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6 Phoenix Newspapers, Inc.

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 JANE DOE #1; JANE DOE #2; NORLAN
10 FLORES, on behalf of themselves and all
others similarly situated,

11 Plaintiffs,

12 vs.

13 Jeh Johnson, Secretary, United States
14 Department of Homeland Security, in his
official capacity; R. Gil Kerlikowske,
15 Commissioner, United States Customs &
16 Border Protection, in his official capacity;
Michael J. Fisher, Chief of the United States
17 Border Patrol, in his official capacity; Jeffrey
Self, Commander, Arizona Joint Field
18 Command, in his official capacity; Manuel
Padilla, Jr., Chief Patrol Agent-Tucson Sector,
19 in his official capacity,

20 Defendants.
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) NO. CV-15-00250-TUC-DCB

)
) **MOTION OF PHOENIX**
) **NEWSPAPERS, INC. TO**
) **INTERVENE FOR THE LIMITED**
) **PURPOSE OF OPPOSING**
) **DEFENDANTS' MOTION TO**
) **SEAL AND SECURING AN**
) **ORDER TO UNSEAL COURT**
) **RECORDS**

) Class Action

) [Oral Argument Requested]

22 Pursuant to U.S. Const. amend. 1, Fed. R. Civ. P. 24, and binding Ninth
23 Circuit precedent, Phoenix Newspapers, Inc. ("PNI"), which publishes *The Arizona*
24 *Republic* and azcentral.com, respectfully moves to intervene for the limited purpose of
25 opposing Defendants' Motion to Seal Documents (ECF 101) and securing an order to
26 unseal basic court records in this certified class action – more specifically, Plaintiffs'
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1 Motion for Preliminary Injunction and its accompanying Declarations and Exhibits (the
2 “Records”).

3 Preliminary Statement

4 PNI seeks leave to intervene in this case to protect the public’s right to
5 inspect court filings at the heart of an ongoing civil dispute of acute public concern. That
6 dispute involves serious allegations of inhumane and punitive conditions at U.S. Customs
7 and Border Protection facilities within the Tucson Sector of the Border Patrol. By this
8 Motion, PNI, as the largest-circulation daily newspaper in Arizona, submits that its
9 intervention will shed light on the substantial public interest in unsealing these Records.
10 Both in print and online, PNI has extensively covered and published news relating to
11 immigration and detention issues at the Arizona-Mexico border.¹ Its ability not only to
12 monitor these court proceedings but also to cover the underlying issues of legitimate
13 concern is impaired by Defendants’ attempts to seal these Records from public view.

14 The public has a strong First Amendment and common-law right to inspect
15 civil court records and attend courtroom proceedings. *See, e.g., NBC Subsidiary (KNBC-
16 TV) v. Superior Court*, 980 P.2d 337 (Cal. 1999) (recognizing First Amendment right of
17 access to civil proceedings); *San Jose Mercury News v. U.S. Dist. Court*, 187 F.3d 1096
18 (9th Cir. 1999) (recognizing public’s common-law right of access to civil court records).
19 Here, the public has an undeniable interest in monitoring a civil case concerning (1) the
20 allegedly inhumane conditions experienced by civil border detainees lodged in
21 government facilities, and (2) whether such persons have the right to injunctive relief for

22 ¹ *See, e.g., Daniel Gonzalez, Judge: Border Patrol destroyed videos of migrant detention*
23 *centers*, azcentral.com (Sept. 30, 2015),
24 <http://www.azcentral.com/story/news/politics/immigration/2015/09/30/judge-border-patrol-destroyed-video-recordings-detention-migrants/73057752/> ; Bob Ortega, *Border*
25 *Patrol sued over migrant detention conditions*, azcentral.com (June 10, 2015),
26 <http://www.azcentral.com/story/news/politics/immigration/2015/06/10/border-patrol-sued-migrant-detention-conditions/71019826/> ; Michael Kiefer, *First Peek: Immigrant*
27 *children flood detention center*,
28 <http://www.azcentral.com/story/news/politics/immigration/2014/06/18/arizona-immigrant-children-holding-area-tour/10780449/>

1 remediation of those conditions. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S.
 2 555, 572 (1980) (“People in an open society do not demand infallibility from their
 3 institutions, but it is difficult for them to accept what they are prohibited from
 4 observing.”). By contrast, Defendants provide no compelling reason why they should be
 5 allowed to continue to litigate this action in secret, immune from public scrutiny. *Cf.*
 6 *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in
 7 the courtroom is public property.”). Accordingly, and for the reasons explained below,
 8 PNI should be allowed to intervene for the limited purpose of opposing Defendants’
 9 Motion to Seal Documents and secure an order unsealing the court records at issue as
 10 promptly as possible.

Argument

I. PNI SHOULD BE PERMITTED TO INTERVENE FOR THE LIMITED PURPOSE OF SECURING PUBLIC ACCESS TO THE RECORDS.

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 13 Rule 24(b) of the Federal Rules of Civil Procedure permits intervention to
 14 anyone “who has a claim or defense that shares with the main action a common question
 15 of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). News organizations are routinely permitted
 16 to intervene in federal matters where a sealing order would restrict public access to court
 17 proceedings and records. *See, e.g., San Jose Mercury News*, 187 F.3d at 1100–01
 18 (reversing denial of newspaper’s motion to intervene to challenge protective order under
 19 Rule 24); *see also Press Enter. Co. v. Superior Court*, 478, U.S. 1 (1986) (recognizing
 20 newspaper’s standing to challenge sealing of criminal hearing transcript); *Phoenix*
 21 *Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940 (9th Cir. 1998) (recognizing standing
 22 for press to challenge closure).

23 Here, a sealing order undermines the public’s ability to monitor this case,
 24 which addresses the issues of border security and humane governmental treatment of civil
 25 border detainees, both of which are topics of public concern. *See, e.g., Godbehere v.*
 26 *Phoenix Newspapers, Inc.*, 783 P.2d 781, 789 (Ariz. 1989). Given PNI’s abiding interest
 27 in reporting news to the public in general, and its demonstrable interest in reporting
 28 information about these issues in particular, intervention should be permitted. *See San*

1 *Jose Mercury News*, 187 F.3d at 1103; *cf. United States v. Loughner*, 769 F. Supp. 2d
2 1188, 1189 (D. Ariz. 2011) (allowing intervention by media to advocate unsealing of
3 search warrants).

4 **II. PNI AND THE PUBLIC HAVE A FIRST AMENDMENT AND COMMON-
5 LAW RIGHT OF ACCESS TO THESE RECORDS AND PROCEEDINGS.**

6 The press and public have a general right to inspect and copy judicial
7 records and documents, including in civil cases. *Kamakana v. City & Cnty. of Honolulu*,
8 447 F.3d 1172, 1178 (9th Cir. 2006). That right, which has origins in both common law
9 and the First Amendment, “is ‘necessary to the enjoyment’ of the right to free speech.”
10 *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786–87 (9th Cir. 2014) (quoting *Globe
11 Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982)). Where a case does not
12 concern “traditionally secret” materials, such as grand-jury transcripts, “a strong
13 presumption in favor of access is the starting point.” *Kamakana*, 447 F.3d at 1178
14 (quotation marks and citations omitted); *see also Mendez v. City of Gardena*, No. 13-cv-
15 9042 (C.D. Cal. July 14, 2015) (granting request to unseal video depicting police
16 shooting during traffic stop).

17 The Ninth Circuit has recently clarified that where motions and
18 accompanying materials are “more than tangentially related to the underlying cause of
19 action,” a party must demonstrate “compelling reasons,” rather than merely “good
20 cause,” to seal the documents at issue. *The Center for Auto Safety v. Chrysler Group,
21 LLC*, No. 15-55084, at 20, filed Jan. 11, 2016, [http://cdn.ca9.uscourts.gov/
22 datastore/opinions/2016/01/11/15-55084.pdf](http://cdn.ca9.uscourts.gov/datastore/opinions/2016/01/11/15-55084.pdf) (reversing order applying “good cause”
23 standard to motion to unseal documents accompanying motion for preliminary
24 injunction). Even once a party has identified such reasons, the court must
25 “conscientiously balance[] the competing interests of the public and the party who seeks
26 to keep certain judicial records secret.” *Kamakana*, 447 F.3d at 1179 (quotation marks
27 and citations omitted). In general, ‘compelling reasons’ that could outweigh the public's
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1 interest in disclosure and justify sealing court records are rare, found only when the files
2 could be used for some palpably improper purpose. *Id.*²

3 Here, Plaintiffs' Motion for a Preliminary Injunction is "more than
4 tangentially related to the underlying cause of action," because it directly touches upon
5 the ultimate merits of whether Plaintiffs will be entitled to final relief. Based on the
6 limited description of the declarations and exhibits at issue in the court file, PNI expects
7 that those documents will be used as prima facie evidence of the constitutional and
8 statutory violations alleged by Plaintiffs. Indeed, they seem directly related to the
9 underlying cause of action against these governmental Defendants. As a result,
10 Defendants must demonstrate "compelling reasons" to seal the documents at issue. No
11 such reasons exist.

12 Defendants have identified three purported justifications for sealing the
13 records at issue: (1) release of the photographs and videos would violate the privacy
14 rights of the depicted detainees; (2) release of certain documents would allow unsavory
15 individuals to escape from, gain access to, or otherwise manipulate Border Patrol
16 facilities; and (3) release of certain documents would impact the privacy rights of
17 identified Border Patrol agents. In Plaintiffs' Opposition to Defendants' Motion to Seal
18 (ECF No. 109), they represent that all identifying information that could implicate the
19 privacy rights of individual detainees, along with all data that could pose an imminent
20 threat to security conditions at the Border Facility and much of the data pertaining to
21 individual Border Patrol officers, has been redacted. *See* Dkt. No. 109, filed Jan. 4, 2016,
22 at 6–13. Because PNI does not yet have access to the redacted or unredacted versions of

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24 ² In addition to recently clarifying the *Kamikana* standard, the Ninth Circuit has issued a
25 Standing Order, effective February 1, 2016, that further reflects the Court's concern for
26 judicial transparency. *See* Notice of the Court's Adoption of the Following Standing
27 Order, Office of the Clerk, *available at* [http://cdn.ca9.uscourts.gov/datastore
28 /general/2016/01/27/standing_order_re_sealed_excerpts.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2016/01/27/standing_order_re_sealed_excerpts.pdf). The new standing order
provides that excerpts of record may no longer be filed under seal in their entirety, and
that parties must instead file items they wish to designate as sealed in a separate volume.
The standing order also "clarifies its presumption that all hearings will be open to the
public absent an express order from this Court to the contrary." *Id.*

1 the documents at issue, it is not positioned to evaluate the relative merits of those claims.
2 Nonetheless, Plaintiffs appear to have made strong arguments that whatever concerns
3 Defendants have raised are mitigated if not satisfied entirely by way of redaction.

4 What Defendants cannot dispute is that this case presents a matter of public
5 concern in Arizona and indeed nationally because it involves the allegedly inhumane
6 conditions experienced by numerous civil border detainees who are or will be housed at a
7 Tucson Border Patrol Station. Ample case law documents the public's strong interest in
8 monitoring civil cases that implicate the conduct of law enforcement. *See, e.g.,*
9 *Godbehere*, 162 Ariz. at 343, 783 P.2d at 789 (“It is difficult to conceive of an area of
10 greater public interest than law enforcement. Certainly the public has a legitimate
11 interest in the manner in which law enforcement officers perform their duties.”); *Lissner*
12 *v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) (recognizing public interest in
13 Customs Service's performance of official duties); *Gregory v. City of Vallejo*, No. 13-cv-
14 00320, 2014 WL 4187365, at *3–4 (E.D. Cal. Aug. 21, 2014) (denying motion to seal
15 police personnel records); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293,
16 1302 (N.D. Cal. 1995) (disclosure proper because “[t]he public has a strong interest in
17 assessing the truthfulness of allegations of official misconduct” and “[m]isconduct by
18 individual officers, incompetent internal investigations, or questionable supervisory
19 practices must be exposed”); *Soto v. City of Concord*, 162 F.R.D. 603, 621 (N.D. Cal.
20 1995) (disclosure proper due to “strong public interest in uncovering civil rights
21 violations and enhancing public confidence in the justice system”). The public interest is
22 heightened here given the ongoing public debate about immigration and border security
23 in a presidential election year, and any redaction of these Records should err on the side
24 of openness and transparency.

25 The United States Supreme Court has long recognized that swift judicial
26 action is required when restriction of First Amendment rights is at issue. *See Elrod v.*
27 *Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even
28 minimal periods of time, unquestionably constitutes irreparable injury.”) (citing *New*

1 *York Times Co. v. United States*, 403 U.S. 713 (1971)) (emphasis added); *In re Charlotte*
2 *Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (holding that even “minimal delay” is
3 fundamentally at odds with First Amendment right of access); *In re Cont’l Ill. Sec. Litig.*,
4 732 F. 2d 1302, 1310 (7th Cir. 1984) (the presumption of access normally involves “a
5 right of *contemporaneous* access”) (emphasis added). Based on the public record, it
6 seems these Defendants have gone to great lengths to conceal these Records, or at least to
7 delay and frustrate the public’s right of access to them, for as long as possible. The law
8 does not countenance such conduct, especially by government officials acting in their
9 official capacities.

10 Because Defendants fail to cite “compelling reasons” to justify sealing of
11 the materials at issue, *Center for Auto Safety*, at 20, and because the balancing of interests
12 favors PNI’s presumptive right to access materials of legitimate public concern, the Court
13 should grant PNI’s Motion, deny Defendants’ Motion to Seal Documents and unseal
14 these Records as expeditiously as possible.

15 Conclusion

16 For the foregoing reasons, PNI’s Motion for Leave to Intervene for the
17 Limited Purpose of Opposing Defendants’ Motion to Seal Documents and Securing an
18 Order to Unseal the Records should be granted, and Defendants’ Motion to Seal
19 Documents should be denied.

20 RESPECTFULLY SUBMITTED this 28th day of January, 2016.

21 BALLARD SPAHR LLP

22
23 By: s/ David J. Bodney _____

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28 Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically transmitted the attached document to the clerk's office using the CM/ECF system for filing and transmittal of a notice of electronic filing to all CM/ECF registrants, and mailed a copy of same to any parties, if non-registrants, this 28th day of January, 2016.

s/ Dawn Archambo

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