IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

JOHN BAXLEY, JR.,
ERIC L. JONES,
SAMUEL STOUT,
AMBER ARNETT,
EARL EDMONDSON,
JOSHUA HALL,
DONNA WELLS-WRIGHT,
ROBERT WATSON,
HEATHER REED,
and DANNY SPIKER, JR.,
on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v. **CIVIL ACTION NO. 3:18-1526**
(Judge Chambers)

BETSY JIVIDEN, in her official capacity as Commissioner
of the West Virginia Division of Corrections and Rehabilitation and
THE WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION, and
SHELBY SEARLS, in his official capacity as
the Superintendent of Western Regional Jail and Correctional Facility,

Defendants.

MEMORANDUM IN SUPPORT OF THE AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA'S EXPEDITED MOTION TO UNSEAL COURT RECORDS

Defendant Jividen is the Commissioner of the Division of Corrections and Rehabilitation, the state public agency which oversees West Virginia's correctional facilities. Defendant's agency has refused to make public the details of its plan to prevent or manage a COVID-19 outbreak in any of the state's jails or prisons. In this case, after Plaintiffs filed an emergency motion requesting that Defendants develop and implement a plan for the prevention and management of COVID-19 in the state's correctional facilities, Defendants requested in their response to Plaintiffs' motion an Order to provide its plans to the Court under protective cover. The Court issued that Order, and the plan, the response by Plaintiffs' expert to the plan, and

Defendant's responses to the Plaintiffs' expert declaration are currently held under seal. Intervenor the American Civil Liberties Union of West Virginia (ACLU-WV) moves this Court to unseal (1) Defendants' COVID-19 response plan, (2) any responsive documents to the plan filed in this case by Plaintiffs on behalf of their expert; and (3) any responses by Defendants to the declaration made by Plaintiffs' expert. Because this motion pertains to an urgent public health concern—specifically, what, if any, policies Defendant has implemented to protect incarcerated individuals in light of COVID-19—Intervenor respectfully requests this Court expedite the deadline for responsive briefing and set, if necessary, a hearing on this matter.

I. BACKGROUND

On March 25, 2020, Plaintiffs—incarcerated individuals who filed suit in December 2018 seeking relief to ensure that proper and necessary medical care is provided in West Virginia jails—filed an emergency motion in this action requesting a preliminary injunction in light of COVID-19. Dkt. 161. The injunction, if granted, would require Defendants to "immediately develop and implement an appropriate plan for the prevention and management of COVID-19 in the State's prisons and jails, as well as order other appropriate relief to ensure that infection does not spread unabated to inmates, correctional staff, and others in [the West Virginia Division of Corrections and Rehabilitation's] custody." *Id.* On March 26, this Court entered an Order establishing deadlines for expedited briefing and set a telephonic hearing for the following week. Dkt. 165. On March 30, Defendants filed a response to Plaintiffs' motion and requested the Judge issue an order that would permit the Defendants to file its policies under seal and allow the Court to review the documents *in camera*. Dkt. 168. On April 1, the Court held a telephonic hearing and ordered Defendants to provide to the Court a copy of its COVID-19 response plan, to be filed under seal. Dkt. 176. The Order further required Plaintiffs to file a declaration, also to be held under seal, from their public health expert in response to Defendants' plan. Dkt. 179. On April 6, a hearing by video on Plaintiffs' emergency motion was held, and the Court denied Plaintiffs' request for a preliminary injunction. Dkt. 182.

Almost one month prior to the April 6 hearing, undersigned counsel in this matter submitted a request to Commissioner Jividen pursuant to the West Virginia Freedom of Information Act (FOIA), West Virginia Code Section 29B-1-1, *et seq.*, seeking the Division of Corrections and Rehabilitation's (DOCR) COVID-19 response plan. Ex. A. The DOCR declined the request, stating that its plans were "exempt from disclosure" pursuant to an exemption from West Virginia's FOIA that permits the state's correctional facilities to withhold policy directives that, if released, could endanger public safety. Ex. B.

Intervenor on April 9 filed a habeas petition with the Supreme Court of Appeals of West Virginia seeking expedited relief from the court on behalf of 39 incarcerated petitioners in danger of contracting COVID-19 if the virus were to enter the state's correctional facilities. Ex. C. Defendant Commissioner Jividen is a named respondent in that matter. *Id.*

Intervenor has filed an expedited motion to intervene and now files this motion to lift the Court's seal on the documents currently held under protective order.

II. ARGUMENT

"It is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." *Company Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 n.17 (1980), *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978), and *Media Gen. Operations v. Buchanan*, 417 F.3d 424, 428 (4th Cir. 2005)). "The right of public access springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Id.* (*citing Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004)).

The United States Court of Appeals for the Fourth Circuit, along with other federal and state courts across the country, have consistently held that the common law and the First Amendment afford the public a presumptive right of access to court hearings and court records in civil cases. *Company Doe*, 749 F.3d at 265; *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 576, 575 (4th Cir. 2004). Rulings on dispositive motions, *Company Doe*, 740 F.3d at

267, and briefs and evidence submitted in support of or in opposition to such motions, *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988), are within the ambit of the First Amendment right of public access.

The Fourth Circuit has erected both substantive and procedural protections for the application of the First Amendment right of public access to court records. On the merits, the presumption of public access is a heavy one that can be overcome only if the party seeking secrecy shows (1) that restricting access is necessary to further a compelling governmental interest; (2) that the restriction is narrowly tailored to serve that interest; and (3) that no less restrictive means are available to adequately protect that interest. See *Virginia Dep't of State Police*, 386 F.3d at 575 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)). "Even with findings adequate to support closure, the trial court must consider reasonable alternatives before access may be restricted." *In re Knight Pub. Co.*, 743 F.2d 231, 234 (4th Cir. 1984).

The Fourth Circuit has also demanded strict compliance with procedures that are designed to ensure that the public has a fair opportunity to assert its right of access and to have that right considered carefully before a seal is imposed. A court may temporarily seal the documents while the motion to seal is under consideration so that the issue is not mooted by the immediate availability of the documents. *In re Knight Pub. Co.*, 743 F.2d at 235 n.1; *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986). Before sealing more permanently, the district court must:

(1) provide reasonable notice to the public that a hearing will be conducted on a motion to restrict access;

(2) provide the public with a reasonable opportunity to object to the motion;

(3) consider less drastic alternatives to closure; and

(4) if the district court determines that restricting access is appropriate, it must support its decision with specific findings, both as to the competing interests and

as to potential alternatives, and state them on the record. *See Virginia Dep't of State Police*, 386 F.3d at 576 (4th Cir. 2004); *Ashcraft v. Conoco*, Inc., 218 F.3d 288, 302 (4th Cir. 2000).

When a district court does not observe the procedural prerequisites, the Fourth Circuit generally will remand the issue to the district court for further consideration using correct procedures and correct substantive standards. See *Under Seal v. Under Seal*, 230 F.3d 1354 (4th Cir. 2000); *In re Washington Post Co.*, 807 F.2d at 393; *Stone*, 855 F.2d at 182.

The sealing decision in this case contravened both the procedural and the substantive requirements imposed by these precedents. First, there was no advance notice to the public that the Court would consider via hearing or otherwise the sealing of (1) Defendants' response plan and explanations of any redactions to that plan; (2) Plaintiffs' expert's declaration regarding that plan; and (3) Defendants' responses to the declaration would be under consideration, and no member of the public was able to appear at the hearing on which that issue was addressed to question the need for sealing and to represent the public interest in access to that record. "The opportunity to be heard on a closure or sealing motion is the "central requirement." *In re South Carolina Press Ass'n*, 946 F.2d 1037, 1039–40 (4th Cir. 1991). Second, the Court has never stated in a publicly available written ruling specific reasons why the documents were sealed outside of general public safety concerns. Thus, for procedural reasons alone, the sealing orders must be vacated.

In addition, the order should be vacated and the seal lifted for lack of sufficient justification for sealing. As the Fourth Circuit has held, the First Amendment guarantees public access to "a district court's decision ruling . . . and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible." *Company Doe*, 749 F.3d at 267. Here, the records under seal involve the Defendants' plans to protect incarcerated individuals and correctional facility employees against the risk of contracting COVID-19.

The District Court in the Northern District of West Virginia in January of this year granted a motion by non-profit intervenors seeking to unseal court records. In doing so, the Court noted that:

> [T]he First Amendment provides a strong presumption favoring the public's right of access to court documents. *Rosenfeld v. Montgomery Cty. Pub. Sch.*, 25 F. App'x 123, 132 (4th Cir. 2001). This right "applies to documents submitted in support of summary judgment motions in civil cases [and] *requires a showing that the denial of access is necessitated by a compelling government interest and is narrowly tailored to serve that interest* in order to justify the sealing of documents. *Id.*

See Order Granting Mot. Intervene, Granting Mot. Unseal Recs., and Unsealing Two Docs., *Hosaflook v. Ocwen Loan Serv'g.*, 1:17-cv-00028-IMK (filed Jan. 20, 2020), attached to this memorandum as Exhibit D.

Here, movant has a similar interest in access to the records, and as in *Hosaflook* and other cases, the Defendants must provide a showing that the denial of access is necessitated by a compelling government interest and is narrowly tailored to serve that interest.

These records are of serious interest to intervenor and its members for two reasons: (1) intervenor participates in ongoing advocacy for the fair treatment of the incarcerated, and (2) intervenor this week filed a habeas petition in the Supreme Court of Appeals of West Virginia on behalf of 39 incarcerated individuals at risk of contracting COVID-19 if an outbreak occurs in any of the state's correctional facilities. The records are also of interest to the public, particularly to the loved ones of those incarcerated.

The sealed records would help the public understand how the DOCR is addressing the threat of COVID-19 with regards to the state's correctional facilities, and it would allow advocates like intervenor to ensure that the agency's own policy directives are being complied with throughout West Virginia's prisons and jails.

Even if the records were properly sealed, it does not appear that Defendants have offered any substantive, specific explanation that would justify the sealing of those documents, much less one that is narrowly tailored to support a compelling government interest.

Defendants in their brief first argued against providing the documents, simply stating that "[f]or security and public safety reasons, the Policy Directive related to the COVID-19 pandemic is confidential . . . ." Dkt. 168 at 2. Although Defendants' briefing provided that an expert would be made available to the Court to explain security interests at the hearing on the motion, *id.* at 17, the telephonic hearing was not open to the public, and intervenor—as well as any other outside interested individuals or organizations not made party to the matter—does not know the substance of what statements were made, if any, to further justify the sealing of the record.

As the Fourth Circuit held in *Company Doe v. Public Citizen*, evidence, not just briefing, is required to justify sealing:

> Company Doe does not point us to any evidence that buttresses the district court's conclusion. After scouring the record on appeal, we find no credible evidence to support Company Doe's fear that disclosure of the challenged report of harm and the facts of this case would subject it to reputational or economic injury . . .. This Court has never permitted wholesale sealing of documents based upon unsubstantiated or speculative claims of harm. 749 F.3d at 270. *See also United States ex rel. Thomas v. Duke Univ.*, 2018 WL 4211375, *5 (M.D.N.C. Sept. 4, 2018) ("Statements in a brief are not evidence and are insufficient to justify a motion to seal."); *Qayumi v. Duke Univ.*, 2018 WL 2025664, *2 (M.D.N.C. May 1, 2018) (citing *INS v. Phinpathya*, 464 U.S. 183, 188 n. 6 (1984)).

Company Doe, 749 F.3d 246 at 270.

"[T]he mere fact that a court document was previously sealed does not suggest that it should remain sealed permanently." *Topiwala v. Wessell*, 2014 WL 2574504, *3 (D. Md. June 5, 2014) (citing–*Am. Discovery Grp. v. Atl. Mut. Ins.*, 203 F.3d 291, 303 (4th Cir. 2000). Because the public was not given notice that the Court would consider holding Defendants' response plan, and the associated filings, under seal, and because Defendants never submitted any

evidence on the record in support of the request for sealing of these documents, the records should be unsealed in their entirety.

III. CONCLUSION

The motion of the American Civil Liberties Union of West Virginia to unseal the documents should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA FOUNDATION

/s/ Loree Stark
Loree Stark
West Virginia Bar No. 12936
WV Bar No. 12936
ACLU of West Virginia Foundation
P.O. Box 3952
Charleston, WV 25339-3952
(914) 393-4614 / (304) 345-0207 (f)
lstark@acluwv.org

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

JOHN BAXLEY, JR.,
ERIC L. JONES,
SAMUEL STOUT,
AMBER ARNETT,
EARL EDMONDSON,
JOSHUA HALL,
DONNA WELLS-WRIGHT,
ROBERT WATSON,
HEATHER REED,
and DANNY SPIKER, JR.,
on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v. **CIVIL ACTION NO. 3:18-1526**
(Judge Chambers)

BETSY JIVIDEN, in her official capacity as Commissioner
of the West Virginia Division of Corrections and Rehabilitation and
THE WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION, and
SHELBY SEARLS, in his official capacity as
the Superintendent of Western Regional Jail and Correctional Facility,

Defendants.

CERTIFICATE OF SERVICE

I, Loree Stark, do hereby certify that on this 10th day of April, 2020, I electronically filed a true and exact copy of ***Memorandum in Support of American Civil Liberties Union of West Virginia's Expedited Motion to Unseal Court Records*** with the Clerk of Court and all parties represented by counsel using the CM/ECF System.

/s/ Loree Stark
West Virginia Bar No. 12936