No. _____

In The
Supreme Court of the United States

RICHARD ROE a/k/a FREDERICK OBERLANDER,

Petitioner,

v.

UNITED STATES OF AMERICA and
JOHN DOE a/k/a FELIX SATER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit On Behalf Of Petitioner Frederick M. Oberlander

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In May 2012, by interlocutory petition from the same docket below, petitioner sought certiorari here in a case concerning the court-ordered concealment of Donald Trump's partner Felix Sater's involvement in Russian organized crime. By order of the Second Circuit, he tried to file here entirely under seal, but this Court ordered him to move to seal *and* to propose versions of the petition and the motion, redacted by rules it gave him, for public access. He did, serving them on respondents, who didn't object; and on review this Court, finding the redactions met with its rules, ordered both public here. In the years since, though retired from access here as they predate e-filing, the redacted motion and petition became and remain publicly available at the Library of Congress and the National Archive, and the redacted petition is also on Westlaw. Yet in 2018 the Second Circuit ordered both, which had been filed on its docket, redacted beyond what this Court approved and ordered public. Should this Court, using supervisory power, summarily reverse, ordering that court to remove its extra redactions?

2. The Second Circuit justified its refusal to limit itself to this Court's redactions by holding *inter alia* that because the redaction process here is delegated to or supervised in part by clerks its determinations are not legally binding on lower courts. Is that correct?

3. Where judicial records are publicly docketed and widely available, *a fortiori* at higher courts, but in any

QUESTIONS PRESENTED – Continued

event at public venues like the National Archive, is there a *per se* public right of access to them, equally as unrestricted, when filed in court?

4. If a lower court seals parts of documents ordered public here, is it an abuse of its inherent powers to charge with or find in contempt one who disseminates those parts?

5. A lower court may not directly order this Court or its personnel to act. May it purport to control this Court's docket indirectly by ordering on penalty of contempt a petitioner to somehow ensure a sealing here, *a fortiori* one that contradicts this Court's own orders?

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ORDERS & OPINIONS BELOW

The Second Circuit's order, the subject of this petition, is dated February 9, 2018, (Appendix ("App.") 1-4), adopts the report and recommendation dated July 5, 2017 of the Honorable Pamela K. Chen, serving as a Special Master (App. 5-49), and the subsequent "unsealing order" dated March 5, 2018 of Special Master Chen (App. 50-60), effectuating the Second Circuit's order of February 9, 2018.

JURISDICTION

Statutory jurisdiction lies in 28 U.S.C. § 1254(1).

On February 9, 2018, the Second Circuit issued its Order "ADOPT[ING] IN FULL" the Special Master's Report and Addenda.

Petitioners sought from this Court a sixty-day enlargement of time, to July 9, 2018, to file its Petition for Certiorari, which this Court granted on May 2, 2018.

CONSTITUTIONAL PROVISION AT ISSUE

The Constitutional provision at issue is the First Amendment, which protects the rights of petition and expression, and – by decisions of this Court – rights of access to certain court information, rights which are implicated when lower courts' concealments of information as to which the *public* has a First Amendment right of access, and as to which the *petitioner* has a

First Amendment right to speak. Petitioner argues that, by concealing – that is, by failing to make public on its docket – information that is otherwise public, information as to which there is no colorable basis for it to be maintained under seal, the Second Circuit violated the First Amendment to the United States Constitution, which provides, in pertinent part:

> "Congress shall make no law . . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

A. Overview.

This petition arises from the 2017 motion of members of the media,[1] joined by petitioner[2] and supported by amici, to intervene in and unseal the content of Second Circuit matter 10-2905-CR, which arose from Eastern District of New York matter 98-CR-1101, the criminal case of one Felix Sater, twice convicted felon,

[1] Richard Behar, *Forbes Media LLC*, David Johnston, *DCReport.org*, Joe Conason, *National Memo*, Russ Baker, *WhoWhatWhy.org*, Dan Wise, *WiseLawNY*, the BBC, BNN-VARA (Dutch PBS), Michael Moore, James Henry, and *The American Interest*.

[2] In 2012, when the prior petition for writ of certiorari had been filed, petitioner was proceeding anonymously as Richard Roe and respondent Felix Sater was proceeding as John Doe. Their true names have since been ordered and lawfully made public.

associate of Russian organized crime, and longstanding business partner of Donald J. Trump.

While the preceding and ensuing eight-year history of this case is complicated, the relevant legal principles are not. Nevertheless, despite their simplicity, they are of critical constitutional concern. We explain:

In December 2016, the Hon. Lorna Schofield, Southern District of New York, denied defendants' motion to dismiss a civil RICO complaint in *Kriss v. Bayrock*, 10-CV-3959, for failure to state a claim. The complaint alleged that defendants had either participated in, or facilitated, the operation of Bayrock, a real estate firm, in a pattern of racketeering. It alleged that the main objectives of that racketeering were fraudulent concealments of Sater's (1) 1998 racketeering conviction for securities fraud and money laundering; and (2) substantial, at times majority, ownership in the firm. Judge Schofield correctly held that operating the firm, or either agreeing to facilitate or facilitating its operation, through a pattern of such concealments *did indeed* state a cause of action in civil RICO (so, necessarily stated a criminal RICO offense as well, which is identical to civil RICO save for the need to claim causal injury in a civil RICO case).

While so correct as to be otherwise unremarkable, that holding may be of explosive importance, because among the persons partnered with Sater and Bayrock in the years in question was one Donald J. Trump, who thus either had no clue whom he was in business with, and what kind of business, or knew and didn't care,

and thus facilitated a racketeering enterprise. In other words, he was either a dupe, a co-conspirator; or, perhaps, first the former, then the latter.

Trite as it may be, the issue is, "What did the President know, and when did he know it?" That, in turn, comes down to, "What could he have been expected to know, if he wasn't explicitly told, and what might have been well hidden from him."

So, it's probably significant, or ought to be, that if for any length of time the truth was hidden from him, a smoking gun revealed that it was in large part due to culpable efforts of members of the federal government, in both the executive and judicial branches.

The gun is Sater's 2004 PSR, which among other things has an admission (presumably against penal interest) of the probation officer who prepared it that he knew that Sater was hiding his conviction from his partners at Bayrock so, astonishingly, the probation officer was staying away from them and from the firm to facilitate Sater's concealment.

Realize the implications. By Judge Schofield's ruling, *supra*, it states a cause of action in racketeering to help Sater and others operate Bayrock through a pattern of concealing his conviction, yet the probation officer in charge of his presentencing admitted, and presumably the AUSAs and sentencing judge read, that he was facilitating exactly that.

The sole reason anyone but Sater, the government, and his lawyers know this is because in 2012 this Court relaxed an order of the Second Circuit barring petitioner from telling anyone, by giving him leave to make it public in a redacted version of a 2012 petition for writ of certiorari that ***this Court knowingly ordered public here***.

Yet last February, despite that order of this Court, and though that redacted version, and a redacted version of petitioner's motion for said leave, is all over the Internet, on Westlaw and at the National Archive and the Library of Congress, the Second Circuit by decree purported to overturn history by placing it under seal there despite its globally public provenance.

This would be funny were it not for the fact that the Second Circuit weaponizes sealing orders, using them as global gag orders *contra mundum*, threatening to hurl contempt charges at strangers to cases where sealing orders exist (even cases where they don't) if they talk about anything under seal, even if it has been public for years.

B. The Concealment of Sater's Criminal Case.

Sater has a long history of defrauding investors in various businesses. In 1998, he pled guilty to racketeering for participating in the operation of an organized crime pump-and-dump stock fraud that bilked investors, many of them elderly, some even Holocaust survivors, out of more than $40 million.

His guilty plea should have resulted in the imposition of mandatory sentencing orders on him, including $80 million in forfeiture and $40 million in restitution to the benefit of his many victims, even if he never knew who they all were or which of the crooked brokers under his direction had sold which of them which garbage stock. This is so because fifty years ago, in reasonable enough fear that "the mob" was infiltrating legitimate businesses, Congress basically made it illegal to be Don Corleone.

In 1970, RICO, or the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*., made it a crime to participate in the operation of a business through a pattern of "predicate" crimes, such a business defined to be a racketeering, or RICO, enterprise, and this was so even if the accused didn't himself commit predicate crimes, didn't know exactly what crimes others were committing, and didn't know exactly who the victims were. Mere participation in its operation while knowing, or willfully blind, or recklessly indifferent to the fact that it was conducted by a pattern of predicate crime was enough to be imprisoned for 20 years and ordered to (1) forfeit twice the proceeds of the entire scheme, and (2) pay full restitution to all its victims.

Indeed, even a mere agreement to facilitate such an enterprise, or the actual facilitation of it, even if one only knows generally that it is being operated through a pattern of such crime, is enough for total, vicarious liability in conspiracy.

But not for Sater. His entire RICO case was hidden, leaving victims and third parties unaware of his conviction and leaving him in possession of the millions of dollars he'd admitted taking. So, armed with the money, and protected by the secrecy of his case, Sater wasted no time in resuming his old tricks.

By 2002 he had infiltrated Bayrock, a New York real estate firm, and over the ensuing years used it to launder hundreds of millions of dollars, skim millions more, and again defraud investors and partners, but this time doing so in, eventually, conspiracy with Donald Trump, and with the full knowledge of the government.

In 2008, Jody Kriss, Bayrock's Director of Finance and, importantly, one of its four equity principals and managing partners, in fact at the time by far the largest equity owner in the firm, engaged petitioner, an attorney, to (1) investigate his suspicions that the firm had engaged in criminal activity, and (2) vindicate his rights. Part of his suspicion had taken root long ago, growing for years; part was newly-minted, caused by Sater's response to him a few months before when he had asked Sater when he would receive the rest of a $5 million partnership distribution he was due and Sater had replied that if Kriss made trouble he (Sater) would have him worked over, if not killed, by one Butch "Green Eyes" Montevecchi, a Genovese-family enforcer Sater and his family had used for muscle in their various organized crime ventures.

Petitioner confirmed Kriss's suspicions, learning that the three other Bayrock principals, Sater, Tevfik

Arif, and Julius Schwarz, had been variously running the firm since Sater's entry in 2002 largely as a money-laundering conduit for Russian organized crime, perpetrating hundreds of millions of dollars of crimes like tax fraud and bank fraud with impunity, as if they were protected from all accountability.

(Petitioner wouldn't know how true that really was for years, when he learned that they acted as if they are immune *because they effectively were immune* by virtue of Sater's deal with the government, as a co-operator with a get-out-of-jail-free card for any crimes he'd commit, but details of that are beyond this petition, so it suffices to say that given Bayrock's racketeering and what we now know was Trump's eventually culpable role in it, it was a racketeering enterprise whose ultimate victims were not only the banks it defrauded, and the investors, and the customers, ***but also 325 million Americans, defrauded of a fair election by cover-up of the government's protection of a convicted Russian mobster and his tainted partner, the ultimate fraud imaginable***.)

This led to petitioner's preparation of one of the most extensive RICO complaints in history, and while preparing it, in 2010 he received, unsolicited, documents from a whistleblower at Bayrock revealing Sater's 1998 crimes, including a 2004 presentence report ("PSR") from the 1998 case revealing that Sater was hiding a RICO conviction from his Bayrock partners *and that the government was helping him do so*.

In May 2010, in the Southern District of New York, petitioner filed the RICO complaint, directly on behalf of Kriss and co-plaintiff Michael Ejekam, another aggrieved Bayrock partner, and indirectly, that is derivatively, in behalf of the many other of Sater's and Bayrock's victims. It exhaustively laid bare details of hundreds of millions of dollars of fraud and money laundering in connection with many Bayrock projects, like Trump SoHo and Waterpointe in New York, Trump International in Florida, and Trump Camelback in Phoenix.

It alleged that Sater fraudulently hid his 1998 RICO conviction and substantial (indeed, until he purportedly got rid of it in 2008, majority), equity ownership in Bayrock, to defraud Bayrock's investors, lenders, partners, and customers.

Most important, is that (1) it alleged in detail Sater's partnership, via Bayrock, with Donald J. Trump; and (2) it quoted some of the documents petitioner had been given by that whistleblower, including portions of the PSR.

Judge Buchwald, to whom the S.D.N.Y. RICO case had been first assigned, soon put the complaint under seal. In 2015, attorneys not associated with petitioner took over the case. A year later in 2016 it survived a 12(b)(6) motion to dismiss, the judge then assigned (Schofield, J.) holding that its allegations that Sater and others had run, or facilitated the running of, Bayrock through a pattern of concealing Sater's ownership and RICO conviction did indeed properly state causes

of action in, respectively, substantive and conspiracy RICO.

The case eventually settled on February 16, 2018. But, be that as it may, focusing on the events immediately following the filing of the complaint, we see that ***instead of taking steps to help Sater's victims recover losses and put him behind bars, the government, followed by two district courts, instead swung into action to squelch all public reference to Sater's earlier criminal proceedings and to punish, not Sater for his ongoing crimes, but petitioner for disclosing evidence of them, even those still then ongoing***.

As noted, the S.D.N.Y. court sealed the RICO complaint days after its filing, and the E.D.N.Y. court in which Sater had been secretly prosecuted issued TROs barring petitioner from disseminating the documents he'd been given by that whistleblower, even though petitioner was not a party to that case, hadn't got the documents by court process, and the court couldn't identify any sealing or other order that applied to him.

The E.D.N.Y. court later converted the TRO barring dissemination of the PSR (but not the other TRO's, which lapsed) to a permanent injunction, and in June 2011, upon interlocutory appeal therefrom, which appeal is (still) underlying docket 10-2905-CR here, the Second Circuit affirmed.

Petitioner then in May 2012 timely petitioned for relief from this Court.

C. Prior Appeal to This Court (U.S. Supreme Court Docket 12-112).

During the pendency of the Second Circuit appeal, that court had said any "papers filed in the Supreme Court" containing documents under seal in the Second Circuit must be filed under seal there. Lerner, counsel acting in behalf of Oberlander, attempted to file a petition for writ of certiorari entirely under seal, but it was rejected by the intake clerks here, with the instruction that he simultaneously file (1) a motion to file the petition under seal; (2) a redacted version of that motion for public access; and (3) a redacted petition for public access, the latter two ordered to conform to rules this Court had, in the meantime, set forth in its procedural directive of June 25, 2012.

Lerner filed all, and notably, all parties below and here, the government and Sater both, were served with the motion, petition, and proposed redacted versions of each and did not make any objections to the redactions or the publication of unredacted information on this Court's docket.

On July 13, 2012, after finding that the proposed redacted versions complied with the rules it had given, this Court granted Lerner's "Motion to Order the Docketing and Public Availability of the Petition for Writ of Certiorari in Redacted Form as Provided Herewith" (hereinafter "Motion to Order Docketing and Public Availability"). The motion and companion petition specifically had apprised the Supreme Court of the lower courts' orders that the information remain sealed and

that "the Second Circuit ordered that any appeals Roe filed in this Court be denominated 'Sealed'." The motion further enumerated what information was not redacted in the proposed redacted petition, including leaving unredacted information necessary to understand the petition and the argument that the PSR contains information of public concern – viz, evidence or prosecutorial and judicial misconduct: For example, Sater's Probation Officer (i) reported that Sater was receiving no salary from his firm while he was skimming millions; (ii) reported that Sater had a negative net worth while he was spending large sums on rent and buying a home; (iii) admitted that he had been told not to ask the whereabouts of the proceeds of Sater's crime, from which Sater admitted taking millions; (iv) admitted knowing that Sater was hiding his conviction from his firm, partners and victims; and (v) noted the DOJ's failure to comply with the victim notification requirements of 18 U.S.C. § 3664(d)(2)(A), especially as to restitution. While this information was not redacted, dollar amounts and other details, such as the name of the company from which Sater was skimming millions of dollars, were.

By order of June 25, 2012, this Court granted the motion, directing petitioner to submit for review a new, proposed redacted version of both the motion and the petition which would be in compliance with certain rules it had set forth in that order. Thereafter, Lerner worked with Atkins . . . invited the SG to participate (the SG declined), and so on, until, in mid July 2012,

the Court advised Mr. Lerner that his proposed redacted versions were in compliance with this Court's order and ordered the documents made publicly available at the clerk's office here.

At almost the same time, in early August 2012, as Judge Glasser explained, there was "an unfortunate series of events in the office of the Clerk of E.D.N.Y.", specifically, "the docket sheet of 98-CR-1101, which revealed [Sater's] identity and the fact of his conviction and cooperation, was inadvertently unsealed for days then resealed," and had gone on Lexis and Westlaw. Glasser said that "information the government and [Sater] seek to maintain sealed has already been publicly revealed; the cat is out of the bag; the genie is out of the bottle. [Sater's] identity and the fact of his conviction was publicly revealed by the government in a press release, and the docket sheet revealing [his] identity, conviction, and cooperation is accessible on Westlaw and Lexis." Further, he explained that the Second Circuit had previously held "that a court lacks power to seal information that, although once sealed, has been publicly revealed" and that "[o]nce it is public, it necessarily remains public." (*Id.* at 6.)

On September 20, 2012, this Court called for the response of the Solicitor General. On March 19, 2013, days before the Court had scheduled consideration of the petition, the Solicitor General sent a letter to this Court, which had attached to it two orders from Judge Glasser: (1) a March 13, 2013, order unsealing a large portion of the filings on Sater's criminal docket, and (2) a March 14, 2013, order in which he stated that Sater had been sentenced "in an open courtroom" and noted that certain of the documents in dispute had never been filed, and so were never sealed.

This Court denied Oberlander's petition for certiorari on March 25, 2013.

D. 2017 Members of the Media Intervene to Unseal.

As noted, on March 22, 2017, media interests moved to intervene to unseal the content of the entire docket in Sater's criminal matter. The Second Circuit appointed the Hon. Pamela Chen as special master to hold hearings on the unsealing motion. Notably, included on the docket was the 2012 redacted cert petition. In her Report, Judge Chen made additional redactions to that petition – sealing information that had been made public by order of this Court on this Court's docket. Judge Chen stated:

> The same redactions have been made to Dkt. No. 85, which is [Oberlander's] Supreme Court petition for certiorari. The petition was filed in this case with redactions that cannot be undone in Dkt. No. 85. ***The redactions***

> ***indicated above, however, <u>are in addition to the petition's original redactions.</u>***

(Spec. Master Rep., App. 44, n.28.)

And, discussing whether to unseal the PSR because information in it had been ordered public in the 2012 redacted cert petition, Judge Chen opined:

> Clearly, the Supreme Court does not make legal findings via its redaction procedures as administered by its Clerk's Office staff. And there is nothing in the record to even suggest that the Supreme court made a finding that [Oberlander's] disclosure of Doe's PSR information – in knowing contravention of this Court's February 2010 [sic 2011] order that any petition to the Supreme Court be filed under seal – was in the public interest.

(App. at 41.)

Chen found in general that the "sealing of the proposed redacted information is warranted to protect the safety of Doe and his family, and that the proposed redactions are narrowly tailored." (App. 32-33.)

On February 9, 2018, after considering Oberlander's and the media's objections to the report, the Second Circuit in a cursory order adopted the Report "in full" and granted "Judge Chen the authority to determine whether to unseal any or all motion papers filed in the course of the proceeding." (CA2 February 2018 Order, App. at 3.) On March 8, 2018, Chen issued a final Unsealing Order, addressing the sealing of motion papers filed in the proceeding. Notably, Chen put

under seal quotes in Oberlander's filings that were from the motion ordered public here in 2012 to order docketing and public availability purportedly because it is not currently "accessible through the Supreme Court's public docket or Westlaw." (Unsealing Order, App. at 56.) notwithstanding that Oberlander had brought to the attention of both the Second Circuit and Judge Chen that the redacted 2012 cert petition and the Motion to Order Docketing and Public Availability had been ordered publicly docketed by this Court and were still available to members of the public through the National Archives (and attached a copy of the motion obtained from the National Archives with confirmation of its provenance there to his objections).

E. In the Second Circuit, Sealing is No Idle Threat.

The Second Circuit in this and related proceedings has treated alleged sealing of materials and filings as gag orders as to anything under seal, even if otherwise publicly available. Indeed, there are currently investigations of persons who allegedly revealed to members of the media information that the courts put under seal regarding Bayrock and Sater, regardless whether that information was also publicly available.

ARGUMENT

I. This Court Has Supervisory Authority over Lower Courts, and so Overrides Lower Court Sealing Orders When It Orders Information Publicly Revealed on Its Own Docket, and has Supervisory Authority over Its Own Docket, Such That Lower Courts Cannot Put Under Seal Material This Court Ordered Publicly Docketed.

This Court should grant certiorari because the actions of the Second Circuit and its Special Master, in placing material under seal that this Court previously ordered public on its own docket and publicly available in the National Archive is "such a departure . . . as to call for an exercise of this Court's supervisory power." R. 10.

Article III of the United States Constitution vests this Court with the "judicial power" of the United States. Article III additionally states that this Court "shall have appellate Jurisdiction, both as to Law and Fact" over matters of federal subject matter jurisdiction. Inherent in the creation and vesting of such power in this Court is its supervisory power over the lower federal courts. Thus, this Court can vitiate lower federal court orders. In Chen's Report, she found that Oberlander had acted "in knowing contravention of [the Second Circuit's] February [2011] order that petition to the Supreme Court be filed under seal." (App. at 41.)

But, in fact, Lerner originally did file the petition "under seal" with this Court, and then was instructed

to move for permission to file a redacted cert petition that would be publicly available, and then filed such a motion (with the explanation that the Second Circuit had ordered that any cert petition be filed "under seal") with a copy of the proposed redacted cert petition. This Court then granted that motion and ordered public docketing of the redacted 2012 cert petition and the Clerk of this Court worked with Lerner to ensure the redactions comported with this Court's order. ***Lerner and Oberlander couldn't have acted in "knowing contravention" of the Second Circuit's order by obeying this Court's orders. This Court has the power to vitiate the sealing orders of a lower court.***

And, this Court *"**has supervisory power over its own records and files**."* *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598 (1978). So, after this Court ordered material made available publicly on its own docket, and it was in fact publicly docketed and available to the public and is still available from the Archives where this Court deposited its own records (with the cert petition also on Westlaw), to say nothing of the countless websites that contain it, the lower federal courts lacked the power to further redact and put under seal portions of that material which this Court had ordered publicly filed here.

The Second Circuit's failure to recognize its lack of power to seal materials publicly placed on this Court's docket is also in conflict with comparable situations addressed by other Circuit Courts of Appeals.

For example, in *In re Marin,* 956 F.2d 339 (D.C. Cir. 1992), the DC Circuit held that "it lacked subject matter jurisdiction to review any decision of the Supreme Court or its Clerk" when a *pro se* petitioner sought mandamus against the Clerk of this Court for not accepting his petition for certiorari. The D.C. Circuit explained:

> We are aware of no authority for the proposition that a lower court may compel the Clerk of the Supreme Court to take any action. The Supreme Court, on the other hand, has inherent supervisory authority over its Clerk. . . . We believe that this supervisory responsibility [over the Supreme Court Clerk] is exclusive to the Supreme Court and that neither a district court nor a circuit court of appeals has jurisdiction to interfere with it by mandamus or otherwise.

See id. at 340; *see also Miller v. Harris,* 599 Fed. Appx. 1 (D.C. Cir. 2015) ("The district court correctly determined it lacked jurisdiction to review decisions of the United States Supreme Court, including those of its Clerk."); *Panko u. Rodak,* 606 F.2d 168, 171 n.6 (7th Cir. 1979) (refusing to mandamus the Supreme Court Clerk, and stating "it seems axiomatic that a lower court may not order the judges or officers of a higher court to take an action"); *Borntrager v. Stevas,* 772 F.2d 419 (8th Cir. 1985) (declining to grant mandamus against the Supreme Court Clerk).

In the *Marin* cases, the issue was whether lower federal courts had the power to order the Clerk of this Court to take an action, such as accepting a petition for

certiorari. Here, rather than trying to order the Clerk to take an action, the Second Circuit instead abrogated the authority of this Court and its Clerk by placing under seal portions of filings ordered public by this Court, redacted with the assistance of its Clerk to ensure compliance with this Court's order, and publicly docketed.

Rather than "ordering" this Court and its Clerk to make further redactions to the public filings, the Second Circuit effectively sought to accomplish the same thing by simply placing under seal parts of filings ordered publicly docketed here.

II. This Court Should Grant Certiorari to Recognize a First Amendment Right of Access to Judicial Records That Have Been Publicly Docketed and Made Publicly Available.

This Court should grant certiorari and recognize a First Amendment right of access to judicial records that have been publicly docketed or otherwise made publicly available, whether available at the court itself or elsewhere, for example here by its redeposit with the National Archives. The decisions of the Circuit Courts are in conflict regarding whether there is such a right of access or whether judicial records that have previously been publicly docketed and available can thereafter be sealed and made unavailable. And, under this Court's First Amendment caselaw and considering the modern realities of the Internet and electronic dissemination of information, the First Amendment right of

access should be extended to publicly docketed and remotely available judicial records.

III. The First Amendment Right of Access Must Include Access to Publicly Docketed or Publicly Available Judicial Records.

"[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to ***prohibit government from limiting the stock of information*** from which members of the public may draw." *Richmond Newspapers v. Virginia,* 448 U.S. 555, 575-76 (1980) (internal citations omitted). So held this Court when recognizing a First Amendment right of access to criminal trials. The Court further expounded that rights found in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at 575. And, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1995), this Court explained that "official records and documents open to the public ***are the basic data of governmental operations***." It is essential that such data is available to a self-governing populace, as well as to the media, so that the body politic can perform its proper role checking the activities of governmental agents, including the judiciary.

In a series of cases, this Court recognized that the First Amendment protected access to and dissemination of publicly disclosed judicial records – even when

that public disclosure was accidental.[3] For example, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), a father brought suit for invasion of privacy for the publication of the name of his daughter Cynthia Cohn, who had been raped and murdered. A state law prohibited news media from printing, publishing, or otherwise disseminating the name or identity of a rape victim. A reporter obtained copies of indictments that included Cohn's name, and published a brief article naming her as the victim. The indictments that included her name ***were publicly available for inspection upon request at the courthouse,*** which is precisely how the reporter obtained them. This Court held that the First Amendment protected the reporter, who could not be punished for disseminating the information. The Court explained:

> *By* ***placing the information in the public domain on official court records,*** the State must be presumed to have concluded that the public interest was thereby being served. ***Public records by their very nature are of interest to those concerned with the administration of government*** and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical

[3] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), does not foreclose recognition of such First Amendment right of access. In *Nixon,* the Court relied in large part on existence of the Presidential Recordings Act, which ensured the public would receive the recordings through the Congressional procedure set forth in the Act.

> importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government, *the First and Fourteenth Amendments command nothing less than that the States* ***may not impose sanctions on the publication of truthful information contained in official court records open to public inspection***.

Id. at 495.

True, *Cox* dealt with *punishment for disseminating* material in public records, but the same principles apply to *sealing* such information, trying to remove it from the public domain *after it's already there,* impermissibly "***limit[ing] the stock of information*** from which members of the public may draw." *Richmond Newspapers v. Virginia,* 448 U.S. at 575-76. It puts the public and courts in an undesirable position, and in the Second Circuit exposes members of the public to contempt. Those who were privy to the information prior to its sealing, who accessed it while it was publicly available, will not know if they can disclose it free of risk of contempt.

Indeed, where sealing comes on pains of contempt as it appears in the Second Circuit, sealing such information has the same effect as punishment or threat of same for dissemination. Further, courts will be sealing information in a context where they will enforce or sanction breaches of the sealing order as punishment for revealing information obtained from public court documents though such is barred by the First Amendment. Citizens and members of the press who accessed

the information when publicly available wouldn't know once sealed or resealed if they could disseminate it. For example, if the media interests in this case, like *Forbes,* access the redacted certiorari petition on Westlaw or obtained the Motion to Order Docketing and Public Availability from the National Archives, can they publish it freely now?

The Second Circuit has redacted and put under seal parts of those documents, yet the media lawfully obtained them as publicly docketed court records. The media wouldn't know if they were free to disseminate the originals as docketed by this Court and currently available in the National Archives. *Cox Broadcasting* says they must not be punished: "At the very least, the First and Fourteenth Amendments ***will not allow*** exposing the press to ***liability for truthfully publishing information released to the public in official court records***." *Id.* at 496.

Other cases from this Court are in accord. In *Florida Star v. B.J.F.,* 491 U.S. 524 (1989), a case also dealing with disclosure of a rape victim, the Court reiterated these points from *Cox.* And in *Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977), a case involving the name and photograph of a juvenile defendant, the Court again quoted *Cox:* "the press ***may not be prohibited from truthfully publishing information released to the public in official court records***."

Thus, even though the Second Circuit purported to place portions of the redacted 2012 cert petition and Motion for Docketing out of Public Availability, neither

the press nor public can be prohibited from "truthfully publishing" the full contents of those "official court records" as docketed by this Court.

Last, in *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979), this Court relying on *Cox* and *Oklahoma* held that if "***truthful information was 'publicly revealed'*** or 'in the public domain' ***the court could not constitutionally restrain its dissemination***." Sealing and redacting as the Second Circuit did here are of course, methods for "restraining dissemination."

So, what is the solution to keeping truly private or proprietary material released in court proceedings from dissemination? This Court explained in *Cox:* "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which *avoid public documentation* or other exposure of private information." *Id.* at 496. That is because ***"[o]nce true information is disclosed in public court documents open to public inspection,"*** the First Amendment applies, and "the press cannot be sanctioned for publishing it." *Id.*

Here, both the redacted 2012 cert petition and Motion to Order Docketing and Public Availability were publicly docketed by this Court and available as "public court documents open to public inspection." Thus, the First Amendment applies, and the Second Circuit cannot seal "true information [as] disclosed" in such documents.

First Amendment protection for information in a judicial record that has been publicly docketed also accords with other lines of First Amendment cases. In *Bartnicki v. Vopper,* 532 U.S. 514, 528-30 (2001), the Supreme Court explained that the First Amendment forbids suppression or punishment of "a law-abiding possessor of information" even if that person received such from a third party who obtained it illegally. Certainly, one who obtains official court records from the National Archives or on Westlaw would be "a law-abiding possessor of information," even though the Second Circuit has put under seal and attempted to suppress information contained in those records. Moreover, this Court in *Sorrell v. IMS Health, Inc.,* 564 U.S. 552 (2011), emphasized the importance of the free flow of information to the public even in the context of commercial speech. Of course, that interest is acute in the context of judicial records. The Court reiterated that disclosure, dissemination, and publication of information constitute speech under the First Amendment. *See id.* at 570.

This Court has emphasized that open courts and access to court proceedings, especially criminal proceedings as at issue here, are essential pieces of our democratic system of justice and the proper functioning of our courts, that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court." *Richmond*

Newspapers v. Virginia, 448 U.S. 555, 575-76 (1980). In *Cox,* 420 U.S. at 492, the Court noted the "special protected nature of accurate reports of judicial proceedings has repeatedly been noted." In *Cox* and in *Craig v. Harney,* the Court proclaimed that, "[a] trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity." *Cox,* 420 U.S. at 492 (quoting *Craig v. Harney,* 331 U.S. 367, 374 (1947)). The same should be true of publicly available judicial records: those who see and hear them should be privileged to "report them with impunity" without a court able to later put information from such records under seal and perhaps even threaten with contempt those who dare repeat it. As this Court recognized in 1980, even before the advent of the internet, ECF, etc.: "[T]hat the right to attend [an open court proceeding] may be exercised by people less frequently today when information as to trials ***generally reaches them by way of print and electronic media in no way alters the basic right***." *Richmond Newspapers,* 448 U.S. at 577 n.12.

IV. There Is a First Amendment Right of Access to Publicly Available Judicial Documents, so as Even Where a Compelling Government Interest Exists for Denying Access, Sealing Material That Is Publicly Available Cannot Be Narrowly Tailored to Serve That Interest, and, Indeed, Is Futile.

Where a presumptive First Amendment right of access attaches, as it does for judicial documents, the presumption of access may be overcome only by an

overriding interest based on findings that ***closure is essential to preserve higher values and narrowly tailored to serve that interest***. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1, 9-10 (1986). However, where the information being sealed is or has been a publicly available judicial document, it is impossible for sealing such information to be "essential to preserve higher values" or "narrowly tailored to serve that interest." This was noted in *B.J.F.,* 491 U.S. at 535, where this Court said: "punishing the press for its dissemination of information ***which is already publicly available*** is ***relatively unlikely to advance the interests in the service of which the State seeks to act***." *See also Cox,* 420 U.S. at 495 ("the [State's] interests in privacy fade when the information involved already appears on the public record"); *CBS, Inc. v. USDC Cent. Dist. Cal.,* 765 F.2d 823, 825 (9th Cir. 1985) (the government's interest in law enforcement, though implicated, was insufficient to overcome the presumption of access under *Press Enterprise* as "most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record").

Relatedly, several lower federal courts have held that requests for sealing information already public renders a case "moot" as the court cannot fashion an effective remedy; the information is already available in the public domain. Wright & Miller, 13C *Federal*

Practice and Procedure § 3533.3.1 & n.35 (citing cases); *Constand v. Cosby,* 833 F.3d 405 (3d Cir. 2016). In the age of the internet, this is stark reality.

Since any member of the public can obtain the redacted 2012 cert petition from Westlaw and the petition and the Motion to Order Docketing and Public Availability from the National Archives, how can the government's asserted interest be served by sealing certain information publicly available in those documents? Thus, Judge Chen's finding that "the proposed redactions are narrowly tailored" to interests in secrecy can't withstand ***any***, let alone strict, scrutiny. Anyone who would know what she redacted from either the redacted 2012 cert petition or the Motion to Order Docketing and Public Availability can find out. Thus, sealing simply cannot serve the interest of "protect[ing] the safety of [Sater] and his family," as anyone purportedly interested in harming Sater or his family based on either of these documents already knows or can easily find the information.

V. Circuit Court Decisions Are Conflicted as to Whether Information in Publicly Available Judicial Records Can Later, Even Years Later, Be Resealed or Removed from the Public Domain.

Circuit Courts of Appeals disagree with each other and intra-circuit whether information in publicly available judicial records can be resealed or otherwise removed from the public domain. For example, in this

case the Second Circuit sealed material from the redacted 2012 public cert petition and Motion to Order Docketing and Public Availability that was publicly available and docketed (which was emphasized to them by attaching a copy of the motion that was obtained from the National Archives).

Yet, in *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 144 (2d Cir. 2004), the Second Circuit held that it could not seal information that had already been publicly disclosed: ***"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."*** The Circuit explained: "This is generally so when information that is supposed to be confidential – whether it be settlement terms of a discrimination lawsuit or the secret to making the hydrogen bomb – is publicly disclosed. ***Once it is public it necessarily remains public.***" *Id.* at 144 n.12 (citations omitted). Further the *Gambale* court noted that it did not matter whether the making of something public was accidental. The *Gambale* court concluded: "The genie is out of the bottle, *albeit because of what we consider to be the district court's error.* We have not the means to put the genie back." *Id.* at 144.

Nevertheless, the Second Circuit has in fact attempted to put "the genie back in the bottle" in this case. Even though it isn't even the Second Circuit's bottle.

Similarly, the Ninth Circuit held that cases seeking to enjoin dissemination are moot because "once a fact is widely available to the public, a court cannot

grant any effective relief to a person seeking to keep that fact a secret." *See Doe No. 1 v. Reed,* 697 F.3d 1235 (9th Cir. 2012); *Associated Press v. USDC for Cent. Dist. Cal.,* 705 F.2d 1143, 1146 (9th Cir. 1983). Yet, in 2016 in *United States v. Madrid*, 9th Cir. Docket No. 15-50344, Docket Entry 57 (Oct. 21, 2016), the Ninth Circuit in an unpublished decision "resealed" a district court opinion which was then and still is today publicly available on Lexis.

Further, both the Third Circuit and the Eleventh Circuit have indicated an inability to reseal information that has been publicly disclosed. *See Constand v. Cosby,* 833 F.3d 405 (3d Cir. 2016) (motion to reseal information disclosed by the court moot because "disclosure cannot now be undone"); *C&C Prods. Inc. v. Messick,* 700 F.2d 635, 637 (11th Cir. 1983) ("At this point, it is too late for this court to prevent the release of the materials.").

CONCLUSION

This Court should grant certiorari to resolve these conflicting decisions from the Courts of Appeals and to vindicate the public's First Amendment right of access to publicly available judicial documents, including those made public on this Court's own docket by this Court's own order.

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