No. 12-112

IN THE
Supreme Court of the United States

RICHARD ROE, *ET AL.*,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent,
v.

JOHN DOE,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

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

As advocates for the rights of the news media and others who gather and disseminate information about issues that affect the public, *amicus* has a strong interest in upholding the public's right to monitor and report on the proceedings of this nation's court system. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion), journalists need unfettered access to all information that sheds light on the function of the courts. This case involves one of the most significant impediments to that access: the impenetrable secrecy inherent when judicial proceedings are not only closed and records sealed but when entire cases are left off a court's docket so that there is no public acknowledgement of their very existence.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* state that counsel for all parties received timely notice of the intent to file the *amicus* brief; written consent of all parties to the filing of the brief has been filed with the Clerk of the Court; no counsel for a party authored the brief in whole or in part; and no person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Amicus curiae urges the Court to accept review of this case in order to clarify lower courts' authority to seal entire case files and wholly omit cases from the public docket.

Despite the profound issues at stake — organized crime, racketeering, conspiracy and fraud — this case was prosecuted entirely in secret for more than ten years and remains largely shielded from public view to this day. A search for the case on the district court docket yields only a statement that "[t]his case is under seal," and the circuit court opinions and petition for a writ of certiorari filed under seal with redacted copies for the public record are the only court documents that provide what limited information is available to the public.

This Court should clarify that such an arrangement is unconstitutional. More than thirty years ago, the Court recognized a presumptive right of access to criminal proceedings. *Id.* The Court has reiterated its holding repeatedly, and the circuits since have applied the same reasoning to find that the omission of an entire case from a court's docket violates this right of public access to judicial records. *Amicus* recognizes that various interests, including the need to protect national security information and undercover officers or witnesses in law enforcement investigations, may justify closed proceedings and sealed records in certain circumstances. They do not, however, generally justify complete docket secrecy, particularly when the interests at stake have not been properly articulated and balanced by the reviewing court. Even disputes about claims of national

security are litigated in the open: "Briefs in the *Pentagon Papers* case[2] and the hydrogen bomb plans case[3] were available to the press, although sealed appendices discussed in detail the documents for which protection was sought." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000).

While the law disfavors secret dockets, they are still used with alarming frequency by federal courts nationwide to hide sealed cases. When an entire case is sealed, rather than individual documents, effective newsgathering becomes impossible because those who are excluded from a particular proceeding have no notice of a case's existence and thus are precluded from objecting to that exclusion. And the effects of such secrecy are significant: Cases of important public interest and concern proceed behind a veil of secrecy, eroding the openness that is fundamental to the administration of justice.

Review is also appropriate because the U.S. Court of Appeals for the Second Circuit in the opinion below has sanctioned a drastic departure from the "accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), which warrants reversal as an exercise of this Court's supervisory powers. The complete secrecy in this case — as well as the lower courts' failure to issue sealing orders, make any individualized findings, explore less restrictive alterna-

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[2] *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

[3] *United States v. Progressive, Inc.*, 467 F. Supp. 990, *reh'g denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

tives or give the public an opportunity to be heard — constitutes an egregious violation of well-settled law.

ARGUMENT

I. Because of the significant public policy interests at stake, the Court should grant review to resolve the conflicting interpretation and practice by lower courts regarding their authority to seal entire case files and wholly omit cases from the public docket.

The decision of the U.S. District Court for the Eastern District of New York to seal the entire case file and shield its very existence from public view highlights uncertainty about the fundamental issue of secrecy in court proceedings. While certain interests often justify sealing orders in particular proceedings, overly broad sealing orders that fail to articulate adequate reasons for the secrecy are at odds with this Court's established practice of deciding issues of constitutional importance in public. They also present a stark example of the unresolved tensions between the public's right of access to the courts and a court's interest in protecting parties. Thus, the Court should grant the petition in order to correct this misapplication of the authority to order the complete sealing of a case record and to ensure that the interests underlying the right of public access to judicial proceedings and records are preserved.

A. This Court has consistently recognized that the public interest in government oversight justifies a presumptive First Amendment right of access to judicial proceedings in criminal cases.

History makes abundantly clear that the open administration of justice is this Court's preference and practice. As then-Associate Justice Rehnquist stated more than 30 years ago, "all of the business of the Supreme Court of the United States comes in the front door and leaves by the same door." William H. Rehnquist, *Sunshine in the Third Branch*, 16 Washburn L.J. 559, 564 (1977). Justice Rehnquist's comment reflects this Court's enduring commitment to open courts. The open administration of justice provides "therapeutic value" to the community, allowing citizens to reconcile conflicting emotions about high-profile cases. *See Richmond Newspapers, Inc.*, 448 U.S. at 570–71 (discussing openness in criminal trials). Additionally, open access reassures the public that its government systems are working properly and correctly and enhances public scrutiny into and understanding of the judicial process. *Id.*

Indeed, open access to judicial proceedings is not just a beneficial practice; in many instances, it is a constitutional mandate. Court proceedings related to criminal trials in particular are subject to a First Amendment right of access — a right that "permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *see also Richmond Newspapers, Inc.*, 448 U.S. at 596 (Bren-

nan, J., concurring) (citation and internal quotation marks omitted) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[.]").

Allowing such access "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). As former Chief Justice Burger wrote, "[p]eople 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, Inc.*, 448 U.S. at 572.

This understanding of the value of the open administration of justice is reflected in the Court's pronouncements on the procedural steps necessary to close judicial proceedings and records from the public. Where the right of public access is anchored in the First Amendment, the presumption of openness may 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. In criminal cases at least, courts must articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* Moreover, these findings must be "on the record." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). In fact, it can be reversible error for lower courts to not undertake the proper analysis before closing a proceeding. *See, e.g.*, *id.* at 15 (reversing the sealing of a preliminary hear-

ing transcript in a criminal proceeding pursuant to the First Amendment right of public access). The Court also has suggested that "individualized determinations are *always* required before the right of access may be denied," *Globe Newspaper Co.*, 457 U.S. at 609 n.20, a guarantee that is necessarily lacking when a court enters a blanket sealing order such as the one at issue in this case.

B. A number of circuit courts have recognized that the omission of an entire case from a court's docket violates this right of public access to judicial records.

The public and the news media have a legitimate interest in knowing the details of this case, which involves a widespread conspiracy to defraud investors. Pet. for a Writ of Cert. at 4–6. Although this Court has not directly addressed the issue of access to dockets and to what extent a secret docketing system infringes that right, several circuits have recognized that the public policy interest in open criminal dockets mirrors the interest in open criminal proceedings.

In *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), the *St. Petersburg Times* challenged the use of dual dockets by the district courts, which permitted cases to be placed on either a public or a sealed docket. The U.S. Court of Appeals for the Eleventh Circuit concluded that the use of a dual-docketing system was "inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings." *Id.* at 715. The court recognized that the "dual-docketing

system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences" and held that this system was "an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings." *Id.*

In *Hartford Courant Co. v. Pellegrino*, 290 F. Supp. 2d 265 (D. Conn. 2003), media intervenors challenged Connecticut's three-tiered case sealing procedures, which applied to both criminal and civil cases. Under these procedures, a case was designated "Level 1 sealed," which meant that the case would not appear on dockets or court calendars; "Level 2 sealed," which meant that the entire record was sealed (including the sealing order) but the docket number remained public; or "Level 3 sealed," which meant that only specific documents in the court file were sealed. *Id.* at 268. Members of the media sued the chief court administrator and the chief justice of the Connecticut Supreme Court in federal court. *Id.* at 267. The district court granted the defendants' motions to dismiss, holding that "neither defendant has the authority nor the power to provide the plaintiffs with the relief they seek." *Id.* at 278.

On appeal, the U.S. Court of Appeals for the Second Circuit vacated the dismissal and remanded the case, holding that the defendants "can provide relief as long as they do not encounter the resistance of actual judicial orders or statutory sealing provisions." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 97 (2d Cir. 2004). In addition, the court held that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them." *Id.* at 96. Other-

wise, the court explained, "the ability of the public and press to attend civil and criminal cases would be merely theoretical." *Id.* at 93. A right of access to docket sheets, according to the court, was necessary to "endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id.* Thus, the court concluded that there was not only a historical tradition of public access to docket sheets but that such access allows the public to "discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed." *Id.* at 94–96.

At least two other circuit courts have noted that secret dockets fail to satisfy the procedural requirements courts must follow before permitting such pervasive secrecy. *See, e.g.*, *In re State-Record Co., Inc.*, 917 F.2d 124, 129 (4th Cir. 1990) ("There are probably many motions and responses thereto that contain no information prejudicial to a defendant, and we cannot understand how the docket entry sheet could be prejudicial. However, under the terms of the orders entered in these cases, this information, harmless as it may be, has also been withheld from the public. Such overbreadth violates one of the cardinal rules that closure orders must be tailored as narrowly as possible."); *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 475 (6th Cir. 1983) ("The importance of the rights involved and interests served by those rights require that the public and press be given an opportunity to respond before being denied their presumptive right of access to judicial records. In order to protect this right to be heard, the most reasonable approach would be to require that motions

to seal be docketed with the clerk of the district court. The records maintained by the clerk are public records."). And although its decision was not based on the common law or constitutional right of public access, the U.S. Court of Appeals for the Eighth Circuit found "no reason … why the procedural information in the docket sheet" should not be disclosed. *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990). Reviewing and redacting a copy of the public docket sheet so that a newspaper could have access to information about the procedural status of the case would not be burdensome to the trial court, the Eighth Circuit ruled. *Id.*

Federal courts also have begun to eliminate secret sealing procedures through administrative reform. The U.S. Court of Appeals for the Third Circuit, for example, banned the practice of sealing dockets in 2008. *See* U.S. Court of Appeals for the Third Circuit, Notice to the Bar (Nov. 4, 2008)[4] ("Because the text of the docket contains procedural information only, Court of Appeals dockets will not be sealed."). Moreover, the Judicial Conference of the United States recently adopted a national policy that encourages courts to seal civil cases only when it is required by statute or "justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort." *Judicial Conference Approves Standards and Procedures for Sealing*

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[4] *Available at* http://www.ca3.uscourts.gov/Public%20Notices/seal_dockets_webNov08.pdf.

Civil Cases, The Third Branch, Sept. 2011.[5] The Conference also endorsed modifying the judiciary's docket management software to include a mechanism that would remind judges to review cases under seal annually. *Id.* An earlier policy altered the software to indicate the existence of sealed cases as "Sealed v. Sealed" rather than asserting that "case does not exist." *Greater Access to, Transparency in Court Proceedings Aim of Conference*, The Third Branch, Mar. 2007.[6]

C. The public policy implications of the total secrecy in numerous cases like the one below highlight the need for guidance from this Court.

Despite this trend of increased openness, anecdotal evidence discussed below suggests that the district court case below is not an anomaly. And the effects of such secrecy are significant: Effective newsgathering becomes impossible when those who are excluded from a particular proceeding have no notice of a case's existence and thus are precluded from objecting to that exclusion. Perhaps more significantly, though, the prevalence of sealed cases raises the question of whether such secrecy is being used to protect the government from scrutiny, in direct contra-

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[5] *Available at* http://www.uscourts.gov/news/TheThirdBranch/11-09-01/Judicial_Conference_Approves_Standards_Procedures_for_Sealing_Civil_Cases.aspx.

[6] *Available at* http://www.uscourts.gov/News/TheThirdBranch/07-03-01/Greater_Access_to_Transparency_in_Court_Proceedings_Aim_of_Conference.aspx.

vention of the very rationale underlying the presumptive openness of criminal proceedings. By granting review and reiterating the constitutional standard for sealing entire criminal cases, the Court will ensure that the public and the news media have a meaningful way to exercise their right of access to judicial proceedings and records. Such a ruling also would largely eliminate the veil of secrecy behind which these cases have proceeded.

If the public and the news media have a right of access to court proceedings and documents, there must be some procedural means for preserving that right. Dockets are important avenues of access to the courts because they serve to notify the public and the news media that a judicial proceeding exists. *See, e.g.*, *In re Search Warrant*, 855 F.2d 569, 575 (8th Cir. 1988) ("The docketing of motions to close a proceeding or seal certain documents provides notice to the public, as well as to the press, that such a motion has been made and, assuming that such motions are docketed sufficiently in advance of a hearing on or the disposition of the motion, affords the public and the press an opportunity to present objections to the motion."). But if an entire docket is kept secret, or if cases are left off the public docket, courts impermissibly destroy the only feasible method of objecting to the closure.

Moreover, secretly docketed cases undermine the very rationale for the presumption of openness. Although it is impossible to know even the approximate number of criminal cases that are sealed in their entirety, a 2006 study by The Associated Press revealed that records of 5,116 criminal defendants who journeyed through the federal court system in

2003, 2004 and 2005 were shrouded in secrecy. Michael J. Sniffen & John Solomon, *Thousands of Federal Defendants' Cases Kept Secret*, Associated Press, Mar. 5, 2006, *available at* 2006 WLNR 25977074. A separate investigation by *amicus* revealed that during the five years ending Dec. 31, 2005, defendants in 469 criminal cases were indicted — and in some cases prosecuted, tried and sentenced — in complete secrecy in Washington, D.C.'s federal court. Kirsten B. Mitchell & Susan Burgess, *Disappearing Dockets*, The News Media & The L., Winter 2006, at 4, 4.[7] Similar comprehensive studies have not been conducted since these, so there is no way to ascertain whether the Judicial Conference's adoption of its 2007 policy has resulted in a decrease in the number of cases sealed entirely from public view.

One need look no further than the facts of this case to see the alarming effects of such secrecy. Petitioner Roe's clients allegedly suffered more than $500,000,000 in losses by investing in Respondent Doe's failed real estate ventures — investments they never would have made had they been aware of his prior conviction. Pet. for a Writ of Cert. at 11. Moreover, the public was unable to monitor judicial conduct in the case, namely the court's alleged failure to impose mandatory restitution to victims under federal law. *Id.* at 6. In addition, the blanket sealing order has allegedly amounted to an unconstitutional prior restraint on speech by Petitioner Roe. *Id.* at 14.

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[7] *Available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2006/disappearing-dockets.

But numerous other examples of entirely sealed dockets exist, particularly in terrorism cases raising issues of national security. In *M.K.B. v. Warden*,[8] for example, Mohamed Kamel Bellahouel, an Algerian-born Florida man who was detained for five months after the Sept. 11, 2001, attacks, instituted a habeas corpus action challenging his deportation. The case was not placed on the public docket, no public hearings were held, and all records of the proceeding were sealed. Bellahouel appealed to the Eleventh Circuit, where, again, there was no official record of the case listed on the public docket, all records were sealed, and all proceedings were closed. The case became public only after an error by a clerk in the Eleventh Circuit caused the appeal to appear on a published court calendar. Ultimately, the appellate court issued a secret order that the case be noted on the public docket.

Relying on *Valenti*, 987 F.2d at 715, which prohibited use of a "dual-docketing system," as well as Supreme Court precedent requiring specific findings to support closure of judicial proceedings or the sealing of judicial records, Bellahouel petitioned the Supreme Court for a writ of certiorari. The petition was heavily redacted, with even the identity of the circuit court removed, but it did shed some light on the lower court rulings. According to the petition, the Eleventh Circuit ordered the district court "to docket the case publicly," but it also "affirmed the district court's refusal to unseal any of the filings in the case." Petition for Writ of Certiorari, 2003 WL 23139103, at *10. The actual order requiring the

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[8] Petition for Writ of Certiorari, 2003 WL 23139103 (11th Cir. June 27, 2003), *cert. denied*, 540 U.S. 1213 (2004).

docketing was "sealed, not publicly docketed, and filed in a case that [was] not publicly docketed." *Id.* at *9. Bellahouel argued that the complete sealing of his case violated the right of access to judicial proceedings grounded in both the First Amendment and the common law, but the Supreme Court denied his petition without comment. *M.K.B. v. Warden*, 540 U.S. 1213 (2004); *see* Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 Cal. L. Rev. 1537, 1547 (2006) (noting that sealing docket sheets in habeas corpus cases such as these is particularly concerning because the practice "reduces the appearance of fairness in such cases; hinders the habeas petitioner's ability to present his case; prevents advocates from monitoring the integrity of proceedings; and restricts the public from engaging in fully informed discourse on matters such as the treatment of post-September 11 detainees[]").

On May 1, 2003, Iyman Faris pleaded guilty to providing material support to al Qaida, including researching ultralight airplanes, procuring lightweight sleeping bags, plane tickets and cell phones and assisting in a plan to destroy the Brooklyn Bridge for the terrorist organization. But his arrest, indictment and, ultimately, his plea bargain with the U.S. Department of Justice proceeded in absolute secrecy. Faris' case may have remained a secret were it not for two *Newsweek* reporters, Michael Isikoff and Mark Hosenball, who discovered through intelligence documents that Faris was suspected of working for key al Qaida operative Khalid Shaikh Mohammed. In a June 18, 2003, article, the reporters speculated whether Faris was on the run, had disappeared or had been captured. For individuals such as Faris, there is "a new category that seems to be evolving

outside the orbit of the criminal-justice system," the *Newsweek* reporters wrote. Michael Isikoff & Mark Hosenball, *Al Qaeda in America*, Newsweek, June 17, 2003. Only after *Newsweek* reported on Faris did then-Attorney General John Ashcroft reveal in a June 19 press conference that Faris had pleaded guilty to terrorist charges more than a month earlier. Stephen Koff, *et al.*, *Ohioan Linked to al-Qaida Plots*, Cleveland Plain Dealer, June 20, 2003, at A1.

Secret dockets are not limited to cases involving terrorism, however. The motion to seal a petition for a writ of certiorari (with a redacted version made publicly available) in this Court stated that the district court sealed the case in 2003 and that the case "remained sealed throughout the appellate proceedings." Motion of Petitioner for Leave to File a Petition for a Writ of Certiorari Under Seal with Redacted Copies for the Public Record, *Sealed Petitioner v. United States*, No. 09M14 (July 29, 2009), motion granted (Oct. 5, 2009). The motion provided no guidance on why the lower courts sealed the record and provided no independent arguments for sealing the record in this Court. *Id.* Indeed, a footnote in the motion stated that "[c]ounsel does not have a copy of the original court order sealing this matter. Counsel contacted the district judge's chambers on July 27, 2009 and was advised after a search of the judge's files and the clerk's office case jacket that the order could not be found." *Id.*

And in a case challenging a grand jury subpoena issued to a non-party in an apparent attempt to quell protected speech about the criminal prosecution of a doctor who allegedly overprescribed painkillers, all court documents were shielded from public view

until the case reached this Court. Although the case had proceeded through the district court and the U.S. Court of Appeals for the Tenth Circuit, the only publicly docketed entries related to the case were those that appeared on this Court's docket. *In re Grand Jury Proceedings*, No. 10-512. In fact, although the Court denied the petition for a writ of certiorari nearly two years ago and the petitioner has since died, a search of the Tenth Circuit's docket simply states "Case Under Seal." *Case Under Seal*, No. 09-3288, Petition for a Writ of Certiorari denied (Nov. 15, 2010).

While *amicus* recognizes that various interests, including the need to protect national security information, may justify closed proceedings and sealed records, it is hard to fathom that *all* the documents in sealed cases — and *all portions* of those documents — consist of information of such a confidential nature that no part of them can be publicly disclosed. Yet, courts routinely make such determinations, and without specific, on-the-record findings about those documents that are actually sensitive and deserving of protection and the ability, or lack thereof, to protect those interests by disclosing only part of the information contained therein, the parties' interest is protected at the expense of the public interest. If the public is to have any faith in the justice administered by its courts — the very interest underlying this country's strong right of public access to judicial proceedings — it needs to have confidence that the judiciary is operating in the open. As such, this Court should grant review to reiterate the high standard by which courts may invoke a procedure that prevents this public oversight.

II. Total secrecy below, without explanation or opportunity to object, is a drastic departure from the "accepted and usual course of judicial proceedings" and warrants exercise of this Court's supervisory powers.

One of the 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." Sup. Ct. R. 10(a). This criterion is undoubtedly met here, as the Second Circuit has sanctioned[9] a drastic departure from the usual course of a criminal proceeding.

As discussed in Part I above, it is neither typical nor constitutionally acceptable for a court to conduct a case entirely in secret, without entering a sealing order, articulating any findings to support secrecy or considering the possibility of less restrictive alter-

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[9] The Second Circuit neither embraced nor rejected the broad consensus in favor of a constitutional right of access to criminal proceedings and records. Indeed, the opinion addressed the issue only in passing, stating that the lower court properly balanced its findings of physical danger to Doe and the intentional defiance of a sealing order by Roe — "findings that we hold were not clearly erroneous" — against Roe's asserted need for the sealed materials. *Roe v. United States*, 428 F. App'x 60, 66–67 (2d Cir. 2011). The appellate court did not discuss the lower court's presumed failure to make these findings in 1998, when it sealed the entire case from public view. Rather, its discussion of the sealing was limited to the findings the lower court made in 2010, after Roe attached the sealed documents at issue to a filed pleading. *Id.* at 64.

natives 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, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) (vacating a sealing order because proper sealing requires "a showing of extraordinary circumstances set forth by the district court in the record"); *see also Union Oil Co.*, 220 F.3d at 567 (holding that it was improper for the district court to seal "[a]lmost every document filed in this case" without making any findings in support); *Wash. Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (vacating an order to seal a plea agreement where the court "failed to articulate any findings in support of the … Order"); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 346 (6th Cir. 1987) (vacating an order sealing pleadings and exhibits and remanding for more adequate findings and consideration of less restrictive alternatives). Yet neither the district court not the Second Circuit made any public findings to support a sealing order. Indeed, neither issued a public sealing order, and the passing reference in the Second Circuit's opinion to the lower court's findings provides the only public discussion of the sealing issue. *Roe v. United States*, 428 F. App'x 60, 66–67 (2d Cir. 2011).

Second, the district court and Second 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. "[P]rior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests." *Press-Enterprise I*, 464 U.S. at 510. Thus, for

example

> [T]he constitutionally preferable method for reconciling the First Amendment interests of the public and press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses.

Id. at 520 (Marshall, J., concurring); *see also Kasza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (stating that where public release of court records presents a risk to national security, "[p]ublic release of redacted material is an appropriate response").

By contrast, the courts below sealed the case in its entirety. Even the opinions and orders of the district court are entirely sealed. *See Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348–49 (7th Cir. 2006) (hoping "never to encounter another sealed opinion" because "[t]he political branches of government claim legitimacy by election, judges by reason"). As stated above, it simply cannot be the case that every pleading, transcript, docket and district court order in this case contains information so sensitive that it cannot be revealed. *See id.* at 348 ("The Supreme Court issues public opinions in all cases, even those said to involve state secrets.").

Third, neither court provided the public with notice and an opportunity to comment on proposed closure orders, in violation of accepted procedural standards. *See Globe Newspaper Co.*, 457 U.S. at 609

n.25 (stating that access rights are meaningful only if the press and the public may be heard prior to exclusion); *United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a court must provide notice on the public docket of a closed hearing).

Finally, the lower courts' handling of the case violates the established law of the Second Circuit itself, which has made clear that a government proceeding subject to a qualified First Amendment right of access may be closed only if four factors are satisfied: 1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; 2) the closure must be no broader than necessary to protect that interest; 3) the trial court must consider reasonable alternatives to closing the proceeding; and 4) it must make findings adequate to support the closure. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 304 (2d Cir. 2012); *see also ABC, Inc. v. Stewart*, 360 F.3d 90, 102, 105 (2d Cir. 2004) (finding that an order barring the media from attending the *voir dire* examinations of potential jurors in a highly publicized securities fraud prosecution infringed their First Amendment right of access to criminal proceedings where the district court failed to choose "the most narrowly tailored course available"); *In re Application of The Herald Co.*, 734 F.2d 93, 103 (2d Cir. 1984) (invalidating a lower court's order closing the courtroom during a pretrial hearing on a motion to suppress where the trial judge did not "articulate on the public or sealed record a sufficiently detailed basis for his serious concern about public dissemination risks and for his marked preference for closure over alternative remedies").

According to *The Herald* court, "[s]ince by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure." *Id.* at 102. The blanket sealing of this case, however, deprived the public and the news media of that "meaningful opportunity" in such an egregious manner as to warrant exercise of this Court's supervisory powers.

CONCLUSION

This case has been prosecuted for more than ten years in complete secrecy, a testament to the need for the Court's guidance regarding lower courts' authority to seal entire case files and wholly omit cases from the public docket. The Court should grant review to reiterate the constitutional standard for sealing entire criminal cases, thereby ensuring that the public and the news media have a meaningful way to exercise their right of access to judicial proceedings and records. Such a ruling also would eliminate the dangerous veil of secrecy behind which far too many of these cases have proceeded.

Moreover, review is warranted in order to correct the lower courts' abusive secrecy practices in a case of significant public interest and concern. If the courts below had a compelling reason to close these proceedings, and were truly unable to devise less restrictive alternatives to total closure, they should be required to say so and make public findings in support of this conclusion. The failure below to meet these rudimentary obligations constitutes a drastic

departure from usual and accepted judicial practice and warrants intervention by this Court.

Respectfully submitted,

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August 27, 2012