

Nos. 18A669, 18M93 & 18-948

IN THE
Supreme Court of the United States

IN RE GRAND JURY SUBPOENA

**ON APPLICATION FOR A STAY AND MOTION FOR
LEAVE TO FILE A PETITION FOR A WRIT OF
CERTIORARI UNDER SEAL**

REPLY IN SUPPORT OF MOTION TO INTERVENE

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The Reporters Committee for Freedom of the Press (the “Reporters Committee”) is a nonprofit organization dedicated to defending the First Amendment and the newsgathering rights of journalists and the public.¹ On January 9, 2019, the Reporters Committee moved for leave to intervene in this matter for the purpose of filing a Motion to Unseal. Petitioner has not opposed intervention. On January 25, 2019, the government filed a response in this Court, opposing the Reporters Committee’s Motion to Intervene.² The Reporters Committee respectfully submits this reply in further support of its Motion.

Although the Reporters Committee appreciates the government’s agreement that broad swaths of these previously blanket-sealed proceedings need not be sealed, Opp’n to Mot. to Intervene at 2-3 (filed Jan. 25, 2019) (“Opposition”), intervention is warranted here despite that agreement. Neither of the parties to these proceedings has an interest in protecting the public’s right of access—and, in fact, the government denies that the public has any right of access at all, Opposition at 2. Because the Reporters Committee is a third party and has a longstanding and demonstrated interest in protecting the public’s right of access, the Reporters Committee can serve

¹ Pursuant to Rule 29.6 of the Rules of this Court, the Reporters Committee discloses that it is an unincorporated nonprofit association of reporters and editors with no parent corporation and no stock.

² The government’s opposition appears untimely, as it was filed sixteen days after the Reporters Committee moved to intervene. *See* Sup. Ct. R. 21(4) (“Any response to a motion shall be filed as promptly as possible . . . , and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise.”). Because the identity of the parties to these proceedings was sealed at that time, the Reporters Committee was unable to effectuate service itself on the date of filing. The Motion to Intervene was placed on the public, electronic docket on January 15, 2019, but the Reporters Committee is unsure whether the Clerk’s Office provided notice of the Motion to the parties at an earlier date.

as a “surrogate[] for the public.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). The Reporters Committee “asserts a right directly and substantially related to the litigation, a right of access to court proceedings and documents born of the common law and the First Amendment.” *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000). For that reason, the lower courts have long conceived of intervention as the preferred mechanism to protect the “longstanding tradition of public access to court records.” *E.E.O.C. v Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (quotation marks omitted); Mot. to Intervene at 5-6 (collecting cases).

Intervention is particularly appropriate so that the Reporters Committee can challenge specific redactions by the parties that do nothing to further the government’s claimed interest in maintaining the secrecy of a matter occurring before a grand jury. Although this Court can direct that the parties file public, redacted versions of materials, the parties have no incentive to propose the narrowly tailored redactions the Constitution and common law require. Nor are the parties likely to challenge each other’s proposed redactions. Permitting intervention by a third party that can stand in for the public’s interest will promote community respect for the rule of law by ensuring that proposed redactions in this proceeding are tested in the crucible of adversarial proceedings. Simply put, a third party can ensure that any redactions in this case—one that has garnered significant public attention—are narrowly tailored.

Any redactions the parties propose should be rigorously scrutinized, particularly given the parties’ longstanding penchant for over-sealing—one that has continued

even in the most recent filings before this Court. For instance, the public version of the Petition for a Writ of Certiorari filed in this case inexplicably redacts the names of the attorney(s) and law firm representing Petitioner. Redacted Pet. for a Writ of Cert. 38 (public version filed Jan. 22, 2019). Notwithstanding those redactions, the government has revealed Petitioner’s counsel’s name (and law firm) to counsel for the Reporters Committee. Specifically, when the government served by email its response to the Reporters Committee’s Motion to Intervene, the government cc’d Petitioner’s attorney. Rather than objecting to this revelation, Petitioner’s counsel responded to the full email group and acknowledged receipt. Based on these emails, counsel for the Reporters Committee now knows the names of the law firm and counsel representing Petitioner in this case despite the over-redacted Petition. The parties plainly do not believe that there is a compelling reason under Federal Rule of Criminal Procedure 6(e) or otherwise to keep secret the identity of Petitioner’s counsel, having revealed it to a non-party public interest group whose mission includes ensuring public access to and public dissemination of information. This disclosure alone warrants unsealing. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (noting that where “attorney decided to reveal” name of “person subpoenaed to appear before the grand jury,” such information was “no longer a secret”).

Moreover, no party has justified publicly why the disclosure of Petitioner’s own identity to the public would harm the secrecy of a matter occurring before the grand jury—particularly where contempt sanctions have been imposed by the district court

and affirmed by the court of appeals. Nor is the government likely to offer such an explanation unless the Reporters Committee is permitted to intervene and litigate the core questions presented in its proposed Motion to Unseal, as the government denies any First Amendment or common law right of access exists here. Opposition at 2. As the Reporters Committee explained, there is a longstanding history in this country that contempt proceedings and appellate proceedings are open to public access. *See* Proposed Mot. to Unseal at Arg. Pt. I.A-I.B. The parties therefore must justify why redacting the name of the company now held in contempt is narrowly tailored to protect a matter occurring before a grand jury—or any other compelling governmental interest. *See* Proposed Mot. to Unseal at Arg. Pt. I.C.

Finally, neither party identifies any cognizable prejudice that it would face if this Court permits intervention. Nor could they. The Reporters Committee agrees that preventing the disclosure of a matter occurring before a grand jury is a compelling governmental interest and that narrowly-tailored redactions in support of that aim are generally permissible. By challenging specific, unnecessary redactions in the parties' proposed public versions of filings, the Reporters Committee will cause no prejudice to any party, cause no undue delay, and will not threaten any asserted interest in maintaining the secrecy of a matter occurring before a grand jury. By contrast, the public's interest—one the Reporters Committee is well-suited to protect—is indisputably harmed when redactions that do not serve any compelling interest are left unchallenged. *See, e.g., Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (noting that when disclosure is appropriate

“access should be immediate and contemporaneous” because the “newsworthiness of a particular story is often fleeting” and “[e]ach passing day” that disclosure is delayed “may constitute a separate and cognizable infringement of the First Amendment” (quotation marks omitted)), *superseded by rule on other grounds as stated in Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009).

For the foregoing reasons, the Reporters Committee respectfully requests that this Court grant the Motion to Intervene.

Respectfully submitted.

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