IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Subpoena	Case No. 1:18-gj-00041-BAH Chief Judge Beryl A. Howell

MOTION TO UNSEAL

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a nonprofit organization dedicated to defending the First Amendment and the newsgathering rights of journalists. Pursuant to Local Criminal Rule 6.1, the Reporters Committee respectfully moves this Court to direct the prompt, public filing of redacted versions of the briefs, record, transcripts, and orders in this action. The Reporters Committee further requests that the Court direct that the public versions of filings identify the contemnor in this proceeding. The government stated it is "not opposed, in principle, to the public filing of redacted versions of certain documents" but declined "blanket consent" to this motion. The contemnor took no position on this motion.

For the reasons set forth above, and explained more fully in the accompanying Memorandum of Points and Authorities, the Reporters Committee for Freedom of the Press requests that this Court grant this Motion to Unseal.

Dated: February 26, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS'S MOTION TO UNSEAL

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The Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has an interest in protecting the public's First Amendment and common law rights of access to judicial documents. The Reporters Committee hereby moves to unseal the orders, briefs, transcripts, and underlying record filed in this proceeding pursuant to Local Criminal Rule 6.1, which provides that "[p]apers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public . . . on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury."

PRELIMINARY STATEMENT

Although this case started and proceeded in secret, it is gradually—by court order and party agreement—coming into the public domain. Multiple filings in the Supreme Court have been made public. The D.C. Circuit issued a 28-page opinion that detailed the parties' legal arguments and the court's conclusions on important issues of law and further ordered the appellant there to file redacted briefs. This Court has partially unsealed the docket and has indicated that it may release further documents to the public. And the public now knows which lawyers represent each side in this case—including that members of Special Counsel Robert Mueller's office have represented the government in this matter. Despite the gradual unsealing of these proceedings, however, the filings in this Court remain shielded from public view.

The parties, the Supreme Court, the D.C. Circuit, and this Court have all recognized that the public should have access to at least some subset of the filings in this matter. The public

filings made available in the D.C. Circuit and Supreme Court since the new year confirm that continuing this proceeding under seal, without access to the underlying materials, is not narrowly tailored to serve any compelling governmental interest. Indeed, even if preserving the secrecy of a matter before the grand jury is a compelling interest, that interest alone is not enough to abrogate entirely the public's right of access to the documents submitted to this Court in this contempt proceeding. Nor does the fact that this is a contempt proceeding limit the public's right of access: Contempt proceedings in particular—including those arising from grand jury investigations—are presumed open to the public just like any other court proceeding.

In response to the Reporters Committee's D.C. Circuit motion to unseal the appellate record in this matter, the government asked the D.C. Circuit to refer unsealing of the record to this Court. The Reporters Committee did not oppose that request, but respectfully requested the opportunity to challenge any redactions proposed by the parties and to assert the public's right of access in this Court. To that end, the Reporters Committee brings this motion to unseal pursuant to Local Criminal Rule 6.1, the First Amendment, and the common law, all of which require at least some form of publicly accessible documents in this contempt matter. The Reporters Committee respectfully requests that the Court direct the public filing of the Court's orders, motions and briefing, transcripts, and other judicial records in this case, redacted only to the extent necessary to preserve a compelling governmental interest.

STATEMENT OF FACTS

I. This Action Commences Under Seal.

This case was commenced in this Court in August 2018. The case—including the docket—was filed entirely under seal. *Sealed v. Sealed*, No. 1:18-gj-00041 (D.D.C. Aug. 18, 2018). In September 2018, this Court issued a ruling under seal, which was appealed. *In re Grand Jury Subpoena*, No. 18-3068 (D.C. Cir. Sept. 25, 2018). The D.C. Circuit dismissed that

appeal for lack of jurisdiction on October 3, 2018. *Id.* One week later, a new appeal ensued from this same action. *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Oct. 10, 2018).

Almost immediately, these proceedings captured the public's and press's attention. *See* Katelyn Polantz, et al., *Mystery Mueller mayhem at a Washington court*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html (reporting on courthouse activity contemporaneously with district court proceedings); Josh Gerstein & Darren Samuelsohn, *Mueller link seen in mystery grand jury appeal*, Politico (Oct. 24, 2018), https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572; Michael S. Schmidt, *Mueller Is Fighting a Witness in Court. Who Is It?*, N.Y. Times (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/us/politics/special-counsel-subpoena.html. And the interest only grew when the D.C. Circuit held sealed oral argument on December 14, closing not just the courtroom but the entire floor of the courthouse. Darren Samuelsohn & Josh Gerstein, *Reporters shooed away as mystery Mueller subpoena fight rages on*, Politico, Dec. 14, 2018, https://www.politico.com/story/2018/12/14/mystery-mueller-subpoena-fight-1065409.

II. The D.C. Circuit Publishes a Judgment and Redacted Opinion Revealing Additional Detail About the Case.

Four days after oral argument, the D.C. Circuit issued an unsealed three-page judgment, providing some factual and legal information about the proceedings. *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018) ("Op."). The judgment affirmed this Court's order holding a foreign-owned company (the "Corporation") in contempt, with monetary fines increasing each day it refused to comply. Op. 1. The D.C. Circuit rejected the Corporation's argument that, as an entity owned by a foreign country, denominated "Country A," it was immune from a grand jury subpoena under the Foreign Sovereign Immunities Act ("FSIA").

The court reviewed the government's sealed and *ex parte* submissions and concluded that the subpoena fell within the Act's exception for commercial activities. Op. 2-3. The court also held that it had subject matter jurisdiction, rejecting the Corporation's written arguments and "a new theory" introduced at oral argument. Op. 2. Finally, the D.C. Circuit concluded that it was "unconvinced that Country A's law truly prohibits the Corporation from complying with the subpoena." Op. 3. While not revealing which country's laws were at issue, the court stated that "[t]he text of the foreign law provision the Corporation relies on does not support its position" and that the Corporation's submissions (including from a foreign regulator) "lack[ed] critical indicia of reliability." *Id*. Later that month, the D.C. Circuit issued a 28-page, redacted opinion, expanding on its earlier judgment. *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019) (per curiam).

The D.C. Circuit's decision deepened public interest in this matter, offering "tantalizing clues to a mystery that has riveted Washington journalists and legal insiders." Charlie Savage, *Washington's Mystery Witness Turns Out to Be a Corporation*, N.Y. Times (Dec. 18, 2018), www.nytimes.com/2018/12/18/us/politics/mystery-witness-corporation-robert-mueller.html. But the clues only continued the "guessing game" surrounding the case. Devlin Barrett, *Prosecutors win court fight over secret subpoena of a foreign company*, Wash. Post (Dec. 18, 2018), https://www.washingtonpost.com/world/national-security/prosecutors-win-court-fight-over-secret-subpoena-of-a-foreign-company/2018/12/18/b56dafac-0315-11e9-b5df-5d3874f1ac36_story.html?utm_term=.098ccd82d846.

In late 2018, the Corporation applied to the Supreme Court both for a stay of the contempt ruling and for leave to file its application under seal. On January 8, 2019, the Supreme Court denied the Corporation's stay application. The next day, the Reporters Committee filed a

motion to intervene in the Supreme Court and motions to unseal in both the Supreme Court and the D.C. Circuit.

III. The Courts Grant Additional Public Access To The Case.

In the Supreme Court, the petitioner was granted leave to publicly file a redacted version of its petition for a writ of certiorari. *See In re Grand Jury Subpoena*, No. 18-948 (S. Ct. Jan. 7, 2019); Docket Entry Granting Motion, *id.* (S. Ct. Jan. 22, 2019). Meanwhile, the government opposed the Reporters Committee's motion to intervene, arguing it was "unnecessary" because "a substantial amount of information about the filings in this case has already been unsealed"; the government agreed that "redacted versions of those filings" under seal in the Supreme Court "may now be made on the public record without compromising grand jury secrecy." *See* Government's Opp'n to Mot. to Intervene 1-2, *id.* (S. Ct. Jan. 25, 2019).

Simultaneously with its opposition to the Reporters Committee's motion to intervene, the government filed a motion for leave to file a redacted copy of the application for a stay, the government's response, and the reply. *See id.* at 2-4. The government also requested that the Supreme Court allow the D.C. Circuit to address the motion to unseal the record. *Id*. In the Supreme Court, the government also revealed the names of counsel for the petitioner—disclosing for the first time that the petitioner had been represented by Brian Boone of Alston & Bird. Reply in Supp. of Mot. to Intervene 3, *id.* (S. Ct. Jan. 28, 2019). The Supreme Court has since denied the Reporters Committee's motion to intervene but only after granting the government's request to file redacted versions of its papers publicly.

In the D.C. Circuit, the court issued an order granting the Corporation's motion to file publicly its response to the Reporters Committee's motion to unseal. Order, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Feb. 1, 2019). The Corporation's response took no position on the motion to unseal, which indicates that the Corporation does not oppose the unsealing of its

identity. Reply in Further Supp. of Mot. to Unseal 1 ("Reporters Committee Reply Br."), *id.* (D.C. Cir. Feb. 4, 2019).

The government responded to the Reporters Committee's motion to unseal in the D.C. Circuit on February 5. As in the Supreme Court, the government "agree[d] that certain redacted materials can be unsealed," including the "transcript," the "government's brief," and the appellant's briefs, Gov't Resp. 1, *id.* (D.C. Cir. Feb. 5, 2019), but maintained that no right of access attached to any judicial records "beyond what the government is offering to release." *Id.* at 5. The government "propose[d] referring the request for record redactions to the district court." *Id.* "Given [the district court's] familiarity with the record and the volume of materials," the government asserted, "it is well positioned" to balance the need for public access with the need for redactions. *Id.* at 4-5. The government made no effort to continue shielding the names of its counsel—revealing to counsel for the Reporters Committee and asking the D.C. Circuit to unseal filings showing that the government in this case is represented by members of the office of Special Counsel Robert Mueller. *See* Reporters Committee Reply Br. 3-4. On February 13, the D.C. Circuit ordered the unsealing of multiple briefs relating to the original motion to unseal. Order (Feb. 13, 2019) (per curiam). Further, the D.C. Circuit ordered that appellant file a copy of its opening and reply briefs under seal with proposed redactions by February 22, 2019. *Id.* The Reporters Committee's D.C. Circuit motion to unseal remains pending.

This Court has also begun to unseal these proceedings. In recognition of the fact that a significant amount of "information [has been] made available through the D.C. Circuit's and the Supreme Court's docket," on January 23, this Court directed the parties to submit "a joint status report advising the Court whether . . . the docket in this matter may be unsealed with redactions and proposing redactions to be made prior to any unsealing." Minute Order (D.D.C. Jan. 23,

2019). The parties submitted that Status Report on January 28. Dkt. No. 66. On January 30, 2019, this Court made the currently available PDF version of the docket in this proceeding available for public viewing. *See* Dkt. No. 72. The Court has also directed the parties to submit a joint status report "advising the Court" whether five orders or opinions "may be unsealed." Minute Order (Jan. 31, 2019). As of the date of this filing, no documents reflected on the redacted docket made public by the Court are publicly available.

ARGUMENT

I. This Court Should Unseal The Filings In These Proceedings Pursuant To Local Criminal Rule 6.1.

This Court should unseal these proceedings pursuant to Local Criminal Rule 6.1, which provides that:

> All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing. Papers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.

Local Criminal Rule 6.1; *see In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998) (noting that Local Rule 302—now Local Criminal Rule 6.1—authorizes access to "pleadings and papers" and comports with the public's "constitutional claim" of access). Local Criminal Rule 6.1 applies to all proceedings in this case—starting with the witness's Motion to Quash, Dkt. No. 3 *et seq.*, as well as the contempt proceedings that followed the witness's failed compliance with the Court's order, Mot. to Hold Witness in Contempt, Dkt. No. 27, *et seq.*

As this Court has recognized in the recent minute orders reflected on the publicly released docket, it is no longer "necessary" to seal the documents filed in these proceedings. Minute Order (Jan. 28, 2019); Minute Order (Jan. 31, 2019). The public now has access to

numerous filings at the D.C. Circuit and Supreme Court which provide some detail as to what these proceedings are about. *See, e.g.*, *In re Grand Jury Subpoena*, 912 F.3d 623. And the government has expressly recognized in responding to the Reporters Committee's motions in the D.C. Circuit and Supreme Court that it is no longer necessary to seal all documents filed in these proceedings. Gov't Opp'n to Mot. to Intervene 1-2, *In re Grand Jury Subpoena*, No. 18-948 (S. Ct. Jan. 25, 2019); Gov't Response 1, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Feb. 5, 2019). For its part, the grand jury witness—the Corporation or "Country A"—has taken no position on unsealing, suggesting it has no interest in preserving any secrecy here. Appellant's Resp. to Mot. to Unseal 1, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Jan. 16, 2019).

Everyone therefore appears to agree: there is no longer any need to seal these proceedings wholesale. *See Dow Jones*, 142 F.3d at 504 (remanding for district court to reconsider "why, in light of [Criminal Rule 6.1], there has been such a blanket sealing of the docket"). Accordingly, the Reporters Committee respectfully requests that the Court continue to direct the unsealing of the filings in this proceeding—including more than the docket and the first batch of documents that this Court has indicated should be unsealed. *See* Minute Order (Jan. 31, 2019) (directing the parties to advise whether Court's Memoranda & Orders at Dkt. Nos. 30, 48, 57, 65, and 72 may be filed publicly).[1]

[1] If this Court denies the Reporters Committee's request, it should "offer some explanation . . . [that] bear[s] some logical connection to the individual request. In other words, it must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks." *In re Sealed Case*, 199 F.3d 522, 527 (D.C. Cir. 2000). The Reporters Committee also respectfully reserves the right to challenge redactions the parties propose to the filings in this matter.

II. This Court Should Unseal The Filings In This Proceeding Pursuant To The First Amendment And Common Law Rights Of Access.

This Court should also unseal these proceedings in accordance with the public's right of access to them. The First Amendment creates a presumptive "right of access" to a wide range of judicial proceedings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") (preliminary hearings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press Enterprise I*") (voir dire); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trials). Building on these seminal cases, the D.C. Circuit has declared that "[t]he first amendment guarantees the press and the public a *general right of access to court proceedings and court documents* unless there are compelling reasons demonstrating why it cannot be observed." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis added).

"[T]wo complementary considerations" govern whether a particular judicial proceeding is subject to the First Amendment presumption of access. *Press-Enterprise II*, 478 U.S. at 8. The first is "whether the place and process have historically been open to the press and general public." *Id*. The second is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* Where a qualified public right of access exists, "the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id*. at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

A. The First Amendment And The Common Law Grant The Public A Right Of Access To Contempt Proceedings.

Under the *Press-Enterprise* test, history and logic dictate that a right of public access applies to the contempt proceedings at issue in this case. The right of access to contempt proceedings begins with the indisputable right of access to criminal trials. Since the Norman

Conquest, public criminal trials have allowed "people not actually attending [to] have confidence that standards of fairness are being observed . . . and that deviations will become known." *Press-Enterprise I*, 464 U.S. at 508. "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1980)).

Following this historic tradition, courts have recognized that the public has a qualified First Amendment right of access to numerous types of judicial proceedings. The right applies to nearly all facets of a criminal trial. *See, e.g.*, *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 297-98 (2d Cir. 2012) (collecting cases); *see also Wash. Post*, 935 F.2d 282 (public access to plea agreements). And "[e]very circuit to consider the issue has concluded" that same "right of public access applies to civil" proceedings, too. *Dhiab v. Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (Rogers, J., concurring in part and concurring in the judgment) (collecting cases).

There is also a long history of requiring that contempt proceedings be public to check a court's power, which the Supreme Court has recognized can potentially be "arbitrary in its nature and liable to abuse." *Levine v. United States*, 362 U.S. 610, 615 (1960) (citing *Ex parte Terry*, 128 U.S. 289, 313 (1888)); *In re Oliver*, 333 U.S. 257, 265-73 (1948). And because the distinction between civil and criminal contempt is "elusive" and often without a difference, *see Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830–31 (1994), numerous courts have held that the public's right of access applies equally to civil and criminal contempt proceedings. *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1092 (9th Cir. 2014) (unsealing civil contempt docket, while "consider[ing] any redactions the government may request"); *Newsday LLC v. Cty. Of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013); *In re Iowa*

Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983); *see also In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990) (holding that right attaches where incarceration is a possible penalty); *cf. Dow Jones*, 142 F.3d at 502, 506 (directing district court to consider what redacted documents could be publicly filed in grand-jury subpoena litigation). Indeed, the "First Amendment 'does not distinguish between criminal and civil proceedings,'" *Newsday LLC*, 730 F.3d at 164 (quoting *N.Y. Civil Liberties Union*, 684 F.3d at 298) (holding that public right of access applies to civil contempt proceedings); because "civil contempt proceedings . . . carry the threat of coercive sanctions," the right of public access attaches. *Id*. Contempt proceedings that arise from grand jury investigations are not immune from the public's right of access. *Index Newspapers LLC*, 766 F.3d at 1095-97.

Logic makes clear why public access to grand jury contempt proceedings in particular causes no injury, as a general matter, to grand jury secrecy. Grand jury secrecy represents four "distinct interests." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979). Those four interests are that, in the absence of secrecy, (1) witnesses might not come forward, "knowing that those against whom they testify would be aware" of their testimony; (2) because of this same fear of retribution, witnesses who do appear "would be less likely to testify fully and frankly"; (3) individuals about to be indicted "would flee, or would try to influence individual grand jurors to vote against indictment"; and (4) persons accused, but ultimately "exonerated by the grand jury," might be "held up to public ridicule." *Id*. at 219.

If anything, recognition of the public's right of access to contempt proceedings *serves* these interests. Allowing tailored public access will *encourage* a reticent witness to comply with a grand jury investigation by making clear the potential penalties for failing to do so. Such a witness would even be less likely to flee, because the penalty for flight is being held in contempt.

Moreover, matters occurring before a grand jury could be preserved through redaction if necessary, *see infra* Pt. I.B. Likewise, any risk that a vindicated accused could be "ridicule[d]" can be mitigated through appropriate, limited redactions, *see id*.

The D.C. Circuit's opinion in *Dow Jones* is not to the contrary. There, the D.C. Circuit held that no First Amendment or common law right of access attaches to proceedings "ancillary" to a grand jury investigation, like objections to a subpoena. *See* 142 F.3d at 500. But the Court did not pass on whether the First Amendment right of access attaches to contempt proceedings, and, in fact, acknowledged that Local Rule 302 (now Local Criminal Rule 6.1) provides that contempt proceedings must be held in the open when "the alleged contemnor requests a public hearing." *Id.* at 501 (quotation marks omitted).[2]

The Federal Rules of Criminal Procedure underscore that *Dow Jones*' holding regarding ancillary proceedings does not limit the public's right of access to contempt proceedings. In fact, Rule 6(e)(5)—relied on in *Dow Jones*, 142 F.3d at 502-03—acknowledges that sealing contempt proceedings is "[s]ubject to any right to an open hearing in a contempt proceeding," and that district courts "must close any hearing" only "to the extent necessary to prevent disclosure of a matter occurring before a grand jury." Rule 6(e)(5) thus codifies the public right of access to contempt proceedings, recognizing that such a right can be rebutted as "necessitated" to justify the compelling interest of preserving grand jury secrecy. *See Press-Enterprise I*, 464 U.S. at 510 (quotation marks omitted). District courts also possess "inherent authority to unseal and disclose grand jury material." *In re Unseal Dockets*, 308 F. Supp. 3d 314, 323 (D.D.C. 2018). Maintaining the seal of documents filed in this action—hardly the least-restrictive means

[2] It is not clear whether the Corporation here requested a public hearing or not. The *public's* right of access, however, does not turn on whether the alleged contemnor wishes its hearing to be open or closed. *Cf. United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995).

available as all parties and courts have agreed—cannot be necessary here, particularly after release of the D.C. Circuit's judgment and its more fulsome, redacted opinion.

"Public access" to contempt proceedings "provides a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody." *Index Newspapers*, 766 F.3d at 1093; *see Levine*, 362 U.S. at 615-16.[3] And contempt proceedings may well be attenuated from the actual content of a grand jury investigation, meaning that "[l]ogic favors greater public access to these transcripts and filings because they are less likely to disclose sensitive matters relating to the grand jury's investigation." *Index Newspapers*, 766 F.3d at 1094-95 (discussing filings regarding continued confinement proceedings). At bottom, the public has a right of access to contempt proceedings. There can thus be no doubt that the public has a right of access to the orders, briefs, transcripts, and underlying record in the proceedings before this Court.[4]

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[3] It is of no moment that the Corporation was not incarcerated. Any argument that a qualified right of access can never apply to monetary penalties would require the conclusion that the public *never* has a right of access to any corporate contempt proceeding because corporations cannot be jailed. Likewise, monetary penalties can have serious implications and unquestionably cannot be imposed without constitutional safeguards. *See Int'l Union*, 512 U.S. at 831–32; *cf. S. Union Co. v. United States*, 567 U.S. 343, 360 (2012) (holding that *Apprendi* applies to criminal fines).

[4] The public's common law right of access provides further justification to unseal the filings in this action. "The common law right of access to judicial records antedates the Constitution." *United States v. El-Sayegh*, 131 F.3d 158, 161-62 (D.C. Cir. 1997). It provides a "right to inspect and copy public records and documents, *including judicial records and documents*." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978) (emphasis added). The documents the Reporters Committee asks this Court to unseal were introduced during the judicial proceedings for the purpose of persuading judges, which lies at the core of the common law right of access. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668-69 (D.C. Cir. 2017) (holding common law right of access attached to district court briefs and record). "Given" that the factors on balance favor unsealing "and the strong presumption in favor of public access," the documents filed in this proceeding should be unsealed. *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1410 (D.C. Cir. 1996).

B. Continued Blanket Sealing of these Proceedings Cannot Serve Any Compelling Governmental Interest.

The public's First Amendment right of access to contempt proceedings does not necessarily mandate disclosure of the entire record in and of itself—nor does the Reporters Committee argue that it does. The "presumption of openness," *Press-Enterprise I*, 464 U.S. at 510, is just that—a presumption. But where the government attempts to overcome the public's constitutional right of access to judicial proceedings or records it must demonstrate that closure "'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 606-07). "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

At this stage, there has been no public explanation as to why the documents in these proceedings must be sealed, limiting the Reporters Committee's ability to challenge the sealing of particular documents. *See In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 95 (3d Cir. 1990). Nonetheless, there can be no compelling interest that justifies withholding the parties' motions, briefs, and all other filings in this matter in full, as this Court has already recognized, *see* Minute Order (Jan. 31, 2019). Indeed, the D.C. Circuit's ability to file a judgment and redacted version of its opinion publicly, outlining the parties' legal arguments and at least part of the underlying factual circumstances of the appeal, demonstrates that at least some portions of these contempt proceedings may be open to public view without jeopardizing any compelling governmental interest. So does the public redacted petition for certiorari in the Supreme Court, the government's opposition to the petition—which was filed completely unredacted on February 21, 2019—the forthcoming redacted briefs in the D.C. Circuit, and the public version of this Court's docket. Even the government agrees that "versions

of the briefs and sealed oral argument transcript" in the D.C. Circuit "may now be made public, with appropriate redactions, without compromising grand jury secrecy." Gov't Response 2, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Feb. 5, 2019). So, too, can materials in this Court.

Because at least some of the materials under seal in this Court can "only . . . confirm to the public what [is] already validated by [] official source[s]," keeping such information under seal is not necessary—or justifiable. *Wash. Post*, 935 F.2d at 292; *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007) (ordering the "release" of "those redacted portions of [the] concurring opinion and the two ex parte affidavits that discuss grand jury matters" where "the 'cat is out of the bag'" given that one grand jury witness "discusse[d] his role on the CBS Evening News"); *Dow Jones*, 142 F.3d at 505 (noting that when grand jury witness's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed," that fact was no longer protected by grand jury secrecy). And redacting portions of documents is a more narrowly tailored (and thus less-restrictive) alternative to withholding them wholesale. *See United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (Where "a party seeks to seal the record of criminal proceedings *totally* and *permanently*, the burden is heavy indeed."); *In re Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984) (*citing Press-Enterprise I*). In *Dow Jones*, for instance, the D.C. Circuit recognized that the trial court must consider whether redactions, rather than sealing whole documents, would be possible. 142 F.3d at 502, 506. This Court should do the same for orders, briefs, transcripts, and record in these proceedings, particularly since the Court is well positioned to avoid inadvertent disclosure of secret grand jury information.

III. The Contemnor's Identity Should Be Unredacted.

Finally, pursuant to Local Criminal Rule 6.1, the First Amendment, and common law, this Court should direct that any publicly filed documents do not redact the name of the Corporation held in contempt. Requiring continued redaction of the identity of the Corporation can no longer be considered "necessary" or narrowly tailored to support any compelling governmental interest. Indeed, the nature of this proceeding and the fact that it emanates from Special Counsel Mueller's investigation are already matters of public record. The Corporation itself has not opposed sharing its identity with the public. Appellant's Resp. to Mot. to Unseal 1, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Jan. 16, 2019). And, indeed, prohibiting a grand jury witness who has been held in contempt—and fined significant sums—from revealing its identity and the nature of its punishment to the public would itself present grave First Amendment and due process concerns.

As a general matter, the public is not prohibited from learning the names of grand jury witnesses. Rule 6(e) contemplates that a witness itself is not prohibited from revealing its own participation in a grand jury proceeding. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *Judith Miller*, 493 F.3d at 154-55; *Dow Jones*, 142 F.3d at 505. Rule 6(e) expressly provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Moreover, "[t]he original advisory committee note" for Rule 6(e) "specifically states that '[t]he rule does not impose any obligation of secrecy on witnesses,' and that a 'seal of secrecy on witnesses seems an unnecessary hardship.'" *In re United States for an Order Pursuant to 28 U.S.C. § 1651(a) for Order Precluding Notice of Grand Jury Subpoena*, 2017 WL 3278929, at *2 (D.D.C. July 7, 2017) (Howell, C.J.) (quoting Rule 6 Advisory Committee Notes, 1944 Note to Subdivision (e)).

This Court has noted that in "rare" circumstances and upon "a demonstration of compelling necessity . . . shown with particularity," a witness may be barred from revealing that it is a grand jury witness. *Id*. at *3. It is not apparent on the face of the public docket whether this Court issued such a non-disclosure order or what the basis for such an order would have been, though presumably the existence of a non-disclosure order should be publicly available at least in redacted form. *Nat'l Children's Ctr.*, 98 F.3d at 1409 ("A court's decrees, its judgments, its orders, are the quintessential business of the public's institutions."); *Metlife*, 865 F.3d at 668; *In re Sealed Case*, 199 F.3d at 527. But even if this Court previously determined that there was once a "compelling necessity . . . shown with particularity" to justify sealing the identity of the witness here, and preventing the Corporation from identifying itself publicly, this Court should reassess whether such compelling necessity still exists in light of the contempt order as well as the substantial public information that has since been disclosed regarding this action. The Court should also consider whether such a non-disclosure order, if it exists, is still warranted given that the grand jury proceeding at issue appears to be concluding. *See* Evan Perez, Laura Jarrett & Katelyn Polantz, *Justice Department Preparing for Mueller Report as early as next week* (Feb. 20, 2019), https://www.cnn.com/2019/02/20/politics/special-counsel-conclusion-announcement/index.html (noting that Special Counsel Mueller's grand jury "hasn't apparently convened since January 24").

Accordingly, this Court should direct that the identity of the contemnor here be publicly released. Redacting the name of the Corporation does not appear "necessary," Local Crim. R. 6.1, or narrowly tailored to support a compelling governmental interest such that limiting the public's right of access to the nature of these civil contempt proceedings is justified.

CONCLUSION

For the foregoing reasons, the motion to unseal the filings in this proceeding, including the orders, briefs, transcripts, and record, should be granted.

February 26, 2019

Respectfully submitted,

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