IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

IN THE MATTER OF THE CONSERVATION OF
NEXTLEVEL HEALTH PARTNERS, INC.

Jacqueline Stevens, Intervenor, *Pro Se*

2020 CH 04431

AMENDED MOTION TO RECONSIDER

Introduction and Argument

Pursuant to 735 ILCS 5/2-1203, Intervenor Jacqueline Stevens ("Intervenor") respectfully requests this court vacate its order of June 13, 2022 ("Order"), declare unconstitutional 215 ILCS 5/188.1 (b) (4,5) ("Privacy Provisions"), and declare public all records and hearings for *In the Matter of the Conservation of NextLevel Health Partners, Inc. (*2020 CH 04431). Reconsideration of the Order is requested on grounds of several clear legal errors; orders from other courts, including the Supreme Court, materially relevant to the controversies in this case released after briefing; and, new evidence. *People v. Anderson*, 112 Ill.2d 39 (1986). ("An abuse of discretion will be found only if the judgment of the trial court is manifestly unjust or palpably erroneous. *In re Marriage of Batchelor* (1980), 89 Ill. App.3d 781, 783; *In re Marriage of Poston* (1979), 77 Ill. App.3d 689.) The court orders of June 13, 2022 and July 18, 2022 disregard prevailing case law Intervenor cited in her motions, including on the presumption of access to court records under common law and the First Amendment, especially when the records are already in the public domain; the standard for declaratory relief; and encroachment on judicial powers. Among the numerous clear legal errors was the court's failure to rule on

Intervenor's timely motion filed on April 4, 2022 for declaratory relief in the form of declaring public, records in the public record. The court at a hearing on July 15, 2022 stated that its Order of June 13, 2022 denying the underlying First Amended Motion to Vacate Orders Denying Access to Hearings and Records in this Proceeding and Declare Unconstitutional 215 ILCS 5/188.1 (b) (4,5) encompassed the records that had been publicly released. However, the court's Order does not address the legal precedents Intervenor cited. Further, the court's order of July 18, 2022 states, "1. Intervenor's Motion to Declare [for Ruling on Relief Sought Pursuant to the Motion to Declare Public Records in the Public Record] is entered and continued." The refusal to consider timely evidentiary and legal arguments during proceedings is a *de facto* if not *de jure* restraint on publication and in clear legal error. (Authorities cited below.)

In light of the demonstrably unusual disarry of the records and filings the court itself noted during hearings, caused largely by the failure of DLA Piper, the firm representing NextLevel Health Partners, Inc. ("NextLevel"), to correctly represent in its pleadings the status of records to which it had immediate and complete access, it was an unjust abuse of discretion to deny as "untimely" consideration of Intervenor's arguments in motions filed prior to to the final judgment that included facts and case law materially relevant to an accurate and lawful ruling. Declaration of Jacqueline Stevens, July 27, 2022, ¶¶45-47, Exhibit A ("Declaration"). This clear violation of Intervenor's rights under the Equal Protection Clause of the Illinois and U.S. Constitutions provides further grounds for reconsidering the court's order excluding legal and evidentiary arguments presented in Intervenor's Supplemental Motion to Order Department of Insurance to Release Financial Records, Declare Termination Provision Unconstitutional, Sur-Sur Reply, Strike Portions of Sur-Reply, and Order Sanctions for Rule 13[7] Violations"

("Supplemental Motion") filed on June 8, 2022 and Intervenor's Motion for Postponement of Final Order ("Mot. Postpone") filed on June 13, 2022. By providing opposing counsel immediate access at no cost to records in this proceeding while obligating Intervenor or her assistants to physically go to the Cook County Circuit Court clerk office on the eighth floor of the Daly Center, Intervenor was obligated to spend considerable time and money on transaction costs not obligated for opposing counsel. Declaration, ¶¶ 21, 28-42.

Further evidence of clear error is that the court's order of November 29, 2021 reflected its decision on or about December 1, 2021 not to use language of a draft order stating that the court was relying on the Sequestration or Privacy Provisions in its analysis of whether to grant NextLevel's motion for sealing and redacting certain documents. The court's decision to use the language the Illinois Department of Insurance ("DOI") submitted on December 1, 2021 (DOI Proposed Draft Order, Ex. 1), *not* NextLevel's draft order grounding the sealing and redactions in the statute ("NextLevel Proposed Draft Order," Ex. 2), indicates that the Order's statement of the court's intent is in clear legal error. Further, the concealment from Intervenor of information in two draft orders materially relevant to legal questions central to these proceedings is in violation of 735 ILCS 5/2-408 (f) ("An intervenor shall have all the rights of an original party...") as is the court's order of June 29, 2022 withholding from Intervenor other communications about these proceedings that occurred outside her presence. Finally, the court's Order provides no empirical or legal analysis to refute Intervenor's evidence and arguments that the Privacy Provisions are "capable of repetition" and will necessarily "evade review," owing to the secrecy they obligate, and is a legal error and abuse of discretion.

Proceeding History

On November 29, 2021, the Court issued an order lifting the stay on ending sequestration and granting NextLevel's motion to file exhibits under seal and replace the original Complaint of June 3, 2020 and order of June 9, 2020 with versions that had portions redacted. On December 6, 2021, the court issued an order granting Jacqueline Stevens Intervenor status for the purpose of making arguments about the "public nature of these proceedings." Intervenor filed her First Amended Motion to Vacate Orders Denying Access to Hearings and Records in this Proceeding and Declare Unconstitutional 215 ILCS 5/188.1 (b) (4,5) on January 31, 2022. ("Am. Mot.") On March 14, 2022, NextLevel Health Partner, Inc. ("NextLevel") filed its Opposition Response. On March 21, 2022 the People of Illinois representing the Department of Insurance ("DOI") filed its Opposition Response motion. Intervenor on April 4, 2022 filed a Motion to Obligate Parties to Notice all Motions to Intervenor and to Declare Public all Records for 2020 CH 04431 previously released by Chancery Division ("Mot. Declare"). On April 26, 2022, NextLevel filed its Sur-Reply. On June 8, 2022, Intervenor filed a motion for leave to file a Supplemental Motion and attached as an exhibit a motion containing new evidence, a Sur-Sur Reply, and a motion for sanctions. Later that day, oral argument was held on the briefings and the court announced an intention to issue the final judgment at 2 p.m. on June 13, 2022. On June 12, 2022 at 9:20 p.m. Intervenor submitted a Motion to Postpone the Final Order. Following presentment at a hearing on June 13, 2022, the court issued an order denying motions in the exhibit containing the Supplemental Motion with the exception of the motion for sanctions under Illinois Supreme Court Rule 137. The court also denied the Motion for Postponement. In a written order issued later on June 13, 2022, the court issued its final judgment on Intervenor's Am. Mot. and denied the motion to vacate the seal and redaction orders of November 29, 2021. On June

21, 2022, Intervenor filed a Motion for Ruling on Relief Sought Pursuant to the Motion to Declare Public Records in the Public Record ("Mot. Ruling"). On June 27, 2022 the court held a hearing on Intervenor's Mot. Ruling. On June 29, 2022, the court in response to Intervenor's "Motion For Release To Intervenor Of Court Communications With Opposing Counsel And Tolling Of Briefing Schedule" ("Mot. Release") held that "Email communications between counsel and the Court's chambers prior to the entry of the Court's December 6, 2021, order granting Intervenor's petition for intervention are not 'ex parte communications' to the extent Intervenor was not included on any such communications." On July 15, 2022, the court held a hearing to review the record of proceedings withheld and released to the public. On July 18, 2022, the court ordered Intervenor's Mot. to Declare was "entered and continued"; that Intervenor "shall file an amended version of her recently filed Motion to Reconsider and for Order to Obtain Equal Access to Court Records (the "Motion to Reconsider")" with limits on legal arguments; and denied Intervenor's "Motion for Release to Intervenor of Court Communications with Opposing Counsel" ("Mot. for Release").

I. Burden on Opposition Parties to Show Historical Regulation of Public Access to Conservation Proceedings

The court states "the Privacy Provision was in fact the basis for withholding those documents from the public view" and that "[t]his case cannot be resolved without considering constitutional arguments" (Order, 3). By rejecting opposition party claims that the Lift and Seal order was based on the court's "'inherent power to control its docket'" (Order, quoting NextLevel Sur-Reply at 2), the court suggests that it relied on a standard other than those of the court's inherent power, i.e, "a statute such as ours, which explicitly provides for certain *court proceedings* to be conducted outside of public view." Order, p. 3, emphasis added.

The court stipulates to the fact that the records and hearings to which Intervenor seeks access are "court proceedings." The court's Order states Intervenor failed to prove a "presumption of public access to *conservancy* proceedings" (emphasis added) necessary to trigger judicial review under standards obligated by common law or the First Amendment. This is the *first* clear legal error. Intervenor's motions cite to numerous precedents obligating the parties opposing public access as a right under common law or the First Amendment to prove that the court proceedings in question were not open to the public in the time frame of the founders. Absent such historical evidence they were closed, the court has found the party opposing public access bears at minimum the burden of showing a "significant interest" in closing such hearings, or a higher First Amendment burden of proving the government has a compelling interest in court secrecy. *See* Am. Mot. at ¶88, quoting *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (2000), citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 27–29, (1994); *In re Memorial Hospital of Iowa County, Inc*., 862 F.2d 1299, 1302–03 (7th Cir.1988) ("...Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is *presumptively* public business ... Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.") Emphasis added. *See al*so *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) ("The Court in Nixon stated there is a 'presumption—however gauged—in favor of public access to judicial records." Id. at 609. The Statute clearly violates this presumption.") Am. Mot. ¶91. These orders do not exempt prohibitions on judicial access instituted by law and not a court order from

overcoming a presumption of public access, nor does the court cite to any judicial authority to assert this.

Intervenor's Am. Mot. states "Illinois courts have *relied on common law* to infer the public's right of access to judicial proceedings entails as well access to case records filed with the courts. (*In re Marriage of Johnson*, 1068, 1071-72 and A.P. v. M.E.E., 354 Ill. App. 3d 989, 1001 (1st Dist. 2004).) And see *Skolnick v. Altheimer & Gray*, 730 NE 2d 4 Ill (2000), (quoting and affirming *Nixon* at 15). The Illinois Supreme Court has held that 'The common law right of access to court records is essential to the proper functioning of a democracy' (*Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn.1986).") Am. Mot. ¶92, emphasis added. See also *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 US 1, 4; and *Johnson*, 232 ILL. App. 3d at 1075. Further, "The Court has held that the standard for presumptive access is whether proceedings are typically those to which the public has access ('we have considered whether the place and process have historically been open to the press and general public' (*Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 US 1, 4)[)].") Am. Mot. ¶94.

Having acknowledged the controversy is about court records for civil litigation involving a company, judicial precedents on presumption obligate an assessment of either the common law or constitutional equities, notwithstanding the court's citation to *Skolnick v. Altheimer & Gray*, 1919 Ill. 2d 214, 232 (2000). Order, p. 4. Appellee Skolnicks lost their efforts to keep records sealed because "under either the common law standard or the first amendment standard, the Skolnicks failed to make the necessary showing to rebut the *presumption of a right of access to the court file*," (*Skolnick* at 232-233, emphasis added) (and see Am. Mot. ¶92), not because appellant Altheimer proved that there was a specific history of public access to professionally

damaging claims about Illinois attorneys filing professional complaints against colleagues included in court records.

Related to the standard of review, the court's order's distinguising the statutory basis of the exclusion from other precedents obligating public access ("[these] cases do not involve a statute such as ours, which explicitly provides for certain proceedings to be conducted outside public view") is a clear legal error. Order, p. 3. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022), a case decided after the order of June 13, 202 and finding that a New York State statute in place for a century unconstitutional:

> This Second Amendment standard accords with how we protect other constitutionalrights. Take, for instance, the freedom of speech in the First Amendment, to which [*District of Columbia v.*] *Heller* [554 U.S. 570 (2008)] repeatedly compared the right to keep and bear arms...In some cases, *that burden includes showing whether the expressive conduct falls outside of the category of protected speech*. [citation omitted]. And *to carry that burden the government must generally point to historical evidence* about the reach of the First Amendment's protections. p. 15, emphases added.

As in the First Amendment analogy to which the Court cites in *NYSRPA*, the burden is on parties opposing public access to point to historical evidence that under common law, court proceedings addressing a firm's conservation in the wake of debt payment avoidance or insolvency were closed to the public. See also *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1072, 1075 (1992) (quoted in part at Am. Mot. ¶95):

> In order to overcome the presumption of access, the [opposing] party bears the burden of establishing a compelling interest why access should be restricted. Under either a common law or first amendment analysis, we find the trial court abused its discretion by denying access to the court records and transcripts in the two proceedings. In this case, there is no compelling interest in barring public access to the court files and transcripts .... The parties' desire and agreement that the court records were to be sealed falls far short of outweighing the public's right of access to the files.

And see *People v. Kelly*, 921 N.E.2d 333, 344 (2009). ("[I]n addition to the constitutional right of access, there is a 'parallel common-law right of access,' recognized by the Illinois Supreme Court" [citations omitted]); *A.P. v. M.E.E,* 354 Ill. App. 3d 989, 993-94 (2004) (cited in Am. Mot. ¶92), reversing on interlocutory appeal trial court sealing of civil records and remanding:

> Judicial proceedings in the United States are open to the public — in criminal cases by constitutional command, and in civil cases by force of tradition...Certain jurisdictions have recognized a constitutional right of access to civil court files and records." [Citations omitted.]....Moreover, the district court did not rely on any particularized showing of the need for continued secrecy, as asserted in *Ernst & Ernst*, but instead only on the general interest in encouraging settlement. As we have held, that is not enough. Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access.

Insofar as Intervenor is challenging the statutory standards obligating exclusions from court hearings and withholding of information in court records, the order's failure to provide a fact-based equitable analysis grounded in the record and balancing the benefits of the Privacy Provision against the burdens of a public denied access to information about the operations of a firm repeatedly attracting substantial and repeated regulatory fines and the response of the DOI in the wake of its order finding NextLevel's insolvent despite receiving $1.7 billion in taxpayer funds following bidding procedures implemented over objections from Illinois Comptroller (Reply, pp. 1-2, citing to facts in Mot. of January 31, 2022) is a clear legal error. Further, insofar as Intervenor's assertion of the public's prerogative to access to court proceedings relies in part on common law and not only a First Amendment right, the court's sole reliance on *In re S.G. 175* Ill. 2d 471, 486 (1997) to assign Intervenor the responsibility to overcome the "strong presumption of constitutionality" is inapposite as it disregards Intervenor's claims under common law. Moreover, the subject matter concerns child welfare, not the welfare of the courts,

which make life and death decisions, including those affecting whether charity hospitals can provide full services to Illinois residents, in which the entire public has far greater interest than an individual child's well-being.

At no point does the court find that the statute advances any specific public interest much less one sufficient to overcome the common law presumption that judicial records are open to the public. The court's review of the Privacy Provision relies only on the mere recitation of the statutory text and the existence of similar policy in other states on which the court bases a conclusory finding that "[t]he interest being protected here is not the interest of the insurance company, but that of its creditors, policyholders, and the public." Order, p. 4. Even if the interest protected in the court's order of November 29, 2021 pursuant to the Privacy Provision were indeed those the court references – the motions state lender and purchaser Centene Corporation is the main beneficiary[1] – a mere "interest" is insufficient to defeat the common-law or constitutional right to public access for a statute purportedly "designed to have the Director return control to the company without damaging it." Sur-Reply, 6.

II. "Historical": 1776, not 1967

A *second* clear legal error is the court's assertion that by being in place for 55 years and similar provisions existing in other states during this time frame, the opposing parties have shown that these proceedings have indeed been historically confidential and therefore do not trigger any constitutional presumption of a First Amendment right the Privacy Provision violates. Order, p. 5. *See Tumey v. Ohio* 273 U.S. 510, 523 (1927) ("... '[T]he Court must look to those settled usages and modes of proceeding existing in the common and statute law of England…'" quoted in Reply at pp. 10-11. And *See NYSRA (2022), finding unconstitutional a law passed*

1 People of the State of Illinois, Reply Brief Supporting End of Sequestration, September 26, 2021, pp. 3-5, 8-9.

over 100 years ago. ("Today's licensing scheme largely tracks that of the early 1900s ... Only if a firearm regulation is consistent with *this Nation's historical tradition* may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command," citation omitted, pp. 8, 14, emphasis added.)

Copious case law shows that a practice in place for 55 years does not count as "historical" for purposes of the Court's history and logic tests paraphrased in *Skolnick* (at 232) and from which this court quotes. Order, p. 4. As the Court recently affirmed, the time frame for ascertaining if a statute or case law is *historical* for purposes of denying constitutional relief is that of the founders. Elaborating on constitutional points cited in Intervenor's briefs, the Court notes:

> [W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. *NYSRPA v. Bruen* at 17.

The court's order provides no examples of Privacy Provisions in place for court proceedings responsive to the societal problem of firms, including insurance firms, not paying commercial debts in the time frame of the founders, nor does the court point to any statutes obligating courts not to permit public access to financial records of firms sued by creditors or the state for insolvency or potential insolvency. The silence in the record on these matters is a clear legal error.

III. Common Law Public Notice and Access to Similar Proceedings

A *third* clear legal error is failing to declare 215 ILCS 5/1881.1 (b) (4,5) unconstitutional on the grounds that historically the public has had access to to such proceedings and thus has a

First Amendment right to records of such court proceedings. See *re Astri Inv., Management & Securities Corp*., 88 BR 730, 741 (Bankr. D. Md. 19988) (holding "a presumptive First Amendment right of access to creditors' meetings exists"). Although the burden is not on Intervenor to prove that such court proceedings historically allowed public access, the record indicates this was the case. U.S. bankruptcy proceedings today by statute are open to the public (Mot. ¶94 and note), and insurance firms operating in states with about half the U.S. population are unable to hide records the court Order allows for NextLevel and other firms not paying debts. Reply pp. 12-13.

To elaborate, U.S. bankruptcy proceedings[3] may in rare events use trustees for "return[ing] control to the company," the purpose NextLevel assigns to the conservation statute. Sur-Reply, p. 6. According to the agency administering the U.S. Courts:

> A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a 'reorganization' bankruptcy.' Usually, the debtor remains 'in possession,' has the powers and duties of a trustee .... The appointment or election of a trustee occurs only in a small number of cases .... The court, on motion by a party in interest or the U.S. trustee and after notice and hearing, shall order the appointment of a case trustee for cause ... The case trustee is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Bankruptcy Code requires the trustee to file a plan 'as soon as practicable' or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. 11 U.S.C. § 1106(a)(5).[4]

The procedures for federal court appointing a trustee to assist in the reorganization of a firm are those relied on by 215 ILCS 188.1, with the exception that hearings, filings, and even meetings are public by statute as well as common law:

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3 Each federal district has a bankruptcy court. "Federal courts have exclusive jurisdiction over bankruptcy cases involving personal, business, or farm bankruptcy. This means a bankruptcy case cannot be filed in state court. Through the bankruptcy process, individuals or businesses that can no longer pay their creditors may either seek a court-supervised liquidation of their assets, or they may reorganize their financial affairs and work out a plan to pay their debts." "Court Role and Structure," https://www.uscourts.gov/about-federal-courts.

4 Chapter 11 - Bankruptcy Basics, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics.

> Public examination of the debtor has continued into modern times as a feature of English bankruptcy law. 'The public examination had traditionally been regarded [in England] as one of the most important aspects of the bankruptcy process, for it is intended to serve one of the main purposes of public policy associated with bankruptcy law, namely the protection of the public by gathering as much information as possible about the debtor and his affairs.' I. Fletcher, *Laws of Bankruptcy* 111 (1978) (footnote omitted)." *Re Astri* at 740.

The Bankruptcy Court in the federal district of Maryland further noted, "historical analysis of English and American practices would appear to support the media's position" on public access to creditor meetings in bankruptcy proceedings." *Id.* Citations omitted. This court's assertion that the Privacy Provision benefits policy-holders, creditors, and the public is exactly the opposite of case law going back to English common law and is a clear legal error.

Federal bankruptcy courts consistently recognize a presumption of public access to these proceedings, with no exceptions for circumstances of reorganization undertaken by a trustee, a position functionally similar to the work performed by the DOI Office of Special Deputy Receiver.[5] *In re Symington*, 209 BR 678, 681-2, 683 ((Bankr. D. Md. 1997), obligating public access to pre-litigation third party records obtained by subpoena. ("[T]he press and public are entitled to attend Rule 2004 examinations because such examinations were historically public proceedings and because public access plays significant role in the bankruptcy process.... 'The sweeping general examination' of debtors and others to recover assets and uncover fraudulent conduct is a traditional feature of bankruptcy jurisprudence that is traceable to the first bankruptcy statute enacted by the English Parliament more than 450 years ago. 5 *Remington on Bankruptcy* § 1979 (1953 ed.).")

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5 "The primary responsibilities of the Receiver are to marshal the assets of companies in liquidation; reduce those assets to cash; and to pay the cash to persons having claims against the liquidated company as directed in the Illinois Insurance Code." Office of the Special Deputy Receiver, https://www2.illinois.gov/sites/Insurance/AboutUs/Pages/OSD.aspx

English courts since at least 1589 obligated public notice and public access to hearings and records under statutes empowering a court or state official to seize control of a firm's assets for the purpose of insuring payment to creditors. *Smith v. Mills*, (1589) Trinity Term, 31 Elizabeth I. In the Court of the King's Bench, Part I, noting public announcement of bankruptcy and creditor awareness thereof as crucial to fair disbursement. ("And this Act gives benefit to those who will inquire and come in as creditors, and not to those, who either out of obstinacy refuse, or through carelessness neglect, to come before the commissioners and pray the benefit of the said statute; for vigilantibus et non dormientibus jura subveniunt, for otherwise a debt might be concealed, or a creditor might absent himself, and so avoid all the proceedings of the commissioners by force of the said Act. And every creditor may take notice of the commission, being matter of record, as is aforesaid, and so no inconvenience can happen to any creditor who will be vigilant...").[6]

Judges relying on English bankruptcy case law in the time frame of the founders would have made the same inferences of debt avoidance in violation of a contract that Kindred asserted in its complaint against NextLevel,[6] which, along with Centene and the DOI, were using the Privacy Provisions for the sole purpose of maintaining secrecy during liquidation and not for reorganization. Similar proceedings at the time of the founding of this country were advertised in newspapers; indeed, public access was a key component of their equitable objectives. *See Ex parte Bullock*, 14 Ves. 452 (1808), order denying bankrupt[cy] petition to avoid penalty of debt

6 2 Co. Rep. 25a (K.B. 1589).

6 "Since Next Level [sic] received payments from the government each month, one way in which it was able to increase its revenue was to delay payment (or deny payment entirely) to the medical and hospital providers that cared for its insureds and thereby earn money on the 'float.' The longer Next Level [sic] could hold on to these amounts before it paid those providers, the greater the returns from investing those funds." *Kindred THC Chicago, LLC d/b/a Kindred Hospital – Chicago North and Kindred – Chicago- Central Hospital v. NextLevel Health Partners, Inc*. 2021L002873, Complaint, Circuit Court of Cook County, Law Division, filed March 16, 2021, ¶14.

on grounds of prior bankruptcy hidden from creditors after removal from public docket of bankrupt debt on petition of one creditor in collusion with bankrupt's attorney and nephew working for the court not lawful grounds for avoiding subsequent debt.[8] Again, although NextLevel is asserting the policy rationale of conservation, but for the conjuncture of two rare events, NextLevel and its officials would have been in the situation of the bankrupt officials criticized in *Ex parte Bullock*.

IV. Order Sealing and Redacting Records not Based on 215 ILCS 5/188.1(b)(4,5), Statute Encroaches on Judicial Power

The court observes that precedents Intervenor cited "do not involve a statute such as ours, which explicitly provides for certain court proceedings to be conducted outside of public view." p. 3. As noted above, the Supreme Court does not shift the presumption of public access to court proceedings because the limit on public access is a statute and not the court's inherent power. To distinguish the precedential authority and power of judicial orders limiting a court from excluding the public from court proceedings from the prerogative of a state legislature, and to accord more deference to the latter, derogates judicial power in violation of Article II, Sec. I of the Illinois constitution and is a *fourth* clear legal error in the court's Order. Precedents with boilerplate language on constitutional avoidance are not applicable when the case law Intervenor cites clearly identify a common law or constitutional right that is violated, be it by the legislature or a court. *See Kunkel v. Walton*, 179 Ill. 2D 519 (1997), discussed in Reply at pp. 11-2.

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8 "The Bankrupt Laws impose many hardships upon the bankrupt: on the other hand, if he can set up a secret act of bankruptcy, and, availing himself of it, set aside the Commission, the creditors are placed in a situation of difficulty, in which they ought not to be, and from which it is not easy to relieve them. The bankrupt may permit the Commission to proceed without objection, until he has obtained his certificate; and he has the whole benefit, if the creditors do not find out, that he has concealed any of his effects: but if they happen to make that discovery, the instant they complain he brings forward the secret act of bankruptcy; and thus defeats all prosecution." *Ex Parte Bullock* at 467.

Further, although the court presumably knows its own intentions, on or about December 1, 2022, the court chose for its order of November 29, 2021, the draft order of the DOI that differed from the order submitted by NextLevel, the latter of which proposed the following: "NextLevel has demonstrated that it is entitled to continued sequestration of the redacted information referenced in Paragraphs 2 and 3 of this Order." Ex. 2. The DOI proposed and the court accepted for its order the following: "NextLevel has made a case that the information referenced in Paragraph 2 of this Order is subject to protection as sensitive to NextLevel's interests." Ex. 1 and Lift and Seal Order. The discrepancy indicates that the order to substitute the redacted documents is pursuant to the court's inherent power, as NextLevel and DOI claimed in their briefings (Order, p. 3), and not the sequestration statute. Insofar as the court disagrees with the case law cited in Part I, and finds it is Intervenor's burden to prove conservation proceedings are lack a presumption of public access, the order sealing and redacting records by relying on the court's inherent power is therefore subject to the common law or Constitutional criteria Intervenor cites and that obligate a finding of a compelling interest to prohibit public access. Am. Mot., ¶¶88-96.

V. "Logic" Rationale Illogical and Inaccurate

A *fifth* clear legal error is that the analysis favoring the putative "logic" prong of the test for public access – "public access to proceedings could lead to a 'run on the bank' by the company's creditors" p. 4 --is facially absurd, inconsistent with the statute, and supported by only vague policy concerns, absent specific analyses or findings. *Johnson*, 232 ILL. App. 3d at 1075. ("Once documents are subject to the right of access, only a compelling reason, accompanied by specific factual findings, can justify keeping them from public view.") Am. Mot. ¶95. No brief

or court order references a single authority on which any party or court relies for the "run on the bank" assertion, and there is no reference to source for phrase quoted.

On June 9, 2020 the court ordered NextLevel to turn over its books and control of accounts to the DOI, thus prohibiting any payments outside the conservatorship. What sort of "run on the bank" do the opposing parties and court have in mind? *A.P. v. M.E.E*, 354 Ill. App. 3d 989, 996 (Ill. App. Ct. 2004), finding trial court in civil litigation abused discretion by sealing court record for family trust without specific reasons. ("A closure order should both articulate the privacy interest involved and be accompanied by a statement of reasons 'specific enough that a reviewing court can determine whether the closure order was properly entered.' *Press-Enterprise Co.*, 464 U.S. at 510 ..."). A "run on the bank" is not a reason, but here a meaningless cliché. The very Conservation Order the court insists requires redactions to avoid a "run on the bank" made it impossible for any party to receive funds from NextLevel without the approval of the DOI, which was:

> hereby authorized and directed to immediately take possession and control of the property, books, records, accounts, assets, business and affairs of NextLevel and of the premises currently occupied, or hereafter occupied, by NextLevel for the transaction of business, pursuant to the provisions of Article the same for the benefit XIII of the Code, 215 ILCS 5/187, et seq., and to conserve of the policyholders and creditors of NextL evel and of the public; and, further, to take such actions that the nature of this cause and the interests of the policyholders and creditors of NextLevel, or the public, may require, subject to the further orders of this Court... (Conservation Order, p. 4, ¶6)

The court further ordered that NextLevel officials were "enjoined and restrained from transacting any business approval of the Director, as Conservator, of NextLevel without the prior written or until further order of the Court ..." *Id.* The court provides not even a whiff of a reason as to how redacting a line from a court order that is itself controlling NextLevel's disbursements, much less documents filed after this, could lead to a "run on the bank" or even a plausible parsing of the

phrase for this context. To the extent that the court is claiming the Privacy Provision discharges the court of making specific findings justifying sealing records, the court's ruling is in clear legal error because on November 29, 2021 the Privacy Provision was irrelevant to these proceedings.

To be sure, there is a widely cited federal district bankruptcy court order affirming the sealing of financial records during bankruptcy proceedings to avoid what could be construed as a "run on the bank." However, this order was limited to the impact of publicity on *actual banks* that had lent funds to *other banks* that were in bankruptcy proceedings. *EPIC Assocs. V,* 54 B.R. 445, 449 (Bankr. E.D. Va. 1985. ("According to Professor Weimer, the recent savings and loan crises in Ohio and Maryland have created a climate that would make runs on area banks *reasonably probable* if the information requested by the Post is disclosed." Emphasis added.) Insofar as NextLevel's largest creditor was the state of Illinois,[9] the invocation of a "run on the bank" reveals the absence of any assessment of how publicity would affect the actual proceeding. Further, the actual record shows a *certainty of no harm at all* from the release of all records ordered sealed or redacted in this case, discussed next, and is further grounds for finding clear legal error in the court's order of June 13, 2022. Declaration, Ex. A.

VI. Records Ordered Redacted and Sealed Remain in Public Record

In her filings, email, and at hearings, Intervenor since January 5, 2022 has repeatedly pointed out discrepancies between statements in the court's Lift and Seal Order of November 29, 2021 and the actual records filed and available to the public:

> In her [Am. Mot.] of January 31, 2022 intervenor stated, "As of January 23, 2022, there is no list of documents filed in this proceeding available on the Cook County Circuit Court website and no clear and authoritative record has been released to intervenor." [Am. Mot] at ¶77. Intervenor also noted in a status hearing on February 7, 2022 that the record of

9 NextLevel Opposition to Motion to Vacate Order of Sequestration, 2020 CH 4431, September 13, 2021 ¶10.

> proceedings was in disarray and it appeared that records order sealed had been released. On March 29, 2022, intervenor asked if any party to the proceeding had an accurate record of the documents and orders filed. Reply, April 4, 2022, pp. 5-6.

Intervenor filed as Exhibit 11 to her Reply brief the Complaint that was filed as "Ex. 1" to NextLevel's Memorandum. She filed as Exhibit 13 to her Reply brief the Conservation Order that was without redactions and not filed as an exhibit by NextLevel. Thus, the record on April 4, 2022 was crystal clear as to the existence of records ordered redacted or sealed not being replaced, and remaining publicly accessible in their original form *and* also as exhibits to NextLevel's Memo. As late as July 15, 2022, the court acknowledged that the records ordered sealed or redacted remained available to the public. Declaration, Ex. A, p. 8, ¶42.

The *sixth* legal error in the order is its disregard of the record on the precedents and equities for the sealing and redacting of proceeding records. Order, p. 3. *See United States v. Mitchell*, 551 F.2d 1252, 1261 (D.C. Cir. 1976) ("It suffices to note that once an exhibit is publicly displayed, the interests in subsequently denying access to it necessarily will be diminished."); *Levenstein v. Salafsky*, 164 F.3d 345, 348 (7th Cir. 1998), discussing information in a civil complaint that was under seal but facts available to public in appellate filings. ("Litigation is a public exercise; it consumes public resources. It follows that in all but the most extraordinary cases — perhaps those involving weighty matters of national security complaints must be public. In any event, *given that the briefs on appeal are (appropriately) publicly available documents, and the briefs recount all allegations contained in the complaint, we present the facts as alleged in the complaint*." Emphasis added.)

Other authorities hold similarly. *Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979) ("We held that once the truthful information was 'publicly revealed' or 'in the public domain' the

court could not constitutionally restrain its dissemination," citing *Oklahoma Publishing Co. v. District Court*, 430 U. S. 308 (1977).") And see *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001), finding that information originally obtained unlawfully, unlike the records in dispute in this controversy, may be published without penalty to party who obtained information lawfully ("[T]his Court has repeatedly held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order. Id., at 103; see also *Florida Star v. B. J. F.*, 491 U. S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U. S. 829 (1978).") Intervenor's request for the court to acknowledge and declare that the court is not permitted to invoke the court's contempt power to punish the publication of information in the public record also is clearly affirmed in *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 491 (1975), a case in which the name of a rape victim was published in violation of a statute prohibiting this and the newspaper was sued for making use of information that by law was prohibited from publication. ("...[W]hether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.")

Moreover, other third parties have accessed the documents the court ordered sealed or redacted. Stevens Declaration, ¶¶15-27. Leaving in place an order that prohibits Intervenor but not others from publishing the records ordered sealed or redacted (Declaration ¶¶43-44) is exactly the sort of "underinclusiveness" that raises a "red flag" for violations of the First Amendment. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (2015), upholding law

prohibiting judges but not other politicians from soliciting campaign funds, since law narrowly tailored to protect judicial independence. ("For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy. *Smith v. Daily Mail Publishing Co*., 443 U. S. 97, 104-105, (1979)].) In *Williams-Yulee*, the Court found there was a difference between judges and other politicians and thus found constitutional the campaign finance restriction. Unlike *Williams-Yulee* here there is no substantive or functional difference between Intervenor Stevens and any other reporter, attorney, or citizen who has or will access the publicly released documents.

VII. Mootness

The court notes Intervenor sought "'anticipatory relief,' to declare the statute unconstitutional going forward, reasoning that this issue is 'capable of repetition yet evading review'" and ruled "[t]he Court will not decide hypothetical issues." Order, 3. The court's Order on mootness disregards the relevant case law and facts in Intervenor's pleadings, including in her Am. Mot. (Am. Mot., ¶1, ¶57, note 54, ¶76; Reply, pp. 5-6).[10] *See People v. Kelly*, 397 Ill. App. 3d 232, 249 (2009), holding that a trial court's order to seal transcripts was not moot after the transcripts had been released. ("Two exceptions to the mootness doctrine include (1) the "'capable of repetition, yet evading review' exception; and (2) the public interest exception.") 215 ILCS 188.1 (b)(4,5) obligates secret proceedings that will exclude Intervenor going forward.

Further, in the hearing of July 15, 2022 on the Mot. for Ruling to Declare Public, Mr.

10 "The Court has held that where civil controversies are 'capable of repetition, yet evading review,' then even when the event giving rise to the challenge is in the past, unlike this current proceeding, the constitutional controversy remains live. *First Nat. Bank of Boston v. Bellotti*, 435 US 765, 774. (Holding that First Amendment appeal of ruling on law limiting campaign contributions not moot after referendum held, citing *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 US 498, 515 (1911).)" Reply, p. 5.

Schwab attempted to distinguish the facts in this case from *Bartnicki*, insofar as the latter dealt with criminal punishment after publication. The Seventh Circuit has cited to *Belloti* using the analysis of Intervenor (Reply, pp. 14-15) and refuting Mr. Schwab's inferences. *Matter of Special April 1977 Grand Jury*, 581 F.2d 589, 591 (7th Cir. 1978). ("While it could be argued that appellant could have obtained review before compliance by refusing to supply the documents and appealing a subsequent finding of contempt, the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions in order to meet this prong of the mootness test. See, *e. g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683; *First National Bank of Boston v. Bellotti, supra.*). *See* also *In re A Minor*, 127 Ill. 2d at 258, issuing order on public access after a sealed transcript was released. ("[A]s in *Globe Newspaper, supra*, at 603, and *Gannett Co*. v. *DePasquale*, 443 U.S. 368, 377-378 (1979), this controversy is "'capable of repetition, yet evading review.'") And see *Gannett Co. v. Depasquale*, 443 U.S. 368, 377-78 (1979), holding release to media of transcript and conclusion of trial did not moot declaratory relief. This court has not explained how going forward Intervenor would be capable of petitioning to intervene in a litigation under 215 ILCS 188.1 (b) (4,5) that by statute will not appear on the public docket. Thus, the Privacy Provision challenged will be used again, and, by design, will evade detection or review.

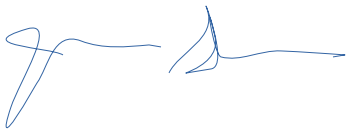
Second, while disregarding *Bellotti* and *Citizens United v. Federal Election Commission* 130 S.Ct. 876 (2010), the court cites *Lyon v. Dept. of Child. Fam. Services*, 209 Ill. 2d 264 (Ill. 2004) to support the blanket doctrine of constitutional avoidance. Order, p. 3. However, the Illinois supreme court in Lyon actually finds against the State for infringing on Lyons' due process rights. *Lyon* at 268. ("We affirm the appellate court's judgment affirming the

expungement of the indicated findings *because Lyon's due process rights were violated by the standard of proof used and the delays in the administrative appeal*, so we do not reach the additional constitutional issues raised by Lyon." [Emphasis added].) Moreover, the supreme court in *Lyon* provides exactly the equitable weighting of competing if not compelling interests the court here avoids. *Lyon* at 279. ("We conclude that the interests of indicated subjects and the state, on behalf of children, are both significant. However, we find it is appropriate to place more of the risk of error on adults, who may suffer mistaken employment hardship, than on children, who may suffer additional abuse.") NextLevel is a corporation that has been established by profit-seeking investors and sued for avoiding payment of its debts to charity hospitals. Am. Mot. ¶¶29-¶30, ¶¶32-3, ¶¶35-37, ¶¶39-41, ¶¶ 43-47, ¶¶50-52, ¶54, ¶69, ¶72, ¶79, ¶85. It is not a child but a corporation that at best put Illinois children at risk by not paying its bills, according to lawsuits filed against NextLevel and filings in this proceeding. The court's avoidance of these facts is inconsistent with the outcome and analysis pursued in *Lyon,* and thus indicates a clear legal error in the court's decision finding Intervenor's claim for declaratory relief moot.

Respectfully Submitted,
/s/ Jacqueline Stevens
JACQUELINE STEVENS
Pro Se
Professor, Political Science Department
Northwestern University
Evanston, IL 60208
(847) 467-2093
jackiestevens@protonmail.com
July 27, 2022

VERIFICATION

I, the undersigned, swear under penalty of perjury, as provided by law under Section I-109 of the Illinois Rule of Civil Procedure, that the statements contained in this motion are true and correct to the best of my knowledge and belief, except where I lack sufficient knowledge to form a belief of the truth of the allegations, where so stated.



Jacqueline Stevens

Certificate of Service

I certify that on July 27, 2022, I caused the foregoing document to be filed and served on all counsel of record.