No. 23-20097

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

SAMAN AHSANI, CYRUS ALLEN AHSANI

Defendants – Appellees,

v.

THE FINANCIAL TIMES LIMITED, GLOBAL INVESTIGATIONS REVIEW, THE GUARDIAN,

Intervenors – Appellants.

On Appeal from the United States District Court for the Southern District of Texas
Case No. 4:19-CR-147 (Hon. Andrew S. Hanen)

INTERVENORS-APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

For more than a decade, Saman Ahsani spearheaded a criminal enterprise involving the payment of millions of dollars in bribes to corrupt officials across the globe to secure billions of dollars in government contracts for multinational companies. *See* ROA.713; *Unaoil: The Company that Bribed the World*, The Age (2016), https://perma.cc/Q2QV-FT97. The vast Unaoil corruption scheme and its effects—including the destabilization of foreign governments in Iraq and elsewhere, ROA.555, ROA.713—have rightly attracted substantial media and public interest in the United States and around the world. *See, e.g.*, ROA.101–17, ROA.665–71. Understanding how United States prosecutors (the "Government") and courts have dealt with the men at its center—Saman Ahsani and his brother, Cyrus Allen Ahsani—and the basis for their court-imposed punishment, is of paramount public importance, and is a fundamental public right.

Yet from the time Saman Ahsani ("Ahsani" or "Defendant") was charged in 2018, he and the Government have sought to resolve his criminal case behind closed doors. And despite a 2020 district court ruling that unsealed judicial records, and assured Intervenors-Appellants and the public they would have notice of and access to future proceedings, including sentencing proceedings, ROA.78–117, ROA.2794, Ahsani's January 30, 2023 sentencing was shrouded in secrecy. In advance of sentencing, the parties filed key documents under seal—including

sentencing memoranda, Ahsani's statement of no objections to the presentence report ("PSR"), and an unidentified "sealed event"—requiring Intervenors-Appellants to file a new motion to unseal. ROA.2796. The district court then closed a portion of Ahsani's sentencing hearing—with no notice to the public—and sealed the transcript of it, along with sentencing letters, the statement of reasons, and the parties' joint opposition to Intervenors-Appellants' unsealing motion. ROA.2796–97. Further, the district court permitted filings—including sentencing letters and the parties' joint opposition brief—to be reflected on the public docket only as "sealed event[s]." *Id.*

Contrary to the parties' arguments, the district court made manifest errors of law in closing part of Ahsani's sentencing proceeding without public notice, sealing all sentencing-related judicial records, and entering, on the basis of secret arguments, the February 23, 2023 order denying Intervenors-Appellants' motion to unseal, ROA.690–91 (the "Order"). The parties effectively ask this Court to ignore the record before it and instead assume a fiction: that the district court applied the correct legal standards and carefully determined that wholesale sealing and closure, without notice, were necessary to protect compelling interests, and narrowly tailored to those interests. But the record, including the Order itself, makes clear the district court failed to identify, let alone apply, the correct legal standards. ROA.690–91.

Procedurally, the First Amendment required the district court to give the press and public advance notice of—and a meaningful "opportunity to be heard" on—any "contemplated closure" or sealing. *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 181–82 (5th Cir. 2011). In holding part of Ahsani's sentencing hearing beyond closed doors without notice to the public, and in entering the Order based on secret arguments proffered by Ahsani and the Government *ex parte*, the district court failed to comply with constitutional requirements.

Substantively, the district court was permitted to deny public access to Ahsani's sentencing and related judicial records *only if* and *only to the extent* that such closure or sealing was necessary to serve a compelling interest. *Press-Enter. Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 510 (1984); *In re Hearst Newspapers*, 641 F.3d at 181. At minimum, the district court was required under the common law to consider the need for sealing on a "case-by-case, document-by-document, line-by-line" basis, to take into account the public's interest in access, to exercise its discretion to seal any portion of those records "ungenerous[ly]," and to "explain[]" its reasoning "at a level of detail that [would] allow for this Court's review." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 418–19 (5th Cir. 2021) (citations and internal quotation marks omitted). It is clear from the face of the Order that these standards were not met.

The district court incorrectly treated Intervenors-Appellants' motion as one seeking reconsideration of a portion of Judge Gilmore's 2020 order permitting limited redactions to mentions of Ahsani's cooperation in different judicial records. ROA.690–91. Erroneously applying a presumption of secrecy, the district court declined to "set aside" that more than two-year-old order. *Id.* It did not consider, let alone address, Intervenors-Appellants' arguments that there could be no compelling interest, at present, in sealing references to Ahsani's cooperation because that cooperation is public knowledge. As a result, the district court declined to unseal any portion of the records related to Ahsani's sentencing, *id.*—a decision it could not have reached if it had applied the correct legal standards.

The parties' efforts to shore up the Order and defend the extensive closure and sealing imposed by the district court fall far short of what the common law and First Amendment demand. Indeed, neither the Government nor Ahsani identify compelling interests that necessitate continued, wholesale sealing, admitting, as they must, that Ahsani's cooperation is public knowledge. *See* Gov't Br. at 38; Def.'s Br. at 18.[1] Simply put, it is clear from the parties' briefing that any residual interests they may have in the non-disclosure of specific, limited details of Ahsani's widely known, extensive cooperation with law enforcement—

[1] Intervenors-Appellants have concurrently filed a motion to unseal the parties' briefs.

cooperation made public through official proceedings and media coverage—could be accommodated "by redacting sensitive information rather than refusing to unseal the materials entirely." *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1195 n.5 (9th Cir. 2011).

For the reasons set forth in Intervenors-Appellants' opening brief and herein, this Court should reverse the Order and instruct the district court to unseal the judicial records at issue subject, at most, to narrowly tailored redactions necessitated by compelling interests, and supported by specific factual findings.

ARGUMENT

I. The press and public have a presumptive right to attend sentencing proceedings and inspect each type of judicial record at issue here.

The First Amendment and common law "right of access promotes the trustworthiness of the judicial process, curbs judicial abuses, and provides the public with a better understanding of the judicial process, including its fairness." *United States v. Sealed Search Warrants*, 868 F.3d 385, 390 n.1, 395 (5th Cir. 2017); *see also* Opening Br. at 15–24 (describing both access rights). This Court addresses legal questions regarding the scope of these access rights *de novo*. *Sealed Search Warrants*, 868 F.3d at 390–91. As detailed below, the public has a presumptive right of access to each type of proceeding and record at issue here: sentencing hearings and transcripts, sentencing memoranda, statements of no objections to PSRs, statements of reasons, sentencing letters, and legal briefs.

A. Sentencing hearings and transcripts

"[T]he public and press have a First Amendment right of access to sentencing proceedings." *In re Hearst Newspapers*, 641 F.3d at 176–77, 179 (explaining that openness enables the public to "observe whether the defendant is being justly sentenced"). No party disputes this constitutional right of access and, indeed, the Government concedes it is "'especially salient'" when, as here and "'as in the vast majority of criminal cases, there was no trial, but only a guilty plea.'" Gov't Br. at 19 (quoting *id.* at 177).

Transcripts of sentencing proceedings are likewise presumptively public under the First Amendment and common law. *See, e.g.*, *United States v. Antar*, 38 F.3d 1348, 1361 (3d Cir. 1994). Particularly where, as here, a sentencing proceeding or portion thereof was closed, unsealing the transcript "'within a reasonable time'" safeguards "'the constitutional values sought to be protected by holding open proceedings.'" *In re Hearst Newspapers*, 641 F.3d at 181 (quoting *Press-Enterprise I*, 464 U.S. at 512).

Neither the Government nor Defendant question the public's right of access to sentencing proceedings and transcripts; nor could they. Instead, the Government attempts a sleight of hand. It suggests a *new* category of *presumptively non-public* judicial records: transcripts of sentencing proceedings involving a cooperating defendant. *See* Gov't Br. at 22 & n.6. But that suggestion fundamentally

misconstrues the access inquiry. The fact that the transcript of *this* sentencing proceeding involves a cooperating defendant could affect whether the presumption of access to it has been overcome (which, as discussed below, it has not). But that fact does not determine whether the presumption attaches in the first place. Courts, including the Supreme Court, consistently reject attempts to conflate these issues. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 n.13 (1982) (rejecting argument that right of access to criminal trials "as a general matter" turns on a particular trial's contents); *United States v. Cohen*, 366 F. Supp. 3d 612, 630–31 (S.D.N.Y. 2019) (explaining that applying presumption "based on case-specific circumstances . . . would require courts to engage in potentially arbitrary judgments" and "patchwork determinations"). This Court should do the same.

B. Sentencing memoranda

Sentencing memoranda are likewise presumptively public under the First Amendment and common law. As this Court noted in *Hearst Newspapers*, no fewer than five sister circuits have "recognized a First Amendment right of access to documents filed for use in sentencing proceedings." 641 F.3d at 176. The First Circuit has since held that sentencing memoranda are presumptively accessible under the common law, and numerous district courts continue to find both access rights applicable. *See United States v. Kravetz*, 706 F.3d 47, 56–57 (1st Cir. 2013); Opening Br. at 18, 22 (collecting cases).

While the Government notes that *Hearst Newspapers* did not expressly address sentencing memoranda, the reasoning of that decision squarely applies. Gov't Br. at 20–21. Access to sentencing memoranda, like access to sentencing hearings, ensures confidence in the justice system by "allow[ing] the public to observe whether the defendant is being justly sentenced." *In re Hearst Newspapers*, 641 F.3d at 179. And the Government's attempt, again, to erase the presumption of access to sentencing memoranda in cases involving a cooperating defendant, Gov't Br. at 21, fails for the same reasons stated above. Whether a judicial record is presumptively public is a threshold question distinct from the question of whether the presumption is overcome as to one specific judicial record (or portions thereof). The public's right of access plainly attaches to sentencing memoranda. *Cf., e.g.*, *United States v. Harris*, 204 F. Supp. 3d 10, 15 (D.D.C. 2016) (finding constitutional right of access to sentencing memorandum discussing cooperation); *United States v. Strevell*, No. 05-CR-477 (GLS), 2009 WL 577910, at *4 (N.D.N.Y. Mar. 4, 2009) (same).

Here, the Government's sentencing memorandum contained a motion for downward departure under § 5K1.1 of the U.S. Sentencing Guidelines. Gov't Br. at 8. Like sentencing memoranda, such motions are presumptively public because they are judicial records filed with courts to influence sentencing decisions. *See, e.g.*, *United States v. Chavis*, 111 F.3d 892 (5th Cir. 1997) (analyzing unsealing of

motion for downward departure under common-law framework); *United States v. Sater*, No. 98-CR-1101 (ILG), 2019 WL 3288389, at *2 n.3 (E.D.N.Y. July 22, 2019) (explaining that courts "around the country . . . accord Section 5K1.1 memoranda a presumptive right of access under the First Amendment or, at minimum, the common law"). Access to such motions, in general, is important because "[t]he public has a vital interest in knowing the details of deals made between the government and criminal defendants that accomplish . . . lower punishment than otherwise contemplated by law." *United States v. Raybould*, 130 F. Supp. 2d 829, 833 (N.D. Tex. 2000). And that vital interest is especially salient here; as one commentator noted, the deal struck by Ahsani and the Government appears to be "'the deal of the century.'" ROA.671.

C. Statements of no objections to presentence reports

Contrary to the Government's contentions, statements of no objections to PSRs should also be considered presumptively public judicial records.[2] Like sentencing memoranda, they are "a submission by a party to the Court in the sentencing process." *United States v. Sattar*, 471 F. Supp. 2d 380, 387 (S.D.N.Y. 2006). The Government's argument to the contrary relies on *In re Morning Song Bird Food Litigation*, 831 F.3d 765, 776 (6th Cir. 2016), a non-binding Sixth Circuit decision finding no right of access to PSR objections. Gov't Br. at 51–53;

[2] Intervenors-Appellants did not move to unseal the PSR. ROA.462.

cf. United States v. Huckaby, 43 F.3d 135, 138 (5th Cir. 1995) (affirming order unsealing PSR objections). While PSR objections also should be considered presumptively public judicial records under this Court's precedent, statements of *no* objections are, in any event, distinct. They do not "necessarily refer to the content of the PSR itself and tend to focus on the most controversial pieces of information"; they thus do not "entail the same concerns about misinformation that courts have cited in denying the release of PSRs." *In re Morning Song Bird Food Litig.*, 831 F.3d at 776. To the extent a statement of no objections quotes directly from the PSR, the proper remedy would be to redact it, not to deny that a right of access attaches in the first instance. *Cf. United States v. Iqbal*, 684 F.3d 507, 512 (5th Cir. 2012) (affirming release of redacted PSR); *United States v. Tangorra*, 542 F. Supp. 2d 233, 237 (E.D.N.Y. 2008) (finding attorney letter referencing PSR was presumptively public but redacting specific references to PSR).

D. Statements of reasons

Although the Government claims no presumption of access attaches to a district court's statements of reasons, they are judicial records that play an important role in the sentencing process. They explain the sentence and "indicate both whether [it] was within or outside of the Sentencing Guidelines and the particular Guideline relied upon." *United States v. Sinkler*, 555 F. App'x 217, 222 (3d Cir. 2014). Statements of reasons inform "reports to Congress," *id.*, help

"ensure a measure of consistency in sentencing throughout the country," *United States v. Ray*, 273 F. Supp. 2d 1160, 1164 (D. Mont. 2003), *aff'd*, 375 F.3d 980 (9th Cir. 2004), and allow the public to "determine why the district court did what it did," *United States v. Lewis*, 424 F.3d 239, 247 n.5 (2d Cir. 2005). For these reasons, Congress concluded that their disclosure would serve important, pro-transparency goals. *See* Opening Br. at 19 n.7. Simply put, statements of reasons, like other sentencing-related judicial records, are presumptively public under the First Amendment and common law.

It is true that the Judicial Conference's statement of reasons form is marked "not for public disclosure." *See Statement of Reasons*, Form AO 245B, https://www.uscourts.gov/sites/default/files/ao245b.pdf. But this should not—and cannot consistent with constitutional or common law—be read to require or permit them to be automatically sealed. As this Court has made clear, sealing judicial records "without any showing that secrecy is warranted or why the public's presumptive right of access is subordinated . . . harms the public interest," *Binh Hoa Le*, 990 F.3d at 421, particularly where the document goes to a core aspect of sentencing. Like other sentencing-related judicial records, statements of reasons may be sealed only if—and only to the extent that—case-specific overriding reasons necessitate sealing. *Cf. United States v. Cannon*, No. 14-CR-87 (FDW),

2015 WL 3751781, at *2 (W.D.N.C. June 16, 2015) (unsealing statement of reasons).

E. Sentencing letters

Sentencing "letters are central to, and serve as an evidentiary basis for, the defendants' arguments for leniency." *Kravetz*, 706 F.3d at 57 ("[h]aving concluded that the common law right of access attaches to sentencing memoranda," finding "but a small step to also conclude" that "the right also extends to sentencing letters submitted in connection with those memoranda"). Regardless whether the letters are contained in sentencing memoranda or submitted directly to the court, they "are meant to effect the judge's sentencing determination and thus 'take on the trappings of a judicial document under the common law.'" *Id.* at 58 (quoting *United States v. Gotti*, 322 F. Supp. 2d 230, 249 (E.D.N.Y. 2004)); *see also Binh Hoa Le*, 990 F.3d at 419; *United States v. Brown*, No. 16-CR-93, 2017 WL 7049108, at *1 (M.D. Fla. Dec. 18, 2017) (ordering disclosure of letters); *Cannon*, 2015 WL 3751781, at *4 (same); *United States v. Byrd*, 11 F. Supp. 3d 1144, 1149 (S.D. Ala. 2014) (finding letters subject to common law presumption of access); *United States v. King*, No. 10-CR-122 (JGK), 2012 WL 2196674, at *2 (S.D.N.Y. June 15, 2012) (same); *Tangorra*, 542 F. Supp. 2d at 237 (same). Access to them thus provides essential information about sentencing and promotes "accountability . . . in the letter-writers' representations to

the court." *Gotti*, 322 F. Supp. 2d at 250. As "documents filed for use in sentencing proceedings," *In re Hearst Newspapers*, 641 F.3d at 176, sentencing letters are subject to both the constitutional and common law presumptions of public access.

Intervenors-Appellants could not have briefed this issue below because the sentencing letters were docketed as "sealed event[s]"; Intervenors-Appellants first learned of them from the Government's brief, *see* Gov't Br. at 55–57. But, contrary to the Government's arguments, this Court is both well-equipped and empowered to decide whether sentencing letters are presumptively public and, here, should be unsealed. *See Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022) ("[W]e may use our independent power to identify and apply the proper construction of governing law to any issue or claim [that] is properly before the court[.]" (citation and internal quotation marks omitted)); ROA.462, ROA.686 (requesting access to the letters by docket entry, ECF Nos. 118 and 122).

F. Legal briefs

It is undisputed that the constitutional and common law rights of access also attach to legal briefs—including the parties' opposition to Intervenors-Appellants' unsealing motion. *See United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 689 (5th Cir. 2010) (common law presumption of access extended to "papers concerning . . . [party's] Motion"); *see also In re L.A. Times Commc'ns*

LLC, 28 F.4th 292, 296 (D.C. Cir. 2022); *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1096 (9th Cir. 2014) ("Motions to unseal judicial proceedings . . . should be open to the public unless the public's right of access is overcome by a compelling government interest."); *In re Providence J. Co*., 293 F.3d 1, 5 (1st Cir. 2002). Indeed, as the Government acknowledges, "litigation over sealing should be open to the greatest extent practicable." Gov't Br. at 39.

II. The district court committed manifest errors of law that require reversal of its Order denying Intervenors-Appellants' motion to unseal.

Where the First Amendment right of access attaches, a party seeking to close judicial proceedings or seal judicial records must establish that such secrecy is necessitated by a compelling interest and is no broader than necessary to serve that interest. *Press-Enterprise I*, 464 U.S. at 510; *In re Hearst Newspapers*, 641 F.3d at 181. Where the common law right of access applies, "the working presumption is that judicial records should not be sealed"; district courts must "be ungenerous with their discretion to seal judicial records," consider the necessity of sealing on a "line-by-line" basis, take into account the public's interest, and explain any sealing "at a level of detail that will allow for this Court's review." *Binh Hoa Le*, 990 F.3d at 418–19 (citations and internal quotation marks omitted). A district court's analysis of the case-specific interests in sealing is reviewed for abuse of discretion, but this Court reviews *de novo* whether the district court applied the correct legal

standards. *See Sealed Search Warrants*, 868 F.3d at 391; *In re Hearst Newspapers*, 641 F.3d at 174.

Here, the district court failed to apply the correct legal standards when it sealed nearly all judicial records filed in connection with Ahsani's sentencing, in violation of the public's constitutional and common law access rights. The parties can attempt to save the Order only by rewriting it, claiming it "indicates" the district court performed the correct analysis when it is clear from the face of the Order the district court did not. Gov't Br. at 45. The Order erroneously started with a presumption of secrecy, treating Intervenors-Appellants' unsealing motion as a motion for reconsideration of the 2020 unsealing order, overlooked the (lack of) current case-specific overriding interests in sealing, and improperly rejected less-restrictive alternatives. ROA.690–91. Fatally, there were "no authorities cited, no document-by-document inquiry," "no grappling with public and private interests, no consideration of less drastic alternatives," and "no assurance that the extent of sealing was congruent to the need." *Binh Hoa Le*, 990 F.3d at 420. If the district court *had* applied the correct legal standards, it could not have concluded that continued, wholesale sealing of the judicial records filed in connection with Ahsani's sentencing was necessary, given the discussion of Ahsani's extensive cooperation in the public record and the public's strong interest in access.

A. The district court erroneously applied a presumption of closure.

First and foremost, the district court erred by failing to apply a presumption in favor of public access. The Order passingly mentions "the First Amendment rights of the press," but expressly presumes that any records referencing Ahsani's cooperation must remain wholly sealed unless and until the district court finds "good reason to set aside" the 2020 unsealing order that permitted redaction of certain mentions of Ahsani's cooperation in different documents. ROA.690–91. But Intervenors-Appellants did not ask to "set aside" the 2020 order; rather, they invoked their presumptive right to inspect judicial records newly filed in connection with Ahsani's sentencing. ROA.461–75.

The Government asks this Court to "infer[]" that the district court applied a presumption of access, arguing the Order "is best understood as expressing the court's agreement with the previous presiding judge" that the presumption was overcome. Gov't Br. at 45–46. But the Order cannot support such an inference, and it is not this Court's task to guess at the district court's reasoning. When "it is unclear whether the district court applied the proper" legal standards, including "the presumption in favor of access," its sealing order cannot stand. *Sealed Search Warrants*, 868 F.3d at 393, 396. Here, it is clear the district court applied *im*proper legal standards, requiring reversal.

B. The district court erred by failing to consider whether there are, currently, compelling case-specific interests that overcome the presumption of public access.

The district court also erred by failing to consider whether there are, at present, compelling or countervailing interests that necessitate sealing the records at issue, instead relying on a general—and no longer applicable—interest that Judge Gilmore found supported limited redactions "years ago." ROA.690. District courts must make specific findings regarding the *present* interests in closure, which fade over time. *See, e.g.*, *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 518 n.3 (5th Cir. 2022); *Miller v. Indiana Hosp.*, 16 F.3d 549, 551–52 (3d Cir. 1994). Had the district court done so, it would have found no compelling interest supporting the blanket sealing of "court filings concerning [Ahsani's] ongoing cooperation," ROA.690, because his cooperation is public knowledge. It, "like the genie, has long been out of the bottle." *Strevell*, 2009 WL 577910, at *5. It has been discussed extensively in the press, in open court during the public portion of Ahsani's sentencing (including by Ahsani, who called himself "Exhibit A for the benefits of true cooperation"), in U.K. court filings, the Order itself, and now the parties' appellate briefs. *See* ROA.480–671; ROA.690; ROA.714–15; ROA.721–22; Gov't Br.; Def.'s Br. This Court and others have consistently held that there can be no overriding interest in sealing publicly available information.

See, e.g., *June Med. Servs.*, 22 F.4th at 520–21 (explaining it "cannot be sealed" because it "*already* belong[s] to the people"); Opening Br. at 37 (collecting cases).

Nothing in the briefs filed by the Government or Defendant rehabilitates the Order's fatal defects. At most, they support an argument for applying limited redactions—a less-restrictive alternative that, as noted below, the district court declined to consider. Indeed, the very fact that those briefs, again, publicly discuss Ahsani's cooperation only underlines the lack of any compelling interest in sealing any mentions of it.

First, the Government asserts that there was a compelling interest in sealing when the Order was entered because "the government had made no comparable official acknowledgment of Ahsani's cooperation, nor had Ahsani himself admitted that fact." Gov't Br. at 35. That is untrue; both the Government and Ahsani had already discussed his cooperation in open court during the sentencing hearing. ROA.714, ROA.721–22. In any event, it is hard to see how the right of access could be "fundamental" to the American justice system if it guaranteed access only to information that the Government or a defendant had decided to confirm or admit. *Binh Hoa Le*, 990 F.3d at 418. Such an approach would hand the Government, in particular, a trump card fit for any case, marking a stark departure from our system's conviction that neither "[a] free press" nor a free public can "be made to rely solely upon the sufferance of government to supply it

with information." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979). This Court has not so limited the public's rights of access. To the contrary, it has made clear that because "[m]ost litigants have no incentive to protect the public's right of access," it is "judges" who must make access determinations. *Binh Hoa Le*, 990 F.3d at 419 (citations and internal quotation marks omitted); *see also In re L.A. Times Commc'ns LLC*, 28 F.4th at 296, 298 (finding district court erred in sealing records relating to an investigation discussed in "extensive media reporting" and by investigation's subject but not "acknowledged by the government").[3]

Second, in a blatant attempt to rewrite the Order, the Government posits that the district court "agreed with" its position "that confirming Ahsani's cooperation could still imperil important interests" by revealing information that "far exceeded" what was already public. Gov't Br. at 35–36. But the Order says nothing of the sort. ROA.690–91. It does not discuss the public nature of Ahsani's cooperation whatsoever, let alone address the extent of what was publicly known about it. And nothing in the Order explains how "confirming Ahsani's cooperation"—which had already been confirmed publicly by Ahsani himself,

[3] The fact that some of the official documents discussing Ahsani's cooperation are from U.K. court proceedings does not change the fact that they are publicly available, or the fact that Ahsani's cooperation has been discussed in numerous U.S. media reports and court documents. *Cf.* Gov't Br. at 34.

ROA.721—"could still imperil important interests," and why, if such residual interests remained, redaction could not address them. Gov't Br. at 35.

The district court failed to make any specific findings about the purported need to seal mentions of Ahsani's cooperation, instead pointing in conclusory fashion to "the rights of the Defendant to be safe from harm and the Government to have its investigations free from impairment." ROA.690–91. This bare-bones assertion falls far short of fulfilling the requirement to make "detailed, clear, and specific findings" supporting sealing. *Sealed Search Warrants*, 868 F.3d at 397 (finding order deficient where it explained only that "'there is a substantial probability that the investigation will be compromised if the affidavit is unsealed'"). And the parties' attempts to fill in the gaps—by claiming, for example, that defendants can face safety risks when other inmates discover their cooperation through court records—are unavailing. *See, e.g.*, Gov't Br. at 24, 32. This generalized claim cannot support sealing here, since to the extent disclosing Ahsani's cooperation would endanger him or others, those risks have long been present given the public nature of his cooperation. And, in any event, it is the district court, not the parties, that must explain its reasoning.

Ahsani also tries to reform the Order by claiming sealing is necessary because "the sentencing memoranda include sensitive medical and personal information," but the Order nowhere finds privacy interests support sealing, nor

does Ahsani explain how this interest could warrant any restriction greater than limited redactions. Def.'s Br. at 22; *cf. Strevell*, 2009 WL 577910, at *5 ("[T]he general sealing of personal information contained in sentencing documents under the rubric of privacy concerns is unwarranted . . . particularly when it serves as the basis for sentencing advocacy.").

Finally, and crucially, the district court also failed to consider the public's weighty interest in knowing the basis for the sentence Ahsani received. ROA.690–91. The Ahsani Prosecution arose out of a vast, worldwide corruption scheme involving numerous governments and multinational companies; Ahsani's plea was what one observer called "'the deal of the century.'" ROA.671. Yet although this "case involve[s] matters of particularly public interest," *June Med. Servs.*, 22 F.4th at 520 (citation and internal quotation marks omitted), "it does not appear that the district court weighed as a factor in favor of disclosure the presumption of the public's right of access," *Bradley ex rel. AJW v. Ackal*, 954 F.3d 216, 233 (5th Cir. 2020). The Order cannot stand for that reason too.

C. The district court erred by failing to consider the less-restrictive alternative of redaction.

The district court further erred by failing to conduct the requisite "document-by-document, line-by-line" analysis and consider "less drastic alternatives." *Binh Hoa Le*, 990 F.3d at 419–20 (citations and internal quotation marks omitted). The Order lumped all of the sealed records together and overlooked many, mentioning

only "two requested documents," ROA.691—presumably the sentencing memoranda—while ignoring Intervenors-Appellants' requests to unseal the other sentencing-related judicial records. *See* ROA.2796–97. The Order's bald assertion that redaction would "essentially destroy any value the documents have," ROA.691, is neither sufficient to allow for meaningful appellate review, nor justifiable given the public nature of Ahsani's cooperation. *See Sealed Search Warrants*, 868 F.3d at 397; *cf. Chavis*, 111 F.3d at 892 (affirming order unsealing redacted sentencing memorandum where redactions were "very specific to particular information, in one particular document"); *In re Providence J. Co.*, 293 F.3d at 15 (rejecting "blanket characterization" that redaction was not feasible).

The parties' briefs are not to the contrary; indeed, they discuss Ahsani's cooperation in public filings with some redactions. *See generally* Gov't Br.; Def.'s Br. The Government again tries to remedy the Order's deficiencies by listing hypothetical reasons why redactions may not always work: when the records are too voluminous, disclosure is too risky, or redaction would misleadingly alter the documents' meaning. Gov't Br. at 46–47. But the Order says none of this; nor

would any of those reasons prevent redaction here, where, among other things, there is a discrete set of records at issue.

III. The district court erred by denying Intervenors-Appellants an opportunity to be heard by closing part of Ahsani's sentencing without public notice and by sealing the parties' joint opposition.

A. The district court's closure of a portion of Ahsani's sentencing hearing without notice was legal error.

In an effort to excuse the district court's failure to give the public notice of its intent to hold part of Ahsani's sentencing hearing behind closed doors, the Government first attempts to evade the command of *Hearst Newspapers* by advancing the theory that the press and public are not entitled to a meaningful opportunity to be heard before a "partial closure." Gov't Br. at 27. The suggestion is frivolous. *Globe Newspaper* itself dealt with a partial closure—not of "the entire criminal trial," but only the portions during which a minor sex victim testified, 457 U.S. at 600—and explained in no uncertain terms that "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion," *id.* at 609 n.25 (citation and internal quotation marks omitted).[4]

[4] The Government's nod at the "less demanding" standard for partial closures under the Sixth Amendment gets it nowhere. Gov't Br. at 27. Even if the Sixth Amendment provided relevant guidance here, its "procedural requirements must still be met" regardless of whether a closure is partial or total. *United States v. Sherlock*, 962 F.2d 1349, 1358 (9th Cir. 1989). That includes both an opportunity to be heard, *see id.*; *Douglas v. Wainwright*, 739 F.2d 531, 533 n.2 (11th Cir. 1984), and "detailed factual findings" supporting any degree of closure, *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995).

Nor can the Government avoid the safeguards of *Hearst Newspapers* by labeling the closure a "bench conference." Gov't Br. at 26. "[T]he First Amendment question cannot be resolved solely on the label we give the event"; it turns on the substance of the proceeding. *Press-Enter. Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 7 (1986). *Hearst Newspapers* governs here.

The fallback position advanced by the Government and Defendant—that failure to give the public notice and an opportunity to oppose closure was justified by an interest in delaying official acknowledgement of Ahsani's cooperation—makes no sense. This Circuit has never blessed closing a sentencing hearing with "no notice or opportunity to be heard, of any kind." *In re Hearst Newspapers*, 641 F.3d at 183 n.15. *Globe Newspaper* states flatly that an opportunity to be heard "'must be given'" where a First Amendment presumption of access attaches, 457 U.S. at 609 n.25 (citation omitted), and other circuits have condemned the failure to observe those requirements even where national security is at stake, *see In re Wash. Post Co.*, 807 F.2d 383, 390–92 (4th Cir. 1986). But regardless of whether extraordinary risks could justify ignoring those safeguards, this case did not present them. Ahsani's cooperation was already public knowledge. And even if official confirmation of a motion to close a portion of sentencing could have contributed marginally to any danger he faced—it couldn't—the district court could have "order[ed] that docketing" of such a motion "be delayed for some brief

interval" until the sentencing was imminent without letting it pass by entirely. *In re Herald Co.*, 734 F.2d 93, 102 n.7 (2d Cir. 1984).

At base, while *Hearst Newspapers* recognizes that district courts may tailor notice and an opportunity to be heard before closing a sentencing hearing to "the unique facts of the case," they cannot "automatically choose the most minimal options available." 641 F.3d at 184. In doing so here—absent findings of any kind, *see* Gov't Br. at 31 n.8—the district court erred.

B. The district court erred in relying on wholly sealed arguments.

The same is true of the district court's decision to seal the parties' joint opposition to Intervenors-Appellants' motion to unseal, and to deny Intervenors-Appellants notice of its filing. Neither Ahsani nor the Government defends the failure to reflect on the docket that the opposition brief had been filed. *See* Gov't Br. at 39 ("Docketing the joint opposition as a 'sealed event' may well have been inadvisable[.]"). And neither attempts to suggest that the district court engaged the common law or First Amendment presumption of access to their opposition brief before sealing it as a blanket matter.[5] Instead, they argue that Intervenors-

[5] The closest the Government comes is its suggestion that it is "common practice" to rely on sealed briefs "in disputes over sealing," Gov't Br. at 40. But its preferred authority says the opposite. While *In re Copley Press* found no First Amendment right of access to documents "*appended* to the government's motion to seal and to the memoranda supporting that motion"—the very material the government hoped to seal—it squarely held that the constitutional right of access attaches to "the government's motion to seal and the memoranda supporting it."

Appellants' opportunity to guess at their arguments and the district court's justifications for sealing satisfied due process. But the district court's reliance on wholly sealed arguments plainly prejudiced the rights of Intervenors-Appellants, as the parties' briefs in this Court only underline.

For one, the bare fact that Ahsani and the Government have filed public, redacted briefs again confirms that blanket sealing was never necessary. Even on the parties' view of the key interest at stake (delaying official acknowledgement of Ahsani's cooperation), that fact was confirmed during the open portion of Ahsani's sentencing—eight days before the opposition brief was filed, and twenty-four days before the Order was entered. *See* Gov't Br. at 11, 38. The arguments the Government and Ahsani make publicly before this Court could just as well have been made publicly before the district court then.

The parties' briefs likewise make clear that Intervenors-Appellants could have done much more than "reiterate[]" their original motion if the opposition brief had been public. Gov't Br. at 42. Much of the parties' briefing focuses on "the law regarding the common law and First Amendment rights of access," and no harm could have resulted from requiring them to address those purely legal questions publicly. Order & Opinion, *In re Associated Press*, No. 5:22-mc-0011

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518 F.3d 1022, 1028 (9th Cir. 2008) (emphasis added). Other authority uniformly recognizes that briefs in disputes over sealing are presumptively public. *See In re L.A. Times Commc'ns LLC*, 28 F.4th at 296.

(S.D. Tex. Nov. 28, 2022), slip op. at 8, https://perma.cc/VR4V-F2L5. But concealing their positions prevented Intervenors-Appellants from replying effectively. If Intervenors-Appellants had known, for instance, that the Government's case for secrecy rested on a distinction between official acknowledgements and other public reports, *see* Gov't Br. at 34–36, Intervenors-Appellants could have highlighted that other circuits have rejected that theory, *see In re L.A. Times Commc'ns*, 28 F.4th at 298.

Intervenors-Appellants were likewise unaware until reading the parties' appellate briefs that the sealed records included sentencing letters or a motion for a downward departure under § 5K1.1. Neither party explains what harm could have resulted from disclosing either fact below, or from open legal argument as to whether a right of access attaches to those categories of documents. And as the Government candidly concedes, *see* Gov't Br. at 55, the sealing of the opposition brief denied Intervenors-Appellants an opportunity to argue with any specificity that those records should be unsealed.

In every respect, the wholesale sealing of the parties' joint opposition brief distorted this litigation by placing before the court arguments that never confronted "the crucible of meaningful adversarial testing." *United States v. Cronic,* 466 U.S. 648, 656 (1984). No private or public interest was advanced by that overbroad secrecy; "the risk of an erroneous deprivation" of the public's right of access was

not just greatly heightened but plainly realized. *In re Hearst Newspapers*, 641 F.3d at 184 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). And the district court erroneously reached that result, as far as the record shows, without any effort to "weigh these factors in relation to the unique facts of the case." *Id.*

CONCLUSION

For the foregoing reasons and those set forth in their opening brief, Intervenors-Appellants respectfully request that this Court reverse the decision below and instruct the district court to unseal the sentencing-related judicial records at issue subject only, if necessary, to narrowly tailored redactions shown to be necessitated by compelling, countervailing interests and supported by specific factual findings.

Dated: May 18, 2023

Respectfully submitted,

/s/ Katie Townsend

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CERTIFICATE OF SERVICE

I, Katie Townsend, hereby certify that I have filed the foregoing Intervenors-Appellants' Reply Brief electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered as CM/ECF Filers and that they will be served by the CM/ECF system.

Dated: May 18, 2023

/s/ Katie Townsend
Katie Townsend
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CERTIFICATE OF COMPLIANCE

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Dated: May 18, 2023

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