20-2413

United States Court of Appeals for
the Second Circuit

[redacted],

Plaintiff-Appellee,

—against—

GHISLAINE MAXWELL,

Defendant-Appellant,

SHARON CHURCHER, JEFFREY EPSTEIN,

Respondents,

JULIE BROWN, MIAMI HERALD MEDIA COMPANY,
ALAN M. DERSHOWITZ, MICHAEL CERNOVICH, DBA CERNOVICH MEDIA

Intervenors.

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

Ghislaine Maxwell's Opening Brief

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Introduction

This case, 15-cv-7433 (LAP) (S.D.N.Y), began as a defamation action, though it is hardly recognizable as that anymore. The stakes are much higher now.

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

In the criminal case, 20 Cr. 330 (AJN) (S.D.N.Y.), the government alleges, among other things, that Ms. Maxwell committed perjury during her civil deposition. But Ms. Maxwell sat for her 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 long ago 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."[1]

It now appears that the district court's promise of confidentiality was dubious at best. Indeed, the promise is at risk of being broken entirely.

[1] *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979), *cited with approval in In re Teligent, Inc.*, 640 F.3d 53, 58 (2d Cir. 2011).

The government has obtained a copy of Ms. Maxwell's confidential deposition, sealed pursuant to the Protective Order entered by the district court. The criminal indictment quotes directly from it. And just three weeks ago, the district court in the civil case ordered it to be unsealed.

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

To vindicate Ms. Maxwell's reasonable reliance on the Protective Order, to protect her constitutional rights to remain silent and to a fair trial by an impartial jury, and for all the other reasons offered below, this Court should reverse the unsealing order.

Jurisdictional Statement

The district court had diversity jurisdiction under 28 U.S.C. § 1332(a). This Court has jurisdiction under the collateral order doctrine. *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 228 (2d Cir. 2001) (collateral order jurisdiction exists over order unsealing material within the scope of a protective order).

Issues Presented

Whether the district court abused its discretion in ordering the unsealing of Ms. Maxwell's April 2016 deposition transcript, the transcript of the deposition of Doe 1, and the district court filings that quote, summarize, or characterize both transcripts.

Statement of the Case and the Facts

The defamation action and the Protective Order.

[redacted] alleged that Ms. Maxwell defamed her. App. pp 121–24. The alleged defamation centered on a statement from Ms. Maxwell's attorney-hired press agent 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. App. p 119.

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. App. p 116, ¶¶ 8–10; p 119 ¶ 27; p 122, ¶ 12; p 123, ¶¶ 14, 16; p 124, ¶ 20.

Plaintiff chose this course of action because even she had to admit that numerous of her 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, numerous responses to interrogatories, and thirty-some depositions, including depositions of plaintiff and Ms. Maxwell as well as several third parties, including Doe 1. *See Brown v. Maxwell*, 929 F.3d 41, 46, 51 (2d Cir. 2019) (explaining that discovery was "hard-fought" and "extensive" and noting that the court file, which includes only a portion of documents created during discovery, totals in the "thousands of pages").

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. *Brown*, 929 F.3d at 48 n.22. 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. App. pp 126–31. 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. App. p 128, ¶ 8; p 129, ¶ 11; p 130, ¶¶ 12–13.

"The Protective Order, despite the angst it is now causing, is unremarkable in form and function." App. p 516. 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." App. p 609.

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. App. p 570. In turn, the language agreed upon and made an order of the district court specifically excluded an exception for law enforcement. App. pp 126–31.

Had the Protective Order included a law enforcement exception, Ms. Maxwell would have proceeded in a different fashion, including by invoking her constitutional right to remain silent. U.S. CONST. amend. V. App. p 570. She instead relied on this language and the protection afforded to her by this Court under established Second Circuit law, *e.g.*, *Martindell*, 594 F.2d 291.

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. [redacted]*v. Maxwell*, 325 F. Supp. 3d 428, 436 (S.D.N.Y. 2018), *vacated and remanded sub nom. Brown*, 929 F.3d 41. As the district court below found as a matter of fact, "a significant, if not determinative, factor" in reaching a settlement 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. *Id.* at 446.

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. App. pp 381–402. The district court denied the motion to unseal. [redacted], 325 F. Supp. 3d 428.

The Miami Herald appealed, and this Court vacated. *Brown*, 929 F.3d at 44–45. The majority concluded that the district court erred in sealing the summary judgment materials. *Id.* at 47–48. Upon the issuance of the mandate, this Court unsealed the summary judgment materials to the public and the press, redacting certain sensitive and private information, including "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." *Id.* at 48 n.22. 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 have had this Court unseal only 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, this 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.

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's April 2016 deposition transcript is part of the court file *only* because

Plaintiff submitted the *entire 418-page transcript* as an exhibit to a motion to exceed the presumptive ten deposition limit in Federal Rule of Civil Procedure 20(A)(2)(a)(ii). App. pp 188–215, 1003–30, 1214–1632. The submission of the entire deposition transcript was gratuitous and unnecessary and exactly the type of abuse of court filings this Court anticipated in *Brown*. 929 F.3d at 51–52.[2] While the entire transcript of the Doe 1 deposition was not filed with the district court, those excerpts that were filed likewise were gratuitous to the plaintiff's requested relief.

Ms. Maxwell accordingly filed an objection to the unsealing request, plaintiff and the Herald each filed a response, and Ms. Maxwell filed a reply. App. pp 403–22, 480–513, 527–66.

On July 2, 2020, one day after Ms. Maxwell filed her reply, the government staged a dramatic, forced entry at dawn into her home and arrested her. App. p 569.

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

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[2] The transcript of Ms. Maxwell's April 2016 deposition is contained at App. pp 1214–1632, filed under seal with this Court. This Court, however, is already aware of the nature of some of its contents, because it *redacted* statements made by Ms. Maxwell from the July 2016 deposition when it released the summary judgment material to the public, some of which included excerpts of the July transcript. *Brown*, 929 F.3d at 48 n.22.

she was guilty of "l[ying]" in her deposition "because the truth, as alleged, was almost unspeakable." App. p 569.

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." App. p 569. 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. . . ." App. p 569.

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." App. p 586. 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." App. p 586. 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." App. p 586.

On July 8, the government filed a superseding indictment alleging that Ms. Maxwell "assisted, facilitated, and contributed" to Epstein's abuse of minors. App. p 588. The indictment turned to and relied on 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. App. p 596.

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." App. pp 602–03.

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." App. p 127. As explained above, *supra* at 5, this language was negotiated by the parties specifically to *exclude* an exception for investigations by law enforcement.

From Ms. Maxwell's indictment and arrest, two 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 did not obtain a copy of the deposition transcripts from Ms. Maxwell or her counsel.

The order unsealing the deposition material, including Ms. Maxwell's April 2016 deposition transcript.

On July 23, over Ms. Maxwell's objection, Judge Preska—who is presiding over the civil case and the litigation about the unsealing of the district court filings—ordered the complete unsealing of Ms. Maxwell's April 2016 deposition transcript 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

(collectively, the "deposition material").[3] App. pp 835–51. That Ms. Maxwell was under criminal investigation and had been indicted, the court ruled, "is not entitled to much weight" in determining whether the deposition material should be unsealed. App. p 839. The court did not address Ms. Maxwell's argument that she relied on the Protective Order, let alone explain why that reliance was "unreasonable." App. pp 836–49.

On July 28, the district court entered an order directing the public release of the deposition material on July 30. App. p 567.

Ms. Maxwell filed a motion to reconsider on July 29. App. pp 568–76. 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. App. p 568.

The court denied the motion to reconsider but stayed the unsealing until August 3. App. pp 779–80.

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[3] The district court is poised next to consider whether Ms. Maxwell's July 2016 deposition transcript should also be unsealed.

What this brief refers to as the "deposition material" is included in Appendix Vol. V –VIII, filed under seal with this Court, and includes District Court docket entries: 143, 144-1, 144-2, 144-4, 144-5, 144-6, 144-7, 149, 150-1, 152, 153-1, 172, 173-6, 184, 203, 211, 224, and 228.

On July 29, Ms. Maxwell filed a notice of appeal from the district court's unsealing order. App. p 781. Ms. Maxwell also filed an emergency motion with this Court to stay the unsealing order pending appeal.

This Court granted the motion to stay and, accepting Ms. Maxwell's suggestion, ordered expedited briefing.

Events after the filing of the notice of appeal and the critical new information.

On August 5, just days after Ms. Maxwell filed the notice of appeal and this Court stayed the unsealing order pending appeal, the government in the criminal case produced discovery to Ms. Maxwell that revealed critical new information. This information bears directly on the merits of this appeal, namely whether it was proper for the district court to unseal the depositions, and it supports a stay of the civil case until the resolution of the criminal case. App. pp 787–89. Ms. Maxwell on August 7 reviewed the government's disclosure and on August 10 informed Judge Preska about the existence of the critical new information. App. p 787.

At the time, however, a protective order in the criminal case, entered by Judge Nathan, prevented Ms. Maxwell from informing Judge Preska about the nature of the new information. App. pp 787, 791–802. The same protective order now prevents Ms. Maxwell from disclosing to this Court the nature of the new information. App. pp 791–802.

On August 12, after learning that new information existed but unaware of what the new information was, Judge Preska took no action. App. pp 803–04. Judge Preska said she would reevaluate the matter should Judge Nathan modify the criminal protective order to allow Ms. Maxwell to share with her and this Court the nature of the new information. App. p 804.

On August 17, Ms. Maxwell filed a motion with Judge Nathan to modify the criminal protective order to allow her in sealed submissions to inform Judge Preska and this Court about the new information.[4] As of the filing of this brief, Judge Nathan has not yet ruled on that request. Judge Nathan has ordered the government to respond to Ms. Maxwell's motion by noon August 21. App. p 852. Ms. Maxwell's reply is due at noon on August 24. App. p 852.

If Judge Nathan grants the motion to modify the criminal protective order, Ms. Maxwell intends to ask this Court for a limited remand to permit Judge Preska to reevaluate her unsealing order based on the information previously kept from her.

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[4] Because of the protective order entered by Judge Nathan in the criminal case, Ms. Maxwell's motion to modify the protective order was itself filed under seal.

If Judge Nathan denies the motion to modify, Ms. Maxwell intends to file a notice of appeal from the order denying modification and to consolidate that appeal with this one.

As explained below, however, even without the benefit of this critical new information, Judge Preska abused her discretion in ordering the unsealing of the deposition material.

Summary of the Argument

The district court erred in ordering the unsealing of the deposition material. First, the district court failed to address or even acknowledge the reliance interests of those who, like Ms. Maxwell, sat for a deposition confident in the guarantee of confidentiality provided by the Protective Order. The district court's failure to acknowledge or address Ms. Maxwell's or Doe 1's reliance interest is itself an abuse of discretion, particularly because, had the district court addressed the issue, it would have seen this Court's longstanding commitment to vindicating reasonable reliance on Protective Orders.

Second, the district court erred in dismissing outright the fact of the criminal indictment of Ms. Maxwell as a relevant consideration. In fact, the pending indictment of Ms. Maxwell—based in part on the government's possession of her sealed and confidential deposition—provides compelling reasons to keep the

deposition material under seal. Unsealing the deposition would prejudice (or at least prejudge) Ms. Maxwell's argument in the criminal case that the government improperly obtained her sealed and confidential deposition. Releasing the deposition material also would lead to prejudicial and unconstitutional pretrial publicity while also undermining the truth-seeking function of the criminal trial by leading witnesses to conform their testimony and recast their memories of events from decades ago.

Finally, the district court did not give adequate weight to the privacy interests of those, including Ms. Maxwell and Doe 1, about whom intimate, sensitive, and personal information is about to be spread like wildfire across the Internet. To be sure, the district court intends to release information of the type this Court itself declined on privacy grounds to release in the first appeal when it redacted certain deposition answers from the summary judgment material. The court abused its discretion on this basis as well.

Argument

I. Even without the benefit of the critical new information, the district court abused its discretion in ordering the unsealing of the deposition material.

A. Standard of review.

When reviewing a decision to unseal, this Court examines the district court's factual findings for clear error, its legal determinations de novo, and its ultimate

decision to seal or unseal for abuse of discretion. *Brown*, 929 F.3d at 47 & n.11 (quoting *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016)). A district court "necessarily abuses its discretion if its conclusions are based on an erroneous determination of law." *TheStreet.Com*, 273 F.3d at 229 (quoting *Crescent Publ'g Grp., Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 146 (2d Cir. 2001)).

"Reviewable-for-abuse-of-discretion, however, does not mean unreviewable." *In re Mazzeo*, 167 F.3d 139, 142 (2d Cir. 1999). To the contrary, the district court must address the relevant legal principles and arguments of the parties and it must explain its reasoning to permit meaningful appellate review. *Id.* ("A principal purpose of the requirement for specific factual findings is to inform the appellate court of the basis of the decision and to permit effective appellate review."). "An abuse of discretion occurs if the district court fails to make the required factual findings, or if those factual findings are clearly erroneous." *United States v. Juvenile Male No. 1*, 47 F.3d 68, 71 (2d Cir. 1995) (citation omitted).

B. The district court erred in ordering the unsealing.

There are "two related but distinct presumptions in favor of public access to court proceedings and records: a strong form rooted in the First Amendment and a slightly weaker form based in federal common law." *Newsday LLC v. Cnty. of*

Nassau, 730 F.3d 156, 163 (2d Cir. 2013); *see Brown*, 929 F.3d at 47. These presumptions exist because of the "need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*").

A presumption of access, however, is just that: a presumption. *Brown*, 929 F.3d at 49–50. There is no absolute right of access, and the presumption, where it applies, can always be overcome. *Id.*; *Newsday*, 730 F.3d at 164. "What offends the First Amendment is the attempt to [exclude the public] without sufficient justification," not the act of exclusion itself. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth. (NYCTA)*, 684 F.3d 286, 296 (2d Cir. 2012); *see Brown*, 929 F.3d at 48–51; *Newsday*, 730 F.3d at 165. That's because

> every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify private spite or promote public scandal and when its files serve as reservoirs of libelous statements for press consumption.

Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (cleaned up), *quoted in Brown*, 929 F.3d at 51.[5]

When a nonparty seeks access to records in possession of a court pursuant either to the common law or the First Amendment, the threshold question is whether the records qualify as "judicial documents." *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 134 (2d Cir. 2017) ("The threshold merits question in this case is whether the Monitor's Report is a judicial document, as only judicial documents are subject to a presumptive right of public access, whether on common law or First Amendment grounds."). This Court has made clear that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Brown*, 929 F.3d at 49 (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"). In order to be designated a judicial document, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *Id.* (quoting *Amodeo I*, 44 F.3d at 145); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (same).

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[5] "The parenthetical 'cleaned up,' while perhaps unfamiliar, is being used with increasing frequency to indicate that internal quotation marks, alterations, and/or citations have been omitted from a quotation." *State v. Cady*, 414 P.3d 974, 977 (Utah Ct. App. 2018).

In considering whether a record qualifies as a "judicial document," this Court must "determine the degree of judicial reliance on the document in question and the relevance of the document's specific contents to the nature of the proceeding." *Newsday*, 730 F.3d at 166–67. The filing with the court of "deposition transcripts, interrogatories, and documents exchanged in discovery" does not, from that fact of filing alone, convert the transcripts, interrogatories, and discovery documents into "judicial documents" for purposes of the right to access. *HSBC*, 863 F.3d at 139. Nor does the "mere fact that a dispute exists about whether a document should be sealed or disclosed" render the disputed document a judicial document. *Newsday*, 730 F.3d at 167. Were the rule otherwise, it "would bootstrap materials that are not closely related to judicial proceedings into judicial documents." *Id.*

If a filing qualifies as a judicial document triggering the presumptive right of access, the court must determine the weight to be afforded to the presumption and then balance the interest in access against competing considerations. *Amodeo II*, 71 F.3d at 1050. Competing considerations include, but are not limited to, the reliance interests of those resisting disclosure, the constitutional rights attendant a criminal trial, and the right to privacy. *TheStreet.Com*, 273 F.3d at 229–31 (reliance);

Martindell, 594 F.2d at 293 (constitutional rights); *Amodeo II*, 71 F.3d at 1150 (privacy); *see Brown*, 929 F.3d at 47 n.13.

1. The presumption of access to the deposition material is lower than the presumption of access this Court ascribed to the summary judgment material.

In *Brown v. Maxwell*, this Court directly released to the public the summary judgment order and material submitted in connection with the summary judgment briefing, subject to minimal redactions. 929 F.3d at 53. This Court concluded that the minimally redacted material was subject to a "strong presumption" of access under the First Amendment and the common law. *Id.* at 47 & n.12 (citing *Lugosch*, 435 F.3d at 121–22).

The deposition material at issue here, however, was not submitted to the district court in connection with summary judgment briefing. Thus, as this Court found in *Brown*, 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.

Take Ms. Maxwell's April 2016 deposition. Plaintiff filed with the district court the entire 418-page transcript as an exhibit in support of her motion to exceed the presumptive ten deposition limit in Federal Rule of Civil Procedure

20(A)(2)(a)(ii). Doing so was unnecessary and gratuitous. *See Brown*, 929 F.3d at 51–52 & n.42 (recognizing that court files should not "serve as reservoirs of libelous statements for press consumption" or of "redundant, immaterial, impertinent, or scandalous" material (quoting, among others, *Nixon*, 435 U.S. at 598; Fed. R. Civ. P. 12(f))). The deposition transcript (certainly in its entirety) was irrelevant to plaintiff's request to exceed the presumptive ten deposition limit. *See Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("We do not say that every piece of evidence, no matter how tangentially related to the issue or how damaging to a party disclosure might be, must invariably be subject to public scrutiny.").

Yet, by filing the deposition transcript in its entirety, plaintiff improperly attempted to transform it into a "judicial document." *See Amodeo I*, 44 F.3d at 145 ("[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access."). Plaintiff accomplished this even though ordinarily the deposition would never be "filed with the court, but simply passed between the parties in discovery," and therefore would "lie entirely beyond the . . . reach" of the presumption of access. *Brown*, 929 F.3d at 50 & n.31 (quotations omitted).

A judicial document that "play[s] only a negligible role in the performance of Article III duties" warrants "little more than a prediction of public access absent a

countervailing reason." *Id.* at 49–50 (quoting *Amodeo II*, 71 F.3d at 1050). Thus, while a motion filed by a party necessarily calls for the court to exercise its judicial powers, the same cannot be said of a gratuitously filed exhibit attached to the motion, irrelevant to the question presented and offered merely to "humiliate and embarrass [an] adversar[y]." *See id.* at 47.

Here, the transcript of Ms. Maxwell's April 2016 deposition falls into the latter category. Attaching the entire deposition to a routine discovery motion was improper and a plain effort to "weaponize the discovery process" against Ms. Maxwell. *Id.* at 47. This Court, therefore, should afford it nothing but a limited presumption of access.

In turn, as explained below, several countervailing interests rebut this minimal presumption of access.

a. Ms. Maxwell's reliance interests, and those of Doe 1, outweigh any presumption of access.

To begin with, the deposition material should remain sealed to vindicate Ms. Maxwell and other individuals' reasonable reliance on the judicial promise of confidentiality. *See TheStreet.Com*, 273 F.3d at 229–31 (recognizing the importance of reliance interests in assessing whether to allow access to sealed documents (citing *Martindell*, 594 F.2d at 296); *see also Brown*, 929 F.3d at 48 n.22 (recognizing the propriety of sealing deposition material "concerning intimate matters where

the questions were likely only permitted—and the responses only compelled—because of a strong expectation of continued confidentiality" (citing Fed. R. Civ. P. 5.2)). That is the very purpose of protective orders. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35–36 (1984) ("The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.").

The district court thought otherwise. But in ruling as it did, the district court failed even to acknowledge, let alone address, the reliance interests of those who sat for depositions only because of the security the Protective Order afforded. App. pp 836–49. Failing to address this countervailing interest and make the required findings is itself an abuse of discretion. *United States v. Nelson*, 68 F.3d 583, 588 (2d Cir. 1995) ("A district court is said to abuse its discretion when it fails to make the required factual findings or where the findings it does make are clearly erroneous."); *see Brown*, 929 F.3d at 48 (concluding, in the first appeal in this case, that the discretion court committed "legal error" by failing to make "specific, on-the-record findings" in support of its decision).

Had the district court actually considered reasonable reliance, it would have seen that this Court's decisions support Ms. Maxwell's argument to keep the deposition material sealed. In *S.E.C. v. TheStreet.Com*, this Court held that

"[w]here there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) 'absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.'" 273 F.3d at 229 (quoting *Martindell*, 594 F.2d at 296; citing *FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982)). The deponents in *TheStreet.Com*, however, could not have reasonably relied on the confidentiality provisions of a January 2001 protective order, because they "had provided Confidential Testimony at least a month before the entry of that order." *Id.* at 234.

The opposite is true in this case because Ms. Maxwell and numerous third parties, including Doe 1, unquestionably relied on the Protective Order in offering their deposition testimony. Indeed, 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. Judge Sweet made factual findings on exactly this point, which this Court never questioned in *Brown*. [redacted] 325 F. Supp. 3d at 445, 446 (recognizing that Ms. Maxwell "as well as dozens of third persons" all "relied upon the promise of

secrecy outlined in the Protective Order and enforced by the Court" and that there were "dozens of non-parties who provided highly confidential information relating to their own stories . . . . in reliance on the Protective Order and the understanding that it would continue to protect everything it claimed it would").

"It is presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied." *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) (quotation omitted). As to Ms. Maxwell in particular, the unfairness in unsealing the deposition material is evident because the record of her reasonable reliance on the Protective Order could not be clearer. Plaintiff's counsel stipulated to the Protective Order to facilitate taking Ms. Maxwell's deposition, saying, "I just want [Ms. Maxwell's] deposition . . . . It is that important to me." 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." 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."

The district court's failure entirely to address Ms. Maxwell's reasonable reliance contrasts with its prior recognition of the reliance interest at stake. On July 1, just before briefing on the motion to unseal concluded, the district court denied a motion filed by Alan Dershowitz to modify the Protective Order "to permit him access to all filings and discovery materials, including third-party discovery, from that case." App. p 514. The district court rightly rejected Mr. Dershowitz's motion, explaining that this Court "has held that where there has been reasonable reliance by a party or non-party in providing discovery pursuant to a protective order, a district court should not modify that order 'absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.'" App. p 520 (quoting *TheStreet.Com*, 273 F.3d at 229). The court concluded:

> [T]here is no question that the plain terms of the *Maxwell* Protective Order would justify such an expectation. The *Maxwell* Protective Order incentivized parties to provide sensitive information in discovery by explicitly promising that said information would only be wielded in connection with litigating the claims at issue in that case and that case only. Had the parties producing discovery in *Maxwell* under the auspices of the protective order anticipated that their information could eventually be turned over to make litigation of a related, but entirely separate, case more convenient, they may have never produced information in the first place. The Court accordingly concludes that such reliance on the *Maxwell* Protective Order precludes modification.

App. p 525. Having once appreciated the reliance interests of those, like Ms. Maxwell, who reasonably relied on the Protective Order, the failure of the district court even to address reliance in ordering the unsealing of the deposition material is all the more arbitrary and unreasonable. *See Wu v. I.N.S.*, 436 F.3d 157, 161 (2d Cir. 2006) (a decision will be reversed for an abuse of discretion when it "(1) provides no rational explanation, (2) inexplicably departs from established policies, (3) is devoid of any reasoning, or (4) contains only summary or conclusory statements").

Ms. Maxwell's reasonable reliance on the Protective Order is more than enough to overcome whatever limited presumption of access attaches to the deposition material, much of which (including the entire 418-page transcript of the April 2016 deposition) should never have been filed with the district court in the first place. *See Martindell*, 594 F.2d at 296–97 ("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."). The district court erred in concluding otherwise and abused its discretion by failing even to consider reliance on the Protective Order as a basis for keeping the deposition material sealed.

b. Ms. Maxwell's constitutional right to remain silent outweighs any presumption of access.

Next, in overruling Ms. Maxwell's objection to the unsealing of the deposition material, the district court said that the indictment of Ms. Maxwell was "not entitled to much weight." App. p 839. That was the sum of what the district court had to say on the matter.

In fact, however, Ms. Maxwell's constitutional right to remain silent outweighs the limited presumption of access attached to the deposition material. *See* U.S. CONST. amend. V. This Court's decision *Martindell v. Int'l Telephone & Telegraph Corp.* shows why.

In *Martindell*, 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. 594 F.2d at 292. The government said it was investigating possible violations of federal criminal laws, including perjury, subornation of perjury, obstruction of justice, and conspiracy. *Id.* at 293. 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.

Id. 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. It 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.* This 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 *Martindell* violation (or at least prejudge the issue) and prejudice Ms. Maxwell's right to seek relief in the criminal case. Ms. Maxwell has a strong claim that the government violated *Martindell*.

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." Toward that end plaintiff withheld documents responsive to defense discovery requests for any documents relating to such a criminal investigation. She asserted that the documents were subject to a law enforcement, "investigative," or public interest "privilege."

In response to Ms. Maxwell's motion to compel the production of documents, App. pp 132–38, plaintiff submitted the "law enforcement materials" *ex parte* and *in camera* to the district court, App. pp 139–49, 155–56, 139–78, Ms. Maxwell objected to the submission of the materials *ex parte* and *in camera*. App. pp 150–54, 179–87. The district court denied Ms. Maxwell's motion to compel. App. p 1873. To this day, the district court in this case has not turned over the materials to Ms. Maxwell.

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 the action pending completion of any such investigation. App. pp 132–38. In part, Ms. Maxwell needed information concerning any such investigation to assess "the impact on any 5th Amendment privilege." App. p 134. The district court declined to afford Ms. Maxwell the requested relief. App. pp 805–33.

The day before Ms. Maxwell's April 2016 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." App. p 825. Plaintiff produced no such materials, and the deposition proceeded as scheduled the next day. App. p 575.

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," Ms. Maxwell did not assert her Fifth Amendment privilege against self-incrimination during that deposition.

This history, culminating in plaintiff's gratuitously attaching the entire transcript of Ms. Maxwell's April 2016 deposition to court submissions, and the government's possession of the sealed materials, suggest a circumvention of *Martindell*: A perjury trap was set for Ms. Maxwell when plaintiff took her deposition.

The civil case is not the appropriate forum to litigate the government's apparent violation of *Martindell*. Ms. Maxwell intends to make that argument to Judge Nathan in the criminal case. But if Judge Preska's unsealing order is affirmed and Ms. Maxwell's deposition is released, her ability to make that argument before Judge Nathan will be prejudiced. Keeping the deposition material sealed will preserve the status quo and protect Ms. Maxwell's right to litigate *Martindell* and the Fifth Amendment in the criminal proceeding.

At the time the parties briefed the unsealing of the deposition material, Ms. Maxwell was (as it turns out) only under criminal investigation. Only after the briefing was concluded was Ms. Maxwell indicted, arrested, and held without bond.

The stakes are much higher now, and the weight to be afforded the presumption of access correspondingly lower as a result.

In a related context, this Court has recognized that district courts have the power to stay civil cases pending the resolution of pending criminal proceedings. *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96 (2d Cir. 2012). "In evaluating whether the 'interests of justice' favor such a stay, courts have generally been concerned about the extent to which continuing the civil proceeding would unduly burden a defendant's exercise of his rights under the Fifth Amendment." *Id.* Short of granting a stay, district courts are empowered to do exactly what the district court did here: enter a Protective Order. *Nosik v. Singe*, 40 F.3d 592, 596 (2d Cir. 1994) ("Although civil and criminal proceedings covering the same ground may sometimes justify deferring civil proceedings until the criminal proceedings are completed, a court may instead enter an appropriate protective order.").

Even absent an indictment, Ms. Maxwell's reliance on the Protective Order as a basis for not asserting her Fifth Amendment privilege against self-incrimination would be reason enough to reverse the district court's order unsealing the deposition material. Now that Ms. Maxwell has been indicted, there can't be any question that the deposition material should remain sealed. *See Maldanado v. City of New York*, Case No. 17-cv-6618 (AJN), 2018 WL 2561026, at

*2 (S.D.N.Y. June 1, 2018) ("Whether the defendant has been indicted has been described as 'the most important factor' to be considered in the balance of factors.").

Accordingly, the district court erred in ordering the unsealing of the deposition material. The district court's conclusory reasoning to the contrary—that the criminal case against Ms. Maxwell was "not entitled to much weight" as a factor weighing against unsealing the deposition material—was unreasoned and unsupported, and therefore an abuse of discretion.

c. Ms. Maxwell's constitutional right to a fair trial by an impartial jury outweighs any presumption of access.

Third, the deposition material should remain sealed to protect Ms. Maxwell's right to a fair trial by an impartial jury. U.S. CONST. amends. 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.

As this Court already recognized in the first appeal, preserving "the right of an accused to fundamental fairness in the jury selection process" is an entirely appropriate basis for sealing court filings from public view. *Brown*, 929 F.3d at 47 n.13 (quoting *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984)). Here, the unsealing of the deposition material would result in substantial negative media publicity and speculation in an Internet world of the type foreshadowed in *Brown*. It would, as in *Nixon*, generate substantial and irreversible publicity negatively affecting Ms. Maxwell's 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).

Lest there be any doubt, the Miami Herald's response to Ms. Maxwell's emergency motion to stay settles the matter. In opposing Ms. Maxwell's request, the Herald said: "The documents at issue have been improperly sealed for years—in a way that allowed . . . Ms. Maxwell['s] . . . abuse of young girls to go on unchallenged and unpunished, and allowed a legal system that protected perpetrators over victims to go unquestioned." Resp. at 12. This unqualified statement of Ms. Maxwell's alleged guilt is precisely the type of unfair and unconstitutional pretrial publicity that will result should the district court's unsealing order go into effect.

In the criminal case, Judge Nathan has appreciated the potential for improper and unreliable pretrial publicity to prejudice Ms. Maxwell and her ability to obtain a fair trial. App. p 586. In ordering the unsealing of the deposition material, the district court in this case appears to be operating at a cross-purpose. Only this Court can step in and strike the appropriate balance, a balance that weighs in favor of keeping the deposition material sealed since it enjoys "little more than a prediction of access" that is substantially outweighed by numerous countervailing considerations.

Apart from pretrial publicity affecting the ability to obtain a fair and impartial jury, unsealing the deposition material also risks compromising the integrity of witness testimony because it provides an opportunity for a witness to change his or her story to conform to the allegations made in the unsealed (and publicized) material. Witnesses at the criminal trial are required to testify based on their own independent recollection of events which, in this case, allegedly occurred decades ago. If, by contrast, the deposition material is unsealed, these witnesses are likely to "remember" events differently than if called upon at trial to rely on their independent recollection. Much like sequestering a witness during trial, keeping the deposition material sealed will facilitate the truth-seeking function of a criminal trial by preventing against tainted memories of witnesses, or at least, allowing Ms.

Maxwell and her counsel to explore the source of any refreshed memories. *See* Fed. R. Evid. 615, 1972 Advisory Committee Notes ("The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.").

For these reasons, 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.

d. Ms. Maxwell's privacy interests outweigh any presumption of access.

Finally, Ms. Maxwell's privacy interests, as well as those of Doe 1, outweigh the limited presumption of access attached to the deposition material.

> Our legal process is already susceptible to abuse. Unscrupulous litigants can weaponize the discovery process to humiliate and embarrass their adversaries. Shielded by the "litigation privilege," bad actors can defame opponents in court pleadings or depositions without fear of lawsuit and liability. Unfortunately, the presumption of public access to court documents has the potential to exacerbate these harms to privacy and reputation by ensuring that damaging material irrevocably enters the public record.

Brown, 929 F.3d at 47.

These words, authored by this Court in the first appeal, could not be more apt. At issue in this appeal are documents submitted to the district court in connection with discovery disputes. The documents were not filed in conjunction

with dispositive motions or admitted into evidence at trial. Many of the documents—like the complete transcripts of Ms. Maxwell's deposition—likely should never have been filed with the district court in the first place. In this context, the privacy interests of Ms. Maxwell and Doe 1 take on even more importance when balanced against the limited "prediction of public access" applicable to the deposition material. *See Brown*, 929 F.3d at 49.

The privacy interest of those resisting disclosure, and particularly of those "innocent third parties[,] . . . should weigh heavily in a court's balancing equation." *TheStreet.Com*, 273 F.3d at 232 (quoting *Amodeo II*, 71 F.3d at 1050); *see Application of Newsday, Inc.*, 895 F.2d 74, 79–80 (2d Cir. 1990) ("[T]he privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure of the Title III material should weigh heavily in a court's balancing equation." (quoting *In re New York Times Co.*, 828 F.2d at 116)); *see also Brown*, 929 F.3d at 47 n.12. This case was replete with "allegations concerning the intimate, sexual, and private conduct of the parties and of third persons, some prominent, some private." [redacted] 325 F. Supp. 3d at 433. The district court should have afforded more weight to this consideration. *See Application of Newsday*, 895 F.2d at 79 ("[T]he common law right of access is qualified by recognition of the privacy rights of the persons whose intimate relations may thereby be

disclosed."); *Amodeo II*, 71 F.3d at 1050 ("[T]he privacy interests of innocent third parties . . . should weigh heavily in a court's balancing equation.").

This Court has already recognized 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, by contrast, intends to unseal the April 2016 deposition transcript in its entirety, without redaction. The district court should not unseal material of the type 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 and should never have been filed in the district court in the first place).

Conclusion

This Court should reverse the district court's order unsealing the deposition material.

August 20, 2020.

Respectfully submitted,

s/ Adam Mueller

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Certificate of Compliance with Rule 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 9,112 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(III).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Equity.

s/ Adam Mueller

Certificate of Service

I certify that on August 20, 2020, I filed *Ms. Maxwell's Opening Brief* with the Court via CM/ECF, which will send notification of the filing to all counsel of record. I also certify that I mailed a copy of the opening brief to:

The Hon. Loretta A. Preska
District Judge
United States District Court for the
Southern District of New York
(*via* United States mail)

s/ Nicole Simmons

Attachment 1 to Opening Brief

July 23, 2020 Transcript Ordering Unsealing of the Deposition Material

K7N9GIUD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

[redacted]

Plaintiff,

v. 15 CV 7433 (LAP)
Remote Zoom Conference

GHISLAINE MAXWELL,

Defendant.

----------x

New York, N.Y.
July 23, 2020
11:30 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

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HADDON, MORGAN, AND FOREMAN, P.C.
Attorney for Defendant
BY: LAURA A. MENNINGER

(The Court and all parties appearing via Zoom)

THE COURT: Are we ready to begin or is there anyone else we're waiting for? OK.

So let's begin. I wanted to start out by thanking counsel for organizing the docket entries by motion, by Doe, by pinpointing the references to the Does and the like. It was exceedingly helpful to the Court and really a model of making it easy for the Court.

My law clerk is on the call and I'm going to invite him to correct me if I make any mistakes in going over charts when we go document by document.

To remind us where we are in the process of unsealing materials from [redacted] v Maxwell, the Court is to:

One, evaluate the weight of the presumption of public access to the materials;

Two, identify and evaluate the weight of any countervailing interests; and

Three, determine whether the countervailing interests rebut the presumption.

The Court acknowledges that the presumption of public access attaches to judicial documents, that is, to documents filed in connection with a decided motion or to papers that are relevant to the Court's exercise of its inherent supervisory powers. The documents at issue here relate to discovery motions previously decided by Judge Sweet, and so the Court

concludes that they are judicial documents to which the presumption of public access attaches. Because the motions are discovery motions, the presumption is somewhat less weighty than on a dispositive motion but is nevertheless important to the public's interest in monitoring federal courts' exercise of their Article III powers.

The motions at issue today mention Does 1 and 2, the first long line of nonparties mentioned throughout the sealed materials. Pursuant to the protocol set out in docket no. 1044, these individuals were given notice of the motion to unseal and given the opportunity to request the material that pertains to them and to object to its unsealing. Neither Doe requested the material or lodged an objection to unsealing. The Court notes that the names of Does 1 and 2, portions of their deposition transcripts, and portions of the Palm Beach police report ascribed to them have already been made public. Also, Doe 1 gave a press interview about the subject matter of this action.

Also pursuant to the protocol, the parties were permitted to comment on the motion to unseal, and defendant Maxwell has lodged objections to unsealing. In her objections, Ms. Maxwell relies on several countervailing interests, the most weighty of which are that the material concerns personal matters that, if released, might lead to annoyance or embarrassment, that the material was abusively filed or is

untrustworthy, and that the material concerns the subject of a criminal investigation.

With respect to the argument that the material constitutes personal information which might lead to annoyance or embarrassment if unsealed, Ms. Maxwell proffers little more than her ipsi dixit; she provides no specifics as to these conclusions. In her first deposition, which is among the documents being considered on this motion, Ms. Maxwell refused to testify as to any consensual adult behavior and generally disclaimed any knowledge of underage activity. In the context of this case, especially its allegations of sex trafficking of young girls, the Court finds that any minor embarrassment or annoyance resulting from disclosure of Ms. Maxwell's mostly nontestimony about behavior that has been widely reported in the press is far outweighed by the presumption of public access.

With respect to the argument that the material was abusively filed or is untrustworthy, again, Ms. Maxwell proffers few specifics. That some of the exhibits to the motion papers might not have been technically required on the motion does not make the papers abusively filed. That Ms. Maxwell's lawyers did not cross-examine some of the witnesses relied on does not make the witnesses' testimony too unreliable to be unsealed. In any event, the Court is dubious that such a fine-toothed comb review is required to evaluate

the public interest in access to these papers. Thus, the Court finds that these interests are entitled to little weight under the facts of this case.

Finally, that the material relates to a person now known to be under criminal investigation, Ms. Maxwell, is not entitled to much weight here. Again, Ms. Maxwell has relied on ipsi dixits and has not explained how the sealed material, if released, could, as she posits, "inappropriately influence potential witnesses or victims." Again, the Court finds that this interest is entitled to little weight under the facts of this case.

As should be clear from the above, the Court finds that the countervailing interests identified fail to rebut the presumption of public access to the motions at issue and the documents filed in connection with those motions. Accordingly, those papers shall be unsealed.

The Court also notes that several of the documents sealed on these motion papers have already been made public, and so those documents will not be discussed.

Also, personal identifying information as to any person mentioned in the documents and the names of nonparties other than Does 1 and 2 and other portions related to such nonparties' specific conduct will be redacted from the materials being unsealed. Disclosure of the additional nonparty names will await notice to those parties and an

opportunity for them to be heard.

I won't repeat this caveat as to each document but will only comment when it is not applicable. So unless there's a specific comment, personal identifying information should be redacted and the names of the other Does not yet identified.

Consistent with the protocol, the Court will now announce its findings with respect to the sealed documents relating to Does 1 and 2 that are the subject of this motion to unseal. For ease of reference, as counsel knows, the Court will proceed in the order of the documents listed on Exhibit A, that is docket no. 1068-1.

Docket entry 143. Plaintiff's motion to compel defendant to answer deposition questions. Unseal subject to the caveat which I won't keep saying.

144. Plaintiff's declaration of Ms. McCawley in support of the motion. Unseal.

144-1. Exhibit 1. Page 21 of Ms. Maxwell's April 22, 2016 deposition. Unseal.

144-2. Additional pages of Ms. Maxwell's April 22, 2016 deposition. Unseal.

Same thing for 144-4.

Same thing for 144-5.

Same thing for 144-6.

Same thing for 144-7.

149. Defendant's response to the motion. Unseal.

150. Declaration of Mister -- how does he say it, Mr. Pagliuca? Say it again.

MS. MENNINGER: Pagliuca.

THE COURT: Mr. Pagliuca in opposition to the motion to compel. Unseal.

150-1. Additional pages from Ms. Maxwell's April 22, 2016 deposition. Unseal.

152. Plaintiff's reply memorandum of law on the motion. Unseal.

153. Ms. McCawley's declaration in support of the motion to compel. Unseal.

I'm sorry. I'm going to go back to 152 for a minute. Unseal the portions summarizing Doe 1's public statements. Those appear on page 6. Unseal portions summarizing deceased nonparties' public statements. Page 6. OK.

Continuing on. 153-1. Additional deposition excerpts. Unseal.

164. Defendant's motion to compel all attorney-client communications and work product put at issue by plaintiff and her attorneys. Unseal.

165. Declaration of Ms. Menninger in support of that. That can be unsealed in full because there are no -- there is no material within the caveat in the document.

165-3. Exhibit C. This is a copy of a motion to join in Jane Doe 1 and Jane Doe 2 files in court. That document is

already public.

165-8. Excerpts from Ms. [redacted] deposition taken in the Dershowitz matter on January 16, 2016. Unseal.

165-10. Copy of e-mail correspondence. Unseal.

165-11. Excerpts from Ms. [redacted] deposition, May 3, 2016. Unseal.

184. Plaintiff's response in opposition to the motion. Unseal the portions relating to Does 1 and 2 which appears on page 3.

185. Ms. McCawley's declaration in opposition. That can be unsealed in full because there is no material included in the caveats in the document.

185-2. Copy of Jane Doe's no. 3 and 4 corrected joinder motion. Already filed in public.

185-3. Response to the motion to intervene. Already filed in public.

185-11. Various deposition excerpts from Ms. [redacted] deposition. The pages unsealed by the Second Circuit should, of course, remain unsealed.

185-13. It's a copy of Ms. [redacted] May 30, 2016 affidavit. That can be unsealed in full.

185-14. Copy of deposition excerpts from Mr. Cassell. Unseal.

185-15. Copy of a transcript of the Scarola/Edwards interview of April 7, 2011. Unseal in full. The document is

already public

185-16. Copy of common interests agreement. Unseal.

194. Ms. Menninger's declaration in support of the motion to compel. Unseal in full.

194-3. Excerpts of Ms. [redacted] May 3, 2016 deposition. Unseal.

172. Plaintiff's motion to exceed the presumptive ten deposition limit. That may be unsealed. Obviously subject to the caveat.

173. Ms. McCawley's declaration in support. Unseal

173-5. May 18, 2016 deposition transcript of Doe 162. Pages released by the Second Circuit, of course, will remain sealed -- will remain unsealed. Let me say it again. The pages unsealed by the Second Circuit, of course, remain unsealed and further unsealing awaits notice.

173-6. Excerpts from Ms. Maxwell's April 22, 2016 deposition. Same thing. Pages unsealed by the Second Circuit remain unsealed. The portions of the deposition relating to Does 1 and 2 which appear pages 71, 72, 73, and 218 shall be unsealed.

189. Response in opposition to the motion. Unseal everything except for the reaction -- I'm sorry, the redaction on page 5 pending further nonparty notice.

190. Ms. Menninger's declaration in opposition. That can be unsealed in full.

190-1. Excerpts from Ms. [redacted] deposition taken on May 3, 2016. Unseal everything except for the inadvertently included letter on page 2.

203. Response in support of the motion. The portions relating to Does 1 and 2 which appear at pages 2, 5, and 6 may be unsealed.

204. Ms. McCawley's declaration in support. Unseal.

204-1. Doe no. 162's deposition transcript. The pages unsealed by the Second Circuit will, of course, remain unsealed and the remainder of the document remains sealed until notice to the nonparty.

204-2. It's Doe no. 151's rough deposition transcript excerpts. The pages unsealed by the Circuit will remain unsealed. The remainder will await notice to that Doe.

204-3. Deposition of John Doe 1. Unseal in full.

211. That's the reply to the motion. The portions mentioning Does 1 and 2 which appear at pages 2, 5, and 6 may be unsealed.

212. Ms. Schultz's declaration in support of the motion. The portions mentioning John Does 1 and 2 which appear at page 2 may be unsealed.

212-1. Doe no. 162's deposition transcript excerpts, pages unsealed by the Circuit will remain unsealed.

212-2. Doe 151's final deposition transcript excerpts. The pages unsealed by the Circuit will remain

unsealed

212-3. Doe 1's deposition transcript excerpt. Unseal in full

222 -- I'm sorry. 224. It's the reply on the motion. The portions relating to Does 1 and 2 which appear at page 2 may be unsealed.

199. That's a motion for an extension of time to complete depositions. That's open in any event.

228. The response in opposition to the motion. Unseal.

229. Ms. Menninger's declaration in opposition. Unseal.

221 -- 229-1. Excerpts of the deposition of Doe no. 151. Hold until notice to that Doe.

229-2. The billionaire playboy's club book manuscript. The pages unsealed by the Circuit will remain unsealed.

229-4. Excerpts of plaintiff's deposition of May 3, 2016. Unseal the pages released by the Circuit.

229-10. This is correspondence released in the case between Ms. Maxwell and Jeffrey Epstein from January 2015. Unseal in full.

229-11. Notices of deposition and a subpoena for Doe 84 -- Will, I can say these two names, right?

THE LAW CLERK: Yes, Judge.

THE COURT: Joe Recarey and Michael Reiter together with a letter of production from Ms. McCawley. Unseal in full.

248. Reply memorandum of law in support of the motion. We're going to await the notice to the Doe on that one.

249. Ms. McCawley's declaration in support of the motion. Unseal in full.

249-4. Ms. McCawley's correspondence with opposing counsel. The portions relating to Does 1 and 2 which appears at pages 4 and 5 can be unsealed.

249-13. Defendant's Rule 26 disclosures. The portions relating to Does 1 and 2 shall be unsealed.

249-14. Ms. Schultz's correspondence with opposing counsel. Unseal.

249-15. Same. Same.

230. Defendant's motion to reopen the deposition of plaintiff [redacted] It may be unsealed. However, the information currently redacted in the document relating to plaintiff's medical history shall remain redacted for obvious reasons.

235. Ms. Menninger's declaration in support of the motion. Unseal.

235-4. The deposition of Ms. [redacted] The pages released by the Second Circuit of course remain unsealed. The portions relating to Doe 1 and 2 which appears -- which appear

at pages 122, 126, 134, and 138 shall be unsealed.

235-5. Ms. Menninger's declaration. The medical records on pages 5 to 12 should remain sealed; otherwise, unseal.

235-6 are medical records. They shall remain sealed.

235-7. Excerpts from the -- a deposition of Doe no. 131. That will remain sealed pending notice to the Doe.

235-8. Production letters from Ms. Schultz to Ms. Menninger. The exhibits will remain sealed.

235 -- and they are medical records.

235-9. Excerpts from the May 26, 2016 deposition of Dr. Stephen Olsen. The material relating to plaintiff's medical issues shall remain sealed. The other material in the deposition, for example, how the doctor takes notes, how the doctor gets new patients, how the doctor writes prescriptions and that sort of thing may be unsealed.

235-10. Production letters from Ms. McCawley to Ms. Menninger. Unseal.

235-12. The June 1, 2016 errata sheet relating to Ms. [redacted] deposition. Unseal.

235-13. Plaintiff's third revised disclosure pursuant to Federal Rule 26. Unseal.

260. Ms. McCawley's declaration in opposition to the motion. The redactions which are medical information will remain.

260-1. Will, is this only the authorization or is it the authorization plus material?

THE LAW CLERK: Judge, I believe it's the authorization on the first two pages and then the medical records on subsequent pages.

THE COURT: Thank you. The medical record authorization may be unsealed. The subsequent pages which constitute medical records will remain sealed.

260-2. Dr. Lightfoot's June 27, 2016 correspondence. That may be unsealed.

267. The reply on the motion. The information relating to plaintiff's medical history shall remain sealed.

268. Ms. Menninger's declaration in support of the motion. Unseal.

268-1. Pages from plaintiff's medical records. They shall remain sealed.

268-2. Excerpts from the deposition of Doe no. 67. The pages unsealed by the Second Circuit will remain sealed -- I'm sorry, will remain unsealed and the remainder of the document will remain sealed pending notice to the relevant Does.

Counsel, I will ask you to confer and to prepare the documents for unsealing pursuant to this order and post the documents within a week on the docket sheet as documents unsealed pursuant to the Court's order of July 23 or something

like that.

Counsel, do you have any questions?

MS. MENNINGER: Your Honor, on behalf of Ms. Maxwell I would ask if we could have the opportunity for a brief stay in order to seek relief in the Second Circuit. There is not a certain mechanism for doing that in an unsealing context but I know that the Brown Court at the conclusion of their opinion stated their intent for that panel to maintain jurisdiction over this case for purposes of any appeals taken from an unsealing order and so we would ask for two weeks, if we could, to seek relief in the Second Circuit.

THE COURT: Ms. McCawley.

MS. McCAWLEY: Yes, your Honor. We obviously believe that the material should be unsealed as quickly as possible so we would prefer to obviously have the material unsealed.

MS. MENNINGER: Your Honor, if I may briefly, to add to my record. While I understand and respect the Court's ruling, there have been some significant changes with respect to my client's position since we concluded briefing. In particular, and perhaps known to everyone listening to this, while we were speaking about a potential ongoing criminal investigation at the time we submitted our brief, since that time Ms. Maxwell has been indicted and a trial has been scheduled for next July in another courtroom in the Southern District. So while we were not able to provide specifics

necessarily with regard to what witnesses might be relevant to any such criminal trial, now we are in a vastly different position and certainly have great concerns about our client's ability to seek and receive an impartial and fair trial and jury given the intense media scrutiny around anything that is unsealed or anything that happens in this or any of the related cases. So while we -- your Honor had mentioned at the beginning of this ruling that there was a lack of specifics on the front of the pending criminal investigation, I think there may be the ability to provide a lot more specifics about that at this time and certainly I think it's an issue that we would like to, if we may, have a brief amount of time to submit. It is important either to this Court's analysis or to the Second Circuit.

THE COURT: So what are you asking me for?

MS. MENNINGER: Your Honor, I ask for two weeks if we could to file an emergency appellate motion in the Second Circuit and ask them to stay any further release.

THE COURT: I will give you a week to file the motion. In the meantime I will still ask counsel to confer and to prepare the papers for release. If the Court of Appeals has not ruled on your motion in a week, then you can let me know.

(Court reporter dropped off the call; called back in and read record to the point where call dropped)

THE COURT: After that, I asked counsel to confer

generally along the outlines of the proposal in Ms. Maxwell's letter of April 3, docket no. 1045 to propose the next chronological set of motions to be considered for unsealing. I also asked counsel to confer on ways to make the process more efficient, less time consuming, and to make it stretch out or over a shorter time period. For example, it occurs to me we could shorten the briefing time. We could reduce the number of pages of briefing, for example, to ten pages each side total or something like that. I'll ask counsel to confer and to report back within a week.

Finally, going forward, as you all saw, Exhibit A to Ms. [redacted] motion -- I said the number of it earlier but that was exceedingly helpful. If you would like to propose a joint exhibit similar to that as we go forward with everybody's positions, I would welcome it.

Is there anything else you want to ask, counsel?

MS. McCAWLEY: No, your Honor.

MS. MENNINGER: No, your Honor. Not from Ms. Maxwell. Thank you.

THE COURT: Thank you and I'll just tell you lawyers again how useful the work you did in organizing the docket entries was. Thank you for it again.

MS. MENNINGER: Thank you, your Honor.

THE COURT: Good afternoon, counsel. Thank you.

MS. McCAWLEY: Good afternoon. Thank you. (Adjourned)

Attachment 2 to Opening Brief

July 28, 2020 Order Directing Process of Unsealing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted]

Plaintiff,

-against-

GHISLAINE MAXWELL,

Defendant.

15 Civ. 7433 (LAP)

ORDER

LORETTA A. PRESKA, Senior United States District Judge:

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.

Dated: New York, New York
July 28, 2020

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District Judge

Attachment 3 to Opening Brief

July 29, 2020 Order Denying Motion to Reconsider

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted]

Plaintiff,

-against-

GHISLAINE MAXWELL,

Defendant.

No. 15 Civ. 7433 (LAP)

MEMORANDUM & ORDER

LORETTA A. PRESKA, Senior United States District Judge:

The Court has reviewed Defendant Ghislaine Maxwell's letter requesting reconsideration of the Court's July 23, 2020, decision to unseal (1) the transcripts of Ms. Maxwell's and Doe 1's depositions, and (2) court submissions excerpting from, quoting from, or summarizing the contents of the transcripts. (See dkt. no. 1078.)

Ms. Maxwell's eleventh-hour request for reconsideration is denied. As Ms. Maxwell acknowledges in her letter, reconsideration is an "extraordinary remedy." In re Beacon Assocs. Litig., 818 F. Supp. 2d 697, 701 (S.D.N.Y. 2011) (quoting In re Health Mgmt. Sys. Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)). Such motions "are properly granted only if there is a showing of: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) a need to correct a clear error or prevent manifest injustice." Drapkin v. Mafco Consol. Grp., Inc., 818 F. Supp. 2d 678, 696 (S.D.N.Y. 2011). "A motion for reconsideration

may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court." Bennett v. Watson Wyatt & Co., 156 F. Supp.2d 270, 271 (S.D.N.Y. 2001).

Here, Ms. Maxwell's request for reconsideration hinges on her assertion that new developments, i.e., her indictment and arrest, provide compelling reasons for keeping the deposition transcripts sealed. (See dkt. no. 1078 at 5.) But, despite Ms. Maxwell's contention that she could not address the effect of those events in her objections because they occurred after the close of briefing, (id.),[1] this is plowed ground. Indeed, in her original objection to unsealing, Ms. Maxwell argued that the specter of ongoing criminal investigations into unknown individuals associated with Jeffrey Epstein--a group that, of course, includes Ms. Maxwell--loomed large over the Court-ordered unsealing

[1] The Court notes as a practical matter that Ms. Maxwell was arrested on July 2, 2020--that is, three weeks prior to the Court's July 23 decision to unseal the materials at issue. To the extent that they relate to the to the Court's balancing of interests in the unsealing process, the issues that Ms. Maxwell raises in her request were surely plain the day that Ms. Maxwell was apprehended. Ms. Maxwell, however, did not seek to supplement her objections to unsealing despite ample time to do so. In fact, the Court notified the parties on July 21, 2020, that it would announce the unsealing decision with respect to Ms. Maxwell's deposition, together with other documents, on July 23. (See dkt. no. 1076.) Even then, Ms. Maxwell made no request for delay or to supplement her papers. Ms. Maxwell did not raise her "vastly different position," (Transcript of July 23 Ruling at 16:2-3), until moments after the Court had made its decision to unseal the relevant documents.

process. (See dkt. no. 1057 at 5.) This argument, specifically Ms. Maxwell's concern that unsealing would "inappropriately influence potential witnesses or alleged victims," (id.), and her reference to "publicly reported statements by Plaintiff, Plaintiff's counsel, the United States Attorney for the Southern District of New York, and the Attorney General for the U.S. Virgin Islands" about those investigations, (id.), carried with it the clear implication that Ms. Maxwell could find herself subject to investigation and, eventually, indictment. The Court understood that implication as applying to Ms. Maxwell and thus has already considered any role that criminal charges against Ms. Maxwell might play in rebutting the presumption of public access to the sealed materials. Ms. Maxwell's request for reconsideration of the Court's July 23 ruling is accordingly denied.

Given the Court's denial of Ms. Maxwell's request for reconsideration, the Court will stay the unsealing of Ms. Maxwell's and Doe 1's deposition transcripts and any sealed or redacted order or paper that quotes from or discloses information from those deposition transcripts for two business days, i.e., through Friday, July 31, 2020, so that Ms. Maxwell may seek relief from the Court of Appeals. Any sealed materials that do not quote from or disclose information from those deposition transcripts shall be unsealed on July 30, 2020, in the manner described by the Court's Order dated July 28, 2020. (See dkt. no. 1077.) Ms. Maxwell's and

Doe 1's deposition transcripts and any sealed materials that quote or disclose information from them shall be unsealed in the manner prescribed by the July 28 Order on Monday, August 3, 2020, subject to any further stay ordered by the Court of Appeals.

SO ORDERED.

Dated: New York, New York
July 29, 2020

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District Judge