UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARGHAVAN LOUHGHALAM and MAZDAK POURABDOLLAH TOOTKABONI, Petitioners v. DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., Respondents.	CIVIL ACTION NO. 17-10154-NMG

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER PERMITTING REMOTE ACCESS TO ELECTRONIC COURT FILINGS PURSUANT TO FED. R. CIV. P. 5.2(c) OR TO PERMIT THE PUBLIC TO PRINT AND/OR COPY UNSEALED COURT RECORDS

Boston Globe Media Partners LLC, publisher of The Boston Globe Newspaper (the "Globe") respectfully submits this memorandum of law in support of its motion for an order (1) allowing the public to remotely access on Pacer unsealed electronic court filings in this case pursuant to Fed. R. Civ. P. 5.2(c); or, in the alternative, (2) permitting the public to print and/or copy unsealed case file records made available in the courthouse.

This case presents the court with issues of paramount concern to the nation. The petitioners-plaintiffs (and the Commonwealth of Massachusetts as a proposed intervener) claim that an Executive Order issued by the President of the United States violates fundamental constitutional rights of due process, equal protection, and religious freedom. The President contends that the Executive Order is needed to protect the American people from terrorist attacks by foreign nationals admitted to the United States. Article III of the Constitution vests in the court the authority (and duty) to decide whether, or to what extent, the Executive Order may be enforced consistent with the laws of the United States. The nature of the dispute demonstrates the compelling nature of the public's interest in these proceedings, and that the ability of the press to gather and disseminate information about how the judicial branch resolves the dispute

directly serves the First Amendment's "common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

On January 31, 2017, the court denied the petitioners' Motion to Permit Public Access to Electronic Case Files, ruling that petitioners "have not provided sufficient reason why an exception should be made to the Federal Rule of Civil Procedure which specifically limits access to electronic files in immigration cases…." Docket # 20. On February 1, 2017, in accordance with the court's ruling, a Globe reporter went to the courthouse in order to examine recent case filings. He was told that he could look at the filings via a computer terminal, but could not print them. *See* Declaration of Milton Valencia filed herewith.

For the reasons set forth below, the Globe asks for the right to remotely access through PACER electronic public court records in this case (*i.e.*, court records that have not been sealed) in order to better inform the public of how the court resolves this dispute and, depending upon the contents of the court records, make them available to the public. The current lack of remote access prevents the Globe from reporting on court filings in a timely fashion, particularly when the filings are made close to or after the hours in which the clerk's office is open to the public. In the alternative, the Globe seeks the right to copy and/or print unsealed court filings made available at the courthouse. *Id.*

I. ARGUMENT

A. This Case Warrants an Order Permitting Remote Access under Rule 5.2(c).

Fed. R. Civ. P. 5.2(c) provides that, "*[u]nless the court orders otherwise*, in an action . . . relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file" is limited to the parties and their attorneys. *Id.* (emphasis added). The rule further provides that "any other person may have *electronic access* to the *full record at the courthouse*," but may have remote electronic access only to the docket and any opinion, order, judgment or other disposition of the court. *Id.* (emphasis added).

The advisory committee notes to Rule 5.2(c) explain that the limitation on remote electronic access in immigration cases is "due to the prevalence of sensitive information and the volume of filings." *See* Rule 5.2 Committee Notes on Rules—2007. The Notes also state that "nonparties can obtain *full access to the case file at the courthouse*, including access through the court's public computer terminal." *Id.*

There is no doubt that some immigration case files contain sensitive, private information (as do some social security benefit cases, to which Rule 5.2(c) also applies). Disclosure of information in asylum applications, for example, "could subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin." *Anim v. Mukasey*, 535 F. 3d 243, 253-55 (4th Cir. 2008); *see also Lin v. US Dept. of Justice*, 459 F. 3d 255, 263-64 (2d Cir. 2006) (citing U.S. Citizenship and Immigration Services, *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* (June 3, 2005)); *A.B.T. v. U.S. Citizenship & Immigration Servs.*, No. 2:11-CV-02108 RAJ, 2012 WL 2995064, at *5 (W.D. Wash. July 20, 2012) ("there exists a strong public interest in restricting asylum seekers' identities from the public").

Rule 5.2(c) thus is principally intended to protect the privacy interests of individuals in immigration cases, the very individuals who, in this case, asked the court to permit remote access to the electronic case records. Nothing in the Rule, the Advisory Committee Notes, or its history suggests that it was intended to protect the *government* from public scrutiny. *See generally Panel Two: Should There Be Remote Public Access to Court Filings in Immigration Cases?*, 79 Fordham Law Review 25, 31 (2011) ("deportation can be a sort of enforcement tsunami that bears close watching, especially by lawyers, advocates, policy groups, and the press"). Where, as here, the intended beneficiaries of Rule 5.2(c) – represented by experienced counsel -- ask the court to permit remote access, the interests in promoting a transparent judicial process far

outweigh the fact that the government did not consent to the petitioners' motion to permit remote access.[1]

Even if Rule 5.2(c) established a mandatory prohibition against remote access, the press and the public still should have the right to print and/or copy court filings at the courthouse. The Rule does not contain any language limiting the public's common law or constitutional right to inspect and copy judicial records (discussed further below). To the contrary, the Advisory Committee Notes expressly state that "nonparties can obtain *full access to the case file at the courthouse*, *including* access through the court's public computer terminal." Rule 5.2 Committee Notes on Rules—2007 (emphasis added). Rule 5.2(c)'s limitation on immediate, world-wide remote access to certain electronic judicial records does not reverse the historical presumptive right to inspect and copy public court records, a right that serves important public interests in a case of this magnitude.

B. The Public Has a Common Law Right to Inspect and Copy Court Records.

"It is clear that the courts of this country recognize a general right to *inspect and copy* public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (emphasis added). *See also In re Providence Journal Co., Inc.*, 293 F.3d 1, 17 (1st Cir. 2002) ("Historically, the common-law right of access permitted the public to *copy the contents of written documents*.") (citing *United States v. Myers (In re Application of Na'l Broad. Co.)*, 635 F.2d 945, 950 (2d Cir.1980) (emphasis added); *In re Globe Newspaper Co.*, 920 F.2d 88, 96 (1st Cir. 1990) ("The Supreme Court has recognized a historically based common law right to *inspect and copy* judicial records and documents.") (emphasis added).

This common law right of access is "no paper tiger." *F.T.C. v. Standard Fin. M'gmt Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). The party seeking to restrict the public's common law

[1] The issue of voluminous filings in immigration cases, another underlying concern of the Rule, does not appear to be relevant in this case and, in all events, is insufficient to overcome the public's compelling interest in this particular case.

right bears the "heavy burden" of proving "good cause" to overcome the presumption of public accessibility. *Id.* at 412-13; *see also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). A finding of good cause must be based on a "particular factual demonstration of potential harm and not on conclusory statements." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). *See also Standard Financial Management*, 830 F.2d at 412 ("[o]nly the most compelling reasons can justify non-disclosure of judicial records") (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir.1983)) (internal quotations omitted). Accordingly, a court "must carefully balance the competing interests that are at stake." *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1998).

"The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Standard Financial Management*, 830 F.2d at 410. In such cases, the "threshold showing required for impoundment of the materials is correspondingly elevated," and the interests asserted in support of impoundment must be balanced against the public's "substantial stake and interest in the proceedings at bar." *Standard Financial Management*, 830 F.2d at 412. *See also United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

The facts here overwhelmingly favor recognition of the public's common law right to inspect *and* copy court records. The case concerns a matter of national importance involving the constitutionality of governmental conduct and the interests in homeland security. Even if remote electronic access is not allowed under Rule 5.2(c), the public should be allowed to exercise its common law right to copy public judicial records available at the courthouse.

C. The Public Has a First Amendment Right to Inspect and Copy Court Records.

The United States Supreme Court has considered two complementary factors in determining whether a First Amendment right of access attaches to a judicial proceeding. The first consideration, the "experience" factor, considers whether there is a historical tradition of

openness to the proceeding at issue. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982); *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-08 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). The second consideration, the "logic" factor, considers whether public access plays a positive role in the functioning of the governmental process at issue by, for example, enhancing the quality and safeguarding the integrity of the system, fostering an appearance of fairness, and permitting the public to participate in and serve as a check upon the judicial process -- "an essential component in our structure of self government." *Globe*, 457 U.S. at 606 (internal citation omitted); *Press-Enterprise I*, 464 U.S. at 508-10; *Press-Enterprise II*, 478 U.S. at 8-9.

Applying these principles, the First Circuit has held that the First Amendment provides the public with a right of access to court records in criminal cases. *See Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989). The basis for this right is that without access to documents the public often would not have a "full understanding" of the proceeding and therefore would not always be in a position to serve as an effective check on the system. 868 F.2d at 502. *See also In re Globe Newspaper Co.*, 729 F.2d 47, 52, 59 (1st Cir. 1984).

Application of the experience and logic factors to this case similarly compels the conclusion that the public has a First Amendment right of access to court records of immigration proceedings. "We have long recognized that deportation is a particularly severe 'penalty,'" and that, although removal proceedings are civil in nature, "deportation is nevertheless intimately related to the criminal process." *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). *See generally Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984) (applying two part test of history and functioning and finding First Amendment right of access to civil trials); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) (First Amendment protects public's right of access to records of civil proceedings); *Hartford Courant v. Pellegrino*, 371 F.3d 49 (2d Cir. 2004) (First Amendment provides right of access to docket sheets); *Virginia Department of State Police v. The Washington Post*, 386 F.3d 567 (4th Cir.

2004) (recognizing First Amendment right of access to investigatory police records filed in civil case).

As to the experience factor, the historical tradition of access to civil judicial proceedings and records is beyond dispute. *See Nixon*, 453 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents. … In contrast to the English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.") (internal citation and footnotes omitted). To paraphrase the Supreme Court, "Whether the First Amendment right of access to [civil judicial records] can be restricted in the context of any particular [civil case] depends not on the historical openness of that type of [civil case] but rather on the state interests assertedly supporting the restriction." Globe Newspaper, 457 U.S. at 605 n.13. *See also In re Boston Herald, Inc.*, 321 F.3d 174, 182 (1st Cir. 2003) (court was "unpersuaded" that both the "history" and "logic" factors must be met for First Amendment right of access to apply). The constitutional right of access to records of civil proceedings similarly applies in full force to this case.

In addition to the "favorable judgment of experience," access to the records of civil cases unquestionably plays a positive role in the functioning of the judicial process, the second factor to be considered in determining whether the First Amendment right of access applies. *Globe*, 457 U.S. at 605 (citation and internal quotation omitted). As the Supreme Court has stated, "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 Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n. 15 (1979).

Public access to court documents in civil cases "allows the citizenry to 'monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.'" *Standard Financial Management*, 830 F.2d at 410. *See also Publicker*, 733 F.2d at 1070 ("Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs."). "Although courts have a number

of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. … Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honest of judicial proceedings." Amodeo II, 71 F.3d at 1048.

Recognition of the public's constitutional right of access to court records does not mean that the public never may be denied access to any portion of any record under any circumstances whatsoever. It does mean, however, that the barriers to impoundment are extraordinarily high.

First, "[w]here … the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest." *Globe Newspaper*, 457 U.S. at 506-507; *Press-Enterprise II*, 478 U.S. at 13-14; *Pokaski*, 868 F.2d at 505. In addition, any sealing order must be "narrowly tailored to serve that interest." *Id.*

The First Amendment also requires that any sealing order must effectively serve the interest asserted by the proponents of closure. *Press-Enterprise II*, 478 U.S. at 13-14 (restriction on public access must be "essential" to prevent harm "that closure would prevent"); *Globe Newspaper*, 457 U.S. at 607 n.19, 610 (assessing effectiveness of closure order in protecting juvenile rape victims required distinguishing injury caused by testifying in general from incremental injury caused by testifying in the presence of the press); *Pokaski*, 868 F.2d at 505 ("the means chosen by the state must effectively promote the statute's objectives").

Finally, in those rare circumstances where access to a judicial record may be limited, the justification for the restriction must be articulated in specific findings made by the trial court sufficient to enable appellate review. *Richmond Newspapers*, 448 U.S. at 581; *Press-Enterprise II*, 478 U.S. at 13-14.

The Globe respectfully submits that, on the facts of this case, the public's First Amendment right to inspect and copy the court records overcomes any asserted competing interest, regardless of whether remote electronic access under Rule 5.2(c) is permitted.

II. CONCLUSION

For the foregoing reasons, the Globe requests that the court enter an order (1) allowing the public to remotely access on Pacer unsealed electronic court filings in this case pursuant to Fed. R. Civ. P. 5.2(c); or, in the alternative, (2) permitting the public to print and/or copy unsealed case file records made available in the courthouse.

BOSTON GLOBE MEDIA PARTNERS, LLP,

By its attorneys,

/s/ Jonathan M. Albano
Jonathan M. Albano
BBO #013850
jonathan.albano@morganlewis.com
Emma Diamond Hall
BBO #687947
emma.hall@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
+1.617.341.7700

Dated: February 2, 2017

CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 2, 2017.

/s/Jonathan M. Albano
Jonathan M. Albano