No. 14-4387

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHNNY DWYER, *Intervenor-Appellant,*
v.
UNITED STATES OF AMERICA, *Appellee,*
v.
JOHN DOE, *Defendant*.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF INTERVENOR-APPELLANT SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* The Reporters Committee for Freedom of the Press states that it is an unincorporated association that has no parent corporation and no stock.

Respectfully submitted,

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Dated: March 5, 2015
Washington, D.C.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press ("the Reporters Committee") is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the right to a free and unfettered press guaranteed by the First Amendment, and the right of citizens to be informed, through the press, of the actions of their government, including their courts. The Reporters Committee has provided guidance and research in First Amendment and freedom of information litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases involving sealed court documents or court access issues.

The Reporters Committee has a strong interest in preserving the presumptive right of access to criminal court proceedings and documents afforded by the First Amendment, because such access enables the press to gather the news and report on matters of utmost concern to the public, and because reporters, as representatives of the public, have an interest in observing the conduct of the courts and overseeing the operation of the criminal justice system. Accordingly, the Reporters Committee writes separately to emphasize the serious threat posed to that presumption of openness by the practice of broadly sealing filings and closing

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *amicus curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

proceedings in prosecutions of anonymous John Doe defendants, and to underscore the need for district courts to, at a minimum, both find and articulate publicly substantial justifications for such extraordinary secrecy. In light of the apparent prevalence of John Doe prosecutions in the Eastern District of New York, lower courts in this Circuit need guidance from this Court as to the appropriate scope of sealing and closure orders in exceptional criminal cases where compelling interests necessitate something less than complete transparency.

The Reporters Committee submits this brief pursuant to Federal Rule of Appellate Procedure 29(a) with consent of all parties.

SUMMARY OF ARGUMENT

This case is one of a number pending in the Eastern District of New York in which the criminal defendant is anonymous, all or nearly all of the proceedings have been closed, and the bulk of documents filed in connection with the matter have been sealed, including the sealing order itself. In this case, the John Doe defendant waived indictment and entered a guilty plea in a closed, after-hours hearing, after the Government had filed a motion to seal the courtroom for what was identified publicly as only an unspecified "proceeding." Citing the presumptive right of access afforded by the First Amendment, Appellant, a freelance reporter, sought to intervene in the district court to unseal the proceedings, records, and the defendant's identity. The district court granted Appellant's request to intervene but denied his motion to unseal, concluding that in light of national security interests, it had no alternative but to impose what is, in effect, complete secrecy. *See* Mem. & Order at 5, *United States v. John Doe*, No. 1:14-cr-00438-PKC-1 (E.D.N.Y. Oct. 30, 2014), ECF No. 24 (App. at A-11).

The blanket sealing of documents and closing of court proceedings in criminal cases—particularly where the defendant's identity is withheld from the public—impedes public scrutiny of government conduct and violates the First Amendment. When district courts seal particular documents and close individual hearings, such measures must, *inter alia*, be essential, and their scope narrowly

tailored. The Constitution requires no less where the combined effect of a district court's sealing and closure orders amounts to a complete lack of transparency concerning the prosecution of an anonymous criminal defendant.

The Reporters Committee for Freedom of the Press ("Reporters Committee") writes to emphasize that (1) total or near-complete secrecy of the kind typified by this case is anathema to the First Amendment, and (2) assuming, *arguendo*, that a district court may, consistent with constitutional guarantees, *ever* properly issue a secret sealing order applicable to virtually all documents and close all proceedings in a criminal case against a defendant whose identity is itself hidden from the public, the district court must, at a minimum, justify such extensive secrecy, and should be required to articulate publicly its basis for concluding that nothing short of complete closure is necessary.

ARGUMENT

I. Openness and transparency are bedrock principles of our criminal justice system.

For centuries, openness has been "an indispensable attribute" of the criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The benefits of an open and transparent criminal justice system are manifold, both to the defendant and the public. As the Supreme Court has recognized, secrecy breeds "distrust" of the judiciary and its ability to adjudicate matters fairly. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). Openness, on the other hand, not only gives "assurance that the proceedings [are] conducted fairly to all concerned," it also "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. In addition, public dissemination of convictions and sentences enables closure for victims, their families, and communities, serves as a deterrent to future crimes, and permits the public to evaluate the performance of both the executive and judicial branches.

This Court has stated that

> [t]ransparency is pivotal to public perception of the judiciary's legitimacy and independence. . . . Because the Constitution grants the judiciary neither force nor will, but merely judgment, courts must impede scrutiny of the exercise of that judgment only in the rarest of circumstances. This is especially so when a judicial decision accedes to the requests of a coordinate branch, lest ignorance of the basis for the decision cause the public to doubt that complete independence of

> the courts of justice [which] is peculiarly essential in a limited Constitution.

United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (citations and quotation marks omitted).

The nexus between openness and fairness in criminal proceedings and the role of an unfettered press is well-established. "A responsible press has always been regarded the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard*, 384 U.S. at 350 (internal quotation marks and citations omitted).

For these reasons, the First Amendment provides the press and the public a presumptive right of access to criminal trials and related documents. *See Richmond Newspapers*, 448 U.S. at 580–81; *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989) (describing the "presumption of public access to a criminal trial," "a pretrial proceeding in a criminal case" and "documents filed in connection with criminal proceedings"). That 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." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").[2]

As the Supreme Court and this Circuit have repeatedly recognized, the First Amendment does not permit blanket restrictions on access to court documents and proceedings. Documents and proceedings "to which the public has a qualified right of access may be sealed only if 'specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Aref*, 533 F.3d at 82 (quoting *Press-Enterprise II*, 478 U.S. at 13–14).

In this Circuit, courts analyze restrictions on access to criminal proceedings or documents using a four-step approach. *See United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995) (articulating a four-step analysis to review court closure and sealing motions); *see also United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (applying the four-step *Doe* analysis to a sealing order). First, "the district court must determine, in specific findings made on the record, if there is a substantial probability of prejudice to a compelling interest of the defendant, government, or third party," that sealing or closure would prevent. *Doe*, 63 F.3d at

[2] In determining whether the right of access afforded by the First Amendment attaches to a particular proceeding, courts consider both "whether the place and process have historically been open to the press and general public" as well as "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*").

128. Compelling interests may include, for example, "the defendant's right to a fair trial," "the integrity of significant [government] activities entitled to confidentiality, such as ongoing undercover investigations or detection devises," or "danger to persons or property." *Id.* "Broad and general findings" by the district court "are not sufficient" to justify closure or sealing. *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). Second, if there is a substantial probability of prejudice to a compelling interest, then the court "must consider whether 'reasonable alternatives to closure [or sealing] cannot adequately protect' the compelling interest that would be prejudiced by public access." *Doe*, 63 F.3d at 128 (quoting *Press-Enterprise II*, 478 U.S. at 8–10). If so, the court must, third, determine whether under the circumstances "the prejudice to the compelling interest 'override[s] the qualified First Amendment right of access.'" *Id.* Fourth and finally, if closure or sealing is warranted, the court must devise an "order that, while not necessarily the least restrictive means available to protect the endangered interest is narrowly tailored to that purpose." *Id.* (citations omitted).

The more extensive the restrictions on public access being sought, the higher the burden on the movant to show a compelling interest, a substantial probability of prejudice, the unavailability of less restrictive alternatives, and narrow tailoring. *Id.* at 129. Where "a party seeks to seal the record of criminal proceedings *totally* and *permanently*, the burden is heavy indeed." *Doe*, 356 F. App'x at 490

(emphasis in original). Because any single "step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat," *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006), a district court's decision to permit the prosecution of an anonymous John Doe defendant, while at the same time closing his or her proceedings to the public, and sealing virtually all documents related to his or her criminal case—if such extraordinary secrecy is constitutional under *any* circumstances—requires the most substantial and "'rigorous" of justifications. *See Aref*, 533 F.3d at 83 (quoting *Hicklin* with approval).

II. Courts in the Eastern District of New York are processing and disposing of seemingly ordinary criminal cases against John Doe defendants in almost complete secrecy.

The Eastern District of New York has placed a troubling number of criminal cases against anonymous defendants under near-total seal, without any apparent need or stated justification for departing from the longstanding tradition and First Amendment mandate of presumptively open criminal proceedings. Many of these cases, judging from the public dockets, do not obviously implicate heightened governmental interests. Rather, they appear to be ordinary criminal proceedings being conducted in what is, in effect, complete secrecy. In such cases, district courts are sentencing anonymous defendants to unknown terms of imprisonment or imposing criminal fines without any public oversight. Moreover, because the

sealing orders are often themselves sealed, the public has no way of knowing what procedures are being followed, or what legal standards are being applied, by district courts in determining that such an extreme level of secrecy is warranted.

Three recent cases illustrate this problematic lack of transparency in sealed John Doe prosecutions. In *United States v. John Doe*, No. 2:13-cr-278-1 (E.D.N.Y. filed May 3, 2013), the anonymous John Doe defendant faced charges of forging endorsements on Treasury checks, bonds or securities, in violation of 18 U.S.C. § 510. In aggregate, the forgeries amounted to less than $1,000, judging from the statutory provision referenced on the docket, 18 U.S.C. § 510(c).[3] The John Doe defendant waived indictment and pleaded guilty on June 11, 2013. He was released on his own recognizance, according to a text entry on the docket. The filed information, waiver of indictment, order setting conditions of his release, and bond are all under seal. The docket does not contain an entry for a sealing order, and there are no publicly available findings that indicate why the district court allowed for the defendant to be prosecuted anonymously and has kept his identity and all filings in the case under seal, even after disposition.

In *United States v. Jane Doe*, No. 1:13-cr-306-CBA-1 (E.D.N.Y. filed May 20, 2013), the Jane Doe defendant faced one count of theft or embezzlement from

[3] "If the face value of the Treasury check or bond or security of the United States or the aggregate value . . . does not exceed $1,000 . . . the penalty shall be a fine under this title or imprisonment for not more than one year, or both." 18 U.S.C. § 510(c).

an employee benefit plan. The public docket contains only three entries: a sealed notice of intent to proceed under Fed. R. Crim. P. 7(b) and an order of reassignment, both entered on May 20, 2013, and a sealed sentencing memorandum from July 10, 2014. The docket does not contain an entry for a sealing order, or provide any justification for such secrecy. Nor is there any indication as to why, after the defendant was sentenced, the seal has not been lifted. It is impossible to tell from the public docket whether the defendant was imprisoned and, if so, for how long.

In *United States v. John Doe*, No. 1:14-cr-40-MKB-1 (E.D.N.Y. filed Jan. 30, 2014), a defendant was charged with three counts of producing or trafficking in "counterfeit device[s]" and one count of "fraud with identification documents." The public docket in this case also has only three entries: a notice of hearing on a motion to close the courtroom, a letter related to the notice of motion, and a minute entry for the motion hearing held March 7, 2014. Of these three entries, the only document publicly available is a one-page letter by the government to the presiding judge confirming that the motion hearing had been set, and that counsel for the defendant was advised of the motion. There are no docket entries after March 7, 2014, and no explanation from the court justifying the secrecy.

These are but a few examples of the scores of criminal matters against John Doe defendants filed in the Eastern District of New York in the last four years,

many of which are sealed in significant part, if not almost entirely. Other cases under near-total seal involve drug,[4] weapons,[5] or racketeering charges,[6] among others.[7] These cases share two things in common: extreme secrecy and the lack of any public justification for it. By offering no information as to the district court's reasons for permitting the defendant to be prosecuted anonymously, or for sealing virtually all related documents, these cases raise concerns about prosecutorial abuse or coercion, or preferential treatment for defendants who wish to remain anonymous. Accordingly, such secret prosecutions undermine public confidence in both the Department of Justice and the judiciary. *See Aref*, 533 F.3d at 83.

Perhaps even more concerning, it does not appear that all filings or events in these cases—including, possibly, any motions contesting the secrecy measures—are reflected on the public dockets. In *Jane Doe*, No. 2:12-cr-733-JFB-AKT-1, for example, the docket contains only two entries: the first noting that the case was "unsealed," on August 15, 2013, and the second, on July 23, 2014, scheduling a sentencing for January 13, 2015. The docket contains no indictment or waiver of indictment, no judgment, no order of dismissal or transfer, no further scheduling

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[4] *See, e.g.*, *United States v. John Doe*, No. 1:14-cr-214-ILG-1 (E.D.N.Y. filed Apr. 11, 2014) (conspiracy to import cocaine).

[5] *See, e.g.*, *United States v. John Doe*, No. 1:13-cr-600-ENJ-1 (E.D.N.Y. filed Oct. 24, 2013) (attempted exportation of arms and munitions).

[6] *See, e.g.*, *United States v. Jane Doe*, No. 2:12-cr-733-JFB-AKT-1 (E.D.N.Y. filed Nov. 20, 2012) (racketeering).

[7] *See, e.g.*, *United States v. John Doe*, No. 1:13-cr-555-KAM-1 (E.D.N.Y. filed Oct. 1, 2013) (interference with commerce by threat or violence).

orders or minute entries, and no sentencing order. Because there are no docket entries after July 23, 2014, it is impossible to determine whether the scheduled sentencing in fact took place in January 13, or was continued for some reason. Other dockets are also seemingly incomplete. *See, e.g.*, *Doe*, No. 1:14-cr-40-MKB-1 (displaying only three events on the docket, all related to closure of the courtroom, and no further filings after March 7, 2014).

This Court has held that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004). Such right is worth little if the docket sheet contains only a pseudonym for the defendant and does not contain a list of all relevant filings and other events in the case. *See id.* at 93 ("docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and the press with the capacity to exercise their rights guaranteed by the First Amendment"); *see also Company Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) ("Access to docket sheets therefore enhances the appearance of fairness and enlightens the public both to the procedures the district court utilized to adjudicate the claims before it and to the materials it relied upon in reaching its determinations."). And it is difficult to imagine a scenario where merely acknowledging publicly that a filing had been made or a hearing held would so compromise a compelling state interest as to

justify its exclusion from the docket, without violating the *Press-Enterprise* test. *See Hartford Courant*, 380 F.3d at 96 ("'There are probably many motions and responses thereto that contain no information prejudicial to a defendant, and we cannot understand how the docket entry sheet could be prejudicial'") (quoting *In re State-Record Co., Inc.*, 917 F.2d 124, 129 (4th Cir. 1990)).

This extraordinary level of secrecy harms the public and the press and frustrates the policies underlying openness in the criminal justice system. A criminal prosecution is a quintessentially public act, deserving of public oversight. The Department of Justice, a public agency, brings criminal charges on behalf of the people in a public court, often resulting in imprisonment in a publicly managed prison facility. "To ensure that ours is indeed a government, of the people, by the people, and for the people, it is essential that the people themselves have the ability to learn of, monitor, and respond to the actions of their representatives and their representative institutions." *United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014). As set forth below, because super-sealing in a John Doe prosecution completely deprives the public of the ability to engage in any oversight, whatsoever, of that criminal case, it is incompatible with the First Amendment. Assuming, *arguendo*, however, that it is permissible at all, such an extreme level of secrecy requires the most substantial of justifications from the requesting party, and a rigorous evaluation followed by a public ruling from the district court.

III. Effectively secret criminal prosecutions of John Doe defendants violate the First Amendment's guarantee of access to criminal trials.

As the U.S. Supreme Court has long-recognized, public scrutiny plays a critically important role in the administration of justice. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process."). Given the importance of public oversight, the First Amendment requires that closure of criminal proceedings be narrowly tailored, and that the district court consider alternatives to closure. *See Press-Enterprise I*, 464 U.S. at 513 (discussing obligation to consider alternatives to total closure of *voir dire*).

Blanket sealing of the documents and proceedings in a case, coupled with the use of a pseudonym to obscure the defendant's identity, undermines these principles, and renders the public's ability to exercise its First Amendment right to access documents and attend judicial proceedings "merely theoretical." *Hartford Courant*, 380 F.3d at 93. The combined effect of the various secrecy measures utilized by the district court in this case makes it impossible for the public not only to understand the substance of the proceedings, but also to verify that trial procedures have been conducted fairly and properly.

As this Court stated in *Hartford Courant*, "[b]y inspecting materials like docket sheets, the public can discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement

rates in different areas of law, and the types of materials that are likely to be sealed," 380 F.3d at 95–96. In this case, however, while a docket sheet technically exists, the absence of certain documents and descriptions on that docket sheet prevents the public from obtaining the information that the Court in *Hartford Courant* recognized as essential to the task of public oversight.[8]

Moreover, in this case, the government filed—under seal—a motion to seal documents and close the courtroom in advance of an unidentified "proceeding." The next day, the defendant waived indictment and pleaded guilty in a closed hearing. The public never received notice that the court would conduct a plea hearing, the defendant entered his plea in secret, and neither the government's arguments in favor of secrecy nor the court's justifications for closure are available to the public.

Taken together, the anonymity of the defendant, the sealing of the indictment, the sealing of the plea agreement, and the sealing of the sealing order, along with the closure of proceedings before the district court, have prevented the public from monitoring the criminal prosecution and evaluating the actions taken by the district court. The combination of these secrecy measures violates the First Amendment. Two of those measures—the use of a pseudonym for a criminal

[8] For example, the first twelve entries are missing entirely from the public docket in this case.

defendant, and the final disposition of a criminal case in a closed courtroom—warrant particular attention.

A. The names of criminal defendants are presumptively public.

In the order denying Appellant's motion to unseal the documents and proceedings in this case, the district court stated that the government's motion to seal included a request to proceed against the defendant as "John Doe." Mem. & Order, *supra*, at 1 (App. at A-7). Because the sealing order remains under seal, it is not clear what standard the district court applied to decide whether pseudonymity was appropriate. Rather, in its order denying Appellant's motion to unseal, the district court offered nothing more than general, blanket assertions that the sealing of this matter —including obscuring defendant's identity—was both "crucial" and narrowly tailored. *Id.* at 2 (App. at A-8).

This Court has stated that in certain "sensitive situations," such as appeals involving proceedings pending before a grand jury, "some materials, including the names of the parties, may be under judicial seal." *In the Matter of the Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 n.4 (2d Cir. 2009) (citing *In re Richard Roe, Inc.*, 68 F.3d 38, 39 n.1 (2d Cir. 1995) ("Because this appeal involves proceedings currently before a grand jury and the briefs and record on appeal are under seal, we employ pseudonyms."). This Court has never considered, however, what standard applies when a party in a

criminal case seeks to substitute a pseudonym for the defendant's name. Indeed, the authority for proceeding against a pseudonymous defendant in a criminal case is, at best, unclear. *See Johnson v. Sawyer*, 47 F.3d 716, 734 n.37 (5th Cir. 1995) (finding no statute, "state or federal, authorizing a felony defendant's use of a pseudonym in the criminal proceedings against him").[9]

Other circuits have recognized that the names of criminal defendants are presumptively public, and have used a variety of *ad hoc* tests for determining the propriety of allowing a criminal defendant to proceed pseudonymously in a given case. The Ninth Circuit, for example, has recognized that "the identity of the parties in any action, civil or criminal, should not be concealed except in an unusual case, where there is a need for the cloak of anonymity." *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981). And the Sixth Circuit allowed a pseudonymous criminal appeal under certain circumstances "in order to prevent unnecessary dissemination of information" about a conviction that had been set aside. *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977).

In the civil context, this Court has recognized that "[i]dentifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d

[9] The Reporters Committee assumes for purposes of this brief that, standing alone, it is not constitutionally impermissible for the government to proceed against a "John Doe" criminal defendant in at least some circumstances.

185, 189 (2d Cir. 2008) (quoting *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir.1997)). Indeed, in civil litigation there are only a "limited number of exceptions to the general requirement of disclosure of the names of parties." *Sealed Plaintiff*, 537 F.3d at 189 (articulating a non-exhaustive list of ten factors courts should consider when a party in a civil suit applies to proceed anonymously). Certainly, the identity of a defendant is a dimension of the publicness of a trial that is no less important in the criminal context. Thus, *at a minimum*, when a party seeks to have a criminal prosecution proceed against a pseudonymous defendant, the district court must apply at least the standard applicable in the civil context, and balance "the interest in anonymity" against the "public interest in disclosure" and any prejudice to the opposition. *Id.* at 189.

However, in light of the important First Amendment rights of the press and the public that are at stake when the government seeks to try and convict a defendant without ever disclosing his or her name, courts should follow the more rigorous four-step analysis in *Doe* to analyze whether proceeding pseudonymously is appropriate. 63 F.3d at 128. Because the use of "John Doe" to replace a defendant's identity denies the public access to perhaps the most critical element of a criminal prosecution, just as it does when deciding motions for closure, the district court should be required to make specific factual findings, on the record, "of a *significant* risk of prejudice to the defendant's right to a fair trial or of danger

to persons, property, or the integrity of significant activities entitled to confidentiality," and that reasonable alternatives to pseudonymity do not protect those interests. *Doe*, 63 F.3d at 127–128. Here, there is no evidence that the prosecution or defense made any showing whatsoever concerning the need for pseudonymity, or that the district court made any findings regarding the risk of prejudice, or weighed possible alternatives to pseudonymity.

B. The Federal Rules of Criminal Procedure require that certain important hallmarks of the judicial process take place in "open court."

According to the limited text on the docket available in this case, the government filed a notice of intent to proceed by information, under seal, on August 11, 2014. The John Doe defendant waived indictment and pleaded guilty in a sealed courtroom after hours on August 13, 2014. Federal Rule of Criminal Procedure 7 requires that, if a defendant is to waive indictment, he or she must do so in "open court." Likewise, Rule 11 requires that "[b]efore the court accepts a plea of guilty or nolo contendere, . . . the court must address the defendant personally in open court." This Court has recognized that the phrase "open court" "refers to a courtroom to which the public has access." *United States v. Alcantara*, 396 F.3d 189, 205 (2d Cir. 2005).

In *Alcantara*, the appellants appealed from their convictions after the judge conducted their respective plea proceedings in the robing room rather than in

"open court," as required by Rule 11. Recognizing that "more than the rights of the defendants and the government are at stake," *id.* at 203, this Court remanded the proceedings for rehearing in open court, writing:

> Because of the fundamental nature of this error, we consider this to be one of those rare situations where it is appropriate to exercise our supervisory powers. Holding these significant criminal proceedings behind closed doors — without notice to the public or any statement of reasons for the closure — is inconsistent with our open system of justice.

Id.

In this case, the government's request to close the courtroom was made under seal, without any notice to the public that a plea hearing was to occur. Although this Court has previously stated in a case involving a named defendant that a motion to seal may be filed "with the plea agreement attached under seal pending a disposition of the motion by the district court," *see United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988), there is no indication from the docket that a sealed plea agreement was attached to the motion to seal submitted by the government here. And, as noted above, the district court's statement of reasons for the closure, if any, is also under seal. *See* Order, *United States v. John Doe*, No. 1:14-cr-00438-PKC-1 (E.D.N.Y. Aug. 13, 2014), ECF No. 16.

Although the district court, in its order denying Appellant's motion to unseal, contended that the docket gave sufficient notice to the public that a

hearing on the government's motion to seal was to occur, it gave no notice, whatsoever, that the motion was to hold a sealed plea hearing. Mem. & Order, *supra*, at 5 (App. at A-11). Instead, the document available on the public docket states only that a "proceeding" was scheduled to occur. Mot. to Seal Courtroom, *United States v. John Doe*, No. 1:14-cr-00438-PKC-1 (E.D.N.Y. Aug. 12, 2014), ECF No. 14.

As this Court has previously recognized, "the public and press have a qualified First Amendment right of access to plea proceedings and plea agreements," as well as sentencing proceedings. *Alcantara*, 396 F.3d at 196–97. And district courts are required to give the public notice "before closing a proceeding to which a First Amendment right of access attaches." *Id.* at 192. Here, the public had no notice that the district court was to hold a closed a plea hearing. And, because the sealing order is itself sealed, it is unclear whether the district court ever considered its obligation to hold the waiver of indictment and plea proceedings in "open court" under the Federal Rules of Criminal Procedure.

IV. District courts must publicly justify closing all, or the vast majority of, proceedings and documents in a criminal case against a John Doe.

As set forth above, the combined effect of the extensive sealing of documents and closure of proceedings in a criminal matter against an anonymous John Doe defendant deprives the press and the public of *any* ability to oversee the actions of the executive and judicial branches of government, and cannot pass

constitutional muster. Assuming, *arguendo*, that such broad secrecy of a criminal matter is permissible in some set of circumstances under the First Amendment, district courts must provide the public with some justification to allow for such extraordinary secrecy. In John Doe cases where substantial numbers of documents are sealed (or absent from the docket entirely), the public has no ability to know whether the district court even considered whether near-total secrecy was, in fact, "essential to preserve higher values and [] narrowly tailored . . . ." *Press-Enterprise I*, 464 U.S. at 510.

In this case, although the district court held a five-minute public hearing on the government's motion to seal the proceedings and documents at issue, it offered no public justification at all for its decision until Appellant intervened to contest the sealing and, then, offered only the most general of explanations. While district courts in this Circuit are permitted, in very rare circumstances, to "articulate the basis for any closure order" under seal "[i]f such articulation would itself reveal information entitled to remain confidential," *In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984), this is a narrow exception to the rule that courts must make their rulings public. And it is the expectation that such sealing, even in those rare cases, will not be permanent. Indeed, in *In re Herald Co.*, this Court endorsed a limited approach to sealing of closure orders in the context of a closed suppression hearing. *Id.* at 101 ("There is a legitimate public interest in knowing the grounds

on which government conduct in obtaining evidence is challenged, even if the content of that evidence must temporarily remain confidential."). Moreover, for the reasons discussed above, special consideration must be given when the defendant's identity is also withheld from the public, and virtually all other substantive documents concerning the case have been placed under seal. *Id.* at 100 ("[C]losure should be tailored to the circumstances of the perceived risk.").

Where, as here, a district court's sealing and closure orders have the effect of shielding the entirety of a presumptively open criminal matter from public view, the district court must, at the very least, consider whether the total extent of closure—not just the sealing of individual documents or closure of individual hearings—is both essential and narrowly tailored to serve a compelling interest.

V. This Court has an independent obligation to review sealing decisions.

Even if this Court does not find that the district court abused its discretion, this Court has an independent obligation to evaluate whether the documents associated with this appeal may be withheld from the public. *See Newsday LLC v. Cnty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013) (stating that "'[e]very court has supervisory power over its own records and files'" and that "we have traditionally undertaken an independent review of sealed documents, despite the fact that such a review may raise factual rather than legal issues") (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)); *Aref*, 533 F.3d at 82 (conducting

an "independent review of the sealed documents" to determine whether closure was narrowly tailored to protect national security); *see also United States v. Foster*, 564 F.3d 852, 853 (7th Cir. 2009) (stating that because filings made with the appellate court, including the record below, "influence or underpin the judicial decision" and are "vital to the case's outcome," they are "presumptively public," and "any claim of secrecy must be reviewed independently in this court").

Accordingly, if, in this Court's independent judgment, the presumptive right of access afforded by the First Amendment is not overcome for any portion of the appellate record, this Court must, pursuant to its inherent supervisory powers, unseal that portion of the record.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the district court's denial of Appellant's motion to unseal.

Respectfully submitted,

Dated: March 5, 2015
Washington, D.C.

/s/ Bruce D. Brown

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 5,601 words, excluding the parts of the brief exempted Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Time New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief of *amicus curiae* with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system on March 5, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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