No. 05-190

In the
Supreme Court of the United States

SIBEL EDMONDS,
Petitioner,
v.
DEPARTMENT OF JUSTICE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, BLOOMBERG NEWS, CABLE NEWS NETWORK LP, LLLP , DAILY NEWS L.P., LOS ANGELES TIMES COMMUNICATIONS LLC, THE NEW YORK TIMES CO., REUTERS AMERICA LLC, SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE WASHINGTON POST CO. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, described more fully in Appendix A, are journalists who report on matters of public concern, and journalism organizations that represent journalists. This case concerns an issue critical to the media specifically and the public in general: whether the public has a presumptive right of access to appellate court proceedings of significant public importance.

As cases stemming from the War on Terrorism move through our courts, the distinction between the public interest in access to criminal versus civil cases becomes less relevant. Some of the more important developments are occurring in the civil context, such as the suits brought against the government by individuals implicated in the anthrax attack investigation, espionage investigations at nuclear facilities, and, in the present case, allegations of improper activities within the Federal Bureau of Investigation.

It is imperative that this Court accept review to clarify that the presumptive public right of access applies to these controversies.

Each of the amici parties has an interest in protecting and preserving the news media's ability to report to the public on matters of public concern.

STATEMENT OF FACTS

Amici rely on the summary of the facts presented by petitioner, but emphasize that the facts relevent to this brief are those involving the closure of the appellate proceeding on

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

April 21, 2005.

The day before oral arguments were to be held, the U.S. Circuit Court of Appeals for the District of Columbia announced that the argument would be sealed from the press and public, despite the fact that neither party had moved for closed arguments and both parties had filed public briefs. *See Petition for Certiorari* at 13. The court then rebuffed two motions for access to the proceedings filed by a news media coalition and public interest groups, again with no explanation or justification of the need for closure. App. 3a.

SUMMARY OF ARGUMENT

Amici argue that the second question presented for review, concerning the denial of public and press access to the proceedings, merits review by this Court. A number of federal and state appellate courts recognize a presumptive right of access in circumstances similar to or — given the important public interests at stake here — even less important than in the present case. Recognition of a *presumptive* right, of course, does not settle the issue of access, but instead allows closure if the court identifies a compelling governmental interest that will be jeopardized and narrowly tailors a closure order to satisfy that interest. Other federal circuit courts manage to operate under such a standard, even in cases involving state secrets in terrorism investigations.

In *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, this Court looked in part to public policy arguments when it established the First Amendment right-of-access framework for criminal trials. In the 25 years since the Court issued *Richmond Newspapers*, a plethora of federal and state appellate courts have looked to those same public policy arguments in finding that the right of access also applies to civil litigation. Indeed, a number of courts have

specifically found a right of access to appellate oral arguments where the cases involve national security issues.

This Court's decisions make clear that a presumption of access applies to criminal cases, and that a court can overcome that presumption only by allowing the public an opportunity to be heard before closure and then issuing specific findings of fact showing that a compelling government interest justifies denying access and that the denial of access is narrowly tailored to achieve that goal. The presumption of openness and procedural safeguards have been extended to civil cases as well.

In this case, the Court of Appeals did not acknowledge the public's right of access to attend the appellate argument. It issued no findings of fact that attempted to justify its closure of the court and its decision to disregard the constitutional right of access. And it did not explain how its remedy — complete closure of the courtroom — constituted a narrowly tailored solution to the situation.

The D.C. Court of Appeals is attempting to allow the closing of broad categories of civil litigation from the public, and by doing so it has abridged the public's First Amendment rights.

ARGUMENT

I. The important public policy concerns underlying this Court's recognition of a First Amendment right of access in the criminal trial context are even more evident in the present case.

This Court's review is essential in the present case so that lower courts will know they cannot completely deny access to an appellate proceeding in a civil case of great public importance without justifying that closure in written findings that identify a compelling governmental interest and limit closure to the extent necessary to protect that interest.

In establishing the public's presumptive constitutional right of access to attend criminal trials, discussed *infra* at II, this Court has discussed the public policy reasons supporting access. Those reasons include, but are not limited to, the following: that openness ensures the accountability of our justice system, improves the functioning of a trial, provides an outlet for public concern, improves the public's understanding and acceptance of the judicial system, improves informed public debate, fosters an appearance of fairness, and permits the public to serve as a check on the judicial process.

These public policy factors also favor a presumptive right of access to civil appellate arguments. For better or worse, many of the most critical public policy battles are now fought through civil litigation. The front pages of America's newspapers are filled with stories about whistleblower litigation against employers, product liability litigation against cigarette companies and automobile manufacturers, toxic tort litigation against chemical manufacturers, class action lawsuits concerning breast implants, and wrongful death lawsuits against people acquitted of criminal murder charges. This phenomenon is hardly new. As this Court noted in discussing the history of civil rights litigation, "[I]n some civil cases the

public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

Furthermore, most of the concerns that justify closure of trial court proceedings — such as pretrial publicity that will influence jurors or interfere with the fair trial rights of a criminal defendant — do not apply to appellate proceedings.

Cases against the federal government that include claims under the Privacy Act, 5 U.S.C. § 552(a), such as the present case, present an even greater issue of public importance. The plaintiff alleges that the government, in defending its actions against charges of retaliation for exposing espionage within the FBI, released information to the public that it was not allowed to release under the Act. Such Privacy Act claims have been among the most controversial court actions in recent years, covering topics ranging from wrongful termination to the anthrax attacks and espionage at Los Alamos labs. These claims go to the heart of government accountability to the people because they involve both government statements to defend its own actions and individual claims of illegal retaliation by the government.

If the U.S. Court of Appeals for the District of Columbia circuit's decision to close the courtroom with no opportunity to be heard and no written finding justifying closure is allowed to stand, members of the public could be excluded from any broad category of cases that would facilitate public review of government conduct and would never understand when the government's interest in protecting state secrets outweighs the public's right to access. Under the Court of Appeals' reasoning, Circuit Courts need not articulate the reasons for denying the public's First Amendment right of access to civil appellate proceedings that concern fundamental issues of governance.

II. This Court recognizes the public's First Amendment right of access to criminal cases.

This Court has held that the public has a First Amendment right of access to attend criminal trials and related criminal proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) ("The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials.")

In subsequent cases that clarified when the presumption of access attaches, the Court first "considered whether the place and process have historically been open to the press and the general public." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (citing *Globe Newspaper*, 457 U.S. at 605 and *Richmond Newspapers*, 448 U.S. at 589). Second, it "considered whether public access plays a significant positive role of the functioning of the particular process in question." *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

In *Richmond Newspapers* and its progeny, this Court has established procedural requirements that must be carried out before closing a courtroom. *See* generally C. Thomas Dienes et al., NEWSGATHERING AND THE LAW § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the various U.S. Supreme Court access decisions).

"[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)). For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a

courtroom. *See*, *e.g.*, *United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

For a court to close a proceeding, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13-14. One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 510 (1984).

III. The constitutional right of access is equally important in civil litigation as in criminal litigation.

A. The factors that led to a right of access to criminal proceedings are identical for civil proceedings.

This Court has not ruled on whether the right of access applies to civil cases. Nevertheless, its opinions have discussed the similar historical background of both criminal and civil litigation and the similar public policy factors at issue in both criminal and civil litigation.

In *Gannett Co. v. DePasquale*, this Court noted the striking similarities between the history of the public's right to attend civil and criminal trials:

> For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered

> in civil as well as criminal matters" . . . English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two.
>
> The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil *or* criminal." . . . Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that "all courts shall be open."
>
> . . .
>
> Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. *See, e. g., Dred Scott v. Sandford*, 19 How. 393 [60 U.S. 393 (1856)]; *Plessy v. Ferguson*, 163 U.S. 537 [(1896)]; *Brown v. Board of Education*, 347 U.S. 483 [(1954)]; *University of California Regents v. Bakke*, 438 U.S. 265 [(1978)]. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

Gannett, 443 U.S. at 386-87 n.15 (internal citations omitted).

Since the issuance of *Richmond Newspapers* one year after *Gannett*, many members of this Court have noted that both the historical and functional component of the right-of-access framework lead to the conclusion that civil and criminal proceedings should be treated alike. *Richmond Newspapers*, 448 U.S. at 580 n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal

trials have been presumptively open"); *Id.* at 599 (Stewart, J., concurring) ("The First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."); *Press-Enterprise II*, 478 U.S. at 27 (Stevens, J., dissenting) ("[T]he logic of the Court's access right extends beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket . . .").

Many lower courts have reached the conclusion that the constitutional right of access to criminal proceedings applies to civil proceedings because the same rationales pertain. *See*, *e.g.*, *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984).

As with criminal proceedings, access to civil proceedings "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Publicker*, 733 F.2d at 1070 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606). "Public access to civil trials enhances the quality and safeguards the integrity of the factfinding process,' 'fosters an appearance of fairness,' heightens 'public respect for the judicial process,' and 'permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.'" *Id*.

Additionally, civil cases often involve issues that are crucial to the public — whistleblower actions against large corporations, discrimination class actions, mass tort litigation — all concern issues that affect the public at large because they contain allegations of wrongdoing that have a broad effect. Public scrutiny is needed to expose any unjust acts committed by the parties, and to ensure that the courts are

performing their role as prescribed. "The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson*, 710 F.2d at 1179.

Finally, the principle underlying the First Amendment right of access that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," applies to both criminal and civil proceedings. *Westmoreland*, 752 F.2d at 22 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). When courts close civil proceedings that involve allegations of government misconduct, they deprive the public of information needed to evaluate governmental affairs and weigh in if needed. When courts are sealed, the public may suspect the worst and lose faith in their government simply because they are prohibited access. *See Richmond Newspapers*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

B. The rationale behind a presumptive right of access applies to appellate oral arguments, even when national security interests are involved.

Courts have extended the constitutional right of access to appellate oral arguments under the same rationale on which this Court premised a right of access to criminal trials. *See*, *e.g.*, *United States v. Moussaoui*, 65 Fed. Appx. 881, 890, 2003 WL 21076836 (4th Cir. 2003) (Appellate oral arguments "have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceed-

ings."); *Doe v. United States*, 253 F.3d 256 (6th Cir. 2001); *In re Grand Jury Proceedings*, 983 F.2d 74, 75 (7th Cir. 1992) (refusing to seal appellate arguments on the basis that "[w]hat happens in the halls of government is presumptively open to public scrutiny.").

In *Moussaoui*, the Fourth Circuit rejected the government's request to completely seal oral arguments to protect classified information to protect the interests of the press and public. The court explained: "The value of openness in judicial proceedings can hardly be overestimated. 'The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.'" *Moussaoui*, 65 Fed. Appx. at 885 (citing *Union Oil Co. v. Leavell*, 220 F.3d 562, 578 (7th Cir. 2000)). *See also In re Grand Jury Proceedings*, 983 F.2d at 75; *Doe*, 253 F.3d at 262.

The public interest in access to appellate arguments is at least as high as in access to lower court proceedings. At the appellate level, the lower court's reasoning is reviewed. Publicity ensures that the public can evaluate the merits of each party's position and the appellate court's holding. This scrutiny contributes to the quality and integrity of the appellate process, which is crucial to the preservation of justice. In appellate cases that involve allegations of government wrongdoing, public scrutiny is essential to protect against corruption or incompetence.

C. The procedural safeguards found to be essential in the criminal context also apply to civil appellate proceedings.

In this case, the D.C. Circuit made no attempt to explain

why public access would be denied. However, other circuits have recognized that specific findings are necessary. The U.S. Court of Appeals for the Eleventh Circuit described the type of procedural safeguards that it believed must be put in place before closing a civil proceeding:

> There is nothing in this record that supports the closing of these proceedings to the press and public. The district court did not hold any hearing after proper notice, nor did it enter findings that justify any restrictions on public access to the proceedings. *See Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2622, n.25 (the press must be afforded an opportunity to present its case for an open proceeding); *Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring) (same). *See also* Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temp. L.Q. 311, 332 (1979). We commend to the trial courts the same procedure that has been recommended in a fair trial-free press context. *See* ABA, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (1976).
>
> Other procedures also might accomplish the purpose. . . . We do not bind the district courts to the formality of any set procedure. But the issue must be squarely confronted and those with various interests must be given the opportunity to be heard.

Newman v. Graddick, 696 F.2d 797, 802 (11th Cir. 1983); *see also Publicker Indus.*, 733 F.2d at 1070 (holding that before a court closes a civil courtroom it must show that a denial serves an important government interest, that no less restrictive way exists to serve that government interest, and that the court has made record findings in order to facilitate meaningful governmental review).

Even when national security is concerned, before closing a proceeding, appellate courts must make specific findings that demonstrate that closure is narrowly tailored to protect a compelling government interest. In *Moussaoui*, to protect the guaranteed "right of access by the public to oral arguments in the appellate proceedings of this court" while preserving national security interests, the Fourth Circuit ordered a bifurcated argument. *Moussaoui*, 65 Fed. Appx. at 890. "Should counsel believe that reference to classified information is necessary, such a discussion will be reserved to the second part of oral argument, which will be conducted in a sealed courtroom." *Id.* To protect the interests of the public and press in the sealed hearing, the court also ordered a release of a redacted transcript of the sealed hearing after the argument concluded.

CONCLUSION

The Court of Appeals ruling ignores the now-well-established public interests affected by any court closure decision. Closing cases that involve allegations of government wrongdoing leads to increased public interest in what takes place behind closed doors, fosters public doubts about the private justice that certain people and entities get in the public courts, harms public debate about the issues involved in the litigation, and perhaps most devastatingly fosters an appearance of unfairness, that the government can close off access to the public courts when it is under fire.

This Court should not allow courts to deny access to civil cases that involve allegations of government wrongdoing with no specific, on-the-record findings, in large part because of the devastating impact that such a holding would have on public confidence in the fairness and accountability of the justice system and the government. The courts must articulate

when the government's interest in protecting state secrets outweighs the public's right to access.

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APPENDIX A

Descriptions of *amici*:

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

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the Untied States and Canada. The purposes of the Society include assisting journalists and providing and unfettered and effective press in the service of the American people.

The Associated Press is a global news agency with headquarters in New York City and bureaus in every state and in more than 100 foreign countries. AP gathers and delivers news reports in text, photographic, audio and video formats to thousands of subscribing, print, broadcast and multimedia news organizations and other customers worldwide.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 108 bureaus around the world, including a fulltime bureau in Washington, D.C. Bloomberg News supplies real time business, financial and legal news to more than 200,000 subscribers world-wide. As a wire service, Bloomberg provides news to more than 350 newspapers globally, and also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates eleven 24-hour cable news television outlets globally, which often brings to the public video coverage of important trials in the public

interest. Bloomberg also publishes four monthly magazines. Its Bloomberg Press division publishes more than 50 book titles each year.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., a Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

Daily News L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000, primarily in the New York City metropolitan area.

Los Angeles Times Communications LLC, dba Los Angeles Times, a wholly owned subsidiary of Tribune Company, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California, as well as the *Laguna Beach Coastline Pilot*, *Newport Beach-Costa Mesa Daily Pilot*, *Glendale News Press*, *Burbank Leader*, *La Canada Valley Sun*, *La Crescenta Valley Sun*, and the *Huntington Beach Independent*.

The New York Times Company publishes *The New York Times*, a daily newspaper with a national circulation of 1.1 million daily and more than 1.7 million on Sunday. The company also owns *The Boston Globe* and *The International Herald Tribune*, as well as 17 regional newspapers and eight television stations.

Reuters America LLC is an indirect subsidiary of Reuters Group Plc. Founded in 1851 in London, Reuters serves the

global financial markets and news media with a wide range of information products and transactional solutions. Reuters is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 196 bureaus around the world, serving 129 countries, and publishes approximately 30,000 headlines daily, including third party contributions, in 19 languages.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The Washington Post is a newspaper with a nationwide daily circulation of over 738,000 and a Sunday circulation of over 1 million.

APPENDIX B

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