." *In re. Cendant Corp*., 260 F.3d 183, 192 (3d Cir. 2001) (citation and quotation marks omitted). This right applies to both civil and criminal proceedings, *id*., and creates a "strong presumption" in favor of the public's right to access and inspect the judicial records. *Id*. at 193.

Appellant's emergency motion does not appear to dispute that the portions of the appellate records that appellant seeks to have retroactively sealed constitute judicial records. *See* Appellant's Emergency Motion to Seal ("Mot.") at 3.[1] Numerous decisions by this Court foreclose any argument otherwise. *See Cendant*, 260 F.3d at 192 (filing of a document in court "clearly" establishes it as a judicial record); *Leucadia, Inc. v. Applied Extrusion Techs., Inc*. 998 F.2d 157, 161-62 (3d Cir. 1993)(once a document is filed in court, it is subject to the presumptive right

[1] Yet appellant's motion incorrectly focuses on the "good cause" analysis used to evaluate the issuance of a protective order over *non-judicial* records in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (holding that a settlement agreement that is not filed in court is not a judicial record). *See id.* at 792 n.31 ("Because the . . . order of confidentiality did not . . . seal judicial records, we do not apply the standards we have articulated in our line of cases dealing with access to judicial proceedings and documents.").

of access). Briefing and motions filed by litigants undoubtedly qualify as judicial records. *Bank of America Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986)("It follows from our decisions . . . that the common law presumption of access applies to motions filed in court proceedings. . . .").

Accordingly, the burden is on appellant to demonstrate that the records at issue should be sealed. *Leucadia,* 998 F.2d at 165. In order to "override" the common law right of access, a litigant has the burden "of showing that the material [to be sealed] is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *Cendant*, 260 F.3d at 194 (citations and quotation marks omitted).[2] "In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *Id.* The judicial records at issue here do not satisfy these requirements.

[2] Appellant takes issue with the supposed motivations of other *amici* for publishing portions of the judicial records. But the motivations are irrelevant. As this Court stated in *Leucadia*, "[t]he Supreme Court has made it plain that all persons seeking to inspect and copy judicial records stand on an equal footing, regardless of their motive for inspecting such records." 998 F.2d at 167.

A. No "overriding interest" supports retroactively sealing the portions of the judicial records at issue.

Large portions of a party's briefing, containing legal argument and the facts that support that argument, do not qualify as the "kind of information that courts will protect" from public disclosure. *See Cendant*, 260 F.3d at 194. A party's briefing informs the public of the issues in a case, and is at the heart of the public right of access to judicial records. As this Court has repeatedly affirmed, the common law right of access serves as a means of enabling the public to understand the judicial process and, ideally, to judge the fairness of the system:

> The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court. As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

In re. Cendant Corp., 260 F.3d at 192 (quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir.1988)).

Court filings are a principal means for parties to convey their positions to the court and, by extension, the public. Limiting access to such filings deprives the public of an important measure of the case itself, as well as a means of understanding how the parties are litigating the case. This Court's prior decisions reflect this understanding. For example, in *Bank of America*, this Court declined to

"countenance what are essentially secret judicial proceedings" by allowing the continued sealing of motions and orders related to a settlement agreement. 800 F.2d at 345. This Court described such actions as being "in direct contravention of the open access to judicial records that the common law protects." *Id.*

Similarly, in *Republic of Philippines v. Westinghouse Electric Corporation*, this Court rejected the argument that records submitted with a summary judgment motion were presumptively public only if the court granted summary judgment. 949 F.2d 653, 660 (3d Cir. 1991). The Court explained that, regardless of the outcome of the motion, access to the summary judgment records enabled the public to "make a contemporaneous review of the basis of an important decision of the district court." *Id.* at 664. There was a "strong public interest," the Court continued, in allowing the public to understand "why [the party] sought summary judgment and why the district court denied it." *Id.*

The same rationale applies here. At issue are appellant's own filings, in an appeal that he himself brought. Appellant has sought various forms of relief from this Court through these filings – which were publicly filed weeks ago. Public access to these documents provides the public with an ability to understand why appellant sought the relief requested, and to understand this Court's actions in response. Importantly, it also provides the public with a means of assessing the manner in which the parties are litigating the case. For the public to have a "more

complete understanding of the judicial system and a better perception of its fairness," *Littlejohn*, 851 F.2d at 678, the public must have access to the documents upon which the court relies.

Appellant puts misplaced reliance on *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), for the proposition that courts may justifiably seal filings to avoid having their dockets used "as a 'reservoir[] of libelous statements for press consumption." Mot. at 5 (quoting *Nixon*, 435 U.S. at 598). The historical cases cited as support for that statement in the *Nixon* opinion addressed matters that are not at issue here: the concern that parties may file malicious court actions as a means of spreading libelous comments; the scope of the fair report privilege; and the historical right to access certain pretrial pleadings before trial.[3]

Those circumstances are not applicable here. Rather, appellant here seeks to seal *appellate* documents that he himself filed – in a legal action that he filed and appealed. In other words, appellant chose to bring this private dispute into the public. "By submitting pleadings and motions to the court for decision, one enters

[3] *See Park v. The Detroit Free Press*, 40 N.W. 731, 734 (1888) ("[N]o more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court[.]"); *Sanford v. Boston Herald Co*., 61 N.E.2d 5, 6 (Mass. 1945) (privilege in reporting allegations); *Cowley v. Pulsifer*, 137 Mass. 392 (1884) (privilege in reporting allegations). The closest case is perhaps *Munzer v. Blaisdell*, 268 A.D 9, 11 (N.Y. A.D. 1944), a 1944 New York appeal that suggested in *dictum* that a plaintiff could ask to file a *complaint* under seal.

the public arena of courtroom proceedings and exposes oneself, as well as the opposing party, to the risk, though by no means the certainty, of public scrutiny." *Leucadia*, 998 F.2d at 164 (quoting *Mokhiber v. Davis*, 537 A.2d 1100, 1111 (D.C.App.1988)).

This Court made a similar point in *Bank of America*, rejecting the assertion that litigants who voluntarily submit a settlement agreement in court retain the full confidentiality rights they would otherwise have. "Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements." *Bank of America*, 800 F.2d at 345; *see also Westinghouse*, 949 F.2d at 663 (a party's concern about its own "public image" is "not enough to rebut the presumption of access" that attaches to judicial records).

Notably, this Court's precedent emphasizes the privacy concerns of third parties over those of voluntary litigants. *See, e.g.*, *Westinghouse*, 949 F.2d 653, 662 (3d Cir. 1991) (contrasting rationale for sealing motion papers filed by a litigant with sealing evidence submitted by third parties); *see also Bank of America*, 800 F.2d at 346 (citing *United States v. Criden ("Criden I")*, 648 F.2d 814 (3d Cir.1981), for the proposition that "evidence which may inflict 'unnecessary and intensified pain on third parties who the court reasonably finds are entitled to such protection' may be protected" from disclosure, and *United*

States v. Smith, 776 F.2d 1104 (3d Cir.1985), as supporting the denial of access to a bill of particulars because of "risk of serious injury to innocent third parties")). Yet this Court has held that the common law presumption of access requires disclosure even of court records that contain unflattering, embarrassing and presumably false references to third parties. *United States v. Criden ("Criden III")*, 681 F.2d 919, 922 (3d Cir. 1982). Only references within the judicial records that may "inflict unnecessary and intensified pain on third parties" override the common law right of access in such cases. *Id.* at 922 (citing *Criden I*).

More fundamentally, the idea that an appellant's briefing should be sealed runs counter to the "centuries of tradition of open access to court documents and orders." *Bank of America*, 800 F.2d at 345. As the Seventh Circuit observed in rejecting a request to seal appellate records, "Even disputes about claims of national security are litigated in the open." The court noted that briefs in the *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), and the "hydrogen bomb plans case," *United States v. Progressive, Inc.*, 467 F. Supp. 990, *appeal dismissed*, 610 F.2d 819 (7th Cir.1979), "were available to the press, although sealed appendices discussed in detail the documents for which protection was sought." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). Stating that people "who want secrecy should opt for arbitration," the court continued:

> When [parties] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible.

Id. at 568 (citations omitted).

Appellant seeks to avoid public disclosure of matters that he himself injected into this lawsuit. A party's desire to suppress commentary on the matters contained in his briefing cannot override the public's common law presumption of access to court records.

B. Sealing the records at issue will not prevent a "clearly defined and serious injury to the party seeking closure" and cannot constitutionally require an amicus party to refrain from publishing the contents of judicial records already in the public domain.

Regardless, appellant has not demonstrated that the material he seeks to have placed under seal will otherwise "work a clearly defined and serious injury to the party seeking closure." *Cendant*, 260 F.3d at 194. Appellant's assertion is that the portions of his briefings that he wishes to have sealed are those that discuss defamatory statements made by "others" (non-parties) on separate websites. Mot. at 1. Even if appellant's briefing is placed under seal, that fact would have no effect on whether the allegedly defamatory statements remain on these other websites, in the public domain.

Moreover, to the extent that appellant argues that by "sealing the relevant portions of the briefing which cite to these defamatory statements, the Court can ensure that the Amici bloggers (and any other parties) will refrain from publically disseminating such horrific accusations," Mot. at 3, appellant appears to misconstrue First Amendment law. The judicial records at issue are already part of the public domain. A retroactive order to seal those documents would not, on its own, prevent anyone currently in possession of those documents from publishing them.

To the contrary, any order attempting to prevent their publication could not be reconciled with the First Amendment. Prior restraints on speech and publication are "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and "one of the most extraordinary remedies known to our jurisprudence." *Id*. at 562. As the Supreme Court explained in rejecting a prior restraint on the publication of the Pentagon Papers, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," which imposes "a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (citations omitted). This heavy burden explains why the "Supreme Court has never upheld a prior restraint, even faced with the

competing interest of national security or the Sixth Amendment right to a fair trial." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

Although not expressly calling for a prior restraint on further speech, appellant's briefing suggests that a *nunc pro tunc* sealing order would "compel Amicus blogger Volokh to remove his internet blog, which republished the defamatory accusations that will be placed under seal." Mot. at 3. Yet appellant's briefing does not explain how an order by this Court could permissibly restrain further speech on a topic currently being litigated in this Court and contained in a public record. "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1972). Appellant cites to no support for such an order.

II. SEPARATELY, THE PUBLIC'S FIRST AMENDMENT RIGHT OF ACCESS TO THE JUDICIAL RECORDS AT ISSUE PREVENTS THE RETROACTIVE SEALING OF THESE RECORDS .

A First Amendment right of access also attaches to judicial records in civil proceedings. *Leucadia*, 998 F.2d at 161 n.6; *Westinghouse*, 949 F.2d at 659 ("[T]he First Amendment, independent of the common law, protects the public's

right of access to the records of civil proceedings."). [4] Overcoming this First Amendment right of access requires an even greater showing than that of the common-law right. *Cendant*, 260 F.3d at 198 n.13. Specifically, a court must expressly find "an overriding interest based on findings that closure is narrowly tailored to serve that interest." *Bank of America*, 800 F.2d at 344 (citation omitted).

Appellant cannot make this showing. For the same reasons advanced above, a party cannot demonstrate that his interest in shutting off public debate on issues raised in his own briefing constitutes an "overriding interest" justifying restriction of the public's First Amendment rights. *See supra*.

Moreover, even if Appellant could establish that his interests were of overriding importance, the proposed sealing order would still be impermissible because it cannot have the desired effect. Appellant's motion acknowledges that the material he wishes to retroactively seal is contained in documents that are already part of the public domain; indeed, his motion rests on his objection to the

[4] The "reach" of the First Amendment right of access remains undefined, however. *Cendant*, 260 F.3d at 198 n.13. Because appellant cannot overcome the common law right of access in this matter, this Court need not decide whether the First Amendment right extends to the appellate records at issue here. *See id.* ("Because we conclude that the District Court's confidentiality order did not satisfy the requirements for abridging even the common law right of access, we will not address [the First Amendment access] issues."). To the extent this Court disagrees, *amici* submits that the analysis of the First Amendment right of access in *Publicker Industries, Inc. v. Cohen*, 733 F.3d 1059, 1067-70 (1984), supports extending that right to civil appellate records and proceedings.

public discourse that these filings have engendered. *See* Mot. at 2-3. No order of this Court can "unring" this bell, and, as addressed above, any attempt to do so would not only be ineffective, but would also run afoul of the First Amendment. Because the documents are already in the public domain, the sealing sought by Appellant cannot protect the interest advanced by Appellant.

CONCLUSION

Numerous Circuit Courts have recognized "the fundamental importance of issuing public decisions after public arguments based on public records." *United States v. Stoterau*, 524 F.3d 988, 1012 (9th Cir. 2008) (*quoting Doe v. United States*, 253 F.3d 256, 262 (6th Cir.2001)). Appellant's motion asks this court to diverge from this well-established tradition. *Amici* urges this Court to deny this motion, and to lift the temporary seal of appellate records ordered by this Court on January 18.

Dated: January 24, 2011

Respectfully Submitted,
By: /s/ Lucy Dalglish

Lucy A. Dalglish
Gregg P. Leslie
Derek D. Green
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

The undersigned *Amicus* counsel certifies that, on January 24, 2011, a PDF copy of the foregoing *Response of* Amici Curiae *The Reporters Committee for Freedom of the Press and 19 Media Organizations in Opposition to Plaintiff-Appellant's Motion to Seal Portions of Court Filings* was served upon all parties via electronic filing, and a PDF copy was provided to the Court and scanned for viruses using Norton Internet Security version 18.5.0.125, which detected no viruses.

/s/ Lucy A. Dalglish

Lucy A. Dalglish
Counsel for The Reporters Committee for Freedom of the Press