Case Nos. 20-1003, 20-1222

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NELDA KELLOM, Individually and as Personal Representative of the Estate of TERRANCE KELLOM, Deceased; LAWANDA KELLOM, Individually; TERRELL KELLOM, Individually; KEVIN KELLOM, Individually; TERIA KELLOM, Individually; JANAY WILLIAMS, as personal representative of Terrance Kellom's two minor children, son, T.D.K., and daughter, T.D.K.

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA (20-1003/1222)

DARELL FITZGERALD, individually and in his official capacity as a Detroit Police Officer; TREVA EATON, individually and in her official capacity as a Detroit Police Officer; CITY OF DETROIT, MI; MITCHELL QUINN, Immigration and Customs Enforcement Agent; JAMES E. CRAIG, in his official capacity, jointly and severally (20-1003)

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Michigan

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, DETROIT BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND ARAB AMERICAN CIVIL RIGHTS LEAGUE SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union of Michigan, Detroit Branch of the National Association for the Advancement of Colored People, and Arab-American Civil Rights League are not a subsidiary or affiliate of a publicly owned corporation and know of no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome.

/s/ Mark P. Fancher
Mark P. Fancher
on behalf of the American Civil Liberties Union of Michigan

/s/ Chui Karega
Chui Karega
on behalf of the Detroit Branch, National Association for the Advancement of Colored People

/s/ Rula Aoun
Rula Aoun
on behalf of the Arab American Civil Rights League

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide, nonprofit, nonpartisan organization with over a million members committed to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has long been deeply committed to defending broad rights to freedom of speech protected by the First Amendment to the United States Constitution, including the abolition of prior restraints on such speech and the free and open access to our judicial system. The ACLU regularly participates in cases in state and federal court involving the First Amendment, as counsel and amicus curiae. The lower court's order sanctioning plaintiffs' counsel for violating the protective order in this case squarely implicates the ACLU's concerns with the unconstitutional restraints on freedom of speech.

The Detroit Branch of the National Association for the Advancement of Colored People (the "Detroit Branch, NAACP") joins in the filing of this brief. Since 1909, the NAACP has been an interracial nonprofit nonpartisan organization dedicated to the advance of justice through equality of rights for all persons. Since

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, amici hereby state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

its inception in 1912, the Detroit Branch, NAACP has been committed to working to achieve equality of rights and eliminate race prejudice within the United States. Central to the work of Detroit Branch, NAACP has been protection of the rights of persons in the United States to engage in free and public commentary surrounding issues of civil rights. The guarantees of liberty and equality found in the Constitution of the United States, including the First Amendment, have always been recognized as major concerns of the Detroit Branch, NAACP. The lower court's order regarding the protective order in this case raises substantial questions about unconstitutional restraints on freedom of speech and the First Amendment rights of litigants and their lawyer to comment on published materials available to the public in the course of litigation.

The Arab American Civil Rights League ("ACRL") is a non-profit membership organization founded in 2011 to protect the constitutional rights of its members through litigation, education, and advocacy. Led by civil rights attorneys and advocates, the ACRL offers the community it serves a solid commitment to ensuring that their constitutional rights are protected and preserved, particularly freedom of speech protected by the First Amendment to the United States Constitution. This case interests ACRL because it involves the right to discuss public case materials concerning practices of law enforcement. The ability to disseminate information regarding government officers in the performance of their official duties

is critical for a free society and protected by the First Amendment. Only by accurately showing law enforcement's actions can those actions be effectively criticized and, as needed, remedied. The ACRL shares Plaintiffs' concerns about the constitutionality of the lower court's order and submits this brief to highlight the particular threat that order has on our constitutional right to freedom of speech. The public's interest is certainly constrained if courts have the unchecked ability to impose punitive sanctions to restrict the discussion of cases involving potential abuses and use of deadly force by the government.

INTRODUCTION

Amici curiae submit this brief to emphasize the important First Amendment issues implicated in, but overlooked by, the lower court's opinion and order on the defendant's motion for a protective order. (Op. & Order, ECF No. 127, PageID.3057.) In that opinion and order, the lower court sanctioned plaintiffs' counsel for speaking to the press about materials apparently produced in discovery and subject to a stipulated protective order, but that the defendant had included as publicly filed exhibits in support of his own motion for summary judgment. As set forth below, longstanding principles of common law and First Amendment jurisprudence condone counsel's public comment on publicly filed discovery materials, even if the materials were subject to a boilerplate stipulated protective order during discovery. At a minimum, the lower court did not fulfill its obligation to make specific findings that could demonstrate "compelling reasons" to restrict the rights of a party and their counsel to publicly comment on matters publicly filed with the court. Therefore, amici urge this Court to reverse the lower court's order, and hold that, absent specific findings not made or justified here, a party and their counsel have a right to publicly comment on documents and discovery publicly filed on the lower court's docket.

BACKGROUND AND FACTS

The parties in this case entered into a stipulated protective order "for the purpose of protecting against the disclosure of the investigative law enforcement techniques and information, and for the further purpose of safeguarding the privacy of individuals, as required by the Privacy Act, 5 U.S.C. § 552a." (Stip. Prot. Order, ECF No. 29, PageID.232-233.) The order permitted "the disclosure, in the course of this action, of information covered by the Privacy Act, 5 U.S.C. § 552a, reasonably necessary or useful to respond to discovery or to defend this action." (*Id*., PageID.233.) The order noted that "[a]ny discovery materials disclosed to plaintiff under this order shall be used only to prepare for and to prosecute this action," and required that "Plaintiff, her counsel, and other parties shall not disclose any of the records or information to any person unless the disclosure is reasonably and in good faith calculated to aid in the preparation and/or prosecution of this case." (*Id*., PageID.233-234.)

After what appears to be extensive discovery, defendant Mitchell Quinn moved for summary judgment. (Mot. for Summ. J., ECF No. 78, PageID.1371.) Concurrent with the motion, Quinn filed a statement of material facts with nearly fifty exhibits attached. (Statement of Material Facts, ECF No. 77.)[2] Quinn's motion

[2] There is no indication that the statement or its exhibits were filed under seal or were otherwise not fully available to the public through PACER. The defendant

itself included pictures marked as "Subject to Protective Order," and is replete with quotes and references to discovery references. (Mot. for Summ. J., ECF No. 78, PageID.1384, 1385, 1386, 1387.) The motion and its exhibits remain publicly available to this day (*see id.*, PageID.1371), and there is no indication that Quinn moved to seal his summary judgment materials.

After the summary judgment motion and exhibits were filed, the plaintiff and his counsel spoke to a local television news station and held a press conference. (Op. & Order, ECF No. 127, PageID.3059.) Counsel spoke about deposition testimony obtained during discovery and filed in support of the defendant's summary judgment motion, and the reporter "shows photographs from the investigation and a photograph of [a] report, [a] deposition transcript, and one of Quinn's briefs filed in the case." (*Id*., PageID.3060.)

Aside from making passing reference to the discovery discussed by the plaintiff or his counsel during the interview or press conference, the lower court conducted no analysis about the specific items discussed other than to recognize that they were discovery materials in the case. And without citing any law, the lower court determined that plaintiffs' counsel should be sanctioned simply for discussing discovery materials in the interview and press conference. The lower court also

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admitted that the exhibits were available to the public and the media in his public filings. (Mot. for Prot. Order, ECF No. 111, PageID.2884.)

dismissed as "nonsense" the plaintiff's argument that Quinn had waived the protections of the protective order by publicly filing the materials on PACER. (Op. & Order, ECF No. 127, PageID.3063.) And although plaintiffs claimed that the First Amendment entitled them to speak on these publicly available materials (Resp. to Mot., ECF No. 116, PageID.3008), the lower court sanctioned counsel without even mentioning, much less analyzing, the First Amendment implications for sanctioning their speech. (Op. & Order, ECF No. 127, PageID.3063, "The Court concludes that Mr. Ayad had no reasonable basis for believing that he could disregard the terms of the Stipulated Protective Order that he signed and agreed to in this case.").

ARGUMENT

I. The Lower Court's Ruling Violates the First Amendment.

The public has a right of access to judicial proceedings and records grounded in the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). This Court has long held that "the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as waiver of any rights a party had to restrict its further use." *National Polymer Prods., Inc. v. Borg Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981) (confirming the "importance of public trials to our system of justice and recognizes the right to publish information made a part of the record in a

judicial proceeding"). In addition to information disclosed at trial, the "First Amendment right of access attaches to documents and materials filed in connection with a summary judgment motion." *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014). This Court has thus held that litigants cannot be restrained from commenting on publicly available information in pending cases. *National Polymer*, 641 F.2d at 423 ("We believe . . . that the mere status of involvement in a lawsuit, without more, is insufficient to justify the restriction of [publishing information made public in open trial]."). "The principle that parties do not lose their First Amendment rights by virtue of their participation in legal processes extends to information obtained in discovery as well as that obtained from the public record." *Id.*

Where, as here, a litigant agreed to a protective order, the lower court is required to make a First Amendment assessment as to whether the litigant expressly waived the ability to comment on otherwise publicly available information. *Id.* at 423-24. In analyzing a pretrial protective order in the *National Polymer* case, this Court maintained that the purpose of such an order "is to preserve the confidentiality of materials which are revealed in discovery but not made public by trial." *Id.* at 424. If a protective order is not "drawn expressly to require the submission of confidential matter to the trier of fact under seal," the First Amendment would bar the lower court's sanction of commentary on publicly filed materials with the Court. *See id.*

In order to restrain or sanction a litigant's commentary about matters that could be subject to a protective order, the Court must first determine whether matters discussed were subject to the protective order, and whether the matters were already publicly revealed, such as in trial or having been filed with the court as a publicly available judicial record. *Id.* "As for matter that has been publicly revealed, the court must proceed to the second step, which involves a balancing process. Such matter may not be restrained unless the court finds that the interests in preserving the confidentiality of the material outweigh [the litigant's] interest in disseminating it and the legitimate interest others may have in receiving it." *Id.* The lower court "must bear in mind that prior restraints bear a heavy presumption against their constitutional validity." *Id.* Failure of a lower court to make an analysis of the First Amendment interests warrants reversal and remanding for further consideration. *Id.* at 425.

Other courts considering this issue have reached a similar conclusion. For example, where a governmental agency publicly filed documents otherwise subject to a protective order issued under Rule 26(c) of the Federal Rules of Civil Procedure, the party seeking to limit further disclosure must show "'compelling reasons' to justify sealing documents attached to dispositive motions and other filings that relate to the merits of a case, even when those documents were produced pursuant to a sealing order." *Ground Zero Ctr. for Non Violent Action v. United States Dep't of*

Navy, 860 F.3d 1244, 1261 (9th Cir. 2017). "This higher standard is warranted because, '[u]nlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default,' a fact that 'sharply tips the balance in favor of production when a document, formerly sealed for good cause under Rule 26(c), becomes part of a judicial record.'" *Id.* (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006)). In order to impose continuing restrictions on the public dissemination of documents that the government made public, "the court must identify a compelling reason to impose the restriction and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* "Any restriction of . . . public speech at this point must be justified by specific facts showing that disclosure of particular documents would harm national security." *Id.* at 1262.

In this case, the lower court did not even reference the First Amendment, much less perform any analysis of whether the information on which plaintiff and his counsel commented was (1) still subject to the protective order given Quinn's apparent waiver of its protections by publicly filing the material on the court's docket; (2) fell within the purpose of the protective order; or (3) warranted a compelling reason to restrict or sanction the public commentary on publicly available information. At a bare minimum, the First Amendment guarantees close consideration of these issues prior to any restraint or sanction of their public

commentary. The lower court's failure to review, much less mention, these critical First Amendment protections warrants reversal of the order below.

II. The Common Law and First Amendment Protect Commentary by Parties and Their Counsel on Publicly Available Court Filings.

Had the court below properly analyzed the judicial records and public statements at issue in this case, it would have been required to conclude, under the common law and First Amendment, that the speech was protected and plaintiffs' counsel could not be prohibited from, or sanctioned for, speaking publicly about the evidence that had been filed with the court.

The existence of a protective order itself does not imply that discovery properly shielded from public disclosure may remain secret once it is filed with the court. As this Court has explained:

> [T]here is a stark difference between so-called "protective orders" entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other. Discovery concerns the parties' exchange of information that might or might not be relevant to their case. Secrecy is fine at the discovery stage, before the material enters the judicial record. . . .
>
> At the adjudication stage, however, very different considerations apply. The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record. Unlike information merely exchanged between the parties, the public has a strong interest in obtaining the information contained in the court record.

Shane Group, Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) (quotation marks, citations, and alterations omitted).

Courts analyzing the publicizing of judicial records must therefore begin with the common law presumption in favor of public access. *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 670 (3d Cir. 2019). The common law right of access "antedates the Constitution." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986). The "strong presumption of openness does not permit the routine closing of judicial records to the public." *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994). To overcome this "strong presumption," the lower court must articulate the compelling, countervailing interests to be protected, make specific findings on the record concerning the effects of disclosure, and provide an opportunity for interested third parties to be heard. *Avandia*, 924 F.3d at 672-73. "Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *Id.* "[C]areful factfinding and balancing of competing interests is required before the strong presumption of openness can be overcome by the secrecy interests of private litigants." *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167 (3d Cir. 1993). To that end, the lower court must "conduct a document-by-document review" of the contents of the challenged documents. *Id.* "Only the most compelling reasons can justify non-disclosure of judicial records." *In re Knoxville News-Sentinel*

Co., 723 F.2d 470, 476 (6th Cir. 1983). This Court has held that, even in the face of a broad stipulated protective order, the lower court "cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public" simply because the parties agree to a protective order. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 222 (6th Cir. 1996).

In this instance, based on the defendant's assertions in his motion and the publicly available materials still appearing on PACER, it appears that the materials on which the plaintiff and his counsel commented were all made publicly available by the defendant himself in his summary judgment filings and as a judicial record. The lower court made no analysis of whether the public discussion of these publicly available materials violated the protective order at all, or whether each matter specifically fell within the stated purpose of the protective order. Rather than undertaking these important considerations, the lower court sanctioned plaintiffs' counsel for having spoken on a matter of public record.

Had the lower court performed any such analysis, it would have been required to conclude that the commentary was permissible because the matters filed in support of summary judgment have long been considered part of a public record, free for open discussion, under the common law and the First Amendment. Every court that has considered this issue has concluded that the common law ensures that any restrictions on documents submitted with summary judgment motions are

subject to a "rigorous First Amendment standard." *See*, *e.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). The Second Circuit held that "documents submitted to a court for its consideration in a summary judgment motion are—*as a matter of law*—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment." *Lugosch v. Puramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006) (emphasis supplied). As the Second Circuit reasoned, such access promotes the integrity of and public confidence in judicial process. *Id*. Agreeing with "other circuits that have addressed the question," the Second Circuit has held broadly that the constitutional right to access applies "to written documents submitted in connection with judicial proceedings that themselves implicate the right of access." *Id*. at 124 (internal citations omitted).

It would have been particularly improper to prohibit discussion of these matters given the nature of the underlying case. This Court has recognized that "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Shane Group*, 825 F.3d at 305. Here, the lawsuit and matters discussed pertain to a highly publicized incident in which defendant Quinn, a law enforcement officer, shot and killed Terrance Kellom, an African American man, in Detroit. After Quinn's motion for summary judgment was filed, plaintiffs' counsel sought to bring to the public's attention evidence in that

filing that, in plaintiffs' view, undercut Quinn's initial version of events. In this day and age, it is difficult to imagine a matter of greater public interest. It is also difficult to imagine a circumstance where it is more important to protect the First Amendment rights of those who seek law enforcement transparency and accountability.

Although the society-wide concern about police misconduct in recent years is due largely, if not entirely, to the availability of contemporaneous video recordings of police officers inflicting violence on members of Black communities, complaints about this type of behavior are not new. During past decades, allegations of violent acts by police officers were recognized as triggers for numerous spontaneous mass uprisings in Watts, Detroit, Miami and many other cities across the country.[3] Allegations of rampant police misconduct in Oakland, California in 1966 prompted the formation of the Black Panther Party for Self-Defense, which in the organization's infancy adopted the mission of protecting the Black community from police violence.[4]

Notwithstanding the long history of allegations of police misconduct, such allegations were often disbelieved by those outside of the Black community. The recent real time contemporaneous video records of violent acts of police officers have opened the eyes of many and inspired widespread citizen efforts to bring about

[3] *See* Peniel E. Joseph, *Waiting 'Til the Midnight Hour* 121, 186, 226 (2006).
[4] *See* Huey P. Newton, *Revolutionary Suicide* 114 (1973).

long-overdue reform. Such developments are at the very heart of why the First Amendment concerns in the instant case are so crucial. Police misconduct thrives under a veil of secrecy.

Insofar as Quinn publicly filed discovery materials in support of his motion for summary judgment, this Court should conclude that the sanction of counsel's commentary could never pass muster under either the common law or the First Amendment. The local rules in the Eastern District of Michigan provide a process for filing materials under seal, and a party can do so even without a court order if the items filed are authorized to be sealed by statute or rule. E.D. Mich. L.R. 5.3(a). In this case, even though the stipulated protective order appeared to rely on a statutory basis for protecting some materials produced during discovery, Quinn neither referenced the protective order, the applicable local rules, or the legal standards for sealing judicial records in filing his motion for summary judgment and its supporting documents. He therefore waived any expectation of secrecy or confidentiality under the stipulated protective order when he filed his motion with the discovery materials attached.

In sum, once documents are publicly filed, the First Amendment and common law both support free and public commentary on the matters discussed. *See National Polymer*, 641 F.2d at 424 (finding that broadly applying a pretrial protective order to discussion of matters publicly revealed in court "is a prior restraint which cannot

be upheld without supporting findings"). In this case, and to protect these interests in similar cases that could arise in the future, amici urge this Court to emphasize that the First Amendment protects public access to and commentary regarding summary judgment records, as well as the right of litigants to comment thereon.

CONCLUSION

The lower court's order granting Quinn's motion for a protective order and sanctioning plaintiffs' counsel should be reversed.

Respectfully submitted,

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Dated: October 28, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,814 words, excluding the parts of the brief exempted by Rule 32(f).

/s/ Mark P. Fancher
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CERTIFICATE OF SERVICE

On October 28, 2020, I caused this brief to be filed electronically using the Court's electronic filing system which will serve electronic notice of this filing to all counsel of record.

/s/ Mark P. Fancher
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