IN THE SUPREME COURT OF THE STATE OF DELAWARE

TOMALES BAY CAPITAL ANDURIL III, L.P., a Delaware limited partnership, TOMALES BAY CAPITAL ANDURIL III GP, LLC, a Delaware limited liability company, and IQBALJIT KAHLON, Managing Member of Tomales Bay Capital Anduril III GP, LLP,	)	No. 163, 2026 Case Below: Court of Chancery of the State of Delaware Case No. 2022-0175-JTL
Defendants Below/Appellants,	)	
v.	)	
LEO INVESTMENTS HONG KONG LIMITED, a limited liability company organized under the laws of Hong Kong,	)	
Plaintiff Below,	)	
and	)	
PRO PUBLICA, INC.	)	
Objector Below/Appellee.	)	

APPELLEE PRO PUBLICA, INC.'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

This appeal involves Pro Publica, Inc.'s ("ProPublica") efforts to report on an issue of urgent national concern—the extent to which the major defense contractor Space Exploration Technologies Corp. ("SpaceX") permits, but conceals, investment by entities owned in countries that are militarily or politically adverse to the United States.

That question is inextricable from the facts of the underlying lawsuit, which involves Appellant Iqbaljit Kahlon soliciting an offshore subsidiary of a Chinese company to become a limited partner in a fund poised to purchase SpaceX shares, then quickly terminating that relationship after the Chinese company publicized the investment. By reviewing the filings, exhibits, and testimony in this case, ProPublica has twice broken news with reporting by two of its Pulitzer Prize-winning journalists. Joshua Kaplan & Justin Elliott, *How Elon Musk's SpaceX Secretly Allows Investment from China*, ProPublica (Mar. 26, 2025), https://perma.cc/2ZM3-CDG7; Justin Elliott & Joshua Kaplan, *Elon Musk's SpaceX Took Money Directly from Chinese Investors, Company Insider Testifies* (Oct. 2, 2025), https://perma.cc/B8S4-KSKR. In both instances, pointed inquiry by elected officials quickly followed. Letter from Adam Smith, Rep., et al., to Peter Hegseth, Sec'y of Def., & Janet Petro, Acting Adm'r (May 6, 2025), https://perma.cc/TKG5-

SK4J; Letter from Elizabeth Warren, Sen., & Andy Kim, Sen., to Peter Hegseth, Sec'y of Def. (Feb. 5, 2026) https://perma.cc/L55H-4MS7.

ProPublica's reporting is ongoing. For the past year it has sought access to two trial exhibits containing lists of limited partners in investment funds run by Kahlon. Those trial exhibits, Joint Exhibits ("JX") 536 and 537, were relied upon by the Court in issuing its decision and are part of the evidentiary record in the underlying case, which is now before this Court on cross-appeals (Docket Nos. 415, 2025 / 428, 2025).

This Court should affirm the Court of Chancery's decisions denying Appellants' motion for sweeping redactions to both exhibits. First, the immense public interest in the exhibits and Appellants' failure to show particularized harm from their disclosure meant that Appellants failed to meet the requirements of Court of Chancery Rule 5.1(b). And second, the First Amendment to the U.S. Constitution provides a presumption of public access to trial exhibits even stronger than that in Rule 5.1. Appellants have failed to meaningfully address, let alone rebut, that constitutional standard.

The right of access to judicial documents is a contemporaneous one, because "the public benefits attendant with open proceedings are compromised by delayed disclosure." *Doe v. Pub. Citizen*, 749 F.3d 246, 272–73 (4th Cir. 2014). Those public benefits are currently at their apex. The cross-appeals of the underlying

case remain pending, and SpaceX is set to make an initial public offering of its stock in June. As set forth below, to the extent the Court can reach a decision prior to oral argument, *see* Del. R. S. Ct. 16(a), ProPublica respectfully requests that it do so. Further, ProPublica respectfully requests that the Court issue its mandate concurrently with any decision so that the public may access these important judicial records while they are at their most newsworthy. Del. R. S. Ct. 19(a).

NATURE OF PROCEEDINGS

A. Participants in This Appeal

ProPublica is a Pulitzer Prize-winning nonprofit newsroom dedicated to investigative journalism in the public interest. A490.

Appellants, who were the defendants in the underlying litigation, are (i) Kahlon, (ii) an investment fund Kahlon created called Tomales Bay Capital Anduril III, L.P. (the "Anduril III Fund"), and (iii) an entity Kahlon formed to serve as the general partner in the Anduril III Fund called Tomales Bay Capital Anduril III GP. A397.

B. Proceedings Below

1. The Underlying Lawsuit

SpaceX is a privately held company that maintains a right of first refusal over the transfer of its shares. A393. It typically permits the transfer of its shares only to "a small group of intermediaries it trusts." *Id*. As one such intermediary, Kahlon

formed and managed at least 23 funds that leveraged his "close relationship" with, and ability to purchase shares in, SpaceX. A394, B365; *see also* A194, A392–93.

In late 2021, Kahlon learned that an investor sought to sell $528 million in SpaceX shares. A172–73. Kahlon had previously formed a fund called Tomales Bay Capital Anduril II, L.P. (the "Anduril II Fund"), A171, A173. He formed the Anduril III Fund as a successor to the Anduril II Fund to raise the remainder of the $528 million. A171–72; *see generally* A683. To purchase the shares, the two funds were to be members in an aggregator vehicle that Kahlon also formed and managed, A397, which would effectuate the purchase on behalf of both. A182; A397 n.24.

In order to find interested entities who would commit capital to the purchase, Kahlon worked the phones. *See, e.g.*, A373–76; B291–344. Amidst a flurry of messages, Kahlon connected with an entity called Leo Investments Hong Kong Limited ("Leo Investments," plaintiffs in the underlying litigation), which became a limited partner in the Anduril III Fund and committed $50 million for the purchase of SpaceX shares. A396–97. Leo Investments was organized under Hong Kong law, but was a wholly owned subsidiary of a publicly traded Chinese company called Leo Group. A406.

A week after Leo Investments became a limited partner, Kahlon notified it that it had been removed from the Anduril III Fund and returned the $50 million it had committed. A419. On December 13, SpaceX exercised its right of first refusal,

preventing Kahlon's funds from purchasing the full $528 million block of shares. A421. Kahlon's funds were instead later permitted to purchase about $100 million of shares, most of which went to the Anduril II Fund because of its contractual priority over the Anduril III Fund. A422; A190.

On February 23, 2022, Leo Investments initiated the underlying lawsuit against Appellants (collectively, the "Parties"). A422–23. Trial took place in December 2024. A100. The Court of Chancery issued its post-trial decision on June 30, 2025, finding for Appellants and against Leo Investments other than a breach of the duty of candor, for which it awarded Leo Investments $1 in nominal damages. A391. The parties each appealed portions of the Court of Chancery's decision, and briefing was consolidated before this Court, Nos. 415, 2025 / 428, 2025.

2. ProPublica's First Two Challenges to Confidential Treatment

On April 9, 2025, ProPublica challenged the confidential treatment of certain materials filed or lodged in the underlying litigation. Appellants moved for confidential treatment of some of the materials challenged by ProPublica, A351, but chose not to move for continued confidential treatment of others, including:

- JX 1040, which contains a list of limited partners in the Anduril II and Anduril III funds that Kahlon hoped would be allocated shares of SpaceX as of November 24, 2025, B238.
- JX 101, which contains a disclosure by Kahlon of a limited partner in the Anduril III fund to a "longtime friend and associate … based in China" named Lance Liu. A209, A373–74.

Appellants filed public versions of those trial exhibits with no redactions. A352. ProPublica opposed Appellants' motion for continued confidential treatment as to the other items, B239, and the Court permitted Appellants to reply. D.I. 266 (minute order); B258.

On June 2, 2025, ProPublica challenged the confidential treatment of a second set of materials, including JX 536 and 537. Appellants moved for the continued confidentiality of those exhibits and others. A384–87. ProPublica opposed that motion. B275.

On September 15, 2025, the Court of Chancery entered an order addressing Appellants' first two motions seeking continued confidentiality of the filings identified in ProPublica's first and second notices. A477–526. The court held, *inter alia*, that (i) the "particularized harm" requirement of Rule 5.1(b)(2) requires "tangible evidence of concrete damage," A498; (ii) the "public interest" factor in Rule 5.1(b)(2) is "at its height for materials a judge relies on when making a decision, and particularly for trial materials," A499; (iii) the parties had stipulated, through their joint pre-trial order, that the trial record would include all exhibits identified by the parties on their joint exhibit list, and that all items on that list came into evidence and "became part of the record" at the close of evidence, A512–16; and (iv) Appellants were required to file public versions of any exhibits in the parties' pre-trial exhibit list specified in ProPublica's challenge, including those cited in the

Court's June 2025 post-trial order like JX 536 and 537, A516, A523. Appellants did not seek appellate review of the September 2025 order.

3. ProPublica's Third Challenge to Confidential Treatment

The public versions of JX 536 and 537 filed by Appellants after the Court of Chancery's September 15, 2025 order contained significant redactions. *Id.* ProPublica challenged those redactions through a notice filed October 16, 2025. A577–85. Appellants moved for continued confidential treatment of the redacted information in JX 536 and 537, A586, and submitted an affidavit by Kahlon in support of their motion, A599. ProPublica opposed Defendants' motion and objected to Kahlon's affidavit on several grounds. A613 n.6.

On January 28, 2026, the Court of Chancery denied Appellants' motion for confidential treatment, Appellants' Br., Ex. A, holding that Appellants failed to demonstrate the factors set forth in Rule 5.1(b)(2), *id.* at 3–4.

Appellants filed a motion for reargument on February 4, 2026, A622, which ProPublica opposed, A636. Appellants argued that the Court's January 28 order was "based on a factual error," contesting its finding that Kahlon and TBC LP had "been relatively cavalier about keeping the identities of [their] investors private." A623. ProPublica opposed. A636–647.

The Court denied Appellants' motion for reargument on March 18, 2026, Appellants Br., Ex. C, holding that it had given only non-dispositive weight to Joint

Trial Exhibit 101, which it "observed ... undercut Kahlon's claims about the importance he places on the confidentiality of investor names." *Id.* at 2. The Court of Chancery also noted that "[a]fter hearing Kahlon testify at trial and observing his demeanor, the court had a negative impression of Kahlon's credibility." *Id.* at 7.

After the Court of Chancery denied Appellants' motion for reargument, Appellants moved to stay the order as to JX 536 and 537, pending this appeal. A635. ProPublica opposed. A669. The Court of Chancery granted a stay conditioned on Appellants not opposing a motion by ProPublica to expedite the appeal, because "given the court's ruling regarding the public interest and the force of ProPublica's arguments, defendants cannot both obtain a stay and proceed at leisure." Appellants' Br., Ex. C at 3. This appeal followed.

C. ProPublica's Request for Expedited Resolution by This Court

On April 24, 2026, ProPublica moved this Court to set an expedited schedule for briefing and resolution of this appeal. ProPublica noted the importance of contemporaneous access to judicial records, the fleeting nature of newsworthiness, the public's strong interest in following an ongoing, highly publicized case, and the anticipated, imminent initial public offering ("IPO") of SpaceX. The Court granted ProPublica's motion on April 27.

The Clerk of the Supreme Court sought to schedule oral argument on June 3, but Appellants represented that arguing counsel had "preexisting personal and

professional conflicts that make June 3 difficult," and requested that oral argument be delayed until June 10. Several days after the parties filed their acknowledgements of that argument date, Reuters reported that SpaceX had moved forward its planned IPO, moving from a date in "late June" to a "share sale as early as June 11" and a public listing "as early as June 12." Echo Wang & Anirban Sen, *Exclusive: SpaceX Accelerates IPO Timeline, Targets June 12 Listing on Nasdaq, Sources Say*, Reuters (May 15, 2026), http://bit.ly/4dD4Cqv.

SUMMARY OF ARGUMENT

1. Denied. Appellants failed to satisfy the requirements of Rule 5.1. The Court of Chancery did not abuse its discretion by finding that the affidavit of Kahlon submitted in support of Appellants' motion for continued confidential treatment was too conclusory, speculative, and exaggerated to demonstrate particularized harm. Moreover, Appellants failed to demonstrate that any harm from disclosure of JX 536 and 537 outweighed the public interest in access to those documents, given the court's use of those exhibits in its adjudication of the case, their relevance to the claims at issue and inclusion on the evidentiary record, and the demonstrated public concern about the sources and of foreign investment in SpaceX, a major U.S. military contractor.

However, even if Appellants had managed to make the required showing under Rule 5.1, they would still have fallen short of rebutting the presumption of

public access to trial exhibits provided by the First Amendment to the U.S. Constitution. To overcome that constitutional presumption, appellants were required to demonstrate an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Appellants' generic and speculative claims of economic and privacy concerns do not meet that standard.

STATEMENT OF FACTS

A. Before their trial, the Parties stipulated that Joint Exhibits 536 and 537 would become part of the record at the close of evidence.

As their trial approached, the Parties filed a joint proposed pre-trial order, which the court entered on December 10, 2024. B1; D.I. 221.[1] Among other stipulations, the Parties requested, and the court endorsed, a procedure for moving exhibits into the evidentiary record. B35 ¶ 134; *see* A512–14. Every document named on an exhibit list appended to the pre-trial order (A356, hereinafter the "Joint Exhibit List"), would be admitted into evidence at the close of trial, unless the Court of Chancery sustained an evidentiary objection:

> Unless an objection to a proposed trial exhibit has been noted on the [Joint] Exhibit List or an objection is raised through motions *in limine*, in pre-trial briefing, or at trial,

[1] D.I. 221 was filed under seal and is absent from Appellants' appendix. ProPublica cites throughout this brief to D.I. 195, the proposed stipulated order, B1, and to the Chancery Court's September 15, 2025, order, A477–526, which quotes the relevant potions of D.I. 221.

> all exhibits on the [Joint] Exhibit List shall be deemed admitted into evidence (except any exhibit that has been stricken as a result of an objection ruled upon at trial), subject to the resolution of any objection to its admissibility permitted by this Paragraph.

B35 ¶ 134; A513.

Both JX 536 and 537 were on the Joint Exhibit List. A372. Neither party objected to either exhibit. *Id.*; A513. Shortly before trial, the parties provided the court with paper and electronic copies of all exhibits on the Joint Exhibit List. B38–39 ¶¶ 139–42. Accordingly, in September 2025, the Court of Chancery held that at the close of evidence, JX 536 and 537 "became part of the record." A513 (citing D.I. 221 ¶ 134).

B. At trial, testimony about the use of offshore holding companies for limited partners in Kahlon's funds prompted reporting by ProPublica and a Congressional inquiry.

At the parties' December 2024 trial, Kahlon testified that he and TBC LP permitted entities from countries "such as China or Russia" to become limited partners in funds that purchased SpaceX shares so long as the foreign entities took one of "several" measures, including setting up intermediary structures in jurisdictions like the British Virgin Islands, Cayman Islands, or Hong Kong. A170, A175, A213.

SpaceX CFO Bret Johnsen testified that he told Kahlon and other fund managers that SpaceX sought to avoid granting equity to funds with "Russian,

Chinese, Iranian, North Korean ownership interest." A160. SpaceX's concerns with this type of investment purportedly involved both compliance with U.S. law and its competition with other U.S. military and aerospace contractors. Johnsen testified that SpaceX "d[oes] not want to have any—any ownership interest, *direct or indirect*, that we think would cause harm to the company ... in the form of making it more challenging to win government contracts, because we are a large U.S. government contractor." A160 (emphasis added); *see also* A180. He also testified that the mere possibility of inquiry into SpaceX's business dealings by the Department of Treasury's Committee on Foreign Investment in the United States ("CFIUS") was "a negative for us." A167; *see also* A183. Despite this, Johnsen testified that SpaceX was "not always" aware of who its indirect investors were, and that he did "not always" ask firms like TBC LP who they had permitted to become limited partners in funds that sought to purchase SpaceX shares. A159.

In March 2025, ProPublica published reporting based in part on this testimony. Kaplan & Elliott, *How Elon Musk's SpaceX Secretly Allows Investment from China*, *supra*.[2] ProPublica's article noted that President Trump had issued a

[2] Available at https://perma.cc/2ZM3-CDG7. This citation is offered to demonstrate the fact of the article's existence and that the trial testimony was "the subject of media interest." *Totta v. CCSB Fin. Corp.*, 2021 WL 4892218, at *3 (Del. Ch. Oct. 20, 2021) ("The court can also take judicial notice of websites, newspaper articles, and SEC filings, albeit for limited purposes.").

directive the month before stating that investment in U.S. companies by "foreign adversaries, including the People's Republic of China (PRC)" could threaten "national security" and "United States critical infrastructure." The White House, *America First Investment Policy* (Feb. 21, 2025).[3] The directive further stated that "[t]he PRC pursues these strategies in diverse ways, both visible and concealed, and often through partner companies or investment funds in third countries." *Id.*

In May 2025, four members of the U.S. House of Representatives wrote to Secretary of Defense Pete Hegseth and Acting NASA Administrator Janet Petro regarding Elon Musk's "dual role" as SpaceX CEO and the leader of the Department of Government Efficiency. Letter from Smith, et al., to Hegseth & Petro, *supra*.[4] The representatives wrote that they were "troubled to review [ProPublica's] recently published article that highlighted potential obfuscation regarding investment by Chinese investors into SpaceX," and requested that Hegseth and Petro respond to a

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[3] Available at https://perma.cc/Z8YW-7W44. "[T]he referenced statements and releases set forth certain positions of the U.S. federal government and other governments is not subject to reasonable dispute, and the Court may therefore take judicial notice of the positions set forth in the statements and releases." *Jimenez v. Palacios*, 250 A.3d 814, 820 n.3 (Del. Ch. 2019), *aff'd*, 2020 WL 4207625 (Del. 2020).

[4] Available at https://perma.cc/NKG2-RH4P. *See In re Cadira Grp. Holdings, LLC Litig.*, 2021 WL 2912479, at *8 (Del. Ch. July 12, 2021) (holding that court may take judicial notice of public records for the fact "that they exist, are authentic and contain the content they purport to contain").

list of questions that included how their agencies "review foreign ownership or investment, particularly by Russian, Chinese, Iranian and North Korean individuals or organizations, with regard to companies who are under contract to provide goods or services." *Id.* at 2.

C. In October 2025, ProPublica reported that Kahlon had testified during a deposition that SpaceX had Chinese entities "directly on its cap table," prompting another Congressional inquiry.

In its September 2025 Order Regarding Access to Trial Materials, the Court of Chancery found that "the parties must file public versions of the portions of the lodged depositions that they used in their post-trial briefs or at trial." A506. One such portion of Kahlon's deposition contained testimony to the effect that SpaceX had permitted Chinese investors to purchase shares in its company directly, as opposed to indirectly, through an intermediary like the Anduril III Fund. B386. ProPublica published reporting based in part on this testimony on October 2, 2025. Elliott & Kaplan, *Elon Musk's SpaceX Took Money Directly from Chinese Investors, Company Insider Testifies*, *supra*.

On February 5, 2026, two U.S. Senators wrote to Secretary Hegseth citing ProPublica's March and October 2025 reporting. Letter from Warren & Kim to Hegseth, *supra*. The letter expressed the Senators' concerns that SpaceX's foreign ownership "ties could pose a national security threat, potentially jeopardizing key military, intelligence, and civilian infrastructure." *Id.* at 1.

ARGUMENT

I. There is no reversible error in the Court of Chancery's orders denying Appellants' motion to seal Joint Exhibits 536 and 537.

Question presented:

1. Whether the Court of Chancery abused its discretion when it held that Appellants failed to satisfy the requirements of Rule 5.1(b), and thus could not maintain the redactions they made to certain information in JX 536 and 537.

ProPublica preserved this issue at A379–80, A581–82, A611–18, A639–46

Scope of review:

"This Court reviews the trial court's decision to seal or unseal documents for abuse of discretion." *Hurd v. Espinoza*, 34 A.3d 1084, 1086 (Del. 2011), as corrected (Dec. 29, 2011) (affirming Court of Chancery's decision to deny confidential treatment under Rule 5(g), the predecessor to Rule 5.1).[5] The Court also reviews credibility determinations for abuse of discretion. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

Appellants misinform the Court on this point. *See* Appellants' Br. 18. Appellants' question presented and argument do not challenge the "applicability" of Rule 5.1—Appellants agree with the Court of Chancery that the rule applies but take

[5] The Court of Chancery "was motivated to revise Rule 5(g)[,] in part because too much information was being deemed confidential," leaving the public "with an improperly narrow view into the case[s] before the Court." *Al Jazeera Am., LLC v. AT & T Servs., Inc.*, 2013 WL 5614284, at *3 (Del. Ch. Oct. 14, 2013).

issue with the result of that application. Nor do appellants raise an issue about the construction of any term within Rule 5.1 or that rule as a whole. Instead, Appellants address their argument to whether they made the required showing to satisfy the requirements of the rule. *Id.*[6]

Below, the burden was on Appellants to demonstrate that continued confidential treatment of the redacted information in JX 536 and 537 was warranted. Rule 5.1(g)(6)(D). To do so, they were required to show that their redactions sealed "confidential information" by demonstrating that each of the following conditions were met:

> (b)(2) "Confidential Information" means information:
>
> (A) that is maintained confidentially;
>
> (B) that is not otherwise publicly available;
>
> (C) where public access to the information will cause particularized harm;
>
> (D) where the magnitude of the harm from public access to the information outweighs the public interest in the information.

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[6] If an issue of law or the construction of Rule 5.1 had been raised in Appellants' opening brief, *de novo* review of that issue would be appropriate. But no such issue is presented. *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) ("[T]he appealing party's opening brief [must] *fully* state the grounds for appeal, as well as the arguments *and supporting authorities* on each issue or claim of reversible error." (emphasis in original)).

Rule 5.1(b)(2).

Merits of argument:

A. Appellants failed to demonstrate that public access to Joint Exhibits 536 and 537 would cause particularized harm.

The Court of Chancery was well within the bounds of its discretion when it determined that Kahlon's affidavit in support of sealing was too conclusory, exaggerated, and speculative to demonstrate that public access to the information in JX 536 and 537 would cause particularized harm. Appellants' Br., Ex. A at 3; *Id.*, Ex. B at 5–6. Appellants failed to establish that unsealing those exhibits would damage Kahlon's business, unduly help his competitors, or harm third parties.

First, the Court of Chancery correctly rejected Appellants' conclusory argument that the disclosure of any confidential information was intrinsically harmful. Kahlon averred that "revealing the identities of TBC's investors (which would also provide details about TBC's investment strategy) would effectively publicize the confidential relationships and business methods that are central to TBC's operations and competitive advantage." A603. Put differently, if the redacted information were *revealed*, the same information would be *provided* and perhaps even *publicized*. This is a tautology, not a demonstration of particularized harm. Appellants' Br., Ex. A at 3 (holding that this amounted to "a circular claim that the information needs to be kept confidential because it has been kept confidential").

In fact, Rule 5.1, which went into effect on January 1, 2013, was amended in June 2024 in part to clarify that confidentiality alone is not enough to justify continued sealing. "[P]roprietary financial, business, or personal information that would generally be considered private or is not available to the public ... will not qualify as Confidential Information unless the information *also* meets the requirements of Rule 5.1(b)(2)(C) and (D)." Rule 5.1 (West), cmt; *see, e.g.*, *Twitter, Inc. v. Musk*, 2024 WL 4441869, at *3 (Del. Ch. Oct. 8, 2024) (company policy of not sharing junior-level employee names was insufficient for confidential treatment of those names absent a showing of particularized harm).

Second, the Court of Chancery was correct that Kahlon's affidavit exaggerated and speculated about potential competitive harm to TBC LP. Appellants' failed attempt to demonstrate competitive harm was similar to that rejected in *In re Boeing Company Derivative Litigation*, 2021 WL 392851, at *4 (Del. Ch. Feb. 1, 2021). There, Boeing sought to maintain confidentiality over of what it deemed "'sensitive business information,' including Boeing's suppliers, competitive strategy, and motivation for certain design improvements." *Id.* at *4. Despite Boeing's description of that information, the Court of Chancery held that it "failed to articulate any particularized harm from disclosing the redacted information." *Id.*; *see also Al Jazeera Am.*, 2013 WL 5614284, at *4–5 (holding that information parties characterized as "proprietary" and "sensitive" could not be kept confidential "merely

because disclosure has the potential for collateral economic consequences"). As in *In re Boeing*, Appellants' demonstration was speculative. Kahlon's affidavit conjured "the risk of competitive harm," and speculated about how "competitors could ... use this information" and how "counterparties could exploit it." A602–04. Boeing, similarly, "merely speculat[ed]" that it "'could be harmed' and that the information 'could be used to put Boeing at a competitive disadvantage.'" 2021 WL 392851, at *4. Kahlon, like Boeing, failed to "point to specific information like trade secrets or competitively sensitive pricing information that ... if disclosed, will cause clearly identified harm." *Id.* at *2.

Another instructive case is *In re Oxbow Carbon LLC*, in which the parties sought continued confidential treatment for an array of information about a privately held entity run by "notable individuals," including "the profitability of the non-Company investments of certain Company investors," and "the size of each unitholder's stake in the Company." 2016 WL 7323443 at *3 (Del. Ch., Dec. 15, 2026). Noting that "[g]eneric statements of harm are insufficient to overcome the public right of access," the Court of Chancery held that "the parties ... failed to establish the degree of harm necessary to support confidential treatment for the [c]hallenged [i]tems." *Id.* at 23.

These cases stands in stark contrast to two cases on which Appellants rely, *Uvaydov v. Fenwick-Smith*, 2023 WL 4614766 (Del. Ch. July 18, 2023) and *In re*

Lordstown Motors Corp. Shareholders Litigation ("*Lordstown*"), 2022 WL 601120 (Del. Ch. Feb. 8, 2022). Both cases involved motions to redact customer lists in the nascent, highly competitive marketplace for electric vehicles, conditions not present here. Appellants' Br., Ex. B at 6. As the Court of Chancery recognized, Kahlon "does not offer undifferentiated investment advice or access to comparatively generic investment funds." Appellants' Br., Ex. B at 6. He offers "access to indirect investment in SpaceX," which "undercuts the poaching risk." *Id.* Similarly, *BitGo Holdings, Inc. v. Galaxy Digital Holdings*, 2026 WL 992443 (Del. Ch. Apr. 13, 2026), involved a motion to redact sensitive internal financial information, not lists of limited partners or investors. The case does not stand for the proposition that disclosure information at issue here would effectuate competitive harm. And *Surf's Up Legacy Partner LLC*, 2022 WL 1925999, which was issued under a different standard altogether—Superior Court Rule of Civil Procedure 5(g)—and involves a *discovery protective order*, not judicial records, is even less instructive.

In addition, the usefulness of Appellants' cases is limited because those cases do not specify whether the factfinder required the movant to show "tangible evidence of concrete damage" to satisfy Rule 5.1(b). In the Court of Chancery's September 15, 2025, order, it issued a construction of "particularized harm," specifically, that "[t]he harm cannot be general but must be particularized, and a person must proffer 'tangible evidence of concrete damage.'" A498, n.71 (citing *In re Oxbow Carbon*,

2016 WL 732443, at *2).[7] Appellants did not appeal that order, seek reconsideration, or even assert an alternative construction in their October 2025 Motion for Continued Confidential treatment, A590–594. Predictably, the Court of Chancery used the same construction in its January 28, 2026 order. Appellants' Br., Ex. A at 2 (citing *In re Oxbow Carbon*, 2016 WL 732443, at *2). Appellants' opening brief does not assign error to that construction. *See generally* Appellants' Br. 25–33. It is therefore both the law of the case, by virtue of the Court of Chancery's September 2025 order, and waived as an issue on appeal. *See Scharf v. Edgcomb Corp.*, 864 A.2d 909, 915 (Del. 2004) (holding that in the absence of a timely appeal, a legal standard established in an earlier Chancery Court ruling in the same matter becomes the law of the case); *Flamer*, 953 A.2d at 134 ("[T]he failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal.").

[7] *See also Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004) (applying same standard). And similar showings are required elsewhere. *See, e.g.*, *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 491 (Ohio 2012) (discussing "clear and convincing evidence" standard for sealing under Ohio rules of court); *Lederman v. Prudential Life Ins. Co. of Am.*, 385 N.J. Super. 307, 317, (N.J. App. Div. 2006) ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient.").

Further, unlike Appellants' cases, the Court here found that Appellants' claim of particularized harm was not credible and was undercut by the evidentiary record. The court noted that Kahlon's trial testimony had severely damaged his credibility:

> After hearing Kahlon testify at trial and observing his demeanor, the court had a negative impression of Kahlon's credibility. He came across as someone who shoots from the hip and says what he thinks will get him the result he wants. He misled Leo Group about SpaceX's level of concern about investors from China. He misled SpaceX … He even spoliated evidence. He was not a reliable witness. The court was and remains unpersuaded by his testimony.

Appellants' Br., Ex. B at 6–7 (citations omitted). Against that backdrop, the court noted that the record "undercut Kahlon's claims about the importance he places on the confidentiality of investor names," *id.* at 2, which led it to conclude that Kahlon had "exaggerat[ed]" the economic harm his firm would suffer if JX 536 and 537 were disclosed, Appellants' Br., Ex. A at 3. As an example, the Court of Chancery pointed out that Kahlon had encouraged a friend of his named Lance Liu "to use the details of Leo Group's investment to drum up other investors." Appellants' Br., Ex. A at 3–4; *see also* A373. And given its assessment of Kahlon's credibility, the Court of Chancery was correct to discount Appellants' subsequent suggestion that Liu was subject to a nondisclosure agreement. Appellants' Br. Ex. B at 2. The purported NDA was not placed in the record—even during briefing about the confidentiality of JX 536 and 537. Its scope (let alone its existence) is not ascertainable at this stage.

In any event, Kahlon's message to Liu was not the only example the court could have chosen. In February 2021, Kahlon sent a message to a recipient outside of TBC LP that read, "Carlos / Tyler likely delivered a big [LP]. Seems like Richard Li is coming in for [20 million]." B299 at 9. In November 2021, Kahlon dropped a thinly veiled reference to Kaiser Permanente in another external message, writing "my other big LP is a big [U.S.] hospital system with [200 billion] in [assets under management]." B333 at 43. And in April 2025, Appellants filed a public version of a trial exhibit containing an email in which Kahlon wrote to Johnsen at SpaceX, "please find the investor information for our vehicle that will be purchasing the [$528 million block of] shares per the two SPAs submitted last week."

Investor Name	Country	Comment
Kaiser Permanente Pension Plan	US	US Hospital System
Kaiser Permanente Foundation	US	US Hospital System
Ace & Company	Swiss	Said family office (originally from Egypt, Swiss, existing SpaceX LP)
Bracket Capital	US	LA based fund, Qatari Royal Family LPs (existing SpaceX LP)
Stelac Advisory	US	NYC based family office, Bemberg family (existing SpaceX cap table inve
UMB	US	Kansas city based Bank
Gio Agostinelli	US	Family office, Rhone Group
Steppe Capital	Kazakhstan	Family office, Nazarbayev's son in law
Antenna Group	Greek	Family office, Theo Kyrikou, Greek shipping family (one of the largest one
Kirkland & Ellis	US	US partners of Kirkland & Ellis; our lawyers
Nurali Aliyev	Kazakhstan	Family office, Nazarbayev's grandson; our friends that are helping Brian S
Scott Norman / Handley Investment Trust	US	Ex-SpaceX employee / former co-worker at Mithril
Rajeev Goyal	US	Doctor / family friend
Gina Cibuzar	US	CFO @ TBC
David Fisch	US	Ex-Facebook; Venture Partner @ TBC
Milan Kovac	US	Tesla Autopilot lead, reports to Elon
Crestview Ventures, LLC / Iqbaljit Kahlon	US	My trust

B238; *see* A352 ¶ 3 ("Defendants do not object top [filing a public version of] … JX_1040"). Given the disclosures in the evidentiary record, Kahlon's credibility issue, and the spoliation of some of Kahlon's communications, the Court of

Chancery was on solid ground when it decided that Kahlon's testimony and affidavit were exaggerated.

Finally, the Court of Chancery did not fail to "grapple" with any expectation that Kahlon's limited partners may have had that Kahlon would treat their identities as confidential. *Contra* Appellants' Br. 32. Instead, the Court of Chancery held that while the "desire by limited partners to invest secretly," as described by Kahlon, "warrants some weight," it nonetheless "cannot overcome the public interest in this case." Appellants' Br., Ex. B at 5. The thrust of Appellants' attempted demonstration on this point was Kahlon's statement that TBC LP "include[s] restrictive provisions regarding Confidential Information in [its] Limited Partnership Agreements." A602. But the purported restriction says nothing about Kahlon's own confidentiality obligations. A753.

McDonnell v. U.S., 4 F.3d 1227 (3d Cir. 1993), a case involving the statutory privacy exemption in the federal Freedom of Information Act ("FOIA"), is not relevant to this analysis. Appellants' Br. 32–33; *see, e.g.*, *Kamakana v. City & Cty. of Honolulu*,, 447 F.3d 1172 (2006) (holding that in the context of court records, it "does not suffice to show … that a document merits sealing because it would be exempt under [FOIA]."). And further, as the Court of Chancery pointed out, "[c]onfidentiality agreements routinely provide that information can be disclosed when required by law. That is all that is happening here. Parties understand that

risk." *Id.* at 5–6; *see* A753–54 (confidentiality provision for limited partners in Kahlon's fund limited by potential legal requirement of disclosure); *see also Al Jazeera Am.*, 2013 WL 5614284, at *3 ("[A] confidentiality provision, even when carefully negotiated, cannot form the basis for this Court to treat contractual provisions as confidential under Rule 5.1 ... .").

In sum, The Court of Chancery properly assessed Kahlon's affidavit for its evidentiary weight and credibility. Its determination that Appellants failed to demonstrate particularized harm was not an abuse of discretion.

B. The public interest in Joint Exhibits 536 and 537 far outweighs any harm that may result from their disclosure.

The Court of Chancery also correctly held that there is a strong public interest in JX 536 and 537. Appellants' Br., Ex. B at 3–5; Ex. A at 4.

First, the information in Joint Exhibits 536 and 537 will help the public assess (i) Kahlon's judgment in managing the relationship of the Anduril III Fund to Leo Investments, A463 (discussing "reasonable judgment" clause of Parties' the Parties' limited partnership agreement); *accord* A743; and (ii) the Court of Chancery's holding that Kahlon did not have a conflict of interest with respect to his management of the Anduril III Fund, given the other funds he managed. The business and political interests, corporate parentage, organizational structure, and ultimate beneficial ownership of the limited partners in Kahlon's funds relate directly to those questions.

Throughout their case, the Parties and the court probed Kahlon's experience with other limited partners in his funds. Appellants argued that Kahlon's decision to bring on a subsidiary of Leo Group as an indirect investor was sound, based on his experience with his other limited partners; he knew that "[w]hile SpaceX's CFO preferred not having indirect investors from hostile nations, SpaceX had no such policy, and Kahlon had previously taken on investors from China." B134–35. Leo Investments argued that Appellants breached their duty of loyalty through "woefully deficient decision-making," also citing in part Kahlon's testimony about his experience with other limited partners. B91. And the Court of Chancery stated that it was "true that Kahlon's interests were not fully aligned with those of the [Anduril III Fund] and the partners as a whole. He wanted to preserve his relationship with SpaceX and the Musk-iverse across time, *multiple funds*, and every possible Musk-controlled entity." A439 (emphasis added). The public has a strong interest in the information in JX 536 and 537 to assess the court's conclusion that Kahlon "conceivably might ... have prioritized the interests of another fund that he had formed. But he didn't." *Id.*

And, of course, JX 536 and 537 were cited by the Court of Chancery in its post-trial opinion resolving the underlying litigation. A394, A395, A401.[8] That fact

[8] Moreover, as Appellants belatedly clarified, JX 536 and 537 used throughout the underlying case even before the Court of Chancery cited them in its post-trial

alone distinguishes this case from those cited by Appellants. *See also, e.g.*, *Mu v. Zhang*, 2025 WL 3174634 (Del. Ch. Nov. 3, 2025) (redaction of information from a complaint); *Uvaydov*, 2023 WL 4614766 (same); *In re Lordstown*, 2022 WL 601120 (same); *Tornetta v. Musk*, 2022 WL 130864 (Del. Ch. Feb. 8, 2022) (redacted complaint, discovery materials, and discovery motions); *BitGo Holdings*, 2026 WL 992443, at *1 (redaction of deposition transcripts filed in support of a denied motion for leave to file summary judgment).

As the Court of Chancery recognized, information cited in the Court's order resolving the claims of the case sits at the apex of public interest, because it permits the public to assess how its courts have functioned. A499 n.73 (collecting cases). Appellants did not appeal that September 2025 holding. But in any event, the Court of Chancery is entitled to deference for its determination that this was "information that the court used in making [its] finding" Appellants' Br., Ex. A at 4, and that the "exhibit[s] helped the Court decide the case" *Id.*, Ex. B at 4.

Second, Appellants cannot, at this late date, contest the relevance and materiality of the information in JX 536 and 537. Del. R. Evid. 103(a)(1)(A) ("A

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opinion. *See* Letter from Appellants to Lisa A. Dolph, Clerk of the Supreme Court of Delaware (May 19, 2026) 3–4. Both exhibits were used during the deposition of TBC LP's CFO, Gina Cibuzar, which was lodged with the court as part of the trial record. *Id.*, Ex. A, Further, the Expert Report of Marc Brown, which was introduced during his trial testimony, cited JX 536. *Id.*

party may claim error in a ruling to admit or exclude evidence only if [it] ... timely objects."). Appellants stipulated to the admission of JX 536 and 537 into the record at the close of evidence in the absence of an objection. B35 ¶ 134; A513. And although Appellants objected to many of the exhibits on the Parties' Joint Exhibit List, no objections were made to the admission of the exhibits in question. *Compare* A367 (asserting relevance objections under Del. R. Evid. 402 to seventeen exhibits on a single page of the Joint Exhibit List) *with* A372 (no objections of any kind to the admission of JX 536 and 537); *see Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994) ("The definition of relevance encompasses materiality and probative value."). This also undermines Appellants' policy-based complaint that affirmance might "discourage parties from vigorously litigating claims and defenses." If information is truly "unnecessary to the court's decision, and immaterial to the public's understanding of [a] dispute," *see* Appellants' Br. 41, parties will not stipulate to its relevance and admission into the evidentiary record.

Third, public interest in litigation is not necessarily constrained to the questions of fact and law actually before a court. *Contra* Appellants' Br. 38–41. Instead, "the public's intense attention to [facts of the case] compels the conclusion that even the details are of interest." *In re Boeing Co.*, 2021 WL 392851, at *3.

This is not a situation like that in *Alixpartners, LLP v. Thompson*, 2019 WL 4014819 (Del. Ch. Aug. 19, 2019), in which "nobody seeks disclosure of [a contested

filing] other than" a "competitor" who hopes to "wield that exhibit against" the party seeking confidentiality. Rather, ProPublica and others have reported on the proceedings in this case. This has led to multiple Congressional inquiries, which were in turn the subject of additional coverage. Statement of Facts, Sections B, C; *see, e.g.*, Echo Wang & Joey Roulette, *Pentagon Asked to Probe SpaceX for Potential Chinese Ownership*, Reuters (Feb. 5, 2026), https://perma.cc/D4US-BG8Z. "This matter is of public interest, as evidenced by a number of stories in the press." *Sequoia Presidential Yacht Grp. LLC. v. FE Partners LLC*, 2013 WL 3724946, at *3 (Del. Ch. July 15, 2013).

And finally, Appellants selected the law of this state as the forum for resolution of this dispute and "fail[ed] to specify or otherwise opt for a private dispute resolution mechanism." *In re Oxbow Carbon LLC*, 2016 WL 7323443, at *3; A772; *see also* B111–12. That choice, along with the stipulation to the admission into evidence of JX 536 and 537, has consequences, among them a high likelihood that any evidentiary record will be publicly available. *In re Oxbow Carbon LLC*, 2016 WL 7323443, at *3 (quoting *Kronenberg,* 872 A.2d at 606-07); *see also Al Jazeera Am.,* 2013 L 5614284, at *7 ("[t]hose who decide to litigate in a public forum (rather than pursue a private dispute-resolution procedure) must do so in a manner consistent with the right of the public to follow and monitor the proceedings and result of their dispute.").

The Court of Chancery's finding that the public interest in JX 536 and 537 outweighs any harm caused by their disclosure was the right one. For that reason, and because they failed to demonstrate particularized harm, Appellants failed to satisfy the requirements of Rule 5.1(b).

II. Even if Appellants had met their burden under Rule 5.1, the Court of Chancery could not have restricted public access to Joint Exhibits 536 and 537, because Appellants did not overcome the presumption of access to those documents guaranteed under the First Amendment.

Questions Presented:

1. Is the test set forth in Chancery Rule 5.1 for maintaining confidentiality over judicial filings coextensive with the constitutional showing required to overcome the public's presumption of access to civil trial exhibits?
2. Did Appellants make the constitutionally required particularized factual showing that their redactions to the trial exhibits at issue were essential to protect a compelling interest and narrowly tailored to accomplish that interest?

ProPublica preserved these issues at A380–81, A582–83, A610–11, A647–49.

Scope of review:

The Court "may rule on an issue fairly presented to the trial court, even if the court did not expressly address it," and, likewise, "may affirm on a different basis than the rationale articulated by the trial court." *Rosas-Jose v. State*, 2023 WL 6210709, at *3 (Del. Sep. 25, 2023); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

While the Court "address[es] any statutory violation before reaching questions under the United States and Delaware Constitutions," *Culver v. State*, 956 A.2d 5, 7 n.1 (Del. 2008), it decides constitutional questions when doing so is "essential to the disposition of the case." *Wheatley v. State*, 465 A.2d 1110, 1111 (Del. 1983). Accordingly, should this Court decline to affirm the Court of Chancery's order under Rule 5.1, consideration of ProPublica's constitutional claims would be appropriate.

Merits of Argument:

Appellants concede, as they must, that the state and federal constitutions provide the public with a presumptive right of access to exhibits entered into evidence during a civil trial. Appellants' Br. 19.

However, Appellants are incorrect that the burden imposed by this presumption on a party seeking to seal a trial exhibit is the same as the requirements of Rule 5.1. *See id.* Instead, Rule 5.1 sets the floor—it is a requirement for *all* papers filed with the Court of Chancery, from discovery motions to status reports to dispositive briefing. Rule 5.1(a). But the inquiry does not necessarily end with Rule 5.1 when the judicial materials in question are trial exhibits. As set forth below, the First Amendment requires that exhibits submitted to a civil court at trial (and in other situations involving an adjudication of a party's rights) be held to a higher standard. "To overcome the presumption of openness once a qualified right of access attaches, a trial court must find that 'closure is essential to preserve higher values and is

narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Gannett Co. v. State*, 571 A.2d 735, 742 (Del. 1989) (quoting *Press-Enter. Co. v. Superior Ct. of Cal.* ("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984)).

Because Appellants have not met the weighty burden required to overcome this presumption, JX 536 and 537 should be unsealed.

A. The First Amendment guarantees a presumptive right of public access to trial exhibits.

The U.S. Supreme Court has held that the First Amendment provides a presumptive right of access to certain judicial proceedings and records, *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion); *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 603–05 (1982).[9] In deciding whether the constitutional right of access attaches to particular records, courts look to the "complementary considerations" of "experience and logic," asking "whether the place and process have historically been open to the

[9] Though this Court has yet to consider the scope of a right of access provided under article I, section 5 of the Delaware Constitution, it has on multiple occasions noted that the provision is co-extensive with the federal First Amendment. *In re Opinion of the Justs.*, 324 A.2d 211, 213 (Del. 1974) ("[I]t is probable that the free press provision of the Delaware Constitution, Art. 1, s 5, has the same scope as the First Amendment."); *Gannett Co.*, 571 A.2d at 740 n.9 ("We have previously noted that [Del. Const. art. I, § 5] has the same scope as the federal first amendment.").

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 Ct. of Cal.* ("*Press-Enterprise II*"), 478 U.S. 1, 8 (1986); *Gannett Co.*, 571 A.2d at 742–43 (adopting *Press-Enterprise II* principles to determine whether First Amendment presumption of access applies). Appellants have conceded that the First Amendment presumption is present here. Appellants' Br. at 19. But to be sure, experience and logic confirm that JX 536 and 537 must be made accessible to the public unless that presumption is overcome.

1. There is a robust historical tradition of public access to exhibits submitted to a court during a civil trial.

Civil judicial proceedings have historically been open to the public and press. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 580 n.17 ("[H]istorically both civil and criminal trials have been presumptively open."); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) (finding historical right of access to civil judicial proceedings and records); *see also Kronenberg v. Katz*, 872 A.2d at 607 n.80 (collecting cases). This tradition of access "flows from an 'unbroken, uncontradicted history' rooted in the common law notion that 'justice must satisfy

the appearance of justice.'" *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (quoting *Richmond Newspapers*, 448 U.S. at 573–74).[10]

Courts widely agree that this historical right of access attaches to documents that "are used to determine litigants' substantive legal rights," *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006), and are part of "the record on which a judge actually decides the central issues in a case," *In re Bos. Herald, Inc.*, 321 F.3d 174, 189 (1st Cir. 2003); *see also In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) ("The status of a document as a 'judicial record,' in turn, depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings."). Accordingly, this tradition guarantees public access to materials entered into evidence, such as trial exhibits. *See, e.g.*, *Littlejohn v. Bic Corp.*, 851 F.2d 673, 684 (3d Cir. 1988) ("The presumption of public access to evidentiary materials is strong."); *Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1308, 1313 (7th Cir. 1984) (describing tradition of access to records "introduced into evidence and relied on to make a decision"); *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995)

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[10] In evaluating the "experience" prong, courts do "not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (emphasis in original) (internal quotations omitted); *see also Gannett Co. v. State*, 571 A.2d at 744.

("We have also consistently held that the public has an 'especially strong' right of access to evidence introduced in trials."); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) ("[O]nly the most compelling showing can justify post-trial restriction on disclosure of testimony or documents actually introduced at trial.").

That the Parties did not choose to show these exhibits at trial does not change this result. When a document is admitted into evidence—whether that be at trial or by pre-trial stipulation—it becomes, "simply by virtue of that event, subject to the public right of access." *Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 589 (E.D. Va. 2009). Because "the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision," *Lugosch*, 435 F.3d at 123, the right applies to all evidentiary material in the record before the court, regardless whether that material "actually played a role in the court's deliberations," *United States v. Kravetz*, 706 F.3d 47, 58–59 (1st Cir. 2013), or whether the material was shown at trial, *In re Bard IVC Filters Prods. Liab. Litig.*, 2019 WL 186644, at *3 (D. Ariz. Jan. 14, 2019).

In *In re Bard*, for example, a federal district court held that the right of access applied to 80 trial exhibits the parties had admitted into evidence but ultimately opted not to show in open court. 2019 WL 186644, at *1. The court reasoned that exhibits "admitted into evidence," even if "not openly displayed or discussed in court," are "judicial records subject to the public right of access." *Id.* at *3–4.

Though the exhibits at issue had not been "filed with the [c]ourt or made part of its electronic docket," the exhibits "sprang into existence upon their being offered into evidence" and mandated their disclosure. *Id.* at *3 (internal quotations omitted). Here, too, JX 536 and 537 became judicial records when they were admitted into the record on which the Court of Chancery would decide this case. The longstanding tradition of contemporaneous access to judicial records—which "attaches immediately upon their filing," *United States ex rel. Oberg v. Nelnet, Inc.*, 105 F.4th 161, 172 (4th Cir. 2024)—confirms that they are presumptively public under the First Amendment.

2. Public access to trial exhibits enhances the functioning of the civil trial.

Public access to civil judicial records, including trial exhibits, "plays a significant positive role in the functioning" of the civil justice system. *See Press-Enterprise II*, 478 U.S. at 8. As the Third Circuit has recognized, "the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud." *Littlejohn*, 851 F.2d at 678. Allowing the public to scrutinize evidentiary materials enables the public to "serve as a check upon the judicial process," enhancing "the quality and safeguard[ing] the integrity of the factfinding process." *Publicker Indus.*, 733 F.2d at 1068 (citing *Globe Newspaper Co.*, 457 U.S. at 606); *see also Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); *Horres v. Chick-fil-A, Inc.*, 2013 WL

1223605, at *1 (Del. Ch. Mar. 27, 2013) ("Publicity of such records ... is necessary in the long run so that the public can judge the product of the courts in a given case." (internal quotations omitted)). Notably, this insight also undermines the parade of horrible Appellants imagine will occur if the Court of Chancery is affirmed. *See* Appellants' Br. 41. Access to judicial records *promotes* accountability and confidence in the courts.

The access ProPublica seeks in this case is "an essential component in our system of self-government." *Publicker Indus.*, 733 F.2d at 1068 (citations omitted). The "common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs,'" *Globe Newspaper Co.*, 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966), is particularly salient here, given that the information in question may reveal concealed foreign investment in a major U.S. defense contractor.

B. Appellants failed to make a particularized showing that would overcome the constitutional presumption of access to Joint Exhibits 536 and 537.

Where, as here, the constitutional presumption of access attaches to judicial records, it can be overcome only "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510; *Gannett Co.*, 571 A.2d at 742. "The burden to overcome a First Amendment right of access rests on the party seeking to

restrict access, and that party must present specific reasons in support of its position." *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004); *see also Press-Enterprise II*, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion ... .").

Appellants have never—here or in the proceedings below—articulated an "overriding" interest in sealing or shown that the sweeping redactions in JX_536 and JX_537 are "narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. Instead, Appellants have only—erroneously—argued good cause to seal pursuant to Rule 5.1. *See* Appellants' Br. at 18; A589–90; A623. But the burden to overcome the constitutional presumption is notably heavier than the burden under Rule 5.1, which instructs courts to balance "the public interest in the information" against the "particularized harm" of disclosure. Rule 5.1(b)(2).

The latter standard mirrors a common law presumption, under which courts conduct a balancing of the magnitude of harm caused by disclosure against the interests of the public. The First Amendment requires no such balancing. *See also In re Cendant Corp.*, 260 F.3d at 198 n.13 ("The First Amendment right of access requires a much higher showing than the common law right to access ... ."); *Virginia Dep't of State Police*, 386 F.3d at 575 ("[T]he common law does not provide as much access to the press and public as does the First Amendment." (internal quotations

omitted)). Appellants' asserted interests in continued sealing fall well short of meeting this burden.

First, Appellants' speculative and generalized concerns about potential economic harm do not amount to a compelling interest. Even under the less-stringent common law standard, courts have routinely found parties' "vague assertions" that material "contains secretive business information, and that disclosure would render [them] at a tactical disadvantage," "insufficient" to justify sealing. *In re Avandia*, 924 F.3d at 676 (applying common law standard); *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 307 (6th Cir. 2016) (finding generalized "concern about competitively-sensitive financial and negotiating information ... inadequate" to overcome common law presumption) (internal quotations omitted); *Genentech, Inc. v. Amgen, Inc.*, 2020 WL 9432700, at *2 (D. Del. Sep. 2, 2020) (explaining that common law presumption cannot be overcome by "vague, conclusory assertions of commercial or competitive harm").

Accordingly, "confidential commercial information" is typically subject to the constitutional right of access may be sealed only where the information amounts to a "trade secret" and disclosure poses "a sufficient threat of irreparable harm" to the party seeking closure. *Publicker Indus.*, 733 F.2d at 1071, 1074; *see also Littlejohn*, 851 F.2d at 685 ("[N]on-trade secret but confidential business information is not entitled to the same level of protection from disclosure as trade secret information.");

Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983) ("[A] court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.").

Appellants' self-serving and generalized assertions that the names and business information redacted in JX 536 and 537 are "highly confidential" and "sensitive" fall well short of this demanding standard. A601. Confidentiality alone "does not make [the information] a trade secret." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000); *Littlejohn*, 851 F.2d at 685 ("[D]ocuments do not contain trade secrets merely because they are confidential.").

Nor can Appellants' conclusory allegations of a "risk of competitive harm," A601, show that disclosure would "work a clearly defined and serious injury" to their commercial interests, *Publicker Indus.*, 733 F.2d at 1071. As explained *supra*, Kahlon's descriptions of the harm that will befall TBC should this information be disclosed are vague at best. And as the Court of Chancery recognized, they also "appear to be exaggerations," Appellants' Br., Ex. A at 3, undercut by "Kahlon's own conduct," *id.* at 4, and by "[t]he special nature of Kahlon's business," which "enjoys a protected market niche" with diminished "poaching risk," *id.* at 6.

Second, Appellants have asserted no cognizable—let alone compelling—privacy interest in information redacted in JX 536 and 537. Privacy interests may justify sealing only where disclosure would "inflict unnecessary and intensified

pain," *See United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (applying common law standard), or result in "specific, severe harm," *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412 (1st Cir. 1987) (same). Thus, courts have found "compelling" privacy interests where disclosure would, for example, expose "minor victims of sex crimes [to] further trauma and embarrassment," *Globe Newspaper Co.*, 457 U.S. at 607, or damage the reputations of unindicted individuals subject to criminal investigations, *see, e.g.*, *United States v. Smith*, 776 F.2d 1104, 1113–14 (3d Cir. 1985).

Appellants insist that disclosure would undermine the named investors' "strong and well-established expectation of confidentiality" and occasion "the loss of privacy that TBC's investors expect and rely upon." A601–02. But the investors' "desire ... to invest secretly" certainly cannot justify sealing under the constitutional standard. These investors' desire to avoid "unwanted attention" and "public scrutiny, criticism, or questioning," A604, is not a compelling reason to deny the public access. *See In re Avandia*, 924 F.3d at 676 (noting that "concern about a company's public image, embarrassment, or reputational injury, without more, is insufficient to rebut" the less-stringent common law presumption).

Moreover, even if Appellants could assert a cognizable privacy interest in some of this information, Appellants' sweeping redactions would not be "narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510; *Globe*

Newspaper Co., 457 U.S. at 607–09. Less restrictive means—such as limited redactions only of employer identification numbers for non-public companies and email addresses—would adequately protect privacy interests in contact and financial information without burdening the public's constitutional right of access.

In sum, Appellants have not, and cannot, overcome the weighty constitutional presumption in favor of access to JX_536 and JX_537. Thus, the First Amendment guarantees ProPublica, and all members of the public, a right to access these exhibits.

CONCLUSION

The Court should affirm the Court of Chancery's denial of Appellants' motion for continued confidential treatment of JX 536 and 537. Given the accelerated date of the SpaceX IPO, if the Court is able to reach a decision prior to oral argument, ProPublica respectfully requests that it do so. Del. S. Ct. Rule 16(a). ProPublica also respectfully requests pursuant to Supreme Court Rule 19(a) that the Court issue its mandate forthwith upon its determination of this appeal.

Respectfully submitted,

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