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March 23, 2020

Hon. Stewart D. Aaron
United States Magistrate Judge
United States District Court for the Southern District of New York
500 Pearl Street, Courtroom 11C
New York, NY 10007

VIA ECF

RE: ***In re Application of Shervin Pishevar for an Order to Take Discovery for use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782*, 1:19-mc-00503-JGK-SDA**

Dear Judge Aaron:

Amici Reporters Committee for Freedom of the Press and the Media Legal Defence Initiative write in support of Respondent Marcus Baram's request to unseal four sealed documents in the above-referenced matter. *See* Resp't's Mar. 18, 2020 Letter, at 1 n.1, ECF No. 65. As advocates for the newsgathering rights of journalists, amici have a strong interest in safeguarding the public's presumptive right to access court records, which is critical to ensuring that journalists can report on judicial matters of public interest.

The First Amendment and common law presumptions of public access to judicial documents and proceedings ensure that federal courts "have a measure of accountability" and that the public has "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*"). Access is therefore presumed where the documents in question "would materially assist the public in understanding the issues before the district court, and in evaluating the fairness and integrity of the court's proceedings." *Newsday LLC v. County of Nassau*, 730 F.3d 156, 167 (2d Cir. 2013). Such transparency permits members of the press, in their role "as surrogates for the public[,]" to attend courtroom proceedings, review court documents, and report on what has transpired. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

Documents filed in support of or in opposition to Petitioner's section 1782 application, including exhibits, are undeniably judicial documents to which a strong common law presumption of access attaches. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Under Second Circuit precedent, "the weight to be given to the presumption of access" depends on "the role of the material at issue in the exercise of Article III judicial power and resultant value of such information to those monitoring the federal courts." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049). Accordingly, the presumption is particularly strong here, as the documents at issue have and will "directly affect [the] adjudication" of

Petitioner's section 1782 application and motion for reconsideration. *Id.* (quoting *Amodeo II*, 71 F.3d at 1049); *see also Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019) (holding that the presumption of public access applies to a document, if it "would reasonably have the *tendency* to influence a district court's ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court's decision." (emphasis in original)). Against this strong presumption of access, "the court must balance competing considerations" such as "the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

In addition, the public and the press have a qualified First Amendment right of access to certain judicial documents that have been traditionally accessible and where public access "plays a significant positive role in the functioning of the [judicial] process in question," or if they "derived from or [are] a necessary corollary of the capacity to attend."[1] *Lugosch*, 435 F.3d at 120 (quoting *Press-Enterprise Co v. Super. Ct.*, 478 U.S. 1, 8 (1986)). This qualified constitutional presumption can only be overcome by "specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Id.* at 124; *see also Brown*, 929 F.3d at 47, 54 (remanding the case to the district court for individualized review of sealed materials). Avoiding disclosure of embarrassing information does not serve a higher value. *United States v. Martoma*, No. S1 12 Cr. 973, 2014 WL 164181, at *5 (S.D.N.Y. Jan. 9, 2014).

Because the documents at issue here have been "submitted to the Court for purposes of seeking or opposing an adjudication," *Under Seal v. Under Seal*, 273 F. Supp. 3d 460, 470 (S.D.N.Y. 2017)—in this case of Petitioner's application for an order under section 1782 and his motion for reconsideration of the Court's denial of that relief—they are accorded a "heavy" presumption in favor of access under both the common law and First Amendment. *In re Gushlak*, No. 11-MC-0218 (NGG) (JO), 2012 WL 3683514, at *3 (E.D.N.Y. July 27, 2012), *report and recommendation adopted*, No. 11-MC-218 (NGG), 2012 WL 3779229 (E.D.N.Y. Aug. 30, 2012) (finding that a qualified First Amendment right of access applies to documents filed in conjunction with the section 1782 application). Indeed, there can be no doubt that public access to the documents at issue, among other things, would "play[] a significant positive role in the functioning of the [judicial] process in question." *Press-Enterprise Co.*, 478 U.S. at 8. Such access would enable members of the news media to report fully and accurately on the basis for this Court's ruling on Petitioner's section 1782 application, thereby promoting the public's knowledge of the issues before the Court and, ultimately, the public's understanding of the judicial decision-making process.

[1] Courts in this district have found that "there is substantial overlap between the First Amendment and common law rights of access," though the "test for secrecy" is more stringent under the First Amendment. *In re Gushlak*, No. 11-MC-0218 (NGG) (JO), 2012 WL 3683514, at *3 (E.D.N.Y. July 27, 2012), *report and recommendation adopted*, No. 11-MC-218 (NGG), 2012 WL 3779229 (E.D.N.Y. Aug. 30, 2012); *Accent Delight Int'l Ltd. v. Sotheby's*, 394 F. Supp. 3d 399, 416 (S.D.N.Y. 2019).

Because the applicable constitutional and common law presumptions of public access are not overcome, amici respectfully urge the Court to unseal these documents. To the extent the Court determines that higher values necessitate the ongoing sealing of any particular document or portion thereof, less-restrictive alternatives to wholesale sealing of those documents—such as redaction—should be employed. *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 512–13 (1984). And amici further request that the Court set forth, on-the-record, the specific factual findings supporting such a determination.

Respectfully submitted,

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