Nos. 18A669 & 18M93

IN THE

Supreme Court of the United States

IN RE GRAND JURY SUBPOENA

ON APPLICATION FOR A STAY AND MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI UNDER SEAL

MOTION FOR LEAVE TO INTERVENE TO FILE A MOTION TO UNSEAL

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January 9, 2019

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to this proceeding are not currently public.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that proposed intervenor-movant the Reporters Committee for Freedom of the Press (the "Reporters Committee" or "RCFP") is an unincorporated nonprofit association of reporters and editors with no parent corporation and no stock.

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PURPOSE

The Reporters Committee for Freedom of the Press (the "Reporters Committee" or "RCFP") is a nonprofit organization dedicated to defending the First Amendment and the newsgathering rights of journalists. The Reporters Committee respectfully moves for leave to intervene for the purpose of filing a motion to direct the filing of publicly redacted versions of the record and the documents that have been filed thus far in the above-captioned proceedings. The Reporters Committee also seeks leave to file said motion to request that, in the event this Court grants certiorari, the Court direct that the parties file publicly redacted versions of all merits filings and the record, that any oral argument be held publicly, and that a redacted oral argument transcript and recording be publicly filed.

INTRODUCTION

The First Amendment grants to the press and the public a right of access to documents on which a court may rely in making its decisions. That right can only be overcome by a showing that sealing proceedings is "essential to preserve higher values" and "narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) *("Press-Enterprise I")*. The right of access is fundamental to a democratic state because it ensures that the public can scrutinize the conduct of its court system, participate in debates about public affairs, and contribute to self-governance.

The Reporters Committee seeks to intervene in these cases because the public's and the press's interest in these proceedings is significant, and the near-wholesale

blanket seal of this litigation thus far has unduly limited the public's right of access. As an organization that works to ensure the First Amendment right of access is protected, the Reporters Committee is uniquely positioned to advocate that these proceedings be conducted in a way that is open and transparent and that promotes trust in our governmental institutions.

Granting intervention here is in accordance 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 omitted); *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000), and promotes judicial efficiency because, absent intervention, the Reporters Committee would be required to file a separate action to challenge the confidentiality of judicial records. *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015*); see* Fed. R. Civ. P. 24(b). Because permitting intervention to unseal court proceedings supports these important principles, most circuits 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.[1]

At bottom, providing qualified access to the briefing, record, and any oral argument in this proceeding furthers democratic interests in transparency, judicial legitimacy, and an informed citizenry. This Court should grant the Reporters Committee's motion for leave to intervene.

[1] 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.

FACTUAL BACKGROUND

The Reporters Committee is an unincorporated nonprofit association. It was founded by leading journalists and lawyers in 1970 when the nation's news media 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. The Reporters Committee has an interest in ensuring that the First Amendment and common law right of access to judicial documents is protected, an interest that the sealing of the documents and oral argument in this case would directly undermine.

This case commenced in the United States District Court for the District of Columbia on August 16, 2018. The case—including its docket—was filed entirely under seal. *Sealed v. Sealed*, No. 1:18-gj-00041 (D.D.C. Aug. 16, 2018). In September 2018, the district court issued a secret ruling, which one of the parties appealed. *In re Grand Jury Subpoena*, No. 18-3068 (D.C. Cir. Sept. 25, 2018). The D.C. Circuit dismissed that appeal for lack of jurisdiction on October 3, 2018. *Id*. One week later, a new appeal was commenced from the same district court case. *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Oct. 10, 2018). Oral argument occurred on December 14, 2018. Before oral argument began, court officials took the unusual step of sealing not only the courtroom where oral argument took place, but the entire floor where oral argument occurred.

Four days after argument, the D.C. Circuit issued an unsealed three-page judgment that revealed at least some information about the proceedings. The judgment states that the appeal commenced after the district court held a company (the "Corporation") in contempt for failing to comply with a grand jury subpoena. Op. 1. The judgment also identified the Corporation as owned by a foreign state and explained that the district court had ordered that each day the Corporation fails to comply with the subpoena its monetary fine will increase. *Id*. The judgment affirmed the district court's contempt order and provided some detail about the legal and factual issues in the case. The D.C. Circuit released a more fulsome, redacted opinion on January 8, 2019 explaining its decision in further detail.

On December 22, 2018 the Corporation applied to this Court both for a stay of the contempt ruling and for leave to file its application under seal. Case No. 18A669. The next day, the Chief Justice temporarily stayed the district court's contempt order, "including the accrual of monetary penalties," pending the filing of a response and further order. *In re Grand Jury Subpoena*, No. 18A669 (Dec. 23, 2018). On December 28, a mystery party responded to the application, and the original applicant replied on January 2, 2019. This Court denied the stay on January 8, but all documents remain sealed.

On January 7, an undisclosed party to the same D.C. Circuit case below moved for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record. Case No. 18M93. That motion remains pending and does not appear to be publicly available.

ARGUMENT

This Court has broad discretion to grant a party leave to intervene, and intervention is warranted here because the Reporters Committee is seeking to vindicate a significant public interest—the openness and transparency of these judicial proceedings. The Reporters Committee is best positioned to advocate for these principles because the parties themselves presumably have no vested interest in protecting the press's and public's access. 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)(2); *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." *Jessup*, 227 F.3d at 997. "[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*. at 998

Because of the significant public value of open proceedings, "every court of appeals" to have considered the question 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; *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 implicate the First Amendment and common law rights of access to court proceedings and documents. *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 many decisions in the lower courts that have permitted intervention in similar proceedings squarely support the Reporters Committee's motion to intervene in this Court.

Indeed, the interest the Reporters Committee seeks to vindicate through intervention is longstanding. The First Amendment establishes a presumptive right of access to a wide range of judicial proceedings. *See Press-Enterprise I*, 464 U.S. at 510. That right is fundamental to a democratic state 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) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat."). Where a qualified public right of access exists, "the 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 Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*") (quoting *Press-Enterprise I*, 464 U.S. at 510).

At issue here are the parties' filings, the record, and, if certiorari is granted, public access to the oral argument, as well as recordings and transcripts of the argument. All of these aspects of the proceedings should be accessible to the public, subject only to redactions necessary to protect the secrecy of the grand jury. Courts have long concluded that the First Amendment affords the public a right of access to any documents on which a court may rely in making its decisions. *Doe v. Pub. Citizen*, 749 F.3d 246, 267-68 (4th Cir. 2014). And "[t]here can be no question that the First Amendment guarantees a right of access by the public to oral arguments in . . . appellate proceedings." *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003).

Permitting public access to oral argument and 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," *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). Here, with only the D.C. Circuit's judgment and redacted opinion publicly available, 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). And now that this Court has denied the application for a stay, the public has a further interest in reviewing the briefing and understanding the arguments that led to that decision. Continuing to maintain blanket secrecy would undermine public trust in the judiciary and deprive the public of information about important events and judicial proceedings.

The interest the Reporters Committee seeks to vindicate with its intervention is no less forceful because these proceedings arise from a contempt order in a grand jury investigation. A right of public access exists for the contempt proceedings at issue in this matter. This Court has recognized that criminal contempt proceedings must be held in public. *See Levine v. United States*, 362 U.S. 610, 616 (1960). And because the distinction between civil and criminal contempt is "elusive" and often without a difference, *see Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830-31, numerous courts have held that the public's right of access applies equally to civil contempt proceedings. *See e.g., United States v. Index Newspapers LLC*, 766 F.3d 1072, 1093 (9th Cir. 2014); *Newsday LLC v. Cty. Of Nassau*, 730 F.3d 156, 163-64 (2d Cir. 2013); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983). Federal Rule of Criminal Procedure 6(e)(5) itself makes clear that the public has at

least some right of access to contempt proceedings by recognizing that sealing grand-jury contempt proceedings may only occur as "necessary" to justify the compelling interest of preserving grand jury secrecy.

There is a common law right of access to the court proceedings and documents at issue here as well. This broad common law right applies to everything in the record, in addition to any other material on which a court relies in determining the litigants' substantive rights. Whatever else the common law right of access might protect, it must protect "materials upon which a judicial decision is based." *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980), *superseded by rule in other respects as stated in Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *see Metlife*, 865 F.3d at 668 (explaining that briefs and the record supporting a judicial decision are subject to common law right of access).

CONCLUSION

For the foregoing reasons, the Reporters Committee motion for leave to intervene for the limited purpose of asserting the public's First Amendment and common law rights of access to the above-captioned cases should be granted.

Respectfully submitted.

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