No. 18A1238

IN THE

Supreme Court of the United States

CHRISTOPHER LEE PRICE,

Petitioner,

V.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

ON APPLICATION FOR A STAY OF EXECUTION AND FOR LEAVE TO FILE THE APPLICATION UNDER SEAL

MOTION FOR LEAVE TO INTERVENE TO FILE A MOTION TO UNSEAL

JONATHAN HART
ASHLEY MESSENGER
MICAH RATNER
NATIONAL PUBLIC RADIO, INC.
1111 North Capitol St. NE
Washington, D.C. 20002
(202) 513-2000

BRUCE D. BROWN
Counsel of Record
KATIE TOWNSEND
SARAH S. MATTHEWS
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
bbrown@rcfp.org

Counsel for Proposed Intervenors National Public Radio, Inc. and Reporters Committee for Freedom of the Press

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to this proceeding were the Petitioner, Christopher Lee Price, and the Respondents, Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, and Cynthia Stewart, Warden, Holman Correctional Facility, who were sued in their official capacities.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that proposed intervenor National Public Radio, Inc. is a privately supported, not-for-profit organization that has no parent company and issues no stock, and proposed intervenor the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors with no parent corporation and no stock.

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PURPOSE

National Public Radio, Inc. ("NPR") is a privately supported, not-for-profit membership news organization that reaches approximately 105 million people on broadcast radio, podcasts, and NPR.org each month. The Reporters Committee for Freedom of the Press (the "Reporters Committee") is a nonprofit organization dedicated to defending the First Amendment and newsgathering rights of journalists. The Reporters Committee and NPR (collectively, "Proposed Intervenors") respectfully move for leave to intervene for the purpose of filing a motion to unseal the briefs in this matter.

INTRODUCTION

The First Amendment and common law afford the press and the public a qualified right of access to court proceedings and records in both civil and criminal cases.[1] The First Amendment right of access can only be overcome by a showing that sealing is "essential to preserve higher values" and "narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510; *Grove Fresh Distribs., Inc.*, 24 F.3d at 897 (applying *Press-Enterprise* analysis to civil court records). Under the common law, which has long "recognize[d] a general right to inspect and copy . . . judicial records

[1] *See e, g.*, *Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589, 597–98 (1978) (recognizing common law right to court records); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 513 (1984) ("*Press-Enterprise I*") (recognizing First Amendment right of access to *voir dire* and related transcripts in criminal case); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*") (holding that First Amendment right of access applies to certain preliminary hearings in criminal cases and transcripts of those hearings); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895, 897–98 (7th Cir. 1994) (recognizing First Amendment and common law right of access to court records in civil case), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009).

and documents," *Nixon*, 435 U.S. at 597, the presumption of access can be rebutted only by a "showing that countervailing interests heavily outweigh the public interests in access," *Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014).

Public scrutiny of the courts is fundamental to a democratic state, for it "enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of fairness, thereby heightening public respect for the judicial process," and permits "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

Proposed Intervenors seek to intervene in this case to assert the public's and the press's rights to access unredacted versions of the parties' briefs. As organizations that work to safeguard the public's First Amendment and common law rights of access to judicial proceedings and records and to inform the public, Proposed Intervenors are uniquely positioned to advocate for access to the sealed judicial documents at issue.

Granting intervention here accords with the judiciary's "longstanding tradition of public access to court records," *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citation and internal quotation marks omitted); *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000), and promotes judicial efficiency because, absent intervention, Proposed Intervenors would be required to file a separate action to challenge the sealing of judicial records filed with the Court in this case. *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015); *see* Fed. R. Civ. P. 24(b). Because

permitting intervention to unseal court records effectuates these important goals, most federal courts of appeals have found that "permissive intervention . . . is an appropriate procedural vehicle for non-parties seeking access to judicial records in civil cases." *Flynt*, 782 F.3d at 967.[2]

At bottom, providing public access to the entirety of the briefing in this matter furthers democratic interests in transparency, judicial legitimacy, and an informed citizenry. The Court should accordingly grant Proposed Intervenors' motion for leave to intervene and their concurrently filed motion to unseal.

FACTUAL BACKGROUND

NPR is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit news organization, NPR reaches approximately 105 million people on broadcast radio, podcasts, and NPR.org each month. NPR distributes radio broadcasts through more than one thousand noncommercial, independently operated radio stations, licensed to more than 260 NPR members and numerous other NPR-affiliated entities.

The Reporters Committee is an unincorporated nonprofit association. It was founded by leading journalists and lawyers in 1970, when the nation's news media

[2] Although these lower-court cases involve the application of Federal Rule of Civil Procedure 24(b), which does not bind this Court, they remain instructive in their support of a broad right of intervention for the purpose of advocating for public access to judicial proceedings and court records. *See, e.g.*, *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (explaining that intervention in the court of appeals "is governed by the same standards as in the district court") (citation omitted); *cf. Int'l Union, United Auto., Aerospace & Agr. Implement Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (noting that while the Federal Rules of Civil Procedure "apply only in the federal district courts," "the policies underlying intervention may be applicable in appellate courts").

faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Proposed Intervenors have an interest in safeguarding the First Amendment and common law rights of access to judicial documents, generally, and in obtaining access to the sealed materials in this case, in particular. The issues raised by this case have been reported on extensively by NPR and many other journalists and news organizations around the country.[3]

This case commenced in the U.S. District Court for the Southern District of Alabama on February 8, 2019, with the filing of Petitioner Christopher Lee Price's complaint challenging the method of his execution under 42 U.S.C. § 1983. Price asserted that Alabama's lethal injection protocol violated his Eighth Amendment and Fourteenth Amendment rights.

A bench trial in this case was scheduled for June 10, 2019. *Price v. Dunn*, No. 19-cv-57, 2019 WL 2255029, at *2 (S.D. Ala. May 26, 2019), *aff'd*, 2019 WL 2293177

[3] *See, e.g.,* Nina Totenberg, *Supreme Court's Conservatives Defend their Handling of Death Penalty Cases*, NPR (Apr. 1, 2019), https://www.npr.org/2019/04/01/708729884/supreme-court-rules-against-death-row-inmate-who-appealed-execution; Nina Totenberg, *Supreme Court Closely Divides On 'Cruel And Unusual' Death Penalty Case*, NPR (Apr. 1, 2019), https://www.npr.org/2019/04/01/708729884/supreme-court-rules-against-death-row-inmate-who-appealed-execution; Adam Liptak, *Supreme Court Won't Stay Alabama Execution After Bitter Clash*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/politics/supreme-court-alabama-death-penalty.html; Alan Blinder, *When a Common Sedative Becomes an Execution Drug*, N.Y. Times (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/us/midazolam-death-penalty-arkansas.html.

(11th Cir. May 29, 2019). Because Price was scheduled to be executed on May 30, eleven days before that bench trial, Price filed a motion for final judgment under Federal Rule of Civil Procedure 52(c) or in the alternative, a stay of his execution on May 24. Both Price and Respondents sought leave to file their papers in connection with that motion under seal, pointing to a protective order governing the exchange of unfiled discovery material, and noting that their submissions would include information designated "confidential" under that protective order—namely, the Alabama Department of Corrections' ("ADOC's") lethal injection protocol and expert deposition testimony. Mots. to Seal, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 24-25, 2019), ECF Nos. 80, 82. The district court granted both sealing requests without making any on-the-record factual findings in support of sealing, ECF Nos. 85, 87, and the parties filed their papers entirely under seal. These submissions were not identified on the district court's public-facing docket. 2019 WL 2255029 at *1 (referencing sealed docket entries).

On May 26, the district court issued a public opinion denying Price's Rule 52(c) motion for final judgment. *Id.* Price immediately appealed that decision to the Eleventh Circuit, where both parties again sought leave to file their papers under seal, citing the discovery protective order entered by the magistrate judge. Mots. to Seal, *Price v. Dunn*, No. 19-12026-P (11th Cir. May 28, 2019). On May 28, the circuit judge granted both sealing requests without making any on-the-record factual findings in support of sealing. The parties filed heavily redacted briefs in the appellate court in which key portions of the parties' arguments discussing expert

deposition testimony were concealed. On May 29, the Eleventh Circuit affirmed the district court's denial of Price's Rule 52(c) motion for judgment and issued a public opinion referencing sealed expert testimony. *Price v. Comm'r*, — Fed. App'x —, 2019 WL 2293177 (11th Cir. May 29, 2019).

On May 29, Price appealed to this Court, seeking an emergency stay of his execution to afford the district court an opportunity to resolve his Eighth Amendment claim at the bench trial scheduled for June 10. Both parties sought leave to file their papers under seal with redacted copies for the public record, again stating that their submissions would reference material designated "confidential" under the discovery protective order entered by the magistrate judge. On May 30, this Court granted those requests. *Price v. Dunn*, — S. Ct. —, 2019 WL 2295912 at *1 (May 30, 2019). The parties filed heavily redacted briefs with this Court. On May 30, the Court denied Price's application for a stay, and he was executed later that day. *Id.*

ARGUMENT

This Court has broad discretion to grant a party leave to intervene. Such intervention is warranted here because Proposed Intervenors seek to vindicate a significant public interest—the openness and transparency of these judicial proceedings. Proposed Intervenors are best positioned to do so because the parties themselves have not sought to protect the press's and public's access to judicial documents in this case. And permitting intervention serves this Court's interest because it conserves judicial resources.

When determining whether to grant a motion for permissive intervention, courts evaluate whether there is a common question of fact between the movant's claim and the main action. Fed. R. Civ. P. 24(b)(1); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). When a party seeks to intervene to vindicate the First Amendment and common law rights of access, the lower courts have almost universally concluded that its assertion of those rights is "directly and substantially related to the litigation." *See, e.g.*, *Jessup*, 227 F.3d at 998. "[W]hen a district court enters a closure order, the public's interest in open access is at issue and that interest serves as the necessary legal predicate for intervention." *Id.*

Because of the significant public value of open proceedings, "every court of appeals" to have considered whether permissive intervention is proper under Federal Rule of Civil Procedure 24(b) "has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders." *Jessup*, 227 F.3d at 997 (citation omitted); *Nat'l Children's Ctr.*, 146 F.3d at 1045 ("[D]espite the lack of a clear fit with the literal terms of Rule 24(b), every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders."); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015–16 (11th Cir. 1992); *Beckman Indus., Inc.*, 966 F.2d at 473; *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc.*, 823 F.2d

159, 162 (6th Cir. 1987). This is because sealing judicial proceedings and records implicates the First Amendment and common law rights of access. *Jessup*, 227 F.3d at 998 ("[W]hen a district court enters a closure order, the public's interest in open access is at issue and that interest serves as the necessary legal predicate for intervention.").

The interest that Proposed Intervenors seek to vindicate through intervention is longstanding. The First Amendment and common law establish a presumptive right to access a wide range of judicial proceedings and records. *See supra* n.1. That right serves a crucial function in a democratic society because it produces an informed public opinion about the functioning of our court system and protects the free discussion of governmental affairs so that individual citizens can effectively participate in, and contribute to, our government. *See, e.g.*, *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (Easterbrook, Circuit J.) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat."). Where the constitutional right of access applies, "proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510). The common law presumption of access can be rebutted only by a "showing that countervailing interests heavily outweigh the public interests in access." *Doe*, 749 F.3d at 266 (internal quotation marks omitted).

At issue here are the parties' briefs, which should be accessible to the public. Courts have held that the First Amendment and common law afford the public a right of access to any documents on which a court may rely in making its decisions. *See, e.g.*, *Pub. Citizen*, 749 F.3d at 267-68; *Grove Fresh Distribs., Inc.*, 24 F.3d at 895, 897–98. Permitting public access to the material underlying a court decision promotes public trust in the judiciary, *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017), and ensures "an informed and enlightened public opinion," *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936), because a "people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry, Aug. 4, 1822, in 9 Writings of James Madison 103 (Gaillard Hunt ed. 1910). Given the significant redactions to the parties' briefs, the public is denied information it needs "'to appreciate fully the [] significant events at issue in public litigation and the workings of the legal system.'" *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (citation omitted). The Court has denied Price's application for a stay of execution, and the public has a compelling interest in reviewing the parties' briefs and understanding the arguments and evidence that led to that decision.

CONCLUSION

For the foregoing reasons, Proposed Intervenors' motion for leave to intervene for the limited purpose of asserting the public's First Amendment and common law rights of access to sealed materials in the above-captioned case should be granted.

Respectfully submitted.

JONATHAN HART
ASHLEY MESSENGER
MICAH RATNER
NATIONAL PUBLIC RADIO, INC.
1111 North Capitol St. NE
Washington, D.C. 20002
(202) 513-2000

BRUCE D. BROWN
Counsel of Record
KATIE TOWNSEND
SARAH S. MATTHEWS
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
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(202) 795-9300
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