20-2413

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIRGINIA L. GIUFFRE,
Plaintiff-Appellee,

v.

GHISLAINE MAXWELL,
Defendant-Appellant,

SHARON CHURCHER, JEFFREY EPSTEIN,
Respondents,

JULIE BROWN, MIAMI HERALD MEDIA COMPANY, ALAN M. DERSHOWITZ, MICHAEL CERNOVICH, *d/b/a* CERNOVICH MEDIA,
Intervenors.

On Appeal from the United States District Court for the
Southern District of New York, No. 15-cv-07433-LAP

BRIEF FOR INTERVENORS
JULIE BROWN AND MIAMI HERALD MEDIA COMPANY

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, Intervenor Miami Herald Media Company, by and through its attorneys, Holland & Knight LLP, states that it is a wholly owned subsidiary of the McClatchy Company, which is publicly traded on the New York Stock Exchange.

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INTRODUCTION

Intervenors Julie Brown and Miami Herald Media Company ("Miami Herald") and the public have waited more than two years for the unsealing of the remaining judicial records in this case. The district court's review of the sealed materials at issue in this appeal has been thorough and exacting, carefully weighing the interests of all parties and non-parties on a document-by-document basis.

Despite this, Ghislaine Maxwell has made clear that she intends to fight every unsealing order by the court below, regardless of its merit. She recently requested that the District Court issue a blanket one-week stay on every unsealing decision by the district court to allow her time to appeal each unsealing order. *See* App. 789. She stated in her Opening Brief that she intends to consolidate an appeal from her criminal matter if her request to modify the protective order in that case is denied. Maxwell Br., Ghislaine Maxwell's Corrected Opening Br. [hereinafter, "Maxwell Br."], at 21. And she filed this appeal of the first unsealing order entered by the district court following remand without any merit.

Ms. Maxwell's delay tactics serve only to frustrate judicial economy and the public's right to inspect judicial documents involving matters of utmost public importance, that is, accusations of sex trafficking of young girls for years at the hands of the wealthy and powerful.

Pursuant to this Court's July 3, 2019 order, the district court conducted a "particularized review" of the first tranche of sealed documents in the underlying case—those documents that mention two non-parties, J. Doe 1 and J. Doe 2, "the first [in a] long line of nonparties mentioned throughout the sealed materials." *See Brown v. Maxwell*, 929 F.3d 41, 51 (2d Cir. 2019); App. 837. The order presently under appeal is the first unsealing order entered following this Court's remand—after extensive briefing and consideration by the district court. The unsealing order included the release of motions that attached Ms. Maxwell's first deposition and excerpts from the deposition of Doe 1. Maxwell Br., at 14. Ms. Maxwell has filed this appeal to challenge the district court's decision with regards to these materials.

Ms. Maxwell's arguments rely on exaggerated rhetoric regarding the potential prejudice to her criminal matter and alleged harm to her privacy interests that could result from unsealing, but Ms. Maxwell fails to demonstrate any cognizable harm that could overcome the presumption of public access afforded these documents. The district court and Ms. Maxwell herself make clear that she refused to answer questions about her consensual adult sex life, and that she denied knowledge of underage activity in her first deposition. App. 840; Maxwell Br., at 32. Such unremarkable testimony can hardly be said to inflict the kind of humiliation or embarrassment, or impair one's Fifth or Sixth Amendment rights (particularly where

the government is already in possession of the testimony), sufficient to override the presumption of public access that attaches to judicial documents.

The district court proceeded exactly as instructed by this Court by conducting an individualized review of a subsection of the remaining sealed documents, providing notice and an opportunity to be heard to third parties, and making specific findings on the record regarding whether a document is a judicial document, the weight of presumption that attaches, and whether any countervailing interests sufficiently rebut the presumption. *See Brown*, 929 F.3d at 51; App. 836-39. The district court correctly concluded that Ms. Maxwell failed to identify any countervailing interests (beyond conclusory and speculative assertions) that would outweigh the presumption of access. Based on this finding, the district court did not abuse its discretion in unsealing the judicial documents at issue, and its ruling should be affirmed.

STATEMENT OF THE CASE AND FACTS[1]

I. INTERVENORS' COVERAGE OF JEFFREY EPSTEIN AND GHISLAINE MAXWELL, AND THEIR INTERVENTION BELOW.

Integral to its years-long reporting to uncover potential sexual abuse by Jeffrey Epstein and those close to him, the Miami Herald closely monitored the civil and criminal cases brought in connection with Epstein and Maxwell, including the

[1] For a complete review of the case and facts, see Virginia Giuffre's Brief for Plaintiff-Appellee, Dkt. 76.

defamation matter underlying the instant appeal. In April 2018, the Miami Herald sought to access public court filings in the underlying matter to shed light on the investigation, the scope of the crimes, and, most importantly, the remedies—or lack thereof—available to Epstein's victims. App. 381. The continued unsealing of documents filed in the underlying matter, in a timely manner, is necessary for the press and the public to find answers to these questions.

The district court denied Intervenors' motion to unseal in the underlying matter, and Intervenors appealed. This Court vacated the district court's order, finding "the District Court failed to review the documents individually and produce 'specific, on-the-record findings that sealing is necessary to preserve higher values.'" *Brown v. Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019). This Court unsealed the summary judgment filings and remanded the case to the district court with instructions to conduct a "particularized review and unseal all documents for which the presumption of public access outweighs any countervailing privacy interests." *Id.* at 51.

II. THE DISTRICT COURT'S REVIEW PROTOCOL ON REMAND.

After substantial input from the parties, the district court developed an unsealing protocol that included notice and an opportunity to object to third parties, and a plan for reviewing and unsealing documents on a rolling basis. The Court began with documents referencing Does 1 and 2. App. 840. Does 1 and 2 were

notified and given the opportunity to object, and neither objected to unsealing. App. 837. The documents slated for unsealing include discovery motions to which Ms. Maxwell's first deposition transcript is attached, as well as portions of the deposition transcript of Doe 1. Ms. Maxwell objected to the release of these deposition transcripts but offered little reasoning beyond conclusory objections. App. 403. Finding that Ms. Maxwell "provide[d] no specifics as to [her] conclusions," the district court ruled on July 23, 2020, that "the countervailing interests identified [by Ms. Maxwell] fail to rebut the presumption of public access to the motions [and related documents]." App. 838-39. The district court's July 23, 2020 ruling is the subject of this appeal.

SUMMARY OF THE ARGUMENT

The district court's review of the remaining sealed materials in this case has been thorough and exacting, carefully weighing the interests of all parties and non-parties on a document-by-document basis. The district court did not abuse its discretion in finding that Ms. Maxwell provided only *ipse dixit* arguments that were insufficient to override the presumption of public access that attaches to the deposition transcripts (filed in support of motions) and related judicial documents at issue in this appeal. *See* App. 838-39.

The district court correctly noted that a presumption of public access attaches to discovery motions and their attachments, and even if the presumption is lower for

these documents than for dispositive motions, these documents are "nevertheless important to the public's interest in monitoring federal courts' exercise of their Article III powers." App. 837. Therefore, countervailing interests must be "specific and substantial" to overcome the presumption of public access to discovery motions and their attachments. *Brown*, 929 F.3d at 50.

Despite Ms. Maxwell's emphasis on her contemporaneous criminal investigation and indictment, as well as her privacy and reliance interests, she fails to actually demonstrate how those interests are harmed by the release of the deposition materials.

First, Ms. Maxwell did not reasonably rely on the protective order. The protective order contained provisions contemplating that confidential information could become public at trial and that the Court could modify it at any time for good cause shown. App. 130-31. Any reliance that the information given under this protective order would never be disclosed was not reasonable. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006). Additionally, Ms. Maxwell's denials and refusals to answer are not the type of responses elicited only under protection of confidentiality. *See* App. 838.

Second, Ms. Maxwell overstates the potential injury to her Fifth Amendment right to remain silent. It is clear that the federal government is already in possession of her deposition transcript. Maxwell Br., at 16. So, Ms. Maxwell is left to argue

that keeping her deposition sealed will help her position in a motion she intends to file with the criminal court. *Id.* at 37, 39. The public's right of access cannot be delayed or denied simply because Ms. Maxwell would prefer to be better positioned to criticize the government in her criminal case. Moreover, Ms. Maxwell's argument is predicated on cases involving government access to privately exchanged discovery—in other words, cases that do not involve public access to public documents and are thus inapposite to this appeal. *See* Maxwell Br., at 35-39 (citing *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979)).

Third, Ms. Maxwell provides no plausible argument for why the release of the deposition materials will so infect a potential jury pool it will jeopardize her right to a fair trial. Arguments that unsealing will impair a defendant's right to a fair trial must go beyond mere speculation to overcome the presumption of public access. *See United States v. Graham*, 257 F.3d 143, 155 (2d Cir. 2001). Ms. Maxwell fails to explain how alternative measures, such as voir dire, cannot correct the minimal impact the release of the deposition materials will have on the public.

Fourth, Ms. Maxwell failed to demonstrate how the release of her deposition transcript, which the district court described as "mostly nontestimony," would cause sufficient humiliation or embarrassment to overcome the presumption of public access. App. 838.

Because Ms. Maxwell failed to articulate specific and substantial countervailing interests sufficient to overcome the presumption of public access in the deposition materials, the district court did not abuse its discretion in ordering the materials unsealed.

LEGAL STANDARDS

I. STANDARD OF REVIEW

This Court reviews a district court's decision to seal or unseal for an abuse of discretion. *Brown*, 929 F.3d at 47. "[T]he decision whether or not to grant access [to sealed documents] 'is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'" *United States v. Longueuil*, 567 F. App'x 13, 15 (2d Cir. 2014). "The district court [is] 'in the best position to weigh [the] factors" supporting sealing or unsealing. *Id.* at 16.

II. APPLICABLE LEGAL STANDARDS

This Court recognizes a long-established presumption of public access to "judicial documents," which are documents filed with the court that are "relevant to the performance of the judicial function and useful in the judicial process." *Brown*, 929 F.3d at 49. This presumption finds its "twin sources in the common-law right of public access and the qualified First Amendment right to attend judicial proceedings." *In re Omicom Grp., Inc. Sec. Litig.*, No. 02 CIV. 4483 RCC/MHD,

2006 WL 3016311, at *1 (S.D.N.Y. Oct. 23, 2006). The party seeking closure bears the burden of demonstrating that sealing is justified. *Under Seal v. Under Seal*, 273 F. Supp. 3d 460, 469 (S.D.N.Y. 2017).

Once a document is determined to be a judicial document, the Court must consider "the weight to be given the presumption of access," which is "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." *Brown*, 929 F.3d at 49. "The common-law presumption [of access] is intended to promote accountability in the judicial process and to encourage public confidence in the administration of justice." *In re Omnicom Group, Inc. Securities Litigation*, 2006 WL 3016311, at *1.

Finally, the Court must determine whether any countervailing interests are so great as to override the presumption of public access. *Brown*, 929 F.3d at 47& n.13. Such countervailing interests may include an accused's right to a fair jury trial, the danger of impairing law enforcement or judicial efficiency, and privacy interests. *Id.* Even where countervailing interests overcome the presumption, sealing must be narrowly tailored. *Id.*

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY WEIGHED THE PRESUMPTION OF PUBLIC ACCESS.

The district court held that "[b]ecause the motions [at issue in this appeal] 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." App. 837. This standard is directly in line with this Court's holding that discovery motions may have a "somewhat lower" presumption of public access than dispositive motions but that the "court must still articulate specific and substantial reasons for sealing such material." *Brown*, 929 F.3d at 50.

Ms. Maxwell misconstrues this language, suggesting the presumption is almost nonexistent for a deposition transcript attached in support of a discovery motion. Maxwell Br., at 28-29. However, this Court has routinely recognized that exhibits attached to a motion play just as much of a role in the Court's performance of judicial functions as the motion itself. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) ("As a matter of law, then, we hold that the contested documents—by virtue of having been submitted to the court as supporting material in connection with a motion for summary judgment—are unquestionably judicial documents under the common law."); *Brown*, 929 F.3d at 46-47 (unsealing exhibits attached to summary judgment motion).

In *Lugosch*, plaintiffs attached 25 sealed documents, comprising 4,000 pages, to their motion for summary judgment, and defendants responded by attaching 15 volumes of sealed materials containing the plaintiffs' confidential information to

their opposition. *Lugosch*, 435 F.3d at 113-14. The district court was "'doubtful that the entirety of this massive motion record' would be relevant and useful to the judicial function," but this Court rejected that argument. *Id.* at 116. The fact that one party attached the other party's confidential information "'wholesale' as part of a fifteen-volume appendix" did not negate the attachments' characterization as judicial documents. *Id.* at 116, 122-23.

The *Lugosch* Court afforded the same level of presumption to all of the motion's attachments that it applied to the motion itself, finding that "[o]nce those submissions come to the attention of the district judge, they can fairly be assumed to play a role in the court's deliberations." *Id.* at 123.

Here, for all of the reasons articulated herein and in the district court's order, Ms. Maxwell has failed to demonstrate "specific and substantial" countervailing interests to overcome the presumption of access attached to Ms. Maxwell and Doe 1's deposition transcripts and related filings. *See Brown*, 929 F.3d at 50.

II. MS. MAXWELL FAILED TO ARTICULATE COUNTERVAILING INTERESTS TO OVERCOME UNSEALING.

A. Ms. Maxwell's Reliance on the Protective Order Was Not Reasonable.

Ms. Maxwell incorrectly contends that reliance on a protective order is sufficient to support continued sealing of judicial documents. This Court has made clear that "the mere existence of a confidentiality order says nothing about whether

complete reliance on the order to avoid disclosure was reasonable." *Lugosch*, 435 F.3d at 126.

First, parties cannot reasonably allege that every piece of information exchanged over years of discovery was disclosed in reliance on a protective order, because doing so "ignores the fact that civil litigants have a legal obligation to produce all information 'which is relevant to the subject matter involved in the pending action.'" *Id.*

Second, when a protective order contemplates modification or disclosure, parties should expect that information deemed CONFIDENTIAL may not remain so. *Id.* For example, this Court held in *Lugosch* that a provision stating "[t]his Confidentiality Order shall not prevent anyone from applying to the Court for relief therefrom" makes it "difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret." *Id.*

Here, the protective order explicitly states it would "have no force and effect on the use of any CONFIDENTIAL INFORMATION at trial in this matter." App. 130. It additionally states that it could be "modified by the Court at any time for good cause shown . . . ." App. 131. Given these provisions, which explicitly contemplate confidential information later becoming public at trial and modification

of the order "at any time for good cause shown," it was not reasonable for Ms. Maxwell to rely on the protective order. *See Lugosch*, 435 F.3d at 126.

Finally, the information contained in Ms. Maxwell's deposition that she now seeks to conceal is, by all accounts, "mostly nontestimony" consisting of Ms. Maxwell refusing to answer questions and denying knowledge of underage activity. *See* App. 838; Maxwell Br., at 32. This is not the type of information one discloses only on reliance of a protective order.[2]

The district court therefore did not abuse its discretion in deciding to unseal the deposition transcripts.

B. Ms. Maxwell's Right to Remain Silent Is Not Implicated in the Unsealing of Her Deposition Transcript.

Ms. Maxwell's arguments regarding the impact of unsealing on her criminal case are entirely irrelevant to this matter.

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[2] Additionally, while Ms. Maxwell attempts to claim—on Doe 1's behalf—that Doe 1 also reasonably relied on the protective order, she cannot do so. *See* Maxwell Br., at 29. The protective order defines "CONFIDENTIAL" as "information that is confidential and implicates common law and statutory privacy interests of (a) plaintiff Virginia Roberts Giuffre and (b) defendant Ghislaine Maxwell." App. 127. Therefore, it appears on the face of the protective order that a third party cannot have relied on the protective order in giving his or her testimony, because any information about the third party is not considered CONFIDENTIAL under the protective order. Moreover, Ms. Maxwell lacks standing to assert arguments on behalf of Doe 1. *In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 58 (2d Cir. 2013) ("A party must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'). Doe 1 was given notice and opportunity to contest disclosure, and Doe 1 declined to do so. App. 837.

First, Ms. Maxwell claims the documents cannot be unsealed because she did not assert her Fifth Amendment rights during her deposition on reliance of the protective order. This position finds no support in this Court's precedent. In fact, "[a] Rule 26(c) protective order, no matter how broad its reach, provides no guarantee that compelled testimony will not somehow find its way into the government's hands for use in a subsequent criminal prosecution." *Andover Data Servs., a Div. of Players Computer, Inc. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2d Cir. 1989).

Additionally, the protective order defines "CONFIDENTIAL" as "information that is confidential and implicates common law and statutory *privacy interests* of [the parties] . . . ." App. 127 (emphasis added). The definition encompasses the parties' privacy interests, not any statements that may self-incriminate either party. Ms. Maxwell's testimony, in which she denies knowledge of underage activity, does not implicate any privacy interests. It therefore should never have been designated as CONFIDENTIAL under the protective order, and Ms. Maxwell could not have reasonably relied on the protective order in giving this testimony.

Second, Ms. Maxwell contends her criminal case will be harmed if the documents are unsealed. To be clear, Ms. Maxwell does not actually contend that the information should remain sealed because, if disclosed, the government could

obtain it and use it against her: The government already has her deposition transcript. Maxwell Br., at 16. Instead, Ms. Maxwell argues that unsealing her transcript in this matter would undermine a motion she intends to file in the criminal matter, in which she intends to allege the government improperly obtained her deposition transcript. Maxwell Br., at 37, 39 (admitting the "civil case is not the appropriate forum to litigate the government's apparent violation of *Martindell*"). But giving a party an upper hand to prevail on a particular motion in another case is not a recognized countervailing interest sufficient to defeat the public's right of access. *See United States v. Graham*, 257 F.3d 143, 155 (2d Cir. 2001) (rejecting argument that the release of a judicial document would give the public "access to evidence which might be the subject of a successful suppression motion before trial," finding the argument too speculative to overcome the presumption of access).

Third, Ms. Maxwell invokes inapplicable case law to support her argument against unsealing. Specifically, she confuses cases involving the government's ability to access confidential information for law enforcement purposes with the public's right to access judicial records. The former often involves the government seeking a modification to a protective order so it may obtain confidential, privately exchanged discovery that has not been filed with the court—*i.e.*, documents that are not judicial records. The latter is invoked to obtain public access to documents that have been filed with the court that are "relevant to the performance of the judicial

function and useful in the judicial process,"—*i.e.*, judicial documents. *Brown*, 929 F.3d at 49.

To obtain access to confidential documents that are not judicial records, the government must prove "improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need." *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979). For judicial documents, there is a presumption of public access, and the documents should be released unless outweighed by countervailing interests. *Brown*, 929 F.3d at 49-51. Thus, the two analyses involve different interests and different standards.

There is no question that this appeal is about public access to judicial documents. Yet Ms. Maxwell relies almost exclusively on a case about government access to non-judicial documents. Maxwell Br., at 35-39 (citing *Martindell*, 594 F.2d 291). In *Martindell*, the government sought to modify a protective order so that it could obtain 12 full deposition transcripts from a party engaged in civil discovery to investigate possible violations of federal law. *Id.* There is no indication that the transcripts were ever filed with the court in *Martindell*, and the public's right of access was never discussed. *Id.* Therefore, Ms. Maxwell's reliance on *Martindell* is entirely misplaced.

The only other cases Ms. Maxwell cites in support of her argument regarding her Fifth Amendment rights involve staying civil proceedings during the pendency

of a related criminal matter, an analogy Ms. Maxwell seeks to draw with the present case.[3] Maxwell Br., at 40-41. But even the primary case Ms. Maxwell cites for that proposition states that "the Constitution rarely, if ever, requires such a stay." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012). In *Louis Vuitton Malletier*, this Court held "[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege." *Id.* at 98–99. The Court went on to state that it would not disturb the finding of the district court in denying a stay "absent demonstrated prejudice so great that, as a matter of law, it vitiates a defendant's constitutional rights or otherwise gravely and unnecessarily prejudices the defendant's ability to defend his or her rights." *Id.* at 100.

There is ample support for the district court's finding that Ms. Maxwell's parallel criminal investigation and indictment "is not entitled to much weight here," and the Court did not abuse its discretion in so finding. *See* App. 839.

C. Ms. Maxwell Has Not Articulated a Plausible Threat to Her Right to a Fair Jury Trial.

Ms. Maxwell continues to assert vague and conclusory assertions that the

[3] The case Ms. Maxwell cites stating "[w]hether a defendant has been indicted has been described as 'the most important factor'" is in relation to a court's considerations whether to grant a stay of a civil proceeding pending resolution of a criminal matter, not in the context of whether to unseal judicial records, as Ms. Maxwell uses it. *See* Maxwell Br., at 40-41 (citing *Maldanado v. City of New York*, Case No. 17-cv-6618 (AJN), 2018 WL 2561026, at *2 (S.D.N.Y. June 1, 2018)).

release of her deposition transcript will prejudice her right to a fair jury trial. *See* Maxwell Br., at 41-45. But "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]." *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 15, 106 S. Ct. 2735, 2743, 92 L. Ed. 2d 1 (1986). The district court did not abuse its discretion in holding that Ms. Maxwell's *ipse dixit* arguments were insufficient to overcome the presumption of public access to the records. App. 839.

Threats to a defendant's right to a fair trial must go beyond mere speculation to overcome the presumption of public access. *See United States v. Graham*, 257 F.3d 143, 155 (2d Cir. 2001); *Application of Nat'l Broad. Co., Inc. v. Myers*, 635 F.2d 945, 953-54 (2d Cir. 1980). It is not required that there be an absence of media publicity for a defendant to have a fair trial. In fact, this court has recognized that release of videotapes in a highly publicized matter will "no[] doubt . . . greatly increase the number of people" who see the recordings and "create a stronger impression of the events among those who already have been exposed to news accounts." *Graham*, 257 F.3d at 155 (quoting *Myers*, 635 F.2d at 953). But enhanced public awareness does not necessarily equate a tainted jury pool. *Id.* "We do not believe the public at large must be sanitized as if they all would become jurors . . . ." *Id.*

Rather than restrict public access to judicial proceedings and records, courts must first consider alternate means of ensuring a fair trial. *See Lugosch*, 435 F.3d at 124 (sealing must be narrowly tailored). For example, "voir dire examination still remains a sufficient device to eliminate from jury service those so affected by exposure to pre-trial publicity that they cannot fairly decide issues of guilt or innocence." *Myers*, 635 F.2d at 953.

Ms. Maxwell fails to explain how the release of her deposition transcript—which apparently consists largely of her denying any knowledge of or involvement in the crimes she is accused of, *see* App. 838, Maxwell Br., at 16—will "result in substantial negative media publicity and speculation," Maxwell Br., at 43. Certainly, she has received significant media attention, and the release of additional records in this matter may lead to more. But enhanced media attention—especially media attention about matters of public concern like those at issue here—does not alone jeopardize a defendant's right to a fair trial. *See Graham*, 257 F.3d at 155. And based on the district court's description of Ms. Maxwell's deposition transcript as "mostly nontestimony about behavior that has been widely reported in the press," there is no reason to suspect that release of the transcript will substantially prejudice Ms. Maxwell in her potential criminal trial.[4] App. 838.

[4] Ms. Maxwell's argument regarding her right to a fair trial relies substantially on a case that is not instructive here. *See* Maxwell Br., at 41-43 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978)). The Supreme Court itself called *Nixon* a

Furthermore, Ms. Maxwell fails to explain how the release of her sworn testimony (or "nontestimony") refusing to answer questions and denying involvement will lead witnesses to "'remember' events differently." Maxwell Br., at 44. This is exactly the type of conclusory and unsupported allegation this Court has found too speculative to overcome the presumption of public access. *See Graham*, 257 F.3d at 155; *Myers*, 635 F.2d at 953-54. Having found that "Ms. Maxwell has relied on *[ipse] dixits* and has not explained how the sealed material, if released, could, as she posits, 'inappropriately influence potential witnesses or victims,'" the court did not abuse its discretion in finding that such conclusory and speculative interests did not outweigh the presumption of public access. App. 839.

"concededly singular case," as it did not even reach the point where the Court "normally would be faced with the task of weighing the interests advanced by the parties." *Id.* at 602, 608. Instead, the Court was halted in its analysis of whether to disclose President Nixon's tape recordings by "an additional, unique element"—the Presidential Recordings Act—which provides an administrative procedure for the release of presidential recordings. *Id.* at 603. Because the public could access the records through alternate means, the Court "need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials." *Id.* at 605–06.

In recently declining to extend the *Nixon* ruling, the D.C. Circuit stated, "[w]e do not think the [Supreme] Court contemplated [a broad scope] in ruling on the 'singular' case of the Nixon tapes." *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 672–73 (D.C. Cir. 2017). Nor should this Court extend the *Nixon* case here to encompass Ms. Maxwell's broad reading that a judicial document could be sealed—with no alternate means of accessing it—based on conclusory and speculative claims that releasing the information would result in generalized "negative media publicity" that would, in turn, taint a jury trial. *See* Maxwell Br., at 43.

D. Ms. Maxwell's Privacy Interests Are Outweighed by the Public Interest in Access.

Ms. Maxwell fails to adequately explain how her privacy rights will be affected by the release of her deposition transcripts, when all accounts suggest she refused to answer questions about her private life in the deposition. Ms. Maxwell herself explains that she "declined to answer numerous questions regarding her consensual adult sexual activity, invoking her constitutional right to privacy" during her first deposition in April 2016. Maxwell Br., at 32. Ms. Maxwell's lack of responses prompted Ms. Giuffre to file a motion to compel her testimony. *Id.* After the court ordered her to testify, Ms. Maxwell sat for a second deposition, in July 2016. *Id.* at 32-33. But it is only the first deposition that was ordered to be unsealed below. App. 840; Maxwell Br., at 34.

Thus, Ms. Maxwell substantially exaggerates her privacy rights over a deposition in which she admits she refused to answer any questions about her consensual adult sexual activity. Maxwell Br., at 32. The district court, which reviewed the deposition transcript *in camera*, described it as "mostly nontestimony," in which "Ms. Maxwell refused to testify as to any consensual adult behavior and generally disclaimed any knowledge of underage activity." App. 838. Deflecting, Ms. Maxwell's brief argues that "*[t]his case* [not her deposition] was replete with 'allegations concerning the intimate, sexual, and private conduct of the parties and of third persons, some prominent, some private.'" Maxwell Br., at 46 (emphasis

added). She further misleadingly suggests that the district court ordered the disclosure of a transcript that this Court already redacted, but that is not so. *See* Maxwell Br., at 14 n.2, 47 (arguing "[t]he district court should not unseal material of the type this Court already declined to unseal"). This Court redacted statements from Ms. Maxwell's July 2016 deposition—the deposition she took after she was ordered to answer questions about her private life, *see* Maxwell Br., at 14 n.2—not the April 2016 deposition, in which she refused to answer questions about her private life and which is at issue in this specific appeal, *see* Maxwell Br., at 17.

The district court therefore did not abuse its discretion in finding 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." App. 838.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court affirm the district court's order unsealing the judicial records containing Ms. Maxwell's and Doe 1's deposition transcripts.

Dated: September 9, 2020
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local R. 32.1(a)(4)(A) because it contains 4,898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

Dated: September 9, 2020
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 9, 2020, I filed the foregoing **Brief for Intervenors Julie Brown and Miami Herald Media Company** with the Court via CM/ECF, which will send notification of the filing to all counsel of record.

Dated: September 9, 2020
New York, New York

Respectfully submitted,

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