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 TO UNSEAL

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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. It seeks to assert the public's constitutional and common law rights to access more of the proceedings in the above-captioned cases in this Court. RCFP respectfully submits that sealing all documents in these proceedings is overbroad and moves the Court to direct the filing of publicly redacted versions of the documents that have been filed thus far. In the event the Court grants certiorari, RCFP respectfully requests that the Court direct the filing of publicly redacted versions of all merits briefs, that any oral argument be held publicly, and that a redacted oral argument transcript and recording be publicly filed.

INTRODUCTION

The judiciary is "the most transparent branch in government." Chief Justice John G. Roberts, Remarks at 2018 Federal Judicial Conference of the Fourth Circuit (June 29, 2018). This Court in particular has long protected the ability of the public to access its decisions, the record undergirding them, and the arguments that inform them. The public's right of access to filed briefs and oral arguments in appellate courts is longstanding. That our nation's appellate courts are presumed open cannot be disputed.

The public's right of access is a qualified one. It can be overcome where sealing proceedings or documents or portions thereof is a narrowly tailored and necessary means of serving a compelling governmental interest. Although only the D.C.

Circuit's judgment and opinion below have been open to public scrutiny, one possible justification for sealing portions of the appellate record here or any subsequent argument may be preservation of grand jury secrecy. That interest is unquestionably compelling. But the existence of a compelling interest in the abstract does not abrogate the public's right of access, even if that interest can overcome it in certain narrowly tailored circumstances. As this Court has long recognized, contempt proceedings—even those arising from a grand jury investigation—are presumed to be open to the public's scrutiny, *Levine v. United States*, 362 U.S. 610, 616 (1960); *In re Oliver*, 333 U.S. 257, 265 (1948), just as appellate proceedings are. The presumption that the public has a right to access and observe appellate litigation in our nation's courts is thus no less robust where the appeal is from a district court order of contempt.

Even though this case was litigated entirely in secret from the moment it was commenced in the district court until the D.C. Circuit issued its judgment, the D.C. Circuit appropriately recognized that the public's right of access overrides whatever governmental interest the parties had presented to justify their months-long blanket seal of these proceedings. As a result, the D.C. Circuit published its decision. And that publication revealed the nature of the parties' arguments and a veiled account of the facts of this case. Most importantly for this motion: the D.C. Circuit's public filings make clear that a blanket seal of these proceedings cannot be justified. Where a court can file a fully reasoned, unredacted judgment deciding an appeal, followed by a more detailed redacted version of its opinion, the briefs can be similarly

accessible. So, too, can oral argument be held publicly (and, even if partially sealed, be accessible through a promptly released and redacted transcript and recording).

The Reporters Committee therefore brings this motion to unseal, because the First Amendment and common law rights of access to this Court's proceedings require publicly accessible documents in this dispute. The public has a substantial interest in this proceeding. Journalists have pored over the appellate dockets of the appeals in this case for some clue of what has transpired. The Court should direct the filing of publicly redacted versions of the documents filed in the Court thus far. In the event that certiorari is granted, the Court should require public redacted filings of the parties' merits briefs, that any oral argument in this case be held publicly, and that an oral argument transcript and recording be publicly released.

STATEMENT OF FACTS

I. This Action Commences With No Public Access.

This case was originally commenced in the district court in August 2018. The case—including its docket—was filed entirely under seal. *Sealed v. Sealed*, No. 1:18-gj-00041 (D.D.C. Aug. 18, 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 (the instant one) 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.

Almost immediately, these mysterious proceedings captured the attention of court watchers and journalists throughout the nation. Although originally few details were available about the nature of the proceedings, CNN reported that its journalists witnessed several members of Special Counsel Robert Mueller's team entering a courtroom in September and that this same team from Mr. Mueller's office was back before the district judge in this case on October 5, 2018, possibly the date on which the district court issued the order relevant to this case. Katelyn Polantz, Laura Robinson, Em Steck & Sam Fossum, *Mystery Mueller mayhem at a Washington court*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html [hereinafter Polantz, *Mystery*]. CNN has not been alone in reporting that this case was tied to Mr. Mueller's investigation into then-candidate Donald Trump's presidential campaign. Josh Gerstein & Darren Samuelsohn, *Mueller link seen in mystery grand jury appeal*, Politico (Oct. 24, 2018), https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572 [hereinafter Gerstein, *Mueller link seen*]. Indeed, Politico published a story that one of its reporters had visited the appellate clerk's office on the day a key filing was due and saw someone request a copy of the special counsel's latest sealed filing so that he and his firm could respond. *Id.* A sealed response in this appeal was submitted three hours later. *Id*.

II. The D.C. Circuit Allows the Parties to File All Documents Under Seal and Closes the Courtroom for Oral Argument.

"[J]ournalists, legal experts and close followers of the special counsel's investigation" have been trying to confirm the nature of this case since at least

September, and the December 14 oral argument was seen as the best opportunity to investigate further. Michael S. Schmidt, *Mueller Is Fighting a Witness in Court. Who Is It?*, N.Y. Times, Dec. 15, 2018, at A19. On the day of oral argument "[m]ore than a dozen reporters" planned to attend, or—because it was sealed—report on the matter from public areas of the courthouse surrounding the courtroom. Darren Samuelsohn & Josh Gerstein, *Reporters shooed away as mystery Mueller subpoena fight rages on*, Politico (Dec. 14, 2018), https://www.politico.com/story/2018/12/14/mystery-mueller-subpoena-fight-1065409. But the reporters were "shooed away," and the court sealed not only the courtroom, but the entire floor of the courthouse.

Subsequently, "at least 20 journalists" spread out around the courthouse and pooled their resources to communicate about who and what they saw throughout the building. Zoe Tillman, *There Was Drama At Court Today And Maybe It Involved Mueller's Investigation But Who Knows*, BuzzFeed (Dec. 14, 2018), https://www.buzzfeednews.com/article/zoetillman/robert-mueller-sealed-grand-jury-court-drama. CNN later published a story that a reporter had witnessed a car carrying Michael Dreeben, a Deputy Solicitor General and member of Mr. Mueller's team, back to the special counsel's office not long after the appellate oral argument had ended. Polantz, *Mystery*, *supra*.

The removal of the public from the entire floor where the oral argument had occurred "surprised many people familiar with the federal building's practices." Samuelsohn, *Reporters shooed away*, *supra*. The decision was called "unusual," Tillman, *supra*, and "extreme." Polantz, *Mystery*, *supra*.

III. The D.C. Circuit Publishes Its Decision, Revealing Additional Detail About the Disputed Facts and Legal Arguments.

Four days after oral argument, the D.C. Circuit issued an unsealed three-page judgment that revealed at least some information about the proceedings. *In re: Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018). 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. at 1. The judgment also identified the Corporation as owned by a foreign state and explained that the district court ordered that each day it 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.

In the judgment, the court rejected the Corporation's argument that it was immune from a grand jury subpoena under the Foreign Sovereign Immunities Act ("FSIA"). Assuming *arguendo* that immunity could apply, the court found that the subpoena fell within the Act's exception for commercial activities. Op. at 2. Reviewing the government's sealed and *ex parte* submissions, the court concluded that the government had met its burden of establishing a reasonable probability that the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" and that the "act cause[d] a direct effect in the United States," *id*. at 3 (quoting 28 U.S.C. § 1605(a)(2)), and therefore that the Corporation was not immunized from the subpoena.

The court also rejected the Corporation's argument that 28 U.S.C. § 1330(a) was "the sole basis for obtaining jurisdiction over a foreign state in our courts," Op. at 2 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)), and that the statute conflicted with 18 U.S.C. § 3231, which gives district courts original criminal jurisdiction. *Id*. According to the court, Sections 1330(a) and 3231 do not conflict but rather complement each other—otherwise, foreign-sovereign-owned corporations would be insulated from all criminal liability. *Id*. The court even noted that the Corporation offered a new argument on this issue at oral argument—highlighting the need for public access to filings in this Court, which may contain new arguments. *Id*.

Finally, the court rebuffed the Corporation's argument that the subpoena would require the Corporation to violate a foreign country's laws. *Id*. at 3. While not revealing which country's laws were at issue, the court stated that "[t]he text of the foreign law provision the Corporation relies on does not support its position" and that the Corporation's submissions (including that of a foreign regulator) "lack[ed] critical indicia of reliability." *Id*. The court concluded that it was "unconvinced that Country A's law truly prohibits the Corporation from complying with the subpoena." *Id*.

The judgment and its details deepened public interest in this matter.[1] As the *New York Times* explained, the order offered "tantalizing clues to a mystery that has

[1] *See, e.g.*, Devlin Barrett, *Prosecutors win court fight over secret subpoena of a foreign company*, Wash. Post (Dec. 18, 2018), https://www.washingtonpost.com/world/national-security/prosecutors-win-court-fight-over-secret-subpoena-of-a-foreign-company/2018/12/18/b56dafac-0315-11e9-b5df-5d3874f1ac36_story.html?utm_term=.fc5f9ebbaf00; Katelyn Polantz, *Court orders company to comply with special counsel subpoena in mystery grand jury appeal,* CNN (Dec. 19, 2018),

riveted Washington journalists and legal insiders." Charlie Savage, *Washington's Mystery Witness Turns Out to Be a Corporation, Not a Person*, N.Y. Times (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/politics/mystery-witness-corporation-robert-mueller.html. The *Guardian* called the proceedings a "judicial drama" shrouded in "almost unheard of furtiveness." Ed Pilkington, *Sealed v Sealed: ruling sheds light on mystery case thought to involve Mueller*, The Guardian (Dec. 18, 2018). https://www.theguardian.com/us-news/2018/dec/18/sealed-v-sealed-robert-mueller-mysterious-case-subpoena.

IV. The Corporation Appeals to this Court Under Seal, and the D.C. Circuit Issues A Redacted Opinion.

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. The next day, the Chief Justice temporarily stayed the district court's contempt order, "including the

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https://www.cnn.com/2018/12/18/politics/mueller-mystery-grand-jury-appeal/index.html; Lydia Wheeler & Morgan Chalfant, *DC Circuit upholds mystery grand jury subpoena*, The Hill (Dec. 18, 2018), https://thehill.com/regulation/421977-dc-circuit-upholds-mystery-grand-jury-subpoena; Quinta Jurecic, *Document: D.C. Circuit Rules in Mystery Grand Jury Case*, Lawfare (Dec. 18. 2018), https://www.lawfareblog.com/document-dc-circuit-rules-mystery-grand-jury-case; Kelly Cohen, *Mystery foreign company possibly tied to Mueller investigation subpoenaed*, Washington Examiner (Dec. 18, 2018), https://www.washingtonexaminer.com/news/judge-rules-mystery-company-owned-by-foreign-country-must-comply-with-grand-jury-subpoena-suspected-of-being-part-of-muellers-investigation; Darren Samuelsohn & Josh Gerstein, *Mueller appears victorious in mystery subpoena dispute*, Politico (Dec. 18, 2018), https://www.politico.com/story/2018/12/18/mueller-probe-legal-foreign-owned-company-1068725; Tom Porter, *Court orders mystery foreign company to comply with Mueller subpoena*, Newsweek (Dec. 19, 2018), https://www.newsweek.com/court-orders-mystery-foreign-company-comply-mueller-subpoena-1264597; Andrew Prokop, *The mysterious grand jury appeal that may be tied to the Mueller investigation, explained*, Vox (Dec. 19, 2018), https://www.vox.com/2018/12/19/18147495/mueller-grand-jury-mystery-country-a (stating that for months "close watchers of the Mueller investigation have been intrigued by a mysterious court appeal involving a challenge to a grand jury action"); Sonam Sheth, *Washington is buzzing about a mysterious grand-jury fight between Mueller's office and an unknown witness*, Business Insider (Dec. 19, 2018), https://www.businessinsider.com/grand-jury-subpoena-mueller-unknown-corporation-2018-12.

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. On January 8, this Court denied the application and vacated the stay. Each of those documents remain sealed.

On January 7, 2019, an undisclosed party to the same D.C. Circuit case below moved for leave to file a petition for writ of certiorari under seal with redacted copies for the public record. *In re Grand Jury Subpoena*, No. 18M93 (docketed Jan. 8, 2019). That motion remains pending and does not appear to be publicly available. The following day, the D.C. Circuit issued a 28-page, redacted opinion, providing even more information about these proceedings, the legal arguments in this case, and its justifications for affirming the district court's contempt holding. *In re Grand Jury Subpoena*, Case No. 18-3071 (D.C. Cir. Jan. 8, 2019).

ARGUMENT

I. Blanket Sealing of Proceedings In this Court Violates the First Amendment.

The First Amendment creates a presumptive "right of access" to a wide range of judicial proceedings. In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), this Court held that the First Amendment right of access applies to "preliminary hearings" designed to determine whether "probable cause" exists to try an accused for a crime. *Id.* at 10. *Press-Enterprise II* followed the eponymous *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) ("*Press-Enterprise I*"), which held that the First Amendment right of access applies to voir

dire. *Id.* at 510-13. The *Press-Enterprise* duo relied on *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), and *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), both of which concluded that the First Amendment presumption governs criminal trials. In *Washington Post v. Robinson,* 935 F.2d 282 (D.C. Cir. 1991), the D.C. Circuit applied the First Amendment to plea agreements executed in the midst of ongoing grand jury investigations, declaring that "[t]he first amendment guarantees the press and the public a *general right of access to court proceedings and court documents* unless there are compelling reasons demonstrating why it cannot be observed." *Id.* at 287 (emphasis added).

"[T]wo complementary considerations" govern whether a particular judicial proceeding is subject to the First Amendment presumption of access. *Press-Enterprise II,* 478 U.S. at 8. The first is "whether the place and process have historically been open to the press and general public," a consideration deemed relevant because a "tradition of accessibility implies the favorable judgment of experiences." *Id.* (citations omitted). The second is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* "These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes." *Id.* at 9. 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.'" *Id*. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

Here, the public has a qualified First Amendment right of access to the filings and oral argument in this Court. Particularly given that so much information about these proceedings has already been disclosed—including the D.C. Circuit's opinion affirming the contempt order—there can be no interest that justifies blanket sealing of these proceedings.

A. The Public Has a First Amendment Right of Access to Appellate Proceedings.

The First Amendment "guarantees" a "right of access to . . . court documents," *Wash. Post*, 935 F.2d at 287, and no "court documents" are more central to the appellate process than the oral argument transcripts, briefs, and the record the Reporters Committee seeks access to. And "[t]here can be no question that the First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this [C]ourt" because oral arguments "have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings." *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003). The judiciary is "the most transparent branch in government," Chief Justice John G. Roberts, Remarks at 2018 Federal Judicial Conference of the Fourth Circuit (June 29, 2018)—and "[w]hat transpires in the court room is public property," *Craig v. Harney*, 331 U.S. 367, 374 (1947).

Because the public has a right to access judicial opinions and oral arguments, a right of access must also attach "to materials submitted in conjunction with judicial proceedings that themselves would trigger the right of access." *Doe v. Pub. Citizen*,

749 F.3d 246, 267-68 (4th Cir. 2014); *see Matter of N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (same). Accordingly, the briefs and the record—the source material from which a court performs its Article III duty to decide cases and controversies—must also be subject to a First Amendment right of access.

Unsurprisingly, public access to appellate records extends far back in the nation's history. In *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894), for example, the court that would become the D.C. Circuit rejected an appellant's attempt to seal the records in a patent appeal because an "attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." *Id.* at 407-08.

This Court's history of transparency and accessibility has not abated, even in the face of significant countervailing interests. Thus, briefs in the Pentagon Papers case were available to the press, with sealed appendices, *see Matter of Krynicki*, 983 F.2d 74, 76 (7th Cir. 1992), and oral argument was conducted publicly, *see N.Y. Times Co. v. United States*, 403 U.S. 944 (1971) (denying motion "to conduct part of the oral arguments involving security matters in camera"). This Court held public proceedings in a dispute about attorney-client privilege arising out of a grand jury subpoena, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), after the lower court sealed materials and closed oral argument, *see In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), Dkt. Entry June 16, 1997 (granting motion to seal courtroom). And in *M.K.B. v. Warden*, 540 U.S. 804 (2003), even after lower court proceedings were

conducted entirely in secret, this Court published a redacted petition for a writ of certiorari in the public record. *See also Ex parte Quirin*, 317 U.S. 1, 19 (1942) (reflecting that oral argument was held during wartime case involving German saboteurs without any indication that proceedings were sealed). Consistent with this Court's practice, in a case implicating national security concerns, the D.C. Circuit held a bifurcated oral argument and published redacted briefs. *See Doe v. Mattis*, 889 F.3d 745, 769 n.1 (D.C. Cir. 2018) (Henderson, J., dissenting) (noting case "involves materials that have been sealed to protect sensitive diplomatic interests" but relying on "public portion of the briefs and record where possible," "[c]onsistent with the 'presumption of openness in judicial proceedings'" (citation omitted)); *id*., Dkt. Entry Apr. 5 (Oral Argument Held, Closed in Part). Thus, even when strong countervailing interests are present, courts have historically not hesitated to recognize the public's First Amendment right of access to oral arguments, briefs, and records on appeal. *See also In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), Dkt. Entry Aug. 25, 1997 (unsealing "the briefs filed by the parties" because media company did not seek "access to the subpoenas themselves" or "any other [documents] which would reveal" grand jury matters). That is because "[p]ublic argument is the norm." *Matter of Krynicki*, 983 F.2d at 76.

By the logic of *Press-Enterprise*, the public's right of access serves the important goals of promoting judicial legitimacy and core democratic values, including allowing the public to learn of and understand significant issues of public concern. Judges "claim legitimacy . . . by reason." *Matter of Krynicki*, 983 F.2d at 75.

Although judges "deliberate in private," they "issue *public* decisions after *public* arguments based on *public* records." *Id.* (emphases added). The public needs the entire triumvirate: "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat." *Id.*

Thus, keeping briefs and a record under seal does not "maintain[] the integrity and legitimacy of an independent Judicial Branch." *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017). "Without access to the sealed materials, it is impossible to know which parts of those materials persuaded the court and which failed to do so (and why)." *Id.* at 668. Knowing what materials persuaded a court is essential: Courts do "not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). Citizens who cannot see the underlying briefing or arguments will have more difficulty trusting the result, thereby undermining judicial legitimacy.

Likewise, the right of access to appellate contempt proceedings promotes the public's understanding of issues of public concern. The First Amendment 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 (August 4, 1822), *in* 9 Writings of James Madison 103 (Gaillard Hunt ed. 1910). When parties litigate in the appellate court—and the highest Court in the land—on a matter of intense public interest with the vast majority of filings unavailable to the

citizenry to review, 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) (internal quotation marks omitted).

The secrecy in this case makes plain the need for greater public scrutiny. The D.C. Circuit's decision as well as this Court's denial of a stay application are in the public record, but the broader blanket "[s]ecrecy makes it difficult for the public (including the bar) to understand the grounds and motivations of [the] decision, why the case was brought (and fought), and what exactly was at stake in it." *Mueller v. Raemisch*, 740 F.3d 1128, 1135-36 (7th Cir. 2014); *see also United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (observing that public monitoring of the courts "is not possible without access to . . . documents that are used in the performance of Article III functions"). The D.C. Circuit's judgment and opinion reject the Corporation's written and oral arguments, Op. at 2-3, its apparently "[un]reliab[le]" "submissions," Op. at 3, and affirms the sanction the district court imposed, Op. at 1. The issues identified below may well be the same or similar to the ones the parties have presented to this Court—including arguments that preceded this Court's denial of the stay. But without some degree of public access, the public simply cannot understand what has transpired. As the D.C. Circuit has explained, "[i]f the public is to see [the court's] reasoning, it should also see what informed that reasoning." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006). In accordance with the long history and tradition of openness recognized by this Court

and the circuit courts, the Court should recognize and preserve the public's right of access to its proceedings.

B. The Public Has a Right of Access to Contempt Proceedings.

The public's right of access to the filings and oral argument in this Court is in no way obviated by the fact that this case arises from a contempt order imposed for lack of compliance with a grand jury subpoena. Indeed, under the *Press-Enterprise* test, history and logic dictate that a right of public access exists for the contempt proceedings at issue in this case.

The right of access to contempt proceedings begins with the indisputable right of access to criminal trials. Since the Norman Conquest, public criminal trials have allowed "people not actually attending [to] have confidence that standards of fairness are being followed and that deviations will become known." *Press-Enterprise I*, 464 U.S. at 508. "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citing *Richmond Newspapers*, 448 U.S. at 569-71).

Following this historic tradition, courts have declared that the public has a qualified First Amendment right of access to numerous types of judicial proceedings. As various circuit courts have made clear, the right applies to nearly all facets of a criminal trial. *See, e.g.*, *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 297-98 (2d Cir. 2012) (collecting cases); *United States v. Wecht*, 537 F.3d 222, 235-36 (3d Cir. 2008) (obtaining names of trial jurors and prospective jurors); *United States v. Alcantara*, 396 F.3d 189, 191-92 (2d Cir. 2005) (sentencing hearings); *United*

States v. Abuhamra, 389 F.3d 309, 323-24 (2d Cir. 2004) (bail hearings); *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (public access to plea agreements); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (right of access to pretrial criminal documents); *United States v. Chagra*, 701 F.2d 354, 363-64 (5th Cir. 1983) (right to attend bail reduction hearings); *United States v. Brooklier*, 685 F.2d 1162, 1167, 1171 (9th Cir. 1982) (right to attend voir dire and pretrial suppression hearings); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (right to attend pretrial suppression, due process, and entrapment hearings). And "[e]very circuit to consider the issue has concluded that" this same "right of public access applies to civil" proceedings, too. *Dhiab v. Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (Rogers, J., concurring in part and concurring in the judgment) (collecting cases).

Given the opacity of the record to date, it remains unclear what type of penalty—civil or criminal—the district court imposed here. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830-31 (1994) (noting the "elusive distinction" between criminal and civil contempt); *compare* Op. at 1 (noting penalty that appears to be civil), *with* Op. at 2 (discussing the ability of a foreign sovereign "to raise an immunity defense in a criminal case"). If anything, that opacity simply underscores the need for greater access.

In any event, the "First Amendment 'does not distinguish between criminal and civil proceedings.'" *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013) (holding public right of access applies to civil contempt proceedings). History

and logic dictate that the public's First Amendment right of access extends to contempt proceedings of both the criminal and civil varieties (and, by necessity, must extend to any appeal arising from those proceedings). This Court itself has recognized that criminal contempt proceedings must be held in public. *See Levine v. United States*, 362 U.S. 610, 616 (1960)[2]; *Oliver*, 333 U.S. at 265 ("Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court."). And because the distinction between civil and criminal contempt is "elusive" and often without a difference, *see Int'l Union*, 512 U.S. at 830-31, numerous courts have held that the public's right of access applies equally to civil contempt proceedings. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1089 (9th Cir. 2014)[3]; *Newsday LLC*, 730 F.3d at 164; *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *see also In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990) (holding right attaches where incarceration is a possible penalty); *cf. In re Motions of Dow Jones & Co.*, 142 F.3d 496, 506 (D.C. Cir. 1998)

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[2] *Levine*'s recognition that the accused has a right to public criminal contempt proceedings actually undergirded the Court's subsequent holding that the public has a qualified First Amendment right of access to criminal prosecutions generally. *See Richmond Newspapers*, 448 U.S. at 574 (citing *Levine*, 362 U.S. at 616); *Globe Newspaper*, 457 U.S. at 606 n.15 (citing *Levine*, 362 U.S. at 616); *see also Freytag v. C.I.R.*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (recognizing that the right *Levine* recognized is not just personal but provides "'public' . . . benefits to the entire society").

[3] Notably, the Ninth Circuit suggested that the public's right of access extends to some contempt filings ("the order holding [the witness] in contempt") but not others ("[a] motion to hold a grand jury witness in contempt"). *Index Newspapers*, 766 F.3d at 1093. RCFP respectfully suggests that the analysis is slightly different pursuant to the *Press-Enterprise*s: the qualified right of access applies to the contempt *proceeding*, including its record, but documents and hearings can be sealed or redacted if and to the extent that a particular compelling governmental interest so justifies. While the Ninth Circuit may be correct that in certain circumstances "[a] motion to hold a grand jury witness in contempt" may be withheld in full (particularly if there's no way to redact it), *id.*, the withholding is constitutionally sound not because the public lacks a right of access to such a filing but because compelling governmental interests overcome that qualified right.

(directing district court to consider what redacted documents could be publicly filed in grand-jury subpoena litigation). There thus exists a long history of requiring contempt proceedings to be public to ensure that public observation checks a court's power, which can be "arbitrary in its nature and liable to abuse." *Levine*, 362 U.S. at 615 (quoting *Ex parte Terry*, 128 U.S. 239, 313 (1888)); *see also Index Newspapers*, 766 F.3d at 1089. Because criminal and "civil contempt proceedings . . . carry the threat of coercive sanctions," the right of public access attaches equally to both proceedings. *Newsday LLC*, 730 F.3d at 164.

Logic makes clear why public access to grand-jury contempt proceedings in particular causes no injury, as a general matter, to grand jury secrecy. Indeed, grand jury secrecy—the interest potentially affected by the public's right of access to grand-jury contempt proceedings—in fact represents four "distinct interests served by safeguarding the confidentiality of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979). Those four interests are that, in the absence of secrecy, (1) witnesses might not come forward, "knowing that those against whom they testify would be aware" of their testimony; (2) because of this same fear of retribution, witnesses who do appear "would be less likely to testify fully and frankly"; (3) individuals about to be indicted "would flee" or "would try to influence individual grand jurors to vote against indictment"; and (4) persons accused, but ultimately "exonerated by the grand jury," might be "held up to public ridicule." *Id* at 219.

Recognition of the public's right of access to contempt proceedings, however, actually *serves* these interests. Allowing tailored public access will *encourage* a

reticent witness to comply with a grand jury investigation by making clear the potential penalties for failing to do so. Such a witness would even be less likely to flee, because the penalty of flight is being held in contempt. Moreover, the confidentiality of the witness's identity could be preserved if necessary, *see infra* Pt. I.C. Likewise, any risk that a vindicated accused could be "ridicule[d]" can be mitigated through appropriate, limited redactions, *see infra* at Pt. I.C.

The Federal Rules of Criminal Procedure underscore that the source of this case—a grand-jury contempt order—does not minimize the public's right of access to it. In fact, Rule 6(e)(5) acknowledges that sealing of contempt proceedings is "[s]ubject to any right to an open hearing," and that district courts "must close any hearing" only "to the extent necessary to prevent disclosure of a matter occurring before a grand jury." Rule 6(e)(5) thus codifies the public right of access to proceedings like contempt proceedings, recognizing that such a right can be rebutted as "necessary" to justify the compelling interest of preserving grand jury secrecy. *See Press-Enterprise I*, 464 U.S. at 510. Blanket sealing of all proceedings—hardly the least-restrictive means available, *see infra* Pt. I.C—cannot possibly be "necessary" here, particularly after release of the D.C. Circuit's order.

"[P]ublic access" to contempt proceedings also "provides a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody." *Index Newspapers*, 766 F.3d at 1093; *see Levine*, 362 U.S. at

615.[4] And as the Ninth Circuit recognized: contempt proceedings may well be attenuated from the actual content of a grand jury investigation, meaning that "[l]ogic favors greater public access to these transcripts and filings because they are less likely to disclose sensitive matters relating to the grand jury's investigation." *See Index Newspapers*, 766 F.3d at 1094 (discussing filings regarding continued confinement proceedings).

In sum, the public's right to access appellate proceedings is in no way diminished by the fact that these proceedings arise from a district court's contempt order: The public has a right of access that attaches to contempt proceedings, too.

C. Particularly Where the D.C. Circuit's Opinion Was Filed Publicly, Blanket Sealing of These Proceedings Cannot Serve Any Compelling Governmental Interest.

As explained above, the public's First Amendment right of access does not mandate complete disclosure—nor does RCFP request such relief. The "presumption of openness," *Press-Enterprise I*, 464 U.S. at 510, that inheres in appellate proceedings is just that—a presumption. Where the government "'attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Id.* (quoting *Globe Newspaper*, 457 U.S.

[4] It is of no moment that the Corporation was fined and not incarcerated. Any argument that a qualified right of access can never apply to monetary penalties would require the conclusion that the public *never* has a right of access to any corporate contempt proceeding because corporations cannot be jailed. Likewise, monetary penalties can have serious implications and unquestionably cannot be imposed without constitutional safeguards. *See Int'l Union*, 512 U.S. at 831-32; *cf. S. Union Co. v. United States*, 567 U.S. 343, 360 (2012) (holding that *Apprendi* rule applies to criminal fines).

at 606-07). "[T]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

At this stage in the case, there have been no public findings made to articulate why the briefs and record must be withheld wholesale (or why any future oral argument must be sealed), so movant's ability to challenge the blanket sealing of the proceeding—or any portion thereof—is limited. *See In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 95 (3d Cir. 1990) (noting that party moving to unseal "was at a severe disadvantage in trying to show that its" right of access to court proceedings "overcame the government's interest" because the movant "had absolutely no information concerning the[documents'] particular subject matter" and "no information concerning the government interests . . . so it could not directly rebut the reasons that led the" court to seal documents). It is nevertheless clear that there is no compelling interest to withhold broad swaths of the parties' briefs and to completely shield from public view any oral argument that ensues. Indeed, the D.C. Circuit's ability to file its judgment and opinion publicly, outlining the parties' oral and written arguments and at least part of the underlying factual circumstances of the appeal, demonstrates that at least some portions of these proceedings may be unredacted and open to public view without jeopardizing any compelling governmental interest—be it the government's interest in grand jury secrecy, or otherwise.

Because at least some portions of this record can unquestionably be released without harming any governmental interest—and can "only . . . confirm[] to the public what [is] already validated by [] official source[s]"—keeping such information under seal can hardly be justified by any "compelling interest," and thus the information must be disclosed. *Wash. Post*, 935 F.2d at 292; *see In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007) (ordering the "release" of "those redacted portions of [the] concurring opinion and the two ex parte affidavits that discuss grand jury matters" where "the 'cat is out of the bag'" given that one grand jury witness "discusse[d] his role on the CBS Evening News"); *Dow Jones*, 142 F.3d at 505 (noting when grand jury witness's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed," that fact was no longer protected by grand jury secrecy).

Indeed, redacting portions of documents is a more narrowly tailored (and thus less-restrictive) alternative to withholding them wholesale. *See United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (cautioning that a court may not delegate task of redacting documents); *see also United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (Where "a party seeks to seal the record of criminal proceedings *totally* and *permanently*, the burden is heavy indeed."); *In re Knight Pub. Co.*, 743 F.2d 231, 234 (4th Cir. 1984) (stating that courts "must consider alternatives" before denying access in full to court proceedings). In *Dow Jones*, for example, the D.C. Circuit remanded the case so that the trial court could consider whether redactions, rather than sealing whole documents, would be possible. 142 F.3d at 506.

The ability to redact, rather than seal documents completely, is even more appropriate in appellate proceedings where controlling the flow of information is easier than in fast-moving trial court proceedings. Appellate courts can provide publicly filed redacted documents and hold public hearings with far less difficulty and with far reduced risk of inadvertently exposing grand jury secrets. Oral arguments "are always preceded by written arguments, usually filed well in advance," and the "briefs . . . enable [the court] to determine whether discussion of grand jury matters at oral argument will be needed." *Dow Jones*, 142 F.3d at 502. Appellate courts thus are well-positioned to avoid blanket sealing of proceedings. *See United States v. Moussaoui*, 65 F. App'x 881, 891 (4th Cir. 2003) ("We assume [appellate] counsel will be mindful of this possibility and will take care to avoid such references in open court" of oral arguments about classified information).[5]

Finally, even if the parties sought to preserve the blanket seal of these proceedings despite the D.C. Circuit's publication of its judgment and opinion, the public's overarching interests in disclosure must prevail. *See United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) (citing *Globe Newspaper*, 457 U.S. at 607-10, and *Press-Enterprise I*, 464 U.S. at 511, for proposition that First Amendment rights can "outweigh[] the asserted privacy rights"). First, the public has an indisputable interest in ensuring that the nation's appellate courts issue reasoned and fair

[5] Because the motion filed in Case No. 18M93 for leave to file a petition for writ of certiorari under seal with redacted copies for the public record itself appears to be sealed, RCFP has not had an opportunity to review that motion. To the extent the undisclosed party's proposed redactions are not narrowly tailored to serve any compelling governmental interest, this Court should deny that request.

opinions derived from facts and legal arguments the parties present—an interest that cannot be satisfied where the case proceeds almost entirely under seal. *Metlife*, 865 F.3d at 665-69 (explaining the importance of access to briefs and joint appendix so that the public can "know which parts of those materials persuaded the court," whose opinion is "the quintessential business of the public's institution" (internal quotation marks omitted)); *Krynicki*, 983 F.2d at 75 ("The political branches of government claim legitimacy by election, judges by reason."); *Moussaoui*, 65 F. App'x at 890 (appellate proceedings "have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings"). That interest is all the more important here, where this Court has denied a motion to stay the district court's contempt order and the filings underlying that decision are sealed in full.

Second, the public has an unquestioned interest in ensuring the actual fairness of contempt proceedings and also "the appearance of justice," *Levine*, 362 U.S. at 615 (citation and quotation marks omitted); *accord Press-Enterprise II*, 478 U.S. at 7, interests that cannot be satisfied where significant monetary penalties are imposed by a single judge almost entirely in secret. These interests are even stronger where, as here, the Court has issued a decision on the application for a stay. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572 (opinion of Burger, C.J.). The Court should allow the people to observe.

II. Blanket Sealing of the Proceedings in this Court Violates the Common Law Right of Access.

"It is clear that the courts of this country recognize 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, 597-98 (1978). Under this common law right, which "extends to all judicial documents and records," 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) (internal quotation marks omitted). Courts have recognized that under the common law right of access, when a court "conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not," the denial must be justified by "a compelling governmental interest" and be "narrowly tailored to that interest." *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001). The common law right of access also requires granting this motion to unseal.

"A judicial decision is a function of the underlying record." *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 4 (D.C. Cir. 2013). The common law thus recognizes that public access to both a court opinion and the parties' submissions considered by the court in reaching a ruling "contributes significantly to the transparency of the court's decisionmaking process." *Metlife*, 865 F.3d at 668 (explaining that briefs and the record supporting a judicial decision are subject to common law right of access). If the common law right of access applies to anything, it must apply to "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).

Here, the public has a strong interest in access—an interest that, particularly given the public decisions in the D.C. Circuit and in this Court, outweighs any interest in blanket secrecy. The D.C. Circuit reached a decision and published it, and this Court has further denied a stay application arising from the same appeal. With the entirety of the docket sealed, however, the public is unable to see for itself what the Court considered and what it found persuasive. *Metlife*, 865 F.3d at 668. Yet the interest in secrecy is diminished given how much information has already come to light.

Under the common law, the right of access to judicial documents that are "relevant to the performance of the judicial function and useful in the judicial process"—like the application and response undergirding the vacated stay—ensure the public has "confidence in the administration of justice." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016) (right of access "plainly" applied to pleadings). Releasing at least redacted versions of the documents at issue would serve the "citizen's desire to keep a watchful eye on the workings of public" institutions, such as the Court, and the press's interest in publishing "information concerning the operation of government." *Nixon*, 435 U.S. at 597. Each is the type of "interest necessary to support the issuance of a writ compelling access." *Id.* at 597-98. The blanket seal violates the common law right of access.

CONCLUSION

For the foregoing reasons, this Court should direct the filing of publicly redacted versions of the documents, including the record, that have been filed thus far in these cases. In the event this Court grants certiorari, this Court should also direct the filing of publicly redacted versions of all merits briefs, that any oral argument be held publicly, and that a redacted oral argument transcript and recording be publicly filed.

Respectfully submitted.

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