IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, *et al.*, on behalf of themselves and all others similarly situated, Plaintiffs, v. KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas, *et al.*, Defendants.	)	Case No. 16-2105-JAR-JPO

PLAINTIFFS' RESPONSE TO MOTION TO ENFORCE PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION, OR IN THE ALTERNATIVE, MODIFICATION

Plaintiffs submit the following in response to Defendant's Motion to Enforce Protective Order, ECF No. 560, and hereby move for clarification from the Court regarding the status of the excerpts of the videotaped deposition of Secretary Kobach played at trial (the "Tape"). In seeking to block Plaintiffs from providing the Tape in response to media requests, Defendant has misconstrued the record and is wrong on the law. Plaintiffs respectfully request clarification from the Court so that there is no confusion as to their legal obligations regarding Defendant's assertions as to the Tape's confidentiality. Plaintiffs' understanding is that the Tape is not shielded for multiple reasons.

First, the Tape is not covered by the Protective Order, which does not apply to evidence introduced at trial under the express terms of the agreement. The Tape was entered into the record unsealed and played in open court in full view of the public. If Defendant at that time

sought to preserve the Tape's confidentiality, it was incumbent on him to seek to close the courtroom before the Tape was admitted. He did not; and he therefore no longer has a protectable interest in confidentiality with respect to the Tape.

Second, although the Tape is not a public record on the Court's docket, and thus not retained by the Court, that fact does not prohibit Plaintiffs from disclosing it. At Defendant's request, the Court confirmed at trial that the Tape would not be maintained as a record in the Court's possession; it would be returned to the parties at close of trial. But that ruling simply means that *the Court* will not disseminate the Tape if a third-party intervenes to request it. It does not render the Tape confidential, particularly given that it was played in open court directly thereafter. Nor does it prejudice Plaintiffs' constitutionally protected right to provide the Tape to the media after it was admitted into evidence and played in public. Defendant has not attempted to meet the very high standard for restraining disclosure of evidence admitted at a public trial. His motion should therefore be denied.

STATEMENT OF FACTS

1. On March 29, 2016, Judge O'Hara entered a Protective Order intended to govern disclosure of confidential information during discovery in this lawsuit. ECF No. 55 at 1. The Protective Order provided that designated categories of information, should not be disclosed publicly but must be restricted to the Court, the parties, the parties' counsel, and their agents. *Id.* at 3-6. The Order further stated: "Nothing in this Order will be construed to affect the use of any document, material, or information at any trial or hearing." *Id.* at 8.

2. On April 17, 2017, Judge O'Hara granted a motion to compel production of documents responsive to Plaintiffs' discovery request seeking documents and communications related to potential amendments to the National Voter Registration Act. ECF No. 320 at 1-2.

3. On May 22, 2017, Plaintiffs filed a motion for sanctions seeking, *inter alia*, to take the deposition of Secretary Kobach regarding issues related to the previously withheld documents. ECF No. 343 at 1-3. Plaintiffs agreed that the deposition could be subject to "an initial confidentiality designation." ECF No. 354 at 22.

4. On May 23, 2017, Judge O'Hara granted Plaintiffs' request to take Secretary Kobach's deposition. ECF No. 355 at 23. The Court noted that "[a]s agreed to by plaintiffs, all testimony at the deposition will be subject to the confidentiality provisions of the protective order" but cautioned that "this protection doesn't indicate that the testimony is likely to be sealed if any party later seeks to file it in support of a dispositive motion." *Id.* at 23-24 & n.82.

5. A videotape deposition of Secretary Kobach was ultimately taken on August 3, 2017. ECF No. 381. On the day of the deposition, Defendant raised objections to the videotape format of the deposition. Judge O'Hara heard argument from the parties and overruled Defendant's objections, permitting the deposition to be videotaped. ECF No. 361. Defendant has not filed timely objections to Judge O'Hara's order under Fed. R. Civ. P. 72.

6. In advance of trial, on January 30, 2018, Plaintiffs designated "portions of the videotaped deposition of Kris Kobach to be used at the trial" as part of their pretrial disclosures. ECF No. 440.

7. Defendant filed a motion in limine objecting to the introduction of the Tape on relevancy grounds. ECF No. 463 at 1. Defendant offered counter-designations to include in the testimony in case his relevancy objections were overruled. ECF No. 464. Defendant did not raise any concerns regarding confidentiality.

8. At trial, the Court overruled Defendant's motion in limine, concluding that Defendant's deposition testimony was relevant. ECF No. 503 at 286:22-288:5.

9. On the second day of trial, Defendant requested that the deposition be read by counsel instead of being played in court. ECF No. 504 at 315:5-9. The Court denied the request, ruling "it's a video deposition. It's going to come in by video." ECF No. 504 at 319:12-13.

10. On the fourth day of the trial, Defendant argued that the Tape itself "is not an exhibit, therefore it is not a judicial record that can be publicly available after the trial." ECF No. 509 at 1193:9-11. After a colloquy with Defendant, the Court stated that the Tape would be admitted as an exhibit but agreed that it would not be maintained as a judicial record: "the question here now is, does [the Tape] become-- unlike any other exhibit, does it become part of the public docket? It does not." ECF No. 509 at 1195:8-10. Defendant noted that certain portions of the testimony to be played in court still remained under seal on the court docket in connection with the parties' previously filed summary judgment motions. The Court responded: "But they're no longer under seal. . . . my order *in limine* resolved that. They're no longer under seal . . . with respect to those portions that plaintiff has designated and you have counter-designated. I understand you have a continuing objection. You object to the video at all, but you also counter-designated. So those portions which I think is what's going to be played are no longer under seal." ECF No. 509 at 1196:1-11.

11. The Tape was played in open court with members of the public and the media in attendance. ECF No. 509 at 1200:24-25; KCUR Letter, attached to Danjuma Decl. as Ex. A; Pro Publica Letter, attached to Danjuma Decl. as Ex. B.

12. The Tape was then publicly admitted into evidence. The Court noted, "Exhibit 148, the video deposition is admitted, but it can be-- it will be withdrawn at the close of the trial. And for purposes of the record, the written transcript of this will be part . . . of the trial transcript but not the actual tape itself." ECF No. 509 at 1202:4-10.

13. Since the close of trial, Plaintiffs' counsel have received multiple requests from journalists and media entities for copies of the Tape. Danjuma Decl.; Ex. A, KCUR Letter; Ex. B, Pro Publica Letter; Smith Decl. attached to Danjuma Decl. as Ex. C. Some members of the media could not attend trial at the evening time when the Tape was played, Danjuma Decl. ¶ 3, while other viewed testimony and state that there is a strong public interest in publishing and reporting on the video testimony as opposed to the transcript of the proceedings. Ex. A, KCUR Letter; Ex. B, Pro Publica Letter.

14. On September 10, 2018, Plaintiffs sent a letter to Defendant stating their position that they had a legally protected right to distribute the Tape in response to media requests and requesting that Defendant respond with any objections. Sept. 10 Letter to Def., attached to Danjuma Decl. as Ex. D.

15. The parties met and conferred on September 14 and could not reach agreement about the legal status of the Tape. Plaintiffs advised Defendant that they would likely file a motion to clarify with the Court. Defendant's Motion to Enforce Protective Order followed later that evening. ECF No. 560.

16. Neither Plaintiffs nor Plaintiffs' counsel have distributed or disclosed the Tape, with the exceptions of submitting it to the Court, and playing it during the trial in this case.

ARGUMENT

I. Defendant's Motion to Enforce the Protective Order Should Be Denied Because Plaintiffs Have Not Disclosed the Tape Outside of the Trial.

As explained below, Defendant is incorrect as to whether Plaintiffs may disclose the Tape, which was filed as an exhibit, played in open court, is not under seal, and is not subject to a protective order. But as a threshold matter, Defendant's motion should be denied because neither Plaintiffs nor their counsel have disclosed the Tape. Defendant is not entitled to enforce

the Protective Order, because, even assuming *arguendo* that he were correct about the confidential status of the Tape—and, as explained, *infra*, he is not—it is not the case that that Plaintiffs have "ignored . . . the Protective Order in this case" or have "shown blatant disregard for this Court's rulings" regarding the Tape. ECF No. 561 at 1.

To the contrary, Plaintiffs notified Defendant in advance to determine his position on the Tape's disclosure, and, once Defendant indicated that he objects, stated their intention to seek clarification from the Court as to the Tape's status. There is no basis for any argument that the Protective Order has been violated.

II. Plaintiffs Have a First Amendment Right to Disclose Evidence Admitted at a Public Trial.

Defendant's motion squarely implicates the First Amendment. "[P]arties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order." *Oklahoma Hosp. Ass'n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984). The Supreme Court has held that "[i]t is, of course, clear that information obtained through civil discovery . . . would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984)

As Defendant notes, courts can issue protective orders that restrict parties' dissemination of discovery materials without infringing First Amendment rights. ECF No. 561 at 4. But that is if the protective order is limited to *restrictions on pretrial discovery*—not to materials admitted into evidence at trial. As the Court held in *Seattle Times*, when "a protective order is entered on a showing of good cause as required by Rule 26(c) [and] *is limited to the context of pretrial civil discovery*, . . . it does not offend the First Amendment." 467 U.S. at 37 (emphasis added). The Court observed that "pretrial depositions and interrogatories . . . were not open to the public at

common law" and "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." *Id*. at 33. "Therefore," the Court concluded, "restraints placed on *discovered, but not yet admitted*, information are not a restriction on a traditionally public source of information" and "an order prohibiting dissemination of discovered information *before trial* is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id*. (emphases added).

The Tape's status is now far beyond "the context of pretrial civil discovery." *Id.* at 37. The Tape was deemed relevant and admissible, ECF No. 503 at 286:22–288:5, admitted into evidence, ECF No. 509 at 1202:4-10, and played publicly in open court during trial, *id.* at 1200:24-25. Trial proceedings are the paradigmatic "traditionally public source of information," *Seattle Times*, 467 U.S. at 33, and the playing of the Tape was, in fact, public. It was not admitted under seal or otherwise shielded from public viewing at trial. Defendant cites various district court decisions where protective orders were entered over a party's objections. ECF No. 561 at 4-6. But these opinions are inapposite because they were all issued in the context of *pretrial discovery*.

Poliquin v. Garden Way, Inc., 989 F.2d 527 (1st Cir. 1993) provides an instructive case on point. In *Poliquin*, the plaintiffs sought to distribute to third-party plaintiffs a videotape deposition which was admitted and played at trial even though it contained information the defendant asserted was "highly confidential and proprietary[.]" *Id*. at 530, 534 (internal quotation marks and citation omitted). *Poliquin* approved the plaintiffs' right to distribute the videotape and held that the applicable standard was "that only the most compelling showing can justify *post-trial restriction on disclosure* of testimony or documents actually introduced at trial."

Id. at 533 (emphasis added); *see also id*. (rejecting "good cause" standard for restricting disclosure of discovery material "after it has been introduced at trial").

The same standard applies here. Because Defendant's post-adjudication motion seeks to "prohibit[Plaintiffs'] dissemination of discovered information" that was admitted and made public at trial, it is precisely "the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Seattle Times*, 467 U.S. at 33.

III. The Tape Is No Longer Confidential Nor Subject to the Protective Order.

In contending that the Tape "remains both sealed and confidential under the March 29, 2016 protective order," ECF No. 561 at 3, Defendant has misinterpreted the Order and the record in this case.

First, the Tape is no longer governed by the Protective Order because it was introduced at trial. By its express terms, the Protective Order does not cover trial evidence. Subheading 9 provides that, "[n]othing in this Order will be construed to affect the use of any document, material, or information at any trial or hearing." ECF No. 55 at 8. As discussed above, protective orders must be "limited to the context of pretrial civil discovery" to avoid implicating the First Amendment. *Seattle Times*, 467 U.S. at 37.[1] The Protective Order therefore leaves it to the parties to advise the court if they "intend[] to present . . . [or] anticipat[e] that another party may present Confidential Information" and then defers to the Court to "make such orders as are necessary to govern the use of such documents or information at the hearing or trial." ECF No. 55 at 8.

[1] To be clear, a protective order may remain in effect post-adjudication in order to restrict dissemination of confidential discovery materials that were never actually admitted at trial. *See* ECF No. 55 at 8 (Protective Order "will remain in effect and continue to be binding after conclusion of the litigation").

Second, Plaintiffs identified the Tape in advance of trial but Defendant never sought for it to be admitted under seal in a closed court session. In January 2018, Plaintiffs designated "portions of the videotaped deposition of Kris Kobach to be used at the trial" as part of their pretrial disclosures. ECF No. 440. Defendant subsequently raised a series of objections, beginning with a motion in limine opposing admission of the Tape on the basis of relevance and offered counter-designations in case his relevance objections were overruled. ECF Nos. 463, 464. After the Court rejected his motion in limine, Defendant next sought for the transcript to be read by counsel in court rather than played in its original format. ECF No. 504 at 315:5-9. The Court denied that request, ruling "it's a video deposition. It's going to come in by video." *Id.* at 319:12-13. When the Tape was later played, Defendant argued that the Tape itself "is not an exhibit, therefore it is not a judicial record that can be publicly available after the trial." ECF No. 509 at 1193:9-11. Throughout these objections, Defendant never raised the issue of the Tape's confidentiality, asked for it to be admitted under seal, or to close the courtroom to the public.[2]

Third, the Tape was admitted publicly and played in open court, which extinguishes Defendant's claim of confidentiality. ECF No. 509 at 1200:24-25, 1202:4-10. Federal courts

[2] If he had done so, Plaintiffs certainly would have objected as the standard is very high and there is no indication Defendant could have met it. *See Mike v Dymon, Inc.*, No. CIV.A. 95-2405-EEO, 1997 WL 38111, at *1 (D. Kan. Jan. 23, 1997) ("Requests to exclude the public from trial of a case or parts thereof are granted only in extraordinary circumstances."); *see also Holland v. GMAC Mortg. Corp.*, No. 03-2666-CM, 2004 WL 1534179, at *2 (D. Kan. June 30, 2004) (rejecting protective order that would have excluded individuals not authorized to view confidential discovery materials from trial or hearing where such materials would be presented); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) ("[T]o limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."); *Adams v. City of New York*, 993 F. Supp. 2d 306, 314 (E.D.N.Y. 2014) (outlining stringent "four-factor test" in order "to close a courtroom"). The Court never made any findings that Defendant had satisfied these stringent requirements because Defendant never sought a closed court session.

have repeatedly found that the public introduction of evidence at trial removes a party's interest in confidentiality. "It is well established that the release of information in open court is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its future use." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (internal quotation marks and citation omitted).[3] In *Littlejohn*, the court held that because exhibits were admitted at trial "absent a seal," the defendant "could no longer have reasonably relied on the confidentiality accorded under the [Protective Order]." 851 F.2d at 681, n.17.

Similarly, in *Benedict v. Hankook Tire Co. Ltd*., the court held, "if no effort is made to prevent dissemination of confidential information at trial, the right to claim that trial materials containing that information should be sealed is waived . . . even if previous sealing or protective orders covered the materials or information at issue." No. 3:17-CV-109, 2018 WL 3014797, at *11 (E.D. Va. June 15, 2018). The *Benedict* court found that "[t]he waiver doctrine is clearly implicated" because the defendants "did not ask that the courtroom be closed" nor "that observers be ordered not to reveal what they heard[.]" *Id*.; *see also id*. at *7 (collecting cases where party waived confidentiality via admission of evidence in open court).

Here, the Court admitted the Tape into the record unsealed.[4] *See* ECF No. 509 at 1202:4–1. Members of the public were present and viewed the Tape, including some members

[3] *See also Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (noting, in denying motion to seal, that "much of the information [proposed to be sealed] . . . appears to have been disclosed previously in the public probate court proceedings, further undermining [movant's] privacy concerns."); *Flohrs v. Eli Lilly & Co.*, No. 12-2439-SAC, 2013 WL 4773515, at *2 (D. Kan. Sept. 4, 2013) ("Matters already made public 'will not be sealed after the fact absent extraordinary circumstances.'" (citation omitted)).

[4] Even where parties are in full agreement, they cannot consent to the sealing of evidence; the Court must enter an order admitting materials under seal. *See, e.g.*, ECF No. 60; D. Kan. Rule 5.4.6. There was no order admitting the Tape under seal because Defendant never asked for one.

of the media who were able to attend trial that evening. Ex. A, KCUR Letter; Ex. B, Pro Publica Letter. By not moving to close the courtroom and failing to assert a confidentiality interest in advance, Defendant relinquished any such interest. "Once [videotape] evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction." *Appl. of Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980); *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("however confidential [the material] may have been beforehand, subsequent to publication it was confidential no longer. . . . We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again."). Because the Protective Order expressly does not apply to trial evidence and because the Tape was entered into evidence and publicly played, Plaintiffs "have a constitutionally protected right to disseminate" it. *Oklahoma Hosp.*, 748 F.2d at 1424.

IV. Plaintiffs Have an Independent Right to Distribute the Tape Whether Or Not It Is Retained on the Court's Public Docket.

Defendant's Motion is predicated on a misunderstanding of the scope of the public access cases he relies upon. The public access cases Defendant cites do not prevent *a party from voluntarily circulating* materials in its possession that were admitted in open court.

Indeed, the Court made clear that the Tape was *not* under seal: "THE COURT: *You object to the video at all*, but you also counter-designated. So those portions which I think is *what's going to be played are no longer under seal*." ECF No. 509 at 1196:9-11 (emphasis added). If, as Defendant believes, the Court had somehow sealed the Tape *sub silentio*, then the Court would have immediately violated its own (silent) sealing order by permitting the Tape to be played in open court.

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) and *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996) concerned whether media interveners could *force a court* to produce tape recordings played at trial and retained in court custody. In *Nixon*, media interveners asserted that the district court's failure to provide "immediate access" to the tapes violated the "guarantee of freedom of the press[.]" 435 U.S. at 595, 608. The Supreme Court concluded that, under the circumstances, the right of public access did not mean that the media could *compel* a court to produce copies of the tapes. *See id*. at 609 ("[T]he issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical access*—must be made available for copying."). *McDougal* similarly concluded that media interveners could not require a district court to release videotape testimony of President Clinton that was played, but not admitted, at trial. 103 F.3d at 657.

The parties' current conflict is not a dispute over public access in the vein of *Nixon* and *McDougal*. Plaintiffs do not contend that the press have been denied access to the trial and do not seek to compel the Court to produce anything. Unlike the media interveners in *Nixon*, Plaintiffs already have "physical access" to the Tape and are asserting "a constitutionally protected right to disseminate" it after it was admitted and played in open court. *Nixon*, 435 U.S. at 609 (emphasis omitted); *Oklahoma Hosp.*, 748 F.2d at 1424. Rather, Defendant is trying to *prohibit* Plaintiffs from distributing an unsealed trial exhibit already in their possession. That is a very different proposition than the legal issue considered in *McDougal* or *Nixon*. *See Nixon*, 435 U.S. at 609 (noting that "issue presented" was whether audiotapes "*must be made available* for copying" (emphasis added)). What Defendant wants is a prior restraint. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) ("[A] prior restraint on publication [is] one of the most

extraordinary remedies known to our jurisprudence."). Defendant has done nothing to demonstrate that such an extraordinary remedy is justified.

Defendant's misunderstanding of *Nixon* and *McDougal* has caused him to misinterpret the Court's trial rulings about public access. In support of his request that the Tape "not be made publicly available," counsel for Defendant quoted *McDougal* for the proposition that "the deposition videotape itself is not a judicial record to which the common-law right of public access attaches." ECF No. 509 at 1193:6-7, 15-17. The Court stated in response, "exhibits in general are returned to the parties at the close of the trial, so I don't know that it's an issue anyway. But I agree with you, it shouldn't be a public record *for purposes of our docket*." *Id*. at 1194:4-8 (emphasis added).[5] Thus, if a third-party intervener seeks to compel the Court to produce the Tape as in *McDougal*, it will not be available to be disseminated—only the transcripts have been retained as part of the publicly available judicial record. Likewise, the Tape itself is not publicly "available for examination in the office of the clerk" and it will not be publicly disseminated by "furnish[ing] copies" under D. Kan. Rule 79.1.

This does not mean that the Court entered a broad gag order barring disclosure of the Tape by the parties in perpetuity. Whether materials are publicly available on a case docket is not equivalent to whether *a party* is precluded from disclosing it.[6] *Nixon* and *McDougal*[7] ruled

[5] Defense counsel further asked, "so the videotape itself is not available to be publicly disseminated, whereas the trial transcript that may contain the testimony is the judicial record." ECF No. 509 at 1194:15-18. The Court responded, "That's correct" and summarized: "the question here now is, does [the Tape] become-- *unlike any other exhibit, does it become part of the public docket? It does not*." *Id*. at 1194:19, 1195:8-10 (emphasis added). Ultimately, when Plaintiffs moved for admission of the Tape into evidence, the Court stated, "Exhibit 148, the video deposition is admitted, but it . . . will be withdrawn at the close of the trial. And for purposes of the record, the written transcript of this will be part . . . of the trial transcript but not the actual tape itself." *Id*. at 1202:4-10.

[6] Plaintiffs may, for instance, distribute the demonstrative slides they used at trial regardless of whether those slides are "judicial records for purposes of" the public docket.

that the press was not entitled to *compel* a court to produce a videotape played at trial. It does not follow from these decisions that Defendant is entitled to compel Plaintiff *not to* exercise their constitutional right to release a videotape admitted and played in open court. *Oklahoma Hosp.*, 748 F.2d at 1424.

V. Defendant Cannot Even Satisfy the Good Cause Standard for a Pretrial Protective Order.

Defendant's Motion should be denied for the independent reason that he has never shown good cause for a pretrial protective order in the first instance. Defendant's videotape deposition was not, of course, among the original categories of confidential information listed in the

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[7] Defendant has repeatedly relied on *McDougal* in arguing that the Tape should not be deemed a judicial record. Plaintiffs note that *McDougal*'s application within this Circuit is questionable. *Compare McDougal*, 103 F.3d at 657 ("[T]his court . . . specifically rejected the *strong* presumption standard adopted by some circuits . . . . [including] the Second, Third, Seventh, and District of Columbia Circuits . . . .") *with Mann*, 477 F.3d at 1149 (recognizing "strong presumption in favor of public access to judicial records" in Tenth Circuit). Decisions within this Circuit and from other federal courts indicate that admitted exhibits are indeed judicial records. *See United States v. McVeigh*, 918 F. Supp. 1452, 1462 (W.D. Okla. 1996) (noting that "exhibits received at hearings and trials . . . [were] included . . . within the general common law right to inspect and copy public records and documents in *Nixon*") (citing *Nixon*, 435 U.S. at 597-98) *aff'd U.S. v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997) (approving district court's ruling that exhibits admitted at suppression hearing were judicial records).

In the specific context of whether a party could disclose videotape depositions under a protective order, a District of Colorado Court held that "[p]laintiff's counsel may, of course, use video depositions that are actually admitted into evidence at trial" in order to teach private seminars "because these portions will be part of the public record." *Larson v. Am. Family Mut. Inc.*, No. 06-cv-01355-PSF-MEH, 2007 WL 622214, at *2 (D. Colo. Feb. 23, 2007); *see also United States v. Graham*, 257 F.3d 143, 152 n.5 (2d Cir. 2001) (videotapes played at bail hearing then returned to parties were judicial records because "it is common for the parties to retain custody of their own trial exhibits and . . . the tapes became public by virtue of having been played in open court."); *Littlejohn*, 851 F.2d at 681 (exhibits admitted into evidence did not "los[e] their status as judicial records when they were returned to their owner" because "[u]nder Rule 10 of the Federal Rules of Appellate Procedure . . . trial exhibits are a part of the record on appeal and items that were before the district court and then withdrawn by counsel are still considered to be a part of the record on appeal"). Since *McDougal* is already an outlier in tension with Tenth Circuit authority, Defendant should not be permitted to extend the case far beyond its actual holding as he attempts to do here.

Protective Order that Judge O'Hara entered "[f]or good cause shown under Fed. R. Civ. P. 26(c)[.]" ECF No. 55 at 2. Rather, Plaintiffs consented to "an *initial* confidentiality designation" in light of concerns Defendant had raised related to deposition logistics and questions concerning attorney-client privilege. ECF No. 354 at 22 (emphasis added). None of those concerns have materialized and Judge O'Hara himself cautioned that the confidentiality designation was only provisional: "this protection doesn't indicate that the testimony is likely to be sealed if any party later seeks to file it in support of a dispositive motion." ECF No. 355 at 23-24 & n. 82.[8] As explained *supra*, the Protective Order does not apply at all to trial evidence under the express terms of the agreement. But there is even less reason to prohibit disclosure of the Tape because courts have rejected comparable protective orders even during a case's pretrial discovery phase.

In support of his Motion, Defendant has offered cases where protective orders were entered restricting pretrial access to videotape depositions. *See* ECF No. 561 at 5-6. Beyond the fact that each of these cases were in the pretrial discovery phase, the citations are further inapposite because the protective orders were warranted because the parties sought to obtain personal commercial profits by disclosing the tapes.[9] In contrast to these cases, Plaintiffs are not

[8] From the earliest stages of the case, Judge O'Hara has cautioned the parties that material designated confidential would be unlikely to remain so if deemed relevant. At the hearing where the parties initially discussed the Protective Order with the Court, Judge O'Hara stated: "I don't want anybody on this call laboring under the misimpression that merely because a document has been stamped as confidential . . . that that will likely entitle that document to be filed under seal when it's used in a court proceeding. . . . our general operating premise is that anything that is relevant to a filing with the court is open to the public." ECF No. 46; 3/23/16 Telephonic Status Conf. Tr. at 90:25-91:12, excerpt attached to Danjuma Decl. as Ex. E.

[9] *See Am. Family Mut. Ins. v. Minor*, No. 06-cv-02288-LTB-MJW, 2007 WL 4365694, at *1 (D. Colo. Dec. 10, 2007) (video depositions of "private citizens" were "published to the general public in seminars and on television" for Defendant's "personal commercial gain"); *Drake v. Benedek Broad. Corp.*, No. CIV.A. 99-2227GTV, 2000 WL 156825, at *1 (D. Kan. Feb. 9, 2000) (pro se plaintiff sought to use videotape deposition to make "documentary . . . advertised

attempting to sell the Tape or publish it for commercial gain. Plaintiffs seek to provide it freely in response to multiple requests made by members of the media who either could not attend the playing of the Tape at trial or who have explained that the Tape would assist their reporting. Danjuma Decl. Each of the media representatives has asserted a strong public interest in accessing and reporting on the Tape in light of Defendant's status as a government official and public figure. Ex. A, KCUR Letter; Ex. B, Pro Publica Letter; Ex. C, Smith Decl.

In addition, because Defendant is an elected official, this lawsuit has attracted substantial—and entirely legitimate—public interest in the video testimony, further outweighing any good cause for entry of a pretrial order. Indeed, courts have distinguished the propriety of protective orders in cases of private commercial gain versus cases involving public officials and government affairs. For example, in *Flaherty v. Seroussi*, a district court reviewing the confidentiality of a mayor's videotape deposition evaluated the *Paisley Park* and *Drake* cases cited by Defendant and concluded they were "readily distinguishable . . . since both dealt with efforts to make commercial use of otherwise private deposition testimony." 209 F.R.D. 295, 299 (N.D.N.Y. 2001); *see also Paisley Park*, 54 F. Supp. 2d at 349 n.4 (protective orders in cases "in which the government itself is a party" should be treated differently because they fall "out[side] the category of purely private matters"). Because the case involved a public official and government affairs, the court permitted disclosure of the videotape to the media even though the "plaintiff's stated purpose in distributing [it was] to publicly embarrass Mayor Seroussi in the

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for sale at the price of $199.99"); *Paisley Park Enters., Inc. v. Uptown Prods.*, 54 F. Supp. 2d 347, 348 (S.D.N.Y. 1999) (defendant seeking video deposition of recording artist had "created an entire business based on exploiting [artist's] image and persona to their own economic benefit," raising concerns that purpose of videotape was "to generate notoriety for themselves and their business ventures[.]")

eyes of his constituents." *Flaherty*, 2019 F.R.D. at 300.[10] "[W]here issues of strong public interest favoring the free dissemination of discovery materials are at play, the normal practice of not according discovery materials the same degree of access as those filed in connection with trial gives way to a presumption of open inspection." *Id.* at 299; *see also Hawley v. Hall*, 131 F.R.D. 578, 585 (D. Nev. 1990) (rejecting sealing of depositions in civil rights case against city officials because "[t]he public interest in the conduct of public officials, elected and appointed, outweighs the minimal harms" caused by embarrassment or exposure to negative media attention).

Thus, even if this case were still in the pretrial phase—and it is far beyond that—Defendant would not satisfy the much more lenient "good cause" standard for entry of a protective order. Defendant is an elected official. His deposition includes sworn testimony regarding efforts he took to lobby to weaken federal voting rights law and push documentary proof of citizenship requirements with the President of the United States and other high officials. These are matters of clear public concern and members of the press have highlighted the continuing, strong public interest in the video testimony. Ex. A, KCUR Letter; Ex. B, Pro Publica Letter; Ex. C, Smith Decl.

CONCLUSION

For the reasons stated, the Court should deny Defendant's Motion. There is no basis for enforcing the Protective Order or granting Defendant any relief. Nonetheless, Plaintiffs submit that it would be in the best interests of all parties if the Court were to clarify its ruling as to the status of the Tape and whether Plaintiffs may produce it in response to media requests.

[10] The plaintiff's counsel had even stated to local media that he "relish[ed] the opportunity to question Mr. Seroussi about what happened here" and that he is "going to concentrate [his] efforts on knocking Mayor Seroussi's teeth down his throat." *Flaherty*, 209 F.R.D. at 298 (internal quotation marks omitted).

Finally, if Plaintiffs have misinterpreted the Court's trial ruling as to the status of the Tape, Plaintiffs respectfully request that the Court consider altering its initial ruling in light of the arguments and authorities outlined in detail *supra*. "Once a court orders documents before it sealed, the court continues to have authority to enforce its order sealing those documents, as well as authority to loosen or eliminate any restrictions on the sealed documents." *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on September 28, 2018, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

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