

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Anonymous,

Plaintiff,

- against -

Anonymous,

Defendant.

Hon. Franc Perry

Index No. 655887/2018

**PROPOSED *AMICI CURIAE* MEMORANDUM SUBMITTED ON BEHALF
OF SIXTEEN NEWS ORGANIZATIONS AND PRESS FREEDOM
GROUPS IN OPPOSITION TO THE BLANKET SEALING OF THIS CASE**

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PRELIMINARY STATEMENT

More than a century ago, the New York Legislature required that “the sittings of every court within this state shall be public.” N.Y. Jud. Law § 4 (1909). The New York Court of Appeals soon thereafter underscored the significant “public interest in having proceedings of courts of justice public, not secret.” *Lee v. Brooklyn Union Publ’g Co.*, 209 N.Y. 245, 248 (1913). This State has never receded from this policy of judicial transparency, as the Court of Appeals reaffirmed just last month in *rejecting* the claim that a mental patient’s psychiatric records—confidential under the Mental Hygiene Law—must necessarily be sealed when made part of a court record. *In re James Q.*, --- N.E.3d ---, 2019 WL 659395 (N.Y. Feb. 19, 2019).

Public access to judicial proceedings and records is not just the long-standing policy of this State; the U.S. Constitution mandates it. The First Amendment conveys a qualified right of public access to judicial records and proceedings, a right that can be overcome only where there is a substantial probability of harm to a compelling governmental interest and no alternative to closure exists. Even then, factual findings must first be made to support a denial of access, and any limitation of the access right must be narrowly drawn in both scope and time. No public record indicates that any of these required findings were made before complete secrecy was imposed over this case.

For nearly four months the press and public have been kept in the dark about the parties to this lawsuit, the nature of their claims, and the legal issues at stake. All that has been made public is that the subject of an investigative news report is seeking in this case to compel disclosure of a confidential source, who apparently stands accused of violating a confidentiality

order.¹ Notwithstanding any confidential information that may be at the heart of this case, anonymizing the caption and sealing the parties, pleadings, and motion papers—in their entirety—violates the public’s constitutional right of access.

Neither privacy concerns nor the protection of confidential commercial information can justify such a sweeping, blanket sealing of a whole lawsuit. No compelling interest sufficient to justify a complete denial of the access right is established in the record of this case, and even if some compelling interest existed, the blanket closure of the entire litigation is not narrowly tailored. Proposed *amici curiae* news organizations and representatives of journalists respectfully submit this memorandum in opposition to the application to seal the names of the parties and all records in this action. The names of the litigants, all court records, and any transcripts of proceedings that have been held should promptly be disclosed.

IDENTITY AND INTERESTS OF PROPOSED *AMICI CURIAE*

Proposed *amici curiae* are sixteen of New York’s and the nation’s leading news organizations and press advocacy groups. *Amici* regularly rely on their ability to attend court proceedings and access judicial records to gather and disseminate news and other information in this State and have a direct interest in the proper resolution of the pending application to seal.

1. **Advance Publications, Inc.**, is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast’s global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies

¹ Teri Buhl, *NY Court Case Putting Journalist Source Protection At Risk*, Smashmouth Investigative Journalism (Jan. 18, 2019), <http://www.teribuhl.com/2019/01/18/ny-court-case-putting-journalist-source-protection-at-risk/>.

producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

2. The **Associated Press** is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

3. The **Brechner Center for Freedom of Information** at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

4. **Daily News, L.P.** publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

5. The **Electronic Frontier Foundation** is the leading nonprofit organization defending civil liberties in the digital world, working to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

6. **First Look Media Works, Inc.** is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

7. **Gannett Co., Inc.** is a leading news and information company that publishes USA Today and more than 100 local media properties including The Binghamton Press & Sun-Bulletin, The Elmira Star-Gazette, The Ithaca Journal, The Rochester Democrat and Chronicle, The Poughkeepsie Journal and The Journal News (Westchester County). Each month more than 125 million unique visitors access content from USA Today and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

8. **Gizmodo Media Group, LLC** is the publisher of some of the web's best-loved digital media brands and communities, including Gizmodo, The Root, Jezebel and Deadspin. Collectively, the sites reach millions of readers in the United States a month.

9. **Hearst Corporation** is one of the nation's largest diversified media and information companies. Its major interests include, among other things, ownership of 24 daily and dozens of weekly newspapers, including the Albany Times Union, a daily newspaper that serves primarily the capitol region; 33 television stations, including WPTZ-TV in Plattsburgh, which serves New York's North Country; and hundreds of magazines in the United States and around the world.

10. The **National Press Photographers Association (NPPA)** is a nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. As the voice of visual journalists worldwide, NPPA's approximately 6,000 members include video and still photographers, editors and students producing print, broadcast and Internet visual content, as well as representatives of businesses that compose the visual journalism community. Since 1946, the NPPA has vigorously promoted freedom of the press in

all its forms, especially as that freedom relates to visual journalism, including the protection of First Amendment and intellectual property right.

11. **Newsday LLC** is the publisher of the daily newspaper, Newsday, and related news websites and mobile applications. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

12. The **New York Times Company** is the publisher of The New York Times and operates the news website nytimes.com. The Times covers law enforcement matters, both in New York City and across the country.

13. **NYP Holdings, Inc.** owns and publishes the New York Post, the oldest continuously published daily newspaper in the United States, with the seventh largest circulation. It is published in print and online.

14. The **Online News Association (ONA)** is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

15. The **Radio Television Digital News Association (RTDNA)** is the world's largest professional organization devoted exclusively to broadcast and digital journalism. Founded as a grassroots organization in 1946, RTDNA's mission is to promote and protect responsible journalism. RTDNA defends the First Amendment rights of electronic journalists throughout the country, honors outstanding work in the profession through the Edward R. Murrow Awards and

provides members with training to encourage ethical standards, newsroom leadership and industry innovation.

16. Reporters Without Borders, also known as Reporters sans frontières (RSF), is an independent international non-profit that has been defending press freedom for more than 32 years. Thanks to its local network of correspondents investigating in 130 countries, 13 offices worldwide, as well as its consultative status at the United Nations, RSF is able to have a global impact in defending journalists and access to information. RSF has offices in Washington, DC, San Francisco, Paris, Brussels, London, Rio de Janeiro, Taipei, Tunis, Berlin, Madrid, Helsinki, Vienna, and Stockholm.

ARGUMENT

I. THE FIRST AMENDMENT EXTENDS A QUALIFIED RIGHT OF PUBLIC ACCESS TO THE PROCEEDINGS AND RECORDS OF THIS LAWSUIT

Amici and the public at large have a qualified constitutional right to know the names of the parties to this action, attend the hearings, and view motion papers and other records filed with the court.

The Existence of a Constitutional Access Right. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court held that the express protections in the First Amendment for the freedom of speech, freedom of the press, and the right to petition the government carry with them an implied right of public access to certain government proceedings and records. The First Amendment’s express protections, the Court explained, “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.” *Id.* at 575. Accordingly, access to certain government proceedings and records—including specifically court proceedings and records—may not summarily or arbitrarily be closed to the public without running afoul of the First Amendment. *Id.* at 576-77. Justice

Stevens wrote separately to underscore the “watershed” nature of the *Richmond Newspaper* Court’s holding “that an arbitrary interference with access to important information” violates the First Amendment. *Id.* at 582-83 (Stevens, J., concurring).

In *Richmond Newspapers* and three subsequent cases, the Court laid out a two-part test for determining where the constitutional access right exists. *See id.* at 564-74; *id.* at 588-89 (Brennan, J., concurring); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”); *see also Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”). First, courts examine the *history* of a particular type of proceeding and “consider[] whether the place and process have historically been open to the . . . public.” *Press-Enterprise II*, 478 U.S. at 8. Second, courts apply *logic* and ask whether public access “plays a significant positive role in the functioning of the particular process in question.” *Id.* Applying this two-part test, the Supreme Court has held that the public enjoys a First Amendment right of access to various aspects of criminal cases, including trials, jury selection, and preliminary hearings. *See Richmond Newspapers*, 448 U.S. 555; *Globe Newspaper Co.*, 457 U.S. 596; *Press-Enterprise I*, 464 U.S. 501; *Press-Enterprise II*, 478 U.S. 1.

The Constitutional Access Right Extends Fully to Civil Lawsuits. This constitutional access right applies to civil lawsuits to the same extent as criminal prosecutions. In *Richmond Newspapers*, the Supreme Court noted that the very factors that substantiated the existence of a constitutional right of access to the criminal case before it applied fully to civil litigation as well. *Richmond Newspapers*, 448 U.S. at 580 n.17. Following *Richmond Newspapers*, the United States Court of Appeals for the Second Circuit squarely held that “the First Amendment . . . secure[s] to the public and to the press a right of access to civil proceedings” for the same

reasons it guarantees access to criminal trials. *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *see also N.Y. Civil Liberties Union v. NYC Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). Every other federal appeals court to have addressed the issue has reached the same conclusion. *See, e.g., Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983). The qualified First Amendment access right applies fully to the case now before this Court.

The Constitutional Access Right Extends to Judicial Records. Where a court proceeding is subject to the constitutional right of access, the judicial records of that proceeding are equally subject to the qualified access right. The Appellate Divisions of the First, Second, and Third Departments have all recognized the public's constitutional right of access to the judicial records. *See Mosallem v. Berenson*, 76 A.D.3d 345, 348-49 (1st Dep't 2010); *Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 501 (2d Dep't 2007); *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 324 (1st Dep't 2006); *Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6 (1st Dep't 2000); *People v. Burton*, 189 A.D.2d 532, 535 (3d Dep't 1993).

The Second Circuit has also repeatedly recognized that the First Amendment conveys a right of public access to the records of civil proceedings. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (right of access to "documents submitted to the court in connection with a summary judgment motion"); *Pellegrino*, 380 F.3d 83 (right of access

to court dockets); *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (right of access to court forms approving payment for court-appointed counsel and other services). Every federal circuit to have addressed the issue has reached the same conclusion. *Courthouse News Serv.*, 750 F.3d at 786-87 (civil complaints); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th Cir. 1988) (exhibits to summary judgment motions); *Publicker Indus.*, 733 F.2d at 1070 (transcripts of preliminary injunction hearings); *In re Continental Ill. Secs. Litig.*, 732 F.2d at 1308 (evidence admitted in civil trials); *In re Iowa Freedom of Info. Council*, 724 F.2d at 661 (transcript of contempt proceedings); *Brown & Williamson Tobacco Corp.*, 710 F.2d 1165 (documents filed by the FTC in administrative and civil matters); *Newman*, 696 F.2d at 801 (documents submitted to court in § 1983 litigation).

* * * * *

The qualified First Amendment right of access unambiguously extends to the names of the parties and the pleadings, records and proceedings in this lawsuit.

II. THE BLANKET CLOSURE OF RECORDS AND PROCEEDINGS IN THIS CASE VIOLATES THE PUBLIC'S CONSTITUTIONAL ACCESS RIGHT

Sealing the entirety of this litigation, including the identity of the parties and all pleadings and motion papers, violates the public's constitutional right of access. While the First Amendment access right is a qualified right, not an absolute one, it may only properly be limited where the strict standards established by the U.S. Supreme Court are satisfied. *See Richmond Newspapers*, 448 U.S. 555; *Globe Newspaper Co.*, 457 U.S. 596; *Press-Enterprise I*, 464 U.S. 501; *Press-Enterprise II*, 478 U.S. 1. Specifically, a party seeking to limit the constitutional right of access must demonstrate that (1) there exists a substantially probability of harm to a compelling interest if access is not limited; (2) no alternatives to sealing could adequately protect that compelling interest; (3) the proposed limitation on access is narrowly drawn and (4) that

limitation will effectively protect the threatened interest. *Press-Enterprise II*, 478 U.S. at 13-14. Any order limiting the access right must be based on factual findings subject to appellate review. *Id.*; *Press-Enterprise I*, 464 U.S. at 510 (“The [compelling] interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”).

Blanket closure orders are particularly disfavored and suspect. *See generally Globe Newspaper Co.*, 457 U.S. 596. As the First Department has instructed, although “it may be easier for the parties and the motion court to seal an entire court record, rather than make a determination on a document by document basis about sealing, . . . administrative convenience is not a compelling reason to justify [blanket] sealing.” *Maxim Inc. v. Feifer*, 145 A.D.3d 516, 518 (1st Dep’t 2016). Just recently, the New York Court of Appeals reaffirmed the general proposition that blanket sealing is almost always impermissible because it “disregards” “the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the prosper administration of justice.” *See In re James Q.*, 2019 WL 659395, at *4 (citation omitted).

Here, no overriding compelling interest has been identified that could justify the total secrecy that has been imposed. Courts certainly have found interests sufficient to justify the redaction of some records or selective closure of certain proceedings,² but “neither the potential

² *See, e.g., Doe v. NYU*, 6 Misc. 3d 866, 879-880 (Sup. Ct. N.Y. York Cty. 2004) (potential “social stigmatization” from being identified as the victim of a sexual assault); *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995) (protecting ongoing undercover investigations); *United States v. Amodio*, 71 F.3d 1044, 1052 (2d Cir. 1995) (preventing interference with the cooperation of informants); *United States v. Haller*, 837 F.2d 84, 88 (2d Cir. 1988) (protecting identities of those investigated, but not indicted, by a grand jury).

for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records.” *Mosallem*, 76 A.D.3d at 351.

In particular, it has long been recognized that concerns about disclosing confidential business information are not sufficient to justify closure of civil litigation, under either the First Amendment or the common law, where the “commercial interest stems primarily from a desire to preserve corporate reputation.” *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988); *see also, Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (harm to a company’s reputation not sufficient to overcome the presumption of public access); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) (that “the company’s public image . . . is at stake” is “not enough to rebut the presumption of access”). Concerns about the economic harm that might be caused by negative publicity are simply insufficient to override the public’s right to know what transpires in judicial proceedings. *See, e.g., Doe v. NYU*, 6 Misc. 3d at 879 (embarrassment and economic harm insufficient to deny access); *Westinghouse*, 949 F.2d at 663 (integrity of a “company’s public image” insufficient); *Prescient Acquisition Grp., Inc. v. MJ Publ’g Tr.*, 487 F. Supp. 2d 374, 376 (S.D.N.Y. 2007) (concerns of adverse publicity insufficient).

The public knows little about this litigation, other than that the subject of one of journalist Teri Buhl’s investigative stories is attempting to uncover the identity of a confidential source.³ Any asserted interest in sealing this litigation to protect against further alleged reputational harm to the subject of Buhl’s reporting is clearly insufficient to overcome the public’s right of access. Courts in New York and around the country have regularly entertained claims of reputational

³ Teri Buhl, *NY Court Case Putting Journalist Source Protection At Risk*, Smashmouth Investigative Journalism (Jan. 18, 2019), <http://www.teribuhl.com/2019/01/18/ny-court-case-putting-journalist-source-protection-at-risk/>.

harm from confidential informants. *See, e.g., Stega v. N.Y. Downtown Hosp.*, 31 N.Y.3d 661 (2018); *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82 (2016); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). To the extent this litigation is a private business dispute that only tangentially concerns Ms. Buhl, any compelling interest that might warrant some restriction on the public access right would be even more remote.

At a minimum, there is no interest that justifies closing the *entirety* of this litigation; complete sealing is not a narrowly tailored remedy to any compelling harm that might have been shown. *Cf. Press-Enterprise II*, 478 U.S. at 13-14. If the Court is concerned about the disclosure of specific financial information, for example, redacting that information from filings and holding partially closed hearings should sufficiently protect against the disclosure of that information. *See Press-Enterprise I*, 464 U.S. at 520 (“In those cases where a closure order is imposed, the 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.”).

In short, there is no proper basis to keep the public from knowing even the names of the parties, the nature of this dispute, and the legal issues presented. The current secrecy is improper and the blanket sealing requested would be unconstitutional.

III. THE BLANKET SEALING OF THIS CASE IMPROPERLY RESTRICTS REPORTING ON A MATTER OF LEGITIMATE PUBLIC CONCERN

The imposition of complete secrecy in this case is particularly problematic because this dispute appears to involve a matter of significant public concern. Public access to civil trials is important in all cases because it “enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and heightens public respect for the

judicial process, while permitting the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.” *Westmoreland*, 752 F.2d at 23 (internal quotation marks and citations omitted). But “[t]he public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute.” *Danco Labs.*, 274 A.D.2d at 7.

Any attempt to compel a journalist to disclose a confidential source is itself a matter of public concern. “[A] people who mean to be their own Governors[] must arm themselves with the power which knowledge gives.” *In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910)). “Consistent with that maxim, ‘[a] free press is indispensable to the workings of our democratic society,’” and “confidential sources are essential to the workings of the press.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1183 (D.C. Cir. 2006) (Tatel, J., concurring) (quoting *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring)).

It is for this reason that the Legislature of this State has adopted absolute protection against compelled disclosure of a reporters’ confidential sources. See N.Y. Civ. Rights Law § 79-h. The U.S. Supreme Court has also recognized that “harassment of the press undertaken . . . to disrupt a reporter’s relationship with [their] news sources . . . ha[s] no justification” and implicates core “First Amendment protections.” *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). The limited disclosures about this case to date indicate that substantial issues concerning the protection of a reporter’s source is at stake, and this is a matter of legitimate public concern. Continued closure in this case is, for that reason, particularly problematic.

Unless and until the requisite findings of fact have been made to justify a limitation on the public access right, the sealing order should be lifted and the public permitted to know the issues in dispute, the parties to the lawsuit, and the motions and proceedings that have occurred thus far.

CONCLUSION

For all these reasons, and for the reason set forth in the previously filed brief of the Reporters Committee for Freedom of the Press, *Amici* respectfully request this Court to promptly unseal the names of the litigants and the records in this lawsuit, including transcripts of any hearings conducted to date, and deny the application for continued sealing.⁴

Dated: March 1, 2019

Respectfully submitted,

MEDIA FREEDOM AND INFORMATION
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