SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

To be submitted.

In the Matter of a Proceeding under Article 78 of the CPLR

for a Writ of Mandamus and/or Prohibition,

GIZMODO MEDIA GROUP, LLC,

Petitioner,

-against-

THE HONORABLE ROY S. MAHON, in his official capacity as Justice of the Supreme Court County of Nassau,

Respondent.

APPELLATE DIVISION

Index No. 2017/00382

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER GIZMODO MEDIA GROUP, LLC

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SOURCE OF AUTHORITY TO FILE BRIEF

As set forth in the accompanying motion, pursuant to Local Rule 22 N.Y.C.R.R. § 670.11 *amicus* has filed a motion on notice for leave to file this brief. Petitioner consents to the filing of this brief, and Respondent "does not oppose" the filing. The parties in the civil action below, Mr. O'Reilly and Ms. McPhilmy, did not consent to the filing.

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press discloses that it is an unincorporated nonprofit association of reporters and editors with no parent corporation and no stock.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press (the "Reporters Committee") files this brief in support of petitioner Gizmodo Media Group LLC ("Gizmodo") to emphasize the importance of public access to court records and proceedings in civil cases and to urge this Court to ensure that the constitutional and statutory rights of access to civil matters guaranteed to the press and the public are not improperly curtailed by lower courts.

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 Act litigation since 1970, and it frequently files friend-of-the-court briefs in cases involving access to court documents and proceedings.

Access to civil court records and proceedings is necessary for journalists to gather accurate information and to report on legal disputes of public interest and concern. Indeed, citizens rely on members of the news media, like Gizmodo, to keep them informed about the actions of litigants and the judiciary. Thus, both the press and the public have a powerful interest in ensuring that courts do not expand the few limited, narrow exceptions to the presumption of public access to court

records and proceedings in this state, and apply the correct legal standards when evaluating requests for sealing and closure.

INTRODUCTION AND SUMMARY OF ARGUMENT

The importance of this appeal extends beyond the interests of the parties involved. This case presents a fundamental question of court access: whether a civil suit—here, over allegations of fraudulent behavior—may be placed entirely under seal, along with the court's reasons for refusing any public access to the case. *Amicus* agrees with Gizmodo that closing the doors to the court and maintaining a seal on the materials at issue here without *any* written findings supporting such wholesale secrecy violates both the First Amendment and New York's statutory right of access. Federal and New York courts have long held that the First Amendment right of access applies to civil proceedings and records. The trial court below is obligated under both the First Amendment and New York precedent to only close proceedings and seal records in exceptional cases and to justify in writing its decision to do so.

Openness in civil proceedings provides numerous benefits to litigants, courts, and the public. It avoids any appearance of partiality or bias in the judiciary, promotes public confidence in the courts, allows for public scrutiny of the court system and its participants, educates the public about judicial

proceedings, and enables the dissemination of information about matters of public interest and concern.

The proceedings below should not and cannot be subject to a blanket closure order. A court must conduct an individualized inquiry when determining whether certain aspects of a case file or testimony should be sealed or closed to the public, and any ruling shielding aspects of a civil matter from public view must be supported by specific written findings placed in the public record. Courts may not categorically or reflexively seal documents or close civil proceedings simply because they may relate to a personal matter. For the reasons set forth herein, the Reporters Committee respectfully urges this Court to reverse the lower court's decision and remand for further proceedings.

ARGUMENT

I. New York has long guaranteed openness to civil proceedings because it facilitates the fair administration of justice and informs the public.

The guarantee of public access to judicial proceedings is fundamental and "firmly embedded in our jurisprudence." *People v. Hinton*, 31 N.Y.2d 71, 73 (1972), *cert. denied*, 410 U.S. 911 (1973). It is enshrined in the First Amendment to the U.S. Constitution, federal and state case law, state statutes, and common law. *See Press–Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) ("*Press Enterprise I*"); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S.

555 (1980); N.Y. Const., art. I, § 8; N.Y. Civ. Rights Law 512; N.Y. Jud. Law § 4; *Matter of Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 437–38 (1979); *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978).

New York Judiciary Law § 4 (hereinafter, "Section 4") provides especially broad protections, requiring that New York courts be open to the public and press unless there are compelling reasons presented that warrant closure in a particular instance. N.Y. Jud. Law § 4; *see also Matter of Herald Co. v. Weisenberg*, 89 A.D.2d 224, *aff'd* 59 N.Y.2d 378 (1983) (stating that a hearing "may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard"). Section 4 mandates that "[t]he sittings of every court in this state *shall* be public and every citizen may freely attend the same." N.Y. Jud. Law § 4 (emphasis added); *see also* N.Y. Jud. Law § 255 (requiring that court records and dockets be available to the public). The few exceptions to the presumption of access enumerated in Section 4 are narrow. The law permits—but does not require—court closure in only eight types of cases: "divorce, seduction, abortion, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation." N.Y. Jud. Law § 4.

Federal and state courts have repeatedly held that access to judicial proceedings is vital because of the many benefits it provides to the system and the public. As the U.S. Supreme Court has explained,

> [t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.

Press Enterprise I, 464 U.S. at 508 (italics in original). Secrecy breeds distrust of the court system and shields judicial officers, litigants, and other participants from outside scrutiny. *See id*. at 509; *see also In re Oliver*, 333 U.S. 257, 271 (1948) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

New York courts, in particular, have long recognized the many benefits of access for the public and news media. *See Matter of Westchester Rockland Newspapers, Inc.*, 48 N.Y.2d at 437–38. Openness "ensure[s] that [cases] are conducted efficiently, honestly, and fairly," promoting the overall fair administration of justice. *Matter of Brownstone*, 191 A.D.2d 167, 168, 594 N.Y.S.2d 31 (1st Dept. 1993). New York courts have also emphasized that press access and publicity enables the truth about a trial to be told to the public. *See Danco Labs. v. Chemical Works of Gedeon Richter*, 274 A.D.2d 1, 7, 711 N.Y.S.2d 419 (1st Dept. 2000); *Matter of Hofmann*, 284 A.D.2d 92, 94, 727

N.Y.S.2d 84 (1st Dept. 2001). "[P]ublic awareness [thereby also] serves to instill a sense of public trust in our judicial process." *Matter of Westchester Rockland Newspapers*, *Inc*., 48 N.Y.2d at 437 (quoting *Hinton*, 31 N.Y.2d at 73).

Under New York law, the public's right of access to judicial proceedings involving a matter of public interest is well established, even where privacy concerns may be present. *Danco Labs*, 274 A.D.2d at 8, 711 N.Y.S.2d 419 (stating that "when issues of major public importance are involved, the interests of the public as well as the press in access to court records 'weigh heavily' in favor of release" even when privacy concerns are present (internal citation omitted)). Indeed, "in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Danco Labs*., 274 A.D.2d at 6–7, 711 N.Y.S.2d 419 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 386–87, n. 15 (1979)).

Here, the lower court summarily ejected Gizmodo and sealed the courtroom during the January 4, 2017 hearing on a motion to vacate judgment. *See* Petitioner's Verified Petition at p. 4, para. 21. Depriving the news media of access to civil proceedings in this manner deprives it of its ability to gather and disseminate information about how the judicial system operates, undermining both the accountability and credibility of the system itself.

II. Any sealing of court proceedings and records requires specific, written findings on the record, which the lower court failed to make.

Courts lack authority under the First Amendment to shield judicial proceedings and records from public view unless they have made a written, independent determination based on specific, on the record findings. *See Press–Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13–14 (1986) ("*Press Enterprise II*") (requiring "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest") (internal citation omitted); *see also Associated Press v. Bell*, 70 N.Y.2d 32, 39 (1987) (citing *Press Enterprise II*). Such findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enterprise II*, 478 U.S. at 9–10*; see also Globe Newspaper Co.*, 457 U.S. at 607 (stating that any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy).

New York courts have imposed additional requirements for the sealing of court records. *See, e.g., Danco Labs*., 274 A.D.2d at 8, 711 N.Y.S.2d 419 (stating that New York courts are required to provide a "legitimate basis" to "justify the sealing of court documents") (internal citation and quotations omitted); *Gryphon Domestic VI, LLC v. APP Intern. Finance Co*., 28 A.D.3d 322, 324, 814 N.Y.S.2d 110 (1st Dept. 2006) (same). "Pursuant to these general policy objectives, New

York promulgated Rule 216.1(a) of the Uniform Rules of Trial Court," *Danco Labs*., 274 A.D.2d at 8, 711 N.Y.S.2d 419, which states in pertinent part:

> Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof.

22 N.Y.C.R.R. 216.1(a) (emphasis added).

Appellate courts depend upon the existence of detailed, written lower court findings so that they may fulfill their obligation to ensure that the "public interest in accessing [court] documents was properly considered and weighed by the court." *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 501–02, 835 N.Y.S.2d 595 (2nd Dept. 2007). *See, e.g.*, *Mosallem v. Berenson*, 76 A.D.3d 345, 351, 905 N.Y.S.2d 575 (1st Dept. 2010) (by reviewing the trial court's "specific findings" the appellate court could determine that the press and public interest outweighed "the potential for embarrassment or damage to reputation [and] the general desire for privacy").

In this case, the lower court failed to make specific findings on the record before sealing court records or closing the courtroom to Gizmodo. As set forth in Petitioners Verified Petition, on June 2, 2016, the trial court "issued a preemptive and retroactive order sealing the records filed" without making any on-the-record written findings specifying the grounds for that sealing order. *See* Petitioner's

Verified Petition at p. 8, paras. 42 and 43. In addition, Gizmodo's Petition states that despite its counsel's request that the court enter a written order, the trial court "made no public findings before ejecting counsel, sealing the courtroom and excluding [Gizmodo] and the public from these proceedings." *See id*. at p. 4, paras. 14–15. The closing of the courtroom without giving Gizmodo or other interested parties an opportunity to be heard, and without specific factual findings being made in support of closure, violated the public's and Gizmodo's well-established right of access under both the First Amendment and New York law. *See Associated Press*, 70 N.Y.2d at 39 (stating in order to override the "right to access of the public and the press, and close the courtroom, there must be 'specific findings.'")

For these reasons, this Court should reverse and remand this matter to the trial court with instructions to evaluate Gizmodo's request for access under the appropriate legal standards. *See Danco Labs*., 274 A.D.2d at 5, 711 N.Y.S.2d 419 (stating that the trial court's failure to explain why records had been sealed required remand).

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully requests that this Court reverse the lower court's decision and remand for further proceedings.

Dated: February 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR 670.10.3 I, Katie Townsend, do hereby certify the foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double.

The total number of words in the brief, inclusive of point headings and footnotes and exclusive pages containing the table of contents, table of citations, proof of service, certificate of compliance or any other authorized addendum containing statutes, rules, regulations, etc., is 2146.

Dated: February 7, 2017

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Counsel for Amicus Curiae

AFFIRMATION OF SERVICE

I, Katie Townsend, an attorney duly admitted to practice in the State of New York, hereby affirm that on this day of February 7, 2017, I sent by overnight mail, pursuant to CPLR 2103(b)(6), a true and correct copy of the Notice of Motion, the Affirmation in Support of the Motion to File, and the Amicus Curiae Brief filed with the Supreme Court of the State of New York Appellate Division for the Second Department to all parties or their counsel.

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