No. 21-659

In The

Supreme Court of the United States

ASOCIACIÓN DE PERIODISTAS DE PUERTO RICO,

Petitioner,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Puerto Rico

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF JACK JORDAN IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Supreme Court, Jack Jordan, a member of the Supreme Court Bar, respectfully requests leave to file the accompanying proposed brief *amicus curiae* in support of Petitioner.

Amicus provided counsel for all parties with timely notice and requested each's consent to file the accompanying *amicus curiae* brief. Petitioner filed a blanket written consent to the submission of amicus briefs, but no Respondent responded timely to the requests by *Amicus*.

Amicus has a direct and vital interest in the legal issues presented in this matter. *Amicus* is a veteran who represents veterans and other injured workers in federal court proceedings that, *de jure* are governed by the Administrative Procedure Act (APA) and the Freedom of Information Act (FOIA) and federal rules of procedure, but *de facto* are not governed by any law.

In many such cases and appeals, federal district and circuit court judges issue judgments knowingly violating federal law and the Constitution. Some commonly do so even though this Court's precedent (presented to such courts) clearly and emphatically addressed dispositive issues. Just as the Puerto Rico Supreme Court did below, many federal court judges in many cases or appeals issue opinions in which they willfully fail to address clearly-controlling plain language of this Court's precedent, federal law (including

the APA or FOIA and federal rules of procedure) and even the Constitution.

Many judges issue such judgments and opinions in clear and knowing violation of the plain language of Rule 56 of the Federal Rules of Civil Procedure and this Court's well-known, long-standing, repeated precedent thereunder. In thoroughly willful violations of every relevant prohibition or command in the Constitution (in Articles III and VI and Amendments I, V and X), such judges dispose of cases and appeals to knowingly violate veterans' and other American workers' right to petition for redress of grievances. They knowingly and willfully ensure that suits and appeals in federal courts accomplish nothing more than wasting the time, money, and confidence of Americans in American courts of justice.

For many years, *Amicus* and people he represents supported and defended our country and Constitution by risking (and some gave) life and limb and their health and happiness in war zones around the world. But nowhere and never has *Amicus* seen the Constitution so in need of support and defense as it is in American courts. So *Amicus* is profoundly personally and professionally committed to supporting and defending the Constitution and those who support it.

For the foregoing reasons, *Amicus* respectfully requests leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

JACK JORDAN
Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

Amicus curiae is a lawyer who was a soldier. For many years, *Amicus* and people he represents supported and defended our country and Constitution by risking (and some gave) life and limb in conflicts around the world. Many gave their health and happiness. Now, in American courts, *Amicus* is profoundly personally and professionally committed to supporting and defending the Constitution and those who support it.

SUMMARY OF ARGUMENT

This Court should grant the Petition to defend the Constitution and this Court's precedent and litigants' rights thereunder. When clear controlling language in the Constitution and this Court's precedent is presented to courts who ignore both, they effectively render both merely advisory. When they do so, they earn very harsh criticism. When they use overbroad and vague rules or rulings to justify withholding information and concealing evidence about court processes, they obstruct criticism, discussion and reform, as well as judges' defenses against unjustified criticism. No such conduct is Constitutional.

[1] Counsel of record for all parties received timely notice of the intent to file this brief under Rule 37(b). No Respondent consented to the filing of this brief. No one but *amicus curiae* authored any part of this brief or contributed any money that was intended to or did fund preparing or submitting this brief.

REASONS FOR GRANTING THE WRIT

I. This Court Should Vigorously Support and Defend the Constitution.

This Court repeatedly has emphasized that "if the same judgment would be rendered by" another "court after" this Court "corrected its views of federal laws" or the Constitution, then this Court's "review could amount to nothing more than an advisory opinion." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). That happened here and it happens in many cases and appeals.

Here, the majority below decided (or willfully failed to decide) important federal questions in a manner that irrefutably conflicted with clear commands in the Constitution and this Court's precedent. The majority so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power. The highest court in a U.S. territory flouted this Court's clear and controlling precedent. *See* Pet. at 13-14. *Cf.* App. 137a-138a, 145a-146a, 149a, 178a (presenting such precedent). In multiple respects, it clearly violated even the plain language of the Constitution. Knowingly allowing such conduct would (and does in the eyes of many judges) essentially render even the Constitution advisory.

The Constitution repeatedly emphasized that courts and judges have no power to do what they irrefutably did here. Only "[t]his Constitution" and "the Laws" and "Treaties" of "the United States, shall be supreme Law of the Land" and all "Judges in every State shall be

bound thereby" despite "any Thing in the Constitution or Laws of any State to the Contrary." U.S. Const. Art. VI, cl. 2. Absolutely "all executive and judicial Officers, both of the United States and of the several States" are "bound" to "support this Constitution." *Id*., cl. 3.

The Constitution caused the creation of the supreme supporter of the supreme Law of the Land by ensuring that "[t]he judicial Power of the United States, shall be vested in" only "one supreme Court," to which all other courts necessarily are "inferior" regarding application and construction of the Constitution. Art. III, § 1. It emphasized that "[t]he judicial Power" vested in this Court "shall extend to all Cases, in Law and Equity, arising under this Constitution." *Id*. § 2. This clearly is such a case.

"No person" whatsoever may "be deprived" by any court or judge "of life" or any "liberty" or any "property, without due process of law." Amend. V. "No state" employee may "make or enforce any law which shall abridge" Americans' "privileges or immunities; nor shall any State" employee "deprive any person of life" or any "liberty" or any "property, without due process of law; nor deny to any person" at least substantially "equal protection of the laws." Amend. XIV, § 1.

As was emphasized to rally support for ratifying the Constitution, our Constitution and systems of justice and government were founded on the premise and promise that all federal courts (and especially this Court) would be "guardians of the Constitution." The Federalist No. 78, p. 477 (Alexander Hamilton) (The

Federalist Papers, Bantam ed.2003). This Court emphasized that such proposition also was "championed in the Congress by James Madison, who" strongly supported prompt amendment of the Constitution by assuring "the Congress that" the first ten amendments would make "federal courts" the "guardians of those rights" that were "rooted in the Bill of Rights." *Chapman v. California*, 386 U.S. 18, 21 (1967) (citation omitted).

The Bill of Rights was specially designed to make courts "an impenetrable bulwark against every assumption of power" to "resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." *Id*., n.4 (citation omitted). So this Court has long and repeatedly emphasized that "[i]t is the duty of [all] courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886). *Accord Miranda v. Arizona*, 384 U.S. 436, 459 (1966). That principle necessarily applies even when a constitutional violation appears in its "mildest and least repulsive form," *Boyd* at 635, because "unconstitutional practices get their first footing" precisely by "silent approaches and slight deviations from legal modes of procedure," *Miranda* at 459 quoting *Boyd* at 635. In fact, however, judges like those at issue here perpetrate many flagrant encroachments on citizens' constitutional rights. *See* Sections II, III, below.

A judge knowingly violating his oath to support the Constitution is "worse than solemn mockery."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (Marshall, C.J.). Two Chief Justices writing for two unanimous Courts emphasized that judges who "usurp" a power "not given" in the Constitution (by knowingly violating the law or the Constitution) commit "treason to the Constitution." *United States v. Will*, 449 U.S. 200, 216, n.19 (1980) (Burger, C.J.) quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.).

Every court with the authority to do so is responsible for ensuring that the "Judiciary respects" the "proper—and properly limited—role of the courts in a democratic society." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). "Under our Constitution no court" may "serve as an accomplice in the willful transgression of" the law or the Constitution. *Lee v. Florida*, 392 U.S. 378, 385-86 (1968). Federal "judicial Power" was "created by Article III" of "the Constitution" so it clearly "is not" and cannot be "*whatever* judges choose to do." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). "One of the most obvious limitations" is that "judicial action must be governed by *standard*, by *rule.*" *Id*. *Accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

The Constitution needs and requires more than mere assertions and assurances. It needs to be defended by

a strong Court that consistently corrects clear constitutional violations by judges. It needs clear, consistent support to ensure that justice is more than just a word and judges do not treat this Court's precedent as merely advisory. It needs this Court to consistently grant petitions such as the instant Petition. Otherwise, the judicial power of the United States will not extend to some of the most important and profound controversies involving the government, people and Constitution of the United States.

II. This Court Should Emphasize Due Process of Law by Enforcing It.

A court inferior to this Court deprived Americans of crucial liberties without due process of law in multiple respects that are vital to the legitimacy and perception of legitimacy of courts and judicial conduct. First, without applying or complying with the First Amendment and U.S. Supreme Court precedent thereunder, the court violated rights guaranteed by Articles III and VI and the First, Fifth and Fourteenth Amendments by purporting to authorize courts to conceal information about court operations of great and urgent public interest. *Cf.* Pet. at 13; Section III, below. Second, the court accomplished the foregoing by withholding information that courts must and should include in their justifications of their actions. *Cf.* Pet. at 13.

Each court "must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Liljeberg v.*

Health Services Acquisition Corp., 486 U.S. 847, 864 (1988) (cleaned up). There can be no appearance of justice if the controlling legal authorities do not even appear in a court's decision.

Judges also must "promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Id.* at 865. Judges who fail to support their decisions by stating and applying controlling legal authorities clearly are not avoiding "the appearance of impropriety." *Id*. They are creating it. Any legal pronouncement "by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278.

A judicial decision that is "destitute of any semblance of reason" required by the Constitution relies on tactics "one would suppose to have found" their "way from the gaming-table to the bench." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 323 (1971). A decision that does not even state controlling legal authority, or a decision that states controlling legal authority and then fails to apply it, has more in common with confidence games than constitutional court conduct. It relies on little, if anything, more than confidence that judges have applied the law to the evidence and complied with the law and the Constitution. *Cf. e.g.*, App. 9a ("We are confident"); App. 87a ("confidence in a process").

Certainly, judges knowingly violating controlling provisions of law and the Constitution and flouting this Court's precedent perpetrate "violent" and "evil"

attacks on the Constitution, this Court and their own courts. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374-75 (1998). It "is hard to imagine a more violent breach of" judges' duties to such institutions "than" knowingly "applying a rule of primary conduct" that "is in fact different from the rule or standard formally announced." *Id.* at 374. It is "evil" for judges to knowingly "appl[y] a standard other than the one" that the law, the Constitution or this Court's precedent "enunciates." *Id*. at 375. Each judge and court must "apply in fact the clearly understood legal standards that" that the law, the Constitution or this Court's precedent "enunciates in principle." *Id*. at 376.

A "decision without principled justification would be no judicial act at all." *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992). A court's "legitimacy depends on making legally principled decisions [explained in a manner] sufficiently plausible to be accepted" as constitutional. *Id*. at 866. "The courts must declare the sense of the law." The Federalist No. 78 at 476. That is what "jurisdiction" means: the court "pronounces the law." The Federalist No. 81 (Alexander Hamilton) (1788) at 498. *See also id*., n.3 ("jurisdiction" is a "compound" of *jus* and *dictio* meaning "a speaking or pronouncing of the law").

"Article III of the Constitution establishes an independent Judiciary" with the "duty" to "say what the law is" in "particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322-23 (2016). "It is emphatically" the "duty of" judges "to say what the law is," not disregard or violate the law, much less the

Constitution. *Marbury*, 5 U.S. at 177. Each "Judge" is "required to declare" and apply "the law." *Etting v. U.S. Bank*, 24 U.S. 59, 75 (1826) (Marshall, C.J.). If a "Judge proceeds to state the law, and states it erroneously, his opinion ought to be revised; and if it can have had any influence on the" judgment, then the judgment "ought to be set aside." *Id*. So if a court "refuse[s] to give an opinion on" a particular "point," parties "may except to the refusal, which exception will avail" them if they show "that the question was warranted" and "that the opinion" requested "ought to have been given." *Id*.

Under the Constitution, "fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." *W. & A.R.R. v. Henderson*, 279 U.S. 639, 642 (1929). An "outright refusal" or willful failure to apply and comply with the First Amendment and this Court's precedent "without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit" and plain language of the Constitution. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Hundreds of years ago—when courts wrote with feathers dipped in ink—Chief Justice Marshall emphasized courts' duty to say what the law is. Now, opinions and legal authorities can be identified, copied and modified rapidly. Many legal issues already have been addressed by some of the greatest minds in history. Such analysis can be applied to many cases with relatively modest variations.

Moreover, this country's jurists are among the most intelligent, experienced and articulate in the world. They should say at least as much as a *pro se* plaintiff, who must—even before discovery—state "sufficient factual matter" to show that a contention "is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As this Court has emphasized repeatedly, contentions do not have even "facial plausibility" unless they are supported by "factual content that" at least "allows" a "reasonable inference." *Id*. The least that courts must and should do is state the controlling legal authorities and expressly decide issues presented consistent therewith. As the Constitution and this Court established and emphasized, courts must state the law and show they applied it.

III. This Court Should Support and Defend the First Amendment, People Exercising Rights Thereunder for their Most Important Purposes, and Judges' Ability to Defend Themselves.

The opacity and secrecy at issue here clearly are not serving any interest of the victim of domestic violence or her family. *Cf*. App. 123a ¶¶2, 6 (victim's mother requesting access to recordings). The information at issue easily could "be delivered, first to" the victim's surviving "family, so that they have the opportunity to" consider it "beforehand and, if they deem it necessary, alert about any objection to" public release. App. 90a (dissenting opinion of Presiding Judge Oronoz Rodríguez). Instead, the majority very broadly

emphasized that the information about "the processes in the domestic violence courtrooms" must be withheld, even from victims, "even if" release "is limited or part of" the information "is omitted" and "regardless of who requests" release, *i.e.*, even if all victims or their surviving family request it. App. 1a.

The foregoing extremely broad ruling irrefutably protects public officials (judges or legislators) from discussion of grievances and potential remedies pertaining to government proceedings. Here, it prevents the victim's family from learning about legal proceedings immediately preceding her death. It prevents future actual or potential victims and their families from learning about the processes that purportedly exist to protect them. In many respects such secrecy is inimical to the interests of all Americans. It irrefutably is inimical to the Constitution. The right of victims and their families to access the type of information at issue is inextricably intertwined with their rights to comment on and seek to improve official conduct and government processes.

Perhaps of greatest concern, the majority below justified its judgment by broadly and vaguely emphasizing that the "dignity of the human being is inviolable," including "against" any "attacks on" a person's "honor" or "reputation" that the court might consider "abusive." App. 5a quoting Const. P.R. It emphasized that such "inviolability" extremely broadly and vaguely "extends to everything that is necessary for the development and expression of the same." App. 6a quoting Const. P.R.

The foregoing language at least implied a clearly unconstitutional threat of punishment for exercising First Amendment freedoms. *See* App. 2a ("threat of [criminal] contempt"). By blocking victims' and their families' access to information about court processes, the majority clearly unconstitutionally implied that it intended to preclude and punish criticism impugning the honor or reputation of judges. No evidence showed that anyone else's honor or reputation might be attacked.

To justify courts' concealing information about court proceedings, the majority below emphasized and relied on a mere territorial Constitution and statute. *See* App. 5a-7a. Clearly, no such authority controls regarding the issues the court addressed explicitly or implicitly. *Cf*. U.S. Const. Art. VI, Amends. I, V, XIV. Reliance on such authorities only accentuated the extreme extent to which the majority's opinion and ruling violated the Constitution and copious precedent of this Court.

First Amendment "freedoms are delicate and vulnerable," and "supremely precious in our society. The threat of sanctions" or contempt "may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). Any rule, ruling or "statute broadly curtailing" First Amendment "activity" potentially "leading to litigation" or other petitioning "may easily become a weapon of oppression," and its "mere existence could well freeze out of existence all such activity." *Id*. at 436.

Clearly, courts and legislatures "cannot foreclose the exercise of constitutional rights by mere labels" or merely by changing labels, regardless of whether the label is applied to the law, the oppressor or the oppressed. *Id*. at 429. No law, no "regulatory measures," no justification, "no matter how sophisticated," can "be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Id*. at 439.

The "standards of permissible [regulatory] vagueness are strict in the area of free expression." *Id*. at 432. Against "First Amendment freedoms," the "government may regulate" (under any label of law) "only with narrow specificity." *Id*. at 433. The government must prove with "evidence" in the "record" that its regulations narrowly address demonstrated substantive evils. *Id*. at 433. Mere contentions and characterizations (such as are at issue here) should be viewed with suspicion. "Broad prophylactic rules in the area of free expression are suspect." *Id*. at 438. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id*.

The "litigation" at issue below was not merely "a technique of resolving private differences; it" was "a means for achieving the lawful objectives of equality of treatment" by government employees. *Id*. at 437. "It is thus a form of political expression." *Id*.

Even "Congress shall make no law" in any way "abridging" Americans' "freedom of speech" or their "right" to "petition" the government "for a redress of

grievances" as long as they petition "peaceably." U.S. Const. Amend. I. "No state" employee in any proceeding or manner "shall make or enforce any law" that in any way "abridge[s]" any "privileges or immunities" of all Americans under the First or Fifth Amendments. Amend. XIV, §1. That applies to "any law" under any label (including constitutional, civil, criminal, regulatory, administrative or privacy) that abridges any "privileges" (*id*.) within Americans' "freedom of speech" or their "right" to "peaceably" petition the government to redress grievances (Amend. I).

Clearly, the First and Fourteenth Amendments do "not speak equivocally. [Each] prohibits any law 'abridging the freedom of speech, or of the press' [so each] must be taken as a command of the broadest scope that [such] explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 (1941). In "deciding whether or not the sweeping constitutional mandate against any law 'abridging the freedom of speech or of the press' forbids it," this Court is "necessarily measuring a power of all American courts, both state and federal." *Id*. at 260.

"There is no legal alchemy by which" any court or legislature may make any silver bullet to kill or any golden rule to repress criticism of any public officials' official conduct without conscientious and complete compliance with the plain language of the Constitution and this Court's precedent applying and construing the Constitution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964). Judges' and legislators' various

"formulae for the repression of expression" (including laws purporting to punish, penalize or prevent criticism or access to information essential thereto) "can claim no talismanic immunity from constitutional limitations. [They all] must be measured by standards that satisfy the First Amendment." *Id*. at 269.

A primary purpose of Americans' First Amendment privileges and immunities regarding criticism of public officials and official conduct is to provide information to the public. The right to discuss and the right to access information to permit informed discussion are two sides to the same precious coin. Copious precedent of this Court emphasizes Americans' privilege to discuss public officials and official conduct. Americans' privilege to access court records to permit such discussion should be analyzed under the same or similar standards for the same reasons and purposes.

This Court repeatedly has emphasized that in all relevant respects all "public men" are "public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Id*. at 268. "It is as much" the "duty" of "the citizen-critic of government" to "criticize as it is the official's duty to administer." *Id*. at 282. "The interest of the public here outweighs the interest" of any public official "or any other individual. The protection of the public requires not merely discussion, but information." *Id*. at 272.

Americans' "freedom of speech and of the press" is "guaranteed by the First and Fourteenth Amendments" to serve vital national interests. *Id.* at 268. The

Constitution and Congress expressly and emphatically confirmed that "the censorial power is in the people over the Government, and not in the Government over the people." *Id.* at 275 quoting James Madison. "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id*.

The reasons are clear and compelling. *See id*. at 270 quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring):

> Those who won our independence [by sacrificing or risking literally everything they and their entire families had or ever could have had] believed [that to preserve what they earned with copious blood, sweat and tears] public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . [T]hey knew . . . that it is hazardous to discourage thought . . . [because] repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . . [So] they eschewed silence coerced by law—the argument of force in its worst form. [Specifically to prevent] tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

See also New York Times, 376 U.S. at 269:

> The constitutional safeguard [] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

"It must be recognized that public interest is" most "likely to be kindled by a controversial event of the day." *Bridges*, 314 U.S. at 268. The "judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban" on access to information (and implicitly on comment thereon) "is likely to fall not only at a crucial time but upon the most important topics of discussion." *Id*. "It is therefore" some of "the controversies that command most interest that the decisions below" seek to "remove from the arena of public discussion." *Id*. at 269.

Regarding, specifically, commentary on courts and judges, any purported "evil" to be suppressed must be "substantive" and it "must be extremely serious and the degree of imminence extremely high before" speech "can be punished" or access to information regarding entire categories of cases can be obstructed. *Id.* at 263.

This does "no more than recognize a minimum compulsion of the Bill of Rights." *Id*.

Courts cannot justify repressing commentary on or access to information about any court or judge by resorting to "exaggeration" of any purported "tendency" to "interfere with the orderly administration of justice." *Id.* at 273. *See also id*. at 278 ("we find exaggeration in the conclusion that the" speech at issue "even 'tended' to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts," and any potential extra "charge added by [mere speech was] negligible"). Judges and legislators "cannot transform minor matters of" mere "inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." *Id*. at 263.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from" discussion of the issues relevant to the Petition or access to the information necessary to permit informed discussion of such issues "can be deemed clear and present." *Whitney*, 274 U.S. at 377-78 (Brandeis, J., concurring).

Courts must expressly consider whether speech criticizing courts (or access to information that would permit such criticism) presents "danger" that is both

"clear and present" to the "fair administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 348 (1946). To do so, courts "must weigh the impact" of release of information (to victims or family versus to the public or the press) "against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases." *Id*. at 349. "The evil consequence" flowing from the particular type of release of particular information "must" be "extremely serious and the degree of imminence extremely high before" release can be precluded. *Id*. at 334.

Irrefutably, "free speech and fair trials are two of the most cherished policies of our civilization." *Bridges*, 314 U.S. at 260. The Petition seeks to protect and preserve both. Here, a victim of domestic violence repeatedly appealed to courts for protection and apparently was rebuffed repeatedly. She apparently was killed by the person from whom she sought protection. Having failed to protect, the government started to prosecute. The apparent killer apparently killed himself to avoid prosecution. All the foregoing evils might have been avoided with a modicum of effort or slightly different procedures.

It also is important to consider how judges can protect themselves from unjust criticism. The decision of the majority below prevents judges from defending themselves against even extremely harsh and even extremely unjust criticism. Judges responsible for decisions can be accused of knowingly and criminally violating the law, egregiously abusing their powers,

and maliciously abusing victims of domestic violence or alleged abusers, and they cannot defend themselves when they cannot prove that criticism was false, much less that critics should have known it was false.

Heavy handed efforts to conceal relevant evidence, deny due process, and flout controlling legal authority to clearly violate constitutional rights encourage extremely harsh criticism. *See* App. 2a ("threat of [criminal] contempt"); page 2, above (flouting clear controlling legal authority without any attempted explanation); Pet. at 7-16 (using contradictory, summary, preemptive procedures and blanket prohibitions to deny any meaningful opportunity to be heard). Using such tactics (especially to broadly conceal evidence regarding an entire category of court proceedings), judges hand their critics both swords and shields. Judges using such tactics, especially when combined with obvious failures to address controlling legal authority, invite and earn criticism that their justifications were lies and they committed crimes. *Cf., e.g.*, 18 U.S.C. §§ 241, 242, 1001, 1512, 1519.

Any "speech concerning public affairs" is "the essence of self-government. The First and Fourteenth Amendments embody" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic," and "unpleasantly sharp attacks on government and public officials." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) quoting *New York Times*, 376 U.S. at 270. Critics certainly may resort "to vilification of" judges. *New York*

Times at 271. A "judge may not" punish any critic who "ventures to publish anything that [merely] tends to make [a judge] unpopular or to belittle him" even by using "strong language, intemperate language," and "unfair criticism." *Craig v. Harney*, 331 U.S. 367, 376 (1947).

"The public-official rule," below, "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which" even "might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation." *Garrison* at 77 (pertaining specifically to criticism of judges). *See also New York Times* at 272-73 (cleaned up):

> [Regarding] judicial officers [ ] concern for the dignity and reputation of the courts does not justify the punishment [ ] of criticism of the judge or his decision [even if the criticism] contains half-truths and misinformation. . . . [J]udges are to be treated as men of fortitude, able to thrive in a hardy climate. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations. [Clearly,] neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, [and] the combination of the two elements is no less inadequate.

Any "repression" of any such criticism "can be justified, if at all, only" by presenting clear and convincing evidence of each fact that is material to showing a "danger" that was both "clear" and "present" of "the obstruction of justice." *Id.* at 273. "The constitutional guarantees," in the First, Fifth and Fourteenth Amendments "require" a universal "federal rule that prohibits a public official from" punishing, penalizing or precluding any criticism "relating to" any "official conduct" except a "falsehood" that "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false." *Id*. at 279-80.

"[S]uch a privilege is required by the First and Fourteenth Amendments." *Id*. at 283. "Truth may not be the subject of" any type of "either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison*, 379 U.S. at 74. So all courts must apply "the *New York Times* rule, which absolutely prohibits" any type of "punishment of truthful criticism" of official conduct of public officials, as well as any falsehood that was not asserted with actual malice. *Id.* at 78 (emphasis added).

"In such a case" critics have "a privilege qualified to this extent. Any" public official may be criticized by the public and press except to the extent that false criticism was asserted with "actual malice." *Id*. at 281 (citation omitted). "This privilege extends" to "matters of public concern, public men, and candidates for office." *Id*. at 281-82. "Such a privilege for criticism of official conduct is appropriately analogous to the protection

accorded a public official when he is sued for libel by a private citizen." *Id*. at 282. Any "utterance of a federal official" is "absolutely privileged if made 'within the outer perimeter' of his duties." *Id*. "Analogous considerations support the privilege for the citizen-critic of government. It is as much [the citizen's] duty to criticize as it is the official's duty to administer." *Id*. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." *Id*. Such unjustified preference over the public is precisely what the majority below seek to impose. They clearly seek to deprive Americans of liberty without due process of law and deny Americans equal protection of the law.

Any "forfeiture of the privilege" must be preceded by a "showing of malice" regarding a factual falsehood; each element is "not presumed but is a matter for proof." *Id*. at 284. Moreover, "the proof presented to show" a falsehood asserted with "actual malice" must have "the convincing clarity which the constitutional standard demands." *Id*. at 285-86. The "First Amendment mandates a 'clear and convincing' standard" of proof regarding each material fact. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986). The "clear-and-convincing-evidence requirement must be" applied whenever "*New York Times* applies." *Id*. at 244. Anyone wishing to punish, penalize or preclude criticism of any judge's official conduct "must bear" such "quantum and quality of proof." *Id*. at 254. The same standard should apply to judges quashing criticism by imposing secrecy.

"The judicial system" plays "a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1035 (1991). "Public vigilance serves" America "well" because "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id*. Indeed, public criticism of judges and judicial proceedings "has always been recognized as a" vital "safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that" judicial conduct is "subject to contemporaneous review in the forum of public opinion" is intended be "an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). *See also Bridges*, 314 U.S. at 270-71:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of [Americans and] American public opinion. For it is a prized American privilege to speak one's mind . . . on all public institutions. [Any] enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. [Certainly,] disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation.

The first words of the Constitution protecting all Americans emphasize that it was "the People of the

United States" who did "ordain and establish this Constitution," and they did so specifically and expressly "in Order" to "establish Justice," to "insure domestic Tranquility" and to "secure the Blessings of Liberty to" their "Posterity." U.S. Const. Preamble. The last words of the Bill of Rights clearly emphasize that all "powers" that were "not delegated to the United States by the Constitution" were expressly "reserved" to "the people." Amend. X. Articles III and VI and the First, Fifth and Fourteenth Amendments emphasized that the power to repress speech (with sweeping contentions about privacy and dignity to justify secret proceedings potentially violating victim's rights under federal law and the Constitution) clearly was not delegated to any government.

The Petition should be granted to give the words of the Constitution and this Court's precedent the plain meaning and profound significance they should have. The First, Fifth and Fourteenth Amendments clearly and categorically emphasize that "no law" or "any law" may be used, and "no person" may be deprived of the liberties and privileges at issue. Such clear and categorical commands and prohibitions protect the discussion that the people seek to have and access to the information necessary to have such discussion.

CONCLUSION

This Court should grant the Petition to protect the vital constitutional rights and national interests at issue.

Respectfully submitted,

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