UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN DOE, Petitioner-Appellant v. **UNITED STATES OF AMERICA,** Respondent-Appellee.	**No. 17-1841**

MOTION BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO INTERVENE AND TO UNSEAL JUDICIAL RECORDS

Katie Townsend
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
ktownsend@rcfp.org

Counsel for the Reporters Committee for Freedom of the Press

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for the Reporters Committee for Freedom of the Press (the "Reporters Committee") hereby certifies that the Reporters Committee is an unincorporated nonprofit association with no parent corporation and no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a nonprofit association dedicated to defending the First Amendment and newsgathering rights of journalists and news organizations, including by asserting the rights of the press and the public to access judicial records and court proceedings.

By this Motion, the Reporters Committee seeks to vindicate the public's constitutional and common law rights of access to judicial records, including the Court's docket sheet, in the above-captioned matter. The entirety of the record in this appeal—save for a redacted opinion issued by this Court on February 14, 2019—is sealed. The identities of the petitioner-appellant, his counsel, the attorneys representing the United States in this case, and even the district court from which this appeal originated, remain secret. Indeed, the Government's criminal prosecution of the petitioner-appellant, from beginning to end, including all appellate proceedings concerning his *coram nobis* petition, appear to have taken place entirely behind closed doors, with no opportunity for public oversight of the conduct of prosecutors, defense counsel, or the courts.

For the reasons set forth herein, the Reporters Committee respectfully requests that the Court unseal the judicial records in this appeal, including the

docket sheet, the transcript and/or recording of the oral argument held on October 22, 2018, and the sealed portions of the Court's February 14, 2019 opinion.

The Reporters Committee was unable to notify opposing counsel in accordance with Local Rule 27.1(b) because the names of petitioner-appellant's counsel and the names of the attorneys representing the United States are sealed.

BACKGROUND

On February 14, 2019, this Court issued a redacted 26-page opinion in the above-captioned matter, a true and correct copy of which is attached hereto as Exhibit A (hereinafter, the "Opinion"). To the Reporters Committee's knowledge, the Opinion is the only publicly available judicial document related to the criminal prosecution of petitioner-appellant and his efforts to have his conviction vacated. The Court's docket sheet and all other judicial documents related to this appeal are sealed and the Reporters Committee is unable to ascertain the case number of any proceedings that took place before the district court. The identity of petitioner-appellant is also sealed; the Opinion refers to him using the pseudonym "John Doe." Ex. A at 2, fn. 1. Redacted in the Opinion are, *inter alia*, the names of petitioner-appellant's counsel, the names of the attorneys representing the United States, and the name of the district court from which the appeal originated.

The Opinion reverses a district court order denying a petition for writ of *coram nobis* that was filed by petitioner-appellant in 2014. Ex. A at 1–2.

According to the Opinion, the *coram nobis* petition sought to vacate petitioner-appellant's prior conviction for "conspiracy" on the ground that his original defense counsel was "ineffective in affirmatively assuring him that there should be no immigration consequences for pleading guilty when, in fact, the crime to which he pleaded was an aggravated felony resulting in mandatory removal." *Id*. at 2.

According to the Opinion, petitioner-appellant pled guilty "to a one-count information charging him with conspiracy" at some point in time between 2002 and 2010, *see* Ex. A at 3, 10. The Opinion indicates that petitioner-appellant was convicted of an offense involving "fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000." *Id.* at 4, 8, fn. 2 (citing 8 U.S.C. § 1101(a)(43)(M)); *see also id.* at 19–20. As part of his plea agreement, petitioner-appellant "consented to cooperate with the Government." *Id.* at 3. He was ultimately sentenced to "probation rather than prison," *id.* at 17, and it appears that he is not presently in custody. *Id.* at 7 (explaining that a writ of error *coram nobis* is "typically granted only when a prisoner is out of custody").

In finding petitioner-appellant entitled to the "extraordinary remedy," Ex. A at 7, of an order directing the district court to grant his *coram nobis* petition and vacate both his conviction and his guilty plea, the Court in its Opinion highlights not only the ineffective assistance of his original defense counsel, who "misadvised him as to the immigration consequences of his plea," *id.* at 9, but also

"troubling" conduct on the part of the Government, *id.* at 25. Specifically, the Court's Opinion points to the "troubling changing positions" taken by the Government in connection with petitioner-appellant's *coram nobis* petition, *id*.; the unidentified United States Attorney's Office that handled this matter initially opposed petitioner-appellant's *coram nobis* petition, then joined in asking the district court to grant it, then "switched positions again," arguing to this Court that the district court's denial of the petition was not an abuse of discretion. *Id.* at 3.

The Opinion also details misrepresentations made by the Government to petitioner-appellant. The Government did not dispute, for example, that petitioner-appellant was "dissuaded" for years by his Government "handlers" from seeking to vacate his conviction. Ex. A at 4. The Government "promised" petitioner-appellant that "he would obtain citizenship or that they would get his criminal case dismissed," *id.* at 22, notwithstanding the fact that his conviction for an aggravated felony made him ineligible for citizenship and "conclusively presumed to be deportable." *Id.* at 8, fn. 2. Even after petitioner-appellant was denied citizenship, "agents continued to tell him . . . that they would be able to provide him the relief he sought," and, "rely[ing] on his handlers," petitioner-appellant waited "five more years" after his failed citizenship application, presumably in or around 2009, before filing a *coram nobis* petition in 2014. *Id.* at 23; *see also id*. at 6 (quoting the district court as stating that "the Executive Branch," by joining the request for the

district court to grant petitioner-appellant's *coram nobis* petition, was effectively "requesting that the Judicial Branch remedy what the United States Attorney's Office believes to be a wrong perpetrated by either ICE or the FBI").

ARGUMENT

I. THE REPORTERS COMMITTEE HAS STANDING TO INTERVENE TO ASSERT THE PUBLIC'S CONSTITUTIONAL AND COMMON LAW RIGHTS OF ACCESS.

The Reporters Committee has standing to intervene for the limited purpose of seeking access to sealed judicial records in this appeal. Courts have long recognized that members of the public, including members of the press, have standing to vindicate the public's qualified right of access to judicial proceedings and documents. *See*, *e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion [from judicial proceedings.]" (internal marks and citation omitted)).

This Court has confirmed that a motion to intervene is the proper procedural mechanism for the press and public to challenge sealing orders in both civil and criminal matters. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126–27 (2d Cir. 2006) (acknowledging that newspapers have right to intervene to seek access to sealed documents and concluding that holding an "intervention motion in abeyance" in a civil case "was a delay that was effectively a denial of any right to

contemporaneous access"); *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008) (holding that "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper"). Accordingly, the Reporters Committee's request to intervene for the limited purpose of asserting the public's rights of access to the sealed records in this appeal should be granted.

II. THE PUBLIC HAS A CONSTITUTIONAL AND COMMON LAW RIGHT TO ATTEND APPELLATE PROCEEDINGS AND TO INSPECT SEALED JUDICIAL RECORDS IN THIS APPEAL.

There are "two related but distinct presumptions in favor of public access to court proceedings and records: a strong form rooted in the First Amendment and a slightly weaker form based in federal common law." *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013). Both are applicable here.

a. The First Amendment presumption of access applies to appellate proceedings and the sealed judicial records in this appeal.

In determining whether the First Amendment right of access attaches to a particular proceeding or judicial document, courts apply the "experience and logic" test, which looks to "whether the place and process have historically been open to the press and general public" and "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*"). In addition, this Court has recognized that the public has a constitutional right of access to judicial documents that "are 'derived from or [are] a necessary corollary of the

capacity to attend the relevant proceedings.'" *Lugosch*, 435 F.3d at 120 (citation omitted); *see also In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (explaining that "the constitutional right of access . . . appl[ies] to written documents submitted in connection with judicial proceedings that themselves implicate the right of access").

Under either approach, it is clear the public has a First Amendment right to attend and observe appellate proceedings and to access the parties' briefs, the record on appeal, the Court's docket sheet, and the Court's rulings in this appeal. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (holding that the press and the public have a First Amendment right of access to court docket sheets); *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1097 (9th Cir. 2014) (applying First Amendment right of access to request to unseal appellate docket, parties' appellate briefs, and motions filed in the appeal); *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003) ("There can be no question that the First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this court.").

As an initial matter, the public's right of access to proceedings and judicial records in criminal matters is deeply rooted in American history and "an indispensable attribute" of our criminal justice system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564–68, 569 (1980). This Court has expressly

recognized that holding 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." *United States v. Alcantara*, 396 F.3d 189, 203 (2d Cir. 2005); *see also United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993) (stating that a court's "power to close a courtroom where proceedings are being conducted during the course of a criminal prosecution and/or to seal the records of those proceedings is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons").

The First Amendment presumption of public access to criminal proceedings applies broadly. *See New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286, 297 (2d Cir. 2012) (collecting cases showing that the presumption applies to, among other things, *voir dire* transcripts and proceedings; witness testimony; "judicial records such as videotapes of defendants;" plea agreements and plea hearings; and information on payment of court-appointed counsel). It extends to plea and sentencing proceedings. *Alcantara*, 396 F.3d at 199. And it applies to post-conviction proceedings as well. *See CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (holding that a cooperating witness's post-conviction motion to reduce his sentence could not be filed under seal, finding "no principled basis for affording greater confidentiality to

post-trial documents and proceedings than is given to pretrial matters"); *see also United States v. Milken*, 780 F.Supp. 123, 126 (S.D.N.Y 1991) (finding that First Amendment right of access applied to affidavit and portions of memorandum in support of post-conviction motion to reduce sentence). Petitioner-appellant's "belated effort to set aside the conviction and sentence in [his] criminal case" through a petition for a common law writ of error *coram nobis*, *United States v. Morgan*, 346 U.S. 502, 511 (1954); *see* Ex. A at 7, is a post-conviction criminal proceeding to which the constitutional presumption of public access applies.

Moreover, appeals in both criminal and civil matters have historically been open to the public, and such openness plays a "significant positive role in the functioning" of the appellate process. *Press-Enterprise II*, 478 U.S. at 8. There is a well-established tradition of public access to appellate oral arguments. *Moussaoui*, 65 F. App'x at 890 (recognizing that appellate oral arguments "have historically been open to the public"); *see also In re Krynicki*, 983 F.2d 74, 76 (7th Cir. 1992) ("Public argument is the norm."). This presumption of public access has been heeded even when the Government has asserted that national security interests were at stake. *See N.Y. Times Co. v. United States*, 403 U.S. 944 (1971) (denying motion to conduct part of oral argument in the "Pentagon Papers" case *in camera*).

Judicial records in appellate matters have likewise historically been open to the public. Beginning as early as 1832, the U.S. Supreme Court printed transcripts of the records in its cases, which have long been publicly available. *See Resources for Locating Records & Briefs of the U.S. Supreme Court*, Library of Congress, https://www.loc.gov/law/help/sct-records.php (last visited Feb. 25, 2019). And this long tradition of openness of appellate filings is found in the federal courts of appeals as well. In *Ex parte Drawbaugh* decided in 1894, for example, the D.C. Circuit rejected an appellant's attempt to seal records in a patent appeal because an "attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." 2 App. D.C. 404, 407–08 (1894).

Logic also strongly supports a right of public access to appellate proceedings and records. This Court has recognized that public access to documents "used in the performance of Article III functions" is vital to ensuring public "confidence in the conscientiousness, reasonableness, [and] honesty of judicial proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*"). No material is more central to an appellate court's performance of its Article III functions than the parties' briefs, oral argument, and the record on appeal. *See, e.g., Metlife, Inc. v. Fin.Stability Oversight Council*, 865 F.3d 661, 667–69 (D.C.

Cir. 2017) ("*Metlife*") ("A brief (or part of a brief) can affect a court's decisionmaking process even if the court's opinion never quotes or cites it. To affect the court's decision, after all, is the reason parties file briefs."). Judges "claim legitimacy . . . by reason." *In re Krynicki*, 983 F.2d at 75. Accordingly, though they "deliberate in private," appellate courts "issue public decisions after public arguments based on public records." *Id*.

b. The common law presumption of access also applies to the sealed judicial records in this appeal.

In addition to the presumptive right of access guaranteed by the First Amendment, the common law also provides a right of access to judicial documents—*i.e.*, documents that are "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"). In determining whether a document is a judicial document, the court must evaluate "the relevance of the document's specific contents to the nature of the proceeding" and "whether access to the [document] would materially assist the public in understanding the issues before the . . . court, and in evaluating the fairness and integrity of the court's proceedings." *Newsday*, 730 F.3d at 166–67.

As stated above, the parties' briefs, oral argument, and the record on appeal are central to an appellate court's performance of its Article III functions. *Amodeo I*, 44 F.3d at 145; *see also Metlife*, 865 F.3d at 667–69 (stating that there "is no

doubt" that "parties' briefs play a central role in the adjudicatory process" and "[s]o too, the joint appendix"). Moreover, "[b]ecause in all cases where the First Amendment [right of access] applies a common law right [of access] applies *a fortiori*," *Newsday*, 730 F.3d at 164 n.9, the common law presumption of access also applies to the sealed judicial records at issue here.

III. COMPELLING INTERESTS DO NOT JUSTIFY THE CONTINUED, NEAR-TOTAL SEALING OF THIS APPEAL.

"The right of access is the rule, and it is a rare and exceptional case where it does not apply." *Cojab*, 996 F.2d at 1407. Where, as here, the public has a qualified First Amendment right to inspect them, judicial records may remain sealed only if—and to the extent that—shielding them from public view "is essential to preserve higher values." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Such sealing must be supported by "specific, on the record findings" demonstrating that it is "essential," and must be "narrowly tailored." *Press-Enterprise II*, 478 U.S. at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510); *see also In re N.Y. Times Co.*, 828 F.2d at 116 (explaining that "[b]road and general findings" are "not sufficient"). As this Court has recognized, the more extensive the closure of court proceedings or sealing of judicial documents, "the greater must be the gravity of the required interest and the likelihood of risk to that interest" needed to justify it. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (*en banc*).

The Opinion does not explain the extensive, near-complete sealing of this appeal. While it states that petitioner-appellant "has been given the pseudonym 'John Doe' throughout this litigation to safeguard his identity," it does not set forth specific factual findings demonstrating why such a step—extraordinary in its own right—is both necessary and consistent with constitutional requirements. Ex. A at 2, fn. 1. Nor does the Opinion explain why referring to petitioner-appellant using a pseudonym "throughout this litigation" is not alone sufficient to protect any asserted compelling interests on the part of the Government or petitioner-appellant. It is entirely unclear, for example, why the name of the district court from which this appeal originated and the entirety of the parties' briefs on appeal must remain sealed, particularly if the name of petitioner-appellant is withheld from the public.

Though the Opinion states that petitioner-appellant agreed to cooperate with the Government in connection with his plea agreement, Ex. A at 2, and alludes to unspecified "danger" that he "would face if he were sent back to his home country," *id.* at 14, such generalities do not justify the near total sealing of this appeal. *See Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (district court erred in finding disclosure of the terms of a cooperating witness's plea agreement would pose a risk to his safety where there was "no evidentiary support" and no "facts demonstrating any danger"); *United States v. Doe*, 63 F.3d 121, 130 (2d Cir. 1995) ("[T]he burden of establishing a

substantial probability of danger rests squarely on the shoulders of the [party seeking closure or sealing].”). And, indeed, the Opinion provides a number of reasons why this matter need not—and should not—remain under a near-total blanket of secrecy.

First, petitioner-appellant pled guilty to one-count of conspiracy more than a decade ago. *See* Ex A. at 2, 23 (explaining that petitioner-appellant was denied citizenship sometime after his conviction and five years before filing his *coram nobis* petition, which was filed in 2014). The age of the underlying conviction at issue calls into question any asserted interest in maintaining near-total secrecy of either petitioner-appellant’s underlying prosecution or this appeal. When closure of proceedings has been “justified by,” for example, “the need to protect an ongoing investigation, the secrecy may be maintained only so long as is necessary to protect the investigation” and “[a]s long as the proceedings remain sealed,” the party advocating for sealing “bears a continuing burden of justifying the need for secrecy.” *United States v. Moten*, 582 F.2d 654, 661 (2d. Cir. 1978) (finding that, in the case before it, “there has been quite enough time for any ‘ongoing’ investigation to be completed”). There is no indication that this heavy, continuing burden has been satisfied here. *See United States v. Doe*, 356 F. App’x. 488, 490 (2d Cir. 2009) (“Where, as in this case, a party seeks to seal the record of criminal

proceedings *totally* and *permanently*, the burden is heavy indeed." (emphasis in original)).

Moreover, that the Government engaged in what the Court called "troubling" conduct in this matter, Ex. A at 25, highlights precisely why public access is necessary, and why it "plays as important a role in the administration of justice today as it did for centuries before our separation from England." *Press–Enterprise I*, 464 U.S. at 508. Openness not only promotes fairness in the handling of criminal matters, it also promotes "the appearance of fairness so essential to public confidence in the system." *Id.* at 508. "[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Id*. at 508 (emphasis in original); *see also Amodeo II*, 71 F.3d at 1048. Here, not only did petitioner-appellant's original defense counsel provide ineffective representation, but the Government also engaged in questionable conduct. *See supra* at 3–4. This case thus underscores the importance of public access to ensuring Government accountability in criminal matters, and the public's perception of the fairness and legitimacy of the criminal justice system as a whole.

Finally, that the Court issued a redacted Opinion publicly does not diminish the public's right of access to the parties' briefs, oral argument, and the record on appeal. To the contrary, as the D.C. Circuit explained in *Metlife*, 865 F.3d at 668,

a "completely public opinion contributes significantly to the transparency of the court's decisionmaking process" but "[w]ithout access to the sealed" briefs filed by the parties and the record on appeal "it is impossible to know which parts of those materials persuaded the court and which failed to do so (and why)." And, indeed, that the Court issued such a redacted Opinion publicly demonstrates that complete secrecy is not necessitated by compelling interests. Where the Court can file a fully reasoned, redacted Opinion, the parties' briefs, the record, and the oral argument transcript can be similarly accessible. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) ("If the public is to see our reasoning, it should also see what informed that reasoning.")

IV. EVEN IF COMPELLING INTERESTS JUSTIFIED SEALING, SUCH SEALING SHOULD BE NARROWLY TAILORED TO SERVE THOSE INTERESTS.

Even if the Court determines, based on "specific, on the record findings," that there is "a substantial probability of prejudice to a compelling interest" that sealing of the judicial records in this appeal would prevent, *Press-Enterprise II*, 478 U.S. at 13–14, the Court must consider "alternatives to sealing," *Doe*, 63 F.3d 128. In the event no alternatives to sealing are available to protect the compelling interest identified, the Court's sealing order must be narrowly tailored. *Id*. "This ordinarily involves disclosing some of the documents or giving access to a redacted version." *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989);

see also In re N.Y. Times Co., 828 F.2d at 116 (instructing trial judge to consider alternatives to "wholesale sealing of the papers" such as the "redaction of names and perhaps portions of the . . . materials contained in the motion papers . . .").

Accordingly, even if the Government or petitioner-appellant were to assert a compelling interest sufficient to overcome the public's presumptive First Amendment right of access to the sealed judicial records in this appeal, limited sealing and redaction—not continued, wholesale sealing—would be warranted. *See Aref*, 533 F.3d at 83 (emphasizing "the requirement that district courts avoid sealing judicial documents in their entirety unless necessary").

V. CONSTITUTIONAL STANDARDS APPLY TO THE SEALING OF PETITIONER-APPELLANT'S IDENTITY.

This Court has previously adjudicated pseudonymous appeals in criminal matters. *See, e.g., Doe*, 63 F.3d 121; *Doe*, 356 Fed. Appx. 488. It has not, however, identified the standard for determining whether the name of a criminal defendant may be kept from the public. Accordingly, the Court should clarify that the First Amendment presumption of public access that applies to the proceedings and judicial records in this appeal encompasses the name of petitioner-appellant, and keep his name sealed only if it is necessitated by—and narrowly tailored to—a compelling government interest. *Press-Enterprise I*, 464 U.S. at 510.[1]

[1] To the Reporters Committee's knowledge, this Court has never addressed the constitutionality of prosecuting and sentencing a criminal defendant entirely in

This Court in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir. 2008), set forth a "factor-driven balancing inquiry" for district courts to apply when determining whether to grant an application to proceed using a pseudonym in a civil case. That test—which flows from the requirement of Federal Rule of Civil Procedure 10(a) that the "title of [a] complaint must name all the parties," *id*. at 188–89—requires a court to "balance plaintiff's interest in proceeding anonymously against the interests of defendants and the public," *id*. at 190–191. The Court identified a list of ten "non-exhaustive factors" for courts to consider when "weighing competing interests," including, for example, "whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities." *Id*. at 190.

The balancing test articulated in *Sealed Plaintiff* for use in civil cases is ill-suited to criminal matters, where the First Amendment affords a strong presumption of public access that "inheres in the very nature" of criminal proceedings "under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. Indeed, the fundamental importance of public criminal proceedings is

---

secret, with no public knowledge of his identity. That it appears that is what occurred here raises serious constitutional concerns. Because the Reporters Committee, by this Motion, seeks access only to records in this appeal, it assumes for purposes of this Motion that permitting a criminal defendant to pursue an appeal using a pseudonym is not in all circumstances unconstitutional, and urges only that the Court apply First Amendment standards to evaluate whether petitioner-appellant's identity should remain sealed from public view.

manifest not only in the First Amendment's presumed right of public access, but in the Sixth Amendment's guarantee of the right to a public trial, which has been assiduously enforced in this Court's decisions. *See, e.g.*, *United States v. Gupta*, 699 F.3d 682, 690 (2d Cir. 2012) (reversing conviction where public was excluded from *voir dire*); *Smith v. Hollins,* 448 F.3d 533, 540 (2d Cir. 2006) ("The denial of a public trial is a 'structural' error and accordingly is not subject to a harmless error analysis."). As the Supreme Court has explained, the guarantee of a public trial "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).

The public's right to know the identity of a criminal defendant is part and parcel of the public's right to attend and observe the criminal proceedings against him; in an open court, members of the press and the public can see who it is the Government is prosecuting. And it is critical that the public know the identity of the criminal defendant if it is "to participate in and serve as a check upon the judicial process. . . ." *Globe Newspaper Co.*, 457 U.S. at 606. "The American legal tradition has long assumed that 'contemporaneous review' of criminal prosecutions 'in the forum of public opinion' serves as an important restraint on abuse of government power." *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004) (quoting *In re Oliver*, 333 U.S. at 270). Yet no review—let alone contemporaneous review—of a criminal prosecution may take place in the forum

of public opinion if the identity of a defendant is sealed and remains so through the entirety of his prosecution and appeals.

That petitioner-appellant may have agreed with the Government to seek broad sealing in this matter, including of his name, does not change the analysis. *See Doe*, 63 F.3d at 128 ("The same test applies whether a closure motion is made by the government over the defendant's Sixth Amendment objection or made by the defendant over the First Amendment objection of the government or press."). To the contrary, where the Government desires broad secrecy of a prosecution for its own investigative purposes, and is in a position to demand that a defendant acquiesce to such secrecy as part of an agreement to cooperate in exchange for a more lenient sentence, that the defendant would not object to secrecy is unsurprising. Though civil plaintiffs who seek to pursue claims pseudonymously may be forced to choose between litigating publicly and abandoning their civil lawsuits, criminal defendants face a starker choice: to either cooperate in secret, if that is what the Government demands, or face far harsher criminal penalties.

In sum, the balancing test forth by this Court in *Sealed Plaintiff* for use in civil cases is not applicable to criminal matters, including appeals like this one. Because the First Amendment right of access applies to the sealed proceedings and records in this appeal, including the name of petitioner-appellant, his identity should be kept secret only if such sealing is found, on the basis of specific, on the

record findings, to be "essential to preserve higher values," and narrowly tailored to that purpose. *Press-Enterprise I*, 464 U.S. at 510.

CONCLUSION

Openness is a "keystone" of criminal justice. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." *Richmond Newspapers*, 448 U.S. at 569 (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)). For this and all the reasons herein, the Reporters Committee respectfully requests that the Court unseal the judicial records in this appeal, including the Court's docket sheet, the transcript and/or recording of the October 22, 2018 oral argument, and the sealed portions of the Court's Opinion.

Dated: February 25, 2019

Respectfully submitted,

/s/ Katie Townsend

THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
Counsel for the Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

I hereby certify that I caused four (4) copies of the foregoing Motion for Leave to Intervene and Unseal Judicial Records to be transmitted in sealed envelopes to the Clerk's Office via overnight mail. As detailed in the foregoing Motion, counsel is unable to serve copies of this document on opposing counsel, as their identities are currently under seal.

/s/ Katie Townsend
Katie Townsend
Counsel for the Reporters Committee for Freedom of the Press

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,068 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 25, 2019

s/ Katie Townsend
Katie Townsend
Counsel for the Reporters Committee for Freedom of the Press