

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

**IN RE THE APPLICATION OF
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS TO UNSEAL
CRIMINAL PROSECUTION OF JULIAN
ASSANGE**

Misc. Action No. _____

**APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS TO UNSEAL CRIMINAL PROSECUTION OF JULIAN ASSANGE**

1. The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “Applicant”) respectfully moves this Court for an Order unsealing court records—including the docket and any criminal complaint, indictment, or other charging document—from the United States government’s sealed criminal prosecution of WikiLeaks founder Julian Assange (“Assange”) (hereinafter, the “Assange Prosecution”).

INTEREST OF THE APPLICANT

2. The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom of information interests of the news media and the public. The Reporters Committee has participated as a party and as *amicus curiae* in First Amendment and freedom of information litigation since 1970. The Reporters Committee frequently represents the interests of the press and the public in matters implicating the public’s First Amendment and common law rights of access to judicial proceedings and court records.

3. The Reporters Committee, like all members of the public and the press, has a strong interest in access to criminal matters pending in federal district courts. Both the press and the public have a particularly powerful interest in access to sealed court records related to the government's prosecution of Assange, the founder of WikiLeaks.

BACKGROUND FACTS

4. Assange is an Australian computer programmer and the founder of WikiLeaks, which describes itself as a “multi-national media organization and associated library.” WikiLeaks.org, <https://wikileaks.org/What-is-WikiLeaks.html>. On information and belief, Assange founded WikiLeaks in or about 2006. Since 2012, Assange has lived in the Ecuadoran Embassy in London.

5. In or about July of 2018, Special Counsel Robert Mueller's office indicted 12 Russian military intelligence officers and charged them in connection with an alleged conspiracy to hack computer systems at the Democratic National Committee (“DNC”) to secure proprietary communications and data for release during the 2018 U.S. presidential campaign. Indictment, *United States v. Netyksho*, No. 1:18-cr-00215-ABJ (D.D.C. filed July 13, 2018). “Organization 1”—which, it has been widely reported, is WikiLeaks—is referred to in the indictment as a conduit through which hacked communications were published. *Id.* ¶¶ 47–49; *see also, e.g.*, Matt Zapposky and Devlin Barrett, *Julian Assange Has Been Charged, Prosecutors Reveal Inadvertently in Court Filings*, Wash. Post, Nov. 15, 2018, <https://perma.cc/9VV2-7LBE>.

6. In addition, in or about April of 2018, both Assange and WikiLeaks were named as defendants in a civil lawsuit by the DNC against Russia, Russian military intelligence, the Trump campaign, and numerous individual defendants, arising out of the same alleged

conspiracy. Complaint and Jury Demand, *Democratic National Comm. v. the Russian Fed'n*, No. 1:18-cv-03501 (S.D.N.Y. filed Apr. 20, 2018).

7. On or about November 15 and November 16, 2018, *The Wall Street Journal*, *The New York Times*, and *The Washington Post* reported that the Justice Department had filed criminal charges against Assange. See Aruna Viswanatha and Ryan Dube, *U.S. Is Optimistic It Will Prosecute Assange*, Wall Street J., Nov. 16, 2018, <https://perma.cc/WTD2-YKRA>; Charlie Savage, et al., *Julian Assange is Secretly Charged in U.S., Prosecutors Mistakenly Reveal*, N.Y. Times, Nov. 16, 2018, <https://perma.cc/K32Q-UWJW>; Zapotosky & Barrett, *supra*. *The New York Times* reported that the prosecution was approved during the summer of 2018 by senior Justice Department officials. Savage et al., *supra*.

8. On or about November 15, 2018, Seamus Hughes, the deputy director of the Program on Extremism at George Washington University, reported that the U.S. Attorney's Office for the Eastern District of Virginia had pasted sections of a motion to seal the charging document in the Assange Prosecution into a publicly available sealing motion filed in an unrelated matter. See @SeamusHughes, Twitter (Nov. 15, 2018, 4:48 PM), <https://perma.cc/Q2UJ-RE3B>. *The Washington Post* reported that the assistant U.S. attorney on that unrelated case, Kellen S. Dwyer, is also assigned to the Assange Prosecution. See Zapotosky & Barrett, *supra*.

9. The government unsealed the motion disclosing the Assange Prosecution in the unrelated matter in September of 2018, and the defendant in that case was indicted last week. *Id.* The portions of that motion disclosing the Assange Prosecution are found in paragraphs three and five. See Government's Motion to Seal Criminal Complaint and Supporting Documents Pursuant to Local Rule 49(b) ¶ 3, *United States v. Seitu Sulayman Kokayi*, No. 1:18-mj-406

(filed Aug. 22, 2018). Paragraph three of that motion states, specifically, that the United States has considered alternatives to sealing, and that any procedure “short of sealing will not adequately protect the needs of law enforcement at this time because, due to the sophistication of the defendant and the publicity surrounding the case, *no other procedure is likely to keep confidential the fact that Assange has been charged.*” *Id.* (emphasis added). Paragraph five of the motion states in pertinent part that the “complaint, supporting affidavit, and arrest warrant, as well as this motion and proposed order would need to remain sealed until *Assange is arrested in connection with the charges in the criminal complaint* and can therefore no longer evade or avoid arrest and extradition in this matter.” *Id.* ¶ 5 (emphasis added).

10. Upon information and belief, the Assange Prosecution, including its case number, is currently sealed in its entirety.

11. Counsel for the Reporters Committee contacted counsel for the government and Assange via e-mail to seek consent for the relief sought by this Application. Counsel for Assange has stated that Assange does not oppose the relief sought by the Reporters Committee. As of the filing of this Application, counsel for the government has not responded. In the event the government opposes the relief sought by this Application, counsel for the Reporters Committee shall meet and confer with counsel for the government, and seek to set a hearing on this Application as soon as practicable.

REQUEST FOR RELIEF

12. The Reporters Committee seeks an order unsealing the court records—including, but not limited to, the Court’s docket and any criminal complaint, indictment, or other charging document—from the government’s criminal prosecution of Assange.

13. The Reporters Committee seeks any further relief that the Court deems just and proper.

Dated: November 16, 2018

Respectfully submitted,

/s/ Caitlin Vogus

Caitlin Vogus
VA Bar No. 81054
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
cvogus@rcfp.org

Katie Townsend*
Gabriel Rottman*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
**Pro Hac Vice Applications Pending*

*Counsel for Applicant the Reporters
Committee for Freedom of the Press*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS TO UNSEAL CRIMINAL PROSECUTION OF JULIAN ASSANGE** was filed with the Clerk of Court using the CM/ECF system, and served on counsel for the following via email and U.S. Mail:

Kellen Dwyer
U.S. Attorney's Office (Alexandria)
2100 Jamieson Avenue
Alexandria, VA 22314
kellen.dwyer@usdoj.gov

Barry J. Pollack
Robbins Russell
2000 K Street, NW
4th Floor
Washington DC 20006
United States of America
bpollack@robbinsrussell.com
Attorney for Interested Party Julian Assange

This the 16th day of November, 2018.

/s Caitlin Vogus

Caitlin Vogus

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Reporters Committee for Freedom of the Press

(b) County of Residence of First Listed Plaintiff District of Columbia (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Caitlin Vogus, Reporters Committee for Freedom of the Press, 1156 15th St. NW, Suite 1020, Washington, DC 20005 (202) 795-9315

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause: Application to unseal court records.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE 11/16/2018 SIGNATURE OF ATTORNEY OF RECORD /s/ Caitlin Vogus

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

**IN RE THE APPLICATION OF
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS TO UNSEAL
CRIMINAL PROSECUTION OF JULIAN
ASSANGE**

Misc. Action No. _____

**[PROPOSED] ORDER GRANTING APPLICATION OF THE REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS TO UNSEAL CRIMINAL
PROSECUTION OF JULIAN ASSANGE**

This matter coming before the Court upon the Application of the Reporters Committee for Freedom of the Press to unseal court records, including the Court's docket and any criminal complaint, indictment, or other charging document, from the United States government's prosecution of Julian Assange ("Assange"). Upon review and consideration of the Reporters Committee's Application, supporting Memorandum of Points and Authorities, and any opposition thereto, it is hereby **ORDERED** as follows:

The Application is **GRANTED**. All court records, including the Court's docket and any indictment or other charging document, from the United States government's pending prosecution of Assange are **HEREBY UNSEALED**.

SO ORDERED this _____ day of _____, 2018.

United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
_____ DIVISION

In re Application of Reporters Committee for
Freedom of the Press to Unseal Criminal
Prosecution of Julian Assange
vs.

Civil/Criminal Action No. 18-mc-37

FINANCIAL INTEREST DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualification or recusal, the undersigned counsel for

_____ in the above captioned action, certifies that the following are parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public or own more than ten percent of the stock of the following:

Or

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualification or recusal, the undersigned counsel for

_____ in the above captioned action, certifies that the following are parties in the partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCs or other closely held entities:

Or

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualifications or recusal, the undersigned counsel for

The Reporters Committee for Freedom of the Press
_____ in the above captioned action, certifies that there are no parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public.

November 16, 2018
Date

s/ Caitlin Vogus
Signature of Attorney or Litigant
Counsel for The Reporters Committee for Freedom of
the Press

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

**IN RE THE APPLICATION OF
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS TO UNSEAL
CRIMINAL PROSECUTION OF JULIAN
ASSANGE**

Misc. Action No. _____

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE APPLICATION OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
TO UNSEAL CRIMINAL PROSECUTION OF JULIAN ASSANGE**

Caitlin Vogus
VA Bar No. 81054
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
cvogus@rcfp.org
*Counsel of Record for Applicant the Reporters
Committee for Freedom of the Press*

Katie Townsend*
Gabriel Rottman*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
**Pro Hac Vice Applications Pending*

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

ARGUMENT 4

 I. Criminal cases are presumptively open to the public under the First Amendment and common law..... 4

 A. Openness is a bedrock feature of the American criminal justice system..... 4

 B. The First Amendment and common law guarantee the public a presumptive right to access judicial documents in criminal cases. 5

 II. The public’s constitutional and common law rights of access apply to court records from the Assange Prosecution. 6

 III. The Government cannot meet its burden to overcome the public’s presumptive rights of access to the Assange Prosecution. 9

 A. There can be no countervailing or compelling interest justifying the continued total sealing of the Assange Prosecution..... 9

 B. Even if the government could identify a compelling interest that justified sealing some portion of the court records at issue, redaction—not wholesale sealing—is required.. 11

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997) (*en banc*) 1

Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989)..... 6, 11

CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985) 10

Co. Doe v. Pub. Citizen, 749 F.3d 246 (4th Cir. 2014)..... 1, 4, 5, 6

Democratic National Comm. v. Russian Fed’n, No. 1:18-cv-03501 (S.D.N.Y.) 2

Gambale v. Deutsche Bank AG, 377 F.3d 133 (2d Cir. 2004)..... 10, 11

Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004)..... 6

In re Herald Co., 734 F.2d 93 (2d Cir. 1984)..... 8, 10

In re Knight Publ’g. Co., 743 F.2d 231 (4th Cir. 1984) 9, 11

In re State–Record Co., 917 F.2d 124 (4th Cir. 1990) (*per curiam*)..... 6

In re Wash. Post Co., 807 F.2d 383 (4th Cir. 1986) 9

Level 3 Commc’ns, LLC v. Limelight Networks, Inc., 611 F. Supp. 2d 572 (E.D. Va. 2009) 9

Littlejohn v. Bic Corp., 851 F.2d 673 (3d Cir. 1988)..... 4

Matter of Application and Affidavit for a Search Warrant, 923 F.2d 324 (4th Cir. 1991)..... 8

Nixon v. Warner Commc’ns, Inc., 435 U.S. 589 (1978)..... 11

Post v. United States, 161 U.S. 583 (1893) 7

Press–Enter. Co. v. Superior Court, 464 U.S. 501 (1984) 1, 4, 9, 11

Press–Enter. Co. v. Superior Court, 478 U.S. 1 (1986) 6, 7, 8, 9

Renigar v. United States, 172 F. 646 (4th Cir. 1909) 8

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)..... 4, 5

Rushford v. New Yorker Magazine, 846 F.2d 249 (4th Cir. 1988) 9

Sheppard v. Maxwell, 384 U.S. 333 (1966)..... 5

Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178 (4th Cir. 1988)..... 10

Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp., Inc., 565 F. App’x 477 (6th Cir. 2012)..... 6

U.S. ex rel. Doe v. X Corp., 862 F. Supp. 1502 (E.D. Va. 1994) 5

United States v. Anderson, 799 F.2 1438 (11th Cir. 1986)..... 7

United States v. Giordano, 158 F. Supp. 2d 242 (D. Conn. 2001)..... 8

United States v. Graham, 257 F.3d 143 (2d Cir. 2001) 8

United States v. Netyksho, No. 1:18-cr-00215-ABJ (D.D.C.) 2

United States v. Progressive, Inc., 467 F. Supp. 990, *reh ’g denied*, 486 F. Supp. 5 (W.D. Wis.),
appeal dismissed 610 F.2d 819 (7th Cir. 1979)..... 10

United States v. Seitu Sulayman Kokayi, No. 1:18-mj-406 (E.D. Va.)..... 3, 10

United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) 7, 8

Virginia Dep’t of State Police v. Wash. Post, 386 F.3d 567 (4th Cir. 2004)..... 9

Wash. Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) 10

Other Authorities

@SeamusHughes, Twitter (Nov. 15, 2018, 4:48 PM), <https://perma.cc/Q2UJ-RE3B>..... 3

Aruna Viswanatha & Ryan Dube, *U.S. Is Optimistic It Will Prosecute Assange*, Wall Street J.,
 Nov. 16, 2018, <https://perma.cc/WTD2-YKRA> 2

Charlie Savage, et al., *Julian Assange is Secretly Charged in U.S., Prosecutors Mistakenly
 Reveal*, N.Y. Times, Nov. 16, 2018, <https://perma.cc/K32Q-UWJW> 3

Matt Zapotosky & Devlin Barrett, *Julian Assange Has Been Charged, Prosecutors Reveal
 Inadvertently in Court Filings*, Wash. Post, Nov. 15, 2018, <https://perma.cc/9VV2-7LBE> .. 2, 3

WikiLeaks.org, <https://wikileaks.org/What-is-WikiLeaks.html>..... 2

Rules

Fed. R. Crim. P. 6 8

L. Crim. R. 49 7

PRELIMINARY STATEMENT

The Reporters Committee for Freedom of the Press (“Reporters Committee”) seeks access to sealed court records—including the docket and any criminal complaint, indictment, or other charging document—from the United States government’s pending criminal prosecution of WikiLeaks founder Julian Assange (“Assange”) (hereinafter, the “Assange Prosecution”).

While the existence of a pending criminal case against Assange is public knowledge, and has been the subject of extensive media coverage, all court documents from that criminal case, including the docket, are currently under seal. Such extreme secrecy is anathema to our open system of justice. Both the First Amendment and common law give rise to a strong presumptive right of public access to the Assange Prosecution. *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014) (“*Public Citizen*”). Accordingly, judicial documents from it may be sealed and remain under seal only if countervailing factors so demand. *Id.* at 265–66. Indeed, because the constitutional right of access applies, the Assange Prosecution may remain under seal only if—and only to the extent that—shielding it from public view “is essential to preserve higher values.” *Press–Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press–Enterprise P*”).

The more extensive the closure of court proceedings or sealing of judicial documents, “the greater must be the gravity of the required interest and the likelihood of risk to that interest” needed to justify it. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (*en banc*). Given that it is public knowledge that Assange has been criminally charged, and in light of the public’s powerful interest in access to court records in his case, there can be no overriding interest that overcomes the public’s presumptive rights of access—let alone an interest so compelling that it demands continued complete and total sealing. No interest is served by continuing to allow the government to keep its prosecution of Assange entirely behind closed doors.

FACTUAL BACKGROUND

Assange is an Australian computer programmer and the founder of WikiLeaks, which describes itself as a “multi-national media organization and associated library.” WikiLeaks.org, <https://wikileaks.org/What-is-WikiLeaks.html>. Since 2012, Assange has lived in the Ecuadoran Embassy in London.

In July 2018, Special Counsel Robert Mueller’s office indicted 12 Russian military intelligence officers and charged them in connection with an alleged conspiracy to hack computer systems at the Democratic National Committee (“DNC”) to secure proprietary communications and data for release during the 2018 U.S. presidential campaign. Indictment, *United States v. Netyksho*, No. 1:18-cr-00215-ABJ (D.D.C. filed July 13, 2018). “Organization 1”—which, it has been widely reported, is WikiLeaks—is referred to in the indictment as a conduit through which hacked communications were published. *Id.* ¶¶ 47–49; *see also, e.g.*, Matt Zapotosky & Devlin Barrett, *Julian Assange Has Been Charged, Prosecutors Reveal Inadvertently in Court Filings*, Wash. Post, Nov. 15, 2018, <https://perma.cc/9VV2-7LBE>.

In addition, in April 2018, both Assange and WikiLeaks were named as defendants in a civil lawsuit by the DNC against Russia, Russian military intelligence, the Trump campaign, and numerous individual defendants, arising out of the same alleged conspiracy. Complaint and Jury Demand, *Democratic National Comm. v. Russian Fed’n*, No. 1:18-cv-03501 (S.D.N.Y. filed Apr. 20, 2018).

On November 15 and 16, 2018, news media outlets, including *The Wall Street Journal*, *The New York Times*, and *The Washington Post* reported that the Justice Department had filed criminal charges against Assange. *See* Aruna Viswanatha & Ryan Dube, *U.S. Is Optimistic It Will Prosecute Assange*, Wall Street J., Nov. 16, 2018, <https://perma.cc/WTD2-YKRA>; Charlie

Savage, et al., *Julian Assange is Secretly Charged in U.S., Prosecutors Mistakenly Reveal*, N.Y. Times, Nov. 16, 2018, <https://perma.cc/K32Q-UWJW>; Zapatosky & Barrett, *supra*. According to *The New York Times*' reporting, the prosecution was approved during the summer of 2018 by senior Justice Department officials. Savage et al., *supra*.

On November 15, 2018, Seamus Hughes, the deputy director of the Program on Extremism at George Washington University, reported that the U.S. Attorney's Office for the Eastern District of Virginia had pasted sections of a motion to seal the charging document in the Assange Prosecution into a publicly available sealing motion filed in an unrelated matter. See @SeamusHughes, Twitter (Nov. 15, 2018, 4:48 PM), <https://perma.cc/Q2UJ-RE3B>. *The Washington Post* reported that the assistant U.S. attorney on that unrelated case, Kellen S. Dwyer, is also assigned to the Assange Prosecution. See Zapatosky & Barrett, *supra*.

The government unsealed the motion disclosing the Assange Prosecution in the unrelated matter in September 2018, and the defendant in that case was indicted last week. *Id.* The portions of that motion disclosing the Assange Prosecution are found in paragraphs three and five. See Government's Motion to Seal Criminal Complaint and Supporting Documents Pursuant to Local Rule 49(b), ¶ 3, *United States v. Seitu Sulayman Kokayi*, No. 1:18-mj-406 (E.D. Va. filed Aug. 22, 2018). Paragraph three of the motion states, specifically, that the United States has considered alternatives to sealing, and that any procedure "short of sealing will not adequately protect the needs of law enforcement at this time because, due to the sophistication of the defendant and the publicity surrounding the case, *no other procedure is likely to keep confidential the fact that Assange has been charged.*" *Id.* ¶ 5 (emphasis added). Paragraph five of the motion states in pertinent part that the "complaint, supporting affidavit, and arrest warrant, as well as this motion and proposed order would need to remain sealed until *Assange is arrested*

in connection with the charges in the criminal complaint and can therefore no longer evade or avoid arrest and extradition in this matter.” *Id.* ¶ 5 (emphasis added).

Notwithstanding public disclosure of the Assange Prosecution, all court records related to that criminal case are sealed.

ARGUMENT

I. Criminal cases are presumptively open to the public under the First Amendment and common law.

A. Openness is a bedrock feature of the American criminal justice system.

Openness is “an indispensable attribute” of our judicial system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). Based on an “unbroken, uncontradicted history, supported by reasons as valid today as in centuries past,” the U.S. Supreme Court has recognized “that a presumption of openness inheres in the very nature” of criminal proceedings. *Id.* at 573.

Among other things, public access to criminal matters guards against unfairness and inequity in the application of laws, as “the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.” *Press-Enterprise I*, 464 U.S. at 508 (emphasis in original). Public access to court proceedings and records also “provide[s] the public with a more complete understanding of the judicial system, including a better perception of fairness.” *Public Citizen*, 749 F.3d at 266 (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988)). As the U.S. Supreme Court has explained, “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.” *Richmond Newspapers*, 448 U.S. at 572.

The U.S. Supreme Court has also recognized that the news media plays a vital role in facilitating public monitoring of the judicial system.

A responsible press has always been regarded the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Thus, “[w]hile media representatives enjoy the same right of access as the public,” they often “function[] as surrogates for the public” by, for example, reviewing court documents and reporting on their contents to the public at large.

Richmond Newspapers, 448 U.S. at 573.

In short, it is well-settled that the public and the press have a presumptive right of access to court documents that serves “not only the public’s interest in monitoring the functioning of the courts but also the integrity of the judiciary.” *See Public Citizen*, 749 F.3d at 266. And, while there is always a “firmly rooted common law right of the public to have access to records of judicial proceedings,” there is “an even stronger justification for public access to judicial records where, as here, the proceedings consist of matters involving the operation of government.” *U.S. ex rel. Doe v. X Corp.*, 862 F. Supp. 1502, 1510 (E.D. Va. 1994).

B. The First Amendment and common law guarantee the public a presumptive right to access judicial documents in criminal cases.

“It is well settled that the public and the press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings” that “springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny.” *Public Citizen*, 749 F.3d at 265 (internal citations omitted). “The distinction between the rights of access afforded by the common law and the First Amendment is significant” in the Fourth Circuit. *Id.* (internal quotation omitted). The common law right “extends to all judicial documents and records, and the presumption can be rebutted only by

showing that countervailing interests heavily outweigh the public interests in access.” *Id.* at 265–66 (internal quotations omitted). The First Amendment right, by contrast, applies “only to particular judicial records and documents”; when it applies, “access may be restricted only if closure is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest.” *Id.* at 266 (internal quotations and citations omitted).

To determine whether the First Amendment right of access applies to a particular type of proceeding or document, the Fourth Circuit has instructed courts to consider both “experience and logic,” *i.e.* (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press–Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 9 (1986) (“*Press–Enterprise II*”); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989).

II. The public’s constitutional and common law rights of access apply to court records from the Assange Prosecution.

As stated above, it is well settled that the public and the press have a qualified First Amendment and common law right of access to judicial documents and records in criminal matters like the Assange Prosecution. *Public Citizen*, 749 F.3d at 265.

Both the common law and constitutional rights of access apply, specifically, to court dockets. Indeed, several federal circuit courts of appeals, including the Fourth Circuit, have recognized that the First Amendment right of access extends to court dockets. *See Public Citizen*, 749 F.3d at 268 (holding that there is a First Amendment right of access to dockets in civil proceedings); *In re State–Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990) (per curiam) (reversing the sealing of criminal docket sheets as overbroad and incompatible with the First Amendment and stating, “we can not understand how the docket entry sheet could be

prejudicial”); *see also Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93–94 (2d Cir. 2004) (holding that docket sheets in civil and criminal proceedings “enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them”); *Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp., Inc.*, 565 F. App’x 477, 490 (6th Cir. 2012) (“The First Amendment access right extends to court dockets, records, pleadings, and exhibits . . .”). In sum, it is well-established that the public and the press have not just a common law, but also a constitutional right of access to the docket in the Assange Prosecution.¹

Similarly, both the First Amendment and common law presumptions of access apply to any criminal complaint, indictment, or other charging document filed against Assange. *See United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) (“*Smith*”) (holding that indictments are subject to both the First Amendment and common law presumptions of access); *see also United States v. Anderson*, 799 F.2 1438, 1442 n.5 (11th Cir. 1986) (stating that an indictment is “entitled to the status of a public document”).

Applying the experience and logic test of *Press–Enterprise II*, 478 U.S. at 8, to conclude that the First Amendment right of access attaches to indictments, specifically, the Third Circuit in *Smith* explained that “[i]t has long been the law that ‘criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by

¹ A public docket is an essential precursor to the news media’s and the public’s ability to assert their rights of access to court proceedings and court documents. Without public access to docket sheets, the public and press are unable to, among other things, oppose closure and sealing. Local Criminal Rule 49, which governs the designation and handling of sealed documents in criminal matters, presupposes that even when an “entire case” is sought to be kept under seal, the “Clerk shall provide *public notice* by docketing the motion in a way that discloses its nature as a motion to seal” to allow “[o]ther parties and non-parties” to submit memoranda in support of or opposition to the motion.” L. Crim. R. 49(D)–(G); *id.*, (G) (stating that a “motion to have an entire case kept under seal shall be subject to the requirements and procedures of sections (D) and (F).”)

indictment presented or information filed in court.” *Smith*, 776 F.2d at 1112 (quoting *Post v. United States*, 161 U.S. 583, 587 (1893)). Indeed, in 1909, after conducting “an investigation of the practice in every state, where the institution of the grand jury is preserved,” and citing case law dating back to 1825, the Fourth Circuit concluded that “[n]othing is more clear than that the ‘established mode of procedure’ is for the grand jury to make its presentments *publicly in open court* all of the grand jurors being present and answering to their names.” *Renigar v. United States*, 172 F. 646, 658 (4th Cir. 1909) (emphasis added).²

Consistent with historical experience, logic also dictates that the constitutional presumption of access attaches to criminal complaints, indictments, and other documents that “set forth the charge or charges to be tried.” *Smith*, 776 F.2d at 1112. Such information is “essential to an understanding of the trial, essential to an evaluation of the performance of counsel and the court, and, most importantly, essential to an appraisal of the fairness of the criminal process to the accused.” *Id.* Public access to such information unquestionably “plays a significant positive role” in the administration of justice. *Press–Enterprise II*, 478 U.S. at 8.

In addition, U.S. Supreme Court precedent likewise makes clear that the First Amendment affords the public a presumptive right of access to materials filed in support of criminal complaints and other charging documents. For example, persuasively applying precedent of the U.S. Supreme Court and Second Circuit, the U.S. District Court for the District of Connecticut concluded that there is “no question” that a First Amendment right of access applies to affidavits filed in support of criminal complaints. *United States v. Giordano*, 158 F.

² The requirement of Rule 6(f) of the Federal Rules of Criminal Procedure that an indictment be presented in open court “reflects [this] common law tradition.” *Smith*, 776 F.2d at 1112.

Supp. 2d 242, 244 (D. Conn. 2001) (citing *Press-Enterprise II*, 478 U.S. at 13; *United States v. Graham*, 257 F.3d 143, 148 (2d Cir. 2001); *In re Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984)).

III. The Government cannot meet its burden to overcome the public’s presumptive rights of access to the Assange Prosecution.

A. There can be no countervailing or compelling interest justifying the continued total sealing of the Assange Prosecution.

The common law presumption “in favor of access,” *Matter of Application and Affidavit for a Search Warrant*, 923 F.2d 324, 329 (4th Cir. 1991), can be rebutted only upon a showing that countervailing interests “heavily outweigh” the public’s interest in access. *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988). The party seeking to overcome this presumption bears the burden of showing “some significant interest” outweighing the presumption. *Virginia Dep’t of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). In evaluating a request for access to court records under the common law, courts must consider “whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public’s understanding of an important historical event; and whether the public has already had access to the information contained in the records.” *Id.* (quoting *In re Knight Publ’g. Co.*, 743 F.2d 231, 235 (4th Cir. 1984)).

The First Amendment right of access is “much stronger than the guarantee provided by the common law.” *Level 3 Commc’ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 577 (E.D. Va. 2009); see *Rushford*, 846 F.2d at 253 (stating that the First Amendment analysis is “more rigorous”). A document to which the First Amendment right of access applies may remain under seal only if “specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Press–*

Enterprise II, 478 U.S. at 13–14 (quoting *Press–Enterprise I*, 464 U.S. at 510). Put another way, the constitutional right of access is overcome only if “(1) closure serves a compelling interest; (2) there is a ‘substantial probability’ that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest.” *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

“Regardless of whether the right of access arises from the First Amendment or the common law, it ‘may be abrogated only in unusual circumstances.’” *Virginia Dep’t of State Police*, 386 F.3d at 576 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)). Here, given that the government’s case against Assange is already a matter of public knowledge, the government cannot plausibly claim a legitimate—let alone compelling—interest in keeping the docket and all documents related to the Assange Prosecution under seal. Indeed, given that “the fact that Assange has been charged” has now been disclosed to the public, the government can no longer assert a need to keep the Assange Prosecution wholly sealed until “Assange is arrested” purportedly to prevent him from “evad[ing] or avoid[ing] arrest and extradition[.]” See Government’s Motion to Seal Criminal Complaint and Supporting Documents Pursuant to Local Rule 49(b), ¶¶ 3, 5, *United States v. Seitu Sulayman Kokayi*, No. 1:18-mj-406 (E.D. Va. filed Aug. 22, 2018).

Courts “do not have the power” to make what has become public private again. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004). Although the Second Circuit in *Gambale* was referring to information made public by the district court, this principle also applies when information that is supposed to remain confidential is publicly disclosed by other means. *Id.* at 144, n.11 (citing *United States v. Progressive, Inc.*, 467 F. Supp. 990, *reh’g denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed* 610 F.2d 819 (7th Cir. 1979)); *see also*

CBS, Inc. v. United States Dist. Court, 765 F.2d 823, 825 (9th Cir. 1985) (holding that a cooperating witness’s post-conviction motion to reduce his sentence and the government’s response could not be filed under seal in part because “most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record”); *Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (holding that a plea agreement of a cooperating witness must be unsealed when the fact of the witness’s cooperation “was already within the public knowledge”). In sum, once “[t]he genie is out of the bottle” the court has “not the means to put the genie back,” *Gambale*, 377 F.3d at 144, and “public exposure” alone may “preclude a closure order.” *In re Herald Co.*, 734 F.2d at 101; *see also In re Knight Publ’g Co.*, 743 F.2d at 235 (stating that factors to be weighed in determining whether the common law right of access had been overcome include “whether the public has already had access to the information contained in the records” (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–608 (1978))). Here, the fact of Assange’s criminal prosecution is public knowledge as a result of the government’s actions, and is the subject of intense media coverage. The “genie is out of the bottle,” *Gambale*, 377 F.3d at 144, and court records related to the Assange Prosecution must be unsealed.

B. Even if the government could identify a compelling interest that justified sealing some portion of the court records at issue, redaction—not wholesale sealing—is required.

Even when public access to court records in a criminal case may be denied because sealing is “essential to preserve higher values,” such sealing must be “narrowly tailored to service that interest,” and the court “must consider alternatives to sealing the documents.” *Baltimore Sun Co.*, 886 F.2d at 66 (quoting *Press-Enterprise I*, 465 U.S. at 410). “This ordinarily involves disclosing some of the documents or giving access to a redacted version.” *Id.*

Thus, even if the government could identify a compelling interest sufficient to overcome the public's presumptive First Amendment right of access as to certain sealed court records in the Assange Prosecution, limited sealing and redaction—not wholesale sealing of the entire criminal case—would be required. *Press-Enterprise I*, 464 U.S. at 510 (finding that closure of records must be narrowly tailored to serve the compelling government interest).

CONCLUSION

The press and public have a presumptive right of access to court records—including the docket and criminal complaint, indictment, or any other charging document—from the Assange Prosecution under both the common law and the First Amendment. The Court should, for the foregoing reasons, grant this Application for an order unsealing those court records.

Dated: November 16, 2018

Respectfully submitted,

/s/ Caitlin Vogus

Caitlin Vogus
VA Bar No. 81054
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
cvogus@rcfp.org
*Counsel of Record for Applicant the Reporters
Committee for Freedom of the Press*

Katie Townsend*
Gabriel Rottman*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
**Pro Hac Vice Applications Pending*