IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-00138-RM-MLC

TAMMY HOLLAND,

Plaintiff,

v.

WAYNE W. WILLIAMS, in his official capacity as Colorado Secretary of State,

Defendant.

OBJECTIONS TO MOTION TO RESTRICT PUBLIC ACCESS

Eugene Volokh
Scott & Cyan Banister
First Amendment Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
Telephone: (310) 206-3926
Facsimile: (310) 206-7010
E-mail: volokh@law.ucla.edu

Counsel for the Institute for Free Speech and for himself

Allen Dickerson
Institute for Free Speech
124 S. West Street, Suite 201
Alexandria, Virginia 22314
(703) 894-6800
(703) 894-6811 (Fax)
adickerson@campaignfreedom.org

Interest of Objectors

The Institute for Free Speech (formerly the Center for Competitive Politics) is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. It comments often on cases related to the enforcement of campaign finance laws, and it would like to be able to effectively comment on this case.

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law and writes often on First Amendment law, both in law review articles and on his blog, formerly hosted at the Washington Post (http://washingtonpost.com/news/volokh-conspiracy) and now hosted at Reason Magazine (http://reason.com/volokh); he too would like to write about this case. He has moved to unseal court records in other cases in the past. *See, e.g.*, Decision and Order on Motion to Intervene etc., ECF No. 96, *Barrow v. Living Word Church*, No. 3:15-cv-341 (S.D. Ohio Aug. 16, 2016); Motion of Eugene Volokh to Unseal Record etc., *Bouari v. Chaney*, No. D-13-473819-D (Nev. Clark Cnty. Dist. Ct. filed Nov. 27, 2017).

Volokh was counsel for the Institute when it filed an *amicus* brief in support of plaintiff's opposition to defendant's motion to dismiss (ECF No. 40). But for purposes of these objections, he is one of the objectors (with the Institute's permission) as well as counsel to the objectors.

The Institute and Volokh file these objections to Campaign Integrity Watchdog LLC's motion to restrict access in accordance with Local Rule 7.2. *See* D.C.COLO.

LCrR Rule 7.2(d) ("Any person may file an objection to the motion to restrict no later than three court business days after posting.").

Argument

The Institute and Volokh would each like to publicly discuss any eventual decision on the motion for summary judgment in this case. As with most court decisions, that decision could only be sensibly evaluated based on the evidence that the parties offer to this Court.

This evidence includes the settlement agreements between movant Campaign Integrity Watchdog LLC (CIW) and speakers against which it has filed complaints. Indeed, the agreements are especially important evidence: Plaintiff Holland argues that the Colorado campaign finance law gravely burdens Coloradans' free speech rights, precisely because it involves private enforcement. Plaintiff's Motion to Compel Discovery from Non-Party Campaign Integrity Watchdog LLC, ECF No. 86, at 10-12. Evidence of how such enforcement has played out in concrete cases—what the private enforcers are doing, what they can pressure people to do as part of settlements, and what they offer those people in exchange—is thus likely to be particularly relevant to understanding this Court's ultimate decision.

Precisely to promote public commentary on court decisions, and public evaluation of such decisions, "[c]ourts have long recognized a common-law right of access to judicial records." *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007). "[T]here is a strong presumption in favor of public access," especially "where the district court

use[s] the sealed documents to determine litigants' substantive legal rights." *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (internal quotation marks omitted).

Indeed, federal circuit courts have recognized a First Amendment right of access to documents as well as a common-law right of access, including First Amendment and common-law rights of access to documents filed in support of a motion for summary judgment. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123-24 (2d Cir. 2006); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir. 1988). Though the Tenth Circuit has not spoken to the First Amendment question, a District Court within this circuit recently has: "Documents submitted to the court in support of a summary judgment motion fall within the First Amendment right of access . . . because 'summary judgment adjudicates substantive rights and serves as a substitute for a trial,'" and because "adjudication is a 'formal act of government' which, absent exceptional circumstances, should be subject to public scrutiny." *Angilau v. United States*, No. 2:16-00992-JED, 2017 WL 5905536, at *8 (D. Utah Nov. 29, 2017) (quoting *Rushford*, 846 F.2d at 252, and *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)).

Nor can this presumption of access be overcome in this case. "The party seeking to overcome the presumption of public access to the documents bears the burden of showing some significant interest that outweighs the presumption." *Pickard*, 733 F.3d at 1302 (citing *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011)). Indeed,

under the First Amendment right of access, any sealing "must be necessitated by a compelling government interest and narrowly tailored to serve that interest." *Rushford*, 846 F.2d at 253.

The mere presence of "explicit confidentiality provisions" in "settlement agreements" does not itself suffice to justify sealing those agreements. *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012) (denying a motion to file under seal even while "recogniz[ing] that preserving the confidentiality of settlement agreements may encourage settlement, and that denying a motion to seal may chill future settlement discussions"). And that is especially so when the agreement settles an enforcement action that is deliberately designed as a tool for enforcing a state's election laws, rather than just a normal private-law dispute between two parties.

CIW argues that restricting access to the settlement agreements is necessary to protect "CIW (and CIW's officer Matt Arnold) reputational interests" as well as "CIW's commercial viability." Motion to Restrict Public Access Under Level 1 Restriction for Documents Produced Solely Contingent to Protective Order, ECF No. 137, at 5. But letting third parties, such as the Institute, Volokh, and others, see the settlement agreements will simply facilitate factual statements (since there appears to be no doubt about the authenticity of the agreements), as well as opinions based on those statements. There is no compelling or even substantial reason to try to protect CIW's "reputation[]" and "commercial viability" from accurate reports of how it has been enforcing Colorado's campaign finance laws.

CIW asserts that "Plaintiff's counsel has a demonstrated track record of harassing and attempting to damage the legitimate commercial activity of Campaign Integrity Watchdog LLC and attempting to harass and defame the reputation of its officer, Matthew Arnold." *Id.* But the public's right of access cannot be taken away because of a lawyer's supposed misbehavior, or in order to prevent hypothetical future misbehavior.

"[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). The Supreme Court so held in explaining why prior restraints on speech are presumptively unconstitutional, but the same logic applies to attempts to prevent speech by restricting public access to court documents. If CIW believes that some statements are false and defamatory, it is free to sue for defamation, or to move for sanctions if the statements were made in court documents. But it cannot suppress access to accurate information that is relevant to a motion for summary judgment, simply to prevent future criticism.

DATED: January 11, 2018

Respectfully Submitted,

By: s/ Eugene Volokh
Counsel for the Institute for Free
Speech and for himself

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, I electronically filed these Objections to Motion to Restrict Public Access with the Clerk of the U.S. District Court of the District of Colorado by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

By: s/ Eugene Volokh
Counsel for the Institute for Free Speech and for himself