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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Y.G.H,

Petitioner–Plaintiff,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Respondents–Defendants.

1:25-cv-00435-KES-SKO

PETITIONER'S OPPOSITION TO REQUEST TO SEAL

PRELIMINARY STATEMENT

Pursuant to Local Rule 141(c), Petitioner respectfully submits this opposition to the government's request to seal the Declaration of Yousuf Khan, submitted in response to the Court's May 7, 2025, minute order. ECF 42 (Request); ECF 41 (Khan Declaration). The First Amendment right of access applies to judicial records in this action. *See Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1, 8 (1986); *see also Courthouse News Serv. v. Planet*, 947 F.3d 581, 590–91 (9th Cir. 2020) ("[A]lthough the First Amendment does not explicitly mention a right of access to court proceedings and documents, the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and document") (citation and quotation marks omitted). The common law right of access also applies to judicial records in this action. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597-98 (1978). The government's submission falls well short of meeting its burden to justify its sealing request under either standard.

I. LEGAL STANDARDS

The First Amendment right of access applies to records and proceedings that "experience and logic" dictate it should. *Press-Enterprise II*, 478 U.S. at 8. In making the "experience and logic" assessment, courts consider (1) "whether the place and process have historically been open to the press and general public" and (2) whether the right of access plays a "significant positive role in the functioning of the particular process in question." *Id.* When the First Amendment applies, records and proceedings should be made public unless a "compelling governmental interest" supports nondisclosure and nondisclosure is "narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 606; *see also Press-Enterprise II*, 478 U.S. at 10. The government must show that "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there

are no alternatives to closure that would adequately protect the compelling interest." *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 949 (9th Cir. 1998). The Court must be able to make "on the record findings . . . demonstrating that 'closure is . . . narrowly tailored to serve'" the compelling interests involved. *Press-Enterprise II*, 478 U.S. at 14.

The common law right of access applies to all judicial records. *Nixon*, 435 U.S. at 597-98. There is a "strong presumption" of public access to all judicial records under the common law. *Id.*; *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) ("Unless a particular court record is one 'traditionally kept secret,'" under this test, "a 'strong presumption in favor of access' is the starting point.") (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). The government can overcome this presumption only by articulating "compelling reasons supported by specific factual findings . . . that outweigh the general history of access and the public policies favoring disclosure, such as the 'public interest in understanding the judicial process.'" *Id.* (internal citations omitted). The common law right of access "may be overcome only 'on the basis of articulable facts known to the court.'" *Hagestad v. Tragessser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citations omitted). After conducting "document-by-document, line-by-line balancing," *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 419 (5th Cir. 2021) (citations and internal quotation marks omitted), any order ultimately sealing any portion of a record must "articulate the factual basis" for doing so "without relying on hypothesis or conjecture," *Valley Broad. Co. v. U.S. District Court*, 798 F.2d 1289, 1295 (9th Cir. 1986).

These rights of access are "especially strong" in cases that involve—as this one does—allegations of potential wrongdoing by public officials. *In re NBC, Inc.*, 635 F.2d 945, 952 (2d Cir. 1980); *accord In re L.A. Times Commc'ns LLC*, 28 F.4th 292, 298 (D.C. Cir. 2022); *Bradley ex rel. AJW v. Ackal*, 954 F.3d 216, 232 (5th Cir. 2020); *United States v. Beckham*, 789 F.2d 401, 413 (6th Cir. 1986); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981).

II. THE REQUEST TO SEAL SHOULD BE DENIED

A. The Filings at Issue Are Judicial Records Under Both the First Amendment and the Common Law Rights of Access.

The records of civil cases are presumptively open to the public.[1] Only a narrow range of filings are not subject to the right of public access: those which have traditionally been kept secret for important policy reasons, such as "grand jury transcripts and warrant materials in the midst of a pre-indictment investigation." *Kamakana*, 447 F.3d at1178 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)). Otherwise, "we start with a strong presumption in favor of access to court records." *Ctr. for Auto Safety v. Chrysler Grp.*, 809 F.3d 1092, 1096 (9th Cir. 2016) (cleaned up). That presumption extends to any motion—including any attachments—that is "dispositive" in the sense that it seeks relief "more than tangentially related to the merits of a case." *Id.* at 1101; *see also id.* at 1098 (explaining "[m]ost litigation in a case is not literally 'dispositive' but nevertheless involves important issues and information to which our case law demands the public should have access"); *Kamakana*, 447 F.3d at 1179 (applying presumption to attachments to motions for summary judgment); *accord Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110,126 (2d Cir. 2006) (same, "under both the common law and the First Amendment"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("rigorous First Amendment standard" governs public access to "documents filed in connection with a summary judgment motion in a civil case"); *see also Foltz*, 331 F.3d at 1136 (citing *Rushford*, 846 F.2d at 252, for proposition that sealing documents made part of dispositive motion requires "overriding interests in favor of keeping [them] under seal").

[1] The openness of judicial proceedings is essential to their legitimacy. "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." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (quoted in *United States v. Stoterau*, 524F.3d 988, 1012 (9th Cir. 2008)).

Evaluated under the "experience and logic" test, *Press-Enterprise II*, 478 U.S. at 8, the Khan Declaration is a judicial record, because factual material submitted for the Court's consideration in connection with a motion affecting a litigant's substantive rights historically has been accessible to the public. *Cf. United States v. Sleugh*, 896 F.3d 1007, 1014 (9th Cir. 2018) (explaining that access "ordinarily attaches to judicial records, which are those materials on which a court relies in determining the litigants' substantive rights"). Moreover, the unsealing by the Southern District of Texas of an assertedly law-enforcement-sensitive declaration describing the government's procedures for providing notice of designation and removal under the Presidential Proclamation invoking the Alien Enemies Act, *see J.A.V. v. Trump*, No. 1:25-cv-72 (S.D. Tex., Minute Entry dated Apr. 24, 2025), demonstrates the significant role that disclosure has played in advancing the courts' and the public's understanding of the implementation of the Proclamation.[2] Several courts have discussed the government's notice procedures and have held they violated due process. *See, e.g., G.F.F. v. Trump*, No. 25-cv-2886, 2025 WL 1301052, at *6 (S.D.N.Y. May 6, 2025); *A.S.R. v. Trump*, No. 3:25-cv-113, 2025 WL 1378784, at *7, *19–20 (W.D. Pa. May 13, 2025). And the revelation that the government—in the teeth of a Supreme Court order holding that individuals designated under the Proclamation are entitled to notice "within a reasonable time and in such manner as will allow them to actually seek habeas relief" before removal, *Trump v. J.G.G.*, No. 24A931, 2025 WL 1024097, at *2 (U.S. Apr. 7, 2025)—was providing people it had moved

[2] This Court may "take judicial notice of" the widespread news coverage of the manner in which the government is implementing an unprecedented invocation of a wartime power outside the context of war and against an entity that is not a foreign government or nation in evaluating the "significant interest to the public" of the policy issues at stake here. *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 807 & n.5 (2002). *See, e.g.*, The Associated Press, *Venezuelans subject to removal under wartime act have 12 hours to contest*, NPR (Apr. 25, 2025), https://perma.cc/6GND-ZH78; Laura Romero, *DOJ giving migrants 'no less than 12 hours' to indicate they intend to contest AEA removal*, ABC News (Apr. 24, 2025), https://perma.cc/2XEH-UM6J.

incommunicado from all around the country to isolated detention centers in Texas and giving them mere hours to vindicate their rights, recently led to an even stronger rebuke from the Supreme Court. *See A. A. R. P. v. Trump*, No. 24A1007, 2025 WL 1417281, at *2 (U.S. May 16, 2025) ("[N]otice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster."). In sum, the Khan Declaration and the request to maintain it under seal are judicial documents to which the First Amendment and common law rights of access attach.

B. The Request Does Not Meet the Standard for Sealing Judicial Records.

Under the common law, "[t]hose who seek to maintain the secrecy of documents . . . must meet the high threshold of showing that 'compelling reasons' support secrecy." *Kamakana*, 447 F.3d at 1180 (quoting *Foltz*, 331 F.3d at 1136). And under the First Amendment, the government must show "a compelling interest," "a substantial probability that, in the absence of closure, this compelling interest would be harmed," and the absence of "alternatives to closure that would adequately protect the compelling interest." *Phoenix*, 156 F.3d at 949. Here, the government has submitted little more than counsel's vague, conclusory averral that "information in the declaration may reveal law enforcement techniques and information about an ongoing, sensitive operation"—without specifying what information is sensitive or what harm would result should the Khan Declaration and request to seal be made public. That blunderbuss approach is insufficient to justify redaction of any portion of the declaration, let alone wholesale sealing of it. *See FTC v. Standard Financial Mgmt. Corp.*, 830 F.2d 404, 412 (1st Cir. 1987) (motion to seal "must be based on a particular factual demonstration of potential harm, not on conclusory statements," and court may not "accept conclusory assertions as a surrogate for hard facts").

Finally, the context surrounding the government's request militates against crediting the government's vague invocation of law enforcement concerns. Law enforcement officers exercise

unique powers in our society, but the specific conduct at issue in this case threatens our free society. The Khan Declaration would inform the public's understanding of the jurisdictional dispute pending before this Court, which arises from a highly unusual, purposeful campaign of attempting to avoid and manipulate judicial review, specifically by withholding notice of designation under the Proclamation until transferring a person far from counsel and then providing only *de minimis* notice before summarily removing the person from the country. At the same time that the government seeks to withhold this information from public view, it argues that the district court in the last-known district of confinement may not exercise jurisdiction to examine the lawfulness of the government's conduct. *Cf. New York Times Co. v. U.S.*, 403 U.S. 713, 719 (Black, J., concurring) ("The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.")

CONCLUSION

For these reasons, the government's request to seal the Khan Declaration should be denied.

Dated: May 19, 2025 By: */s/ Jordan Wells*

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