IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Gabriel Steele, *et al.*, Plaintiffs, v. **City of Burlington, *et al.*,** Defendants. ***Randy Evans and the Iowa Freedom of Information Council,*** Movants-Intervenors.	**Case No. 3:16-cv-00105-JEG-SBJ** **Movants-Intervenors Randy Evans and the Iowa Freedom of Information Council's Brief in Support of Their Limited Motion to Intervene With Respect to Sealed Court Records And to Unseal and Make Public All Court Filings, Including Summary Judgment Motions, Pleadings, Briefs, and Evidence** **(Oral Argument Requested)** **(Motion Resisted by Defendants)**

Pursuant to Fed. R. Civ. P. 24 and L.R. 7(d), Movant-Intervenors Randy Evans and the Iowa Freedom of Information Council file this Brief supporting their resisted motion[1] to intervene and to unseal all court filings, including, most notably, summary judgment motions, pleadings, briefs, and evidence.

Background

Use of fatal force by police in America occurs at an alarming rate, as *The Washington Post* has chronicled in a database of killings by police since 2015.[2] The *Post* reports, "police have shot and killed 3,309 people since 2015, or more than twice as many fatal shootings per year as the average reported by the FBI. Of those killed, 231, or 7 percent, were not armed with

[1] Movants-Intervenors further note that plaintiffs consent to the intervention and unsealing requested here, while defendants resist.
[2] *See* https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.99672e0852f7 (last accessed June 9, 2018).

guns, knives or other objects that could be used as weapons at the time of the shootings, according to the data."[3]

Autumn Steele was one such unarmed American killed by police. Her January 6, 2015 shooting places her as the first Iowan listed in the *Post*'s 2015 fatal force database.[4]

Thus, this case, which involves Steele's alleged wrongful death at the hands of police, inherently involves matters of utmost public concern and interest, as do the pleadings, evidence, and filings before this Court.

Despite this, and notwithstanding the clear mandates of law and the obvious need in a democracy that the administration of justice be open and accountable, the litigants here successfully have used the federal judiciary as their own private forum by shielding substantive filings and information presented in court records from public access, review, and scrutiny.

Indeed, of the 78 docket entries in this matter appearing as of June 9, 2018, some 33 (42%) related to requests for approval to file matters in secret, orders approving such sealed filings, or submission of motions, pleadings, and exhibits under seal.[5]

Particularly troublesome, briefs, resistances, exhibits, and evidence relating to the parties' cross-motions for summary judgment remain under seal, even though those motions were argued on-the-record in a 70-minute hearing before the Article III judge presiding over this case and

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[3] *See* https://www.washingtonpost.com/investigations/fatal-police-shootings-of-unarmed-people-have-significantly-declined-experts-say/2018/05/03/d5eab374-4349-11e8-8569-26fda6b404c7_story.html?noredirect=on&utm_term=.d097f45905f8 (last accessed June 9, 2018).

[4] *See* https://www.washingtonpost.com/graphics/national/police-shootings/ (last accessed June 9, 2018).

[5] Ironically, plaintiffs' motion to unseal records was filed under seal, as were all related resistances and replies. See Docket Nos. 62, 65-68. The Court has not ruled on that motion.

thereupon were deemed submitted for dispositive ruling. *See e.g*. Docket Nos. 39-41, 43-51, 52-57, 60-68, 74-75; *see also* Docket. No. 77.

According to Docket Entry No. 78, the parties, having now used this taxpayer-funded court as their private forum for 19 months, recently settled this case, with closing papers due by July 6, 2018.[6] Therefore, absent action by this Court to reverse the improvident sealing orders, the evidence and arguments submitted on cross-motions for summary judgment, the workings of this Court, and the facts underlying the police killing of a young woman in Burlington, Iowa, and damage claims by her family will remain shielded from public scrutiny.

Such secrecy undermines the accountability of government officials and the public's acceptance of the justness of any result reached through use of the federal courts. As the Third Circuit has put it in upholding the right of access to summary judgment papers,

> "[T]he public's exercise of its common law access right in civil cases promotes public confidence in the judicial system.... As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the 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."

Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991) (quoting *Littlejohn v. BIC Corp*., 851 F.2d 673, 678 (3rd Cir. 1988)).

Intervention

The movants seeking status as intervenors are Randy Evans, a journalist and the executive director of the Iowa Freedom of Information Council, and the council itself. Each directly and in association with the council's members have a substantial interest in the subject

[6] While the parties currently are documenting settlement, Movants-Intervenors understand the ultimate terms will be presented to a state court for approval, thereby continuing judicial involvement in the action through disposition of the case.

matter of this case and, like the public at large, are adversely affected by the sealing orders they seek to set aside.

Under Fed. R. Civ. P. 24, intervention can occur as a matter of right or by permission of the court. Under Fed. R. Civ. P. 24(b), the decision to grant permissive intervention is measured by whether a motion is timely (it is here, given the recent submission of the summary judgment motions and completion of the May 24, 2018 hearing); whether the applicant's claim shares a question of law or fact in common with the main action (it does here, based on the Movants' interest in access to presumptively public files court files); and whether intervention will unduly prejudice or delay adjudication of the original parties' rights (it will not here, given the pendency of the summary judgment motions and the stay in proceedings as a possible settlement is consummated and presented to a state court for review and approval).

When a member of the news media objects to limits on access to judicial records and proceedings, "the court must give him or her a reasonable opportunity to state the objection." *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983). In the Eighth Circuit, a motion is the preferred procedural mechanism for objecting to limitations upon access. For example, *In re Search Warrant for Secretarial Area Outside Office of Gunn* arose after a federal district court allowed a publishing company to move pursuant to Federal Rule of Criminal Procedure 41 to unseal affidavits and other materials attached to two search warrants. 855 F.2d 569, 570 (8th Cir. 1988). The Eighth Circuit observed that "[u]sually motions for public access to court proceedings or records are filed by the press in connection with pending criminal or civil proceedings." *Id*. at 572.

In *Richmond Newspapers, Inc. v. Virginia*, the case that established a First Amendment right of access to criminal trials, the appellant initially requested a hearing on a motion to vacate

the trial court's closure order, which the trial judge granted, and the court later allowed the appellant to intervene *nunc pro tunc*. 448 U.S. 555, 560–62 (1980); *see also, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 5 (1986) (*Press-Enterprise II*) (noting petitioner had joined state's motion for release of transcript); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 504 (1984) (*Press-Enterprise I*) (noting that petitioner had moved for the release of a complete transcript of voir dire proceedings); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 599 (1982) (noting that newspaper had moved the court to revoke its closure order and to permit it to intervene for the limited purpose of asserting its access rights); *United States v. Graham*, 257 F.3d 143, 145 (2d Cir. 2001) (noting that magistrate judge invited the news media to intervene on the questions of public access); *In re Associated Press*, 162 F.3d 503, 508 & n.6 (7th Cir. 1998) (citing cases and stating that "the Press ought to have been permitted to intervene in order to present arguments against limitations on the constitutional or common law right of access."); *United States v. Valenti*, 987 F.2d 708, 711 (11th Cir. 1993) ("We first note the Times's standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party."); *In re New York Times Co*., 828 F.2d 110, 113 (2d Cir. 1987) (district court treated media as intervenors in criminal proceeding).

Here, Evans and the Iowa Freedom of Information Council personally and in association with the council's members have substantial interests in the workings of this Court, access to information contained in judicial records, and open court files generally. They also personally and in association with the members of the council have a stake in this case specifically, which involves a police officer killing of an innocent bystander and use of public funds in a lawsuit assailing Government conduct. Accordingly, the Court should grant the motion for intervention for the limited purpose of seeking public access to court records in this matter.

Motion to Unseal

Maintaining summary judgment papers and other court filings under seal raises serious constitutional issues under the First and Fourteenth Amendments. *See Press-Enterprise Co. I; Press-Enterprise II*; *Globe Newspaper Co.*, 457 U.S. 596; *Richmond Newspapers*, 448 U.S. 555; *U.S. v. Thunder*, 438 F.3d 866 (8th Cir. 2006).

This secrecy similarly violates common law access rights to court files. *See Nixon v. Warner Communications, Inc*., 435 U.S. 589 (1978); *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996); *Gunn*, 855 F.2d 569; *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986). Those common law rights, which pre-date the Constitution, are grounded upon the public's right to monitor the workings of the judicial system. *See United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981). Moreover, "The common law right of access is not limited to evidence, but rather encompasses all 'judicial records and documents.' It includes 'transcripts, evidence, pleadings, and other materials submitted by litigants.'" *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984) (internal citation omitted).

Many courts have found that both the First Amendment and the common law secure the public's right to inspect judicial documents. *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91–92 (2d Cir. 2004) (citing cases and holding that "the media and the public possess a qualified First Amendment right to inspect docket sheets, which provide an index to the records of judicial proceedings"). The rationale for this conclusion is solid: "Not only do such [court] records often concern issues in which the public has an interest, in which event concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment, but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret." *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

In sum, there can be no serious dispute that the press and public hold a presumptive right of access to the court files in this case, including the summary judgment motions and supporting documents. Judge Robert Pratt has eloquently described the gravity of Rule 56 proceedings:

> The term "summary judgment" is something of a misnomer. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 Green Bag 2d 273 (Spring 2010). It "suggests a judicial process that is simple, abbreviated, and inexpensive," while in reality, the process is complicated, time-consuming, and expensive. *Id*. at 273, 281. The complexity of the process, however, reflects the "complexity of law and life." *Id*. at 281. "Since the constitutional right to jury trial is at stake," judges must engage in a "paper-intensive and often tedious" process to "assiduously avoid deciding disputed facts or inferences" in a quest to determine whether a record contains genuine factual disputes that necessitate a trial. *Id*. at 281-82. Despite the seeming inaptness of the name, and the desire for some in the plaintiffs' bar to be rid of it, the summary judgment process is well-accepted and appears "here to stay." *Id*. at 281. Indeed, "judges are duty-bound to resolve legal disputes, no matter how close the call." *Id*. at 287.

Mills v. Iowa, 924 F. Supp. 2d 1016, 1027 (S.D. Iowa 2013) (footnote omitted). For this reason, access to summary *judgment* papers is especially important. *See, e.g., IDT Corp. v. eBay, Inc.*, 709 F.3d 1220, 1224 (8th Cir. 2013) (stating that "'the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and resultant value of such information to those monitoring the federal courts'" (*quoting United States v. Amodeo*, 71 F. 3d 1044, 1049 (2d Cir. 1995)); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003).

Thus, any order sealing files or otherwise restricting release of information must be *narrowly tailored* and based on evidence showing that a *compelling* state interest in government secrecy overrides the press and public's right of access. *In re —Gunn*, 855 F.2d at 574 (stating that documents may be sealed only if "closure is essential to preserve higher values and is narrowly tailored to that interest" (internal citations omitted)). Moreover, a finding that a litigant has met its burden to seal court records must follow a hearing where those whose access rights

are affected have an opportunity to be heard, and the Court has articulated its findings of fact and conclusions of law in a written order. *Id.*; *see also Press-Enterprise I*, 464 U.S. at 510.

Here, it does not appear that the litigants have even *attempted* to explain why sealing documents filed with this Court is appropriate, and they certainly have not satisfied the high evidentiary burden imposed upon them by common law and the First Amendment. Instead, sealing orders were routinely sought and immediately approved in text orders without presentation of evidence, a hearing, or an on-the-record articulation of the factors showing either compelling need or the absence of less restrictive alternatives (such as redaction). The orders here do not mention any separately filed findings of fact and conclusions of law, rendering meaningful appellate review impossible. *In re—Gunn*, 855 F.2d at 574.

Meanwhile, Movants can conceive of no compelling rationale, even if the litigants belatedly tried to come forward with one, justifying continued sealing of the court file. This is especially true given the 70-minute hearing at which arguments raised in the cross motions for summary judgment were publicly aired. Even if secrecy could have been justified before that hearing, no compelling government interest at this stage mandates keeping secret the filings and evidence argued during in-court, on-the-record proceedings.

Even if documents filed with the Court were to reflect badly upon law enforcement or defendants, that does not present a compelling governmental interest sufficient to maintain sealing orders. *See Procter & Gamble Co. v. Bankers Trust Company, BT*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal."); *Skolnick v. Altheimer & Gray*, 730 N.E.2d 4, 18 (Ill.

2000) ("The mere fact a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file.").

Speculation on other possible grounds for a sealing order would serve no purpose and would invert the First Amendment and common law burden that rests upon the proponent of secrecy. If anyone contends that other grounds justify sealing public court records, those bases can and should be raised in a public filing. This would allow Evans and the council to challenge the legal soundness of such contentions or to suggest less restrictive means available to protect any legitimate asserted interest, such as redacting only limited and specific portions of the information from the public filings. *See, e.g., Press-Enterprise I*, 464 U.S. at 513 ("The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.").

Accordingly, Evans and the Iowa Freedom of Information Council request that the Court unseal all filings in this case, including summary judgment documents, or, alternatively, require the party or parties seeking a sealing order to make public the justifications for their requests and allow the Movants-Intervenors an opportunity to be heard in opposition in a meaningful way.

Conclusion

This Court should vigilantly protect the principle of public access to judicial records by granting the pending motion to unseal. Nowhere is this truer than in a case where a police officer accidentally shot a young mother, at a time of reckoning over use of force by law enforcement across America. Therefore, Movant-Intervenors respectfully request that the Court grant them all relief as requested in their limited motion to intervene and to unseal and make public all filings, including without limitation the parties' summary judgment motions, pleadings, and evidence.

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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing **Movants-Intervenors Randy Evans and the Iowa Freedom of Information Council's Brief in Support of Their Limited Motion to Intervene with Respect to Sealed Court Records and to Unseal and Make Public All Court Filings, Including Summary Judgment Motions, Pleadings, Briefs, and Evidence (Oral Argument Requested) (Motion Resisted by Defendants)** was served upon the counsel through the Court's CM/ECF electronic filing system on June 12, 2018.

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