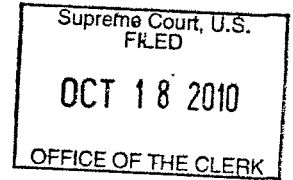


IN THE SUPREME COURT OF THE UNITED STATES



No. 10-512

IN RE GRAND JURY PROCEEDINGS (SIOBHAN REYNOLDS AND PAIN  
RELIEF NETWORK ALLIANCE, INC.)

MOTION TO UNSEAL PETITION FOR CERTIORARI, DOCKETS  
AND ORDERS AND MEMORANDA OF LAW

Siobhan Reynolds and the Pain Relief Network Alliance, Inc. (collectively “Petitioners”) hereby respectfully move this Court to unseal their entire petition (“Petition”) for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. The Petition and Appendix was filed on September 17, 2010, along with a Motion for Leave to File Under Seal. Counsel requested leave to file the Petition under seal with a redacted version for the public docket in order to satisfy this Court’s practice, which strongly disfavors filings under seal, while at the same time striving to avoid disclosure of any confidential grand jury material. However, as explained below, Petitioners believe there is no confidential grand jury information to be protected by keeping this matter under seal. Accordingly, they ask the Court to unseal all pleadings filed in this docket.<sup>1</sup>

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<sup>1</sup> Petitioners are aware that the Court has not yet acted on their Motion to File Petition for a Writ Of *Certiorari* Under Seal. However, they are submitting the instant motion so that the Court may consider it together with the initial motion to seal.

## Background

The United States Court of Appeals for the Tenth Circuit entered its sealed order and judgment on April 20, 2010, and the docket in the proceedings below remains sealed in its entirety, including an *amicus curiae* brief based entirely on facts available to the public. The docket and all documents in this matter from the United States District Court for the District of Kansas also remain under seal, ostensibly to protect grand jury secrecy, although the Assistant United States Attorney will neither confirm nor deny to Petitioners' counsel the existence of an ongoing grand jury investigation. Petitioners moved to file their Petition under seal out of an abundance of caution, in order to comply with any orders of the United States District Court and the United States Court of Appeals that might require such sealing, and upon the Assistant United States Attorney's observation that all pleadings in this case need to be filed under seal.

## Argument

1. It is far from clear that the rules governing grand jury proceedings support the blanket sealing orders for the ancillary proceedings below. Rule 6(e)(2)(B) of the Federal Rules of Criminal Procedure does not list the target of an investigation among those who must not disclose grand jury material, and the Committee notes to Subdivision (e)(2) state that “[t]he rule does not impose any obligation of secrecy on witnesses.” Fed. Crim. Code and Rules (West, 2010 ed.) at 45. Moreover, “Rule 6(e) does not provide specific guidance on whether a grand

jury's subpoena should be kept secret," and "case law has not consistently stated whether a grand jury's subpoena should be kept secret." *Id.* at 52.

Because the Petition does not reveal secret grand jury information, the basic presumption in favor of open judicial records dictates that it must be unsealed. This Court has held that the presumption of openness "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," a standard the government plainly cannot meet in this case. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*") (quoting *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Even in the grand jury context, "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *In re Grand Jury Proceedings*, 776 F.2d 1099, 1103 (2d Cir. 1985) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 680-681 (1972)).

2. To whatever extent sealing might have been justified at some point earlier in the proceedings, "grand jury secrecy is not unyielding' when there is no secrecy left to protect." *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007) ("*Miller Unsealing Opinion II*") (citation omitted). "There is no per se rule against disclosure of any and all information which has reached the grand jury chambers; ... the touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation ....'" *Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) (Ruth

Bader Ginsburg, J.). In this regard, Rule 6(e)(6) requires unsealing where the information at issue is “sufficiently widely known,” such that “the cat is out of the bag.” *Miller Unsealing Opinion II*, 493 F.3d at 154-55. The rule “reflects the common-sense proposition that secrecy is no longer ‘necessary’ when the contents of grand jury matters have become public.” *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (“*Miller Unsealing Opinion I*”).

In this case, the underlying investigation and subpoenas have been covered in detail by the Associated Press,<sup>2</sup> which obtained copies of the subpoenas at issue, and also by the *Chicago Sun-Times*,<sup>3</sup> *The Kansas City Star*<sup>4</sup> and States News Service.<sup>5</sup> Furthermore, the grand jury investigation purportedly relates to obstruction of justice in the context of a different criminal proceeding, *United States v. Schneider*, No. 07-cr-10234 (D. Kan. filed Dec. 20, 2007) – a proceeding that has been closed and resolved. No purpose would be served by requiring the sealing or redaction of documents filed in this docket.

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<sup>2</sup> *See, e.g.*, Roxana Hegeman, *Doctor's Advocate Targeted In Grand Jury Probe*, Associated Press, Aug. 21, 2010; Roxana Hegeman, *Activist, Group Fined For Contempt In Kan. Case*, Associated Press, Sept. 3, 2009; Roxana Hegeman, *Kan. Judge Mulls Contempt Against Patient Advocate*, Associated Press, Sept. 1, 2009; Roxana Hegeman, *ACLU Raises First Amendment Argument Over Subpoena*, Associated Press, May 11, 2009; Roxana Hegeman, *Patient Advocate Subject Of Investigation In Kan.*, April 15, 2009; Associated Press, *NM Patient Advocate Subject of Kan. Grand Jury*, April 14, 2009.

<sup>3</sup> Jacob Sullum, *Drug Control Effort Spurs Speech Control*, *Chicago Sun-Times*, Sept. 12, 2009 at 15.

<sup>4</sup> Roxana Hegman, *DOJ Eyes Kansas Complaint Against Federal Prosecutor*, *The Kansas City Star*, Jul 10, 2009.

<sup>5</sup> States News Service, *ACLU Asks Court To Block Government's Unconstitutional Attempt To Silence Pain Relief Advocate*, May 7, 2009.

3. Secrecy in this case does not serve the historic purposes of confidentiality in grand jury proceedings. In other cases where courts have held that ancillary grand jury proceedings can be sealed, the stated purpose has been to uphold such traditional interests as ensuring that persons who are accused but exonerated by the grand jury are not exposed to public ridicule. *E.g., United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997) (ancillary proceedings involving government release of memorandum naming uncharged individuals) (*quoting Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)); *Newark Morning Ledger Co.*, 260 F.3d 217, 222-23 (3d Cir. 2001) (ancillary proceedings involving alleged leaks to the media of secret grand jury information by the Justice Department).

This case, however, involves the opposite concern. In this situation, the broad sealing orders ignore the fact that “information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment,” *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), and that public access to such information “has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.” *In re Oliver*, 333 U.S. 257, 270 (1948).

Allowing courts to conduct grand jury ancillary proceedings in total secrecy all the way through the appeal is overly restrictive. *In re Grand Jury Proceedings*, 776 at 1103. This is particularly true to the extent that the possibility of disclosing grand jury material, and thus the need for secrecy, attenuates as proceedings move to the appellate phase. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502

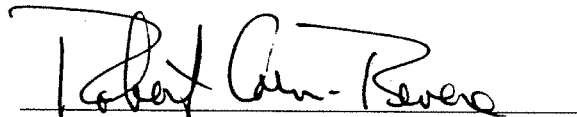
(D.C. Cir. 1998). In such proceedings, appellate courts may preserve grand jury secrecy in various ways, such as by simply reducing the level of detail in discussing the relevant issues. *E.g., Ealy v. Littlejohn*, 569 F.2d 219, 230 (5th Cir. 1978).

### Conclusion

For the foregoing reasons, Petitioners respectfully move this Court to unseal the Petition and Appendix.

Dated: September 21, 2010

Respectfully submitted,



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