No. 03-6747

In the
Supreme Court of the United States

M. K. B.,
Petitioner,
v.
WARDEN, ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

This case is perhaps the most egregious recent example of an alarming trend toward excessive secrecy in the federal courts, particularly in cases that bear even a tangential connection to the events of Sept. 11, 2001. The petitioner, known only as "M.K.B." in pleadings with this Court, is, according to news reports, an Algerian-born waiter in Florida who was detained for five months after the Sept. 11 attacks. He has since brought a habeas corpus challenge to his deportation proceedings. For reasons never disclosed, the district court overseeing his habeas case has conducted the proceedings in near-total secrecy, originally maintaining no public docket at all, and later listing all 65 docket entries as "SEALED." This approach, which the Eleventh U.S. Circuit Court of Appeals upheld, has prevented the public and the news media from monitoring the proceedings in any meaningful way, despite the potentially significant news value of the case. Accordingly, The Reporters Committee for Freedom of the Press, as *amicus curiae*, respectfully requests that the Court intervene to reverse the Eleventh Circuit and clarify that the public has a constitutional right of access to federal habeas corpus proceedings and records.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declares that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

SUMMARY OF ARGUMENT

The underlying habeas corpus proceeding in this case has been conducted in extraordinary, and unjustifiable, secrecy. The Reporters Committee, like other members of the public, is precluded from knowing all the facts,[2] but even the limited available information demonstrates a cavalier disregard for First Amendment values by the Eleventh Circuit and district court.

This Court has consistently recognized that the public has a First Amendment right of access to criminal proceedings, but it has never addressed whether the right extends to habeas corpus cases, which combine features of both criminal and civil proceedings. However, because the policy considerations underlying the right of access in criminal cases are largely similar to those in habeas corpus cases, the Court should accept review to clarify that the public has a constitutional right of access to habeas corpus proceedings and records.

Review is also appropriate because the Eleventh Circuit has sanctioned a drastic departure from the "accepted and usual course of judicial proceedings," S. CT. R. 10(a), which warrants reversal as an exercise of this Court's supervisory powers. Specifically, the district court's failure to issue a sealing order, make findings, explore less restrictive alternatives, or give the public an opportunity to be heard constitutes an egregious violation of well-settled law. Particularly in a case of significant public importance, it is imperative that this Court prohibit the abusive secrecy practices that have governed these proceedings.

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[2] The Reporters Committee's understanding of the facts of this case is primarily based on the heavily redacted petition for writ of certiorari filed by Kathleen Williams, Federal Public Defender for the Southern District of Florida. No other official record of the proceeding is available, because all other pleadings have been sealed, the attorneys are subject to a gag order, and the Solicitor General has opted not to file an opposition to certiorari.

ARGUMENT

I. The Court should grant review to define the scope of the public's First Amendment right of access to a federal habeas corpus proceeding.

This case has been conducted entirely behind closed doors. Initially, the docket itself was sealed, meaning there was not even a public record of the fact that a proceeding existed. Later, following a (secret) order by the Eleventh Circuit, the case was publicly docketed, but the district court was permitted to keep every individual entry under seal, effectively stripping the docket of useful information. As it stands now, the docket contains two entries reading, IN RE PETITION FOR WRIT OF HABEAS CORPUS, without listing the names of the parties or counsel. Each of the remaining 63 docket entries is listed as "sealed": SEALED DOCUMENT, SEALED MOTION, SEALED ORDER, SEALED NOTICE OF SEALED HEARING, SEALED MINUTES OF HEARING, SEALED TRANSCRIPT OF HEARING, or SEALED NOTICE OF APPEAL.

Such an arrangement should be held unconstitutional. This Court has not yet addressed whether the public has a First Amendment right of access to civil proceedings in general, but this case presents an opportunity for a more limited, but also valuable, holding. Namely, the Court should clarify whether the public has a constitutional right of access to pleadings and records in federal habeas corpus proceedings, a well-defined subclass of civil proceedings that implicates many of the same policy considerations supporting the established right of access to criminal cases.

A. The First Amendment and this Court's jurisprudence support recognition of a qualified public right of access to federal habeas corpus proceedings.

This Court has consistently recognized that the public and press have a presumptive First Amendment right of access to all

judicial proceedings in criminal cases. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (finding a public right of access to criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute mandating closure of courtroom during testimony of minor victims of sex crimes violated the First Amendment); *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984) (recognizing public right of access to *voir dire* proceedings); *Waller v. Georgia*, 467 U.S. 39 (1984) (right of access to hearing on motion to suppress evidence); *Press Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986) (right of access to pretrial hearings); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (right of access to preliminary hearing).

The right is based on the "unbroken, uncontradicted history" of public criminal proceedings in Anglo-American law and the positive contribution of openness toward the historical function of the proceedings. *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion); *see also Press-Enterprise I*, 464 U.S. at 505-07 (discussing history of openness in criminal trials). Among other benefits, the public's ability to observe criminal proceedings enhances the legitimacy of verdicts, fosters both fairness and the appearance fairness, and guards against abuse. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe*, 457 U.S. at 606.

Accordingly, a judge may close proceedings in a criminal case only after making specific, on-the-record findings that "closure is essential to preserve higher values [than the public's right of access] and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510.

The Supreme Court has not directly addressed whether the public also has a constitutional right of access to civil cases

generally,[3] or to habeas corpus proceedings in particular. Although habeas proceedings are technically civil actions, courts have recognized that they combine elements of both civil and criminal cases. *See, e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) ("[H]abeas corpus cases are, in effect, hybrid actions whose nature is not adequately captured by the phrase 'civil action'; they are independent civil dispositions of completed criminal proceedings.") Nevertheless, the public's right of access to habeas corpus proceedings has not been definitively established.

The criminal-law characteristics of a habeas corpus proceeding implicate many of the same concerns that have animated this Court's recognition of a constitutional right of access to criminal proceedings, however. The legality of a person's confinement in prison goes to the heart of public confidence in the fairness of the criminal justice system; if a prisoner is being detained unlawfully, it is just as grave an injustice as if the person is wrongfully convicted. Excluding the public and press from habeas proceedings precludes independent observation of whether standards of fairness are being met with respect to the

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[3] *But cf. Richmond Newspapers*, 448 U.S. at 580 n.17 (Burger, C.J., plurality opinion) (noting that "historically both civil and criminal trials have been presumptively open"). Numerous federal courts have recognized a public right of access to proceedings and documents in civil cases, though they have differed on the origin and scope of the right. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (right of access to preliminary injunction hearing); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984) (contempt hearing); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (First Amendment limits judicial discretion to seal documents in civil litigation); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (First Amendment right of access to proceedings and common-law right of access to documents in prison overcrowding lawsuit); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996) (right to attend civil trials is grounded in both First Amendment and common law).

detention of alleged criminals.

Ironically, the Eleventh Circuit – the court from which this appeal originates – has recognized, in an earlier case, that the public's constitutional right of access extends to civil cases that relate to the incarceration of prisoners. In *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), the court – applying this Court's First Amendment decisions in *Richmond Newspapers* and *Globe* – held that civil proceedings that "pertain to the release or incarceration of prisoners and the conditions of their confinement" are "presumptively open to the press and public." *Newman*, 696 F.2d at 801.

The *Newman* court specifically rejected a formalistic distinction between civil and criminal proceedings, focusing instead on the significance of the underlying issues:

> Focusing on the beneficial consequences of criminal trials being conducted in public, we see little difference between a criminal trial and the proceedings here which relate to the release of convicted prisoners. The litigation concerning penal administration in Alabama is of paramount important to the citizens of that state. They have a legitimate interest in learning which inmates are being released from prison and the reasons why. . . . If it is beneficial to have public scrutiny of criminal proceedings that may result in conviction and punishment, then it is also helpful to allow public access to civil proceedings that modify the earlier trials by freeing prisoners before their sentences are completed or parole has been granted.

Id.

Likewise, the press and public have a legitimate interest in knowing why M.K.B. has been detained and is now being deported, particularly given the government's allegations that

M.K.B. associated with terrorists.[4] That his habeas proceeding is technically a civil, rather than criminal, action bears little import for First Amendment purposes. The Court should grant review to make clear that the public and press have the same qualified right of access to habeas corpus proceedings that they enjoy with respect to criminal proceedings.

Of course, such a holding would not mean that judges can *never* conduct closed habeas proceedings, only that they would have to do so only on the basis of "finding specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enterprise I*, 464 U.S. at 510. This would represent a reasonable interpretation of this Court's holding in *Richmond Newspapers* and subsequent cases.

B. Recognition of a public right of access to habeas corpus proceedings is particularly crucial where, as here, the news media are otherwise prevented from reporting a case of great public interest.

It bears mentioning that the press and public might never have learned of this case at all but for an inadvertent error by a clerk at the court of appeals. According to newspaper accounts and M.K.B.'s petition, a clerk at the Eleventh Circuit mistakenly listed the proceeding on a public oral argument calendar and displayed it on PACER (the federal courts' electronic access system), prompting a nationally published newspaper story. *See* Dan Christensen, "Secrecy Within," DAILY BUS. REV., Mar. 12, 2003, at A1. Since then, the case has garnered

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[4]Because all the pleadings are sealed, the government's allegations are not fully known. But, according to a media report, the FBI submitted an affidavit to the judge overseeing M.K.B.'s case, in which the FBI quoted witnesses as saying that M.K.B. had "likely" served food to two Sept. 11 hijackers while waiting tables at a Florida restaurant and that he had gone to a movie with another of the hijackers. *See* Dan Christensen, "Secrecy Within," DAILY BUS. REV., Mar. 12, 2003, at A1.

additional media coverage, despite the fact that many aspects of M.K.B.'s story remain under seal. *See* Warren Richey, "Secret 9/11 Case Before High Court," CHRISTIAN SCIENCE MONITOR, Oct. 30, 2003 (*available at* www.csmonitor.com/2003/1030/p01s02-usju.html).

The excessive secrecy surrounding M.K.B.'s petition would be inexcusable under any circumstances, but it is particularly egregious in a case of potentially significant news value. Details of M.K.B.'s arrest and confinement could spark a healthy public debate about the means by which the government is conducting the war on terrorism.

At this point, it is impossible to judge whether M.K.B. was legitimately detained, or whether he was the victim of racial or ethnic profiling. It is also impossible to evaluate whether the government has a valid reason for deporting a man who had lived and worked peacefully in the United States for six years prior to his detainment. There may, in fact, be legitimate reasons for the government's actions against M.K.B. – but without any ability to observe the proceedings, the public and news media cannot be blamed for being skeptical. As this Court has recognized, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

II. Sealing all proceedings and records in a case, without articulating any findings to support doing so, constitutes a drastic departure from the "accepted and usual course of judicial proceedings" and warrants exercise of this Court's supervisory powers.

One of this Court's considerations for granting review is whether a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned

such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. CT. R. 10(a). This criterion is undoubtedly met here, as the Eleventh Circuit has sanctioned a drastic departure from the usual course of a habeas corpus proceeding.

It is neither typical nor constitutionally acceptable for a court to conduct a habeas corpus proceeding entirely in secret, without entering a sealing order, articulating any findings to support secrecy, or considering the possibility of less restrictive alternatives such as closing portions of hearings and redacting records.

First, it is well established that courts must make findings to support closing proceedings or keeping documents under seal. *See Brown v. Advantage Eng'g*, 960 F.2d 1013 (11th Cir. 1992) (vacating sealing order in civil case where district court did not state its reasons for sealing); *see also Cendent Corp. v. Forbes*, 260 F.3d 183 (3d Cir. 2001) (overturning confidentiality order where district court failed to make any findings to support sealing); *Union Oil Co. v. Leavell*, 220 F.3d 562 (7th Cir. 2000) (holding that it was improper for district court to seal "[a]lmost every document" filed in the case without making any findings in support); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (vacating order to seal plea agreement due to inadequate justification); *Application of Nat'l Broadcasting Co.*, 828 F.2d 340 (2d Cir. 1987) (vacating order sealing pleadings and exhibits, and remanding for more adequate findings and consideration of less restrictive alternatives).

Yet the court here made no finding at all to support a sealing order – indeed, according to the petition for writ of certiorari, the district court did not even enter a sealing order. It simply adopted a practice of sealing all pleadings and closing all hearings.

Second, the district court and Eleventh Circuit appear to have given no consideration to the possibility of fashioning a less restrictive alternative to blanket secrecy, such as redacting documents and selectively closing hearings. *See Kasza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where pubic release of court records presents a risk to national security, selective redaction is an appropriate response); *see generally Press-Enterprise I*, 464 U.S. at 510 (closure of proceedings must be "narrowly tailored" to serve the interest justifying the order). Is the public to believe that every sentence of every pleading in this case contains classified information?

Third, the court did not provide the public with notice and an opportunity to comment on its proposed closure orders, in violation of accepted procedural standards. *See Globe*, 457 U.S. at 609 n.25 ("[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'") (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., *concurring*)); *United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (court must provide notice on public docket of hearing to close proceedings).

Finally, the lower courts' handling of the case violates the established law of the Eleventh Circuit itself. As noted, the Eleventh Circuit held in *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), that the public and press have a right to attend civil judicial proceedings relating to the incarceration or release of prisoners. *See id.* at 801. A habeas corpus proceeding fits that bill precisely, yet the lower courts apparently ignored *Newman*.[5]

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[5]In the absence of a publicly available opinion on the closure of proceedings, it is impossible to say whether the courts attempted to distinguish *Newman*.

The court in *Newman* also recognized that the public's right of access to judicial proceedings is, in many instances, incomplete without access to court records as well. "This right, like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system." *Id.* at 803 (permitting The Birmingham News Company to inspect and copy prisoner lists and other documents filed with the court in civil lawsuit alleging prison overcrowding).

Likewise, the public has a presumptive right to inspect and copy pleadings, exhibits, and other documents filed with the court in the pending habeas corpus proceeding. Without such a right, any right of access to the proceedings themselves is seriously undermined. Yet the Eleventh Circuit has permitted the district court to maintain a docket that does not even provide the title of the pleadings, rendering it impossible to monitor what is taking place in the case.

CONCLUSION

This case has been conducted with unacceptable secrecy. The Court should grant review to clarify that the public has a First Amendment right of access to habeas corpus proceedings, on the basis that such proceedings implicate precisely the same concerns about the fairness of the criminal justice system that underlie the right of access to criminal proceedings.

Moreover, review is warranted to correct the lower courts' abusive secrecy practices in a case of significant public interest. If the district court closed M.K.B.'s habeas corpus proceeding to protect national security interests, it should be required to say so, and make findings in support; if its reason was something else, it should be required to identify the reason on the record. The court's failure to meet these rudimentary obligations, as well as to tailor its secrecy order narrowly and provide an

opportunity for public comment, constitutes a drastic departure from usual and accepted judicial practice, and warrants intervention by this Court.

Respectfully submitted,

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