13-3653-CV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ERIE COUNTY, NEW YORK,

Defendant-Appellee

v.

NEW YORK CIVIL LIBERTIES UNION (NYCLU),

Intervenor-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE

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STATEMENT OF JURISDICTION

The United States filed suit against Erie County, New York, pursuant to the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. 1997 *et seq*.

Doc. 1; J.A. 28-119.[1] The district court had jurisdiction pursuant to 28 U.S.C. 1345. The district court subsequently granted the New York Civil Liberties Union (NYCLU) leave to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B) for the limited purpose of asserting a right of public access to documents that had been filed under seal. J.A. 310-316. The district court had jurisdiction over the NYCLU's claims pursuant to 28 U.S.C. 1367. On September 26, 2013, the NYCLU filed a timely notice of appeal challenging the district court's August 30, 2013, denial of the NYCLU's motion to unseal. J.A. 331-332. This Court has jurisdiction over the NYCLU's interlocutory appeal pursuant to the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). See, *e.g.*, *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 117 (2d Cir. 2006); *United States* v. *Graham*, 257 F.3d 143, 147 (2d Cir. 2001).

STATEMENT OF THE ISSUE

The United States' brief is limited to the following issue:

Whether the district court erred in its analysis of the NYCLU's motion to unseal reports prepared by independent, third-party monitors pursuant to a final settlement

[1] "Doc. __" refers to the document number assigned on the district court's docket sheet. "J.A. __" refers to the page number in the Joint Appendix that the New York Civil Liberties Union (NYLCU) filed with its opening brief on behalf of the parties to this appeal. "NYCLU Br. __" refers to the page number of the NYCLU's opening brief filed with this Court.

and implementing court order in a jail conditions lawsuit by equating these reports to settlement negotiation documents.

STATEMENT OF THE CASE

1. Settlement Of The United States' Lawsuit Against Erie County

a. On September 30, 2009, the United States sued Erie County, New York, under the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. 1997 *et seq.*, alleging unconstitutional confinement conditions at county jails. Doc. 1 at 5-6; J.A. 70-119, 304. On August 26, 2011, the district court approved a settlement agreement between the United States and Erie County (the Stipulated Order Of Dismissal). J.A. 185-227. The Stipulated Order Of Dismissal has several substantive provisions that set out remedial goals in the areas of protection of prisoners from harm (J.A. 192-197), medical care (J.A. 197-203), mental health care (J.A. 203-214), and environmental health and safety (J.A. 215) at Erie County jails. In the order approving the parties' settlement agreement, the district court retained "jurisdiction over this matter until the substance of the terms of the Stipulated Order of Dismissal are fulfilled." J.A. 219, 226. Pursuant to the terms of the settlement agreement (J.A. 219) and the district court's order approving settlement, "either party may move to reopen this case at any time should issues requiring this Court's intervention arise" (J.A. 226).

As part of settlement, the parties agreed to implement a monitoring plan for the medical care and mental health substantive provisions of the Stipulated Order Of

Dismissal. J.A. 217-219. To facilitate implementation of the agreed-upon remedial goals and to monitor Erie County's performance in these areas, the parties selected two technical compliance consultants (TCCs). J.A. 191, 217. The TCCs are subject matter experts, one of whom addresses the mental health provisions and one of whom addresses the medical provisions of the Stipulated Order Of Dismissal.[2] J.A. 217. The TCCs are independent monitors; the parties have no supervisory authority over the TCCs. See J.A. 217 ("Neither Party, nor any employee or agent of either Party, will have any supervisory authority over the TCC[s'] activities, reports, findings, or recommendations.").

The TCCs evaluate Erie County's compliance with the remedial goals in the areas of medical care and mental health that the parties agreed to at settlement and that the district court subsequently ordered when approving settlement. Among other things, the TCCs review Erie County's "policies, procedures, and protocols that are contemplated by th[e] Stipulated Order"; review and approve Erie County's "written documents such as screening tools, logs, handbooks, manuals, and forms, to effectuate the provisions of th[e] Stipulated Order"; review and approve "all proposed curricula for training contemplated by this Stipulated Order"; and provide technical assistance as

[2] The TCCs may "hire or consult with such additional qualified staff as necessary to fulfill the duties required by the Stipulated Order ('TCC Teams')." J.A. 217. Any staff members hired by the TCCs must have "relevant experience and education or training in the field of corrections, mental health care, and/or medical care." J.A. 217.

requested by Erie County. J.A. 215, 219. To assess Erie County's compliance with the medical care and mental health remedial goals set out in the Stipulated Order Of Dismissal, the TCCs review documents and interview relevant staff and inmates to assess the current conditions of the jails, and independently verify Erie County's representations regarding progress towards compliance. J.A. 219. The parties agreed that the TCCs would have complete access to Erie County facilities, records, staff, and inmates, and that Erie County would "direct all employees to cooperate fully with the TCC[s] in their evaluation activities." J.A. 217.

The parties also agreed that the TCCs would prepare semiannual monitoring reports "describing the steps taken by [Erie County] to implement th[e] Stipulated Order and evaluat[ing] the extent to which [Erie County] has successfully implemented each substantive provision of the Stipulated Order." J.A. 218. The TCC monitoring reports "describe the steps taken to analyze conditions and assess compliance" in the areas of medical care and mental health, evaluate the status of Erie County's compliance under the standards of "substantial compliance," "partial compliance," and "non-compliance," and provide a factual basis for each finding. J.A. 218-219. These reports are to be "written with due regard for the privacy interests of individual inmates and staff." J.A. 218-219.

The TCCs give drafts of their reports to the United States and Erie County, so that the parties may provide comments before the reports become final. J.A. 218. The

purpose of these comments is for the parties to provide information to the TCCs, request clarification, or challenge a finding or compliance rating. The TCCs are not required to adopt the comments; they are advisory only. J.A. 217-218. The parties do not respond to the comments of the other party. J.A. 218. The TCCs provide the parties with the final versions of the reports, which are then filed with the district court. J.A. 218. The Stipulated Order Of Dismissal does not state that the TCC monitoring reports are to be filed with the district court publicly or under seal. The parties agreed, however, that "[n]o report issued pursuant to th[e] Stipulated Order shall be subject to disclosure," and that the TCC monitoring reports are not be "admissible in any proceeding other than a proceeding related to the enforcement of th[e] Stipulated Order." J.A. 218.

The Stipulated Order Of Dismissal contains other limitations on the TCCs regarding public statements, findings, disclosure of non-public information, outside employment, and testimony in other proceedings, and provides that the TCCs are not public agencies and that their records are not public. J.A. 218. The Stipulated Order Of Dismissal has additional provisions providing for non-disclosure of Erie County documents "unless required by law or authorized by the Court."[3] J.A. 216.

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[3] The complete non-disclosure language provides: "[a]ny document provided to a TCC or the DOJ by the County * * * shall not be re-disclosed to any third party unless required by law or authorized by the Court. To the extent that the United States discloses any such document in response to a FOIA request, it will give the County

(continued...)

In addition to the TCC monitoring reports, the Stipulated Order Of Dismissal provides that Erie County will submit semiannual compliance reports to the United States and the TCCs describing the actions it has taken to implement the terms of the settlement agreement.[4] J.A. 216.

b. On June 22, 2010, prior to the final settlement of the case, the district court approved a partial settlement agreement between the United States and Erie County regarding suicide prevention and related mental health issues, which was later incorporated into the Stipulated Order Of Dismissal. J.A. 1-27, 204. Like the Stipulated Order Of Dismissal, the partial settlement agreement provided for monitoring of Erie County's compliance by a third-party monitor, a joint compliance officer (JCO). J.A. 4, 15-17. The parties agreed that the JCO would issue reports every six months under similar terms and conditions as those later imposed on the TCCs. J.A. 16-17. The first JCO report was publicly filed without objection; the

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(...continued)
Attorney reasonable written notice of such disclosure. The TCC and the DOJ shall protect confidential or personal privacy information, including but not limited to, protected health information, and shall adhere to all federal, state and local laws, rules or regulations precluding the disclosure of such information." J.A. 216-217.

[4] On March 28, 2012, the district court granted Erie County's motion to file its compliance reports under seal. J.A. 240-246, 358 (Doc. 240). The United States did not oppose the motion. J.A. 247-248. Although Erie County's compliance reports are discussed in the district court's decision denying the NYCLU's motion to unseal, these reports are not at issue in this appeal. NYCLU Br. 15 n.2 (clarifying that the NYCLU is not seeking to unseal Erie County's compliance reports).

second and final JCO report was sealed by the district court, apparently *sua sponte.* See J.A. 120-184, 357 (Doc. 228). The Stipulated Order Of Dismissal provides that the mental health TCC will replace and assume the duties of the JCO.[5] J.A. 217.

2. Sealing Of The TCC Monitoring Reports

On March 14, 2012, the district court granted Erie County's motion to file the first TCC monitoring reports under seal. J.A. 228-237, 357-358 (Doc. 235). The United States did not oppose Erie County's motion. The United States' position in response to Erie County's motions to seal the TCC monitoring reports was based on the specific settlement in this litigation.[6]

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[5] Because the TCCs serve the same function as the JCO, reference to "TCCs" in this brief includes the JCO who monitored Erie County's compliance with the partial settlement agreement.

[6] The United States did not oppose Erie County's motion because of language in the Stipulated Order Of Dismissal providing that "[n]o report issued pursuant to th[e] Stipulated Order shall be subject to disclosure." J.A. 218. Although monitoring reports are typically publicly available in other cases, the United States agreed to language stating that that "[n]o report issued pursuant to th[e] Stipulated Order shall be subject to disclosure" by the parties in order to settle this case. The United States understood this language as limiting only the parties' conduct, not that it would, or could, establish a barrier to disclosure otherwise required by law. It was the United States' understanding that this non-disclosure language would mean, for example, that the United States Department of Justice's Civil Rights Division could not post the TCC monitoring reports for this case on its website, as it has done in other cases. See, *e.g.*, United States Department of Justice, Civil Rights Division, Special Litigation Section Cases and Matters: New York Juvenile Facilities, New York; Scioto and Marion Juvenile Correctional Facilities, Ohio; Shelby County Juvenile Court, Tennessee; Georgia Psychiatric Hospitals; Delaware Mental Health System; Virginia System for

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3. The District Court's Decision Denying The NYCLU's Motion To Unseal

a. On June 21, 2012, the NYCLU moved to intervene only to unseal "compliance reports that have already been filed in this case" and to vacate "the standing order permitting future compliance reports to be filed under seal." J.A. 249. Erie County opposed the motion (J.A. 281-282). The United States stated "that it does not oppose the New York Civil Liberties Union's [m]otion[,] * * * except to require that confidential information be redacted" (J.A. 281). "Confidential information" would consist of personally identifiable information about prisoners.

On August 30, 2013, the district court granted the NYCLU leave to intervene for the limited purpose of asserting a right of public access to sealed documents in this case, and then denied the NYCLU's motion to unseal. J.A. 304-330. Although the district court treated the NYCLU's motion to unseal as directed at both the TCC and Erie County reports (J.A. 316 n.3), the NYCLU has clarified on appeal that it seeks public access to only the sealed JCO report issued under the partial settlement agreement, and the subsequent TCC monitoring reports (NYCLU Br. 15 n.2).[7]

(...continued)
Serving People with Developmental Disabilities, all available at http://www.justice.gov/crt/about/spl/findsettle.php (last visited February 3, 2014).

[7] The district court jointly referred to the TCC and Erie County reports as "compliance reports." See, *e.g.*, J.A. 316 & n.3. For the sake of clarity, in this brief, the United States refers to the reports separately as "Erie County compliance reports"

(continued...)

b. The district court held that the TCC monitoring reports are "judicial documents entitled to the common law presumption of public access." J.A. 323. Applying this Court's "experience and logic" test, see, *e.g.*, *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006), the district court then held that the TCC monitoring reports did not fall into the subset of judicial documents entitled to the heightened First Amendment presumption of access. J.A. 326. Under the "experience" prong of the test, the district court held that "compliance reports are more akin to settlement negotiation documents which have not been traditionally open to the public or the press." J.A. 324-325. The district court found that the TCC monitoring reports "serve the same function as settlement negotiation documents: they allow for frank discussion between the parties, with the benefit of a neutral intermediary, about the proper policies needed to remediate the areas of concern, as well as [Erie County's] steps toward compliance with those policies." J.A. 325. Under the "logic" prong of the test, the district court held that the reports had little bearing on its exercise of a federal court's Article III power, and stated that "confidentiality in settlement negotiations and other alternative dispute resolution processes promotes the free flow of information that may result in settlement." J.A. 325 (internal quotation marks and citation omitted).

(...continued)
and "TCC monitoring reports," the latter of which includes the final JCO report. J.A. 357 (Doc. 228).

Turning to the common law analysis, the district court found that the weight of the common law presumption of access was "negligible to nonexistent" because the reports were similar to settlement negotiations and documents. J.A. 327 (quoting *United States* v. *Glens Falls Newspapers, Inc.*, 160 F.3d 853, 858 (2d Cir. 1998)). The district court then held that countervailing concerns weighed against disclosure. First, the court stated that the need for "frank discussions with staff members regarding past or continuing inadequacies" at Erie County's jails was "necessary in order to maintain continued improvement toward the goals outlined" in the Stipulated Order Of Dismissal. J.A. 327. The district court credited declarations of Erie County employees asserting that confidentiality "allowed personnel to readily communicate perceived inadequacies to the TCCs." J.A. 327. Second, the district court acknowledged that, while the case was a matter of public concern, the public had sufficient information by way of the publicly-filed settlement agreements and potential FOIA requests. J.A. 324-325.

Finally, the district court gave some weight to the fact that Erie County said that it had relied on confidentiality provisions in the Stipulated Order Of Dismissal and the subsequent sealing orders in filing "compliance reports." J.A. 329-330. The importance of this finding is unclear because the district court did not specify whether it applied to the TCC monitoring reports (at issue in this appeal) or Erie County's compliance reports (not at issue in this appeal).

Accordingly, the district court denied the NYCLU's motion to unseal. J.A. 330.

4. The NYCLU's Appeal

On September 26, 2013, the NYCLU filed a timely notice of appeal. J.A. 331-332.

SUMMARY OF THE ARGUMENT

The district court erroneously equated the TCC monitoring reports, prepared after settlement has been reached and a remedial plan is in place, with settlement negotiation documents. This error was based on a misunderstanding of the role of the TCCs and the nature of their monitoring reports as well as a misapplication of this Court's precedent. The district court's error affected its analysis of the NYCLU's First Amendment and common law public right of access claims. This Court should vacate the district court decision denying the NYCLU's motion to unseal the TCC monitoring reports and remand the case for reconsideration. The United States does not take a position on the ultimate outcome of the NYCLU's motion to unseal; we address only the district court's analysis of the issues presented in the motion.

ARGUMENT

THE DISTRICT COURT ERRED IN ITS ANALYSIS OF THE NYCLU'S MOTION TO UNSEAL BY CHARACTERIZING THE REPORTS OF INDEPENDENT, THIRD-PARTY MONITORS PREPARED POST-SETTLEMENT AS SETTLEMENT NEGOTIATION DOCUMENTS

A. Standard Of Review

A district court's decision to seal documents is reviewed for abuse of discretion. *Newsday LLC* v. *County of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013). This Court has held that "the First Amendment concerns implicated by the sealing of * * * documents mandate close appellate scrutiny" that involves "an independent review of sealed documents, despite the fact that such a review may raise factual rather than legal issues." *Ibid.*

B. Legal Standards Governing The Public Right Of Access To Documents

The public has "a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon* v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). This right of public access to judicial documents is based both on common law and the First Amendment. *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 119-120 (2d Cir. 2006); *United States* v. *Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (*Amodeo II*). The constitutional right of public access carries a stronger presumption of disclosure than the corresponding common law right. *Newsday LLC*, 730 F.3d at 163. Therefore, the First Amendment and common law rights of public access require separate, although related, analyses.

1. The district court applied this Court's "experience and logic" test, which applies when a court is determining whether the First Amendment right of public access applies to a document. *Lugosch*, 435 F.3d at 120. This test "requires the court to consider both whether the documents 'have historically been open to the press and general public' and whether 'public access plays a significant positive role in the functioning of the particular process in question.'" *Ibid.* (quoting *Hartford Courant Co.* v. *Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). In other words, a court must examine historical practice and public policy concerns. See *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009). Because the First Amendment imposes a "higher constitutional burden in requiring disclosure," documents to which this constitutional right attaches may be sealed or redacted only "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 120, 124; see also *Newsday LLC*, 730 F.3d at 165.

2. With regard to the common law right of public access, the district court must first determine if the document in question is a "judicial document." A "judicial document" is a document on file with the court that is "relevant to the performance of the judicial function and useful in the judicial process." *United States* v. *Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (*Amodeo I*). If the court determines that the document is a judicial document, there is a presumption in favor of public access. *Amodeo II*, 71

F.3d at 1047; *Amodeo I*, 44 F.3d at 146. This "presumption of access is based on the need for federal courts * * * to have a measure of accountability and for the public to have confidence in the administration of justice." *Amodeo II*, 71 F.3d at 1048. The weight of this presumption, therefore, is tied to the role the document plays in the performance of a federal court's Article III functions and to the value of the document to those monitoring the courts. *Id.* at 1049-1050; see also *Newsday LLC*, 730 F.3d at 165. Once the district court determines the weight of the presumption of public access, it must assess whether there are any countervailing considerations that weigh against disclosure. *Lugosch*, 435 F.3d at 119-120.

C. The District Court Erred In Its Analysis Of The NYCLU's First Amendment And Common Law Public Right Of Access Claims

Here, the district court held that the TCC monitoring reports are judicial documents to which the common law, but not the First Amendment, right of public access applies. J.A. 323-326. The district court's subsequent reasoning, in both its First Amendment and common law analyses, was flawed in that it mistakenly characterized the TCC monitoring reports as equivalent to settlement negotiation documents.

1. The court's holding regarding the First Amendment right of public access was based on its erroneous finding that the TCC reports are "akin to settlement negotiation documents." J.A. 324-325. This error affected the district court's analysis of both the experience and the logic prongs of the test. See J.A. 325 (finding that

settlement negotiation documents "have not been traditionally open to the public or the press," and that "[f]ew cases would ever be settled if the press or public were in attendance at a settlement conference or privy to settlement proposals") (alteration in original) (quoting *United States* v. *Glens Falls Newspapers, Inc.*, 160 F.3d 853, 858 (2d Cir. 1998)).

a. The district court incorrectly compared the TCC monitoring reports to the documents the press sought in *Glens Falls Newspapers, Inc.*, which included draft settlement agreements, attorney work product, and correspondence between counsel and the parties in *preparation* for settlement discussions. 160 F.3d at 854. Critically, when the press sought these documents in *Glens Falls Newspapers, Inc.*, the parties had not yet settled the case. The district court denied the motion for access to the documents because, among other things, "the relief sought by the intervenors, which would open all of the settlement negotiation processes to the public, would delay if not altogether prevent a negotiated settlement of this action." *Id.* at 856.

Here, in contrast, the TCC monitoring reports were not part of the settlement process, nor did they assist the parties in reaching settlement. These reports do not reveal deliberations among counsel occurring during the settlement process itself, nor do they provide the public with drafts of possibly abandoned settlement positions. The parties had already entered into, and the district court had already approved, a settlement agreement before the JCO or the TCCs prepared their reports. The United

States and Erie County entered into the Stipulated Order Of Dismissal because they both wanted to "[f]ully and finally resolve all disputes related to the subject matter of this action." J.A. 185. The TCC monitoring reports document the findings of an independent monitor tasked with evaluating Erie County's progress towards achieving the remedial goals agreed-upon at settlement. In short, it was error to characterize the reports the NYCLU seeks to unseal as settlement negotiation documents because the reports were prepared post-settlement by independent, third-party monitors pursuant to the terms of settlement already agreed to by the parties and approved by the court.

Nor do these reports "serve the same function as settlement negotiation documents," as the district court mistakenly concluded. J.A. 325. The TCC monitoring reports do not further settlement; settlement has already been achieved. See J.A. 185-227. The TCC monitoring reports are no more settlement negotiation documents than the court officer's reports in *Amodeo I* and *II*.

In the *Amodeo* cases, the press sought to unseal the reports of a court officer who, pursuant to a consent decree, was charged with "investigat[ing] union-related corruption and tak[ing] appropriate remedial action." *Amodeo I*, 44 F.3d at 142. Although not required by the consent decree, the court officer filed reports with the court that contained both public and confidential components. *Id.* at 143-144. The confidential portions of one such report outlined the court officer's investigation into criminal activity, including witness statements, documentary evidence, referrals to law

enforcement agencies, and the court officer's conclusions. *Ibid*. Like the TCC reports, the court officer's reports were issued post-settlement and addressed compliance with applicable laws. The relevant inquiry in the *Amodeo* cases was whether the release of the court officer's report would detrimentally affect law enforcement and privacy interests and whether redaction of the report could provide the public with information while addressing the countervailing concerns, not whether the report was part of a settlement agreement or arose from a consent decree. See *Amodeo II*, 71 F.3d at 1050-1053; *Amodeo I*, 44 F.3d at 147.

b. In characterizing the TCC monitoring reports as settlement negotiation documents, the district court misunderstood the role of the TCCs. The TCCs are not parties to the case. The Stipulated Order Of Dismissal expressly provides that the TCCs and their activities, reports, findings, and recommendations are independent of both the United States and Erie County. J.A. 217. More importantly, the role of the TCCs is broader than simply issuing reports for review and comment. Institutional change is complex; therefore, under the Stipulated Order Of Dismissal, Erie County must develop policies, create staff positions, implement training, etc., in order to satisfy what would constitute, in the United States' view, constitutional standards of confinement. In addition to the other work of the TCCs, see pp. 4-5, *supra*, the TCC monitoring reports provide the parties with a mechanism for measuring Erie County's continuing progress towards a series of agreed-upon goals in the areas of medical care

and mental health, which will establish what the United States considers to be constitutional conditions of confinement in Erie County jails.

Review of the publicly filed JCO report reveals that these reports are akin to audit reports, not settlement negotiation documents. The JCO report identifies the JCO and his staff; describes development of their "auditing tools," including the documentation they reviewed in preparation for the compliance site visit; describes the site visits and other contacts with Erie County staff; defines the "substantial compliance," "partial compliance," and "non-compliance" standards; outlines the substantive provisions of the partial settlement agreement, provides commentary and recommendations, identifies supporting documentation and interviews, and assigns a compliance status; and summarizes the JCO's findings in a chart. J.A. 120-184. The Stipulated Order Of Dismissal provides for a similar content for the TCC monitoring reports. See p. 5, *supra*. These monitoring reports are substantially different from the draft settlement materials and settlement preparation correspondence at issue in *Glens Falls Newspapers, Inc.*

The district court also misunderstood both the function of the comment process in preparing the final TCC monitoring reports and the role of the parties in assessing compliance. In its analysis of the experience prong of the First Amendment inquiry, the district court incorrectly asserted that the "comment period * * * provides a mechanism to facilitate the parties' continued discussion regarding prison conditions in

the areas specified, which in turn will permit the parties * * * to determine when [Erie County] has substantially complied with the terms of the Stipulated Order such that termination is warranted." J.A. 324.

The district court overlooked, first, the fact that the parties' comments are advisory only. The TCCs are not agents of either party; the parties have no supervisory authority over the TCCs or the TCCs' "reports, findings, or recommendations." J.A. 217. Therefore, the TCCs are not required to incorporate the parties' comments on draft reports, nor do the parties' comments provide any basis for the TCCs' assessment of Erie County's compliance. The purpose of these comments is for the parties to provide information to the TCCs; they are not a dialogue between the parties. See pp. 5-6, *supra*. Second, the TCCs, not the parties, are charged with assessing Erie County's compliance with the medical care and mental health remedial goals agreed-upon at settlement. See J.A. 218-219. The parties "may move the [district court] for any relief permitted by law or equity" in the event of "an alleged failure to fulfill an obligation under th[e] Stipulated Order," but the parties do not themselves evaluate Erie County's compliance in the areas of medical care and mental health. J.A. 219.

2. The district court's error also affected its analysis of the common law right of public access to the TCC reports. Based on its erroneous characterization of the TCC reports as settlement negotiation documents, the district court concluded that the

weight of the common law presumption of public access was "negligible to nonexistent." J.A. 327. Again, the district court incorrectly relied on *Glens Falls Newspaper, Inc.*, which involved "discussions and documents exchanged *before* an agreement ha[d] been reached," as opposed to a final settlement agreement which would be "placed on file and * * * become a public record." 160 F.3d at 857 (emphasis added). As discussed above, the TCC monitoring reports are a means of assessing Erie County's progress in implementing the goals outlined in the court-approved settlement agreement. The reports are in no way similar to preliminary, pre-settlement discussions and documents at issue in *Glens Falls Newspapers, Inc.*

For this same reason, the district court erred in assessing countervailing concerns against disclosure of the TCC monitoring reports. The district court found that release of the sealed reports would impair settlement of the case, and that confidentiality was necessary for Erie County personnel to have "frank" discussions with the TCCs regarding past or continuing inadequacies. As the NYCLU correctly argues, the Stipulated Order Of Dismissal requires Erie County to give the TCCs "full and complete access to the Facilities, all Facility records, prisoner records, staff, and inmates * * * [and] direct all employees to cooperate fully with the TCC in their evaluation activities." J.A. 217. Erie County must also submit new policies, implementing documents, and training curricula to the TCCs for review and approval. J.A. 215. These obligations, which Erie County voluntarily assumed when it entered

into the Stipulated Order Of Dismissal, exist independent of whether the TCC reports are sealed. Regardless of Erie County's level of candor, the TCCs are charged with independently verifying Erie County's representations and examining supporting documentation. J.A. 219.

In sum, the district court's error in equating the TCC reports to settlement negotiation documents permeated its analysis of the NYCLU's motion to unseal the reports, and its decision denying the motion therefore should be vacated and remanded for reconsideration. The United States does not take a position on the ultimate outcome of the NYCLU's motion to unseal.

CONCLUSION

This Court should vacate the district court's decision and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rule 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 5135 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

s/ Erin Aslan
ERIN ASLAN
Attorney

Dated: February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, I electronically filed the foregoing Brief For The United States As Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Finally, I certify that 6 (six) hard copies of the foregoing were sent via certified mail to the Clerk of the Court.

s/ Erin Aslan
ERIN ASLAN
Attorney