

For its Complaint for Writ of Mandamus against the Honorable John R. Miraldi, Judge of the Lorain County Court of Common Pleas (“Respondent”), Relator WEWS-TV (“WEWS” or “Relator”) states as follows:

The Parties

1. WEWS is an ABC-affiliated television station owned by The E.W. Scripps Company. WEWS serves the greater Cleveland metropolitan area and broadcasts nearly 40 hours of locally produced newscasts each week.

2. Respondent is a judge of the Lorain County Court of Common Pleas.

3. Respondent, in his capacity as a judge of the Lorain County Court of Common Pleas, is a “court” within the meaning of Sup.R. 45(B), and a “court of common pleas” within the meaning of Sup.R. 1(A).

Background

1. On November 7, 2017, Gibson Bros. Inc., David R. Gibson, and Allyn W. Gibson (collectively, the “Gibson Parties”) filed a lawsuit against Oberlin College and Dr. Meredith Raimondo (collectively, the “Oberlin Parties”), alleging that the Oberlin Parties, *inter alia*, aided and encouraged Oberlin College students in publishing allegedly libelous statements against Gibson’s Bakery (the “Gibson-Oberlin Lawsuit”). A copy of the complaint in the Gibson-Oberlin Lawsuit is attached to the concurrently filed Affidavit of Katie Townsend (“Townsend Affidavit” or “Townsend Aff.”) as **Exhibit A**.

2. The Gibson-Oberlin Lawsuit was assigned to Respondent.

3. For purposes of facilitating discovery, the Gibson Parties and the Oberlin Parties entered into a stipulated protective order on June 6, 2018 (the “Stipulated Protective Order”), permitting either party to designate documents as confidential “upon making a good faith

determination” that the documents contained information that should be protected from disclosure. A copy of the Stipulated Protective Order is attached to the Townsend Affidavit as **Exhibit B**.

4. Paragraph 16 of the Stipulated Protective Order states that party-level determinations as to confidentiality are not to “be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by counsel or the parties is subject to protection . . . until such time as the Court may rule upon a specific document or issue.” Townsend Aff., Ex. B at ¶ 16.

5. Upon information and belief, among the discovery documents designated as “confidential” by the Gibson Parties under the Stipulated Protective Order was a forensic image of Allyn D. Gibson, Jr.’s Facebook account.

6. A portion of Allyn D. Gibson, Jr.’s Facebook account was included as Exhibit G to the affidavit of Cary M. Snyder and was filed under seal as an exhibit to the Oberlin Parties’ combined summary judgment reply brief (“Exhibit G”). A copy of the Oberlin Parties’ combined summary judgment reply brief is attached to the Townsend Affidavit as **Exhibit C**.

7. Neither the Gibson Parties nor the Oberlin Parties presented arguments to Respondent to justify sealing Exhibit G, nor did Respondent make any findings as to whether a compelling interest outweighed the public’s presumptive right of access to Exhibit G or that sealing Exhibit G in its entirety was the least restrictive means of preserving any such interest.

8. The Oberlin Parties’ motions for summary judgment were granted in part and denied in part. The Oberlin Parties cited to Exhibit G in support of their argument that the court should find the Gibson Parties to be public figures, which was decided by Respondent on

summary judgment. A copy of the entry and ruling on the Oberlin Parties' combined motions for summary judgment is attached to the Townsend Affidavit as **Exhibit D**.

9. The case proceeded to trial on the remaining claims and a jury issued a verdict for the Gibson Parties in June 2019.

10. On August 28, 2019, pursuant to Paragraph 12 of the Stipulated Protective Order, the Oberlin Parties moved the court for an order unsealing Exhibit G. A copy of the Oberlin Parties' motion is attached to the Townsend Affidavit as **Exhibit E**.

11. On September 16, 2019, Respondent denied the Oberlin Parties' motion, noting that the Oberlin Parties "made no attempt to introduce" Exhibit G at trial and further stating that Respondent was not persuaded to "make a post-trial order regarding materials that [the Oberlin Parties] opted to file under seal nearly six months ago in accordance with an agreed protective order that they drafted and stipulated to." A copy of the order denying the Oberlin Parties' motion is attached to the Townsend Affidavit as **Exhibit F**.

12. In denying the Oberlin Parties' motion to unseal Exhibit G, Respondent made no factual findings as to whether the continued sealing of Exhibit G was necessary to serve a compelling interest, whether a compelling interest outweighed the public's presumptive right of access, or whether continued sealing of Exhibit G in its entirety was the least restrictive means of preserving any such interest.

13. Upon information and belief, Exhibit G contains information related to allegations of racial profiling that spurred the student protest at the heart of the Gibson-Oberlin Lawsuit and about which there is significant public interest.

14. On October 31, 2019, WEWS, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") filed a motion to unseal Exhibit G ("Media

Movants' Motion") pursuant to Sup.R. 45(F)(1), which provides that "[a]ny person, by written motion to the court" may request access to "case documents" sealed by a trial court. A copy of Media Movants' Motion is attached to the Townsend Affidavit as **Exhibit G**.

15. The Gibson Parties and nonparty Allyn D. Gibson, Jr. jointly opposed the Media Movants' Motion. A true and correct copy of that opposition is attached to the Townsend Affidavit as **Exhibit H**. The Oberlin Parties filed no opposition to the Media Movants' Motion.

16. On December 9, 2019, the Media Movants filed a reply in support of their motion to unseal. A copy of that reply is attached to the Townsend Affidavit as **Exhibit I**.

17. On February 20, 2020, Respondent issued an order inviting supplemental briefing with respect to Respondent's jurisdiction to decide the Media Movants' Motion while an appeal from the verdict entered against the Oberlin Parties in the Gibson-Oberlin Lawsuit was pending with the Court of Appeals for the Ninth Judicial District. A copy of the order is attached to the Townsend Affidavit as **Exhibit J**.

18. Media Movants and the Gibson Parties each filed a supplemental brief in response to Respondent's order on March 11, 2020. A copy of Media Movants' supplemental brief is attached to the Townsend Affidavit as **Exhibit K**. A copy of the Gibson Parties' supplemental brief is attached to the Townsend Affidavit as **Exhibit L**.

19. On April 29, 2020, Respondent issued an order denying the Media Movants' Motion ("Order"). A copy of the Order is attached to the Townsend Affidavit as **Exhibit M**.

20. In the Order, Respondent noted that Exhibit G was filed under seal pursuant to the Stipulated Protective Order, that its admissibility as character evidence "was at issue during pretrial motions in limine," and that the Oberlin Parties "made no attempt to introduce the contents of Exhibit G . . . during trial." Townsend Aff., Ex. M at 2.

21. In concluding “that the continued restriction of public access is warranted,” Respondent’s Order stated that “[o]f particular importance is Sup. R. 45(E)(2)(c), which includes the risk of injury to persons, individual privacy rights and interests and fairness of the adjudicatory process” and that “[b]ecause of the nature of the information at issue in Exhibit G . . . there is no less restrictive alternative to complete restriction.” Townsend Aff., Ex. M at 2.

22. Respondent’s Order did not identify what risks of injury, privacy interests, or harms to the fairness of the adjudicatory process might potentially be affected by unsealing Exhibit G, nor did it identify or make specific findings as to why or how continued sealing of Exhibit G is essential to preserve these interests.

23. Respondent’s Order did not identify “the nature of the information at issue” or explain why alternatives to wholesale sealing, such as redaction, would be inadequate to protect “the nature of the information at issue.” Townsend Aff., Ex. M at 2.

24. On June 4, 2020, WEWS filed a notice of appeal of the Order to the Court of Appeals for the Ninth Judicial District. A copy of the notice of appeal is attached to the Townsend Affidavit as **Exhibit N**.

25. On June 17, 2021, the Court of Appeals dismissed WEWS’s appeal without a hearing. The Court of Appeals concluded that “mandamus is the exclusive remedy for the trial court’s continued restriction of a discovery exhibit” and that WEWS’s appeal was “not properly before [the] Court [of Appeals].” A copy of the Magistrate’s Order and Journal Entry is attached to the Townsend Affidavit as **Exhibit O**.

26. WEWS received notice of the Court of Appeals’ decision by mail on June 24, 2021.

27. To date, Exhibit G remains under seal and public access to Exhibit G remains unavailable.

COUNT I - MANDAMUS

28. The Ohio Rules of Superintendence apply to all courts of common pleas in the State of Ohio. Sup.R. 1(A).

29. The First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment to the United States Constitution, gives the public a presumptive right of access to judicial documents in both civil and criminal cases. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (“*Press-Enterprise II*”); *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir.2019); *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir.2016); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir.1983).

30. Article I, Section 16 of the Ohio Constitution also grants a presumptive right of access to judicial documents. *See State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 384 (“Article I of the Ohio Constitution guarantees the public’s right to open courts. This right of access found in both the federal and state Constitutions includes records and transcripts that document the proceedings.”).

31. As an exhibit to a combined summary judgment reply brief filed in the Lorain County Court of Common Pleas, Exhibit G is a judicial document to which the constitutional presumptive right of access applies.

32. The constitutional presumptive right of access can be overcome only if “specific, on the record findings are made demonstrating that closure is essential to preserve higher values”

and that any restrictions are “narrowly tailored to serve that interest.” *Press-Enterprise II*, 478 U.S. at 13–14.

33. If an overriding or higher interest is found to apply, it “is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (“*Press-Enterprise I*”).

34. Under the First Amendment, “[o]nly the most compelling reasons can justify non-disclosure of judicial records.” *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983).

35. In the context of civil litigation “only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault) is typically enough to overcome the presumption of access.” *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 308 (6th Cir.2016) (internal quotations and citation omitted).

36. The fact that a judicial document was filed pursuant to a stipulated protective order does not vitiate the press and the public’s presumptive right of access to that document. *Id.* at 305 (“There is a stark difference between so-called protective orders entered pursuant to . . . discovery . . . on the one hand, and orders to seal court records, on the other . . . Unlike information merely exchanged between the parties, the public has a strong interest in obtaining the information contained in the court record.”) (internal quotations and citations omitted); *see also Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 730-31, 761 N.E.2d 656 (1st Dist. 2001) (holding that “discovery material becomes a public record when it becomes part of the court record”).

37. Consistent with the First Amendment and Article I, Section 16 of the Ohio Constitution, Superintendence Rule 45(A) provides that “[c]ourt records are presumed open to public access.”

38. Sup.R. 44(B) defines a “court record” as a “case document . . . regardless of physical form or characteristic, manner of creation, or method of storage.”

39. Sup.R. 44(C)1 defines a “case document” as, *inter alia*, “a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments”

40. “There is no requirement under the Superintendence Rules that a record or document must be used by the court in a decision to be entitled to the presumption of public access specified in Sup.R. 45(A).” *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 27.

41. As an exhibit to a combined summary judgment reply brief filed in the Lorain County Court of Common Pleas, Exhibit G is a “document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including [an] exhibit. . . .” Thus, Exhibit G is a “case document” within the meaning of Sup.R. 44(C)(1) and is entitled to a presumption of public access under Sup.R. 45(A).

42. Exhibit G is not “exempt from public disclosure under state, federal, or the common law” and does not otherwise fall within any of the exceptions set forth in Sup.R. 44(C)(2)(b), (d)-(h).

43. Under the Superintendence Rules, a court may restrict public access to a “case document” or information in a case document only if the court complies with the requirements of Sup.R. 45(E).

44. Before restricting public access, a court must find “by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest,” upon consideration of the factors set forth in Sup.R. 45(E)(2)(a)-(c).

45. “When restricting public access to a case document . . . the court shall use the least restrictive means available, including but not limited to . . . [r]edacting the information rather than limiting public access to the entire document.” Sup.R. 45(E)(3).

46. At the time Exhibit G was filed under seal, Respondent made no findings, by clear and convincing evidence or otherwise, that a compelling interest outweighed the public’s presumptive right of access to Exhibit G or that sealing Exhibit G in its entirety was the least restrictive means of preserving any such interest.

47. In the order denying the Oberlin Parties’ motion to unseal Exhibit G, Respondent made no findings as to whether a compelling interest outweighed the public’s presumptive right of access to Exhibit G or that sealing Exhibit G in its entirety was the least restrictive means of preserving any such interest.

48. In the Order denying the Media Movants’ Motion, Respondent did not articulate specific findings of an overriding interest sufficient to overcome the constitutional presumption of access or how continued sealing was narrowly tailored to serve such interests. *See Press-Enterprise II*, 478 U.S. at 13–14.

49. In the Order denying Media Movants’ Motion, Respondent made a generalized, non-specific reference to three categories of interests stated in the text of Sup.R. 45(E)(2)(C): (1) risk of injury to persons; (2) individual privacy rights and interests; and (3) fairness of the adjudicatory process. *Townsend Aff.*, Ex. M at 2. The Order did not establish, by clear and convincing evidence, that the presumption of public access to Exhibit G is outweighed by a

higher interest in consideration of the factors set forth in Sup.R. 45(E)(2)(a)-(c), or that Respondent could not consider less restrictive available means such as “[r]edacting the information rather than limiting public access to the entire document.” Sup.R. 45(E)(3).

50. Superintendence Rule 47(B) provides that any person aggrieved by the failure of a court to comply with the requirements Sup.R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731 of the Revised Code.

51. This Court has also held that mandamus is an appropriate mechanism by which to obtain access to court records under the First Amendment. *State ex rel. Beacon J. Publ’g Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 49 (“[W]e have held that mandamus is the proper remedy when a right of access is predicated on a constitutional challenge”).

52. Chapter 2731.05 of the Revised Code provides that a writ of mandamus may “not be issued when there is a plain and adequate remedy in the ordinary course of the law.”

53. WEWS pursued a remedy in the ordinary course of the law by appealing the Order to the Court of Appeals for the Ninth Judicial District.

54. The Court of Appeals dismissed WEWS’s appeal, concluding that, as a non-party, WEWS was not entitled to an appeal of its motion, and that a writ of mandamus was WEWS’s exclusive remedy.

55. WEWS is aggrieved by Respondent’s failure to comply with Sup.R. 45(E) and the U.S. and Ohio Constitutions in denying Media Movants’ Motion. Mandamus is therefore an appropriate remedy.

56. The press and the public have a presumptive right of access to Exhibit G under the First Amendment, the Ohio Constitution, and Sup.R.45. In the absence of “clear and

convincing evidence” to support “specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest,” Respondent has a clear legal duty to provide the press and the public with access to Exhibit G. *Press-Enterprise II*, 478 U.S. at 13–14; Sup.R. 45(E).

57. Accordingly, for each of the foregoing reasons and those set forth in the Townsend Affidavit and Memorandum in Support of Mandamus submitted herewith and incorporated herein, WEWS is entitled to a writ of mandamus pursuant to Sup.R.47(B), the First Amendment, and the Ohio Constitution compelling Respondent to issue an order to unseal Exhibit G.

WHEREFORE, Relator respectfully requests:

- A. that the Court issue a writ of mandamus to Respondent Judge John R. Miraldi directing him to immediately unseal Exhibit G to the Oberlin Parties’ combined summary judgment reply brief; and
- B. all other relief that is just and equitable.

Dated: July 15, 2021

Respectfully submitted,

/s/ Michael K. Farrell
Michael K. Farrell (0040941)
Brittany N. Lockyer (0097923)
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 861-7865
Fax: (216) 696-0740

Katie Townsend (PHV- 21675-2021)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: (202) 795-9300
Fax: (202) 795-9310

Counsel for Relator

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a Summons along with a copy of this Complaint to the Respondent identified in the caption on page one via Certified Mail, return receipt requested.

/s/ Michael K. Farrell
Michael K. Farrell (0040941)