

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: [REDACTED]

MOTION INFORMATION STATEMENT

Docket Number(s): 20-2413 Caption [use short title]

Motion for: Emergency Motion to Stay Pending Appeal

Set forth below precise, complete statement of relief sought:

Ms. Maxwell seeks a stay pending appeal, or in the alternative, a temporary administrative stay to afford this Court sufficient time to consider on the merits the motion to stay pending appeal

[REDACTED] v. Maxwell

MOVING PARTY: Defendant-Appellant Ghislaine Maxwell OPPOSING PARTY: Plaintiff-Appellee [REDACTED]

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Adam Mueller OPPOSING ATTORNEY: Sigrid McCawley Haddon, Morgan and Foreman, P.C. Boies Schiller & Flexner LLP

Court- Judge/ Agency appealed from: Hon. Loretta A. Preska, District Judge (S.D.N.Y.)

Please check appropriate boxes: Has movant notified opposing counsel... Oposing counsel's position on motion: Does opposing counsel intend to file a response:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL: Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency: Friday, July 31, 2020. On July 29, 2020, the district court granted a two-business-day stay of its order unsealing deposition material.

Is oral argument on motion requested? Has argument date of appeal been set?

Signature of Moving Attorney: s/ Adam Mueller Date: 7/30/2020 Service by: CM/ECF

# 20-2413

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United States Court of Appeals  
for the Second Circuit

[REDACTED]

*Plaintiff-Appellee,*

—against—

GHISLAINE MAXWELL,

*Defendant-Appellant,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
15-CV-7433 (LAP)

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**Ghislaine Maxwell's Emergency Motion to Stay Pending Appeal  
or, in the Alternative, Motion for a Temporary Administrative  
Stay Pending Full Consideration of the Motion to Stay**

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Ty Gee  
Laura Menninger  
Adam Mueller

[REDACTED]

*Attorneys for Defendant-Appellant Ghislaine Maxwell*

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## Introduction

This case began as a defamation action, though it is hardly recognizable as such anymore. The stakes are much higher now.

The government has indicted Ghislaine Maxwell. The media has all but convicted her.

The government alleges, among other things, that Ms. Maxwell committed perjury during her civil deposition. But Ms. Maxwell sat for the deposition and was compelled to answer numerous personal, sensitive, and allegedly incriminatory questions only after the plaintiff and the district court, through a stipulated Protective Order, guaranteed the confidentiality of her answers. As this Court has long recognized, and as this case shows, “witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.”<sup>1</sup>

Now that promise of confidentiality appears to have been dubious at best. Indeed, it is at risk of being broken entirely.

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<sup>1</sup> *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979).

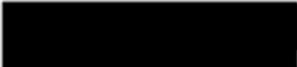
Without any apparent lawful basis, the government has obtained a copy of Ms. Maxwell's confidential, sealed deposition. The indictment quotes directly from it. And yesterday, the district court ordered its imminent unsealing.

The district court's unsealing order sanctions the perjury trap unfairly set for Ms. Maxwell, in violation of the 5th Amendment privilege against self-incrimination. It risks Ms. Maxwell's due process right to a fair trial by an impartial jury. And it eviscerates the promise of confidentiality on which Ms. Maxwell and numerous third parties reasonably relied. Absent a stay from this Court, it will forever let the cat out of the bag.

To vindicate Ms. Maxwell's constitutional right to remain silent, to protect her constitutional right to a fair trial by an impartial jury, and for all the other reasons offered below, this Court should stay the unsealing order pending appeal.

## **Statement of the Case and the Facts**

### **I. The defamation action and the Protective Order.**

 alleged that Ms. Maxwell defamed her. The alleged defamation centered on a statement from Ms. Maxwell's attorney generally denying as "untrue" and "obvious lies" plaintiff's numerous allegations, over the span of four years, that Ms. Maxwell participated in a scheme causing her to be "sexually abused and trafficked" by Jeffrey Epstein.

Plaintiff, a public figure required to prove actual malice, litigated her defamation action by trying to transform it into a criminal or tort action for sexual abuse and sexual trafficking of minors. Her lawyers intended to prove the defamation claim solely by, in effect, “prosecuting” Ms. Maxwell as a proxy for Epstein. Plaintiff chose this course of action because even she admitted some of her public statements were false.

Discovery in the case was correspondingly intrusive, hard-fought, and wide-ranging. It spanned more than a year and included voluminous document productions and responses to interrogatories and thirty-some depositions, including depositions of plaintiff and Ms. Maxwell as well as numerous third parties, including Doe 1.

Plaintiff sought and obtained a wide variety of private and confidential information about Ms. Maxwell, Doe 1, and others, including information about financial and sexual matters. Given the amount of personal, confidential material and information exchanged between the parties during discovery, the district court entered a stipulated Protective Order protecting from public disclosure information the parties in good faith concluded was confidential. EXHIBIT 1. The Protective Order included a mechanism for one party to challenge another party’s confidentiality designation (such a challenge never occurred) and expressly

provided that it was not applicable to any information or material disclosed at trial. *Id.* at 4–5.

“The Protective Order, despite the angst it is now causing, is unremarkable in form and function.” EXHIBIT 2 at 3. Counsel for plaintiff originally proposed protective order language that would have allowed for a “law enforcement” exception. In particular, Paragraph I(a)4 of the draft proposed that “CONFIDENTIAL information shall not be disclosed or used for any purpose except the preparation and trial of this case and any related matter, including but not limited to, investigations by law enforcement.” *See* EXHIBIT 3 at 42.

This language was rejected by Ms. Maxwell because of her concerns that plaintiff and her lawyers were acting as either express or *de facto* agents of the government. The language agreed upon, and made an order of the district court, specifically excluded an exception for law enforcement. Had the language not been made an order of the district court, Ms. Maxwell would have proceeded in a different fashion. She instead relied on this language and the protection afforded to her by this Court under established Second Circuit law.

After the district court denied Ms. Maxwell’s motion for summary judgment, the parties agreed to a settlement of the defamation claim and the case was dismissed. As the district court below recognized, a significant component of

the settlement agreement was its confidentiality, a feature that echoes the purpose of the Protective Order on which Ms. Maxwell and numerous third parties, including Doe 1, justifiably relied.

## **II. The motion to unseal and the first appeal.**

One year after the case was dismissed and closed, the Miami Herald sought to reopen the case and to unseal every sealed filing on the district court docket. The district court denied the motion to unseal.

The Miami Herald appealed, and this Court reversed. *Brown v. Maxwell*, 929 F.3d 41, 44–45 (2d Cir. 2019). The majority concluded that the district court erred in sealing the summary judgment materials. *Id.* at 47–48. Upon the issuance of the mandate, it unsealed the summary judgment materials to the public and the press, and it remanded the case to the district court to conduct a particularized review of the remaining records to which the Herald sought access. *Id.* at 53–54.

Judge Pooler dissented in part. *Id.* at 54. Although she agreed the district court erred, she would only have unsealed the summary judgment order while leaving “the remainder of the materials for the district court to review, redact, and unseal on remand.” *Id.* (Pooler, J., dissenting in part).

Despite the division among the judges, the Court was unanimous in its recognition of “the potential damage to privacy and reputation that may accompany public disclosure of hard-fought, sensitive litigation.” *Id.* at 44.

Finally, anticipating that the district court would not have the last word about whether certain materials should remain under seal, this Court instructed that “[i]n the interests of judicial economy, any future appeal in this matter shall be referred to this panel.” *Id.* at 54.

### **III. The remand, the arrest, and the indictment.**

On remand, the Miami Herald sought to unseal Ms. Maxwell’s depositions (taken in April and July 2016) and the deposition of Doe 1 (taken in June 2016). Ms. Maxwell filed an objection, EXHIBIT 4, plaintiff and the Herald each filed a response, EXHIBITS 5 & 6, and Ms. Maxwell filed a reply, EXHIBIT 7.

On July 2, one day after Ms. Maxwell filed her reply, the government staged a dramatic, forced entry at dawn into her home and arrested her. EXHIBIT 3 at 13.

Immediately after Ms. Maxwell’s arrest, Acting U.S. Attorney Audrey Strauss held a press conference and made numerous comments attacking Ms. Maxwell’s credibility and expressing her opinion of Ms. Maxwell’s guilt, e.g., that she was guilty of “l[y]ing” in her deposition “because the truth, as alleged, was almost unspeakable.” *Id.*

Plaintiff's counsel piled on, offering their own opinions about Ms. Maxwell's guilt. For example, Bradley Edwards opined that Ms. Maxwell was "a main facilitator" of Epstein's crimes who "started the whole thing." *Id.* And Sigrid McCawley praised the prosecutors: "[They] have done an incredible job and they're being very meticulous, they want to make sure that the Indictments stick. . . . They took a lot of time to be very careful and thoughtful and that gives me a lot of hope that [Ms. Maxwell] will remain in prison for the remainder of her life. . . . [Ms. Maxwell] was really the central figure . . . ." *Id.* at 16.

Ms. Maxwell's motion for an order barring such extrajudicial comments led Judge Nathan (S.D.N.Y.), who is presiding over the criminal case, to admonish "counsel for all involved parties [to] exercise great care to ensure compliance with this Court's local rules, including Local Criminal Rule 23.1, and the rules of professional responsibility." EXHIBIT 3 at 19. Judge Nathan further "warn[ed] counsel and agents for the parties and counsel for potential witnesses that going forward [the court] will not hesitate to take appropriate action in the face of violations of any relevant rules." *Id.* Judge Nathan said she would ensure "strict compliance" with the rules and "ensure that the Defendant's right to a fair trial will be safeguarded." *Id.*

On July 8, the government filed a superseding indictment alleging that Ms. Maxwell “assisted, facilitated, and contributed” to Epstein’s abuse of minors. The indictment quickly turned to this civil action, alleging that in 2016 Ms. Maxwell made “efforts to conceal her conduct” by “repeatedly provid[ing] false and perjurious statements” in deposition testimony. EXHIBIT 3 at 29 ¶ 8.

Quoting verbatim from Ms. Maxwell’s April 2016 deposition transcript, the indictment alleges that Ms. Maxwell gave false testimony (a) when she testified “I don’t know what you’re talking about” in response to a question whether Epstein “ha[d] a scheme to recruit underage girls for sexual massages . . . [i]f you know”; and (b) when she testified, “I’m not aware of anybody that I interacted with [other than plaintiff] who was 17 at this point.” *Id.* at 35 ¶ 21.

None of these questions and answers was used in the summary judgment materials released by this Court in *Brown*. The transcript containing this testimony is sealed.

Only two parties—plaintiff and Ms. Maxwell—and their counsel had proper access to the transcripts of Ms. Maxwell’s depositions. The transcripts, which were designated “confidential” under the Protective Order, could only be disclosed to “attorneys actively working on this case” and “persons regularly employed or associated with the attorneys who are working on this case.” EXHIBIT 1 at 2. As

explained above, this language was negotiated by the parties specifically to *exclude* an exception for investigations by law enforcement.

From Ms. Maxwell's indictment and arrest, four things are plain. **One**, as the indictment and superseding indictment establish, the government has a copy of the transcripts from Ms. Maxwell's April and July 2016 depositions, both of which were designated "Confidential."

**Two**, the government had no apparent ability legally to obtain the deposition transcripts. In *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 293 (2d Cir. 1979), *cited with approval in In re Teligent, Inc.*, 640 F.3d 53, 58 (2d Cir. 2011), the government moved in a civil action to which it was not a party for access to transcripts of depositions of twelve witnesses, including some of the civil defendants. The government said it was investigating possible violations of federal criminal laws, including perjury, subornation of perjury, obstruction of justice, and conspiracy. The government:

speculated that the pretrial deposition testimony might be relevant to its investigation into matters similar to those that had been the subject of the *Martindell* action and might be useful in appraising the credibility, accuracy and completeness of testimony given by witnesses in the Government's investigation or might provide additional information of use to the Government. The Government, moreover, feared that unless it could obtain the deposition transcripts, it would be unable to secure statements from the witnesses because they would claim their Fifth Amendment rights in any investigative interviews by the Government.

594 F.2d at 293. The district court denied the government’s request, holding that “the deposition testimony had been given in reliance upon the protective order, thus rendering unnecessary invocation by the witnesses of their Fifth Amendment rights, that the requested turnover would raise constitutional issues, and that principles of fairness mandated enforcement of the protective order.” *Id.*

On appeal, this Court affirmed:

In the present case the deponents testified in reliance upon the Rule 26(c) protective order, absent which they may have refused to testify. . . . [T]he witnesses were entitled to rely upon the terms of a concededly valid protective order and Judge Conner did not abuse his discretion in refusing to vacate or modify that order.

*Id.* at 296-97.

**Three**, the government did not obtain a copy of the deposition transcripts from Ms. Maxwell or her counsel.

**Four**, there has been a *second* violation of the district court’s Protective Order consistent with the plaintiff’s prior violation of the Protective Order.<sup>2</sup>

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<sup>2</sup> On July 1, the district court found a violation of the Protective Order by Plaintiff’s attorneys after learning that her successor counsel, Cooper & Kirk, had received from her former counsel, Boies Schiller Flexner, various discovery materials that were subject to the Protective Order. EXHIBIT 2 at 4. The Court rejected Cooper & Kirk’s suggestion that it properly was a recipient of the material:

[W]hatever Cooper & Kirk’s intentions in requesting and obtaining the *Maxwell* materials from Boies Schiller, the *Maxwell* Protective

—footnote cont’d on next page—

On July 23, over Ms. Maxwell's objection, the district court ordered the complete unsealing of Ms. Maxwell's deposition transcripts and Doe 1's deposition transcript as well as numerous sealed or redacted orders and papers that quote from or disclose information from the transcripts (collective, the "deposition material"). That Ms. Maxwell was under criminal investigation, the court ruled, "is not entitled to much weight here." EXHIBIT 8 at 5.

On July 28, the district court entered an order directing the public release of the deposition material on July 30.

Docket Text:

**ORDER: The parties are directed to prepare for unsealing in accordance with the Court's order of July 23, 2020, (ECF Minute Entry, dated July 23, 2020), the documents listed in Exhibit A to Plaintiff [REDACTED] Opposition to Defendant Ghislaine Maxwell's Objections to Unsealing Docket Entries 143, 164, 172, 199, & 230, (dkt. no. 1068-1). Counsel shall file those documents on the public docket, under a heading of "Documents Ordered Unsealed by Order of July 23, 2020," no later than July 30, 2020. The Court incorporates its rulings specific to each document-which are set forth in the transcript of the July 23 proceedings -- herein. SO ORDERED. (Signed by Judge Loretta A. Preska on 7/28/2020) (va)**

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Order explicitly provides that (1) discovery materials designated CONFIDENTIAL cannot be disclosed or used outside of the *Maxwell* action and (2) that properly designated discovery materials may only be disclosed to *specific groups of individuals*, including attorneys "actively working on" the *Maxwell* litigation.

*Id.* at 4-5 (emphasis added). The district court ordered Cooper & Kirk to destroy "[a]ll of those materials and any material, including work product, derived" therefrom. *Id.* at 6. The court also ordered Cooper & Kirk to "cease use of the [] materials in its preparation of Plaintiff's action against Mr. Dershowitz." *Id.*

Ms. Maxwell filed a motion to reconsider on July 29, 2020. EXHIBIT 3.<sup>3</sup> The motion asked the district court, should it deny the motion to reconsider, for a two-business-day stay of its order to permit Ms. Maxwell an opportunity to seek relief in this Court.

The Court denied the motion to reconsider but stayed the unsealing until August 3, 2013. EXHIBIT 9.

On July 29, 2020, Ms. Maxwell filed a notice of appeal from the district court's unsealing order.<sup>4</sup> This motion asks the Court to stay the unsealing of the deposition material pending resolution of that appeal.

Because the district court intends to unseal the deposition material on August 3, 2020, absent a contrary ruling by this Court, Ms. Maxwell makes this motion on an emergency basis. To prevent irreparable harm, Ms. Maxwell

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<sup>3</sup> As part of the motion to reconsider, Ms. Maxwell also asked the district court to commence contempt proceedings and issue an order to show cause why the person(s) who violated the Order should not be held in contempt. *See, e.g., Blum v. Schlegel*, 108 F.3d 1369 (2d Cir. 1997); *Hunt v. Enzo Biochem, Inc.*, 904 F. Supp. 2d 337, 340 (S.D.N.Y. 2012). EXHIBIT 3 at 4.

<sup>4</sup> This Court has jurisdiction over the order to unseal under the collateral order doctrine. *Brown*, 929 F.3d at 54; *see United States v. Erie Cty., N.Y.*, 763 F.3d 235, 238 n.5 (2d Cir. 2014); *United States v. Graham*, 257 F.3d 143, 147-48 (2d Cir. 2001).

respectfully requests an order on this motion by close of business on Friday, July 31, 2020.

At the very least, this Court should enter a temporary administrative stay to give itself sufficient time to consider the merits of Ms. Maxwell's motion to stay pending appeal.

## **Argument**

### **I. This Court should stay the district court's order pending appeal.**

Federal Rule of Appellate Procedure 8 governs a motion for a stay pending appeal. Fed. R. App. P. 8(a)(2). Under that Rule, this Court will stay a district court order pending appeal after evaluating four criteria: the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest. *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

“The necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other [stay] factors.” *Id.* at 101 (quoting *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). As a result, “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [appellant] will suffer absent the stay. Simply stated, more of one excuses less of the other.” *Id.* (quoting

*Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

Here, irreparable injury will occur if the district court's unsealing order is not stayed. Simply put, unless this Court grants a stay, any appeal of the order to unseal will be moot. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (irreparable injury when denial of a stay will moot appeal).

As with the disclosure of privileged communications, once the deposition material is released, there is no way to "re-seal" the material or repair the damage done. *See In re Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) ("[A] remedy after final judgment cannot unsay the confidential information that has been revealed.") (quoting *In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987))). At that point, particularly in the Internet age, the horse is irrevocably out of the barn. *See United States v. Bolton*, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL 3401940, at \*4 (D.D.C. No. 1:20-CV-1580 (RCL), June 20, 2020) (declining to enjoin publication of a book by former National Security Advisor John R. Bolton because copies were already released, the "horse is out of the barn," and "in the Internet age, even a handful of copies in circulation could irrevocably destroy confidentiality").

Because irreparable damage will result from the improper and premature unsealing of the deposition material, Ms. Maxwell need only show "a substantial

possibility, although less than a likelihood, of success” on the merits. *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985), *vacated on other grounds*, 487 U.S. 1229 (1988). A “substantial possibility” of success is “something less than 50 percent.” *Mohammed*, 309 F.3d at 102.

If the likelihood were more than 50 percent, the appellant would be required to persuade the stay panel that he was more likely than not to win the appeal before the merits panel, just to obtain the critical opportunity to maintain the status quo until the merits panel considers the appeal.

*Id.*

As elaborated below, Ms. Maxwell has more than a substantial probability of success. And in contrast to the irreparable injury Ms. Maxwell will suffer absent a stay, plaintiff and the Miami Herald will suffer no meaningful harm if this Court grants Ms. Maxwell’s motion. Finally, the public interest favors a stay. This Court should issue a stay pending appeal of the district court’s order unsealing the deposition material. *See In re Long Island Lighting Co.*, 129 F.3d 268, 270 (2d Cir. 1997) (stay of order compelling discovery of evidence).

**A. Ms. Maxwell will suffer irreparable harm absent a stay because the denial of a stay will moot her appeal.**

Ms. Maxwell will suffer irreparable harm absent a stay because her “right of appeal here will become moot unless the stay is continued pending determination of the appeal[]”. Once the documents are [disclosed] pursuant to the lower court’s

order, confidentiality will be lost for all time. The status quo could never be restored.” *Providence Journal Co.*, 595 F.2d at 890. As this Court has recognized, stays pending appeal of orders to unseal are appropriate so that “[t]he genie is [not] out of the bottle.” *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 138, 144 & n.11 (2d Cir. 2004).

In *Providence Journal Co. v. Federal Bureau of Investigation*, the First Circuit stayed pending appeal a district court order requiring disclosure to the Providence Journal of various documents reflecting the results of an unauthorized and illegal wiretap. *Id.* at 889. The First Circuit explained that litigants are entitled to meaningful appellate review, which demands the opportunity for the appellate court to “take a fresh look at the decision of the trial court before it becomes irrevocable.” *Id.* at 890. A stay pending appeal was appropriate because the “[f]ailure to grant a stay [would have] entirely destroy[ed] appellants’ rights to secure meaningful review.” *Id.*

The same logic applies here. Unless this Court stays the district court’s order unsealing the deposition material, Ms. Maxwell will lose her right to obtain review of the district court’s order. *See S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 756 (11th Cir. 2009) (dismissing appeal as moot because appellant failed to seek a stay precluding payment of funds to a third-party

creditor). Disclosure of the deposition will moot Ms. Maxwell's challenge to its unsealing.

This Court has already anticipated Ms. Maxwell's right to appeal an unsealing order. As noted above, in *Brown* this Court instructed that in the "interests of judicial economy, any future appeal in this matter shall be referred to this panel." *Brown*, 929 F.3d at 54. This Court would not have directed future appeals to be assigned to the same panel only to allow such an appeal to be mooted before the panel could even consider its merits.

**B. Ms. Maxwell has more than a substantial possibility of success on the merits.**

Ms. Maxwell has more than a substantial possibility of succeeding on her claim that the deposition material should not be unsealed.

A presumptive right of access attaches to a document *only if* the document is a judicial record. *Brown*, 929 F.3d at 49. In turn, a document is a judicial record *only if* it is relevant to the performance of a judicial function. *Id.*

Once an item is deemed relevant to the exercise of judicial power, "the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* "[W]hile evidence introduced at trial or in connection with summary judgment enjoys a strong

presumption of public access, documents that ‘play only a negligible role in the performance of Article III duties’ are accorded only a low presumption that ‘amounts to little more than a prediction of public access absent a countervailing reason.’” *Id.* at 49–50 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

Here, the deposition material was not part of the summary judgment record. Thus, the presumption of access attached to it is “somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment.” *See id.* at 50. In turn, several countervailing interests rebut the lower presumption of access attaching to the deposition material.

First, the deposition material should remain sealed to protect Ms. Maxwell’s right to a fair trial. U.S. CONST. amend. V, VI. The decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) shows why.

In that case, members of the media moved the district court to release audio tapes admitted into evidence in the trial of four of President Nixon’s former advisors. The media intended to copy the tapes for broadcasting and sale to the public. District Judge Sirica denied the motion, principally on the ground that the rights of the four defendants, who had been convicted and had filed notices of

appeal, would be prejudiced if they prevailed in their appeals. 435 U.S. at 595, 602 n.14. Judge Sirica noted that the transcripts of the audio tapes had been released to the public. *Id.* at 595. The D.C. Circuit Court of Appeals held Judge Sirica abused his discretion.

The Supreme Court reversed the court of appeals and rejected the media's arguments that release of the tapes was required under the common law right of access and the First Amendment. The Court noted with approval "Judge Sirica's view" that "the public's 'right to know' did not . . . overcome the need to safeguard the defendants' rights on appeal." *Id.* at 595; *see id.* at 602 n.14 (noting that "Judge Sirica's principal reason for refusing to release the tapes [was] fairness to the defendants, who were appealing their convictions"). The Court indicated that the public interests in access to the tapes properly were balanced against "the duty of the courts," *id.* at 602, including the duty to ensure fairness to the defendants, *see id.* at 602 n.14.

In *Nixon*, the Court was properly concerned about the effect of unsealing materials notwithstanding that they were core judicial documents (audio tapes admitted into evidence at the merits trial). And the court continued to hold these concerns even after the defendants had been convicted and had launched appeals. The court recognized that the right to a fair trial is a compelling interest in

“weighing the interests advanced by the parties in light of the public interests and the duty of the courts,” *Nixon*, 435 U.S. at 602.

Here, the unsealing of the deposition material would result in substantial negative media publicity and speculation in an Internet world in the same way that Judge Sirica found release of the audio tapes in *Nixon* would generate publicity and affect those defendants’ right to a fair trial. *See also In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (recognizing “defendants’ fair trial rights” as an “appropriate” basis for sealing material). The public’s right of access to the deposition material is substantially outweighed by the compelling interest in ensuring Ms. Maxwell’s right to a fair trial.

Second, the deposition material should remain sealed to vindicate this Court’s prohibition on the government breaching a protective order to gain access to deposition transcripts in a civil lawsuit. *Martindell*, 594 F.2d at 294. In *Martindell*, decided forty years ago, this Court held that the government “may not . . . simply by picking up the telephone or writing a letter to the court . . . insinuate itself into a private civil lawsuit between others.” *Id.* The Court rejected the government’s argument that the district court’s “solicitude for the witnesses’ Fifth Amendment” over the government’s desire for the deposition transcripts was an abuse of discretion. *Id.* at 295. It held that “a more significant

counterbalancing factor” is the civil rules’ goal of encouraging witnesses to participate in civil litigation:

Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

*Id.* at 296. After balancing the interests at stake, the Court held that absent improvidence in issuing the protective order or some extraordinary circumstance or compelling need, witnesses must be permitted to rely on the protective order’s enforceability. *Id.* The protective order should not be vacated or modified “to accommodate the Government’s desire to inspect protected testimony for possible use in a criminal investigation, either as evidence *or as the subject of a possible perjury charge.*” *Id.* (emphasis added).

Unsealing the deposition material in this case would sanction a blatant *Martindell* violation. Throughout much of the first year of this litigation plaintiff through her counsel represented to the district court and defense counsel that plaintiff was privy to and participating in an ongoing criminal investigation in which Ms. Maxwell was a “person of interest.” EXHIBIT 3 at 7. Toward that end plaintiff withheld documents responsive to defense discovery requests for any documents

relating to such a criminal investigation; plaintiff asserted such documents were subject to a law enforcement, “investigative” or public interest “privilege.” *Id.* In response to Ms. Maxwell’s motion to compel the production of documents, plaintiff submitted the “law enforcement materials” ex parte and in camera to the district court. *Id.* Ms. Maxwell objected to the submission of the materials ex parte and in camera. *Id.* The district court denied the motion to compel. *Id.* The materials never have been produced to the defense.

Based on plaintiff’s claim of an ongoing investigation, Ms. Maxwell requested, prior to her deposition, that plaintiff disclose any alleged “on-going criminal investigation by law enforcement” or alternatively to stay this action pending completion of any such investigation. *Id.* at 7–8. In part, Ms. Maxwell needed information concerning any such investigation to assess “the impact on any 5th Amendment privilege.” *Id.* at 8. Judge Sweet denied that motion. The day before Ms. Maxwell’s deposition, the Court ordered that “[a]ny materials that the plaintiff has with respect to any criminal investigations will be turned over [by plaintiff] except for any statements made by plaintiff to law enforcement authority.” *Id.* Plaintiff produced no such materials and Ms. Maxwell was deposed the next day. *Id.* In reliance on the protective order which included no exception for any law enforcement need or subpoena and based on plaintiff’s failure to disclose

any “on-going criminal investigation” she did not assert the 5th Amendment during that deposition. *Id.*

This history, culminating in plaintiff’s gratuitously attaching the entire transcripts of both Ms. Maxwell’s depositions to court submissions, and the government’s unexplained possession of the sealed materials, after which they then charged Ms. Maxwell with perjury counts, suggest plaintiff in conjunction with the government sought to circumvent *Martindell*: they set a perjury trap for Ms. Maxwell when plaintiff took her deposition. Unsealing the deposition material would sanction the *Martindell* violation at the expense of Ms. Maxwell’s 5th Amendment rights.

Third, the deposition material should remain sealed to vindicate Ms. Maxwell and other individuals’ reasonable reliance on the judicial promise of confidentiality. *See S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229–31 (2d Cir. 2001) (recognizing the importance of reliance interests in assessing whether to allow access to sealed documents (citing *Martindell*, 594 F.2d at 296 (2d Cir. 1979))). Ms. Maxwell and numerous third parties, including Doe 1, reasonably relied on the Protective Order. Many of the approximately thirty depositions in this case were made possible only because of the Protective Order. The district court had to issue numerous orders compelling deposition testimony of third parties, which

depositions took place only after everyone agreed on the record that the testimony would be confidential and sealed pursuant to the Protective Order.

Indeed, plaintiff's counsel stipulated to the Protective Order in part to facilitate taking Ms. Maxwell's deposition, saying, "I just want [Ms. Maxwell's] deposition . . . . It is that important to me." EXHIBIT 3 at 9. When that deposition finally occurred, on the advice of counsel, Ms. Maxwell declined to answer numerous questions regarding her consensual adult sexual activity, invoking her constitutional right to privacy. In response, plaintiff filed a motion to compel, telling the court "we have a protective order in place, and that assures Ms. Maxwell's right to privacy in answering those kinds of questions." Ms. Maxwell's Answer Brief, Doc. 95, *Brown v. Maxwell*, Case No. 18-2868 (2d Cir. Jan. 10, 2019), at 25. The district court accepted plaintiff's argument and compelled Ms. Maxwell to answer, saying, "the privacy concerns are alleviated by the protection order in this case drafted by the defendant." *Id.*

Finally, as explained more fully in Ms. Maxwell's objection to the unsealing of the deposition material and the reply in support of the objection, EXHIBITS 4 & 7, the deposition material should remain sealed to prevent the abuse of court records and files and to avoid annoyance, embarrassment, oppression, and undue burden. To be sure, this Court has already implied as much. When, in *Brown*, this Court

unsealed the summary judgment material, it redacted “deposition responses concerning intimate matters where the questions were likely only permitted—and the responses only compelled—because of a strong expectation of continued confidentiality.” 929 F.3d at 48 n.22. The district court should not unseal material this Court already declined to unseal, particularly because the material this Court declined to unseal enjoyed a stronger presumption of access (because it was part of the summary judgment record) than the material the district court has elected to unseal wholesale (because it was *not* part of the summary judgment record).

**C. A stay will cause no meaningful harm to plaintiff or the Miami Herald.**

A stay will cause no meaningful harm to plaintiff or the Miami Herald.

First, Ms. Maxwell’s and Doe 1’s depositions have been confidential since they were taken, more than four years ago in April, June, and July 2016. Moreover, neither plaintiff nor the Miami Herald sought to unseal *any* records in the district court for nearly a year *after* the underlying case was settled, dismissed, and closed in May 2017. In that context, keeping the deposition material sealed a little longer, until this appeal is decided, will not tangibly harm either plaintiff or Ms. Maxwell. *See Mohammed*, 309 F.3d at 102 n.11 (rejecting the Government contention of harm from delaying the removal of an alien petitioner because the contention

“substantially weakened” by the “gap of more than ten weeks between the District Court’s continuation of the stay and the Government’s motion to lift the stay”).

Second, expedited consideration of the appeal, on a timeline convenient to this Court, will mitigate any minimal harm that might result from a brief stay that merely preserves the status quo. This Court anticipated exactly this scenario in the *Brown* decision, directing that any future appeals be assigned to the same panel in “the interests of judicial economy.” *Brown*, 929 F.3d at 54.

Third, plaintiff *stipulated* to the confidentiality of the deposition material and induced Ms. Maxwell to rely on it (setting a perjury trap along the way). Plaintiff cannot claim to be harmed when all Ms. Maxwell wants is a meaningful opportunity to show she reasonably relied on the plaintiff and the district court’s promise of confidentiality.

For his part, Doe 1 also relied on the same promise of confidentiality in submitting to his deposition. All Ms. Maxwell is asking is that this Court have a fair opportunity to review the merits of the district court’s decision before the deposition material is unsealed for all time.

**D. The public interest favors a stay.**

Finally, the public interest favors a stay.

First, a stay protects this Court's role in the judicial process. Appellate courts have long exercised their right to "hold an order in abeyance while [they] assess[] the legality of the order." *Nken v. Holder*, 556 U.S. 418, 426 (2009). A stay pending appeal is simply a "means of ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Id.* at 427; *see also Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10 (1942) ("[I]t is reasonable that an appellate court should be able to prevent irreparable injury to the parties . . . resulting from the premature enforcement of a determination which may later be found to have been wrong.").

By contrast, were this Court to deny a stay, Ms. Maxwell's appeal will become moot upon unsealing of the deposition material, at which point this Court will lose jurisdiction over the appeal. *See S.F. Residence Club*, 583 F.3d at 756 (dismissing appeal as moot because appellant failed to seek a stay precluding payment of funds to a third-party creditor). A stay serves the public interest by protecting this Court's jurisdiction. *See Nken*, 556 U.S. at 426 (citing the All Writs Act, 28 U.S.C. § 1651(a), as a "grant of authority to federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'").

Second, a stay serves the public interest by helping to secure Ms. Maxwell a fair trial before an impartial jury. U.S. CONST. amends. V, VI. At her deposition,

Ms. Maxwell was compelled to answer numerous questions about her private, consensual, and intimate conduct with other adults. Evidence of that conduct will not be admissible in Ms. Maxwell's criminal trial, because it is irrelevant and highly prejudicial. *See* FED. R. EVID. 401, 402, 403, 404(b); *United States v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997) (upholding district court's sealing of discovery materials deemed inadmissible at trial, holding that "disclosure of such [materials] would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction"). If her deposition is disclosed and her answers revealed—answers she offered only upon the promise of confidentiality—potential jurors will be irreparably biased against Ms. Maxwell, making it difficult if not impossible to seat a fair and impartial jury. *See Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907) (opinion for the Court by Holmes, J.) ("The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.").

Third, the public has a paramount interest in being able to rely on judicial promises of confidentiality unless and until the courts definitively rule that the promise of confidentiality is no longer enforceable. *See S.E.C.*, 273 F.3d at 229–31

(citing *Martindell*, 594 F.2d at 296 (2d Cir. 1979)). Unless this Court grants a stay, Ms. Maxwell will not be able to test whether the district court correctly concluded that its promise of confidentiality was no longer binding.

### **Conclusion**

At the conclusion of its decision in *Brown*, this Court offered a “cautionary note” to the public and the press:

[C]ourt filings are, in some respects, particularly susceptible to fraud. For while the threat of defamation actions may deter malicious falsehoods in standard publications, this threat is non-existent with respect to certain court filings. This is so because, under New York law (which governs the underlying defamation claim here), absolute immunity from liability for defamation exists for oral or written statements made . . . in connection with a proceeding before a court. Thus, although the act of filing a document with a court might be thought to lend that document additional credibility, in fact, allegations appearing in such documents might be less credible than those published elsewhere.

...

[T]he media does the public a profound disservice when it reports on parties’ allegations uncritically. We have previously observed that courts cannot possibly discredit every statement or document turned up in the course of litigation, and we have criticized the use by the media of the somewhat misleading term court records in referring to such items. Even ordinarily critical readers may take the reference to court papers as some sort of marker of reliability. This would be a mistake.

*Brown*, 929 F.3d at 52–53 (footnotes and quotations omitted). This note of caution is even more apt today, now that the government has indicted Ms. Maxwell and the media circus is descending.

Unless this Court stays the unsealing of the deposition material, there will be nothing to protect against uncritical reporting of the deposition material’s contents, reporting that will only undermine the ability to secure a fair trial for Ms. Maxwell.

This Court should stay pending appeal the district court’s order unsealing the deposition material.

July 30, 2020.

Respectfully submitted,

*s/ Adam Mueller*

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## Certificate of Service

I certify that on July 30, 2020, I served a copy of this *Ghislaine Maxwell's Emergency Motion to Stay Pending Appeal or, in the Alternative, Motion for a Temporary Administrative Stay Pending Full Consideration of the Motion to Stay* via CM/ECF, which will send notification of the filing to all counsel of record.

*s/ Stephanie Poole*

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